

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/22/0144

Witness List:

Witnesses for Appellant:

Head Teacher, School A (witness A)

The appellant

Witnesses for Respondent:

Inclusion Manager (witness B)

Depute Principal Psychologist (witness C)

Quality Improvement Officer (witness D)

Reference

1. This is a reference by the appellant following a refusal by the respondent to place the child in the school specified in the placing request (school A).

Decision

2. We overturn the decision of the respondent and require the respondent to place the child in the school specified in the placing request as soon as reasonably practicable and within two weeks of the date of issue of the full decision or such other date as the parties may agree; in terms of section 19(4A)(b)(i) of the Education (Additional Support for Learning) (Scotland) Act 2004 (**the 2004 Act**).

Process

3. A hearing took place remotely (online) by video conference over three days. Prior to the hearing, directions were issued to regulate the hearing and pre-hearing processes. Witness statements, a joint minutes of agreed facts [T030 – T031] and outline written submissions were lodged. A second joint minute of agreed facts [T055 – T060] and a note of disputed facts [T061] were lodged. Final written submissions were lodged after the oral evidence had been heard. An independent advocacy report was also lodged [T051].
4. Before reaching our decision, we considered the oral and written evidence and written submissions found in the bundle version 8 and the supplementary written submissions.

Findings in Fact

General Findings

5. At the date of the hearing, the child was 13 years old. The appellant is the child's father. The child lives with his mother, father and two siblings in the family home. The child has benefitted from a nurturing family life and parents who are highly committed to supporting his needs.
6. The child moved to Scotland with his family in 2021.
7. The child moved to the respondent's education authority with his family in May 2022. The respondent then became responsible for the child's education.
8. The child has additional support needs in terms of Section 1 of the Education (Additional Support for Learning)(Scotland) Act 2004 ('the 2004 Act').
9. The child has diagnoses of Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorder (ASD), Tourette's Syndrome, personal care challenges and has shown traits of Obsessive Compulsive Disorder (OCD).
10. The child has complex ASD and ADHD with associated needs which impact upon his ability to engage in learning. He requires a high level of support in order to make progress in his learning [R010]. He has difficulties processing verbal language. He lacks capacity to comprehend inferences/nuances. He shows inconsistency in written language.
11. The child has difficulty with sequencing, attention and concentration. He has difficulty re-engaging if he has lost interest in or motivation for a topic. He is more likely to engage in his preferred subjects, in particular in art, and is more reluctant to engage in literacy and numeracy.
12. The child's overall profile of skills is extremely low. His percentile rank indicates that fewer than 1% of his same age peers would be rated similarly in each domain [R011].
13. The child has sensory differences. He finds busy environments difficult to manage. He can be impulsive, particularly if distressed.
14. The child has significant difficulties with social interaction.

15. The child is delayed in general maturity. He presents as a child much younger than his chronological age [R012].
16. The child has a poor sense of danger awareness. He requires firm boundaries and routines. He has a short attention span. He is driven by his own agenda. He needs to be prompted for a wide range of tasks.
17. The child has difficulty with transitions and changes to his routine which can cause him distress. He displays high levels of anxiety in new environments and during transitions. He has difficulty regulating his emotions if upset.
18. The child has been medicated for his ADHD for around 18 months. He has specialist reviews every 3 months.

Findings on the current/specified school (school A)

19. School A is an independent special school. It is not a public school.
20. The child was placed in school A from December 2021. He has attended there since.
21. The appellant made a placing request for the child to attend school A. The placing request was refused by the respondent in a letter dated August 2022.
22. The respondent agreed to pay to transport the child to school A from May 2022 to June 2022 to allow him to complete his primary 7 year.
23. The child has continued to attend school A despite the respondent's refusal of the placing request.
24. School A provides small group specialist day and residential care and education, including therapeutic support, for children and young people aged 11 to 18 years.
25. School A has a diverse range of pupils with a wide and varied range of diagnoses that range from visual impairment, ASD, ADHD, FAS, Autism and Trauma. All of its pupils have behavioural issues for different underlying reasons.
26. The child's profile differs in some respects from the general profile of pupils attending school A.
27. School A is a small school compared to a mainstream school or even a mainstream hub. It is a purpose-built building. Pupils do not need to transition out of the building for their academic studies. There are 10 classrooms within the school. Pupils are escorted from class to class (A034.) The classrooms are large and spacious. There are a maximum of 4 pupils in each class with a teacher and one to two classroom assistants/support workers depending on the needs of the pupils within the class. There are large outside grounds including a garden, pond, greenhouse and polytunnel.
28. School A operates a child centred approach.

