



## Additional Support Needs

### DECISION OF THE TRIBUNAL

FTS/HEC/AR/23/0154

#### List of witnesses

##### **For the appellant:**

The appellant

Appellants family member (witness D)

##### **For the respondent**

Additional Support Needs Manager of the respondent (witness A)

Head teacher of school B (witness B)

Educational Psychologist of the respondent (witness C)

## Reference

1. This is a placing request reference, lodged with the Tribunal in February 2023. The appellant asks the tribunal to require the respondent to place the child in school A.

## Decision

2. The tribunal overturns the decision of the respondent to refuse the placing request, in accordance with section 19(4A)(b) of the Education (Additional Support for Learning) (Scotland) Act 2004 Act ("the 2004 Act"). The tribunal therefore requires the respondent to place the child in school A by August 2024 or such other date as the parties may agree.

## Process

3. A hearing took place remotely (online) over 2 days. Prior to the hearing directions were issued to regulate the hearing and pre-hearing processes. Witness statements, a Joint Minute of agreed facts [T083-084] and outline written submissions were prepared. An independent (non-instructed) advocacy report was also lodged [T070-078].
4. At the start of the hearing the following late documents were allowed to be received. The only objection was from the respondent to the statement of witness D being received on the basis that they would be unable to question her on it. The tribunal was of the view that how much weight could or should be attached to the statement in the absence of the witness being questioned was a matter that could be dealt with in submissions and allowed it and the other document to be received.

For the Appellant

Educational Psychology Diary Sheet	A012 – A014
Assessment of Wellbeing	A015 – A020
Statement of witness D	A021 – A022
Appellant's preliminary Submissions	A023 – A030

5. The appellant objected to the witness statement of a witness who was no longer to be called remaining in the bundle. The respondent agreed.
6. Before reaching our decision we considered the oral and written evidence, Joint Minute of Admitted Facts, Advocacy Report and oral and written submissions found in the bundle (v11) numbered T001-084, A001-030 and R001-063. For the avoidance of doubt the statement of the witness, referred to in the previous paragraph which appeared in the bundle at pages R040 – R045 was not relied on by the respondent as the witness was unavailable so not called and substituted with another. That statement was not considered by the tribunal.

## **Findings in fact**

### **The child**

7. At the date of the hearing the child was nine-years-old. The appellant is the child's mother.
8. The respondent is responsible for the child's education.
9. The child has diagnoses of Intellectual Disability, Developmental Delay and Autism Spectrum Disorder ("ASD"). The child is easily distracted. He struggles to build and maintain appropriate peer relationships. Conversations for the child are very one sided, on his terms and to his interests. The child uses ear defenders. To aid with the child's understanding to help manage his expectations, he has social stories.
10. The child has a significant impairment in intellectual functioning leading to reduced ability to understand new or complex information or to learn new skills, a significant impairment in adaptive functioning leading to reduced ability to cope independently. The learning disability itself will have a lasting effect on his development (T037.)

11. The child has additional support needs in terms of Section 1 of the Education (Additional Support for Learning) (Scotland) Act 2004. He has an Individual Education Plan (“IEP”). He receives one to one support with a Pupil Support Worker (“PSW”) for 4 x 15 minute afternoon sessions in the mainstream class setting. He has access to a private work station in the mainstream class setting.

## **School B**

12. The child is currently enrolled at school B, a mainstream school provision managed by the respondent. His enrollment in P1 was deferred for a year. He has attended there since P1 and is currently in P4. Staff at school B have made every effort to support the child in the mainstream school setting.

13. The child had previously displayed dysregulated behaviour in school from P1 to P3 but he has been much more settled in P4.

14. The child displays dysregulated and self-stimulatory behaviour when not in school.

15. Barriers to the child’s education and learning include that: his attention and focus on tasks can be fleeting; he is more easily able to sustain attention on tasks he chooses and enjoys; he prefers engaging in self-directed activities; he finds it challenging to engage in whole-class activities, such as sitting on the carpet for story time (R20).

16. The child requires a highly individualised support package in comparison to his mainstream peers. In terms of classroom resource and time spent, the amount of differentiation that the child requires is considerable.

