



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/23/0083

Witnesses for Respondent:

Head teacher of School A (**Witness A**)

Education Manager (Additional Support Needs and Inclusion) (**Witness B**)

Educational Psychologist (**Witness C**)

Reference

1. This is a reference by the appellant challenging the respondent's decision to refuse the appellant's request to place the child in **school B**.

Decision

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

Process

3. The reference was made in June 2023. A hearing on this reference took place over two days and was conducted remotely using the Cisco WebEx platform. The parties provided outline and then post-hearing written submissions.
4. We considered all oral and written evidence of all witnesses and the written material available. The written material (including submissions and some late documents) in the bundle consists of the following page numbering: T1-044; A1-043; and R1-176.
5. The child attended the hearing and provided us with his views. He did so in two parts, at the beginning of day 1 of the hearing and later on that day. The child's views were also taken by an advocacy worker who provided a report setting those out (T036-039).

6. The child's views, as recorded in the advocacy report and as expressed to us, can be summarised follows:
- a. The child feels his reading is OK now, as he has taught himself to do that. He likes adventure and action stories. He struggles with maths. He doesn't like to write so he uses the laptop.
 - b. Being out of the classroom at his current school, **School A** and in the sensory room there (**The Room**) helps the child a little as there is no-one there to distract him. If there is anyone there who annoys him, he can just ignore them. He goes to The Room when he gets overwhelmed, and when he can't get his school work done. Sometimes other pupils in The Room can have tantrums, which is not the best. **[Part of this paragraph has been changed by the Chamber President to preserve the anonymity of the child under rule 55 (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
 - c. He feels that he is getting more help this (academic) year than last year. He is in class a bit more this year.
 - d. He was really upset, sad and angry when someone grabbed his lunch at school and ate it. **[Part of this paragraph has been removed by the Chamber President to maintain privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
 - e. He can feel overwhelmed at school assemblies since people shout out, interrupt and talk.
 - f. Sometimes the child gets shouted at in the classroom, which he doesn't like.
 - g. He struggles in the school playground. Everyone else plays football but he doesn't.
 - h. The classes were changed around and he lost the friends who had been in his class, which he did not feel good about.
 - i. He would like to go to School B, since it has smaller classes and a swimming pool and he is really getting into swimming. School B is quieter than School A and it is for people like him. There would be less distractions and people there and this would help him to concentrate. He would make more friends there and there are lots of quiet spaces he could use. School B is the only school he feels he would thrive in.
 - j. School B staff understand him a lot better than they do at school A. Some teachers at School A don't understand him at all, including when he wants to be left alone to calm down and he is told to go back to class.
 - k. **[This paragraph has been removed by the Chamber President to maintain privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

- I. When he was observed in class, he was having a 'good day', and feels that he should have been observed when he was overwhelmed or having a meltdown.
- m. If he went to **School C**, he would be a target. He felt overwhelmed when he went there, and he couldn't go to school the next day as a result. He does not like School C.

Findings in Fact

General findings in fact

7. The appellant is the mother of the child. The child, who is 11 years old, lives with his mother.
8. The appellant made a placing request to the respondent asking that the child is placed in School B. That request was refused in May 2023.
9. The child has a diagnosis of Autism Spectrum Disorder (**ASD**). He has associated social, emotional and behavioural needs. He meets the criteria for dyslexia.
10. He is an anxious child and change triggers his anxiety. Events such as sports day, classroom changes and Christmas shows can trigger the child's anxiety, leading to him refusing to participate. A loud and busy environment can trigger the child's anxiety. Unfamiliar people and changes in routine can prompt the child to become anxious. The child became distressed in class (and found that his ability to concentrate was affected) by the noise made by 'T loop' hearing aids worn by two other pupils. On one recent occasion, the child complained of chest pain while at school. The doctor later assessed this as anxiety-related. The child was unable to go on a school trip due to anxiety.
11. Following concerns raised by the appellant, School A staff, with the appellant's approval, referred the child to an anxiety management project, (**the Project**). This is an 8-week programme delivered by **Agency A**. It involves discussions with the child and his carers and provides the child with strategies to alleviate anxiety. This programme is yet to begin for the child. **[Part of this paragraph has been changed by the Chamber President to maintain privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
12. The child's conditions affect how the child behaves and reacts. He has difficulties understanding social interactions and cues. He has fixed interests, preferring to focus the discussion on his interests. He thinks literally and rigidly.
13. The child currently attends School A, a mainstream primary school. He is in Primary 7. School A is the fourth school the child has attended.
14. When the child is dysregulated or distressed, he finds it difficult to communicate how he feels and what he needs. At times, he becomes non-verbal or uses singular words or hand gestures to communicate. He will often, when dysregulated, ask to go home, and will focus on going home. The child's distress is heightened when others can see him showing distress.

