Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/23/0139

Witnesses for appellant:

Consultant in Paediatric Rheumatology (**witness D**)
The Appellant

Witnesses for respondent:

Inclusive Education Manager (**witness A**)
Depute Headteacher of school A (**witness B**)
Educational Psychologist (**witness C**)

Reference

1. This is a reference in which the appellant seeks an order under s.19(4A)(b) of the Education (Additional Support for Learning)(Scotland) Act 2004 (**2004 Act**) overturning the respondent's decision to refuse the appellant's placing request.

Decision

2. We confirm the respondent's decision to refuse the appellant's placing request, under s.19(4A)(a) of the 2004 Act. We therefore do not require the respondent to place the child in the school specified in the appellant's placing request, namely (**school B**).

Process

3. The reference was case managed to a hearing, which took place over three days. Two additional hearing dates were set, but no evidence was led on either day. On the first such day, this was due to the prospect of settlement discussions leading to the hearing being adjourned on a joint request by the parties. On the other such day, the appellant could not attend due to illness, again leading to an adjournment.

4. On the second day of the hearing, one of the tribunal members fell ill. During a break in the evidence she indicated to the other two tribunal members that she would be unable to continue as a member of the tribunal. The hearing resumed after the break with the

legal member and the remaining ordinary member. The legal member drew the attention of the parties to rule 39(4) of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017 No. 366). This provision applies where at or after the beginning of a hearing a member of the tribunal other than the legal member is absent. In such a situation, the hearing may be conducted by the legal member and the remaining ordinary member if both parties consent to this. After a break to consider matters, both parties provided their consent. We therefore continued and concluded the hearing with two members. Following the hearing, we received written submissions.

5. The relevant advocacy service was directed to seek the child's views on issues relevant to the reference. As narrated in the advocacy report (T044-045 of the bundle), the service attempted to do so. The child declined to engage with that service. At one point during the hearing, the child appeared very briefly, having been encouraged to do so by the appellant. However, it was clear that he was not comfortable, and he quickly left the room.

6. In reaching our decision, we considered all of the oral evidence and argument in addition to the written material in the bundle, numbered T001-047, A001-046 and R001-066 (including the parties' written submissions).

Findings in Fact

General findings in fact

7. The child was born on March 2011. The appellant is his mother.

8. The child has diagnoses of juvenile idiopathic arthritis and psoriasis. He is due to be assessed for Autism Spectrum Disorder (**ASD**). He takes medication for his arthritic condition, under hospital supervision.

9. The child presents with anxiety. He sometimes becomes distressed, for example in loud and busy environments. When the child becomes distressed, he can become angry, leading to a physical reaction consisting of, for example hitting, kicking, punching, shouting and swearing, throwing things and damaging property. Sometimes the child shuts down and refuses to speak when he is distressed. Sometimes, he runs away.

10. The child is enrolled in **school A** where he is currently in his secondary 1 year. The child has attended school A only a few times during the current academic year, namely on the mornings of August, September and October, all 2023. He has not attended school since then.

11. In August 2023, the child attended school A from around 8.50am until 12.30pm. At around 12.30pm that day, the child ran away from school A and called the appellant in distress asking for help. In August 2023 a similar series of events occurred, this time with the child attending school A until around 11.40am. In August 2023, the child attended school A until 10.20am.

12. The child attended **school C** until June 2023. He attended there on a part-time timetable, from 9am until 12.00 noon each day. The child's attendance issues began in his primary 6 year (academic year 2021-2022, during the COVID-19 pandemic). During the last few

weeks of primary 7, the child refused to attend school C at all. The child became distressed sometimes during his attendance at school C, causing a physical reaction. Sometimes the child left school C when distressed, and walked home. During his primary 6 year, the child had an attendance rate of 41% at school C. This dropped to 32% in his primary 7 year there.

13. The child has achieved First Level of Curriculum for Excellence (**CfE**) in listening and talking, reading, writing and numeracy and is mid-way through the Second Level in each of these areas. Under CfE, pupils would normally be expected to have completed the Second Level in these areas by the end of their primary education.

