

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

List of witnesses

For the appellant:

Pupil Support Assistant (Witness A)

For the respondent

Depute Principal Educational Psychologist (Witness B)

Head Teacher of School A (Witness C)

Head Teacher of School B (Witness D)

Reference

1. This is a reference made under section 18(1) of the Education (Additional Support for Learning) (Scotland) Act 2004 (**the 2004 Act**) in respect of a decision by the respondent under section 18(3)(da) refusing a placing request made in respect of the child under paragraph 2(1) of schedule 2 to the 2004 Act to place the child in school A (**the specified school**), a special school. The child is currently enrolled at school B (**the current school**), a mainstream school.

2. The sole ground of refusal relied upon by the respondent at the hearing was:

(a) Paragraph 3(1)(b) of schedule 2 to the 2004 Act

The education normally provided at the specified school is not suited to the age, ability or aptitude of the child;

3. The respondent did not rely upon suitability with regard to age. The respondent accepted that the education normally provided at the specified school is suited to the age of the child.

Decision

4. In terms of section 19(4A)(a) of the 2004 Act, the tribunal being satisfied that:
- (i) one or more grounds of refusal specified in paragraph 3(1) of schedule 2 to the 2004 Act exist; and
 - (ii) in all the circumstances it is appropriate to do so,
- confirms the decision of the education authority.

Process

5. Case management calls took place in December 2024 and March 2025.
6. The reference proceeded to a hearing in May 2025. The parties, their representatives, the tribunal panel and the witness attended in person, with the exception of Witness A who gave evidence (with the agreement of all) by video-link.
7. Parties, as agreed, lodged written submissions with the First-tier Tribunal by May 2025.

Findings in Fact

8. The child was born in 2015.
9. The child lives with the child's mother, father and two siblings.
10. The child has a diagnosis of Autism Spectrum Disorder (**ASD**) with associated language disorder, social, emotional and behavioural needs, hypermobility, and low muscle tone.
11. The child attended the nursery associated with the current school in 2018. The child's entry into Primary 1 was deferred for one year, until August 2021. At this time the child was offered a placement in an Intensive Support Provision (**ISP**). That placement was declined. The child was placed, at the request of the appellant, in the current school.
12. The child has a history of part-time school attendance with low and inconsistent school attendance, particularly during Winter months. The child's attendance in term 1 of Primary 1 was 47.37% (mornings only); in term 2 it was 62.79% (mornings only); in term 3 it was 20.63% (mornings only); and in term 4 61.54% (mornings only). The child

commenced Primary 2 in August 2022. The child's attendance in term 1 of Primary 2 was 41.89% (mornings only); in term 2 it was 19.51% (mornings only); in term 3 it was 49.06% (mornings only); in term 4 it was 69.81% mornings only). The child commenced Primary 3 in August 2023. The child attended school from 10.00 am until 2.00 pm. In term 1 the child's attendance was 71.43%; in term 2 it was 52.27%; in term 3 it was 52.27%. The child has not attended school since December 2023.

13. A risk assessment (page A013 of the bundle) was put in place for the child for academic year 2021-2022. A risk assessment was not subsequently required. There were no subsequent concerns raised by the current school in connection with the child's behaviour in school. The child was observed throwing toys and dropping to the floor. The child did not display overtly heightened dysregulation. The child was able to regulate with support and encouragement. The child was not exposed to other children exhibiting unusually dysregulated behaviour.

14. The child was provided with full-time 1:1 support by a Pupil Support Assistant (**PSA**) at the current school.

15. Initially, at the current school Witness A worked one to one with the child. Subsequently a second PSA was gradually introduced to work with the child.

16. The child requires adult support with personal care.

17. The child is independently mobile.

18. The child participated in class activities, such as gym, dancing art and playtimes at the current school.

19. In her Primary 3 class the child sat at her own work station in class supported by a PSA.

20. The child is at language partner stage of communication using Communication, Emotional Regulation and Transactional Support (**SCERTS**) assessment. The child has clear speech with well developed speech sound skills.