17. The child is not meeting the learning targets set by the respondent in the child’s IEP (R012 -017). For Maths & Numeracy - long term target - recognise and count numbers 1 – 5; short term target October – January to recognise and count numbers 1 and 2. For literacy - long-Term Target to develop fine motor skills and handwriting skills and to recognise letters ‘satpin’ and things beginning with these sounds; short term October – January to write his first name independently; to recognise ‘a’, be able to say sound and to differentiate images that begin with this sound.

18. The child's level of learning is at or below the early level of the Curriculum for Excellence. He is behind his peers academically. He is unable to independently read, draw or write. He would not recognise the word 'Sam' or his forename if it was typed or written down for him. He cannot focus on the work in the mainstream class setting.
19. The child benefits from being in being in the language rich environment of school B which allows him to continue to develop his communication and language skills. When he started school his verbal communication was less functional and more echolaliac.
20. From the Assessment Wellbeing Report (A015 to A020) from May 2023 it was noted that the child had made progress in terms of his communication. He was using more language, particularly during self-directed imaginative play. He was presenting as more settled. He accesses some of his learning outside of the classroom supported 1 to 1 by a PSW which helps him focus on tasks. School B reported it was still very challenging to engage the child in classroom routines and learning activities. Both school B and the child's parents reported significant concern regarding the child's progress with learning. Parents shared they are concerned that the gap between the child and his peers is widening and that he is not progressing through the curriculum. School/parents reported concern that the child is not showing a desire to socialise with peers and spends most of his time on his own. The areas for development include planning & sequencing, self-regulation, reciprocal interaction, comparative behaviour, working memory, transfer of leaning and comparative thinking.
21. In the Assessment of Wellbeing Report from May 2023 (A015 – A020) it was noted [A017] that school B, had significant concern regarding the child's ability to cope in a mainstream setting and that despite regular interventions he has made little academic progress.
22. At the time of the hearing the child was having 1 to 1 support with a PSW in class for four sessions of 15 minutes per week. The Child's/Young Person's Plan and Note of Meeting in September 2023 (at R010) had suggested that to continue to develop the child's existing skills he should receive one to one support for three sessions, each of 45 minutes.

23. The Child's/Young Person's Plan and Note of Meeting in February 2024 (at R062) had suggested that to continue to develop the child's existing skills he should overlearn key literacy/numeracy activities including structured time with PSW.

24. The child does not have a peer group. He does not socialise within school B. The child does not understand how to approach or engage with other pupils.

### **School A**

25. The Appellant made a placing request for the child to attend school A, a special school managed by the respondent. Although temporarily off site (due to issues with RAAC) school A is usually situated within school B. School A caters for children with a range of additional support needs, including Autism Spectrum Disorder and developmental disabilities. Staff at school A have more experience than the staff at school B in supporting children with similar needs to the child.

26. School A is expected to return to its usual location within school B in August 2024.

27. School A has a small pupil roll and therefore small class sizes. The high adult to pupil ratio found in the small class setting will be beneficial to the child. The child has a level of need requiring support which is not available to him in school B.

28. School A has its own dedicated playground but pupils who attend school A can also access the playground of school B.

29. The child's learning is supported by and benefits from having 1 to 1 support in class. The amount of 1 to 1 support being made available to the child in school B is inadequate to support his needs.

30. If the child were to attend school A he would be able to continue to access the resources and experiences, such as the classroom, playground, gym and lunch hall and be exposed to a language rich environment available at school B. If the child continues to attend school B he will have no access to the support and resources, such as smaller classes and higher teacher to pupil ratios which would be available to him at school A.