15. When distressed, the child sometimes covers his ears, pulls his hood over his face, rocks back and forth and sometimes reacts physically, verbally and threateningly towards others. He can also, while in such a condition, throw items and turn over tables. The child displays distress particularly during school breaktimes when playing football. The child's class has had to be evacuated due to the child showing distress. When distressed at school, the child sometimes repeatedly asks for home, leading to School A staff calling in his mother or her partner to come to school to assist school staff to calm him. Sometimes, the appellant or her partner has taken the child home during such a visit.
16. The child sometimes becomes distressed once he arrives home from school. This has caused him to punch walls and doors, throw things, curl up in his bed and want to be left alone. **[Part of this paragraph has been removed by the Chamber President to maintain privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
17. The child finds it difficult to make friends and he can struggle to join in with his school peers.

The child and school A

18. The child has attended school A since August 2021. There are around 250 pupils at that school. Around 150 pupils have additional support needs. The child's attendance at School A in academic year 2022-23 was 73.03%. In the current academic year his attendance rate so far (August-October 2023) is 76.14%.
19. The child often arrives late for school.
20. The child is working at the end of First Level of the Curriculum for Excellence (**CfE**) in most areas; in some areas he is working at the start of Second Level. Most pupils achieve the end of the CfE First Level by the end of Primary 4 and CfE Second Level by the end of Primary 7. The child has gaps in his learning and his reading and spelling are below his chronological age. He is academically behind some of his class peers. He is academically 1 year behind the nationally expected level for pupils of his age and he is 2-3 years behind some of his peers. In national numeracy assessments, he has scored as average and as slightly below average for writing. The child has the potential to be working at the Second Level by the end of Primary 7.
21. The respondent has in place planning and assessment documents to assist in the management of provision for his needs. These include a Wellbeing Assessment (the latest from March 2023, found at R013-R020) and School A Monitoring and Evaluation Plans (dated February-June 2022 and August 2022, found at R034-R045). In addition, regular Team Around the Child meetings take place, providing a further written record of the child's needs and actions to meet them (see the notes of meetings in December 2021, March 2023 and May 2023 at R026-R033).
22. The child has the freedom to choose to attend The Room. The Room is a small, sensory quiet room with some sensory items in it such as sand timers, gels and cuddle balls. The child prefers to use it when no other pupils are there. The child sometimes makes this choice when he finds the classroom busy and noisy, causing him to become anxious or distressed so that he finds it difficult to concentrate. If more than one child requires to

use The Room at the same time, other quiet spaces are available, for example the library. **[Part of this paragraph has been changed by the Chamber President to preserve anonymity of the child under rule 55(4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

23. The proportion of time the child spends in The Room varies from week to week. Sometimes he uses it every day of the week, on other weeks he does not use it often. The child has spent some days only in The Room, with no time in the classroom. Sometimes the child goes straight to The Room on his arrival at school and refuses to go to class. The child often spends part of Mondays in The Room. He often spends his break and lunchtimes in The Room. On one recent occasion, the child spent the whole school week in The Room. Sometimes he falls asleep in The Room. Sometimes the child will go to The Room when he arrives at school late, as he does not like not like to arrive late in class. **[Part of this paragraph has been changed by the Chamber President to preserve anonymity of the child under rule 55(4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
24. The child does not like to use the toilets at School A. **[Part of this paragraph has been removed by the Chamber President to maintain privacy under rule 55(4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
25. When he child becomes distressed and disregulated, he sometimes gets into fights with other pupils at School A, especially in the playground, the most recent being in November 2023. School A staff support the child after fights by involving him in restorative conversations.
26. The child is considered by the respondent to represent a school flight risk. The child has become distressed and has left the grounds of School A on two occasions, making his way home. On each of these occasions, the child was followed home (which is nearby) by a member of School A staff. The child managed to get home safely on his own on both occasions. He attempted to leave the school grounds on a third occasion, but was prevented by staff from doing so. A risk assessment addressing this risk has been prepared in draft form by the respondent.
27. The child sometimes struggles with peer interaction at School A.
28. Although a space is available for him in class to sit alone, the child has chosen to sit as part of a group in his Primary 7 class since the start of the current academic year.
29. The appellant requested that if the child became particularly distressed at school, staff would call her to keep her informed. Until recently, the appellant received regular phone calls from school about the child informing her of the child's distress at School A. This sometimes leads to the appellant or her partner being asked to attend School A to help calm the child, and on some of these occasions, the child is taken home.
30. In around December 2022, the child became distressed when a classroom assistant encouraged him to move from under a staircase (where he was hiding) to The Room. As a result, the appellant (who was in the school for another matter) was called to the head

