**DECISION OF THE TRIBUNAL**

FTS/HEC/AR/22/0013

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| **Witness List:**  **Witnesses for Appellant:**  The child’s mother (**the appellant**)  Principal at School B **(witness E)**  **Witnesses for Respondent:**  Pupil Support Teacher, School A **(witness A)**  Deputy Head Teacher, School A **(witness B)**  Principal Teacher of Pastoral Support, School A **(witness C)**  Educational Psychologist **(witness D)** |

**Reference**

1. The appellant made a placing request for the child at School B, an independent special school, in November 2021. The placing request was refused by the respondent in January 2022, on the ground specified in **Schedule 2, paragraph 3(1)(f) of the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act)**. The appellant lodged a reference in March 2022. The appellant asks us to require the respondent to place the child in school B.

**Decision**

1. We **confirm**the respondent’s decision:
   1. We are satisfied that the ground for refusal of the placing request exists **(Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act), section 19(4A)(a)(i))**. In particular, we are satisfied that:
      1. School B is not a public school;
      2. the respondent is able to make provision for the additional support needs of the child in school A;
      3. it is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in school B and in school A, to place the child in school B; and
      4. the respondent has offered to place the child in the school A (**2004 Act, sch. 2, para. 3(1)(f)**).
   2. We are satisfied that it is, in all the circumstances, appropriate to confirm the respondent’s decision to refuse the placing request (**2004 Act, sec 19(4A)(a)(ii)**).

**Process**

1. The appellant made a reference to the tribunal in March 2022 in relation to the Respondent’s refusal of her placing request for the child.
2. The respondent was granted an extension of the period within which to lodge the statement and written evidence. Case conference calls took place in May and June 2022 (T055-T059; and T060-T064). Dates for a fully remote hearing were fixed and directions given about pre-hearing procedure, including the lodging of witness statements and joint minutes of agreed facts (**JMA**) by specified dates.
3. Three JMAs have been agreed on behalf of the parties (T065-067; T073-T075; and T083-T085), the first and second of which were revised during the hearing.
4. An independent advocate met the child in July 2022 and obtained their views (T068-T072). We heard views from the child at the hearing in September 2022. At the request of parties and with our agreement, the independent advocate spoke to the child again in November 2022 (T080-T082). A summary of the child’s views on relevant matters, which we took into account, is referred to in our reasons, below.
5. The bundle (version 11) consists of page numbers as follows: T001-085, A001-A076, R001-R274, including additional documents added during the hearing.
6. An urgent CMC took place in October 2022, the day before the third scheduled hearing day. There had been changes in the child’s educational provision and additional statements and document had been produced close to the hearing date (T076-T079). The hearing was postponed to December 2022.
7. The evidence concluded in December 2022. The hearing was adjourned for submissions. Written submissions were lodged in January 2023. The three JMAs were reviewed and amended: in the first JMA paragraph 31 was deleted; and in the second JMA paragraphs 18 and 19 were deleted following submissions. A further hearing day for oral submissions took place in January 2023.
8. Following the hearing, we considered the evidence and submissions and deliberated.

**Findings in Fact**

*General findings*

1. The appellant is the mother of the child.
2. The child is 13 years’ old.
3. The child has additional support needs in terms of section 4 of the Education (Additional Support for Learning)(Scotland) Act 2004.
4. The child lives at home with the appellant and a younger and older sibling.
5. The child is a second year pupil at school A, a mainstream secondary school, which they have attended since August 2021.