31. Placing the child at school A would not make it necessary for the respondent to take an additional teacher (or support worker) into employment.
32. The child is reluctant to communicate but when motivated to do so (by things that interest him) he is able to use full sentences.
33. The child is on the waiting list for Occupational Therapy assessment.
34. The child is not willing to use a pencil, if he does he uses a chunky/triangular pencil to assist with grip and he prefers drawing more than writing.
35. The child's learning tasks require to be chunked, he uses a now and next board and requires regular, self-directed brain breaks. He engages in imaginative play during brain breaks.
36. The child has problems with focus and activities have to be delivered in context of something he is interested in such as Paw Patrol or Fireman Sam which do not reflect his peer group interests in his class in school B.
37. A class of seven pupils could be accommodated in a classroom in school A.
38. If placed in school A the child's timetable would be entirely bespoke, individualised and tailored to his specific needs, with a level of support dependent on his needs. As presently he would use a now and next board, engage in an activity then a brain break. He would have access to a sensory room with subdued lighting, furniture and interactive objects to allow him to provoke or calm senses, and assistance to de-escalate emotions, which he would not have if he remains in school B.
39. The child always actively engages in adult led tasks when asked. The child requires adult support to engage in literacy and numeracy tasks. His attention is fleeting and he typically requires adult support, prompting and encouragement to stay on task.

40. Learning activities are differentiated to ensure they are at an appropriate developmental level for him. They are also short, have reduced writing demands (class teacher will scribe where appropriate) and incorporate his interests.
41. There are 5 pupils in P7 at school A who will be moving to secondary school at the end of this school year.
42. If the child was placed in school A he would be encouraged to access mainstream provision as much as possible.

## **Reasons for the Decision**

43. It was a matter of agreed fact that the child has additional support needs as defined in section 1 of the 2004 Act. The point in time for consideration of the evidence is at the date of the hearing and the burden of establishing that the respondent's decision should be confirmed falls on the respondent. This is not a case where there is a significant difference in facts of the case as spoken to by the witnesses. Where the difference lay was in the conflicting views about where child's needs would be better met. The witnesses all adopted their written statements as their evidence, were then asked questions by the other side's representative with the opportunity for re-examination.
44. Witness A is the Additional Needs Manager of the respondent. Although she said the child was educationally progressing well at an appropriate pace she did not give examples against which we could measure what she understood that progress to be. She was asked about the Assessment of Wellbeing Report from May 2023 where it was noted that the school have significant concern regarding the child's ability to cope in a mainstream setting and that he has made little academic progress. She did not think this meant the child would benefit from attendance at school A. That would depend, she said, on what interventions were in place and she would want more detail about the assessment process. This is the kind of detail we would have expected the witness to provide us. It was accepted that there was a need for focused work around the child's social interactions. We were told that *any* class *could* provide that focused work, but the evidence before us was that it was not being provided to the child at a level that was needed to allow the child to reach his full potential. She accepted that there were benefits



in smaller class sizes but said this depended on the needs of the child. She did not go on to elaborate the child's needs and how these would not be better met in a smaller class in school A. Our view of Witness A's evidence overall was that she was able to explain the respondent's policy and procedures in relation to placing children at special schools but was unable to provide much information that related directly to the child from her own knowledge of the child's circumstances. She suggested that there was a risk of the child's learning plateauing but when asked about the likelihood of the academic gap between the child and his peers remaining if not widening she said she could not predict the future. Witness A did not seem to have given any consideration to the possibility that the child would benefit from having access to school B and benefit from having mainstream school experiences if placed in school A.

45. We did not attach any weight to the evidence that there was a risk of the child's learning plateauing if he was placed in school A. This seemed to be an unhelpful generalisation, made without a full understanding of the child. Whilst the learning of some children may well plateau there was no evidence before us that this occurred as a result of a child being placed at a special school rather than as a consequence of a child's particular circumstances and potential. As far as this witness is concerned we agreed with the appellant's submissions that in assessing the credibility and reliability of the evidence that she was unaware of child's academic level, she had met him only twice on routine visits to school B and not specifically to observe him, she did not know if he was prone to mimicking behaviour, did not know how he presented at home or when going to school B and she did not know the profiles of children at school A.

46. Witness B is the Headteacher at school B. She knows the child and meets him most days in the course of the school day. Everyone accepted the child has been more settled in P4. The fact the child is able to follow a general class routine (such as tidying up, having snack or going for lunch) is not evidence that he is being adequately supported to make progress in his learning. On being asked about the Assessment of Wellbeing from May 2023 (stating the child made very little academic progress) she said he has made progress, it was much slower than peers as would be expected, consistent with his diagnoses. She did not accept that school have significant concerns regarding his progress. However we were of the view that the IEP targets did not detail appropriate progress being made with his learning.