29. School A offers almost the full curriculum at Broad General Education (BGE) level and in the senior phase. It offers an academic curriculum which is broadly equivalent to that of a mainstream school.
30. Placing the child in school A will give him access to a narrower range of subjects with specialist teaching. Modern languages, RME, PE and PSE are not taught as subjects.
31. School A has a high staff ratio to pupils. It has eight teachers, all of whom are GTCS registered. Of the eight teachers, one is a primary qualified teacher. One is a volunteer who is a primary teacher. All other teachers are secondary qualified teachers. It has classroom support workers, four members of day staff who are care practitioners who support the pupils and support workers from their houses. The child has close bonds with staff at school A.
32. Classes are made up based on age and stage of the pupils. The child is in class with three peers of the same age. They are all working at roughly around the same level within education. Two have a diagnosis of ADHD. One has a diagnosis of social anxiety [A054].
33. Lessons are taught using different learning techniques and styles. Pupils do academic studies in the morning and chosen activities in the afternoon.
34. School A can make use of virtual school links to two sister schools.
35. School A offers opportunities for wider achievements, such as the Duke of Edinburgh award scheme, Saltire Awards and Dynamic Youth.
36. The child is progressing at school A, particularly in his areas of special interest, such as art and design.
37. There are opportunities available to young people at school A that may not be available within a mainstream school setting.

Findings on school B

38. School B is a special school under the management of the respondent. It is located on a mainstream campus but in a separate wing or base. It has its own entrance and its own space.
39. The respondent has offered the child a place at school B.
40. There are 39 pupils in school B. The child would be the 7th person in his class.
41. School B caters for children with a variety of diagnoses and needs. They meet a very wide range of additional support needs such as global developmental delay, learning disability, physical disability, FAS, OCD, Tourette's, ASD, ADHD, Fragile X, Prader Willi Syndrome, and many other diverse needs.
42. Staff at school B are trained to use ASD diagnostic toolkits to identify the child's strengths and needs and to implement ASD strategies to help overcome the child's barriers to learning.

43. A Social Communication, Emotional Regulation, and Transactional Support (SCERTS) assessment would be carried out by school B to identify ASD specific strengths and needs of the child and to plan support to allow him to develop in target areas.
44. At school B, the child would have his full entitlement of the Broad General Education (BGE), access to a sensory room, outdoor learning, and forest schools. He would be taught independent living skills. Conversational targets would be set for the child and any other targets identified by the SCERTS assessment. He would have access to speech and language therapy, occupational therapy, social work family support, educational psychology, nursing in school, teen talk counsellors and the play outlet.
45. The child has not visited school B.

The Child's views

46. We had the benefit of an advocacy report describing an interview with the child [T051 – T054]. The report notes that the child spoke positively about school A. He stated that the school is nice, he does not have specific friends but gets on well with everyone and he feels safe there [T052]. When asked how he feels about going to another school, he picked a visual Bear Card which is said to depict "Leave me alone." He stated that he does not want to visit school B at all [T053].
47. We also had the opportunity to talk to the child. He repeated to us that he does not have special friends at school A but he gets on well with his classmates. He spoke passionately about school A telling us that he definitely knows it is great, the teachers are really nice and he definitely knows that it is perfect for him. We found that the child communicated well with us, was confident, gave measured answers and showed a good understanding.
48. Our impression was that the child's views as expressed to the independent advocate and to the tribunal were consistent with our findings.

