



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/22/0190

List of witnesses

Witnesses for Appellant:

- **Witness D** - Depute Head Teacher school A
- **Witness E** - Specialist Occupational Therapist

Witnesses for Respondent:

- **Witness A** - Service Manager for ASN & Wellbeing Team (Education Officer)
- **Witness B** - Lead Officer for Improvement, ASN & Wellbeing and HeadTeacher
- **Witness C** - Principal Teacher

**Reference**

1. This reference relates to an appeal against a refusal of a placing request for the child to attend the specified school, school A.

**Decision**

2. The tribunal overturns the decision of the respondent to refuse the placing request, in accordance with section 19(4A)(b) of the Education (Additional Support for Learning)(Scotland) Act 2004 (**the 2004 Act**).
3. This means that the placing request is granted. The tribunal requires the respondent to place the child in school A with immediate effect.

**Process**

4. A hearing took place over three days in June 2023. The hearing was of a hybrid nature. The appellant and child attended in person. The witnesses for the respondent appeared by video conference (WebEx).

5. Prior to the hearing three case management calls took place between February and May 2023. At the case management calls a number of procedural matters were discussed, with directions to regulate the hearing and the pre-hearing process.
6. The respondent made a formal motion in May 2023 to amend their case statement. The amendment reflected that a new educational provision was now offered to replace the original offer at school C. It was stated that the new educational provision was due to be ready for use in June 2023. The motion was opposed. A hearing to consider this preliminary matter was held on May 2023, with submissions being lodged in advance. A direction was issued on May 2023 allowing the amendment by the respondent. Following a request for a review of that decision a revised preliminary decision was issued on May 2023. The decision remained that the amendment of the case statement was allowed (T066–T71).
7. The appellant was allowed to amend their case statement in response. Updated witness statements were lodged. Two further conference calls were held to identify new dates. Additional papers were lodged on the morning of the hearing and were included in the bundle, comprising T1-T83, A1-A179 and R1-R187.
8. Statements were lodged in advance of the hearing and evidence was heard from the following witnesses:
  - Witness A (R074–R088, R134–R149)
  - Witness B (R045–R062, R150–R167)
  - Witness C (R173 -R181)
  - Witness D (A093–A103)
  - The appellant (A082–A092, A124–A141)
9. The child attended on the morning of the third day of the hearing and provided his views directly to the tribunal.
10. Outline submissions were lodged in advance of the hearing. Each party had the opportunity to expand on their submissions orally following conclusion of the evidence, and to comment on the submissions of the other.
11. Before reaching our decision we considered all written and oral evidence along with written and oral submissions.

## **Findings in Fact**

### *General findings*

12. The appellant is the mother of the child, who is eleven years of age. The child resides with the appellant, his father and his two siblings.

13. The child is presently enrolled at school D where he is completing P6. School D is a mainstream primary school. The child is supported by the Complex Needs Primary Team.
14. School A made a written offer of a place to the child on October 2022. The appellant made a formal placing request to the respondent on October 2022 for the child to attend school A.
15. The respondent refused the placing request by letter dated November 2022.

### *The Child*

16. The child has Down's Syndrome (Robertsonian Translocation) with associated physical and cognitive challenges. The child has low muscle tone and excessive flexibility in his joints. He requires adaptive seating. He wears glasses.
17. The child has sensory difficulties and can find noisy or busy environments difficult.
18. Transitions are very difficult for the child. The child doesn't deal well with uncertainty.
19. The child's speech is dysfluent which significantly impacts his communication.
20. The child is sociable and engaging. He is a keen communicator. He enjoys baking and music and attends music lessons outside of school.
21. The child also attends tennis lessons, swimming lessons and a kickboxing club.
22. The child is a confident reader and has a good base in numeracy skills. He is working within the first level of Curriculum for Excellence, accessing some of the elements of second level.
23. The child requires a differentiated curriculum with visual supports to aid his learning. He is a keen learner who is able to access a differentiated mainstream curriculum with learning being chunked and with visual support, including a visual timetable.
24. He requires adult support and scaffolding, including some 1:1 and small group support to ensure that he understands the concepts being taught, what the task requires him to do, to help him if he gets stuck and to help him to focus.
25. The child benefits from regular short relaxation breaks during tasks and activities. Movement breaks are built into his timetable to support his regulation, reduce stress and ensure that the child is able to focus and attend to tasks.
26. The child benefits from large body movements to aid self-regulation.

