



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/22/0113

Witnesses for Appellant:

The specified school physiotherapist – Witness A

The appellant, the child's mother

Witnesses for Respondent:

The NHS physiotherapist – Witness B

The teacher at the alternative school – Witness C

The respondent's officer – Witness D

Reference

1. The child is a four year old girl who has tuberous sclerosis complex (TSC) with epilepsy, impaired vision, substantial motor impairments, non-verbal communication and learning disability, amongst other medical conditions.
2. In March 2022, the child's mother (***the appellant***) made a placing request for the child to be placed in an independent special school which includes nursery provision (***the specified school***). In the absence of any timely decision, the placing request was deemed to be refused. In June 2022, the tribunal received the appellant's reference of that deemed refusal. Subsequently, the respondent offered the child a place at its school which includes nursery provision for children with additional support needs (***the alternative school***).
3. The respondent submitted that the deemed refusal should be confirmed because the specified school was not a public school, the respondent could make provision for the additional support needs of the child in the alternative school, and it was not reasonable (having regard to respective suitability and cost) to place the child in the specified

school (Education (Additional Support for Learning) (Scotland) Act 2004, schedule 2, para. 3(1)(f)). No other grounds of refusal were advanced.

Decision

4. The tribunal not being satisfied that the respondent is able to make provision for the additional support needs of the child in the alternative school (2004 Act, schedule 2, para. 3(1)(f)(ii)), overturns the respondent's decision and requires it to place the child in the school specified in the placing request by July 2023 (section (4A)(b)).

Process

5. Following several case management calls, the hearing took place over two consecutive days by video-link. The respondent's officer and the appellant, each of whom gave evidence, observed all the proceedings.
6. The hearing bundle comprised 283 pages (up to T083; A103 and R092). Each witness who gave oral evidence provided at least one written statement.
7. At the outset of the hearing, the appellant sought to lodge a four-page TSC Associated Neuropsychiatric Disorders (TAND) checklist completed by the specified school's physiotherapist (witness A) in March 2023. The respondent had no objection to it being relied on by the appellant and considered by us.
8. The respondent initially intended to call the lead practitioner for early learning and child care at the alternative school, but she became ill after her written statement of evidence was signed. As a substitute, the respondent led evidence from a principal teacher at the alternative school (witness C). Whilst the respondent's solicitor advised that he would not be inviting the tribunal to rely on the lead practitioner's written statement, he agreed that it remained open to the appellant, if so advised, to invite reliance or consideration of this statement.
9. Parties provided written and oral submissions at the hearing. We invited further written submissions on the form of order should we decide to overturn the respondent's decision, which were provided after the hearing by each party.

Findings in Fact

10. We made the following findings-in-fact, material to our decision:

General

- (a). The child is a four-year-old girl, of pre-primary school age.
- (b). The child has tuberous sclerosis complex with epilepsy, impaired vision, substantial motor impairments, no verbal communication, learning disability and significant developmental delay amongst other medical conditions.

- (c). In December 2021, the child had a hemispherectomy (a form of brain surgery) to reduce the frequency of her seizures.

Seizures

- (d). The child can have multiple seizures a day. They can lead to tiredness.
- (e). The child is currently experiencing around thirteen seizures a day.
- (f). The child's focal (partial) seizures can be difficult to detect, as they might cause only subtle changes in behaviour and responsiveness.
- (g). If the child has cluster seizures (three in thirty minutes or five in an hour) a 'rescue' medication has to be administered. If seizures continue, she requires immediate hospital treatment.

Physical mobility

- (h). The child struggles with balance when she is seated.
- (i). The child has limited independent movement. She cannot stand or walk and relies on the use of a wheelchair, supportive chair and standing frame.
- (j). The child is able to shuffle on the floor when out of her wheelchair.
- (k). The child's brain abnormalities have become worse, resulting in weakness in the left-hand side (hemiparesis) and loss of her entire left visual field.
- (l). The child's physical abilities vary, so that they episodically improve and deteriorate.

Other needs

- (m). The child cannot eat solid food.
- (n). The child has no left visual field, reduced clarity at short distances and involuntary eye movement (nystagmus) especially at times of stress. She requires objects to be four times closer, or larger, than normal for her to see them.
- (o). The child is learning Pragmatic Organisation Dynamic Display (**PODD**) communication. The child does not use PECS (Picture Exchange Communication System).
- (p). If the child was placed at the alternative school, she could use PODD to communicate with some of the staff, but no other pupils there would use PODD.