teacher's office. **[Part of this paragraph has been changed by the Chamber President to preserve anonymity of the child under rule 55(4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

31. The child sometimes does not recognize spoken words, he spells phonetically and leaves out sounds in words. He does not use punctuation consistently in written tasks. The child uses varying sentence structure and vocabulary in his writing. The volume of writing he is producing has grown considerably.
32. The child sometimes reads aloud in class (he did not do so previously).
33. There are two Additional Support Needs Assistants (**ASNA**) and one health and Wellbeing Assistant employed at School A to support the pupils. The child rarely needs 1:1 support in School A, and does not wish such support.
34. Supports in place for the child at School A to meet his additional support needs include:
 - a. Access to The Room or another suitable space, to allow the child to have some quiet time away from the classroom or playground when he wishes this.
 - b. Targeted support from his classroom teacher and ASNA for numeracy and literacy.
 - c. Targeted supports in phonics, blending and segmenting, all techniques related to word comprehension.
 - d. Preparation work with the child in advance of changes in routine that would be likely to cause him distress.
 - e. Upcoming enhanced transition to secondary school.
 - f. Upcoming engagement in the Project (see our findings at paragraph 11 above).
 - g. Strong communication between school and home, to minimise the risk of distressed behavior at home. Calling the child's carers into school to help him to become calm when he is distressed or dysregulated.
 - h. De-escalation techniques such as monitoring the child and 'checking in' with him to make sure he is coping and giving the child space and time to become calm when he becomes distressed.
 - i. Planning and review of supports, progress and techniques for the child through educational psychology and multi-disciplinary input (as evidenced at the documents at R121-125, R026-045).

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35. In October 2023, witness C observed the child in his class for a period of around 70 minutes. The child was seen to be very settled and happy in the classroom. He interacted with his peers, who included him in tasks. He participated well in the lesson, including reading aloud. He put up his hand to ask questions and he asked for clarifications of instructions. The child caused no disruptions during the observation period. Another pupil close to the child became 'very dysregulated' during the lesson. The child coped well and tuned out the other child's behaviour. During some of the observed period, the lesson was unstructured and the child was seated with three other pupils and interacted well with them. The child collected scrap paper for everyone in the group. The child made a joke causing the others to smile. The child and the others with him talked and smiled.
36. Witness B observed the child in class in September 2023. The child engaged in three literacy tasks set for the class. The child engaged in these tasks, and interacted appropriately with peers and his teacher. Witness B went onto observe the child during the lunch break. He enjoyed his break and interacted well with his peers. He was settled throughout witness B's observation, which lasted for around three hours.
37. A Education Officer observed the child in September 2023. On that occasion, the child decided not to attend a whole school assembly since he would not cope with this. He went to The Room instead. He did not speak to the education officer while there, but showed her some resources in the room. He presented as comfortable both while alone and during the time the education officer attended with him. Later that day, the education officer observed the child in the school library. He was happily working with other pupils. He was relaxed. He was included by his peers in the activities. The education officer spoke to the group and the child engaged in conversation with her, explaining the task the group were doing. He displayed knowledge of and enthusiasm for the task. The child was confident in asking for support when needed, and in interactions with staff members. **[Part of this paragraph has been changed by the Chamber President to preserve anonymity of the child under rule 55(4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
38. During academic year 2021-22 at School A, the child was progressing with support in all elements of numeracy and mathematics, health and wellbeing, reading and writing and with other areas of the curriculum. During academic year 2022-23 at School A, the child's performance in each of these areas had improved: he was assessed as making progress across them all.