27. The child does not benefit from the textures or lighting usually in a sensory room (para 56).

#### *School A*

28. School A is not a public school. School A, an independent school, receives public funding directly from the Scottish Ministers. School A provides individualised person-centered, skills-based learning for children and young people up to the age of 18 who have complex and additional support needs, including autism, sensory impairment and communication difficulties.

29. School A has capacity for 18 pupils. There are presently 13 pupils at school A.

30. School A has a maximum class size of six, each supported by a full-time teacher and two or three Learning and Wellbeing Practitioners. The pupil:staff ratio at present is near 1:1.

31. The school is part of a larger campus. There are breakout spaces for each classroom, several play areas and extensive grounds, with daily opportunities for outdoor learning. There is a swimming pool which is accessed regularly by pupils.

32. The spaces within school A are calm with a muted colour scheme and are designed to ensure a low arousal environment throughout.

33. School A has two classrooms, library space attached to the classrooms, a sensory room, art room, quiet room, and a life-skills room. The classrooms are each 49 square metres (**m<sup>2</sup>**).

34. School A uses a total communication approach for learning which includes symbols, signing and digital supports. School A has smartboards in the classrooms. All pupils have their own tablet computers.

35. In addition to focusing on numeracy, literacy and health and wellbeing, school A also focuses on creative activities such as art and crafts, yoga, massage, home economics and craft design and technology.

36. Class composition is based on similar developmental levels rather than age and some classes have fewer pupils than in others.

37. Each child has an Individual Education Plan (**IEP**).

38. School A follows Curriculum for Excellence from pre-early level up to nationally accredited awards, including some Highers. All teaching staff are GTCS registered.

39. The child would be one of a class of 6 pupils. In that class there would be one P5 pupil, two P7 pupils, the child, an S1 and an S2 pupil.
40. One pupil is deaf and non-verbal and communicates through British Sign Language and an app on their tablet computer. Two pupils attend on a part time basis in the form of one day a week (one P7 and one S2).
41. Most of the pupils are working at first and second level Curriculum for Excellence with one pupil moving into third level for literacy.
42. School A has a full-time Speech and Language Therapist (**SLT**). There are opportunities for individual and group sessions with SLT.
43. The child has gone through an assessment process prior to being offered a place at school A.
44. School A is able to make provision for the additional support needs of the child.

#### *School B*

45. School B is a new specialist provision within a mainstream school, school E. School B will provide education for pupils with autism and complex additional support needs, catering for pupils and young people from age 10/11 years until 18 years of age.
46. When the academic term begins in August 2023 there will be four children enrolled, with one Principal Teacher, one class teacher and 2.5 Support for Learning Assistants (**SLA**).
47. The child was offered a place at school B by way of a letter dated May 2023. This followed a Resource Allocation Group (**RAG**) meeting on May 2023, prior to seeking the views of the parents or of the child.
48. There are plans for a purpose-built space for school B on the ground floor of school E. This will include a teaching kitchen, sensory rooms and direct access to outdoor space from the classrooms. This will require significant building work (removal of internal walls) and the formation of a new entrance. At the earliest, this will not be completed until November 2024 and is dependent on funding.
49. School B is currently located in an interim space, with access by an entrance that is used by staff members, visitors to the school and tradespeople. There is no through-traffic in this area. Pupils at school E are not able to access the area where school B is presently located as this is a fobbed area of the building.
50. This interim space has been designated "the mitigation space", reflecting the fact that the specialist provision is not yet built.

