



Additional Support Needs

DECISION OF THE TRIBUNAL

List of witnesses

For the appellant:

The child

The appellant (Witness D)

Social Worker (Witness C)

For the respondent

Headteacher, school B (witness A)

Headteacher, school A (Witness B)

Reference

1. This is a placing request reference lodged by the appellant in terms of section 18(1) and 18(3)(da) of the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act) in April 2021 to place the child at School A. The respondent refused the appellant's placing request on April 2021 on the basis of schedule 2 paragraph 3(1)(a)(i) and 3(1)(a)(v) of the 2004 Act.

Decision

2. The tribunal overturns the decision of the respondent to refuse the placing request, in accordance with section 19(4A)(b) of the 2004 Act. The tribunal therefore requires the respondent to place the child in School A no later than August 2021.
3. In accordance with section 19(4)(b) of the 2004 Act, the tribunal requires the respondent to make amendments to the Co-ordinated Support Plan (CSP) in so far as to specify School A as the school attended by the child and to make any other necessary changes to the personnel details arising from the change of school, as required to comply with section 9(2)(a)(iv), 9(2)(b), 9(2)(c) and (d).

Process

4. Conference calls took place in June 2021 and July 2021 for the purpose of case management. Notes and directions can be found in the bundle at T33-T36.
5. The bundle consisted of pages T1-38, A1-36, R1-111 at the first date of hearing. Subsequent papers were requested by the tribunal and provided by the respondent's representative by email dated August 2021, numbered R112.
6. A minute of agreed facts was lodged (T37-38) and we are grateful to the representatives for this.
7. We benefitted from the provision of detailed witness statements for witnesses A (R95-102), B (R103-104) and D (A29-34) and received a report at A18-23 by a colleague of witness C, together with his resume (A35-36).
8. Legal authorities and submissions were lodged in addition to the bundle and have been considered in making our decision, however they do not form part of the evidence.
9. A summary decision was issued to parties on August 2021 to allow transition to and attendance at school A on August 2021, the start of the school term and the beginning of S1 for the child.

Findings in Fact

General findings

10. The child is currently 13 years of age. The child attended the Service A in her early years. From primary one to primary seven the child attended primary school A, which is a mainstream school. She began primary school at age six.
11. At primary school the child had a team of pupil support assistants who provided significant support on an individual basis. She had a detailed individual learning plan and followed an individual programme for literacy and numeracy. She received physiotherapy and speech and language therapy sessions at primary school. In primary seven the child was working within Curriculum for Excellence Early Level.
12. The child is unable to express a preference for a secondary school due to her language and communication difficulties. The child completed her primary seven year in June 2021 and is now at secondary one stage.
13. The child has a Co-ordinated Support Plan, (CSP).
14. The child has a rare degenerative neuromuscular condition known as Congenital Myotonic Dystrophy which affects every muscle in her body. There is no cure for this condition. She has moderate learning difficulties and complex needs. She has mobility challenges and wears splints on her ankles and legs to aid independent movement.
15. The child moves more slowly than her mainstream peers and requires extra time to move around school. She can climb stairs with supervision. She can find this tiring.

16. **[This paragraph has been removed by the Chamber President for reasons of privacy of the child under rule 55(3)(a)(b)(c) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
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18. The child is susceptible to chest infections such as pneumonia due to her condition.
19. The child enjoys swimming and horse riding.

Findings on the placing request

20. The appellant made a placing request on September 2021 (T24-27).
21. Applications to the respondent for places in special schools and classes are handled by way of a three stage process.
22. The first stage is the gathering of reports and similar assessment material from the multi-disciplinary team working with a child. This material provides an overview of the child's development and specific assessments of educational needs. It also provides information about any child/young person and parental views. The appellant's views were provided in the form of a written statement and formed part of the papers considered at stage one.
23. The second stage is the consideration of these materials by a multidisciplinary panel of advisers with knowledge of additional support needs. The membership of the panel in this case was two senior Educational Psychologists, one Community Paediatrician, one senior Speech and Language Therapist, five Head Teachers and one Depute Head Teacher for the Visiting Teaching Service. Witnesses A and B were two of the five head teachers involved.
24. The child's case was considered by the panel in December 2020. The panel considered 120 children referred for consideration for transition from primary school to special school for secondary one.
25. The panel agreed the child was suitable for a special school.
26. The third stage in the authority process is allocation of places. Following the panel meeting, the two senior educational psychologists and the senior manager for additional support needs allocated places in secondary special schools.
27. The respondent wrote to the appellant by way of an e-mail dated April 2021, refusing her placing request.
28. The child was offered a place at School B rather than school A. School B provides education from early years to secondary senior phase. The offer of a place at school B

has been rejected by the appellant. Transition planning for school C, her local mainstream secondary school, was progressing at the time of hearing. (R110-111).