The child and School B

39. The main purpose of School B is to provide education suited to the additional support needs of the pupils selected to attend there. It offers education to primary and secondary age pupils, meaning that pupils can obtain their full school education there.
40. The class sizes at School B are small and staff there are experienced in supporting pupils with similar needs to those of the child. A place at School B is currently available for the child.

The child and school C

41. School C is a mainstream secondary school. If the child does not attend School B, he would be likely to attend School C, his catchment secondary school.

Reasons for the Decision

42. The parties agree that the child has additional support needs, as defined in section 1 of the 2004 Act. We agree, as supported by our findings in fact at paragraphs 9, 10, 12 and 14-17.

43. The appropriate point in time for consideration of the evidence is at the date of the hearing: the law is clear on this. The burden of establishing that the respondent's decision should be confirmed falls on the respondent.

44. Except where mentioned below, all of the witnesses presented credible and reliable evidence. This reference turns on the proper interpretation of the evidence (written and oral) and an assessment of the arguments advanced in submissions.

The ground of refusal: breach of mainstream requirement (2004 Act, Schedule 2, paragraph 3(g))

45. The respondent argued that one ground of refusal of the placing request exists, namely the breach of the mainstream requirement ground. That ground exists where placing the child in the school specified in the placing request (School B) would breach the requirement in s.15(1) of the Standards in Scotland's Schools etc. Act 2000 (**2000 Act**). In order for the ground of refusal to apply, 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.

46. The parties are also agreed that School A is not a special school within the meaning of s.29(1) of the 2004 Act. Again, given the evidence available, we conclude that this is the case.

47. This brings us to the requirement in s.15(1) of the 2000 Act. That requirement is that the respondent must provide the child's education in a school other than a special school unless at least one of three circumstances set out in s.15(3) arise.

48. The respondent argues that none of the s.15(3) circumstances arise, meaning that it must provide the child's education in a school that is not a special school (School A).

49. The appellant argues that at least one of the three s.15(3) circumstances arises, meaning that the requirement in s.15(1) does not apply. If the appellant is correct, this means that the placing request refusal ground relied upon by the respondent cannot exist since, as far as the child is concerned, there is no requirement to breach.

50. One point to note: the circumstances in s.15(3) arise only exceptionally (s.15(3), last line).

51. The burden of proof in relation to each of the s.15(3) requirements lies with the respondent, since these are part of the ground of refusal: the burden does not switch to the appellant.

52. We will now examine each of the s.15(3) circumstances. In doing so, for the purposes of this case, the 'school other than a special school' in s.15(1) and (3) is a school of the same type as School A.

Circumstance 1: to provide education for the child in a school other than a special school would not be suited to the ability or aptitude of the child (2000 Act, s.15(3)(a))

53. We conclude that this circumstance does not arise here.

54. A number of points of interpretation about this circumstance apply:

- a. We are not comparing two schools (in this case Schools A and B) with one another. We must concentrate only on the provision of education for the child in a non-special school setting.
- b. The reference to 'a school other than a special school' in this provision (and in s.15(1)) does not refer to a particular school, but instead to a type of school. Usually, that type is referred to as a 'mainstream school'. That term is not defined anywhere in education legislation, but it does appear in the heading to s.15 and it is used widely in the Scottish school education field. This means that we are focusing on 'mainstream' education in general, not only the education being provided at School A. The evidence of the child's education there is, of course, very important, since it is of the 'mainstream' type.
- c. If the child continued to attend School A for the remainder of the current academic year, the evidence indicates that he would attend School C as his secondary school from August 2024. While we can take this into account as a factor, our main focus is on School A since that is the school the child is currently attending. The child has visited School C, but has not attended there as a pupil. Also, we have very limited information about School C. Further, if the child is attending School C, there will be a transition process to assist in the move there. Since that process has not properly started, it is very difficult to predict how it will go. This all means that our focus on School C, while relevant (as it is a school that is not a special school and one that the child would be likely to attend), is very limited.
- d. The test here is 'not suited'. This suggests a general incompatibility between the child's ability or aptitude (or both) and the provision in a non-special school. Such an incompatibility relating to either ability or aptitude would lead to the circumstance arising.
- e. The words 'ability' and 'aptitude' are not defined and so should be given their ordinary and natural meaning, taking into account the context in which these terms appear (namely in the context of school education). This means that 'ability' refers to the means or skill to do something, while 'aptitude' refers to a natural ability or skill.