47. Witness C is an Educational Psychologist employed by the respondent. She is not routinely responsible for the child's case but was brought in to replace the educational, psychologist who normally is, who was absent from work. Drawing from her observations she thought some of the child's language seemed scripted, for example 'we need to call the Paw Patrol' but at other times she thought he demonstrated the use of more spontaneous language. She thought his play also typically involves problem situations and resolutions indicating developing problem-solving skills. We agreed with the appellant's evidence on this, that these were more likely scenarios he was re-enacting from being familiar with these television programmes. Broadly put, Witness C's evidence was that the child is more settled now and benefits from being immersed in the language rich environment of the mainstream school. Her evidence on the other children in school A was however general in that it was based on her knowledge and involvement with other special schools as she was not directly involved with school A. She had not met the pupils there. On being questioned on behalf of the appellant it was suggested that the child was at such a different level from the other children in his class that he might learn more if the whole class activity was presented at his level. Rather than answer the question Witness C explained the child has lot of play opportunity in school B which he would also get if in school A. She explained that his teacher will set a whole class activity that the child would be allowed self-directed play, and small groups and the support for learning teacher in the class, would allow the child the ability to access as much of the learning as within his capability. Witness C was asked if the child might achieve more of his potential if lessons were directed at his level rather than the lesson going over his head. Rather than answer the question the witness told us what he is benefiting from in his classroom. On being asked again the response was 'I know what you are trying to say'. She did not answer directly, stating only that a lot of children would benefit from access to a smaller groups. If the answer to the question was 'no' we would have expected it to be so answered but again the witness chose to tell us what she wanted us to hear rather than give a straightforward answer to the question. Witness C's evidence was further undermined by her not being aware that the support for learning teacher does not work in the child's classroom; that it was the pupil support worker who was undertaking the 1 to 1 work with the child; being under the impression that the child was having 3 x 45 minute sessions of 1 to 1 work a week (which was a possible solution/action suggested in the IEP) rather than the 4 x 15 minute session he was actually receiving.

Witness C was not aware of and did not ask the appellant about the child's behaviour outwith school, so was unaware that the appellant stated he is dysregulated maybe 3 mornings out of 4 before attending school. She did not know that the child exhibits self-stimulating behaviour at home and so had not considered that he might be masking his behaviour at school. Witness C had only been in the child's class for one hour, 55 minutes and part of that time she spent with the teacher. We did not agree with the appellant's submission that Witness C's evidence might be adversely affected by having read the statement of the Witness who she in effect replaced when preparing her evidence or that doing so may have impacted or affected her views. It would have been surprising if she had not read that statement and there was nothing to suggest her evidence was anything other than her own professional opinion.

48. The appellant gave evidence in a clear straight forward manner. She answered the questions put to her, and did this in a measured and balanced way. For example, she conceded that the child was more settled in school this year; that his communication had improved as a consequence of him being in a mainstream class and that the school is in a better position to comment on the child's behaviour at school. She also accepted that a small class (in school A) might not be less noisy than a large class in school B if the other children in the small class were dysregulated. Where we didn't agree with her, and did not attach any weight to her evidence was in relation to the suggestion the child being alongside peers with similar diagnoses to him might be beneficial as they will all understand how each other feel. We were not persuaded that the child might find it easier to build peer relationships with others who have similar experiences to himself. Whilst the appellant accepted the child was more settled this year than he had been before, she was concerned that he was not reaching his potential. She thought he could learn a lot more in a small classroom setting with more time spent with him, for example developing his fine motor skills to assist with his writing, but he would still have an opportunity to go to mainstream school and speak to pupils there. She was concerned that as he got older he would begin to realise that he is different from the others in a mainstream class. A lot of his play is learned from Fireman Sam and Paw Patrol and this is what he acts out. She said that if he was shown the word "Sam" written down he would not be able to read it.

