**DECISION OF THE TRIBUNAL**

FTS/HEC/AR/21/0066

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| **Witness List:** **Witnesses for the appellant:** Independent Educational Consultant, (**Witness A**)Occupational Therapist (**Witness B**), evidence agreed by Joint Minute**Witnesses for the respondent :** Headteacher at School B (**Witness C**)Respondent’s Education Manager for Inclusion and Additional Support Needs (**Witness D**) |

**Reference**

1. This is a reference in relation to a placing request lodged with the Tribunal in June 2021. It is made under Section 18(3)(da)(i) of Education (Additional Support For Learning) (Scotland) Act 2004 (**the 2004 Act**).
2. The appellant made a placing request for the child to attend School A, a special school under the authority of the respondent. This request was refused by the respondent in April 2021 based on schedule 2, paragraph 3(1)(g) of the 2004 Act.
3. The appellant asked us to require the respondent to place the child in School A.

**Decision**

1. We **confirm** the respondent’s decision:
2. We are satisfied that a ground for refusal of the placing request exists in terms of section 19(4A)(i) of the 2004 Act. We are satisfied that, as School A is a special school, placing the child in the school would breach the requirement in Section 15(1) of the Standard in Scotland Schools etc Act 2000 **(2000 Act**), usually referred to as ‘the presumption of mainstream education’.
3. We are satisfied that in all the circumstances it is appropriate to confirm the respondent’s decision (2004 Act Section 19(4)(a)(ii)).

**Process**

1. Case management calls took place between the legal member and the parties’ representatives on 6 occasions between October 2021 and November 2022. Two periods of suspension of the reference were granted between December 2021 and February 2022, and February 2022 and March 2022.
2. An independent advocate obtained the views of the child in November 2021 and November 2022 (T043 and T058 respectively). An opportunity was provided for the child to provide his views orally at the tribunal hearing, but he decided not to do so.

1. Written submissions were provided and summarised at conclusion of the hearing.
2. A joint minute was lodged (T065) and a note of disputed issues was provided (T064).
3. Evidence of witness B was agreed in Joint Minute (T065). The terms of her report at A070 to A075 form evidence which is not in dispute.
4. In its final form, the bundle of written evidence consisted of pages T001 to T070, A001 to A075 and R001 to R059.

**Findings in Fact**

*The child*

1. The child has a diagnosis of Autistic Spectrum Disorder (**ASD**) with associated social, emotional and behavioral needs (A023).
2. The child has mild learning difficulties (A007 and A033) and developmental delay (A015).
3. The child has fine motor skill difficulties and low attention span.

1. The child lacks refinement in his motor skills for his age (A009).
2. The child has weak core muscles and back muscles.
3. The child has a hearing impairment (A017).
4. The child suffers from anxiety.
5. A cognitive assessment by Child and Adolescent Mental Health Services confirmed that the child does **not** have a learning disability and that he was functioning within the average range for his age (A041 and A046).
6. In early 2020, Depute Headteacher of the child’s primary school requested Occupational Therapy (**OT)** support as the child was more aware of differences in comparison to his peers and was becoming angry and frustrated (A011).
7. The child was re-referred to OT in January 2021 to assess whether the child had dyspraxia. The OT reported that his motor skills were consistent with his overall developmental profile rather than being due to a specific motor disorder (A009).
8. The child has had input from a variety of agencies over a number of years including an NHS neurosurgeon, Paediatric Occupational Therapy and Speech and Language Therapy (A014).
9. The child’s entry to primary school was deferred by one year (A034).
10. The child may fail to pick up verbal and nonverbal cues in social situations (A005).
11. The child requires routine and may find it difficult when anything in his environment changes (A005).
12. The child finds social interactions and communication difficult (A005).
13. The child needs instructions and information to be short, clear and unambiguous (A005).

1. Teachers must ensure the child’s attention when talking to the whole class (A005).
2. The child requires a lot of praise and encouragement to maintain his motivation and build his self-esteem (A006).
3. The child may not always ask for help and class teachers need to check that he knows what he must do in class (A005).
4. Due to the child’s motor skill difficulties, he requires the use of a laptop for extended pieces of writing as well as handouts (A005).
5. The child benefits from one-to-one support at times (R005) and there is a maturity gap between the child and his peers (R005).
6. Due to his ASD, the child may find the school and classroom environment overwhelming at times. In primary school, the child called out in class making inappropriate comments and could be rude to teachers (R006). He could become very angry and distressed if challenged about his behavior.
7. The child attended school C. This is a mainstream primary school in the education authority.
8. At primary school, the child often refused to participate in learning, and his attendance at primary school declined from 87% in primary 4 to 70% in primary 7 (R016 to R018).
9. A barrier to the child making progress in education is lack of attendance at school.