51. The school bell has been turned off within this space.
52. School B currently consists of a long corridor to the left of the entrance, with a glass door at either end. At one end of the corridor the glass door provides access from the entrance and at the other, the glass door exits to an outdoor space.
53. Accessed from this corridor are: two classrooms - room 23 and room 27; one room which is being turned into a sensory room; one room to be used as a small office and regulation area; and a toilet.
54. Room 23 will be used for general education where each child will have their own workstation. There will be specialised seating. There will be space at the back of the room with resources including a weighted blanket, beanbags, and a blackout tent. The room will have tall cupboards so that teaching materials can be put away to leave the space uncluttered and distraction free. The walls are neutral. There is a chalkboard which covers one entire wall. There is a wheeled whiteboard that will be shared between the two classes.
55. Room 27 is larger and can be used for a number of purposes. It can be used as a social area, as a space for sensory play such as kinetic sand and water, and to play games. There will be movement equipment stored in this room for outside use, including a trampoline and scooter boards. This room has round tables to allow the pupils to learn with others in a shared space. At lunchtime this room can be a quiet space for the pupils to have their lunch. This is also a room that could be used for regulation by the pupils.
56. The sensory room, or 'nurture nook', will be a space for pupils to self-regulate or to regulate with support. There will be lots of textures in this room. There will be a bubble tube, fibre optic lights, a weighted blanket and black out blinds. There will be a range of tactile materials and fidget toys.
57. The office will be used as a base by the Principal Teacher and will have a blackout tent for pupils to use as an alternative quiet space.
58. There are also classrooms in school E, including the home economics classroom, music room, sports hall and dinner hall, where pupils of school B can join pupils of school E if appropriate.
59. School E has outdoor spaces including a garden kitchen, an astroturf area surrounded by a tall fence, and a long jump, to which the pupils of school B could have access with support from an adult.
60. The outdoor space for school B is accessed through the glass door and down seven concrete steps. This leads to a slabbed area at the side of the building. In one direction from this area an access road leads to the garden kitchen. In the other direction there is

a path which leads to the back of the main building and the area where school E pupils enter and exit the school via the school bus.

61. The outdoor space would be accessed at break times and for movement for self-regulation.
62. In order to form the outdoor area which is exclusive to school B, fencing will be erected from the back of the steps, along the side of the steps and for a short distance to a low wall which forms part of a raised garden bed. This will be quite a small area.
63. The date of work involved in fencing off this outdoor area is not known.
64. There is no play equipment in this outdoor area. No information was provided as to what outdoor equipment, if any, would be used in this area once it had been fenced.
65. Photographs of the mitigation space of school B, including the outdoor area, and the immediately surrounding area, were lodged (A142-A164).
66. A community sport and leisure centre is located next to the school E. School B has secured a weekly slot in the swimming pool.
67. School B has space for 12 pupils. The maximum class size depends on the needs of the pupils, their age, stage and additional support needs. Generally, there will not be more than 6 children in a class.
68. From August 2023 there will be 4 pupils enrolled in school B (not including the child). One is in P7 and will be transitioning throughout 2023/24 and will come into S1 in school B in 2024/25. Of the three other pupils who will be attending in 2023/24, one will be in S1 and two will be S2.
69. Curriculum for Excellence will be offered and each pupil will have a differentiated curriculum to meet their needs. The curriculum will focus on literacy, numeracy and health and wellbeing. Where it is identified that a pupil might benefit from accessing an activity within the mainstream high school, opportunities will be built into their Child's Plan.
70. Pupils enrolling in 2023 will all be in one class with a teacher and 2.5 support staff. The S1 year pupil will be doing some mainstream learning in school E. One S2 pupil will be spending the majority of their time in mainstream. It is not yet known if the other S2 pupil will access mainstream classes.
71. With regard to academic peers, the child would be likely to learn with an S1 pupil who is working within early/first level across the curriculum.