14. The child is below his chronological age in literacy and numeracy. The child's literacy level presents a barrier for him accessing the curriculum independently. This means that he requires intervention to do so, including additional time to process information and differentiated instructions to help his understanding. The child is behind his peers academically and this negatively affects his self-esteem.

15. The mainstream environment at school A is much louder and busier than the environment in school B.

16. The child struggles to remain focused on his school work without close adult support.

17. The child is behind his peers academically, as a result of gaps in his education.

18. School A staff identified the child as needing an enhanced transition to assist his move from primary to secondary school. This was offered to the appellant, but the child did not take part since the appellant did not intend that he should attend school A. Some pupils who attend school A have high levels of anxiety, physical conditions such as arthritis and have a similar level of need and aptitude as the child. Other pupils who attend there have a diagnosis of ASD. Many of the child's familiar peers who attended school C now attend school A.

19. In August 2023, the child was due to attend his first Physical Education (**PE**) class at school A. At the appellant's request, witness B notified school A's PE staff not to ask the child to change his clothes or participate in the PE lesson. The child went to his PE lesson but did not get changed and stayed outside the PE room. A member of school A's PE staff asked the child to get changed. The child refused to do so. The member of staff was unaware of who the child was at the time of this interaction. The child became distressed and he phoned the appellant to ask her to pick him up from school. She did so. When the appellant arrived, the child was screaming and swearing. The appellant physically restrained him in the school car park, to prevent him from running off.

20. Following August 2023, school A staff (or someone on school A's behalf) contacted the appellant on a number of occasions to attempt to assist the child to attend school A. For example, a meeting was fixed with the headteacher of school A in August 2023. The appellant did not attend. Witness B spoke with the appellant by telephone in 7 September 2023 to discuss arrangements to take the child's views about the appellant's placing request. The child did not speak to witness B. Since the child had chickenpox at that time, witness B arranged a Teams call with the appellant and the child for the following day, however the child left the room when invited to speak to witness B.

21. The child was ill again in October-November 2023 and (as before in September 2024 when he had chickenpox) was not fit to attend school. During this time, witness B arranged work for the child online on Google classroom. The child did not participate in any Google classroom arrangements. Witness B offered to drop work off for the child once he was well again.

22. In November 2023, witness B contacted a family support worker allocated to one of the child's brothers to enquire about possible support for the child. In November 2023, a pupil support staff member from school A called the appellant to offer help with the child accessing Google Classroom. As a result of that call, witness B became concerned that the family was becoming overwhelmed. She passed her concern onto the family support worker and made an application for support for the family.

23. On around January 2024, shortly before one of the hearing dates, witness B contacted the appellant and offered the child a return to school on a part-time basis in a small group setting. The arrangement offered was for a limited period of time, namely 6 weeks. The small group was to consist of no more than 6 pupils and the child could choose to stay as long as he wanted. The membership of this small group would potentially change every 50 minutes at the end of each teaching period.

24. In addition to a small group setting, the child would have the support of the respondent's educational psychology service at school A. That service would provide support to school A staff to reduce the impact of any barriers to learning for the child. The child can also access support from youth workers called "Pathfinders" who help children with the transition from home to school in the morning.

25. School B is managed by the respondent. It is a school provision that is only accessed by children with complex additional support needs. School B has a small school roll (60 pupils across 7 classes) leading to a calm and quiet environment. School B pupils benefit from a high adult to pupil ratio. For nine periods each week, classes have to take place in an area which had been specifically designated for therapy, but which has now been repurposed as a teaching space due to there being no other available classrooms. There are currently 10 pupils in the secondary 1 class at school B. Pupils in that class spend all day in school B and do not access any inclusion classes in School B mainstream provision.

26. All available space at school B has been converted into classrooms. There is no scope for creating an additional classroom within school B. The maximum pupil number in school B's secondary year 1 class is 10. That maximum number has not been breached in the past. The class number for the secondary year 2 group is at its maximum.

27. Pupils who attend school B in the secondary year 1 group are at CfE levels 0 and 1. The child has a higher academic and social ability level than the other pupils in that year group at school B.