*School A*

1. School A is a special school catering for children with a wide range of additional support needs who cannot be educated in a mainstream school.
2. The appellant and the child visited school A once for 30-40 minutes and did not enter any classrooms.
3. School A has a roll of 171 and capacity for 242 pupils.

1. Children placed in school A are significantly behind their peers, typically around 3-4 years behind in terms of their cognitive and social abilities.
2. Pupils at school A can progress to sit National 4 qualifications, but National 5 or Highers are not available as part of the usual curriculum. Most pupils at school A go on to a project at college to prepare them for work. **Part of this paragraph has been removed by the Chamber President in order to protect privacy interests under rule 55(3)(a) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)**.
3. The majority of pupils at school A travel there by school bus.
4. There are no pupils in S2 at school A achieving at Level 3 in Curriculum for Excellence.
5. There is an Information and Communication Technology (**ICT**) classroom at school A, but the computing science curriculum is limited compared to what is offered at school B.

*The child and school B*

1. The child attends school B, a mainstream school in the education authority, which is responsible for the child’s education.
2. School B is a mainstream denominational school with a roll of 1,465 pupils. Approximately 440 pupils have additional support needs, many with a diagnosis of ASD.
3. The proportion of children with additional support needs in school B is consistent with the numbers in other schools nationally.
4. There are many children in school B who have additional support needs which are greater than the needs of the child.
5. In October 2021, the child started working with the discontinuity teaching team for one session of 90 minutes per week, which was increased to two 90-minute sessions per week in November 2021. These sessions then moved to school B in December 2021.
6. In January 2022, the child began attending classes at school B on a reduced timetable with the support of an Additional Needs Support Assistant (**ASNA)**, but before May 2022 the appellant had not wished to enrol the child at school B.
7. The child made very good progress on a reduced timetable and both he and the appellant wished him to spend full days in school. Enrolment was required to allow the child to do so and he enrolled in school B in May 2022.
8. The child does not have any close friends at school B but has identified one friend. One teacher has observed him interacting positively with another pupil and arranged for them to sit together in class (R046).
9. The support for the child at school Bincludes taxi transport to and from school; ASNA support in most classes; supported breaks and lunch times (club A); special arrangements for ordering lunch, access to laptops and communication aids; a Pupil Profile to advise all teachers of the child’s support needs and a personalised uniform. **Part of this paragraph has been altered by the Chamber President in order to protect privacy interests under rule 55(3)(a) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)**