55. Bearing all of this in mind, we will consider this circumstance through a number of topics.

Circumstance 1: the child's academic ability and aptitude

56. The question is whether educating the child in a mainstream school such as School A is not suited to his ability or aptitude. There is evidence to suggest that not only is this not the case, but that the education being provided in School A is suited to the child's ability and aptitude, taking into account his additional support needs.
57. The appellant points to the child's academic progress at School A and previous non-special schools as an indicator that such education is not suited to his ability and aptitude. The appellant also points to the impact that being behind his peers could have on the child, who is very self-aware: this could impact on his self-confidence.
58. However, Witness A's evidence is that the child is working at the end of the First level/start of the Second Level and she predicts that he will be working at the Second level by the end of primary 7. Further, the child is working at the same level as some other pupils in his class. This suggests that the child is not substantially behind his expected academic level, nor is he working behind the level of all of his class peers.
59. In any event, looking at the child's educational level in isolation is not a reliable way to measure the correlation between a type of educational provision and his ability and aptitude. That correlation needs to be considered in context. There are three main contextual factors: the child's additional support needs, his movements of school and his academic progress. We will consider each in turn.
60. **Firstly**, the child has certain additional support needs, as described in our findings above (at paragraphs 9, 10, 12 and 14-17). These are not in dispute. As a specialist tribunal, it is clear to us that these needs are such that they will have an impact on the child's ability to learn and the rate at which he learns. Give these needs, it is not surprising that the child is academically behind some of those in his class, some of whom will have no such needs.
61. **Secondly**, the child has moved school three times (School A being his fourth school). We know that the child finds change difficult, and three changes in school within five primary school years is likely to have disrupted the child's academic progress. It is impossible, of course, to measure the extent to which this has had an impact on the child's learning level, but it is a factor to which some weight is due.
62. **Thirdly**, the child's education has been progressing at School A. Witness A refers to a 'massive improvement' in a number of areas: the child's ability to spend time in class, engage in class work, build peer and staff relationships and his self-confidence (R130 paragraph 6). That improvement is noted as having happened since the child attended School A. The appellant's representative referred to Witness A's oral evidence, where she accepted that this improvement had happened since he was in Primary 3, when he attended a different school where Witness A was a member of staff. This does not match with what Witness A says at R130, paragraph 6. However, even if the 'massive improvement' in these areas has happened since the child was at Primary 3, that is relevant to considering the suitability of non-special school education, in which the child has been engaged since he started school. It is unlikely that had such an education not been suited to the child's ability or aptitude, he would have made such an improvement in these areas over even four school years.
63. The child's reading has improved recently while at School A. Witness A notes that he has worked hard on this and has made 'significant improvements' (R133-134, para 16).

64. Overall, the child has shown an improvement across most of his subject areas (and a decline in none) at School A, between academic sessions 2021-22 and 2022-23. This is clear from his Annual Pupil Reports from those years (R052-053 and R055-056). This is further evidence of the suitability of the non-special school environment at School A.
65. We accept that difficulties remain with the child's educational provision. He is clearly very anxious. He represents a flight risk. When distressed and disregulated, the child can get involved in fights with other pupils. He requires support to make friendships. He needs support in class and with certain events which involve change. He needs access to a quiet area to allow him to re-regulate or simply to avoid anxiety. We also agree with the appellant's representative about the need to take a holistic approach to the child's education. However, the respondent has taken steps to address all of these matters. We would point to the support offered at School A (findings, paragraph 34), the anxiety project referral (findings, paragraph 11); the risk assessment preparation and measures taken when the child leaves the school grounds (findings, paragraph 26 above). Further, there is a clear concentration on a holistic (wellbeing indicator) approach as evidenced in the documents regulating provision for the child (for example the Monitoring and Evaluation Plans (R034-045) and the Wellbeing Assessment (R013-R020)).

Circumstance 1: supports in place in School A

66. We note the various supports in place for the child (findings at paragraph 34). These seem to us to be appropriate and to be having a positive impact: the child is developing educationally (see the discussion above at paragraphs 62-64). These supports are, we know as a specialist tribunal, commonly applicable for children with additional support needs similar to those of the child.
67. The presence of these supports is a further indicator of the suitability of the environment in School B for the child. They demonstrate that School A staff know about the child's needs and that they have devised supports to match them.