29. The child would have been allocated a place at school A were it not for the capacity issues arising following the above process. It can be drawn from this fact that the education ordinarily provided at school A is suited to the child's age, ability and aptitude and that it is a suitable school for her.

Findings on School A

30. School A is a special school for secondary aged pupils. The school provides education primarily for pupils with a learning disability, many of whom also have language and communication difficulties.

31. The school shares a campus with a mainstream school.

32. The Scottish Negotiating Committee for Teachers was produced at R69 and provides details of class sizes for special schools and units as follows:-

Additional Support Needs arising from:	Number of pupils
Moderate learning difficulties	10
Profound learning difficulties	10 **
Severe physical impairment	8
Severe learning difficulties	8
Significant hearing impairment	6
Significant visual impairment	6
Language and communication difficulties	6
Social, emotional and behavioural difficulties	6

Note: ** This figure applies where teachers are complemented by support staff and councils are recommended to apply an adult/pupil ratio of 1:2.5.

33. There are 81 children attending school A. There is one class of 11 pupils, four classes of ten and five classes of six. One child in the class of 11 is transitioning out of the school in the next few weeks. Having 11 children in a class is a temporary arrangement which was agreed with teaching staff.

34. Class Gen O is the new S1 intake and consists of ten pupils aged 12-13 years. Gen S consists of seven S2 and three S3 pupils aged 12-13 years. Gen L has four S4 pupils and six S3 children aged 13-14 years. Gen B has six children in S2-S4, aged 13-15 years and Gen R has six children S1-S4, aged 13-15 years (R67). In senior phase there is one class of 11, one class of ten and three classes of six pupils in S4-S7 aged 14-18 years.

35. Classes are not composed strictly by age and stage. Class composition is based on the additional support needs of individual pupils and collective pupils. Pupils in the classes of six have greater additional support needs than those in the classes of ten. There are pupils with language and communication difficulties in classes of ten. Class sizes set out in the SNCT handbook, detailed at R69, are not strictly adhered to in school A.

36. The profiles of the pupils at school A are varied and complex. Pupils at school A can be quite boisterous. Many of the pupils require individual breakout rooms. Some share a breakout room with up to two other children.
37. There is pressure on space within the school building due to the layout of the school and the nature of the additional support needs of the pupils, many of whom can become dysregulated. The school would benefit from a greater number of breakout rooms to accommodate the level of complex additional support needs of many pupils.
38. Communal areas of the school previously used for art and play therapy are now used as breakout areas for dysregulated children and as a result these therapies cannot take place.
39. One pupil requires a playroom and a work room as he transitions into class at school A.
40. The aim of school A is to have children in class. This is not always possible due to the extent of the additional support needs of the pupils.
41. Classes of six could physically accommodate more children.
42. There are 17.43 full time equivalent teachers at school A including the head teacher, depute head teacher and three principal teachers. Some are primary qualified and others are secondary qualified teachers.
43. There are 8.2 full time equivalent pupil support assistants employed at school A on a permanent basis and 5.25 in addition who are allocated to provide support on a 1:1 or 1:2 basis to particular pupils.

Findings on the child and school A

44. Some pupils at school A need help to go to the toilet and have sensory needs related to toileting. **[The remainder of his paragraph has been removed by the Chamber President for reasons of privacy of the child under rule 55(3)(a)(b)(c) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)].**
45. Toilet facilities at school A have not been designed with incontinent pupils in mind. Improvements to toileting provisions at school A have been requested to better meet the needs of the pupils in attendance.
46. Supporting a pupil to go to the toilet could take a PSA away from a classroom for up to 30 minutes.
47. The child's physiotherapy needs are different to the those of her peers at school A. It would be difficult to carry out physiotherapy exercises during the school day due to the staff to pupil ratio.
48. The child needs to do physiotherapy exercises once daily but these could be done at home.