1. The child has developed a good relationship with teacher J, Principal Teacher, Support for Learning. He sees the child each day that the child attends school.
2. The child makes an effective contribution to all classes that he attends (R046-047).
3. At times the child does not want support and wishes to work independently.
4. The child works hard in class and asks for help if he requires it. He engages in class discussions. He is attentive and hardworking (R046-R047).
5. The child is coping very well with the curriculum and has integrated socially. He is chatty and polite and communicates well with his peers and staff. None of his teachers have raised any issues about his behavior in class.
6. Despite concerns about the child’s organisational skills, these do not impact on his ability to access the curriculum.
7. The child’s teachers have been provided with guidance about supporting the child with his learning in a Pupil Profile (A005), including breaking down information into manageable chunks and checking that he knows what he needs to do next.
8. The child is supported by staff from the support for learning team to help meet his needs.
9. When the child goes to lunch, an ASNA goes with him to help him with the administration, but he requires very little support.
10. The child works well with computers. He is coping well consistently across all subjects but has a particular aptitude for computer science in which he recently scored the top mark of 95% in a class assessment.
11. The child uses all tools and equipment safely in practical subjects. He knows how to make his way safely around the school building.
12. At lunchtime the child goes to club A, which is part of the support for learning base within the school. Club A is staffed by the members of the support for learning team. S6 pupils also volunteer in club A. **Part of this paragraph has been altered by the Chamber President in order to protect privacy interests under rule 55(3)(a) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)**.
13. Club A is a club for pupils who find the number of pupils in school overwhelming. The child mixes well with other pupils there. **Part of this paragraph has been altered by the Chamber President in order to protect privacy interests under rule 55(3)(a) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)**.
14. The child interacts well with school staff and responds appropriately to them. He has a good relationship with the office staff who organise his taxi.
15. Eleven hours per week support from an ASNAis available to the child in 13 class periods. He often does not want to make use of this support.
16. The ASNA monitors the child’s progress and provides support for other young people in class if required.
17. At times, the child becomes annoyed and resentful if he feels he is being offered too much support as he does not wish to be seen as being different to other children.
18. If teaching staff consider that a child requires a greater deal of support in class than they can provide, they can make a referral to the support for learning team. No teachers have requested such additional support for the child.
19. The child is working at Level 3 in most subjects, which is the appropriate stage for pupils in S2.
20. The child is on the pathway to sitting National 4 or National 5 examinations.
21. The child travels in a taxi to and from school B provided by the respondent. Prior to the October break, the child was sometimes reluctant to get into the taxi. There had been a change of driver after the summer holidays. To encourage the child’s attendance, school B reinstated the taxi firm and drivers known to the child who transported him prior to the summer. The child has an escort and does not have to share the taxi with other pupils. This arrangement was in place to start after the October break (R058). The child has not yet travelled to school in the taxi since this arrangement was made.
22. The child has not attended school since it resumed in October 2022.
23. School B has offered a Home-Link worker to assist the appellant and the child in the transition from home to school each day.
24. In October 2022, the appellant advised teacher J that the child was refusing to come to school and that he was anxious about the forthcoming tribunal.
25. The appellant is keen for the child to do well in school.
26. Until the October break, the child was making progress in his learning.
27. School B has a scheme called the community charter. Pupils start the week with a merit for each of the 33 class periods. If a pupil retains all or most of the merits by the end of the week, parents or carers receive a positive text message (R059).
28. The appellant was sent this text message (‘well done! [the child] has maintained the high standards of school B by working hard and being kind’) from school B in 6 of the 7 weeks between the start of the school year and the October break (R059).
29. The child’s report card in October 2022 indicates excellent progress in most subject areas (R039 TO R042).
30. The child has not absconded or attempted to abscond from school. There is no record of dysregulated behavior, noncompliance or disregard for social norms.

**Reasons for the Decision**

1. Parties are agreed that the child has additional support needs in terms of section 1 of the 2004 Act. Having considered the evidence we are satisfied that this is the case.
2. The respondent’s refusal of the placing request is based on schedule 2, paragraph 3(1)(g) – “the presumption of mainstream education”.
3. The onus of proof lies with the respondent.
4. The assessment point is at the date of the hearing.
5. 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 ground of refusal*

*Presumption of mainstream education*

1. Schedule 2 paragraph 3(1)(g) of the 2004 Act sets out the ground for refusal.
2. S15(3) of the 2000 Act sets out at subsections (a), (b) and (c) the circumstances in which the presumption of mainstream education does not apply, and those circumstances arise only exceptionally.
3. There is no dispute that School A is a special school. Accordingly, this part of the ground of refusal is met.

*Whether mainstream education is not suited to child’s ability or aptitude.*

1. Despite missing a significant amount of schooling during the first year of secondary school, and an attendance record of 84% so far during S2, the child is making good progress at school B and achieving within Level 3, appropriate for this stage of his education (paragraph 71).
2. When he is in school, he attends all classes on time. He was described as an enthusiastic pupil. Feedback reports from all his teachers are very positive (R046-47).
3. The child has a particular ability in computing science (paragraph 62). The appellant has aspirations for the child that he may be able to progress to a college course in computing. The ICT curriculum at school B is likely to allow the child to achieve his full potential in this subject.
4. Overall, the child will be able to achieve National 4 or National 5 qualifications by the end of S6 (paragraph 72) at school B.
5. Pupils at school A are 3 to 4 years behind their peers academically (paragraph 39). We accept the evidence of witness D, who is familiar with school A, that pupils there do not achieve National 5s, and that National 4s are ‘the absolute maximum’. Whilst pupils at school A go onto positive destinations, they tend to progress into employability schemes.
6. The opportunities for the child achieving his potential are significantly greater at school B. There is a risk that the child would not be academically stretched at school A, as he would be educated with peers who are at a significantly lower academic level (paragraph 40).
7. Not having peers at the same learning level could be frustrating for the child. Witnesses A, C and D were consistent in their concern that the child would not achieve his potential at school A.
8. The child has a full timetable at school B and attends all classes on those days when he attends school. We accept the evidence of witness A, which is consistent with evidence from witness C, that the child’s diagnostic difficulties are not severe in terms of his overall functioning. Witness A was clear that the child can manage the day to day demands of school B with the support that is being provided or can be provided.
9. There was no evidence that the child is not coping with the school curriculum with the supports in place (paragraphs 56-60).
10. There are children at school B with similar needs to the child and some with greater needs (paragraphs 46-47). While we accept that the child feels he does not “fit in” at school B, he is working at the same level as his peers and has opportunities to develop friendships.
11. The appellant invited us to consider that the child is masking his emotions at school and that his presentation at school is not an accurate reflection of how he is coping. Both witness A and witness C stated that it would be very difficult for a child to mask throughout a full week at school without showing some sign of it. Witness A described masking as a way that a person tries to fit in and suggested that the fact that the child is managing to do so means that his future is more optimistic than if he had not been able to make this effort. Given the lack of any evidence of masking or any evidence that if it is a factor, such behavior is detrimental to the child, we are satisfied that the reports from school that the child is generally managing are accurate.
12. The appellant also invited us to consider the evidence from witness C as unreliable because, as Headteacher, he has relatively little direct contact with the child. We do not accept this. It is within the tribunal’s knowledge that, while the role of Headteacher is a stage removed, requests for information from teachers, who do have frequent contact with the child, can be relied on. In addition, feedback from teachers about both the child’s behavior and academic progress was consistent (R046-R047).

