



Additional Support Needs

**DECISION OF THE TRIBUNAL**

FTS/HEC/AR/23/0053

List of witnesses

For the appellant:

Speech and language therapy team lead (**Witness A**)  
Chief executive officer (**Witness B**)

For the respondent:

Inclusive education manager (**Witness C**)  
Educational psychologist (**Witness D**)  
Headteacher (**Witness E**)

**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(2) of schedule 2 to the 2004 Act to place the child in school A (**the specified school**). The respondent has offered to place the child in school B (**the offered school**).

2. The ground of refusal relied upon by the respondent is paragraph 3(1)(f) of schedule 2 to the 2004 Act, which provides that the duty to comply with placing requests does not apply 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).*

3. Conditions (i) and (iv) were not in dispute. Only conditions (ii) and (iii) were in dispute.

### **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. A case management call took place in July 2023. A preliminary matter was decided by the legal member sitting alone in September 2023. A case management call took place in October 2023.

6. The reference proceeded to a hearing in January and March 2024. The hearing took place via video conference.

7. Parties lodged written submissions as agreed in March 2024.

### **Findings in Fact**

8. The child was born in December 2014 and should now be in Primary 5.

9. The child attended a special school in the Respondent's area from February 2020 until June 2021 having moved to Scotland from England. He returned to England attending a school for children with complex needs from September 2021 until January 2023.

10. The child has not attended school since January 2023. The Appellant made a placing request for the child to attend the specified school. The Respondent offered to place the child at the offered school. He has not attended either the specified school or the offered school.

11. The child has diagnoses of Cerebral Palsy classed as GMFC 5, which is severe; Hydrocephalus, for which he has a shunt; Epilepsy; and Hip Dysplasia. He has recurrent respiratory infections. The child is tube fed. He had a PEG feeding tube inserted in 2015. This was replaced with a Mic-Key button in 2022. The child is fed at 8.00 am, 12 Noon and 4.00 pm. Sometimes he is fed at 9.00 pm. Morning feeding takes about 1 hour and 15 minutes. Lunchtime feeding takes about 1 hour. Afternoon feeding takes about 1 hour. If

fed at 9.00 pm feeding will take 4 hours 30 minutes to 5 hours depending on the quantity he is being fed. The child's weight is low and measures are in place to stabilize and increase his weight.

12. The child has limited mobility and uses a wheelchair. Two people require to hoist him from his wheelchair. The child requires time out of his wheelchair. The child has a physiotherapy programme. He uses other specialist equipment such as a hoist, standing frame, seating chair and bath seating chair.

13. The child is non-verbal. He can use vocalisations to attract attention to indicate pleasure or to indicate when he is upset. He responds to intensive interaction styles of communicating and will use vocalisations and eye contact to engage with adults

14. The child requires close attention to ensure his needs are met. He has regular seizures due to Epilepsy. These can present as absences. He requires close attention so that seizures are not missed. The child has been hospitalized due to seizures. The child has a Paediatric Seizure Management Plan with rescue medication, Epistatus (Midazolam) for seizures lasting for 5 minutes.

15. The child is dependent on adult support to meet his personal care needs. He has reflux on a regular basis. The child has poor head control and requires close attention to avoid aspiration when he vomits.

**[Part of this paragraph has been removed by the Chamber President to maintain 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)]**

16. The child had a procedure to remove metal work from his hip in July 2023. His condition is being monitored. Further surgery may be required. The child may require gall bladder surgery in the near future.

17. The child has a significant medication regimen.

18. The offered school is a school for children with complex needs with capacity for sixty-four children. The cohort of pupils includes children who are non-ambulant wheelchair users who require intensive physiotherapy and occupational therapy programmes delivered in school; children who require seizure management; children who require postural management; children with eating, drinking and swallowing difficulties, including children who can take nil by mouth and who require enteral feeding.

19. Some classes in the offered school have eight children with three support staff and the class teacher. Children with greater needs are grouped in classes of eight children with four support staff and the class teacher.