72. If he were to attend school B, the child would complete his primary 7 year but this would be with secondary school pupils. He would access a broad general education. The child would have a shorter day than other pupils at school B to reflect that he is in primary, not secondary, education.
73. If the child wanted to access mainstream subjects, such as music, subject specialist teachers from school E could be brought to school B, or they could video record their lessons for the child to watch.
74. In school B the child would benefit from the visual choice boards, visual timetables and the symbolised environment that will be embedded into the practice at school B.
75. The class can break away into smaller groups for more focused learning. Some pupils might be in room 27 doing life skills supported by an SLA while some are in room 23 learning a new concept supported by the class teacher.
76. Each pupil will be provided with a Chromebook, touch screen if preferred.
77. Other professionals such as SLT, Occupational Therapy and Physiotherapy are available by referral through a service level agreement with the local NHS.
78. The number of pupils in the academic year 2024/25 is anticipated to increase by a further three pupils.
79. If the budget to complete school B is further delayed, or does not become available, school B can be extended by using other rooms in school E.
80. The child has visited school B once in advance of this hearing. He enjoyed activities in the home economics classroom which he accessed through the main school building. He also enjoyed the long jump within the outdoor area of school E.
81. Transition work to school B could start during the summer.
82. A Child's Plan has not yet been created for the child.
83. The interim provision at school B is a blank canvas at present. The rooms are still to be furnished and fitted out. Sensory items were being delivered to school B as at the first day of this hearing. Specialist seating is not yet present. Overhead lighting is harsh, and new lighting is being investigated.
84. The classrooms are small and therefore need to be planned carefully. It would be difficult for a child to make large movements within the space, including the outdoor space.
85. The outdoor space is not yet fenced off and it is not possible for the child to access or play in it safely at the moment. There is no play equipment in it.



86. The spaces are being set up and the pupils presently transitioning to school B are being invited to take part in designing the spaces.

### *Findings on Costs*

87. The cost for a day placement at school A for a full academic session of 38 weeks for the session 2023/24 is £39,700. A quote has been provided for the cost of transport, which includes an escort, in the sum of £25,984 per annum.

88. There is already a child placed at school A by the respondent. If transport can be shared this will reduce that cost.

89. School B has a budget to purchase the initial set up items, which include seating, technology and sensory items. Thereafter, an annual budget will be allocated to school B. The budget will be based on the number of pupils. The annual budget 'per child' is unknown.

90. If transport is required to and from school B it is likely that the child would join an existing transport run with little to no additional cost.

### *The Views of the Child*

91. We had the benefit of speaking directly with the child. He was happy to engage with us and to tell us about his interests and hobbies. He was able to describe, very briefly, the two schools but was unable to tell us what he liked or disliked about them.

92. The child did tell us that he wants to go to school A.

### **Reasons for the Decision**

93. The parties are agreed that the child has additional support needs in terms of section 1 of the 2004 Act. Having considered the evidence, we are satisfied that this is the case.

94. The respondent's refusal of the placing request is based on schedule 2, paragraph 3(1)(f) of the 2004 Act, and in particular, (ii) and (iii).

95. Paragraph 3(1)(f) states that the duty imposed on the respondent to place the child in accordance with the parent's wishes does not apply (is a ground of refusal) if **all** of the following conditions apply, namely—

- (i) the specified school is not a public school,

- (ii) the authority are able to make provision for the additional support needs of the child in a school (whether or not a school under their management) other than the specified school,
- (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 the specified school and in the school referred to in paragraph (ii), to place the child in the specified school; and
- (iv) the authority have offered to place the child in the school referred to in paragraph (ii).

96. Only if a ground of refusal exists, do we have to consider whether, in all of the circumstances, it is appropriate to confirm the decision of the respondent (section 19(4A)(a)(ii) of the 2004 Act).

