



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/24/0027

Witness List:

Witnesses for Appellant:

Science Lead (witness D)

The appellant

Witnesses for Respondent:

Depute Head Teacher at school A (witness A)

Head Teacher at school B (witness B)

Educational Psychologist (witness C)

Reference

1. This is a reference by the appellant following a refusal by the respondent to place the child at school B.

Decision

2. We confirm the decision of the respondent to refuse the placing request, in accordance with Section 19(4A)(a) of the Education (Additional Support for Learning) (Scotland) Act 2004 (**'the 2004 Act'**). We therefore do not require the respondent to place the child in school B.

Process

3. An application was made in February 2024, after a placing request was refused in January 2024. Thereafter, case management calls took place in April 2024 and October 2024. Parties lodged written statements from each of their witnesses. Parties also lodged a Joint Minute of agreed facts (**JM**). The views of the child were obtained by an advocacy worker within a written report dated May 2024 and again in November 2024. Written submissions were lodged by parties after the hearing. We considered all of the oral and written evidence and written submissions. The written material in the bundle consists of the following page numbering T001 – T051, A001 – A050, R001 – R151.

Findings in Fact

4. The appellant is the mother of the child. The child is 12 years of age.
5. The child currently attends school A.
6. The respondent is responsible for the child's education.
7. The child transitioned to school A in August 2024. The child has a diagnosis of moderate learning disability (**MLD**) and was diagnosed with a rare chromosomal condition (**the condition**) in June 2024. The condition has widely varying presentations, but often with language processing difficulties and poor muscle tone. The condition is recently discovered with fewer than 400 people worldwide diagnosed; there is no peer reviewed research about it and information about it is anecdotal.
8. The child has additional support needs (**ASN**) in terms of Section 1 of the 2004 Act. The child has difficulties with literacy and numeracy, finds peer interactions challenging and is liable to abscond from school grounds if not supervised.
9. The appellant made a placing request for the child to attend school B. This was refused by the respondent in January 2024 on the basis of Schedule 2, Paragraphs 3(1)(a)(vii), 3(1)(b), & 3(1)(g) of the 2004 Act (R061-R062).
10. The child attends a community farm every second Saturday for respite provision; this is funded by Social Work. The child is interested in social interactions and wants to have friends, but needs support to enable her to do so.
11. The child is supported by a family social worker who engages her in activities in the communities; this is funded by Social Work.

12. The child has a counselling session once a week.
13. The child has a disability badge valid until 2026.
14. School B is a complex needs provision. School B does not teach beyond National 3 qualification.
15. Pupils at school B have a variety of conditions including genetic syndromes, quadroplegia, and blindness. Many of the children at school B have physical care needs.
16. The child would be eligible to attend either the P7 - S4 or the P7 - S3 class in which children have varying levels of learning and differentiated education plans. In the P7 - S3 class the majority of children have Autistic Spectrum Disorder (**ASD**) and one child has down's syndrome. Of the 7 pupils in the P7 - S3 , one is functionally verbal, and the other six have limited or no language skills. One pupil is starting to work at Early Level of Curriculum for Excellence (**CfE**) and the other six are at pre-Early Level and are unlikely to progress to Early Level. These pupils are largely sensory driven and not able to engage or interested in social interactions. The children's behaviour presents many distractions in a typical day, as many of them struggle with emotional regulation and it is a noisy environment. A number of the children at school B have a diagnosis of MLD.
17. Many of the children at school B struggle socially and a significant amount of work is undertaken on feelings and emotions.

Findings on School A and the child

18. School A has 850 pupils.
19. Fifty-seven percent of pupils have an indentified additional support need.
20. During secondary 1 and 2, the plan is for the child to access the enhanced provision. The child is in a class of 12 pupils , all of whom have ASN and who have similar levels of learning and needs to the child.
21. School A's enhanced provision is a flexible curricular program rather than a specific place or traditional 'base'. There are two enhanced provision classrooms used for teaching literacy and numeracy. The child attends these small classes (5-10 pupils) for literacy and numeracy lessons. Although the child does not access certain mainstream classes, such as social subjects, this learning is incorporated into project based and cross-curricular work in literacy and numeracy teaching.