21. The child has access to Clicker communicator software on an iPad in respect of which the child has good operational skills, navigating between pages, constructing a sentence as a message and using the keyboard to type phrases. The child has an understanding of vocabulary being stored in categories and remembers the pathway to

access a word if shown once. The child requires support for functional communication (for example to engage with others or to respond to questions), whether typed or verbal.

22. The child demonstrates skill in learning vocabulary. The child's comprehension is estimated at around that of 3:06 year to 4:06 year level compared to neurotypical peers.

23. The child is able to construct phrases using the keyboard on the iPad and at times uses these phrases correctly.

24. The child can match verb pictures and can follow 2-3 word instructions, including those with concepts of size, shape and colour. The child understands most verbs in simple three key word phrases.

25. The child has well developed visual matching skills which have assisted her to learn to count and read.

26. The child is unable to engage in conversational language. The child learns language in chunks, adding new words and applying these in context.

27. The child will request an item by saying the question an adult might ask her, such as "Would you like an orange juice?" to indicate that she would like an orange juice.

28. The child will indicate if she is unhappy by saying "Stop doing that" or "No".

29. The child has good attention skills for activities in which she is interested, often drawing or arts and crafts. The child follows her own agenda, finding it difficult to follow an agenda set by an adult.

30. The child has very rigid routines around matters such as dressing, leaving the house, other people leaving the house and bedtime.

31. The child worked at her workstation in the classroom, supported by a PSA.

32. The child joined in class activities such as gym, dancing, art and playtimes.

33. In Primary 3 the child was working at early level for aspects of literacy and numeracy. The child had been progressing slowly with writing skills and had a good understanding of some numeracy skills.

34. When at the current school the child showed development of empathy, for example by making a comment to a person who was upset.

35. The specified school is a local authority special school for children and young people with complex and profound developmental, learning and physical disabilities. It provides nursery, primary and secondary school provision.

36. The specified school has capacity for sixty-five pupils. The majority of pupils are non-verbal. Some pupils use gesture to communicate. Other pupils use augmentative and assistive communication devices (**AACD**), but commonly using only a single word to communicate.

37. The pupil cohort is divided among eleven classes. Classes are populated not solely by age of the pupils but by a complex consideration of the ages, abilities, physical and medical conditions and needs, requirement for medical equipment (such as wheelchairs, which will have an impact on the space available in classrooms) and medical treatment and the level of dysregulation of the pupils.

38. The specified school operates three learning pathways. The Sensory Pathway is for pupils who are mostly non-verbal with complex health needs and who are around the eighteen month development stage. Most have visual and / or hearing impairments. A large amount of physical space is required to accommodate equipment, moving and handling. Pupils on this pathway tend to work at the very earliest level of the curriculum and follow a sensory curriculum.

39. The Life Skills Pathway is mostly for pupils with ASD with a significant learning disability. These pupils are usually non-verbal and exhibit high levels of dysregulation. The classes are small with a high staff to pupil ratio given the severity of the dysregulated behaviour that occurs.

40. The Aiming for Independence Pathway is for the school's most able pupils, being that they have some limited communication skills. These pupils have a range of diagnoses, such as ASD, genetic or chromosomal abnormalities. These pupils tend to work at the pre-early to early level of the curriculum. The aim is to provide these pupils with independent life skills such as travelling in the community, and basic numeracy skills and literacy skills, such as recognizing when payment is required to purchase an item and associating a bus with the word "bus".

41. Not all pupils display dysregulation. Dysregulation may take the form of screaming; running at people; causing harm by nipping, grabbing, spitting, kicking or pulling hair of other pupils or members of staff; or throwing and damaging objects.