28. One of the child's older brothers attended school B, but has now left school. Another of the child's brothers attends school B and is in secondary year 3 there.

Reasons for the Decision

29. The respondent relies on the existence of two grounds for the refusal of the appellant's placing request, namely those specified in Schedule 2 of the 2004 Act, paragraphs 3(1)(a)(ii) and 3(1)(g). In order to succeed, the respondent must persuade us that at least one of these grounds exists. The time of consideration is at the time of the hearing. We will deal with each ground of refusal in turn.

Ground of refusal 1: placing the child in the specified school would give rise to significant expenditure on extending or otherwise altering the accommodation at or facilities provided in connection with the school (2004 Act, Schedule 2, paragraph 3(1)(a)(ii))

30. We can deal with this ground of refusal briefly. We are not satisfied that it exists.

31. The respondent's position is that school B is full and there is no space to accommodate any other pupils in secondary year 1, including the child. They argued that, in order to accommodate another child, an additional classroom would have to be built at school A. Witness A told us this would cost around £150,000. However, there were two issues with this evidence.

32. The first is that there was no evidence to indicate that there was any ground at school B upon which an additional classroom could be built.

33. Secondly, the cost of £150,000 was quoted to witness A by someone in the respondent's Housing and Technical department, either by telephone or in an e-mail (witness A could not remember which). Witness A's oral evidence suggested a general conversation about how much it would cost to build any new classroom. There was no evidence that this costing was specifically in relation to school B. Further, the cost quoted was not supported by any plans and was not broken down in any way. Essentially, the cost was a general estimate of how much it might cost to build an additional classroom at a school.

34. The respondent did not present any evidence that there would be a need to alter the accommodation if the child attended school B.

35. We conclude that there is no reliable evidence available to indicate that expenditure of the kind set out in this ground of refusal would arise if the child were to attend school B.

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

36. This ground of refusal would exist if placing the child in 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.

37. The requirement in s.15(1) of the 2000 Act 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.

38. 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.

39. 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.

40. The circumstances in s.15(3) arise only exceptionally (s.15(3), last line). 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.

41. We will now examine each of the s.15(3) circumstances.

Circumstance (a): 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))

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

43. 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 on the education being provided at school A. Evidence of the education available there for the child is, of course, important, since it is of the 'mainstream' type.

    c. The test here is 'not suited'. This suggests a general incompatibility between the child's ability or aptitude (or both) and provision in a non-special school. Such an incompatibility relating to either ability or aptitude would lead to the circumstance arising.

    d. 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 within school education). This means that 'ability' refers to the means or skill to do something, while 'aptitude' refers to a natural ability or skill.

44. Bearing all of this in mind, we turn to consider this circumstance.

45. The child is not currently attending school at all, and there is no clear indication when that situation might change. Gaps in the child's education in the past as well as the current gap negatively affect the child's progress (as would logically be the case with any child). However, there is no evidence to suggest that the child has a learning difficulty or disability (witness C). This means that, in the right environment, there is no reason to suggest that the child will be unable to catch up with the work he has missed as a result of not attending school.

46. The appellant argues that the circumstance in s.15(3)(a) of the 2000 Act applies since the child is not being 'provided' with education under s.15. We do not accept this. Education is being provided when an offer of a place in a school is available for the child. In this case, it is clear from the evidence that an offer of a place is available for him in school A. If a child has to be in receipt of educational input in order to be provided with an education, an education would not be provided in a situation where a pupil refused to attend school and refused to carry out any school work set to be done at home. This would mean that, for that child, the requirement to educate them in a non-special school setting under s.15 of the 2000 Act would simply fly off. This cannot be what Parliament intended by its reference to the provision of education. This is especially the case when one considers the use of that term elsewhere in the 2000 Act, such as in sections 1 and 2 (which connect with s.15). Indeed, it would mean that the duty in s.2 of the 2000 Act could never be complied with unless a child accepted an offer of education.

