



## **DECISION OF THE TRIBUNAL**

### **Summary of the Decision**

The tribunal confirms the decision of the authority and refuses the placing request that the local authority places the child in the school specified in the placing request in terms of section 19(5)(a) of Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act).

### **Introduction**

1. The appellant made a reference to the Tribunal on 12 November 2018 under section 18(3)(e) of the 2004 Act in relation to the refusal by the respondent on 12 September 2018 of a placing request for her daughter to attend School A (the specified school).
2. It was agreed between the parties that the issues to be determined by the Tribunal were as follows:
  - 2.1. Whether placing the child in School A would make it necessary, at the commencement of a future stage of the child's primary education, for the respondent to elect either to create an additional class or take an additional teacher at the school.
  - 2.2. Whether the respondent is able to move a teacher from another local authority school or to use a supply teacher.
  - 2.3. Whether placing the child at School A would prevent the respondent from maintaining reserved places at the school.

### **Evidence at the hearing**

3. At the hearing, the tribunal heard oral evidence for the respondent from witness A, service manager for additional support needs and well-being with the respondent. She has responsibility for resourcing and quality assurance for all ASN support and the overall leadership position for special schools across the whole of the council.

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4. Although it had been agreed at a previous case management hearing that oral evidence would be given and evidence would not be given by witness statements, the appellant's representative had lodged written statements by witness C, the child's physiotherapist, and also from the appellant.
5. The respondent's representative's position was that she considered the evidence of witness C to be irrelevant to the question to be addressed and she would not have intended to cross examine even if witness C had been present.

Although the tribunal agreed that the evidence of witness C was irrelevant to the specific legal questions to be determined, the tribunal permitted that evidence to be lodged by way of background. The appellant also gave evidence to supplement her statement.

6. Consideration had been given to whether it would be possible to obtain the child's views. The appellant's representative had intimated, reflecting the appellant's position, that she does not have cognitive capacity to give her views. The respondent's representative's position was that given that the tribunal is considering a legal question based on technical, factual matters, her views could not influence the outcome in any event.
7. A file of documents was also lodged, although again the documentary evidence lodged was of little relevance to the narrow legal question under consideration.

### **Findings in Fact**

8. The tribunal finds the following relevant facts agreed or proved:
9. The child is an eleven year old girl, born 28 June 2007. She resides with her mother.
10. The child has severe and complex needs, **[the remainder of this finding in fact has been removed by the President under rule 55 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366) for publication purposes in order to preserve the anonymity of the appellant and the child].**
11. The child has additional support needs in terms of the Education (Additional Support for Learning)(Scotland) Act 2004.
12. The education authority with responsibility for the provision of education for the child in terms of section 23(3) of the Education Scotland Act 1980 is a different local authority.

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13. The child currently attends primary 6 at school B in a different education authority area. She currently attends only part-time from 12 to 2 pm each day, because of her conditions which also impact on her ability to travel to and from school with dignity.
14. The appellant is of the firm view that school B is not suitable for the child's current or likely future needs.
15. The appellant therefore made a formal placing request to the respondent for the child to be placed in school A, which is a school for children with severe and complex needs maintained by the respondent.
16. By letter dated 12 September 2018 the appellant was advised that the placing request was refused for the following reasons:
  - 16.1. 'The placing of the child in the specified school would "assuming that pupil numbers remain constant, make it necessary, at the commencement of a future stage of the child's primary education, for the authority to elect either to create an additional class or to take an additional teacher into employment at the school".'
  - 16.2. Having considered the current pupil numbers along with placements planned for children resident within the local authority area who will require a specialist placement in August 2019, they had determined that allocating a place to the child would mean they would need to employ additional teaching and non-teaching staff to support an additional class.
  - 16.3. This reason is compliant with the Education (Additional Support for Learning) (Scotland) Act 2004 schedule 2 para 3(1) (a)(vi) and 3(3)'.
17. School A is the only primary school within the respondent boundary area for children with severe and complex needs. Consequently the catchment area is the whole of the respondent boundary area. Whilst it sits within the school C campus, it is a standalone school with its own management team.
18. The respondent maintains 40 primary schools in addition, with one for children with social and emotional behaviour needs and three for children with autism.