22. The child is physically very capable and accesses Drama and PE in what the school refers to as 'mainstream classes' because they are taught by a mainstream class teacher rather than a Support for Learning (**SfL**) teacher. All of the pupils in these classes have identified ASN; class sizes are also smaller than a typical mainstream class with 12 and 17 children respectively rather than the usual 25 to 30 in a typical mainstream class. A SfL teacher accompanies the child to PE but the child needs little support to be an active participant and generally engages well with staff and her peers.
23. The child attends the enhanced provision base at break times to ensure she is supervised. She has an individualised education plan, a behaviour support plan, and a bespoke curricular timetable. The child was very settled prior to and just after the October holiday. The child can have good and bad days, and can become dysregulated when she throws things in class, takes things from other pupils or pushes tables (JM), but staff do not see a child who is in distress on a daily basis. Staff at school A manage these situations and work closely with the appellant to support the child. The child is working at the beginning of First Level of CfE in literacy and numeracy, but needs to return to Early Level work to consolidate her learning. Early Level is normally achieved by the end of Primary 1.

Findings on School B and the Child

24. Children are selected to attend school B according to the respondent's Complex Needs Provision for Pupils with Significant and Complex Needs Guidance (R100). There are 3 criteria, all of which must be met. This came into effect in May 2023. The profiles of the pupils at school B are therefore becoming increasingly complex.
25. School B has 10 classrooms which can accommodate up to 10 pupils in each class. Classes can be formed of 10, 8, 6 pupils depending on their needs according to the Scottish Negotiating Committee for teachers (**SNCT**) guidelines (R079). Currently three classes have 10 pupils, three have 8 pupils, two have 7 pupils, one has 6 pupils and one has 5 pupils. The P7 - S3 and P7 - S4 classes have 7 and 10 children respectively. The two senior S4 - S6 classes are at maximum capacity with 10 pupils each.
26. The current capacity of school B is 81 pupils although the maximum that could be accommodated is 100 pupils.
27. The pupils at school B are working predominantly at pre-Early level.
28. The child meets only 2 of the 3 criteria in the Complex Needs Provision for Pupils with Significant and Complex Needs Guidance and therefore, on this basis, does not qualify for this type of provision.

29. School B has a small trainer pool, a multi-sensory room and sensory garden, kitchen area and art room. There is currently no staffing for use of the Art room. Children at school B who can swim are taken to a community pool once a fortnight. The school's pool is used for those unable to swim or for hydrotherapy needs. There is a large playground and senior pupils have breaks at different times from the junior classes.

The Child's Views

30. The child confirmed that school A was 'Not that bad now'.
31. The child finds mainstream parts of the school too big and noisy and the bell rings at all times of the day.
32. The child has a friend at school A who is known from primary school.
33. The child enjoys PE and sports, swimming in particular, and participated in a gala recently, but does not like English or Maths.
34. The child stated that there are lots of teachers and support assistants at school A and that two members of staff are particularly liked.

Reasons for the Decision

35. Parties are agreed that the child has ASN in terms of Section 1 of the 2004 Act. Having considered the evidence we are satisfied this is the case.
36. The respondent's refusal of the placing request is based upon grounds set out in Schedule 2, paragraph 3 (1) (g), 3 (1) (b), and 3 (1)(a)(vii) of the 2004 Act.
37. The onus of proof lies with the respondent.
38. The assessment period is at the time of the hearing.
39. Even if the ground of refusal exists then we still have to consider whether in all the circumstances it is appropriate to confirm the decision (Section 19 (4A)(a)(ii) of the 2004 Act).

The Grounds of Refusal

40. The parties were agreed on the legislative framework.

Paragraph 3 (1) (b) of the 2004 Act - If the education normally provided at the specified school is not suited to the age, ability, or aptitude of the child.

41. The term 'age, aptitude or ability' is to be construed disjunctively, so that lack of suitability on any of the three variables will suffice (so the phrase should be read as 'age OR aptitude OR ability'): *Coates v Lothian Regional Council* 1999 Fam LR 8 (this point was conceded in that case: para 8-05). We may not consider any other factors.

42. It is agreed that the child is suited to school B on the basis of age alone.

43. There is clearly a difference of views between parties regarding this ground of refusal. It was clear from the evidence that children of comparable age to the child at school B have significant and complex needs. The child is working at a higher level than these children. As the majority of the potential peers are non-verbal and not willing or able to engage in social interactions, the child would not have an appropriate or suitable peer group. We accept witness B's evidence that these peers would not provide the friendships that the child is looking for, and witness C's evidence that a place in this class would be 'entirely inappropriate'.