Reasons for the Decision

General remarks on the oral evidence and submissions

49. In setting out these reasons we do not assess every argument and fact which was before us, nor are we required to do so. We have chosen only those arguments and facts which significantly influence the legal tests we must consider. However, we considered all the evidence placed before us, both written and oral. Our reasons for the decision follow.
50. We benefitted from the provision of detailed witness statements for all of the witnesses. These statements set out the qualifications and experience of the witnesses. None of the witnesses deviated in any significant way from their witness statements. We accepted the evidence of all of the witnesses as being credible and reliable. This was not a case where any of the central facts were disputed.
51. Witness B's evidence was premised on her firmly held view that the child's profile did not match the profile of pupils at school A and that he was not correctly placed at school A. She gave cogent reasons to explain why she felt that the child would benefit from the autism specific supports and strategies employed at school B but she had limited direct knowledge of the child. Our impression was that, at times, her evidence lacked objectivity and was

undermined by her reluctance to acknowledge possible wider benefits of school A for the child.

52. Witnesses C and D also spoke cogently about the needs of children and young people with ASD, how they can be supported to learn and why it was their professional view that school B offered better supports for the child than school A.
53. Overall, the focus of the respondent's witnesses was on the greater autism specific supports available at school B than at school A and how the child would benefit from those supports. We accepted the evidence of the respondent's witnesses as credible and reliable but we found that their direct knowledge of the child was limited to what they had gathered from a total of three meetings with him. We found that their evidence was focused on a generic view of what would benefit the child, rather than focusing on his particular needs now. We found that they did not fully consider the real and complex implications of a transition which was to a very different environment and was not supported either by the child or the appellant.
54. By contrast, we found that witness A was clear about the supports in place for the child at school A. She was less aware of ASD specific learning strategies, and she accepted that the tracking of his overall academic progress could be improved, but it was obvious that she knows the child well and she perceives that he has progressed well there.
55. We found the evidence of the appellant to be compelling. It was clear that his view is that the child feels safe at school A and is progressing there. He told us that the child is invested in school A. The appellant maintains that school A is suitable for the child and that his wellbeing is protected there.
56. Those factors all affected the weight we placed on the evidence of each of the witnesses. Overall, we preferred the evidence of the appellant and witness A because they spoke from direct knowledge of the child and they know the child best. They demonstrated the progress he has made at school A and spoke of his sense of wellbeing there.
57. These general observations of the oral evidence affect our assessment of the evidence and its application to the relevant legal tests.

General remarks on the legal tests

58. There is no dispute that the respondent is responsible for the child's education.
59. Parties are agreed that the child has ASN in terms of Section 1 of the 2004 Act. We agree that is the case.
60. The burden of establishing that the ground of refusal exists falls on the respondent. The appropriate assessment point is at the time of the hearing.
61. It is appropriate for us to consider the child's additional support needs in their entirety and in a holistic way.
62. When calculating respective costs we must view that according to what is reasonable from the perspective of the respondent. The costs to be compared are the costs (in each of the

two schools) of providing the additional support necessary for the child; not the overall costs.

The ground of refusal

63. The respondent argued that one ground of refusal of the placing request exists, namely Schedule 2, paragraph 3(1)(f) of the 2004 Act. There are four parts to this ground of refusal:

- (ii) the specified school is not a public school;
- (iii) the authority is able to make provision for the additional support needs of the child in a school (whether or not a school under their management) other than the specified school;
- (iv) it is not reasonable, having regard to both the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in the specified school and in the school referred to in paragraph (ii), to place the child in the specified school; and
- (v) the authority have offered to place the child in a school referred to in paragraph (ii).

64. In order to conclude that the ground of refusal exists, we must be satisfied that all four parts of the ground of refusal apply.

65. The parties agree that parts (i) and (iv) of the ground of refusal apply. We agree. The application of the remaining two parts is in dispute.

The ability of the respondent to make provision for the additional support needs of the child in school B (paragraph 3(1)(f)(ii) of Schedule 2 of the 2004 Act)

66. The appellant argues that the respondent is not able to make provision for the additional support needs of the child in school B. The respondent argues that it is so able. We prefer the appellant's position.