*Reserved places*

19. School A has capacity for 30 pupils. At the time of the placing request, and at present, the school has 29 pupils.
  20. There is therefore currently one reserved place for any child moving into the area requiring specialist provision or for a child already resident in the
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catchment area (that is the respondent boundary area) who may require to move to such specialist provision during the course of the school year.

21. The respondent does not take a formulaic approach to the policy in respect of reserved places. This is to ensure maximum flexibility given the range and nature of needs of the children attending the school.
22. In making the decision to reserve one place, the respondent has taken account of known and unknown needs within the school catchment area, relying on past experience. In particular, in the last five years, there was only one year when no child joined in the course of the school year; over the past 4-5 years, three or four children have joined (with the exception of this year to date).
23. At the time of placement, the respondent was in any event aware of one child who may be coming to live in the area and also of one child living in the area attending mainstream school whose needs may require them to be educated in a primary school for children with severe and complex needs.

*Additional teachers*

24. School A has five classes each with one teacher. The class teacher time available is 4.8 class teachers and 0.7 principal teacher providing the required 5.5 class teachers. The principal teacher has 0.3 non-teaching time. The school has a head teacher (with no class contact time). The determination of class teaching and non-contact time are in line with the formula introduced following the McCrone Agreement for teaching and non-contact time.
25. In compliance with the Scottish Negotiating Committee for Teachers (SNCT) Agreement, the requirement is for one class teacher for each group of six pupils. Children at the school have a very wide range of needs, and class teachers require to do a high level of individual planning for each child.
26. The school is therefore now reaching the situation where there is maximum capacity in terms of the staff to pupil ratio in order to cover the 5 classes. This situation has developed only in recent years, having gradually increased because of the increase in the number of children attending the school in recent years.
27. If the child were to take the last remaining place, then the respondent would not be able to accept any additional pupils without engaging an additional teacher. Moreover, if the child were to be given the retained place, it might be that following an assessment of her needs, additional teaching time would be required.

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28. In that event, the local authority would require to engage a supply teacher (few of whom have the specialist skills required in any event).
29. The respondent does not have scope to move a specialist teacher from another local authority school.
30. The respondent has in previous years had a practice of accepting placing requests from children from other education authorities, having taken four in recent years.

### **The relevant law**

31. Section 22 of the 2004 Act gives effect to Schedule 2, which disapplies the ordinary rules relating to placing requests (set out in the Education (Scotland) Act 1980) and substitutes, in relation to children and young person's having additional support needs, the provisions of Schedule 2.
32. Paragraph 2(1) of Schedule 2 of the 2004 Act states that where the parent of a child having additional support needs (ASN) makes a request to an education authority to place the child in the school specified in the request, being a school under their management, it is the duty of the authority to place the child accordingly, unless one or more of the grounds set out in paragraph 3 applies. The reference to a local authority includes an education authority which is not responsible for the school education of the child.
33. Paragraph 3, so far as relevant, states that :
  - (1) The duty imposed by sub-paragraph (1)....paragraph 2 does not apply,
    - (a) if placing the child in the specified school would—
      - (i) make it necessary for the authority to take an additional teacher into employment.....
      - (vi) assuming that pupil numbers remain constant, make it necessary, at the commencement of a future stage of the child's primary education, for the authority to elect either to create an additional class (or an additional composite class) in the specified school or to take an additional teacher into employment at the school, .....
  - (3) the duty imposed by sub-paragraph (1).....does not apply where the acceptance of a placing request in respect of a child who is resident out with the catchment area of the specified school would prevent the education authority from retaining reserved places at the

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specified school or in relation to any particular stage of education at the school.....

(5) In sub-paragraph (3), “reserved places” means such number of places (not exceeding such number or, as the case may be, such percentage of places at the school or relating to the particular stage of education as the Scottish Ministers may by regulation prescribe) as are in the opinion of the education authority reasonably required to accommodate pupils likely to become resident in the catchment area of the school in the period from the time of consideration of the placing request up to and during the year from 1 August to which the placing request relates.