Circumstance 1: time in class

68. One area of concern highlighted by the appellant is the proportion of time the child spends in The Room. We accept that it is important for the child to spend as much time in class with his peers as possible, especially since The Room is a sensory space and is not used for substantive educational purposes. However, the evidence indicates that the child is spending less time than before in The Room. The child spends most break times in The Room. Witness A contrasts the child's time in a previous school when he was in Primary 3 with his experience at School A: she says he spends 'a lot more time in class' at School A (R130, paragraph 6), compared with 'very little time' in class at his previous school. **[Part of this paragraph has been changed by the Chamber President to preserve anonymity of the child under rule 55(4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
69. Further, given the child's anxieties and his need to re-regulate when he feels anxious, The Room (and any other similar facility that might be available as the child progresses into his secondary education) is part of the provision needed for the child, to allow him to maintain a state of mind to help him to learn. It is not a negative part of his provision;

it is a positive support. The fact that such a facility is available in School A and is used freely by the child on a regular basis (while allowing him to make educational progress) is an indicator of suitability of School A for the child's needs. **[Part of this paragraph has been changed by the Chamber President to preserve anonymity of the child under rule 55(4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

Circumstance 1: distress

70. There is clear evidence that the child becomes regularly distressed in School A. However, unfortunately this is not surprising given his additional support needs. We conclude that the support in School A is such that when this occurs, it can be adequately managed.
71. We accept the appellant's argument that when the child is distressed, he is not able to learn. However, given the child's additional support needs, the elimination of distress is an unrealistic goal. This means that the focus should be on minimizing the incidents of distress and dealing with them effectively when they do arise.
72. School A staff sometimes ask the appellant or her partner to attend school to assist with the management of episodes of distress. Sometimes the child can be calmed, and he remains in school; on other occasions, he is taken home. The appellant in her oral evidence stated that she is asked to attend school most days, although this has reduced in the last month or so. Witness A stated that calling in the appellant or her partner has been happening a lot less than it used to (R131, paragraph 8). In her oral evidence, Witness A explained that the number of times this happens reduced from Primary 6 to Primary 7; in Primary 6, this happened much more often and could be every day in a week.
73. We do not accept that the appellant or her partner are being asked to attend the school to assist with the child's distress almost every day. This is not mentioned in the appellant's case statement, nor in her detailed witness statement. Had this been a daily (or almost daily) occurrence, it would be very likely to have featured in the appellant's pre-hearing accounts. We prefer Witness A's account here, which was similar in her witness statement and in her oral evidence.
74. The reason for requests of this nature by the school is important. Witness A indicates that when distressed, the child repeatedly states 'home, home, home' until they get a family member to come and support him (R131, paragraph 8). She indicates that sometimes he does need help from home.
75. We closely considered this evidence. If a pupil is very regularly becoming distressed, requiring input from carers who are asked to attend from home to assist, this might suggest that the school is not providing an appropriate or adequate learning environment for the child. However, we conclude that since instances of this happening are reducing and given the child's additional support needs, that this is not an indicator of inadequacy of environment. This becomes even clearer when we consider all of the other evidence of the supports in place for the child (as discussed above).

Circumstance 1: observations of the child

76. Witness C's observation of the child in the classroom is relevant here. The facts arising from this observation (which were not in dispute and which are supported by Witness C's contemporaneous handwritten notes at R126-127) are at paragraphs 76-77 above. The appellant argues that this observation, lasting around 70 minutes, was a 'snapshot' of the child in class and so is of limited value. The child said that this observation happened on a 'good day' and he wishes that he could be observed when he is having a meltdown. We accept that an observation of this length is not as valuable as a longer observation. However, it holds some value, and helps us to consider how the child can manage within a non-special school environment.
77. From that observation, Witness C concludes that what she observed was 'very positive' and that he was 'certainly socialising in an age-appropriate way with peers' (R157, paragraph 21).
78. Coming back to the 'snapshot' point, two other observations of the child in class took place, one by Witness B, the other by an Education Officer (Inclusion) (see our findings on these at paragraphs 36-37 above). Accounts are provided in statements (R101-102). These observations took place on different days, but were recent. Witness B's was an in-class and lunchtime observation, while the education officer took place in The Room and the school library. **[Part of this paragraph has been changed by the Chamber President to preserve anonymity of the child under rule 55(4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
79. Taking these three recent observations together, they present a picture of the child as a happy, settled and able pupil, engaging well with his peers and staff members in four different settings (the classroom, The Room, during the lunch break and in the school library). These are all 'snapshots' but they are provided by three professionals, one of whom is School A's link psychologist, and they present a similar picture of the child. We accept that they are 'snapshots' and that they do not show the child when he is distressed. But they do present evidence of the child's ability to engage well and happily in a non-special school learning environment. **[Part of this paragraph has been changed by the Chamber President to preserve anonymity of the child under rule 55(4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