44. We were directed to the case of *JH and Scottish Borders Council* 2024 YT 50 in which Lord Young states (paragraph 21):

...the assessment of a placing request should not be reduced to a simple comparison of the child's profile with a profile of existing pupils at the school in question. There is a risk that an individual child whose profile differs to some extent from the current cohort may be excluded even though the school has the expertise to provide suitable education for that child and the child would benefit from being placed at that school.'

45. If the child was placed at school B, she would have an individual timetable appropriate for her learning level. However this would be at a much higher level than the rest of her peers and would mean that there be minimal opportunities for the child to engage in learning with her peers, as she currently does in PE at school A, for example. Given the relatively recent introduction of stricter selection criteria for school B, there are children in the senior part of the school who are more similar to the child in terms of learning level, but it would be inappropriate to place her in one of these senior classes due to the age difference, even if a space was available. There would be limited opportunities for the child to engage with the senior pupils if placed in either of the P7 - S3 or P7 - S4 classes. Additionally, the senior children will be leaving school in the next few years.

46. It is also argued that the smaller class sizes and higher ratio of staff to pupils at school B would be beneficial for the child as the child can find it difficult to concentrate in a busy classroom. In fact, the complexity of other children's needs at school B mean that it is a very noisy and often dysregulated environment, which is something the child finds difficult to tolerate.
47. The appellant also argued that the education and facilities offered at school B would provide a suitable education for the child, for example access to the swimming pool, since the child is a keen swimmer and water provides her with sensory feedback. The child accesses swimming outwith school and is unlikely to access the pool at school B since she is an able swimmer, and would instead access a community pool once a fortnight. While access to a sensory room might be beneficial for the child, this in itself would not outweigh the disadvantages of being placed in school B.
48. The appellant argued that, because many of the children at school B have a diagnosis of MLD, this means that school B can provide a suitable education for the child. We accept the evidence of witness A (and it is within our own expertise) that many children with learning difficulties or disabilities do not receive such a diagnosis, and it often depends whether parents have sought such a diagnosis from health professionals. Witness A was clear that, whatever diagnosis a child may have, supports put in place result from an assessment and understanding of how children present and the difficulties that they experience. A MLD diagnosis does not fundamentally alter how a child presents as it is only a label for a particular presentation.
49. The more recent diagnosis of the condition is clearly a concern for the appellant. Since those who have received this diagnosis are small in numbers with wide-ranging presentations and there is only anecdotal information about the implications of the condition, there is no evidence that we can rely on that is relevant to this test.
50. The child does not meet one of the 3 criteria that are used to select children for school B. This criteria relates to expectations of what the child is likely to achieve during her school years: witness C was clear that the child is above the level referred to in this criteria. The appellant suggested that we should disregard these criteria in favour of an interpretation of what 'is *normally* provided' as set out in the test that predates the use of the guidance.
51. Considering all these factors, we are of the view that school B is not suited to the aptitude or ability of the child.
52. This ground of refusal is upheld

Paragraph 3 (1)(a)(viii) - Placing the child in the school specified would:

(i) Make it necessary for the authority to take an additional teacher into employment

(ii) Give rise to significant expenditure on extending or otherwise altering the accommodation at or facilities provided in connection with the school

(vii) though neither of the tests as set out in Paragraph (i) and (ii) above is satisfied, have the consequence that the capacity of the school would be exceeded in terms of pupil numbers.

53. School B can accommodate 100 pupils. Currently there are 81 pupils attending. The respondent relies on the SNCT guidelines which dictate class sizes of 10, 8 or 6 according to the complexity of needs of the children. Class sizes are determined by witness B in collaboration with other school staff, and on this basis she deemed all classes to be currently full. Two of the classes have 7 and 5 pupils and therefore either exceed or are below the sizes dictated by SNCT guidelines. The inconsistency in the arguments relied upon by the respondent mean that we are only able to rely on witness B's evidence that the 'official' capacity of school B is 100 pupils.

54. We must therefore conclude that school B could accommodate one more child, and that the capacity of school B would not be exceeded if the child was to be placed there.