(6) In sub-paragraphs (3) and (5) “catchment area” in relation to a school, means the area from which pupils resident therein will be admitted to the school in terms of any priority based on residence in accordance with the guidelines formulated by the authority under section 28B(1)(c) of the 1980 Act”.

34. This is a reference in terms of section 18(3)(e) of the 2004 Act, where the child in question has a CSP, in relation to the decision of “an education authority refusing a placing request made.... in respect of a child or young person.....including such a decision in respect of a child or young person for who school education the authority refusing the request are not responsible”.

35. Section 19(5) states that “where the reference relates to a decision in subsection (3)(e) of that section, the Tribunal may -

(a) Confirm the decision if satisfied that –

- (i) One or more grounds of refusal specified in paragraph 3(1) or (3) of Schedule 2 exists or exist, and
- (ii) In all the circumstances it is appropriate to do so,

(b) Overturn the decision and require the education authority to –

- (i) Place the child or young person in the school specified in the placing request to which the decision related by such time as the Tribunal may require, and
- (ii) Make such amendments to any co-ordinated support plan prepared for the child or young person as the Tribunal considers appropriate by such time as the Tribunal may require”.

36. This thus sets down a two stage test, and if the tribunal is satisfied that at least one of the specified grounds for refusal exists, then the tribunal must move to the second stage. In the second stage, the tribunal must exercise its

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discretion and determine whether, in all the circumstances, it is appropriate to confirm the authority's decision. The authority bears the burden of proof in this case overall (at both stages of the exercise).

### **Tribunal observations on the witnesses and the oral evidence**

37. The tribunal heard evidence first from witness A. The tribunal found her to be a knowledgeable and well-informed witness, who gave her evidence in a clear, confident and straightforward way. We had no hesitation in concluding that she was an honest and reliable witness.
38. We also heard evidence from the appellant who submitted a full witness statement and gave further oral evidence regarding The child's continuing complex needs, and in particular recent admission to hospital; her concerns about the lack of suitability of School B both now and in the future; her desire for the child to attend school A; her strong desire to ensure that The child does not require to attend residential school and for her to stay with her in their specially adapted house.
39. We had no doubt that the appellant was an honest and sincere witness who wants what is best for her daughter. She was, self-evidently, not able to respond beyond that to the evidence about the respondent's policy in respect of pupil numbers and additional teachers.

### **Reasons for decision**

40. In this case the education authority which is legally responsible for the child's education is a different education authority.. Notwithstanding, the appellant has a right to make a placing request on behalf of her daughter to attend a school outwith her catchment area, and outwith that education authority boundary area.
41. The child currently attends School B, which is in the different education authority area. The appellant gave evidence regarding how unsuitable that school is for meeting the child's needs and she believes the situation is likely to get worse. It is for that reason that she has made a request for her to attend School A, which although not in the same education authority area, we heard was relatively close to her house.
42. This case is perhaps unusual in respect of placing requests because the respondent does, in principle, accept that the placement at School A is appropriate. However, their refusal of the placing request is based instead on other logistical, practical reasons which comes down to the fact that School A is almost at capacity, and Witness A's view regarding reserved places.

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43. As discussed above, the legal question which the Tribunal requires to answer is a two stage test. First, we require to consider whether the respondent has shown that one or more of the exceptions applies (the onus being on them), to which we now turn.

