



## **DECISION OF THE TRIBUNAL**

**FTS/HEC/AR/24/0007**

### **List of Witnesses**

Witnesses for the Appellant:

- **Witness D** – Head of Learning Services, Donaldson Trust
- **The Appellant**

Witnesses for the Respondent:

- **Witness A** – Head Teacher of School A
- **Witness B** – Educational Psychologist
- **Witness C** – Principal Educational Psychologist

### **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 the **school B**.

### **Decision**

2. We confirm the decision of the respondent to refuse the appellant's placing request under s.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. This reference was managed to a hearing by a number of case management calls. The hearing took place over two days remotely, via the online platform Cisco WebEx.
4. We considered all available oral and written material. The written material (including outline submissions and some late documents) in the bundle consists of the following page numbering: T001-068; A001-203; and R001-080. The document at R058-059, watermarked 'DRAFT' was replaced with a very slightly amended final version on the first day of the hearing. There were no objections taken to the admissibility of any of the documents.

5. We considered the views expressed by the child, as recorded by an advocate, in her report at T058-064.
6. The parties delivered oral submissions at the end of the evidence on the second day. These supplemented the outline written submissions lodged in advance of the hearing, at A195-203 and R066-080.

## Findings in Fact

### *General findings in fact*

7. The child lives with his father, the appellant, and his family. The child was born in October 2017.
8. The appellant made a placing request to the respondent dated August 2023, seeking the placement of the child in school B. The respondent refused that request by letter dated November 2023.
9. The child has diagnoses of autism spectrum disorder (**ASD**) and hyperacusis. He also has a language and speech disorder.
10. The child sometimes finds changes in routine, unexpected events and meeting new people difficult. The child has noise cancelling headphones available to use in school and at home. The child's language and speech disorder means that his speech is delayed. As a result, he has trouble pronouncing certain sounds such as 's', 'sh', 'f', 'g' and 'k'. The child can articulate answers and thoughts in shorter phrases and appropriate verb tenses. He finds longer sentences more challenging.
11. The child benefits from weekly sessions with a speech and language therapist (**SLT**). He also receives assistance from a sleep clinic and a paediatrician.
12. The child previously used gestures, signs and visuals to communicate. He now communicates purely verbally.
13. On returning home from school, the child regularly displays distress. When this happens, the child shouts, breaks things, bangs doors and can hurt himself. These episodes of distress happen on average five days a week and last on average for around 30 or 40 minutes. This distress is less frequent during school holidays.

### *The child and school A*

14. School A is a primary school managed by the respondent. The current roll there is 57. The child attends school A in primary year 1, having started there in August 2023. The child's class is a composite primary 1 and primary 2 class. There are 15 pupils in the child's class, 10 of whom (including the child) are in primary 1, the other five are in primary 2. The child's attendance rate at school A on 1 May 2024 was 97.77%.
15. The environment in school A is calm and quiet. There are no bells to mark transitions for pupils. There are quiet spaces in school A that are available to the child. The child's class has its own dedicated door for use when entering and exiting the classroom. The corridors in school A are not noisy even when the children are moving to the dining area or the playground. The child's class go to the dining room for lunch on their own, before pupils from the other two classes in school A do so. There is no shouting, screaming or

boisterous behaviour in the corridors of school A. The child has not exhibited distress while in the school corridors (or in any other area of school A).