20. The staff of the offered school are all trained in emergency first aid, seizure management and feeding children. If additional training was required to allow staff to meet the needs of a child this would be provided.
21. The offered school works on a multi-agency basis with speech and language therapists, physiotherapists, occupational therapists, dieticians, NHS additional needs nurses from the local integrated community children's nursing service and other NHS colleagues to ensure that appropriate and up-to-date care plans for pupils are in place for school staff to deliver and to ensure that the school environment is safe and children are able to attend school. Staff are familiar with moving and handling children, eating and drinking plans, enteral feeding, seizure management and postural management and work closely with the relevant professionals to deliver care to pupils.
22. Approximately 95% of the pupil cohort at the offered school are non-verbal and require some form of augmented and assistive technology (**AAC**) which the school provides having assessed the needs of each child, ranging from single switch output devices, multiple switch devices Pragmatic Organisation Dynamic Display (**PODD**) books, iPADS, touch screens and EyeGaze technology.
23. At the offered school the child will be provided with 1:1 support as required.
24. Specialist equipment required by pupils is identified by health professionals and then purchased from a central supplier commonly used by schools. The school offers soft play facilities, a sensory room and a hydrotherapy pool. The school offers rebound therapy and hydrotherapy. Specialist beds are available for pupils as required.
25. The offered school has outdoor space and access to specialist equipment (e.g. bikes, trikes, accessible climbing frames) for use outdoors (and, indeed, indoors).
26. The appellant and her family reside with family members. The appellant is looking for permanent accommodation for herself and her family. Staffed transport from the appellant's residence to the school in which the child is placed will be provided by the respondent. The journey time to the specified school is mainly by motorway and dual carriageway and takes about twenty minutes. There are different routes that can be taken to the offered school. The longest such journey takes about thirty-eight minutes.
27. The specified school has a cohort of nineteen pupils two of whom attend part-time. Seven have a diagnosis of cerebral palsy. Thirteen have a diagnosis of epilepsy. Three mobilize using wheelchairs. Vomiting is a common feature of many of the cohort of pupils.
28. There are four classes. One class is a nursery class with three children. One

class is a secondary class of five children. The eleven other children are divided between two classes.

29. The specified school has five teachers, one of whom moves between classes. There are between fourteen and sixteen support assistants. There is one nurse, two speech and language therapists, four physiotherapists and three occupational therapists. The therapists are based on site. The staff work collaboratively to support pupils. 1:1 support for pupils is sought to be achieved by deploying all staff across the classes. It is anticipated that the child would be allocated to a class of six pupils.

30. The specified school has adopted PODD as the central language across the school, used by staff and pupils. Other forms of AAC are utilized as appropriate.

31. Staff are supported to have a high level of knowledge of and competence in working with children with motor impairment and epilepsy.

32. The specified school has hydrotherapy facilities. It can provide hydrotherapy, rebound therapy and active assistive robotic therapy.

### **Reasons for the Decision**

33. The respondent relied upon the ground of refusal set out at paragraph 2 above. The appellant disputed only that statutory conditions (ii) and (iii) of the ground of refusal existed.

34. 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 **Witness E** and the **Appellant**.

35. In the course of the hearing the tribunal received, without objection, a three page document comprising copies of a diary used at a school of the respondent's previously attended by the child. This diary was transferred between the school and the appellant. It consists of entries from February 2020 by school staff and the appellant. The tribunal accepted on the basis of those entries that the appellant had raised with that school concerns about bruising to the child; the school indicated it had no knowledge of such bruising; the school indicated that if the appellant was not happy with the school's explanation she should make a complaint online.

36. Witness A, Witness B, Witness C, Witness D and Witness E each gave their 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.

37. The Appellant gave her oral evidence clearly and in a straightforward manner, engaging thoughtfully with questions put to her and seeking to answer those questions to the best of her ability, acknowledging appropriately where she could not answer questions.