49. The child needs a greater amount of mobility support compared to her peers at school A.
50. A high number of movement breaks may be difficult for school A to accommodate, if required by the child, due to the staff to pupil ratio. Class movement breaks are scheduled into the timetable.
51. Access to a pool at the adjoining mainstream school is possible at school A. Horse riding experiences may also be possible at school A.

Findings on School C

52. School C is a mainstream high school. It is the high school for the primary school that the child has been attending.
53. A pupil support assistant with personal care training would need to be employed to support the child were she to attend school C. The child's PSA from her primary school would attend school C with her until a suitable person could be appointed. The low incidence hours for the child will transfer from primary to School C automatically (R108).
54. The pupil would be likely to begin her secondary school education in the support for learning room in a screened off area if she were to attend school C. The additional support for learning provision had not been planned in full at the time of the hearing.
55. School C is not set up to support a young person with additional support needs as significant as those experienced by the child.
56. The child's experience at school C is unlikely to be an inclusive education experience. There would be fewer opportunities for the child to develop relationships with her peers (R110).

Reasons for the Decision

General remarks on evidence

57. Although the reasons for the decision refer to the evidence of particular witnesses and draw comparison between evidence about crucial points, they are not, nor are they intended to be, a summary of the evidence that was heard. Extensive evidence was heard and is available in the bundle. We have considered all of the evidence and legal submissions before making our decision.
58. We accepted the evidence of all of the witnesses as being credible and reliable. We benefitted from the provision of detailed witness statements for witnesses A (R95-102), B (R103-104) and D (A29-34) and received a report at A18-23 by a colleague of witness C, together with a resume of witness C's credentials (A35-36). The weight given to the evidence varied according to its source and substance.
59. Oral evidence was provided by witnesses A to D. Witnesses A and B did not know the child and spoke about provision in their respective schools (schools B and A). Witness C had had limited contact with the child. Witness D, the appellant and the child's mother, clearly knows the child very well, has been proactive in her care and education and wants the very best for her.

60. Much of the evidence was either agreed or not disputed. For example, there was no significant difference in relation to the child's presentation, health or additional support needs. There was disagreement about whether the child's muscle strength would improve or decline as she grows older. This was not relevant to our decision and therefore did not require further investigation.
61. Evidence about the grounds of refusal was limited. We concluded that the respondent did not evidence that a ground of refusal existed. Therefore, evidence in relation to the second stage of the legal test 'appropriate in all the circumstances' does not need to be examined. It was nevertheless necessary to have this evidence and we are grateful to all witnesses who gave their time to help the tribunal.

General remarks in relation to the law

62. Every education authority must, in relation to each child and young person having additional support needs for whose school education the authority are responsible, make adequate and efficient provision for such additional support as is required by that child or young person, and make appropriate arrangements for keeping under consideration (i) the additional support needs of, and (ii) the adequacy of the additional support provided for, the respective children. (Section 4 2004 Act)
63. Where the parent of a child having additional support needs 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, subject to paragraph 3, to place the child accordingly (Schedule 2, paragraph 2 of the 2004 Act).
64. There was no dispute between the parties on the question of whether the child has additional support needs, as defined in section 1 of the 2004 Act. Given the findings at paragraphs 10-18 above, it is clear to us that this is the case.
65. The respondent relies on two grounds for refusing the placing request which will be dealt with in turn, namely:
- i) placing the child in the specified school would make it necessary for the authority to take an additional teacher into employment (Sch 2 para 3 (1)(a)(i) 2004 Act)
 - ii) placing the child in the specified school would be likely to be seriously detrimental to the educational well-being of pupils attending the school. (Sch 2 para 3 (1)(a)(v) 2004 Act)
66. As pointed out by the appellant (and as set out in the case of *M v Aberdeenshire Council* 2008 SLT (Sh Ct) 126 (Sheriff Court)), the appropriate assessment point is at the time of the hearing. We accept that the onus of establishing the ground of refusal lies with the respondent.