Circumstance 1: peer interactions

80. We accept that there is evidence that the child struggles to join in with peers – that is noted at the respondent's Educational Psychology Assessment Framework document (R121-122 at R122). This is recorded as a 'Risk/Unmet need'. The child pointed to having lost his friends when the class membership was changed.
81. However, all three professionals who observed the child (see the findings at paragraphs 35-37 above) reported that his interactions with other pupils were positive.
82. It is not surprising to find, unfortunately, that children with additional support needs similar to those of the child find making friends difficult. We accept that making friends is an important part of the learning experience for all school pupils. However, there is no evidence to suggest that the education offered by School A prevents or hampers the child from making friends. Indeed, given the observations of his positive interactions with

his peers, it seems to us that the School A environment is conducive to the prospect of the child forming friendship ties with his peers.

Circumstance 2: to provide education for the child in a school other than a special school would be incompatible with the provision of efficient education for the children with whom the child would be educated (2000 Act, s.15(3)(b))

83. We accept that when the child is distressed, his reaction to that distress can have an impact on other pupils at School A. The appellant's representative sets out her arguments on this point at paragraphs 40-41 of her revised written submission.

84. However, we are very clear that this circumstance does not arise in this case. The test is a very high one: providing education for the child has to be incompatible with the efficient education for the children with whom he would be educated. Incompatibility in this context denotes a fundamental clash between educating the child in a non-special school and efficiently educating the other children around him. The use of the phrase 'for the children with whom the child would be educated' suggests that the incompatibility must exist for that group of children as a whole, not only for a small number of them, or even for a significant proportion: it is the pupil body as a whole that matters for this purpose. This circumstance arises when providing education to a child has a general and significant negative impact on the environment in which the child and his peers are educated. There is no suggestion that the child's distress has any significant impact on those being educated around him.

85. There is evidence that the child's class has had to be evacuated on some occasions when he is distressed, but there is no indication of how often this has happened. There is no sense in the evidence that this is a regular occurrence such that the education of other pupils is being interrupted on an ongoing basis.

86. When the child becomes distressed and disregulated, he sometimes gets into fights with other pupils. Most recently, this happened in November 2023. Clearly, this would be detrimental to the education of the pupils involved in those fights and perhaps those who witness them. Again, however, there is no sense that this is happening on a very regular basis or that it is causing a significant negative impact on the children in the classroom, the playground or any other part of the school.

87. There is clear evidence that the child interacts well with the staff and his fellow pupils – see the findings around the observations, above at paragraphs 35-37, discussed at paragraphs 76-79.

88. The Annual Pupil Reports for the child for the last two years at School A (2021-22, R052-053 and 2022-23, R055-056) paint a clear picture of a child who, although he requires support with behaviour and respect and tolerance towards others, is trying hard with his schoolwork and who 'integrates well with his classmates but is often happier working on his own'. There is no suggestion of a downturn in the child's progress so far in the current academic year. If the child was having the kind of impact on other pupils needed to trigger this circumstance, it is inconceivable that his most recent school reports would not reflect that.

89. Finally, the appellant's representative argues (paragraph 41 of her revised submission) that the resources needed to support the child draw support away from other children in

School A. This is not tenable. The evidence indicates that there are resources available, based on need, to cater for the additional support needs of the school population. The appellant's representative argues that there are only four ASNAs and 2 classroom assistants for the whole school where 135 pupils have additional support needs. However, the range of those needs is likely to vary significantly, and it is very likely that a proportion (perhaps a high proportion) of those pupils need little or no ASNA or classroom assistant input. Clearly if support is needed for the child, this will mean that it is not available for that time for other children, but that is the nature of additional support in schools. We did not sense, from any of the written or oral evidence, that the support in place for the child left other pupils short of support they need. Such a shortage would have to not only be present, but would have to have a significant negative impact on the children with additional support needs in the school. The evidence simply does not support this.