16. School A staff have designed its teaching methods and environment to be in line with the Circle Framework of Inclusion, which identifies best practice to support learners with additional support needs to access the curriculum.
17. When the child started attending school A, he was reluctant to engage with other pupils in the playground. Now, he shows no such reluctance and joins in with all playground activities.
18. The child has progressed significantly, both academically and socially, while at school A. He is happy, enthusiastic and fully engaged at school A. He takes part in all classroom and whole school activities, including physical education in the school hall, at community meetings and in the dining hall. The child engages in discussions in class with adults and peers. He listens carefully during group work and is able to answer questions about what he has listened to. The child works independently without close supervision. He initiates contact with adults in class and in the playground in order to meet his needs, for example asking for additional resources or to go to the toilet.
19. The child receives 1:1 support for 20 minutes at a time, three times per week for phonic work. One of these sessions is with a support for learning teacher, the other two sessions are with pupil support workers. He also attends a 15-minute small reading group session once per week. Otherwise, the child benefits from the support available to all pupils in his class.
20. The child's speech has improved significantly while at school A: it is now much clearer. He shares ideas and answers in groups with confidence. His peers understand what he is saying. Since he started at school A, he has not exhibited any frustration or distress during his communications with others. Staff at school A follow advice from SLTs. This supports the child's language development.
21. The child manages changes in school A, including when these are unexpected, for example when the school nurse arrived to complete health checks.
22. Sensory toys are available to all pupils in the child's class. The child does not choose to use the sensory toys. He has noise cancelling headphones available in class, but he has used them only once during a pantomime. He has not needed to take any time out of his class, nor has he used a break out space available in the room opposite his classroom.
23. The child is very able in the school dining hall. He collects his tray, helps himself to a drink, collects his pre-ordered food and sits down to eat with his friends. He eats all (or almost all) his food, both his snack and lunch.
24. The child chats, laughs and plays with his peers in the class, playground and in the dining hall. He sometimes plays with some of the older pupils in the playground. He seeks out the company of a particular pupil who is older than him who he knows from the Breakfast Club which he goes to every day. The child is confident in the company of his peers, for example volunteering to demonstrate a dance with a friend during a physical education class, prompting feedback from classmates.
25. Breaks (called 'brain breaks') were introduced for the whole of the child's class, after the appellant suggested that the child would benefit from these. There are two such breaks, each of 10 minutes, each day. The appellant asked school A to introduce these breaks for the child. The school made them available to all pupils in the class. The child takes

part in these breaks, as well as with movement activities such as yoga and dancing, all of which he enjoys.

26. The child is on track to achieve Early Level in all areas of Curriculum for Excellence (**CfE**) by the end of the current academic year. This means that he is at the appropriate stage of his educational attainment. The child is ahead of that stage for some aspects of numeracy, where he is working within First Level. The child is tracking at a similar educational attainment with the pupils in his class. He is cognitively very able and is expected to take National 5 and Higher qualifications and beyond.
27. On two occasions since the child started attending school A, he has rocked from side to side. On the first occasion, in January 2024, this happened while the child was delivering a presentation to the class. The second occasion was during a numeracy assessment, carried out by school A staff at the request of witness B. On the second occasion, while rocking, the child was smiling, vocal, answered questions and, when asked, stated that he would like to stop after one section of the assessment. Later in the day, the child came back to complete the assessment. He did not rock on that later occasion. He displayed excitement in response to praise during that part of the assessment, as he was able to answer questions beyond expected for his age.
28. Staff at school A, as well as witness B, are aware of the concepts of masking and stimming and they apply the advice in the Guide to Autistic Masking 2022 (**the Guide**) issued by the National Autism Implementation Team (**NAIT**) (R044-049). School A staff have observed the child very closely for signs of masking and stimming but have been unable to detect these behaviours. They have, in particular, been looking out for signs that the child relies on others to talk and make decisions, copies other people's words or actions or hides reactions to sensory experiences which might be distressing to him. None of these have been observed in school A.
29. Witness B has carried out three detailed observations of the child in school A, in September 2023, March 2024 and May 2024.

#### *The child and school B*

30. School B provides individualised, person-centred skills-based learning for children up to the age of 18 who have complex additional support needs including ASD, sensory impairment and communication difficulties.
31. The current roll of school B is 15 pupils. The pupil age range is from 8 years to 18 years. Eleven pupils have a diagnosis of ASD. All pupils benefit from support in developing social confidence, communication and resilience.
32. School B staff have assessed the child as suitable for school B, and have offered him a place.
33. The stage of the education of the 15 pupils at school B is as follows ('P' for primary and 'S' for secondary):
  - P5: 2 pupils
  - P6: 1 pupils
  - P7: 3 pupils
  - S1: 1 pupils
  - S2: 1 pupils
  - S4: 2 pupils
  - S5: 3 pupils