### **First stage**

#### *Paragraph 3(3) reserved places*

44. Considering paragraph 3(3), this creates an exception to the obligation to accept the placing request in respect of a child who is resident outwith the catchment area of the specified school. In such circumstances, the local authority can refuse the placing request if granting it would prevent them from keeping a place in reserve for pupils who may come into the catchment area.
45. As discussed above, it is an undisputed fact that the child lives outwith the catchment area of the school because albeit that it may be very close in geographical terms from her home, it is in the respondent's boundary area.
46. In this case, witness A explained that the school now has 29 pupils, with a capacity of 30. During the course of evidence, questions were asked about how that number was reached, and we understood the evidence to confirm that overall capacity is determined at the education authority level; however the education authority does not have complete discretion because of requirements of various regulations, such as those relating to building regulations and other health and safety requirements, and to take account of other factors such as the requirement for some children to use significant equipment. We accepted that 30 pupils was the correct ceiling, taking account of the implementation of the relevant regulations.
47. The appellant's representative also asked if there were any "excepted" places, but Witness A confirmed that all 29 places were in respect of pupils currently attending the school. She gave evidence that it is only in recent years that this pressure point has been reached, due to increasing numbers transferring to the school. We noted too that the respondent has in the past accepted pupils from outwith the local authority area.
48. It was clear then that Witness A, who does have discretion in respect of the number of "reserved places", relies on only one reserved place. She said in evidence that she had no formula with regard to identifying reserved places, because she wanted to be as flexible as possible when it came to admitting pupils with very differing severe and complex needs.
49. When it comes to the meaning of "reserved places", it is clear from the terms of the schedule that education authorities have discretion in this regard and
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can retain the number of places which they consider are “reasonably required to accommodate pupils likely to become resident in the catchment area of the school in the period from the time of consideration of the placing request up to and during the year from 1 August to which the placing request relates”.

50. This is not a case then where the respondent has to justify numbers beyond just one reserved place. Self-evidently, this is the minimum number of reserved places before there are no places at all. It was not difficult for us to conclude that it was reasonable for the respondent to reserve one place.
51. We came to that conclusion particularly in light of the evidence that we heard. Witness A was able to provide a rationale for the need for that one place. We accept that it might have been that had no pupils moved into the school in recent years that it could at least have been argued that it was not even reasonable to reserve one place. However, Witness A based her decision on past experience, and in particular the increasing numbers coming to the school in recent years in general. She also pointed out that in only one of the last five years has there been a year when no pupils came to the school. Further, although again as discussed during the hearing, she cannot predict the future at the time of the placing request, which she said was “just a snapshot in time”, she was aware of at least one child residing in the catchment to whom consideration was being given to the requirement to move to the school, and also another family who were contemplating moving into the area who had a child who may require to attend.
52. Witness A stressed that she had to take account of the respondent’s responsibility in respect of children who reside in the education authority area, whose education they are responsible for, but also those children who may come to live in the education authority’s area whose education the respondent will become responsible for. Quite legitimately, she said that she had a duty to prioritise those requirements over any desire or ability to educate children who do not reside in the education authority’s catchment area.
53. Given these facts, we had no hesitation in concluding that the respondent had satisfied the tribunal that this exception applies.

*Paragraph 3(1)(a)(vi) creation of an additional class/class teacher*

54. The respondent requires only to prove that one of the reasons set out in paragraph 3 applies. However, the respondent also relies on paragraph 3(1)(a)(vi). It should be noted that the respondent is not relying on paragraph

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3(1)(a)(i), that is that granting the placing request would make it necessary for the authority to take an additional teacher into employment.

55. As we understood it, that was because there would be no immediate need for the respondent to engage a new member of staff, but that offering the child a placement would take the respondent to its maximum staff ratios. Witness A said that she could not be sure, without having fully assessed the child's needs, that teaching capacity over that limit would not be required.
56. Although the respondent's position was that they would not (necessarily) currently require to take on an additional member of staff, in terms of the staffing ratio, the situation is "tight" to the extent that the addition of another pupil would mean that they had reached the maximum in terms of the formulas laid down by the McCrone Agreement and the SNCT. Despite the appellant's representative's submissions, we accept that the respondent is obliged to adhere to the requirements of these agreements with regard to pupil/staff ratios and also in regard to allocating teachers' non-contact time.
57. On the question whether paragraph 3(1)(a)(vi) applies, this allows an education authority to refuse a placing request if at some future stage of the child's education there would become a requirement to employ another teacher (or create an additional class), assuming that pupils numbers remain constant.
58. The respondent's position was that any additional child, if they were to accept the placing request for the child, who the respondent may have an obligation to educate, would require an additional teacher to be employed. There was some discussion about whether the respondent could take on a supply teacher, and while Witness A accepted that was possible (if they could find someone with the right skill set) still that would count as taking on an additional teacher for the purposes of the test.
59. We accepted Witness A's evidence that given current staffing levels, were the child to come to the school, then that made it necessary at a future date, that the respondent would require to engage another teacher or create another class.
60. Consequently, given the evidence which we heard, we concluded that the authority has also satisfied us that paragraph 3(1)(a)(vi) applies.