49. The appellant relied on a witness statement of Witness D, her cousin, which was in the form of an email from her. We accept there is force in the respondent's submission that in the absence of the witness being available to be questioned on her statement we should not attach much, if any weight to it. The statement was supportive of the appellant's position but we have not relied on it as evidence for any of the findings in fact we have made. We do note that as the appellant submitted, it would be wrong to completely ignore the statement as it was another source of information on the child's views. As far as the appellant's approach to matters was concerned she was clearly doing her best to assist the tribunal in understanding the facts and circumstances. That accorded with the evidence of Witness C who had accepted that the appellant had communicated openly with the school B and cooperated with all attempts at support at school.
50. In matters relating to the child's ability where the evidence differed we preferred that of the appellant whose evidence offered a considered and balanced view. She made concessions where appropriate. She did not avoid answering questions where she felt the answer may not be helpful to her. Nor did she volunteer information that she thought might be helpful to her but about which she had not been asked. Her position was that the child cannot write his own name or recognise letters. The evidence led by the respondent was that the child is '*working at*' writing his own name. The appellant's evidence was consistent with the targets set in the child's IEP not being met. We thought it would be surprising, against the background of this placing request remaining outstanding, that such a significant progression as the child independently forming letters let alone writing his name would not have been shared with the appellant as it happened if only to evidence to her the respondent's view that the current placement was working.
51. The respondent's submission was largely that the child benefits from being in a language rich environment and is more settled this year. The evidence was that language use, or the processing of language is not a problem for the child but what makes him choose to use language are environment factors and social stimulation around him. It was accepted by witness B that the child's academic difficulties will continue. The school have had significant concerns about his ability to cope in a mainstream school setting. The appellant did not seek to criticise or blame school, or have a negative attitude towards school. She was not seeking to create a narrative to suit her aim. What was happening

is not working for the child. He is not reaching the potential that he could if he had the right supports in place. At home he will 'stimm', for example by hand clapping. The school did not evidence much of an awareness of how the child is at home as a means of understanding the child and his needs as a whole.

52. If the child was placed at school A he would be encouraged to attend the mainstream provision. He can have the best of both worlds. He would receive the support he needs in smaller groups and perhaps engage in a more meaningful way than he does in the mainstream school. We noted from the advocacy report the child can go a whole morning without interaction with other pupils. Inclusion means participation and engagement in the class. The class in school A that appeared to be the most suited consisted of mostly P5 (so the same age as the child) pupils who were verbal.

53. The respondent's submission was that the grounds in paragraphs 3(1) (a), (b), (g) of Schedule 2 to the Education (Additional Support for Learning) (Scotland) Act 2004 Act ("the 2004 Act") applied, that the reference should be refused and the respondent's decision to refuse the placing request should be confirmed.

## **Grounds of refusal**

54. As far as paragraph 3(1)(a) of Schedule 2 to the 2004 Act was concerned we were not persuaded that the child being placed in school A would make it necessary for the respondent to take an additional teacher into employment. That position was predicated on the basis that it would be necessary to have a new class set up for the child as placing him would exceed the class limit of 6. However, as was stated in the respondent's submission these limits are guidance. The question of class sizes is matter of agreement between SNCT and local authorities. The evidence we heard was that these are guidelines agreed to by the respondent. They were referred to as "Local and national guidance" in the respondent's submissions. The respondent may feel obliged to maintain the enhanced provision class size to 6 pupils in order not to fall foul of the guidance they have chosen to agree to but this is not a statutory limit imposed on them. At its highest the evidence was that a new class would need to be created in order to maintain the class size limit of 6. On a practical level given that by the time of the hearing we were towards the end of Term 2 and there were 5 pupils in P7 would be leaving at the end of term 3 we were not persuaded that it would be necessary for the respondent to create a

new class let alone take an additional teacher into employment. There was no evidence led of the respondent's teacher numbers or teaching capacity so even if a new class was needed there was no evidence that the respondent would be required to employ rather than redeploy a teacher or teaching assistant. Witness B did state that it was conceivable that there was the physical space for an additional pupil in one of the classrooms. As the child is in P4 The Education (Lower Primary Class Sizes) (Scotland) Regulations 1999 do not apply so he cannot be an excepted pupil. For this reason we did not need to consider the appellant's submissions on this point.