97. The respondent bears the burden of proof.

98. The assessment point is at the time of the hearing.

*Condition (i): the specified school is not a public school*

99. The specified school is not a public school and accordingly 3(1)(f)(i) is satisfied and this element of the ground of refusal is met.

*Condition (iv): the authority have offered to place the child in the school referred to in paragraph (ii) of 3(1)(f)*

100. The respondent has offered to place the young person in school B and accordingly 3(1)(f)(iv) is satisfied and this element of the ground of refusal is met.

*Condition (ii): the authority are able to make provision for the additional support needs of the child in a school other than the specified school*

101. The respondent asserts that they are able to make provision for the additional support needs of the child in a school other than the specified school, in fulfilment of paragraph 3(1)(f)(ii).

102. At the time that the respondent sought permission to amend their case statement to reflect that school B was now being offered, it was stated that the new educational provision was due to be open and ready for use in June 2023.

103. The appellant referred us to the case of *M v Aberdeenshire Council* 2008 SLT (Sh Ct) 126. This is the settled authority that the time at which the tribunal must be satisfied that the conditions in section 3(1)(f) have been met is, at the very latest, the date of the hearing and not at some future date.

104. The provision offered for school B has still to be formed. The educational provision is currently being housed in a 'mitigation space'. This is intended to be an interim provision, but there is no guarantee that funding will be approved for the completion of the intended provision. The interim space may become its permanent location.
105. The classrooms and other rooms in the mitigation space are still to be furnished. Witness C advised that she has an unlimited budget to purchase the necessary furnishings and supplies. Orders have been placed and some are already being delivered. If additional requirements are identified, these can also be ordered.
106. We had the benefit of photographs of the mitigation space and its outdoor area. At the date of the photos and at the date of the hearing the rooms had not yet been set up and the fencing demarcating the outdoor area for the exclusive and safe use of the pupils of school B was still to be erected, with no details of what this would look like, and no date given when it would happen.
107. Given that the child needs to regulate using large movements, one of the main spaces he could do so is not ready for him.
108. The outdoor space is accessed by descending concrete steps. The child has physical challenges as described in paragraph 16. We consider it likely that he will always require adult supervision to access the outdoor space safely.
109. From the photographs we could see that the two classrooms were of different sizes, with room 27 being the larger. They were both relatively limited in size. We are told that the classrooms at school A (49 sqm, paragraph 33) were just under double the size of the rooms at school B. Once fully furnished, there would be less space available for the child to move freely in.
110. There are two rooms to be used as classrooms, with room 27 having multiple uses assigned. If one or more pupils were working with the teacher in one room and one or more pupils were working with the SLA, then neither of these rooms might be available as a space for the child for self-regulation.
111. We are told that the child is unlikely to make use of the sensory room. The only other space would be a blackout tent in the office. This is unlikely to offer the child the space he would require to make large movements or move about freely.
112. Witness C is enthusiastic about what school B will be able to offer. However, the provision is, at the date of the hearing, not fully furnished or resourced. School B will not officially be open for pupils to attend until August 2023, although the other pupils are currently going through the transition process.

113. Witness C had not yet received relevant paperwork for the child and there is no Child's Plan for the child in place. The plan would be created if the child was to attend at school B.
114. We do not consider that there would be an appropriate peer group for the child in terms of age and stage of learning. Two of the three other pupils will be accessing mainstream classes at least some of the time. There may be times when the child is the only pupil in the class.
115. Of the three pupils who would be in the class with the child, at least two of them would be accessing mainstream classes for at least some, if not most of their time. They would move in and out of the child's class, causing the number and make up of peers to change. The child, however, finds change and transitions difficult.
116. The child would find difficulty in accessing mainstream classes, given the challenge of the noisier and busier environment of school E. It is anticipated that where he does access mainstream subjects, these would be brought to him, or he could be provided with a videoed lesson to watch. (see paragraph 63).
117. We are not satisfied that school B can fully meet the child's needs and therefore condition 3(1)(f)(ii) of the ground of refusal is not met.
118. Since we must be satisfied that all four conditions of 3(1)(f) apply and, having found that one of the four conditions has not been met, namely, condition 3(1)(f)(ii), we do not need to consider the remaining condition 3(1)(f)(iii) - respective suitability and respective cost.
119. However, for completeness, we did consider this condition.