Reasons for the Decision

Findings

11. The burden of proof is on the respondent, thus it is for the respondent to establish facts that support its decision. It is not for the appellant to prove anything with respect to the quality of the respondent's provision for the child's additional support needs. We have set out certain facts we found that suffice to give a broad indication of the child's conditions and abilities, though it is only a brief indication of the child's severe and complex needs. The important points material to our decision are that the child has frequent seizures which may require urgent hospital treatment, she has varying and substantial physical limitations, and she only uses PODD for communication.
12. It is in the context of the burden of proof being on the respondent that the absence of findings as to the school facilities and environment should be understood. We are unable to say, for instance, what the size of the classrooms at the alternative school are, or that they are adequately sized or necessarily too small. Rather, the respondent has failed to show on the balance of probabilities what size they are, or that they would be adequate to provide for the child's needs. On certain other matters, such findings would be academic. We have not set out findings as to the level of staffing at the alternative school. This is not material to the outcome as we are not satisfied as to the respondent's ability to make provision for the child's additional support needs for reasons that arise independently from the level of staffing.
13. Findings (e), (f) and (g) were derived from the appellant's oral and written evidence (A031, para. 5; A074, para. 20). Finding (g) is perhaps strictly a matter of medical opinion but we presume the appellant has faithfully repeated what clinicians will have told her given the severity of the child's epilepsy; the alternative school teacher also said in oral evidence that she would call the emergency services if a child experiencing seizures was not responding to medication. Finding (i) derives from the written evidence of the appellant and the specialist school's physiotherapist (witness A)(A032, para. 9; A087, para. 17). Finding (k) reflects both the joint minute and more particularly the evidence of the specialist school's physiotherapist (A60, paras. 14, 15). Finding (p) is from the oral evidence of the teacher from the alternative school (witness C). The remaining findings were derived from the joint minute (T079).

Assessment of witnesses

14. We found each of the witnesses who gave oral evidence to have done so honestly.
15. Though the appellant was asked certain questions by the respondent's solicitor, he did not suggest to her that any aspect of her written or oral evidence was untrue or mistaken, nor did he argue this in submissions to us. We accept what she said as honest and reliable.
16. There were certain differences in opinion between the NHS physiotherapist (witness B) and the specified school physiotherapist (witness A), but these appeared to reflect the approaches of conscientious professionals who might reasonably differ and were not material to the bases upon which we decide this reference.

17. The respondent's officer (witness D) decided that the offer of a place at the alternative school should be made, but she did not give evidence as to the provision of the alternative school. She also said in oral evidence at the hearing that she was unaware the child had undergone a hemispherectomy, a matter of some importance given the child's needs have changed substantially as a consequence. Given these and other matters we did not place any reliance on her view as to the respondent's ability to meet the child's needs at the alternative school.
18. The teacher of the alternative school (witness C) ought to have been the witness best placed to speak as to the ability to provide for the child's needs there. She was a patently honest witness. But as to the school's ability to meet the child's needs, she spoke at a high level of generality and her knowledge of this child's needs was limited. We had significant reservations as to the reliability of what she said would be done for this child, as we explain later.

The law

19. A child has additional support needs where the child is likely to be unable without the provision of additional support to benefit from school education (2004 Act, section 1(1)). Education includes the development of the child's personality, talents, mental and physical abilities, to their fullest potential (section 1(2)). We agree with the parties that the child has additional support needs (2004 Act, section 1) in light of our findings-in-fact (at 10(b) and (d)-(o)).
20. The respondent's refusal of the placing request is based on solely on the 2004 Act, schedule 2, paragraph 3(1)(f). This provides that the duty imposed on the respondent to place the child in accordance with the parent's wishes does not apply if all of the following conditions apply:
 - (i) the specified school is not a public school,
 - (ii) the respondent is 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 respondent has offered to place the child in the school referred to in paragraph (ii).
21. If (and only if) a ground of refusal is established, we would have to consider whether, in all of the circumstances, it is appropriate to confirm the decision of the respondent (2004 Act, section 19(4A)(a)(ii)).

Paragraph 3(1)(f)(ii): Whether the respondent is able to make provision for the ASN of the child in a school other than the specified school

We are not satisfied that the respondent is able to make provision for the additional support needs of the child in the alternative school in each of the following three areas of need:-

- (a). The detection, management and aftercare of the child's seizures so as to keep the child safe and preserve her current level of health (**seizures**).
- (b). A suitable physical environment, in the classroom and playground, in which the child can safely and appropriately manoeuvre in and outside of her wheelchair, so that she can make use of that environment safely and effectively (**physical environment**).
- (c). Social interaction with peers with whom she can communicate (**social interaction and communication**).