## **Second stage**

61. Where we conclude, as in this case, that one of the grounds of refusal is satisfied, we are required, if we are to confirm the decision of the
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respondent , to be satisfied that in all of the circumstances it is appropriate to do so.

62. In regard to this question, as we understood her argument, the appellant's representative, at least in the appellant's case statement, argued that it was not appropriate to reject the reference because, even if satisfied that one of the grounds for refusal exist, the tribunal must "go on to consider the overall appropriateness of the placement". Relying on case law (decided under the 1980 Act), as we understood her argument, she submitted that in doing so we should take account of account of "all of the circumstances of the case".
63. We do not accept that submission. The respondent's representative in her written response submitted that the question to be determined at this stage was not the overall appropriateness of the placement, but rather the appropriateness of confirming the education authority's decision, having regard to all the circumstances.
64. We accept that this allows us to take into account all the circumstances, but we are not taking account of all the circumstances to determine the appropriateness of the placement, but rather to determine the appropriateness of the respondent's decision.
65. In any event, in this case, the respondent has accepted that a placement at School A was, in principle, appropriate.
66. The appellants representative, during cross examination of Witness A and in submissions, urged the tribunal to take account of other factors in determining that it was not appropriate to confirm the decision of the local authority in this case.
67. In particular, Witness A did not deny that there may well be physical space at school A; that it would be possible for her to take on a supply teacher; that it may well be that the child could attend part-time (although they would always seek for pupils to attend full-time); that it may well be that pupils might leave to free up a place (although in her experience it was more likely that more pupils would arrive than leave); and it was theoretically possible that some pupils might move to mainstream primaries or to the other ASN provisions within the education authority. Witness A however denied that there was any scope for her to consider sending one of the "local authority" pupils to School B even if it were suitable, and she categorically denied that her position could be said to breach the GIRFEC principles. Her position on these matters, as we understood it, related to the fact that the respondent is not responsible for the child's education.

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68. These factors may well have been relevant had the respondent had the legal duty to educate the child. Indeed, it was clear to the tribunal from the evidence that were the respondent to have been responsible for the child's education then other solutions would and could be found to ensure that she got appropriate and assessable education.
69. In oral submissions, the respondent's representative submitted that this was not an exceptional case and that we should not use our discretion to overturn the education authority's decision if the tribunal is satisfied that grounds of refusal exist. She submitted that the respondent is not the education authority responsible for the child's education; the duty to ensure that she is provided with appropriate and accessible education lies with education authority A. It is not appropriate to require the respondent to place the child at School A when doing so would prevent it from reserving places for children for whom it is responsible, or to require it, at a later stage, to create an additional class or take an additional teacher into employment at the school.
70. We should add that while the appellant's representative referred us to a number of case-law authorities, we accepted the respondent's representative's submission that none of these were directly in point. The appellant's representative referred us to principles stated in those decisions which would not be in dispute, but they had no direct application to the legal question which arose in this case and did not assist her.
71. The respondent is entitled to rely on the exceptions in the 2004 Act. The appellant did not lead evidence to contradict that (and it would be difficult to see how she could). However in any event, as discussed above, we found that Witness A was a well-informed and objective witness, who was able to explain with ease and confidence her rationale for the decisions that she had made. We conclude that, taking account of all of the circumstances, that it was appropriate for the respondent to make the decision which it did.
72. As discussed above, a crucial difficulty for the appellant's representative in this case was that the respondent is the respondent, whereas it is education authority A which has the legal duty with regard to the child's education. That may mean, as the appellant understood, that had she lived in the respondent's area, then a place may well have been available at School A. Had the request been made earlier at a time when the school was not nearing capacity, a place may have been offered since we heard that the school had placed children from other local authorities there. It is unfortunate that due to circumstances of timing and geography that the conditions are not such that there is a requirement for the respondent to accept the appellant's placing request in this particular instance.

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## **Conclusion**

73. After careful consideration of all the circumstances, we confirm the decision of the respondent to refuse the placing request.

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