S6: 2 pupils

34. Nine school B pupils use spoken communication as their preferred method.
35. Each class in school B has a maximum of six pupils. This offers learning within a small group setting. Each class is supported by a full-time teacher and two or three Learning and Wellbeing Practitioners. Class composition is not decided according to age only.
36. If attending school B, in academic session 2024-2025, the child would be placed in a class with three other pupils. Two would be at secondary 1 stage, the other pupil would be at secondary 2 stage. Two of these pupils (one at secondary 1 stage and the other at secondary 2 stage) are on target educationally in line with their age and stage.
37. The child has visited school B on three occasions, in March 2022 and in April and June 2023. He has met members of staff from school B during these visits.
38. If attending school B, the child would be allocated a 1:1 dedicated member of staff. A risk assessment would be prepared for him, ensuring that he is accompanied by adults.
39. School B offers significant areas for its pupils to use, including breakout spaces in each classroom (which can be individualised), areas for life skills development, several fenced and secure play areas and extensive grounds.
40. School B uses visual timetables, objects of reference, regular movement routines or sensory breaks and daily opportunities for outdoor learning.
41. School B uses a total communication approach. This involves the use of a range of communication methods such as symbols, objects of reference, signing, communication devices and digital supports. These methods are used as appropriate for each pupil.
42. School B has its own SLT, who assists pupils and staff in communicating with each other. If the child were to attend school B, the SLT would work closely with him.
43. School B uses the National Autistic Society's 'SPELL' philosophy (Structure, Positivity, Empathy, Low Arousal and Links with partners and professionals) to create a low arousal environment in all of its spaces. This is the equivalent of the Circle Framework of Inclusion used at school A. The environment at school B is conducive to the health and wellbeing of neuro divergent pupils. The spaces are calm and the muted colour scheme reduces stress. There are no bells to mark transitions for pupils.
44. The spaces in school B have different purposes, such as a play therapy area, a Lego therapy space, a Speech and Language space, a sensory room, workstations and dedicated classroom spaces with minimal distraction and consistent adults. The rooms have good natural lighting, adjacent break-out rooms and a nearby outdoor playground space. There is a large gym hall and assembly hall. There is access to activities such as yoga, mindfulness, a sensory swing and small rebounding trampolines. There are also music, creative arts, relaxation and exercise opportunities for pupils throughout the day.
45. School B staff are familiar with the concepts of masking and stimming.
46. All pupils who attend school B have an Individual Education Plan.
47. The education at school B follows CfE from pre-early levels up to and including National 3 level, but not above that level. School B has good links with the local further education

college and other agencies such as Skills Development Scotland and local businesses and schools, as well as with the local community generally.

## Reasons for the Decision

48. 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 9-11 above.
49. 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.
50. A few points are worth noting about the evidence. Firstly, all of the witnesses who gave oral evidence did so in a credible and reliable fashion. Our decision turns on interpretation of the evidence and its application to the relevant statutory tests. Secondly, we were particularly impressed with the evidence of witnesses A and B, who are well-qualified, experienced education professionals with direct knowledge of the child. They demonstrated a clear and detailed knowledge of the child and a palpable dedication to meeting his needs.
51. Thirdly, we do not accept the appellant's argument (made in oral submissions) that the evidence of witnesses A and B is limited due to limited time spent with the child. It was clear from witness A's evidence that she had a very good understanding of what was happening on a day to day basis with provision for the child in school A. It is a small school and she has regular direct contact with child A. She also gathers information from class staff, who see him every day in school. Witness B's observations were, as the appellant argued 'snapshots', in the sense of capturing how the child appeared during observations. However, the three visits were spread across the academic year, they involved observing the child in different school A settings and they were detailed and clearly reported. We have no hesitation in concluding that these witnesses were in a very good position to reach the conclusions they explained in their written and oral evidence.