47. We refer to s.14 of the Education (Scotland) Act 1980 which is designed to deal with a situation where a pupil is, in certain circumstances, unable to attend school or where it would not be reasonable to expect a pupil to attend school. Certain duties apply in such situations. Even if that provision applies here and is not being complied with, that is not part of the question of whether circumstance (a) in s.15(3) of the 2000 Act applies. What we need to consider, in essence, is the suitability of a mainstream school setting for the child, assuming he was able to attend school.

48. Turning to evidence about attendance, the appellant points to the fact that the child has only managed to attend school A on five occasions in the current academic year (and none for a full day). We accept, of course, that the very low attendance at school A and the child's continuing reluctance to attend there is concerning. However, the child has attended a different mainstream school for a number of years (school C). We acknowledge that the child attended there only part-time in his last year and that attendance dipped between primary 6 to primary 7, including not attending at all in the last few weeks of primary 7. This indicates that the child's attendance issues existed prior to any consideration being given to his likely secondary education.

49. There is very clear evidence that the education available at school A (a mainstream school) is suited to the child's ability and aptitude. This emerges from the evidence of the respondent's witnesses. Witness B gave evidence that there are pupils with similar needs to those of the child, who attend school A successfully. Witness C was clear that a mainstream setting such as school A can differentiate the curriculum to meet the child's needs. Witness A explained that (from her perspective as manager of the respondent's Inclusive Education Service) it is rare for children in additional support needs provisions to reach CfE level 2 before their secondary education. None of this clear evidence was contradicted by an educational professional. The qualifications and experience of witnesses A, B and C (see the first page of each of their witness statements at R032, R027 and R030) demonstrate their strong position to express a view on the child's future

educational needs. There was no skilled evidence to support the appellant's assertion that the pupils at school B are more able than at other additional support needs provisions.

50. Further, the child's CfE achievements are not significantly behind expected learning levels in any area, despite his low attendance during primaries 6 and 7 (findings in fact at paragraphs 12 and 13), which supports the potentially very positive impact of the child continuing in mainstream education.

51. Of course, when a child has additional support needs, it is not sufficient merely to provide a standard mainstream education. Those needs must be catered for. It is clear to us that school A would be able to put in place measures to meet those needs such as small group classes on a reduced timetable to suit the child, educational psychology input and support from Pathfinders (see our findings in fact at paragraphs 23 and 24). There was some evidence about the offer of a return to school for the child in a small group setting, and whether that offer was for a 6 week period only or for a longer period. We have assumed that it was for a 6-week period, in order to help the child re-integrate into school A. The appellant was also concerned that the change of the small class membership every 50 minutes would not be suitable for the child. We do not feel that this is a concern that justifies a decision not to attempt such an arrangement, especially as no such arrangement has yet been attempted for the child.

52. We accept the appellant's points that certain things could have been handled differently. For example, it may have been better for school A to have started the child on a part-time timetable in August 2023, given his needs, the lack of any transition process and the fact that he had been on part-time timetable in school C. The management of the PE incident (findings in fact at paragraph 19) should have been better. But the question is not whether or not mistakes have been made or things should have happened that have not: the question is whether the provision at school A (or a similar school) would not be suited to the child's ability and aptitude.

53. On the appellant's argument about lack of contact from the school between August 2023 and January 2024 (when the offer of a part-time return to school in a small group setting was made), given our findings in fact at paragraphs 20-23 above, we do not accept that this is a valid criticism. Regular contact took place and efforts were made to deliver education to the child at home. We note that during part of this period, the child was ill. Concern led to the school alerting other professionals to contact the family.

54. We accept that there would be certain risks were the child to attend a mainstream school environment, give his sensitivities to noise, crowds and changes in routine, and the distress that the child can experience as a result. However, these are risks that exist in any school and reducing those risks would be a key part of any plan to deliver education to the child in that environment.

55. It is not possible to know why the child is unwilling to attend school A. The child is aware of difficulties that one of his older brothers experienced at school A. It is likely that the lack of any transition (let alone an enhanced one, as was assessed as being required), the demands of a full-time timetable and negative experience of PE have contributed to non-attendance. It may be a combination of reasons. However we must only consider the relevant tests in the legislation; we must not simply review the situation and come to a generic conclusion.