38. In reaching its decision, the tribunal had regard to the views of the child as set out in the document at pages T050 to T056 of the bundle of papers before it; all of the papers before the tribunal, the oral evidence given to it and to the written submissions. The tribunal accepted that statutory conditions (i) and (iv) of paragraph 3(1)(f) of schedule 2 to the 2004 Act apply. The tribunal reached its decisions on each of the statutory conditions (iii) and (iv) of paragraph 3(1)(f) of schedule 2 to the 2004 Act for the reasons given below.

***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: paragraph 3(1)(f)(ii) of schedule 2 to the 2004 Act***

39. Given the facts found by the tribunal on the evidence before it, the tribunal was satisfied that the respondent is able to make provision for the additional support needs of the child in the offered school (it being a school other than the specified school).

40. Witness E (the headteacher of the offered school) clearly and cogently explained the reasons for her opinion that the offered school can meet the additional support needs of the child. Witness E was clear, as was Witness A (the inclusive education manager), that the child will be provided with 1:1 support as and when that support is required. The tribunal accepted that evidence.

41. The tribunal was satisfied on the evidence before it that the offered school has the leadership and management structures in place; the teaching and teacher support staff with the requisite training and expertise in dealing with, caring for, supporting and educating children with additional support needs the same as, or similar to, that of the child.

42. The offered school is highly regarded within the respondent's area in the provision of AAC, including PODD. The offered school and its staff have a culture and record of working frequently and regularly on a multi-agency basis with physiotherapists, occupational therapists, speech and language therapists, nursing and other NHS staff to put in place, deliver, monitor and adjust as necessary care and educational development plans for its changing cohort of pupils, evidencing its ability to meet the additional support needs of the child. It has access to the specialist equipment necessary to provide for the additional support needs of the child, both indoors and out. Specialist beds are available to cater for pupils returning to school after medical absence and surgical intervention.

43. There was little overlap between the evidence of the witnesses for the appellant and the witnesses for the respondent. The witnesses for the appellant did not have detailed knowledge of the offered school. Where there was evidence that contradicted the evidence of Witness E on the ability of the offered school to make provision for the additional support needs of the child in the offered school the tribunal preferred the evidence of Witness E on the grounds of her education; her substantial educational experience which comprises long experience of working with children with complex additional support needs; her experience of working as headteacher of the offered school since December 2018; her detailed knowledge of her school, its staff, their training and experience, the school's access to ongoing training for staff, the school's multi-agency working with specialist health and education partners and its frequent, regular and timeous engagement with those partners in setting and delivering individualized care plans for pupils; the offered school's access to necessary specialist equipment and its ability to obtain such equipment as required timeously; the offered school's management structure, practices and protocols; and the offered school's changing cohort of pupils throughout the time of her headship.

44. For the forgoing reasons the tribunal was satisfied that the respondent is able to make provision for the additional support needs of the child in the offered school (it being a school other than the specified school).

***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: paragraph 3(1)(f)(iii) of schedule 2 to the 2004 Act***

*It is not reasonable, having regard to the respective suitability of the provision for the additional support needs of the child in the specified school and in the offered school, to place the child in the specified school*

45. Given the facts found by the tribunal on the evidence before it, the tribunal was not satisfied that it is not reasonable, having regard to the respective suitability of the provision for the additional support needs of the child in the specified school and in the offered school, to place the child in the specified school.

46. Witness B (the headteacher of the specified school) explained the reasons why in his opinion the specified school can make provision for the additional support needs of the child. He set out his analysis of the child's needs, the provision now required and how the specified school with its teaching and teaching support staff, their experience and expertise, facilities and access to onsite physiotherapists, occupational therapists and speech and language therapists and approach to AAC can meet the child's additional support needs.

47. There was little overlap between the evidence of the witnesses for the appellant and the witnesses for the respondent. The witnesses for the respondent did not have detailed knowledge of the specified school. Where there was evidence that contradicted the evidence of Witness B on the ability of the specified school to make provision for the additional support needs of the child in the specified school the tribunal preferred the evidence of Witness B on the grounds of his experience as chief executive officer of the specified school since December 2019 and his detailed knowledge of his school, its staff, their training and experience.