### **The ground of refusal: respective cost and suitability (2004 Act, Schedule 2, paragraph 3(1)(f))**

52. The respondent argued that one ground of refusal of the placing request exists. That ground has four component parts. In order to conclude that the ground of refusal exists, we must be satisfied that **all four** parts of the ground of refusal apply.
53. The parties agree that two of the four parts of the ground of refusal apply. These are: (a) that school B is not a public school (2004 Act, Schedule 2, paragraph 3(1)(f)(i)); and (b) that the respondent has offered the child a place in school A (2004 Act, Schedule 2, paragraph 3(1)(f)(iv)). It is clear from the evidence that these two parts of the ground of refusal apply. The remaining two parts (to which we now turn) are in dispute between the parties.

### *The ability of the respondent to make provision for the additional support needs of the child in school A (2004 Act Schedule 2, paragraph 3(1)(f)(ii))*

54. There is clear, credible and reliable evidence that the child is doing well at school A, in terms of his speech, his social interaction and his academic attainment. Witness A was

very clear: he is a happy, sociable pupil who enjoys all aspects of school life. His speech has improved significantly and he communicates effectively with staff and pupils alike. He is meeting CfE milestones, and indeed is ahead in some aspects of numeracy.

55. The main thrust of the appellant's case is that the child is not coping in school A and is masking his inability to cope (outline submissions, paragraph 19 and part of paragraph 20). He argues that, as a result of masking at school, the child releases his distress at home in behaviour episodes (see the finding in facts at paragraph 13).
56. It was not clear from his evidence whether these episodes had happened at home or at school. In the appellant's written submission, the suggestion is that they happened at home (paragraph 19). In his witness statement, the suggestion is that they happened at school (A174, paragraph 16). We conclude that there is insufficient evidence that these incidents happened at school. If they had happened at school, the staff would have noticed them. The appellant did not attend in the child's class, and so if they did happen at school, he did not explain how he knows about them. Further, there is no indication of when these incidents took place. Overall, we take the view that this evidence was too vague to allow us to conclude that it is relevant to the issues we need to decide. **[Part of this paragraph has been removed by the Chamber President to preserve privacy under rule 55(3)((b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
57. Witnesses A and B point to the Guide, at R044-049 as their reference point on this subject. The appellant did not challenge this as a resource, and we accept the evidence of witnesses A and B that it is an appropriate resource. The concept of masking is defined under the heading 'What is autistic masking?' on page 1 of the Guide (R044). While the motivation for masking is to hide signs of distress, the Guide goes on to outline the possible signs of masking under the heading 'What might we notice if someone is masking?' (pages 1-2, R044-045). A total of nine possible sign types are identified in that bullet-pointed list, some consisting of more than one sign.
58. The Guide also defines the term 'stimming' as '...a positive regulation strategy for many autistic people, but they worry that it will be perceived as weird or unacceptable around other people'. The Guide goes on to give some examples of stimming: 'preferred repetitive movements or noises, such as hand flapping, rocking or humming' (both excerpts are in the fourth bullet point on R045).
59. Applying that guidance to the evidence, we conclude that there is no indication that the child has been masking at any point in his school A education. Witness A was very clear in her evidence that school A staff were 'vigilant' in looking for signs of masking. None has been reported. Witness B, who explained that he has significant experience of working with children with ASD, outlined how younger children find it especially difficult to mask effectively because it is much more difficult for them to control their impulses. Such an effort would require 'incredible willpower and strength' according to witness B, not typical for a child of this age.
60. We are not convinced that the rocking the child displayed on two occasions since August 2023 (see the findings in fact at paragraph 27) is reliable evidence of stimming as a regulation strategy. While rocking is one of the examples of stimming in the Guide, rocking is such a universal movement that on its own, it may not suggest stimming. Even if we had concluded that the child was stimming when he was rocking, the level of this regulation was, given the evidence we heard, minimal.