67. The respondent has not set out what specific arrangements would be put in place for the child at school B, such as provisions to address his sensory needs. It has not set out the specific profiles of the pupils who would be in the child's class at school B, such as what the timetable might look like. We are therefore unable to satisfy ourselves that those arrangements would be suitable but it suffices to say that we consider it highly likely that, were the child able to attend school B, the provision there would meet the additional support needs of the child. That conclusion is derived from the findings in fact at paragraphs 38-44, applying those to the additional support needs of the child as set out in findings in fact at paragraphs 8-18.

68. However, there are a number of additional factors which lead us to conclude that there is little prospect of the child successfully transitioning to school B.

69. Firstly, an unusual and important aspect of this case is that the child has attended school A since December 2021. He is settled and feels secure there. He has developed relationships with staff. We are concerned that having enjoyed over 3 years at school A, the unsettling effects of transitioning to school B would be augmented and the child would regress in his learning.

70. It is also obvious that for the respondent to be able to make provision for the additional support needs of the child at school B, they will have to succeed in transitioning him to school B. The process of planning and managing the transition has not begun. We know that the child has made successful transitions in the past, such as when he moved from England to Scotland and when he enrolled in school A, and we have no doubt that the respondent would carefully plan and manage the transition to school B, but we have significant doubt about whether that transition would succeed. Witness A reflected that it took a year before the child had comfortably made the transition and was able to be himself in school A. Transitions remain an area of difficulty for the child. He has indicated very strongly that he wishes to remain at school A and does not wish to attend school B. Our concerns are reinforced by the child's refusal to visit school B, despite invitations, because he felt unable to do so. Witness B agreed that his reluctance to visit is a significant hurdle. While the child's view is not determinative, it should be taken into account. It is very likely that the child will simply continue to refuse to visit school B or attend as a pupil there.
71. It is also clear from the evidence that the relationship between the child and his family and the respondent is strained. The child and his family feel they are listened to and understood at school A. They feel that they are not listened to by the respondent. While that tension is understandable given the differing views on choice of school for the child, it adds to our concern that a transition to school B has poor prospects of success.
72. We recognise that there may be compelling reasons for a child to be educated in their home education authority but, taking together all of the factors above, there are very limited ground for optimism for a successful transition to school B. We cannot conclude that the respondent will succeed in transitioning the child to school B. This part of the test is not met.

Reasonableness of placing the child in school A having regard to respective suitability and respective cost (paragraph 3(1)(f)(iii) of Schedule 2 of the 2004 Act)

73. Given our conclusion that the part of the ground of refusal in paragraph 3(1)(f)(ii) of Schedule 2 of the 2004 Act does not apply (paragraphs 66-72), we do not need to address paragraph 3(1)(f)(iii) of that schedule and carry out a comparison between school A and B on suitability to meet the child's additional support needs, and on the cost of doing so, against an overall reasonableness test. Since this ground of refusal was argued, we will state our views briefly.
74. Our findings in relation to the second part of the legal test also apply here. We find that this part of the test is not met. It is clear to us that in a number of important respects, school A is more suitable than school B for providing for the child's additional support needs.
75. The respondent's criticisms about school A's suitability for the child are centred upon their concerns about the differences between the profile of the child and the general profile of pupils at school A and a perceived lack of adequate ASD and ADHD focused strategies for learning and teaching.
76. Witnesses B, C and D all agreed that school A is very good at managing relationships and behaviour of pupils.