55. The respondent did accept the child has additional needs and learning disability but maintained (in terms of paragraph 3(1)(b) of Schedule 2 to the 2004 Act) that the education normally provided at the specified school is not suited to the age, ability or aptitude of the child. However in seeking to persuade us on this, the evidence went no further than suggesting that the child's aptitude was beyond the level of the other pupils presently in school A. There was no evidence that the education normally provided at school A is not suited to the age, ability or aptitude of the child. Whether this regulation is engaged needs to be looked at from the perspective of the child's age, ability or aptitude and the education normally provided at the specified school and not by making a comparison to the age, ability or aptitude of the other pupils who from time to time are enrolled there.

56. The question we considered is whether the education normally provided at school A is not suited to the age and ability of the child. The respondent sought to persuade us that it was not, by reference to the level of needs of the other pupils there. It was said that, as the child's needs, abilities, and aptitude were beyond that of the other pupils there, school A was not appropriate for him. We did not accept that was the correct approach. The profile of the other children at school A is something that will change as more pupils start and others leave. The education normally provided at the specified school is directed towards children, such as the child, who have a range of additional support needs, including Autism Spectrum Disorder and developmental disabilities. Staff at school A have more experience than the staff at school B in supporting children with similar needs to the child. School A is suited to the age, ability or aptitude of the child. If the child were to attend school A, the level of support and 1 to 1 support available to him would be greater and would secure that his education is directed to the development of

the personality, talents and mental and physical abilities of the child to his fullest potential. To reach his fullest potential he needs the education normally provided by school A which is small class sizes and an appropriate level of teacher and classroom support. This will allow him to remain focused on his learning. There would be opportunity for the child to take part in activities in the mainstream provision of school B and so be immersed in the language rich environment. However, there was a balance to be struck and the child's social progression as far as social skills and language use is concerned should not take priority over his academic progression and nor should it mean he is not given the additional support he would benefit from in a small classroom setting allowing him to achieve more of his potential.

57. We then considered paragraph 3(1)(g) of Schedule 2 to the 2004 Act and whether placing the child in school A would breach Section 15(2)(a) of the Standards in Scotland's Schools etc. Act 2000. The first issue we considered is whether the education provided at a school other than a special school would not be suited to the ability or aptitude of the child. The child has made little, if any progress academically since he started P1. He cannot read, write or draw. He can count to 5 and sometimes 10. His peers are reading, writing sentences and counting in the thousands. His learning disability means that he has a significant impairment in intellectual functioning leading to reduced ability to understand new or complex information or to learn new skills. The education provided at a school other than a special school is way beyond his grasp. As he has progressed, the academic gulf between him and his peers has widened. The child being settled in class this year, having a good relationship with his teacher and using more language was not evidence that providing education at a school other than a special school was suited to his ability or aptitude. Given the child's particular needs as well as his learning disability, his need for close support and focused attention to keep him on task, we were of the view that the education at a mainstream school was not suited to his ability or aptitude.

58. As the circumstances mentioned in section 15 (3)(a) of the Standards in Scotland's Schools etc. Act 2000 arise (that the 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) we did not need to go on to consider if it the circumstance in either section 15 (3)(b) od (c) arise

## **Appropriateness**

59. As we have concluded that the grounds for refusal of the placing request have not been established by the respondent, we do not need to consider the second stage of appropriateness. Accordingly, we overturn the respondent's decision to refuse the placing request and we require the respondent to place the child at school A no later than August 2024 or by such date as may be agreed between the parties.

## **NOTE**

60. Given the child's familiarity with his surroundings it may be preferable to transition him to school A once it has moved back to the same location as school B as opposed to transitioning him to school A in another geographical location for few the weeks and then to have to transition him to school A in another location in August 2024. For that reason we have directed that he should be placed at school A no later than the start of the school year in August 2024, even if, for some unexpected reason the RAAC issues have not been remedied and school B is not able to move back to its usual location