61. We were persuaded by the evidence of witnesses A and B, taken with the content of the Guide, that had the child been masking, signs (such as those examples in the Guide) would have been detected by a vigilant and experienced staff team. In contrast, the child is happy, confident, sociable and achieving well. We are not convinced that a child, especially a young child, who presents in this way with no signs of distress or masking, is anything other than thriving in his school environment.
62. We accept that there is no evidence to indicate why the child is behaving in a distressed way once he arrives home from school. In the absence of any evidence of masking, and given the evidence of the child's enjoyment of and participation in school, we are persuaded (on the evidence available to us) that this reaction is not related to his education at school A.
63. The appellant makes some arguments about the provision at school A in addition to his argument about masking.
64. The appellant argues (outline submissions, paragraph 22) that the child does not have an appropriate age group at school A. We do not agree. He is in a class which consists of children who are mostly within his age group. There is evidence that the child interacts well with older children as well as with children of his own age. He is happy, participative and attaining educationally.
65. The appellant further argues (outline submissions, paragraph 20) that the child experiences sensory overwhelm in school A. There is no evidence to support this and the respondent has, in any event, persuaded us that the child's sensory experience at school A is healthy. He participates fully in class and in other activities. He shows no signs of distress or sensory discomfort. He is happy and engaged there. The environment is calm and quiet. The child does not need to use the noise-cancelling headphones regularly (see the findings in fact at paragraphs 10 and 22), suggesting that the noise in school A does not present a sensory issue for him.
66. The appellant states that the child's needs are not being met at school A due to his communication difficulties, preventing effective engagement with the curriculum (outline submission, paragraph 21). The evidence points to the opposite conclusion. The child engages very effectively, and fully, with the curriculum at school A. He is happy, participative and attaining well educationally. There remain some issues with his pronunciation of certain sounds, but his speech has improved significantly since he started at school A, and he communicates without difficulty with staff and pupils. It is clear from all of the evidence that the environment of school A has helped the child's speech to improve significantly. That is the view of witness A, and it is a view she presented persuasively in her oral evidence. Further, the assessment relied upon by the appellant at T038 (outline submission paragraph 21) was, by the date of the hearing, nearly a year old. In the context of a young child, that is a significant gap, and the assessment is out of date: it takes no account of the child's speech progress at school A since August 2023.
67. The appellant argues that the child does not have the level of close adult supervision at school A that he requires (outline submission, paragraph 23). The evidence points away from this. The child is thriving at school without 1:1 support (except for a limited period for support with language, which he receives – findings in fact at paragraph 19). Witness



A was very clear in her evidence that the child manages without any additional 1:1 support, and that this is something to be encouraged as it helps the child to become more independent in his learning. As a specialised tribunal, we are aware of the importance of independent learning skills as part of the healthy educational development of young children. Additional 1:1 support when that is not needed would only risk stifling those skills.

68. Finally, the appellant asserts that the child does not have sufficient opportunities for regulation breaks at school A (outline submission, paragraph 24). Again, the evidence suggests the reverse is the case. Witnesses A and B were clear about the breaks available for all pupils in the child's class (introduced at the appellant's request for the child). The reason for extending the 'brain breaks' to all of those in the child's class was to avoid the child missing out on time with his peers when taking such a break. The fact that the child is happy, participative and attaining, and displaying no signs of distress at all in school A indicates that he is in a positive learning environment. The sensory toys are available but not being used since the child does not need to use them. That is clear from the evidence of witness A. Contrary to what the appellant suggests, the child has ample opportunities to play outdoors and appears to enjoy and benefit from that. Witness B spoke about that in some detail following his most recent observation of the child.
69. Given the child's evident enjoyment of his education at school A, his very high attendance rate, participation in all aspects of his education and his achievement level, it is very clear to us that his additional support needs are being provided for there. This means that part (ii) of the ground of refusal is satisfied, since the respondent is able to (and does) provide for those needs in school A.

*Reasonableness of placing the child in school B having regard to respective suitability and respective cost of schools A and B (2004 Act, Schedule 2 paragraph 3(1)(f)(iii))*

70. This part of the ground of refusal involves a comparison between schools A and B on suitability to meet the child's additional support needs, and on the cost of doing so, against an overall reasonableness test.