56. The appellant relies on witness D's evidence (see the appellant's submissions at paragraphs 18-22). While witness D commented on the school environment that would be appropriate for the child, we do not find her opinion to be reliable. Witness D's contact with the child only takes place in a medical environment. She has not observed (or seen) the child in a school environment at all. She is not an educational professional. While it is possible that behaviour in a medical environment might also be exhibited in a school setting, these are, by their nature, entirely different places. We prefer the evidence of the educational professionals (witnesses A, B and C) to the opinions of witness D on matters relating to education.

57. Taking all of this together, we conclude that the respondent has established that providing an education for the child in a mainstream environment would be suited to the child's ability and aptitude. The circumstance in s.15(3)(a) does not, therefore, apply. We reach the same conclusion whether this question is viewed form the perspective of provision at school A or provision in a mainstream setting more generally.

Circumstance (b): 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))

58. We accept that when the child is distressed, his behaviour could have an impact on other pupils at school A (see findings in fact at paragraph 9).

59. 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 the group of pupils with whom the child is likely to come into contact.

60. Given the child's very limited attendance in a secondary mainstream school environment, there is insufficient evidence from which we could infer that such an incompatibility would be likely to exist if the child were to attend such a school. No evidence was led about the impact (if any) of the child's distress on pupils at school C. The test is not whether other children might be negatively affected by the child exhibiting distress: it is part of our specialist knowledge that this is a common occurrence in mainstream schools. Instead, the test is about the incompatibility between the child's likely distress induced behaviour and the efficiency of the education of others. We are in no doubt that this test is far from being met on the evidence available to us.

61. Again, we reach the same conclusion whether this question is viewed from the perspective of provision at school A or provision in a mainstream setting more generally.

Circumstance (c): 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)(c))

62. The appellant does not rely on the existence of this circumstance (appellant's submission, paragraph 50).

63. 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. This circumstance does not, therefore, arise.

64. To conclude on this ground of refusal, none of the circumstances in s.15(3) of the 2000 Act arises (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)

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

66. There are six main factors that lead us to conclude that it is appropriate in all of the circumstances to confirm the respondent's decision to refuse the placing request. These are as follows:

    a. As concluded above, the respondent is able to provide for the child's needs in a mainstream provision that would suit his ability and aptitude.

    b. More importantly, there is no space for the child at school B. While the appellant states that there is, witness A was very clear that the maximum class limit in secondary year 1 is reached and has never (as far as she is aware) been breached. It is within our knowledge as a specialised tribunal that it is common for education authorities to set a maximum number on admissions to additional support needs provisions. The reasons for doing so are obvious: to make sure that the needs of the pupils can be met. This includes maintaining an appropriate staff:pupil ratio.

    c. There is no spare space in school B to make an additional classroom so that the child can attend without breaching the maximum class limit.

    d. The academic and social level of pupils at school B is below that of the child. This means that the child's academic recovery following a period of absence, were he to attend there, would be hampered. His social relations would be hampered too.

    e. The child has not been tested in a mainstream secondary school environment. While this is in part since he won't attend school A, it is not clear how he would fare in that environment, with the right supports in place. It is therefore premature for the child to move from a mainstream primary school environment straight to a non-mainstream environment at secondary school level.

    f. There is no evidence that the child wishes to attend school B: the appellant explained that when school B was discussed, the child did not express a view one way or the other. The appellant acknowledged that she did not know if the child would be able to successfully attend school B.

67. We have considered the appellant's evidence about school B. She points to the fact that he is familiar with the school: he has been there when the appellant has dropped off or

picked up his brothers. However, he has not attended there as a pupil or with a view to attending there. We also accept that the environment would be quieter and less busy there than in school A; however, as noted above, the child has not been properly tested in a mainstream school environment with the right supports in place. We accept the appellant's argument that school B might provide a suitable small group learning environment for the child, but this must be placed alongside our comments above about learning and social level.

68. The points in favour of the child attending school B do not outweigh the more fundamental concerns about this, not least the lack of a place for him there.

69. 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.