42. Classroom 1 comprises eight pupils: two Primary 2 pupils; two Primary 3 pupils; one Primary 4 pupil; one Primary 5 pupil; and two Primary Six pupils. The two Primary 2 pupils are non-verbal; one attends a mainstream school two days each week; the other will not tolerate other pupils in the child's space. One Primary 3 pupil has a complex cardiac condition and uses a AACD. The other Primary 3 pupil attends a mainstream school four days each week and will move to mainstream full-time in the next academic year. The Primary 4 pupil has health issues which cause the child to fall and has one word verbal skills. The Primary 5 pupil is a wheelchair user and uses a AACD. One Primary 6 pupil is non-verbal with very limited literacy and numeracy skills. The other has a genetic disorder, a visual impairment, is making vocal sounds and attends a mainstream school one day each week.

43. Classroom 4 comprises six pupils: one Primary 1 pupil; one Primary 2 pupil; one Primary 4 pupil; two Primary 5 pupils; and one Primary 6 pupil. All are non-verbal. All require significant levels of moving and handling input and involvement by the health care team.

44. Classroom 5 comprises four pupils: one Primary 3 pupil; two Primary 6 pupils; and one Second Year pupil. The Primary 3 pupil is non-verbal. One Primary 6 pupil is beginning to use a AACD. The Second Year Pupil is pre-verbal.

Reasons for the Decision

45. The respondent relied upon the sole ground of refusal set out at paragraph 2 above. The appellant disputed that the ground of refusal existed. The burden is on the respondent to prove that the ground of refusal exists.

46. The tribunal had in the bundle of papers before it written statements from and heard oral evidence from **Witness A, Witness B, Witness C, Witness D** and the **Appellant**.

47. Witnesses A, Witness B, Witness C and Witness D gave their oral evidence in a straightforward manner, engaging thoughtfully with questions put to them, seeking to answer those questions to the best of their ability and acknowledging appropriately where they could not answer questions.

48. The appellant gave her oral evidence in a straightforward manner, engaging thoughtfully with questions put to her and seeking to answer those questions to the best of her ability.

49. In reaching its decision, the tribunal had regard to the views of the child as set out in the document at pages T036 to T055 of the bundle of papers before it; all of the papers before the tribunal; the oral evidence given to it, the written submissions made by the parties and draft findings in fact prepared by each of the parties. The tribunal reached its decision on the ground of refusal for the reasons given below.

The education normally provided at the specified school is not suited to the age, ability or aptitude of the child: paragraph 3(1)(b) of schedule 2 to the 2004 Act

50. In considering this ground of refusal, the tribunal has considered only the suitability of the specified school. The tribunal has not undertaken a comparison of the suitability of the child's current school with the specified school. Where the tribunal makes reference to the child's current circumstances or circumstances at the current school it does so only as a means of addressing the child's ability and aptitude. The tribunal has considered the suitability of the education provided at the specified school specifically for the child. The tribunal has considered whether the education provided at the specified school is not suited to the ability or aptitude of the child. Lack of suitability on both ability or aptitude, or on either one of those, is sufficient to conclude that the ground exists.

51. In considering this ground of refusal the tribunal had regard to various matters including the curriculum, staff, facilities, peer group and educational environment provided at the specified school.

52. The **specified school** – i.e. the school specified in the appellant's placing request – is a special school as defined at section 29(1) of the 2004 Act:

“ “special school” means—

(a) a school, or

(b) any class or other unit forming part of a public school which is not itself a special school,

the sole or main purpose of which is to provide education specially suited to the additional support needs of children or young persons selected for attendance at the school, class or (as the case may be) unit by reason of those needs”.

53. The child was born in 2015. The specified school caters for the education of children through nursery, primary and secondary school. The respondent did not seek to rely on age

as making out this ground of refusal. The tribunal is not satisfied that the education normally provided at the specified school is not suited to the age of the child.

54. The tribunal is not satisfied that, in terms of the curriculum taught, the staff provided and the facilities at the specified school, the education provided at the specified school is not suited to the ability or aptitude of the child.

55. The tribunal is satisfied that, in terms of the peer group and the educational environment provided at the specified school, the education normally provided at the specified school is not suited to the ability or aptitude of the child for the reasons given below.

56. Finding that the education normally provided at the specified school is not suited to the ability or aptitude of the child involves no criticism whatsoever by the tribunal of the specified school or the education normally provided by it. The tribunal is involved only in an assessment of whether the education normally provided at the specified school is suited to the specific needs of the child that this reference concerns.