*Whether mainstream education is incompatible with efficient provision of education for the children with whom the child would be educated*

1. We need to assess whether education of the child at school B would be incompatible with the efficient education of others. The test suggests something beyond a mere challenge or adaptation. We take efficient to mean reasonably productive; the benefit the pupils gain from education should be proportionate to the time and resources employed. If, for instance, a substantial amount of staff time is taken up with matters other than those pupils’ education, then their education is not efficient. It does not imply perfection so that every minute of every day is devoted to the uninterrupted education of all the children.
2. We do not consider education to be inefficient when a particular pupils’ needs or behavior has some consequent effect on the education and wellbeing of other pupils if it does not significantly impair the effectiveness of the education for others. In all classes, children will at times misbehave or progress at a different pace. Inevitably, that has some effect on other pupils. To take a different approach to this part of Section 15 would be inconsistent with the direction that the exceptions to the presumption of mainstream education arise only exceptionally.
3. Witness C was clear in evidence that that there are no issues about the child’s behavior in class. He has regularly been commended for maintaining the high standards of school B. One behavioral issue noted in the child’s Spanish class was quickly resolved by discussion with the teacher and the child and appeared to be a misunderstanding. We accept this evidence. No other concerns have been noted by school B in relation to the child’s education which would disrupt the efficient education of his peers.
4. Class teachers’ comments (R046 to R047) report that the child is eager to engage in class discussions and enjoys sharing his thoughts with peers. He gets on well with staff and other pupils. One class can be challenging, and the child generally ignores disruptions and gets on with the task in hand. We accept this evidence.

*Whether mainstream education would result in unreasonable public expenditure*

1. The evidence from witness C was that the support the child receives in school as well as the provision of taxi transport is catered for within school B’s budget.
2. Witness D stated (R053) that 11 hours of support is within the average range for a child with additional support needs at a mainstream school. In her view, the cost of support for the child is not unreasonable, and we accept this.
3. Both witnesses C and D confirmed that supports are provided for children with greater levels of need than the child at school B. Approximately one third of the school population requires additional support and the child is not at the higher level of that support (paragraph 47).

*Conclusion on the ground of refusal*

1. We are not satisfied that to provide education for the child at a school other than a special school would not be suited to the ability or aptitude of the child. Therefor the circumstances set out in Section 15(3)(a) of the 2000 Act do not apply.
2. Providing education to the child at school B is not incompatible with the provision of efficient education for the children with whom the child is educated. Therefore, the circumstances set out in Section 15 (3)(b) of the 2000 Act do not apply.
3. We conclude that providing education for the child in mainstream school does not result in unreasonable public expenditure which would not ordinarily be incurred, and therefore we conclude that this exception at Section 15(3)(c) does not apply.
4. The respondent has satisfied us that none of the circumstances set out in Section 15(3) of the 2000 Act apply and the ground of refusal exists.