*Findings on the child’s needs*

1. The child has diagnoses of Attention Deficit Disorder (**ADD**)/inattentive sub-type and Autism Spectrum Disorder (**ASD**) with associated social and emotional needs.
2. In June 2022, prior to the current school year, the child was assessed as having dyslexia and dyscalculia.
3. The child experiences feelings of anxiety.
4. The child is not currently on any medication.
5. The child will be kept under low key review by a community paediatric doctor until they are 18, or leave school, whichever is first.
6. The child’s ADD makes it difficult for them to focus on anything that is not of particular interest to them.
7. The child’s ASD can at times make it difficult for them to follow instructions unless they are broken down into smaller manageable tasks.
8. The child is a very literal thinker and struggles to infer meaning from instructions and questions unless explicitly stated.
9. The child can become fixated on certain subjects.
10. The child currently has a focus on Japanese language and culture and World War II vehicles.
11. The child finds comfort in routine.
12. The child will seek clarity in routine.
13. Unexpected changes to the child’s routine will cause them anxiety.
14. The child does not always understand social norms and can sometimes be uncomfortable in unstructured times like breaks and lunchtimes.
15. The child can misinterpret social cues and this can cause them to react in a negative manner.
16. The child is at risk of being socially isolated from peers without appropriate supports in place.
17. The child is easily distracted and requires close adult support to remain on task if the task does not particularly interest them.
18. The child benefits from check-ins.
19. The child is easily distracted.
20. The child can have a poor level of attention in some aspects of learning.
21. The child is not confused by the school environment.
22. The child needs support within a mainstream school setting, in particular pupil support in some classes; an opportunity to develop their understanding of social situations through direct work; an opportunity to develop their numeracy skills; appropriate differentiation and support strategies in the classroom; and strategies to understand and cope with feelings of anxiety.
23. The child does not want to be seen as different from their peers.

*Findings on the provision at school A and suitability for the child*

1. School A is a mainstream school run by the respondent.

1. The child is enrolled in school A and the respondent, which is responsible for the child’s education, has offered to continue this provision.
2. The respondent is able to make provision for the additional support needs of the child in school A.
3. The child’s journey to school takes around twenty minutes and they travel to school either by car with the appellant, or on a bus, by themselves.
4. There is a Child Plan in place for the child which is regularly reviewed by school A, with the participation of the appellant.
5. The child has a targeted support timetable, the most recent version of which has been circulated to teaching staff and provided to the appellant.
6. The child is educated in mainstream classes with the mainstream pupil group (rather than school A’s Department for Additional Support Needs (DAS)).
7. The child receives pupil support in some mainstream classes and their Pupil Support Profile is regularly reviewed by school A, amended as required, made available to teaching staff and provided to the appellant. The Pupil Support Profile details the child’s support needs and suggested strategies to meet those needs.
8. The child is highlighted on class registers as having ASN, which will allow any teacher working with them to know to access the child’s Pupil Support Profile.
9. In or about April 2022, a contextual assessment was undertaken by school A to provide further assessment of the child’s needs in numeracy, which included looking at learning across the curriculum as a whole, in particular numeracy/Maths, literacy and language and is based on the SHANARRI indicators.
10. As a result of the contextual assessment for numeracy, the child was assessed as having dyscalculia and dyslexia.
11. The child is allocated pupil support for four Maths classes per week, comprising: a class with one other pupil one day a week, one to one classes two days per week and a class with two other pupils, supported by a pupil support assistant (PSA), one day per week.
12. For Maths, the staff in school A are using differentiation to support the child.
13. The support for Maths was reviewed in December 2022 and it was agreed that the arrangements can remain the same at present but can be re-visited.
14. In addition to support for Maths, the child receives 11 hours per week of PSA support and 3 hours of PSA time allocated to the child’s registration class.
15. In English, the child has one to one or small group support from a PSA and the class teacher breaks down instructions, talks things through, checks in and ensures that the child knows that there is someone there to support them.
16. In English, the child uses ICT and also has spellcheck and reader.
17. The PSA does not sit with the child but checks in with them to ensure that he understands, scribes if required and uses concrete materials where required.
18. School A has tried, so far as possible, to ensure that the same staff are supporting the child.
19. The appellant’s concern that the child has refused help from PSA support has been raised with school A and is being addressed by the PSA team.
20. The child has started in School A’s anxiety management group in pupil support. On their current timetable, that requires the child to be absent from their DET class and the child has, on occasion, opted to attend the DET class instead.
21. The child is taught modern languages at school A and is currently studying French.