Our approach to whether the respondent is able to make provision for the child's needs

22. In concluding that we are not satisfied that the respondent is able to make provision for the additional support needs of the child, we do not merely decide that the provision is in some respect sub-optimal, or that it is inferior to that on offer at the specified school. We are not satisfied that the provision offered at the alternative school would address certain fundamental aspects of the child's needs.
23. There were additional respects in which we had concerns or reservations as to the suitability of education and care the respondent might provide for the child at the alternative school. We have some concern, for instance, as to the level of access there would be at the alternative school to frequent onsite therapy from a qualified physiotherapist, possibly required at short notice. The way the child's various conditions interact and the fact that her needs frequently and regularly vary, and the importance not merely of developing some functional physical abilities but ensuring the child reaches her full potential, make the question of the adequacy of physiotherapy especially significant. We also have concerns that, generally, the approach of the respondent is based on a comparison of the child's needs only in very broad terms to other children at the alternative school without any careful, up-to-date assessment of the child's specific needs. There is a simplistic and overconfident faith in the school's capacity for staff to be trained and for a range of other adjustments to be made to cater for whatever exact needs the child has once these are better known.
24. However, we have focused on, and based our decision exclusively on, the three areas of need described above (seizures, physical environment, social interaction and communication). These needs are fundamental, the respondent's failure to show it is able to make provision for these needs is particularly stark, and our concerns about any of these three areas is sufficient (without more) to preclude the respondent from establishing the sole ground of refusal it relies on.

Seizures

25. The detection and management of the child's seizures is of fundamental importance given that cluster seizures, if unresponsive to medication, warrant urgent hospital treatment. We are not satisfied that staff at the school are currently able to provide for the child's needs in this respect, nor were we satisfied that the respondent demonstrated that the necessary training would take place in time for the child's admission, or indeed when it might take place. The evidence of the teacher of the alternative school was relied on to show that the staff would appropriately assess, plan and train, but we did not find the teacher's opinions on this subject to be reliable.
26. The extent and quality of information provided to the alternative school's teacher about the child was unclear. Her oral evidence was to the effect that she had considered a speech and language report, she had spoken to the lead practitioner at the alternative school and had read her witness statement, she had spoken to some extent to the respondent's officer, she understood certain details from the questions put to her in advance of the hearing by the respondent's solicitor, and she had acquired some information during the child's visit with her parents to the alternative school, which took place almost a year before the hearing. It was not clear from her evidence that she had considered any other material. The alternative school teacher agreed with the proposition that her knowledge of the child was limited; indeed we understood from her oral evidence that her opinions had been arrived at largely after a broad comparison of this child's potential needs with the level of need of pupils at the nursery. In connection with seizures, she agreed with the proposition that she would not know how the child would 'get on', albeit she expressed confidence that the staff could meet her needs with appropriate training given their experience with other children with severe and complex needs. She said she did not know how the child was supported through a seizure. She did not know how staff should detect a seizure, though she said that would form part of a protocol or plan to be formulated. Similarly, when asked what she would do if medication administered in response to a seizure did not work, she said she would call the emergency services, put the child in the recovery position and do whatever was in the protocol. She did not know what to do if the child had cluster seizures and said she did not know what tonic seizures are.
27. The theme from the alternative school teacher's written and oral evidence was that the child *would be* assessed, plans *would be* put in place, staff *would be* trained, and because the staff had experience in dealing with *other* children with seizures, she was confident they could manage *this* child's seizures. We do not accept this teacher's opinion to that effect is reliable. Rather, we do not think an additional support needs teacher taking a conscientious approach would express such a view without greater knowledge of the particular child's needs. There is a difference between confidence borne from a knowledge that a child's needs fall within a certain range and confidence based on, it seems, little more than prior experience with children with epilepsy. The latter approach is complacent. The teacher was not aware of basic information about the child's seizures such as what was to be done if she had cluster seizures. We do

not consider someone willing to give an opinion on their capacity to cope without better knowledge of the particular child to be reliable. That is especially so given the particular features of the child's epilepsy, such as her tendency to have focal seizures that are difficult to detect. The reliability of the teacher's evidence was also damaged by her lack of knowledge of tonic seizures. From our knowledge as a specialist tribunal, we find this unawareness from someone who claims to have experience in dealing with children with epilepsy to be surprising.

- 28.** The care of the child following a seizure is also important for her welfare. It was apparent both from the teacher's written (R078, para. 15) and oral evidence that an appropriate space had not yet been identified, nor an appropriate bed acquired, for the child to sleep afterwards. When asked whether children would have to be removed from an area so the child could sleep, the teacher answered: 'No, hopefully, well, I have not identified a space at the moment'. In this respect the alternative school expects to, but has not yet shown, an ability to meet this aspect of the child's needs. More broadly, this is indicative of a lack of assessment or preparation even on points which should be relatively easy to be more precise on.