48. To put the matter more plainly, the tribunal was satisfied that each of the specified school and the offered school could make provision for the additional support needs of the child (and on that basis, if the sole consideration was respective suitability, it could not be said to be not reasonable to place the child in the specified school).

*It is not reasonable, having regard 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 offered school to place the child in the specified school*

49. Given the facts found by the tribunal on the evidence before it the tribunal was satisfied that it is not reasonable, having regard 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 offered school, to place the child in the specified school.

50. The agreed annual cost by way of fees to place the child in the specified school for a full academic year of 43 weeks would be £96,133.38 (on the basis of 2023-2024 academic year fees). The anticipated transport costs for the specified school would be about £20,670 per academic year. The anticipated transport costs for the offered school would be higher for each academic year, at about £24,180.

51. The financial cost to the respondent of placing the child at the specified school (including necessary incidental expenses in the form of transport costs) would be about



£116,803.38. The financial cost to the respondent of placing the child in the offered school would be about £24,180. The difference in financial costs between placing the child in the specified school rather than in the offered school would be about £92,623.38. This is the financial cost to the respondent of placing the child in the specified school. It appeared to the tribunal that additional costs of, for example, specialist equipment would be the same or similar in each school.

52. The financial cost to the respondent of placing the child in the specified school is significant. The tribunal was satisfied as to the suitability to make provision for the additional support needs of the child in both the specified school and the offered school. In the circumstances, the tribunal considered whether there was a factor, or were factors, which would justify this significant expenditure. The tribunal was satisfied that there were not.

53. In considering this reference the tribunal had regard to the preference of the appellant for the child to be placed in the specified school. The tribunal had regard, in particular, to the following matters which appeared to the tribunal to weigh with the appellant.

54. The clearest concern of the appellant was the provision of 1:1 full time support for the child to be provided full-time in school which (although she found some statements by Witness E in this regard to be reassuring) the appellant appeared to be of the view would be more readily provided by the specified school.

55. The appellant's view (see paragraph 21 of the appellant's statement) was that the child requires 1:1 support because of his seizures and absences; his poor head support; his vomiting; and to provide for his learning. However, it was pointed out that none of the assessments of the child that had been undertaken specified that he requires 1:1 support to meet these needs. The evidence of Witness E was that the child would be provided with 1:1 support as required. 2:1 support would be required when moving or handling the child. Witness B's written statement did not specifically identify 1:1 support full-time at school as being required for the child. The pro forma document at appendix 1 (at page A076) to his statement did, with a tick box, indicate "Routine 1:1 monitoring and support from highly skilled staff". However, in this oral evidence Witness B was clear that the child did not require "someone standing over him". Indeed, that would be oppressive and counterproductive as children require space of their own. Rather, Witness B indicated that what the child requires is someone to keep an eye on him, that the child required to be watched. On the basis of the evidence before it the tribunal was satisfied that what the child requires throughout the school day is to be watched over. The tribunal was satisfied that

the requisite level of watching over – keeping an eye on – the child would be achieved at both the specified school and at the offered school.

56. A difference between the specified school and the offered school is that the specified school has physiotherapists, occupational therapists and speech and language therapists available on site. The offered school also has a multi-disciplinary approach, but works with physiotherapists, occupational therapists, speech and language therapists and nursing staff who are not based on site. The tribunal was satisfied that each of these approaches is appropriate. They are simply different ways of structuring resources to support the cohort of pupils at each school. The tribunal did not discern a specific advantage to the child of one approach over the other. There were no examples identified of where immediate access – on an “emergency” basis, as it were – to physiotherapy, occupational therapy or speech and language therapy was required. The function of these therapists is to provide appropriate input to teaching and teaching support staff to ensure that appropriate individualized plans are in place for pupils and to provide support, oversight and guidance to teaching and teaching support staff, monitoring and adjusting delivery of plans as required. The important issue is that such therapists work hand in hand with teaching and teaching support staff, providing their services and expertise timeously. The tribunal was satisfied that that happens at each school. Medical emergencies in either school would require either school to call on external NHS expertise.