1. School A provides a wide range of National Qualifications which would be available to the child.
2. The child is in a form class in which forty per cent of the pupils have additional support needs.
3. The child has friends within their peer group. The child believes that they have friends in school A.
4. At breaks and lunchtimes the child enjoys spending time with their friends, who include pupils in other classes. They agree a place to meet and look for one another.
5. School A started a lunchtime movie club for the child because that was one of their interests and the child attended it.
6. The child has the availability of using the library at lunchtimes if required.
7. The staff in school A are working with the child to build their resilience if they are in a situation where they cannot find their friends at break or lunchtime.
8. The child has raised concerns with staff in school A about one or two pupils in their classes who do not understand them or pick up on things that they do and say, which can cause them to feel misunderstood.
9. Staff from school A have been working with the child to improve their understanding of social situations, including social stories with a peer group. This will be generalised in other contexts including around school and at home.
10. The social stories group has been made bigger with the addition of two members that the child knows, who have ASN and are also in the child’s class.
11. The child’s class teachers begin and end classes with social scaffolding such as saying good morning and asking the child about things of interest to the child.
12. In smaller groups, the child’s relationship with their peers is becoming more positive but at times it is still difficult.
13. The child has a soft finish on a Friday.
14. The child has a five minute pass which allows them to leave class early to move through school when it is less busy.
15. The child spends time with a pastoral support teacher during which they are able to express their views and make requests for changes to support.
16. The child has not refused to attend school A.
17. The child’s attendance at school is 95 per cent, which is above average for school A.
18. The child was reluctant to attend school on three days in September 2022 and having been advised of this by the appellant, the head of pastoral support spoke to the child to explore their feelings.
19. Staff in school A have experience of working with young people with additional support needs similar to those of the child and some have had specific training.
20. School A is involved in DYW (Developing the Young Workforce), which provides employability and training opportunities for pupils.

*Findings on the provision at school B and suitability for the child*

1. School B is an independent special school with two campuses which run concurrently, in area 1 and area 2.
2. The majority of pupils at school B are residential pupils, some of whom board 52 weeks per year.
3. The majority of the pupils at school B have complex needs.
4. The majority of pupils at school B have refused to attend their previous schools.
5. The majority of the pupils at school B have involvement with CAMHS for mental health issues.
6. The managers of school B are willing to admit the child to the campus in area 1.
7. Prior to school B making an offer to admit the child, they were provided with documentation by the appellant but were not provided with information about the child’s progress at school A.
8. The school B campus in area 1 is currently single gender provision for pupils aged 12 and over. The school B campus in area 2 will be co-educational and fully residential.
9. There are currently around 29 pupils at the campus in area 1 but most 16+ residential pupils have already been moved from the campus in area 1 to the campus in area 2.
10. The child would be placed in a single sex class of five pupils of similar age at school B’s Fife campus. Three of the pupils are residential and two are day pupils.
11. The child has a different needs profile from the majority of the pupils at school B.
12. The curriculum at school B prioritises life skills over academic achievement.
13. The subjects which will be offered to the child at school B are Maths, English, Art, PE and Science.
14. No modern languages or social science will be available to the child at school B unless offered as an elective subject.
15. It is unlikely that a wide range of national qualifications will be available to the child at school B.
16. School B does not provide transportation for day pupils.
17. The child would require transportation to and from home and school B in order to attend as a day pupil.