*Condition (iii) – it is not reasonable having regard to the respective suitability and respective cost*

120. In relation to **respective suitability**, as stated in our reasoning at paragraphs 105 to 114, we do not consider that school B can fully meet the child's needs.
121. The rooms are relatively small. The classrooms and sensory room are still being set up and fitted out. The child would have limited opportunity to access space for self regulation. The outdoor space is limited and not independently safely accessible and has still to be fenced.
122. The peer group at school B is different from him in both age and stage and ability. At school B the child would also be differentiated from his peers by attending at primary school hours.

123. At the time of the hearing school B has been provided with limited information about the child. They have not yet started preparing a Child's plan to identify how best to meet his needs.
124. In contrast, at School A the child would be in a class of 6 pupils all working at level 2/3 Curriculum for Excellence. While there is a range of ages, the pupils in this class are appropriate for the child, he would fall within the middle of the ages and is suited to their level of learning. (see above, paragraphs 39 and 41)
125. School A has suitable indoor space and extensive outdoor grounds with areas which can be used for play, outdoor learning and self-regulation through movement.
126. At the date of the hearing, school A is fully functional. Having carried out a detailed assessment before offering a place to the child, it has a clear picture of his needs and how they can be met by them.
127. We consider that school A is more suitable for the additional support needs of the child than school B.
128. In relation to **respective costs**, insufficient evidence was led by the respondent to allow us to make a comparison. The position of the respondent is that there is no additional cost to the respondent to place the child at school B.
129. However, we note that school B has a budget to purchase the necessary resources to set up school B which would include any additional items identified as required by the child. An annual budget is allocated to school B based on the number of pupils. The budget will be different based on whether the child is there or is not there.
130. We were referred by the respondent to the case of *SM Appellant*, 2006 CSOH 201. This case held that the cost to be taken into consideration is the additional costs to the education authority if the child went to that school.
131. We cannot accept that there will be no additional cost to the respondent should the child attend school B,
132. We were referred by the appellant to the case of *Slough Borough Council v SENDIST* [2010] EWCA Civ 668, and the passage – 'Every element of a maintained school carries a cost in public funds. The recurrent exercise for Tribunals is to calculate what it is... If it were not so, a like-for-like comparison between public and private provisions could never be made.'
133. While it is true that no additional staff will be required should the child attend school B, the annual budget is based on the number of pupils, so there will be an identifiable cost for the child in the budget.

134. Accordingly, we were unable to make a determination about relative costs.
135. We were referred by the respondent to the case of *M v Aberdeenshire Council*, (above) at paragraph [57] for authority that when considering whether the costs of sending the child to school A as opposed to school B are reasonable, we should have regard to how those costs sit within the overall budget for the respondent.
136. We have not been provided with any information about the overall educational budget for the respondent and so cannot put the cost of school A into any context.
137. School A is more suitable and has satisfied us that it can make provision for the additional support needs of the child.
138. Given that the respondent has not established a ground of refusal, we do not need to consider whether it is reasonable in all the circumstances to confirm their decision (2004 Act, section 19(4A)(a)(ii)).
139. We are satisfied that it is appropriate to overturn the decision of the respondent and to grant the placing request.

## **Conclusion**

140. The decision of the authority to refuse the placing request is therefore overturned. The respondent is instructed to place the child at school A with immediate effect.
141. We are aware that the school term does not commence until August 2023. However, this does not prevent the child from being enrolled at school A, which would allow school A to begin transition planning for the start of the new term.