*Respective suitability*

71. We have concluded (above) that the additional support needs of the child are being provided for in school A. For this part of the test, we need to compare the suitability of school A indicated by this with the suitability of school B to meet those needs.
72. Turning to school B, we conclude that the provision available there for the additional support needs of the child makes that school unsuitable for this purpose. This is in comparison with the provision in school A which is, for this purpose, suitable.
73. The unsuitability of school B is clear from four main factors, as follows:
- a. The child would not have appropriate peers in his class: all would be much older than him, and all would be ahead of him educationally. Indeed, the child would be (by far) the youngest pupil in school B. The next youngest pupil would be 4 years older than the child (see the data in finding in fact 33). Witness C expressed the view that there would be 'no natural fit' between the child and his class peers at school B (see the findings in fact at paragraph 36). Witness B explained that the

child would, if in school B, in effect be taught on his own. We accept these analyses.

- b. The child does not require the 1:1 support that school B would provide, and this support would be likely to reduce the development of the child's independence.
- c. School B would be unable to meet the child's likely longer-term attainment, since he is expected to progress beyond CfE National 3 level, and that is the current upper qualifications limit available at school B. He is expected to take National 5 level qualifications, Highers and beyond. Witness D did not have any explanation of how this ultimate ability level could be provided for at school B. We do not accept the appellant's argument that what matters is what is available now: we have to consider the ability of school B to meet the additional support needs of the child in future (but as evidenced now). Since the child has not attended school B as a pupil (as is almost always the case with the specified school), our consideration of its suitability involves, by its nature, a prediction of how it might fare in providing for his additional support needs. If we placed the child in school B, he would be eligible to attend there until the end of his school education. Once the child is placed there, there is no independent review of the placement. This necessitates consideration of the child's future likely attainment at school B (in as far as that is feasible on the available evidence).
- d. School B's assessment of the child's needs is out of date, having been conducted as a result of visits by the child to the school the latest of which was in June 2023, 11 months prior to the hearing, leading to an offer of a place by letter on 27 June 2023 (T035-036). Witness D conceded that there had been no contact at all between school B and staff at school A or with witness B. This makes school B's assessment of its ability to meet the child's needs unreliable as it does not take any account of the substantial progress the child has made at school A since August 2023.

74. We accept that school B has an impressive educational offering, but we need to consider the suitability of that offering against the needs of the child. Given the substantial difficulties above, it is clear that what is available for the child is not only less suitable than what is currently being provided at school A: it is unsuitable.

75. The gap between the suitability of schools A and B to make provision for the child's additional support needs is so significant (one is highly suitable, the other not suitable at all) that even if there were no cost implication for the respondent in placing the child in school B, we would have concluded that it is not reasonable to place him there. We therefore need not consider the respective cost question; there was no suggestion that the cost to the respondent of provision to meet the needs of the child in school A is greater than it would be in school B.

#### *Conclusion on the ground of refusal*

76. Since all of paragraphs (i)-(iv) of the ground of refusal in Schedule 2, paragraph 3(1)(f) apply, that ground of refusal exists.

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

77. Since we conclude that a ground of refusal exists, we need to consider whether it is appropriate in all the circumstances to confirm the respondent's refusal of the placing request. If we do consider it to be appropriate, the decision to refuse the appellant's placing request must be confirmed; if we do not, the refusal decision must be overturned.
78. We have taken account of the child's views as expressed in the advocacy report (T058-064). While he does identify reading, corridors (due to being noisy) and lunch time as activities that don't work well (T060), there are many more points identified as working well or that the child put under the heading 'not sure' (T059-060). These views are not, therefore, so clear and consistent that they present a different picture to that offered by the very strong, positive evidence about school A as a whole.
79. All of the circumstances includes consideration of the evidence we have assessed above in relation to respective suitability of schools A and B. It is not appropriate to place the child in a school that is not suitable for meeting his additional support needs when he is attending a school that is suitable for meeting those needs, and is, in fact, doing so. Moving the child from a school in which he is thriving to one where he has no age or stage appropriate peers would risk the progress he has made, both socially and educationally, at school A. It would also put his happiness, wellbeing and educational prospects at risk.
80. There are no circumstances indicated in the evidence that point away from this conclusion.
81. This means that we find that it is appropriate, in all of the circumstances, to confirm the decision to refuse the appellant's placing request.