*Findings on the respective cost of school A and school B*

1. The total annual cost for a day placement at school B is £42,939.00, exclusive of transportation costs.
2. Transportation costs between the child’s home and school B are a necessarily incidental expense of the provision at school B.
3. The total annual cost to the respondent (including costs for staffing, janitorial costs, cleaning etc.) per pupil attending school A full time is £6,332.00, excluding any cost associated with a PSA and attendance at anxiety management classes.
4. The on costed hourly rate for a PSA at school A is £15.64. The child is allocated 11 hours of PSA time a week at a cost of £6,681.00 per school year, exclusive of the cost of additional one to one support for Maths.

*Other findings*

1. When the child returns home from school they generally have a snack and then spend time in their room with the door closed from around 4.30pm to dinner time at 6.00pm. On the two weekday evenings when the child goes to a martial arts club, he has dinner earlier. While in their room the child sometimes plays on their Playstation.
2. The child does not do any homework at home.
3. The child has two friends they spend time with outwith school, neither of whom go to school A or school B. Both have additional support needs.
4. The child attends a local martial arts club two evenings a week which he enjoys. The child attends a local gym at least once a week. The child is about to start Army Cadets.

**Reasons for the Decision**

1. There was no dispute between the parties on the question of whether the child has additional support needs, as defined in section 1 of the 2004 Act.
2. The ground of refusal relied upon by the respondent is para 3(1)(f) of schedule 2 of the 2004 Act.
3. The onus of establishing the ground of refusal lies with the respondent.
4. In considering whether the ground exists, we considered all of the evidence and submissions but summarise only evidence which we accepted or rejected and those matters to which we gave weight when reaching our decision. The discussion should be read together with our findings in fact.

***Schedule 2, para 3(f) of the 2004 Act***

1. This provision requires the respondent to satisfy us that all of the following conditions apply:

(i) school B is not a public school;

(ii) the respondent is able to make provision for the additional support needs of the child in school A;

(iii) it is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in school B and in school A to place the child in school B

(iv) the respondent has offered to place the child in school A.

1. There is no dispute that sub paragraphs (i) and (iv) are established by the respondent. The appellant disputes that the respondent can establish sub paras (ii) and (iii).

***Para 3(f)(ii)***

***Whether the respondent is able to make provision for the additional support needs of the child in school A***

1. The respondent submits that it is able to make provision for the additional support needs of the child in school A. The appellant submits it is not able to do so.
2. The hearing took place over several months and concluded with submissions in January 2023, during which time the child was in second year at school A and their educational provision was being kept under regular review by school A, with the participation and agreement of the appellant. While we have heard evidence about supports that were previously in place, in reaching our decision we have considered the provision which is presently in place at school A to provide for the child’s additional support needs, as well as the fact that there is a process in place for regular review of that provision.
3. School A has put a variety of supports in place for the child as referred to in our findings of fact.
4. The appellant gave evidence that she did not know if some of the supports were actually in place at school A. The position she adopted in evidence was that unless she had witnessed something firsthand or the child had told her, she did not know whether the supports were in place. This was at odds with the documentary and oral evidence from other witnesses which we preferred. We are satisfied that the supports we saw and heard evidence about are in place at school A.
5. We are also satisfied that the level of support the child receives at school A is appropriate to meet their present needs, as well as the fact that there is a review and planning cycle in place.
6. We noted that some of the support provision at school A, such as the anxiety management group which has been offered for the child, currently necessitates the child missing a timetabled class of DET on the current timetable, about which the appellant said she was unhappy. While we acknowledge that this support has a consequential effect on a period per week of the child’s education, we consider that it is an appropriate support for the child’s needs, in particular their feelings of anxiety.
7. We accepted evidence that the child has friends at school A and considers that they have friends. Although the appellant is of the opinion that they are not ‘real’ friends and/or they may not be suitable friends, we accepted the evidence from the school A witnesses that the child does spend time with genuine friends in their peer group, both those from the child’s class and those in other classes.
8. The child’s views obtained by the independent advocate about whether they are happy at school A have fluctuated. The child apparently freely provided their views to the independent advocate, although contacted the advocate afterwards to express concern about upsetting their friends and teachers at school by them seeing what had been said as the child did not want to hurt their feelings by saying that they struggle at school A.
9. The child’s concern about what others would think about their views was reflected in Witness C’s evidence. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
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14. We accepted evidence from the appellant that the child can spend periods of time in their room after school, but we were not persuaded that this is due to problems with the provision at school A. We also thought that the time estimate of “hours” was overstated, given that there was evidence of a typical day, including travel home from school, a snack, dinner time and then evening activities, which would not allow for the child to spend multiple hours in their room. We also accepted evidence that the child had a Playstation in their room which they enjoyed using. We cannot reliably attribute the child’s behaviour in spending periods of time in their room at home after school as being causally linked to their experiences, whether positive or negative, at school A.
15. We are satisfied that the respondent is able to make provision for the additional support needs of the child in school A and that the respondent has discharged the burden of proving that that part of the ground is established.