This ground of refusal is not upheld.

Paragraph 3 (1)(g) of the 2004 Act - Where the specified school is a special school, placing the child in the school would breach the requirement in Section 15 (1) of the Standards in Scotland's Schools etc. Act 2000 ('**the 2000 Act**').

55. Section 15 of the 2000 Act provides the 'presumption of mainstream schooling'. That is tempered with certain circumstances as follows:

- a. It would not be suited to the ability or aptitude of the child.
- b. Would be incompatible with the provision of the efficient education for the children with whom the child would be educated.
- c. Would result in unreasonable public expenditure being incurred which would not ordinarily be incurred.

56. This ground of refusal exists where placing the child in the school specified in the placing request (school B) would breach the requirement of the 2000 Act). For this

ground of refusal to exist, the specified school must be a special school (as defined in s.29(1) of the 2004 Act). The parties agree that school B is such a school, and given the evidence available, we conclude that this is the case.

57. The wording of this ground of refusal is clear: for it to exist, there must be a causal link between the placing of the child in school B and a breach of the requirement in s. 15(1) of the 2000 Act. This causal link does not exist here.

58. The appellant argued that the education that is available to the child at school A is education in a special school. If that is correct, placing the child in school B would not cause a breach of the mainstream requirement (the requirement in s.15(1)), since the respondent would already be in breach of that requirement.

59. A special school is defined in Section 29 (1) of the 2004 Act. It means - a) a school, or b) any class or other unit forming part of a public school which is not itself a special school, the sole or main purpose of which is to provide education especially suited to the additional support needs of children or young persons selected for attendance at the school, class, or (as the case may be) unit by reason of those needs.

60. The child is taught within the enhanced provision exclusively. The child only attends classes which only have other children with ASN. Although witness A referred to the child's PE and Drama classes as 'mainstream classes', he acknowledged that this was only because the class is taught by a mainstream class teacher, but could not strictly be thought of as mainstream classes since all of the children attending are either those in the child's class or those with ASN in the mainstream school who are selected to participate.

61. The respondent argued that the enhanced provision at school A should not be treated as a special school; that the enhanced provision is simply part of the educational provision at school A and that the provision in section 15(3) requires attendance exclusively at a special school.

62. We do not accept that argument. We were directed to a decision of the tribunal at ASNTS_D_14_11_2017, which made reference to 'mainstream school being provided 'entirely' in a school other than at a special school in order to qualify as mainstream education. That clearly is not the case for the child here. The child is being provided with education in a special school and has limited involvement in mainstream education.

63. Given this, the necessary causal element is not present, and so this ground of refusal does not exist. Had we reached the conclusion that the necessary causal element did exist, our decision on this ground of refusal would have been the same. We will now explain why.

Application of the circumstance in s.15(3)(a) of the 2000 Act

Section 15 (3)(a) – would not be suited to the ability or aptitude of the child

64. Given the arguments above for Paragraph 3(1)(b) of the 2004 Act, we reiterate that we regard the provision at school B as not suited to the ability or aptitude of the child.

65. This ground of refusal is upheld.

Section 15 (3)(b) – would be incompatible with the provision of efficient education for the children with whom the child would be educated.

66. No evidence was provided that school A is not able to provide an efficient education for the child and for the other children attending school A. There is no doubt that significant resources support the child but other children access this support, although not necessarily to the same level as the child. School A did not identify that the support the child receives is creating a significant issue nor that it would be incompatible with the provision of the efficient education for other children..

67. This ground of refusal is not upheld

Section 15(3)(c) – would result in unreasonable public expenditure being incurred which would not ordinarily be incurred.

68. Again no evidence was provided which indicated that the child being in school A would result in unreasonable public expenditure which would not normally be incurred.

69. This ground of refusal is not upheld.

Appropriateness

70. We still need to consider the issue of appropriateness. We have concluded that one of the exceptions does apply here. Considering the efforts that school A have made to support the child's needs her general positive views of staff and the tailoring of her curriculum, it appears to us that it is an entirely appropriate for the child to remain in school A.

Conclusions

71. Having considered all of the evidence we are satisfied that the ground of refusal as set out in this decision is confirmed and the placing request is refused.

Paragraphs 7, 10, 20, 49 and 60 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.