57. A number of the questions on behalf of the appellant to Witness B and Witness D appeared to be directed towards whether the respondent properly discharged its duty to provide education to the child after the child stopped attending school in December 2023. That is not a matter before the tribunal for determination by the tribunal.

58. Questions on behalf of the appellant to Witness C sought acceptance by Witness C that the specified school could meet the child's needs, particularly in light of the child's prolonged non-attendance at school. Witness C accepted that the specified school could meet the child's needs, up to a point and subject to certain caveats. That is unsurprising given that the specified school is an educational establishment staffed by professional, qualified teachers and PSA. However, it does not quite address the matter before the tribunal, namely whether the education normally provided at the specified school is not suited to the ability or aptitude of the child.

59. One of the draft findings in fact submitted to the tribunal, at the invitation of the tribunal, on behalf of the appellant was:

“[The child] had been progressing slowly with writing skills [T044], and had a good understanding of some numeracy skills when at school [T043]”.

60. That draft finding in fact was accepted by the tribunal and found in fact above.

61. It appears to be agreed by the parties that the child made some progress at the specified school, despite the child's very limited attendance in terms of days attended and the time spent at school each day attended.

62. The appellant's witness, Witness A, gave evidence that at the specified school:

"[The child] joined in many class activities, especially gym, dancing, art and playtimes, but spent much time in class sitting with me at her work-station drawing or playing educational games on her iPad: it was often possible to use [the child's interests] to introduce work on numeracy and literacy. It became clear that that [the child] is far from non-verbal but uses phrases she has heard to express herself: she has recently shown progress in being able to express herself more directly."

63. This, again, despite the child's limited attendance at school and absence from school since December 2023. Witness A was open and transparent in her evidence, clearly had affection for the child, her evidence was not challenged and the tribunal accepted her evidence.

64. Witness B has known the child's family since January 2020 and became involved with the child in April 2021. Witness B stated that the child made progress at the specified school at her own level, noting indicators such as: the development of positive relationships with staff members; development of oral language and use of technology to support communication; development of emotional literacy, such as recognizing when others are hurt; development of ability to follow routines and expectations; increasing time in class rather than in a separate area; able to type on a communicator and read many of the active literacy common words; able to form letters correctly, developing early literacy skills; developing numeracy skills, such as naming numbers up to 100, ordering numbers 1 to 10, showing 1 to 1 correspondence, naming, drawing and counting the sides on 2 D shapes; beginning to eat lunch at school and spending short amounts of time in the lunch hall.

65. Witness D has known the child since January 2023. Witness D stated that the child in Primary 3 was working at early level for aspects of literacy and numeracy, was good at drawing, was making progress, albeit slowly, and she would have expected the child to make greater progress had she been able to be in school more consistently. Witness D identified the child's poor attendance as the child's biggest barrier to learning.

66. In weighing the evidence of Witness B and Witness D, which they gave straightforwardly and clearly, the tribunal had regard to their knowledge of the child and to

their respective professional roles, practice and experience. The tribunal accepted their evidence and, given their personal knowledge and professional experience and involvement with the child, preferred their evidence to any evidence which contradicted their evidence.

67. Witness C gave her evidence clearly and straightforwardly. Witness C does not know the child personally. Witness C gave evidence as to the specified school, its staff, training, facilities, day-to-day experience, teaching practice, curriculum, its three learning pathways, its environment and its pupils. The detail of Witness C's careful evidence is set out in the findings in fact above.

68. Witness C explained that the specified school has capacity for sixty-five pupils. It is often subscribed to capacity. Only recently has the cohort of pupils fallen to sixty-three. The majority of pupils are non-verbal. Some pupils use gesture to communicate. Other pupils use augmentative and assistive communication devices (**AACD**), but commonly using only a single word to communicate.