*Appropriateness in all of the circumstances – section 19(4A)(a)(ii) of the 2004 Act*

1. Having concluded that a ground of refusal exists, we need to consider whether, nonetheless, it is appropriate in all the circumstances to confirm the decision to refuse the placing request.
2. The evidence from the independent assessment by witness A, was that School B should be able to meet the child’s immediate and long-term academic needs as well as providing him with opportunities for personal development and social learning. He concluded that the support on offer at school B was of a high standard and that there was no evidence that the child was ‘lost’ within the system (A064) nor that his needs were being either ignored or understated. We accept this and do not accept the appellant’s argument that the child’s needs are not being or able to be met in school B.
3. The appellant argued that the overriding consideration should be the child’s wellbeing and that school A offers an environment conducive to his mental health, wellbeing and social skills needs. Given that we have concluded that school B meets the child’s holistic needs, we do not accept this argument.
4. Although the child reports no close friendships, he has identified one friend. We accepted the evidence of witness C that school staff have observed the child being greeted warmly by his peers and believe that with support he could develop friendships.
5. Witness C was willing to consider enhancements to the support for the child to help him cope with the demands that the school environment may place on him, as proposed by Witness A (A065). Witness C stated that these adjustments could be provided after discussion with the child and his family.
6. The appellant is concerned that the child cannot cope with the noise level at a mainstream school. We accept the evidence of witness D that school A, while it has fewer pupils, is not necessarily a quieter environment due to the more complex nature of the pupils’ difficulties.
7. The appellant is also concerned that the child is anxious about using the toilets at school. Witnesses C and D both stated that there are alternative toilets that the child can use. We accept that this difficulty can be resolved by school B.
8. School B’s club A was described by witness A in evidence as ‘a real asset, a real bonus’. He suggested this could be used for pupils in small groups to work together to provide opportunities for learning in a smaller environment. The appellant’s primary motivation in seeking the placing request was for the child to be educated in a small setting. Although the child appears to have managed well in a much larger mainstream school, we are satisfied that smaller group opportunities in school B are available to support him if needed. **Part of this paragraph has been altered by the Chamber President in order to protect privacy interests under rule 55(3)(a) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)**.
9. Witness A was clear that none of the child’s difficulties are so severe that they impact on his functioning at school, but that anxiety appears to be a significant factor in his non-attendance at school.
10. The appellant argued that there was a danger of the child becoming a school refuser, since he has not attended school since the October break. We do not accept this. There is no evidence that it is likely. The child successfully integrated into school B after a much longer period of absence at the start of his secondary schooling. Given that the child’s progress at school B has been positive, we do not think that another re-integration is impossible.
11. The appellant also argued that there is no clear plan for the child’s return. A transport arrangement that worked in the past is now in place (paragraph 73). A home link worker can support the family with the morning transition. Teacher J has a good working relationship with the appellant. Witness C was confident that the child will thrive if he consistently attends school B. We are satisfied that the issue about transport to school and reluctance to attend school while these tribunal proceedings were ongoing can be overcome.
12. It is unknown whether travelling in a school bus to the specified school would cause the child to be anxious. A school bus cannot wait for him as it would make other pupils late. The taxi service which has been arranged for the child to attend school B is individual to him, which makes it more likely that he will attend school.
13. We considered the child’s views carefully. His views conflicted with how others perceive him at school B; he states that he does not like being there and that he does not get any support. He thinks that School A would suit him better because there would be more children like him, and he would fit in. His view about School A is based on one very short, limited visit there. Accordingly, his view was not informed by any real knowledge of his potential peer group, or the curriculum and support offered there. The appellant told us that she had informed the child since Primary 6 that School A would be better for him, so this idea has had a number of years to embed. While we take the child’s views into account, these are outweighed by evidence that school B will meet his needs and enable him to reach his potential.
14. We conclude that it is likely that attendance at School A would be detrimental to the child as he would not have the same opportunity to achieve his academic potential as he has at school B.
15. We hope that the appellant will consider the evidence provided by her own witness (witness A) that the child’s needs can be met at school B, and that she will support the child to attend so that he has the chance to succeed.
16. The appellant’s concerns regarding the risk to the child in a large environment are understandable, but the evidence does not support her view that any concerns would be resolved by moving the child to School A. We accept the evidence of witness D that the likelihood of the child being able to return to mainstream school if he was placed in a special school is remote.
17. We are satisfied that the education provided at school B is suited to the development of the personality, talents, and abilities of the child to reach his fullest potential.
18. Accordingly, having considered all of the evidence in the context of the much wider test of appropriateness, we conclude that it is not appropriate in all the circumstances to place the child in school A, and we confirm the decision of the respondent to refuse the placing request.