77. Witnesses B and C gave evidence that school A caters for children with social, emotional and behavioural needs who show high levels of distressed and sometimes risk-taking behaviour. That was disputed by witness A. We observe that none of the three members of the respondent's staff who visited school A witnessed such behaviour during their visits and the child has indicated consistently that he feels safe at school A.
78. We were referred to the evaluation of school A carried out by Education Scotland in May 2024. The evaluation is very positive about the ethos of care and mutual respect across the school and improved attendance and higher levels of engagement for all learners than was evident in their previous educational placements. It records that, in the few instances where children or young people become disengaged, anxious or distressed, staff are skilled at supporting them to reengage and minimise any potential disruption to lesson [A079].
79. We place weight upon the evaluation by Education Scotland. It paints a very positive picture of school A which is in contrast to the views of witnesses B, C and D. Overall, we find that the evidence for the respondent about violent and dysregulated behaviour in school A was not consistent with the body of evidence.
80. In relation to strategies for learning and teaching, Education Scotland was very positive about learning, teaching and assessment at school A and found that it supports pupils effectively to plan future learning and build progressively on what they can already do [A080].
81. Witness A pointed to strategies that are known to work for the child. She was able to demonstrate progress he had made in learning and behaviour. We noted his improved score in his Literacy Composite from 73 in May 2022 to 87 in September 24 [A194]. We also heard from witness A that there are opportunities available to young people at school A that may not be available within a mainstream school setting, such as opportunities to make lunch and serve staff in the school café.
82. We heard very positive evidence from the appellant about school A's focus on developing independent living skills.
83. Weighing up all the evidence, we accept that there may be differences between the profile of the child and the general profile of pupils at school A. We also accept that the child could benefit from the ASD specific diagnostic tools and strategies employed at school B which are not offered by school A, and that he may progress academically more quickly with those supports, but we must take a holistic view of the child's needs and prioritise his broader needs. To succeed in school, the child needs to be attending school and not placed into situations where he does not feel safe and secure so that he is ready to learn. The evidence does not support any conclusion that he will be ready to learn if he is removed from school A.
84. For all those reasons, it is clear to us that school A is more suitable than school B for providing for the child's needs.
85. On respective cost, it is accepted that the current cost of a day service placement at school A is £1,557.37 per week [A060]. Transport costs in 2022 were £32,733.20 per year. Current transport costs are likely to be higher. The total cost of school A fees and transport is therefore in excess of £90,000 per year.

86. The question is whether the enhanced suitability of school A (as we have found exists) is justified by the additional cost of providing for the additional support needs of the child there.
87. The respondent has failed to establish that it is not reasonable, having regard to respective suitability and the cost gap to place the child in school A. That additional cost for school A is justified since, as we conclude above, the evidence suggests that the respondent would be unable to successfully transition the child to school B. This would leave the child with no educational provision. Even if the child would be likely to attend school B, the points of comparison discussed at paragraphs 74-83 go to the very heart of the provision required to meet the child's additional support needs. The benefits of the child's attendance at school A justify the additional cost. This part of the test is not met.

Conclusion on the ground of refusal

88. We understand the concerns raised by the respondent regarding the child's academic progress at school A. If the child had not been attending school A since December 2021, the evidence may have favoured upholding the refusal of the placing request but we find that time dimension to be critically important. Given the passage of time, the child's successful integration into school A, and the evidence that school A is meeting his needs (as we conclude above), we find it unlikely that there would be a successful transition.
89. Taking a holistic view, we conclude that the benefits the child derives from his placement at school A more than outweigh the concerns about the profile of learners at school A and the supports available there. Although there may be criticism of some of the strategies adopted by school A, they are finding ways to teach the child which are meeting his broader needs, including offering non-academic qualifications to boost his sense of achievement.
90. For those reasons, when we compare the two schools and the potential for the child to develop to his fullest potential, on balance we prefer school A. We therefore overturn the respondent's decision to refuse the placing request and order the respondent to place the child in school A.

Second stage – Appropriateness in all the circumstances (s19(4A)(a)(ii) 2004 Act)

91. Having decided that the ground of refusal does not exist, we are not required to consider whether in all the circumstances it is appropriate to confirm the decision. If we had been required to do so, we would have not considered it appropriate to refuse the placing request.

Timing of requirement to place

92. We are required to state the date by which the child is to be placed in school A. Given that the child is already attending school A and the passage of time since the placing request was submitted, we consider that this decision should be implemented as soon as reasonably practicable and within two weeks of the date of issue of the full decision or such other date as the parties may agree.

Paragraphs 6 and 9 in this decision have been edited by the Chamber President for reasons of privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018.