***Para 3(f)(iii)***

***Whether it is reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in school B and in school A to place the child in school B***

*Respective suitability*

1. The respondent submits that school A is more suitable for the child than school B. This is disputed by the appellant.
2. In addition to the findings in fact and factors referred to above in relation to school A, we heard evidence from the appellant and Witness E, the Principal of school B, about the provision at school B.
3. There were a number of matters which caused us to place less weight on Witness E’s evidence than we might have done, given that they are the Principal of school B. In particular, it was of note that prior to a place being offered at the area 1 Campus of school B, neither Witness E nor anyone else at school B requested or had sight of any information about the child’s progress at school A. Witness E had been provided with a bundle of documentation from the appellant, which had not been inventoried or copied and had been handed back to the appellant, with the result that Witness E was unable to give evidence about what documentation he had considered prior to offering the child a place.
4. Additionally, Witness E had only met the child once at home and during the child’s visits to the school they were met by another member of staff, with whom Witness E had not consulted after the visits.
5. We also took into account the views of the child, which had been provided both to the independent advocate and to us, on the second day of the hearing.
6. In the first discussion with the independent advocate, the child’s view about school B was based on a visit and they thought it was “really good. There are drawings on the ceiling which are rather beautiful and there is a grand piano at the bottom of the staircase”. The child commented on the fact that the number of children in the school (29) is the same as a class at school A; and that there are only four children in a class. The child also discussed the layout at school B, including the pool tables, football table, sofa, lounge, kitchen, living room, Xboxes and Playstations. He said that the school really has money, he is excited and it fascinates them.
7. When the child gave their views to the tribunal in September, they spoke about school B as opposed to school A. The child said that they really like school B but feel like they want to stay with their friends. They asked whether if they do not like it may they have a way to go back to learning at school A. The child is worried about making friends at school B. The child spoke positively about the size of the school, class size and lounge facilities. The child said that they liked both schools and said “I wish if I could, I could give [school B] a try and if I do not like it I could go back to [school A]”.
8. In the second discussion with the independent advocate, the child was asked about their second visit to school B which had taken place by that time. The child said that it was so good and that they had a meal with their mum afterwards. The child said that they felt welcome as a result of pupils saying “hi”. The child said that they were told that there were only 30 people in the whole school with four to six in a class and that that would mean that teachers would be able to give them a lot of attention. The child spoke again about the chill out room and facilities and also spoke about the celebrations which would take place for birthdays. The child spoke about the opportunity to be involved in grounds maintenance. The child said that they thought that this would be the place for them and “would get me to where I want to be in life and get me ready”. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
9. We also had available to us evidence about mind maps completed by Witness C in meetings with the child. In these meetings the child’s views were further explored and it was clear that there was some conflict in what the child wished to do and also that there was some pressure as a result of not wanting to upset other people or to keep other people happy. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
10. Clearly, school and class sizes are significantly smaller at school B than school A. However, we did not consider that respective school size and class size was determinative on its own of respective suitability. In this regard, we also took into account the evidence of the educational psychologist that class size alone is not an indicator of suitability and ability to meet a child’s additional support needs.
11. There was evidence, which we accepted, that school A has taken the child’s needs into account in the round and is continually adapting to meet those needs and to address concerns raised directly by the child and by the appellant. The appellant is involved in the ongoing discussions about the child’s needs and the supports required to meet those needs.
12. The child has friends in school A and is being supported to socialise more widely with their peers, including the work with social stories. The child is being educated in a co-educational mainstream provision and has friends of more than one gender. School B is generally dealing with pupils with more severe and complex needs than the child and only offers single sex provision. The majority of pupils at school B were school refusers at previous schools and 85% have involvement with CAMHS in relation to mental health issues. The child has a 95% attendance record at school A and is not involved with CAMHS. We are not satisfied that the child will have a suitable age appropriate peer group at school B. No evidence was led about what the current and future movement of pupils from the area 1 campus to the fully residential area 2 campus, would mean for the child in successive years were they to be placed in school B.
13. The educational provision at school B is extremely limited in terms of both selection of subjects and presentation for national qualifications, whereas the child is being educated in mainstream at school A, with appropriate supports in place, and can be expected to sit national qualifications in later years. The child currently studies modern languages and social sciences and there is no modern language or social sciences provision on the timetable at school B.
14. The child can attend school A daily, with a short journey, either independently by bus or by getting a lift. This allows the child to spend time at home after school and also to attend local activities in the evenings. The school day at school B is longer as it is planned around the residential pupils and the school is further away from the child’s home and would require transportation. Witness E said that school B did not provide transportation for day pupils. No evidence was led about the transportation which would be required.
15. In summary, having taken all evidence and submissions into account, as well as the views of the child, in so far as we can place weight on them, we are of the view that the current provision at school A is suitable for the child; and that the provision at school B is less suitable for the child than that offered at school A.
16. We are therefore satisfied on the basis of the evidence that the provision at school A is more suitable for the child than the provision at school B.
17. Had the question of respective suitability been finely balanced, the respective costs of the provision would have had more significance. Give our finding about suitability, the respective costs of the two schools are a less relevant consideration. However, for completeness we have included our findings in relation to respective costs, discussed below.