57. With regard to AAC the specified school has a clear policy of favouring and integrating PODD, it being used for communication between staff and pupils and between staff themselves. Witness A, in particular, addressed this in detail in her evidence, albeit at times in her statement and her oral evidence she appeared to conflate AAC and PODD (PODD being a subset of AAC). In any event, it was accepted by both schools that AAC in general, including PODD, are useful tools but that only once the child is attending school will either school be able to establish by practice the most effective modes of AAC to be used with the child. Both schools have the staff, experience, training, facilities, materials and technology to meet the child’s AAC needs.

58. Appropriate, and appropriately staffed, transport to and from school will be provided by the respondent whichever school the child is placed at. There was evidence that the route from the appellant’s current residence (which is temporary; the appellant is currently looking for permanent accommodation for her and her family) to the specified school is mainly by motorway or dual carriageway, with little opportunity to stop safely should that be

required to attend to the child. There are different routes from the appellant's current residence to the offered school. A shorter route takes mainly country roads, which it is concerned may induce travel sickness. A longer route on main roads goes through towns. The appellant is an anxious driver and is of the view that if the child had to come home from school during school time she would find it easier to travel to and from the specified school.

59. It appears from the evidence that the difference in travel times from the appellant's current residence to the specified school and to the offered school amounts to some 20 minutes at most. This is not insignificant for the appellant, given the need to ready the child to depart for school in the morning from her current residence. Nevertheless, on the basis of the evidence before the tribunal and the relatively small financial cost to the respondent of about £3,000 per year, this was not a matter that weighed with the tribunal in a significant way in reaching its decisions on the statutory conditions.

60. It was accepted by the respondent that there is more extensive outdoor space at the specified school than there is at the offered school. It did not appear to the tribunal that the extent of the outdoor space itself of the greatest significance. The fact of the outdoor space, that it was accessible and that there was appropriate specialist outdoor equipment available appeared to the tribunal to be the more pertinent issues. Having considered this evidence, this was not a matter that weighed with the tribunal in a significant way in reaching its decisions on the statutory conditions.

61. Taking the paragraph 3(1)(f) statutory condition as a whole, for the reasons given above, the tribunal was satisfied that 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 offered school (i.e. the school referred to in paragraph 3(1)(f)(ii) of schedule 2 to the 2004 Act), to place the child in the specified school.

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

62. The tribunal was satisfied that all of the conditions at paragraph 3(1)(f) of schedule 2 to the 2004 Act apply (conditions (i) and (iv) not being in dispute and conditions (ii) and (iii) being addressed above). The tribunal was satisfied that the ground of refusal at paragraph 3(1)(f) of schedule 2 to the 2004 Act was made out.

63. Accordingly, 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.

64. The tribunal again considered and took into account its reasons for finding that the ground of refusal at paragraph 3(1)(f) of schedule 2 to the 2004 Act was made out. In particular, the tribunal had regard to its reasons for finding that statutory conditions (ii) and (iii) of the ground of refusal at paragraph 3(1)(f) of schedule 2 to the 2004 Act apply.

65. The tribunal also considered again the evidence with regard to the specified school, the offered school, their facilities, access to specialist equipment, cohorts of pupils, staffing, staff, experience, training and access to other health and education professionals, travel to and from each of the two schools and the respective suitability and costs (including necessary incidental expenses) of the provision for the additional support needs of the child by the two schools.

66. Having considered all of the foregoing and taking account of the fact that the tribunal has already found that the ground of refusal at paragraph 3(1)(f) of schedule 2 to the 2004 Act is made out, the tribunal was satisfied that the child is best and most appropriately placed at the offered 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).