69. The pupil cohort is divided among eleven classes. Populating classes is an art, not a science, and takes hundreds of hours of staff time. Classes are populated not solely by age of the pupils but by a complex consideration of the ages, abilities, physical and medical conditions and needs, requirement for medical equipment (such as wheelchairs, which will have an impact on the space available in classrooms) and medical treatment and the level of dysregulation of the pupils.

70. Looking to the classes containing pupils Witness C thought most likely to form part of a class of which the child would be part (the pupils in classrooms 1, 4 and 5) if placed in the specified school, Witness C gave detailed evidence about those pupils. Most are non-verbal, pre-verbal or have very limited verbal capacity. Most have limited potential to develop their skills. Many have complex medical needs and require medical care at school. Some have physical or learning disabilities. Some are highly dysregulated.

71. Witness C was clear that the purpose of the specified school is to provide an educational environment to support pupils who cannot be educated elsewhere. If pupils come to be assessed as being able to be educated elsewhere, whether in mainstream or an ISP, that is facilitated.

72. The aim of the school is to equip pupils with basic life skills to prepare them for life beyond school, such as using public transport or making a purchase. Witness C was clear about the importance of children being educated with an appropriate peer group. Witness

C was also clear that personal care is not a reason for placing a child in the specified school. Personal care can, and is, dealt with appropriately by other schools which are suited to the education of a particular child.

73. Witness C gave clear straightforward and detailed evidence about the specified school. The tribunal had regard to Witness C's professional experience and knowledge of her school, its staff, training, teaching practice, curriculum, learning pathways, environment and pupils. The tribunal accepted Witness C's evidence and, where her evidence was contradicted, preferred her evidence.

74. The appellant gave evidence to the tribunal. The appellant explained her longstanding involvement in educational matters, both personally and in the capacity of giving advice to others. It was clear that the appellant seeks only the best educational opportunities for the child. The appellant explained why she had not wished the child to attend an ISP. She explained why she had wished to place the child in the current school. She explained what she saw as the benefits of placing the child in the specified school. The appellant is clearly impressed by and respects the specified school and Witness C.

75. The tribunal was satisfied that placing the child in the specified school would place the child with a peer group and in an environment that she would find quite challenging, at best, and detrimental to her well-being and educational potential at worst.

76. The tribunal was satisfied that placing the child in the specified school would limit her exposure to verbally more advanced role models, adversely affect the child's learning as part of a peer group, and adversely affect the child's language development and socialization.

77. For the foregoing reasons the tribunal was satisfied that the education normally provided at the specified school is not suited to the ability or aptitude of the child. Accordingly, the tribunal finds that this ground of refusal exists.

Whether the Tribunal is satisfied that in all the circumstances it is appropriate to confirm the decision of the education authority: section 19(4A)(a)(ii) of the 2004 Act

78. The tribunal was satisfied that the ground of refusal at paragraph 3(1)(b) (the education normally provided at the specified school is not suited to the age, ability or aptitude of the child) of schedule 2 to the 2004 Act exists.

79. The tribunal must look at matters afresh and determine whether in all the circumstances it is appropriate to confirm the decision of the education authority refusing the placing request. In doing so, the tribunal must take account of all of the circumstances including those relevant to the consideration of the grounds of refusal and those that are not.

80. The tribunal considered again and took into account its reasons for finding that the ground of refusal at paragraph 3(1)(b) exists.

81. The tribunal considered again the evidence with regard to the specified school, its cohort of pupils, the education normally provided there and its educational environment. The tribunal considered again the evidence with regard to the child, including her ability and his aptitude. The tribunal considered again the evidence with regard to the child's nature, relative lack of dysregulation, and potential to develop socially, linguistically and educationally.

82. Having considered all of the foregoing and taking account of the fact that the tribunal has already found that the education normally provided at the specified school is not suited to the child's ability or aptitude, the tribunal is satisfied that the respondent was correct to decide to refuse to place the child in the specified school. Accordingly, the tribunal is satisfied that in all the circumstances it is appropriate to confirm the decision of the education authority (refusing the placing request).

Paragraphs 8, 20 and 53 in this decision have been edited by the Chamber President for privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018.