*Respective costs*

1. The respective costs of the basic provision at school A and school B were a matter of agreement. However, no evidence was led about the transportation costs of the child attending the area 1 campus of school B as a day pupil, which would be a necessarily incidental expense of the provision at school B. We are only able to conclude that the provision at school B would have a total annual cost in excess of £42,939.00, once transportation costs are added to that figure.
2. In relation to school A, there was no evidence about the cost of attendance at the anxiety management group which the child is due to attend or the PSA support in four periods of Maths per week, which varies between one to one and small group support.
3. Representatives were asked to address these matters by way of discussion and possible agreement of evidence but by the final day of the hearing had not done so.

1. We are satisfied on the basis of the available evidence that the cost of the provision at school B with necessary incidental expenses is more than three times as much as the cost of the provision at school A and would be more had the necessary incidental expenses of transportation costs for school B been provided in evidence.

*Whether it is reasonable to place the child in school B*

1. We are satisfied on the basis of respective suitability and respective costs of the two schools that it would not be reasonable to place the child in school B and that the respondent has established that part of the ground relied upon.

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

1. We have considered all of the evidence, given weight to evidence which is credible and reliable and considered submissions and the views of the child.
2. The child’s views carried particular weight. In this case, their views were consistent with other credible and reliable evidence, in particular from witness C.
3. We are also satisfied that the provision at school A is being kept under regular review, with the participation and agreement of the appellant and that school A is committed to continuing to support the child’s needs, in consultation with the appellant.
4. We consider that it is appropriate in all of the circumstances to confirm the respondent’s decision to refuse the appellant’s placing request.