

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

Reference Number: FTS/HEC/AR/23/0100

List of witnesses

For the appellant:

Educational Psychologist (Witness A)
The appellant

For the respondent

Education Manager (Witness B)
Head Teacher (Witness C)
Educational Psychologist (Witness D)

Reference

1. The appellant made a placing request for the child at (**school B**), a special school under the respondent's authority. In April 2023, the placing request was refused by the respondent, on the ground specified in **Schedule 2, 3(1)(b) of the Education (Additional Support for Learning) (Scotland) Act 2004 (2004 Act)**: '*...if the education normally provided at the specified school is not suited to the age, ability or aptitude of the child*'.
2. In June 2023, the appellant lodged a reference in terms of **Section 18(3)(da) of the 2004 Act**. The appellant appeals the decision of the respondent to refuse the placing request and asks us to require the respondent to place the child in school B.

Decision

3. We confirm the respondent's decision:

- a. We are satisfied that the ground for refusal of the placing request exists (**2004 Act, section 19(4A)(a)**). In particular, we are satisfied that the education normally provided at school B is not suited to the age, ability, or aptitude of the child: (**2004 Act, sch 2, para. 3(1)(b)**).
- b. We are satisfied that it is, in all the circumstances, appropriate to confirm the respondent's decision to refuse the placing request (**2004 Act, sec 19(4A)(a)**).

Process

4. A case conference call took place in October 2023. An in-person hearing was scheduled and instructions were given about what needed to happen before the hearing, including the submission of witness statements and a joint minute of agreed facts (**JMA**).
5. After hearing from both parties, the tribunal asked an independent advocate to carry out non instructed advocacy. The Children's Views service, provided by Children in Scotland, received a referral in October 2023. The independent advocate carried out an observation of the child and had a conversation with the appellant and the child's father in November 2023; carried out a visit and observation in November 2023 at the Additional Support Needs (ASN) resource at **school A**, the mainstream primary school which the child was attending (although the child and their cohort were at that time attending that school at a temporary location due to maintenance works at the original building); and had a conversation with the child's class teacher in November 2023. The independent advocate produced a report in November 2023 (**T040-T048**). The independent advocate noted that the child's family and school staff have each read through and approved the sections of the report pertaining to them.
6. Witness statements were produced for all witnesses.
7. A JMA was lodged agreeing matters of fact and fact and law (**T049 – T050**).
8. The bundle (version 11) consists of page numbers as follows: **T001 - 050; A001 – A034; and R001-R079**. This version includes two additional documents which were added to the R section during day 2 of the hearing: Tribunal chronology Education Support Service Report 7/11/23 (**R073 – R075**) and Current P1 Pupil profile Pinewood (undated) (**R076 – R 079**).
9. Both representatives lodged outline written submissions in advance of the hearing.
10. We met the child on the first day of the hearing and valued being able to do so.
11. The evidence was not completed in the two allocated days and a third hearing day took place remotely in May 2024. The evidence was completed and we asked both parties to lodge supplementary written submissions, which were received from the respondent in May 2024 and from the appellant in June 2024.

12. The tribunal members met in June 2024. We considered all the evidence and the written submissions and deliberated.

Findings in Fact

The child

13. The appellant is one of the parents of the child.

14. The child's was six years old at the time of the hearing in this case.

15. The child has Global Developmental Delay and Autism Spectrum Disorder (ASD) associated with a 16p11 duplication and 2Q37.3 deletion, with associated Social, Emotional and Behavioural needs.

16. The child is pre-verbal.

17. In about January 2023, the child had a vocabulary of around 20 words.

18. The child has a need to move often.

19. The child likes playing outside.

20. The child responds well to a sensory rich environment.

21. In about January 2023, the child required support with personal care throughout the school day.

22. The child requires close adult support and supervision to keep themselves and others safe.

23. The child engages in parallel play and will tolerate others playing alongside them.

24. The child has no self-care skills.

School A and the child

25. The child was placed at the ASN resource school A, a specialist unit in a mainstream school run by the respondent.

26. The child began Primary 1 in the specialist unit at school A in August 2023.

27. During the 2023-24 session, maintenance was taking place on the specialist unit building and the child's entire class relocated to temporary premises for the school year.

28. There were 18 children in the child's Primary 1 class, split into three classes of six.

29. Each class of six has one teacher and two pupil support workers.

30. The child's needs profile is not unusual in the specialist unit at school A.
31. The child's needs profile means that he requires additional, close level support which is provided in school A by staff who are appropriately trained.
32. The children in the child's Primary 1 class in the specialist unit at school A had a similar profile to the child academically, developmentally and socially.
33. The majority of the children in the child's Primary 1 class are not toilet trained.
34. The child's language and communication skills are better than some of his peer group.
35. The child has some communication difficulties but he is able to communicate his needs to staff at school A.
36. The child has developed good relationships with staff in the classroom.
37. The child is able to understand routines and instructions at school A.
38. The child enjoys taking part in lunch in the main dining room with the other children in the specialist unit at school A.
39. The child is able to make choices in school A, including choices about food.
40. The child is able to engage in parallel play alongside his peers at school A.
41. The resources in the specialist unit to meet the child's sensory needs include daily sensory circuits, TACPAC and use of rainbow and sensory rooms.
42. The child has regular access to outside space at school A.
43. Staff set up toys and activities for outdoor play at school A.
44. Access to outdoor space is not permanently open and the child has not shown distress when his outdoor access has been restricted.
45. The garden at school A is secure.
46. The child has not displayed any particular flight risk at school A.
47. The child is happy in school A.
48. The child is valued at school A.