Circumstance 3: to provide education for the child in a school other than a special school would result in unreasonable public expenditure being incurred which would not ordinarily be incurred (2000 Act, s.15(3)(a))

90. There is no evidence available as to the cost that attaches to the child being educated at a non-special school such as School A. The fact that the respondent would not incur any cost in sending the child to School B is irrelevant; it is the cost of educating him at School A that matters.

91. The evidence suggests that the cost of educating the child is simply subsumed within the overall running costs of School A. The child benefits from classroom assistant, ASNA and teacher support that is in place for the children at the school with additional support needs. He does not have a dedicated support that could be reasonably costed. The Room is a general resource available to any pupil who needs it. The child does not like the provision of 1:1 support in class. If the cost of providing education to the child could be reliably calculated (and we think that such a calculation would be very difficult if not impossible), it would not represent unreasonable public expenditure. As a specialist tribunal, we know that the kind of supports in place for the child are similar to those available in many non-special schools where there is a substantial proportion of the pupils who have additional support needs.

92. This circumstance does not, therefore, arise.

Conclusion on ground of refusal

93. None of the circumstances in s.15(3) of the 2000 Act arise (even were we to ignore the requirement that they may only arise exceptionally) and since the specified school is a special school, the ground of refusal in Schedule 2, paragraph 3(g) of the 2004 Act exists.

Appropriateness in all the circumstances (s.19(4A)(a)(ii) of the 2004 Act)

94. As we conclude that a ground of refusal exists, we must also consider whether, nevertheless, it is appropriate in all the circumstances to confirm the respondent's refusal of the placing request.

95. The appellant's representative argues that we should not take any account of the likely provision at School C in considering this part of the legal test (written submission, paragraph 54). We agree. We therefore leave out of account School C at this stage.
96. The appellant's representative argues that the child's needs are not being met at School A, and that they would be met at School B.
97. We agree with the appellant's representative that it would be unfair to speculate about the barriers that might present for the child were he to attend School B. The onus is on the respondent and there is limited information available about that school. It is appropriate then that the appellant is given the benefit of any doubt on the suitability of School B to meet the child's needs. Bearing this in mind, from the evidence, we conclude that it is likely that the child's needs would be met at School B. However, in considering the test at this stage, we must consider the appropriateness of confirming the respondent's decision in all the circumstances. These circumstances include:
- a. That there is a statutory obligation on the respondent to provide education in a school other than a special school except in certain limited circumstances, which arise only exceptionally;
 - b. That the child is making clear progress in a non-special school environment, suggesting that this progress will continue for the rest of the academic year;
 - c. This suggests that the child may make progress in a non-special school at secondary level;
 - d. That some of the pupils from School A may attend School C, meaning that there would be some familiar faces at School C were the child to attend there; and
 - e. That placing the child in School B at this point would involve taking him out of his current Primary 7 class (where he is making progress and seems reasonably settled) and placing him in a new school (his fifth). It seems to us to be sensible to allow the child to complete his primary level education at his current school.
98. On factor e. in the last paragraph, we are aware that it is technically possible to order that the child is placed in School B for the start of the academic year 2024-25, avoiding this disadvantage. But that would not be sensible as it would involve a prediction of appropriateness eight months (and more than half a school year) ahead of our decision taking effect. This would cut across the need to make a decision based on the evidence available at the time of the hearing, as we require to do: *M v Aberdeenshire Council* 2008 SLT Sh Ct 126, Sheriff Court (as pointed out by the appellant's representative: paragraph 54 of her submission).
99. We must also, of course, consider the child's views. He expressed a clear preference for School B, which holds some weight. However, we have to balance that view as part of all of the evidence. The child is doing reasonably well at School A, and a move now to an entirely new environment part of the way through the academic year would jeopardise the progress made at School A in the over 2 years he has attended there. We realise that there are difficulties, but those difficulties are not impeding the child's progress such that a move of school would be wise. Further, the child has not visited School B and the appellant accepted in her evidence that his views must have been formed by overhearing

conversations between the adults at home about the school. This means that the child's views about School B are not his own, formed on the basis of personal experience.

100. Taking the evidence and argument as a whole, we conclude that it is appropriate in all of the circumstances to confirm the respondent's decision to refuse the placing request, meaning that the child will continue his current (and future) education in a non-special school environment.