Physical environment

- 29.** The appellant described the classroom at the alternative school as being 'an incredibly small room' and said it was a 'calamity' to get her daughter out of the room in her wheelchair with two other children there (A038, para. 27). She explained in oral evidence that the room had a curved table on one side, a variety of equipment including standing frames on another, and that she had to perform a three-point turn to manoeuvre her daughter in her wheelchair in the classroom when there were two other children and two members of staff. She was concerned that there would be no space for her daughter to spend time out of her wheelchair safely.
- 30.** The teacher of the alternative school (witness C) said at the hearing that the child's class would consist of five children (including the child), all of whom use wheelchairs. As the staff-to-pupil ratio is 1:1 (R074, para. 3), there would be five members of staff in that room. Her written evidence was that there would be 'ample space' for the child to shuffle around on the floor (R083, para. 27). As the appellant gave evidence last, the teacher could not comment on the more detailed description the appellant gave of what she saw when she visited with the child. The teacher could have been asked to comment (but was not) on the appellant's written description of the classroom being 'incredibly small' and it being a "calamity" to move the child out. The teacher was unable to estimate even the approximate size of the room and said that she could not do so as she 'would be totally making it up'. Given the lack of precise information on the dimensions of the room for the child's mobility despite its obvious importance, we are not satisfied that there would be ample space for the child to shuffle around.
- 31.** The appellant's written evidence was that when she visited there she could see a small sensory stand in the school garden that was of unsuitable dimensions for the wheelchair that her daughter used (R037, para. 26). We mention this simply as an

illustration of the need to consider carefully the suitability of the physical environment for the child. The written evidence of the teacher for the alternative school was that there is a 'wheelchair accessible swing ... which [the child] ... can enjoy using' (R061, para. 22). But in oral evidence, when asked if the child's wheelchair would fit, the teacher said she did not know as she did not have any information as to the wheelchair's dimensions. We appreciate that play equipment can be adapted or acquired, albeit that takes time. We make these observations not on the basis that the lack of a piece of play equipment, or even a complete absence of outdoor play equipment for the child initially, necessarily means in itself that there would be a failure to make provision for the child's additional support needs. Rather, the assertion that the child could make use of some play equipment without the most basic inquiry as to whether in fact the child could use it is indicative of a fundamental lack of consideration as to whether the physical environment at the alternative school meets the child's additional support needs.

Social interaction and communication

32. We proceed on the assumption that staff within the child's classroom at the alternative school would be trained to use PODD, and would use PODD with the child and each other. But none of the child's classmates would use PODD. They would all use PECS. The respondent does not suggest that it would be appropriate or practical for the child to abandon PODD and be taught PECS. It follows that the child would have no other children with whom she could communicate in any meaningful sense.
33. We consider that the opportunity for the child to communicate with other children, where she has the potential to develop this ability to some extent through picture-based communication, is of fundamental importance to her well-being and the development of her personality and mental abilities to her full potential. Interaction with peers is one of the most basic features of childhood development. Without it, there can be profound isolation and exclusion. With it, one can develop friendships and explore emotions. Without other children who use PODD at her school, there would be virtually no opportunity for her to meaningfully communicate with her peers.

Other points

34. Given that we hold that the respondent has not established the second condition for the ground of refusal relied on, we do not require to consider any other conditions including, for example, reasonableness in light of respective suitability and cost (2004 Act, Schedule 2, para. 3(1)(f)(iii)).
35. 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)).

Form of order

- 36.** At the hearing, the appellant's solicitor submitted that, if the respondent's decision was overturned, the tribunal could or ought to specify that the placement was to the school as an institution (rather than just the nursery), as it was anticipated this might affect whether a further placing request and decision would be required to determine where the child receives her primary school education. This position was departed from in her subsequent written submissions, her position then being that the direction should simply be for the school specified in the placing request without further explanation. In written submissions after the hearing, the respondent submitted that the direction should specify that the placement is to be in the specified school's *nursery*, as a nursery and school could exist as distinct institutions.
- 37.** We have no power other than, in the event of overturning the respondent's decision, to direct the placement of the child at the school specified in the request. The tribunal has no general power to decide the legal effects of a placing request being granted, whether by the effect of a successful reference to this tribunal or otherwise. There is no right of appeal to this tribunal regarding decisions made as to the duration of a placement or to bring a placement to an end, or not to continue a placement begun at one stage of education to another, so that a child might progress from the nursery component of a school to the primary component (or the primary to the secondary). In directing the child's placement at the specified school, we have no power to direct the duration of that placement or to decide that it must (or need not) be maintained through to the child's primary stage of education. It is not for us to decide or advise as to what legal consequences there might be for the child's primary education of our direction to place her at the specified school as a child of nursery age.