The Respondent's placing process

49. The placing process undertaken by the respondent includes the completion of a Getting It Right for Every Child (GIRFEC) Assessment Planning (GAP) tool and Educational Psychology assessment in a Schedule of Growing Skills (SOGS).

50. The SOGS is a widely used and well regarded assessment tool for children, which outlines areas of developmental concern and identifies barriers to learning. The SOGS process provides a standardised score for the child, based on their knowledge, undertaking, cognitive abilities, social and emotional skills, measured in intervals of delay from the child's chronological age.

School B and its pupils

51. School B is a special school.

52. School B has a primary and secondary school.

53. For the academic year 2023-24 only children who scored eight or over in the SOGS process were considered for placement at school B.

54. In the 2023-24 session, eight children were placed in Primary 1 at Pinewood, all of whom had profound and complex needs.

55. The children educated at school B will continue to function around the milestones level of their education and are unlikely to progress further academically.

56. Children of the same age as the child within school B are unable to communicate with others and have been assessed as unlikely to progress beyond that level.

57. Children of the same age as the child within school B are children who would not cope with being educated in any other type of provision, including mainstream provisions and specialist settings like the specialist unit in school A.

58. Many children in school B find it difficult to self-regulate.

59. Some classrooms in school B have direct access to outdoor space and some do not.

Placing request

60. The appellant made a placing request for the child to be enrolled at school B.

61. The appellant's placing request was refused by the respondent in April 2023 on the basis of Schedule 2, paragraph 3(1)(b) of the 2004 Act.

Age, ability and aptitude of the child and school B

62. The child scored seven and a half in the SOGS assessment which was undertaken in the pre-school year.

63. The needs of the children in school B are more complex than those of the child.

64. At school B, the ratio of pupils to teaching staff is eight pupils to one teacher and three advanced pupil support workers.

65. The child would be restricted in their educational and personal development at school B.

66. There is a lack of appropriate peer group for the child at school B.
67. If the child were to be placed at school B, there would be a risk of his learning plateauing because he would be educated alongside children who are unable to engage with him socially on any level, and who will not progress beyond the milestones levels of their education.
68. The child could become overwhelmed by the behaviour of other children at school B who find it difficult to self-regulate.
69. School B is not suited to the ability and aptitude of the child.

Findings in fact and law

70. The child has additional support needs in terms of Section 1 of the 2004 Act.

Reasons for the Decision

71. The respondent relied on one ground of refusal of the appellant's placing request:

'... The education normally provided at school B is not suited to the age, ability, or aptitude of the child...': (2004 Act, sch 2, para. 3(1)(b)).

72. The respondent has the burden of proving that the ground of refusal is established.

Ground of refusal - The education normally provided at school B is not suited to the age, ability or aptitude of the child: (2004 Act, sch 2, para. 3(1)(b)).

73. The respondent submitted that the education normally provided at school B is not suited to the ability or aptitude of the child and that the ground is established.
74. The appellant opposed the respondent's submission and submitted that the ground is not established.
75. There was no dispute about the child's additional support needs. Areas of agreement were reached in a JMA which were required to accept as established fact.

76. Evidence about school B came principally from witness B. They gave evidence which we accepted about the profile of children at school B, based on their experience of working there. Witness B also gave evidence about the respondent's placing process. We were able to make findings in fact about school B based on witness B's evidence. In contrast, the appellant had only visited school B once and had not met children of the same age as the child. She had limited knowledge and understanding about the provision at school B in comparison to the respondent's witnesses. While we were satisfied that the appellant knows her own child and clearly wants the best education for their child, we preferred the evidence of the respondent's witnesses about the provision at school B.

77. In relation to the ground relied upon by the respondent, which they require to establish on the balance of probabilities, we are not required to assess whether school A is more suitable for the child than school B. However, we have made findings in fact based on the evidence about how the child is managing with the existing provision in school A, in so far as they are relevant to their ability and aptitude, so that we can consider whether the respondent has proved that school B is not suited to the child's age, ability, or aptitude. The child is already in the specialist unit in school A which is a specialist autism resource with a high ratio of staff to children. We accepted the evidence of witness C about the child's ability and aptitude while within the specialist unit at school A. We also accepted the evidence of witness D about the child's social and emotional development. We also had regard to the observations of the child which were undertaken by the independent advocate both at home and in the school environment at school A. Again, while we considered that the appellant has a very good understanding of her own child's ability, aptitude and needs generally, she is not present during the school day to assess the level of support provided to the child and we preferred the respondent's witnesses in relation to the child's ability and aptitude at school. As a result of all that evidence, we were able to make findings in fact about the child as an individual and as part of the school community in so far as it relates to their ability and aptitude.
78. We are satisfied that the ground for refusal of the placing request exists (**Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act), section 19(4A)(a)(i)**).

Whether it is in all the circumstances, appropriate to confirm the respondent's decision to refuse the placing request (2004 Act, sec 19(4A)(a))

79. Section 19(4A) 2004 Act provides that:

"Where the reference relates to a decision referred to in subsection (3)(da) of that section the First-tier Tribunal may —

(a) confirm the decision if satisfied that —

(i) one or more grounds of refusal specified in paragraph 3(1) or (3) of schedule 2 exists or exist, and

(ii) in all the circumstances it is appropriate to do so, ..."

80. It is a two part test and we need to be satisfied in relation to both parts before we can confirm the respondent's decision to refuse the placing request.
81. In relation to the first part, we are satisfied that one or more grounds of refusal specified in paragraph 3(1) or (3) of Schedule 2 exists, namely ground 3(1)(b).
82. We are also satisfied that it is appropriate in all the circumstances to confirm the decision of the respondent to refuse the appellant's placing request, in terms of Section 19(4A)(a) of the 2004 Act.

Paragraph 21 in this decision has 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.