Reasons

67. Unless otherwise indicated, general findings in fact were taken from the appellant's statement which were not challenged in evidence. Findings in fact in relation to the placing request were detailed in the joint minute of agreed facts and therefore do not

require re-examination. Findings in fact in relation to school A are drawn from the joint minute of agreed facts, documents within the bundle and from the oral evidence of witness B. Findings in relation to school B were from witness A's statement and oral evidence and findings regarding school C were detailed within the bundle (R108-R111).

The ground of refusal: 2004 Act, schedule 2 para 3 (1)(a)(i)

“placing the child in the specified school would make it necessary for the authority to take an additional teacher into employment”

68. The legal test relates to the authority requiring to employ an additional teacher. There must be a causal link between placing the child in school A and employing an additional teacher to find this ground established.

69. There were a number of aspects of evidence in relation to this test namely, class sizes and composition, teaching capacity and teacher availability within the authority.

Class sizes and composition

70. Witness B gave evidence in relation to the allocation of space within the school. It was clear that the current operation of the school and allocation of classrooms and space across the building is not as detailed in the school plans (R059-066).

71. Witness B told us that “lots” of children need their own breakout room and that some of these children spend a great deal of time in these spaces. She said that all rooms are occupied at all times but also that there are times when classes are full. These statements are contradictory. We concluded that, at the very least, the pupils' additional support needs are such that they require individual breakout spaces to be available at all times.

72. Witness B gave evidence that there was enough physical space to accommodate another child within existing classrooms at school A.

73. The respondent sought to rely on the Scottish Negotiating Committee for Teachers Handbook (SCNT) detailing class size maxima to support the argument that it would be necessary to take an additional teacher into employment if the child was placed at school A.

74. Witness B was clear that class composition “is not an exact science” and that there is a degree of flexibility in the allocation of pupils to classes due to the increasing complexity of the profiles of the pupils attending school A. For example, many of the classes of ten contain children with language and communication difficulties, when the SNCT handbook states that these children should be in classes of six only.

75. SNCT class size maxima (R069) are not being adhered to in school A. This weakens the respondent's argument that the child cannot be placed in school A because the school must adhere to these conditions.

76. Evidence of the link between SCNT guidance on class sizes and the number of pupils and teachers at school A was not established.

Teaching capacity at school A

77. It was not clear how teachers are distributed across the school. It was not clear how much time children spend in individual areas or whether they are taught in those areas on a one to one basis by teaching staff. No link was made that placing one more child in a class would mean another teacher would be needed.
78. Witness B told us that there would be timetabling difficulties for practical classes, should classes of six be exceeded. Although we heard that practical classes are classes of six, there was no evidence about how this impacts on teaching across the school. The evidence was that a class of ten is divided in two and attend two separate practical classes.
79. There was no evidence about why these classes of five for practical subjects could not be increased. There was no reference to any legal requirement to have children in classes of six for practical classes. It was therefore unclear how this information supported the respondent's argument in relation to the grounds of refusal.
80. When asked what she thought would be required to allow the child to be placed at school A, witness B said "a PSA, a portacabin and *probably* another teacher". This is not a strong enough argument that it is necessary for the respondent to take an additional teacher into employment.
81. We were satisfied that it is likely that the child will require a high level of PSA support to such an extent that an additional PSA may very well be required to support the child at school A, however a PSA is not the same as a teacher.
82. Findings in fact at paragraphs 33-50 did not allow us to conclude that a further teacher would be required in school A were the child to be placed there.

Teacher availability across the authority

83. Witness B gave evidence that she had spoken with her line manager who had spoken to two others (named but job titles were not known) who advised that there were no other qualified supernumerary teachers available in the authority to transfer to school A.
84. The appellant argued that the status of these individuals was not known, nor how they had arrived at that conclusion, nor whether these individuals had authority to make decisions about transfer of teachers and argued that the information was not tested. We agree with this.
85. This evidence was in itself not sufficient to establish the ground of refusal.
86. Witness B could only say that what was written in the respondent's case statement seemed to be sensible and correct but she had not undertaken any investigations herself. Her knowledge about the employment of teachers across the authority did not amount to substantial evidence in this matter.
87. The respondent argued that there is a "convention" that only two witnesses may give evidence in respect of a reference and that it is impractical for more witnesses to attend

to give oral evidence. This is a provision detailed in the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 ('the 2018 Rules') (schedule to SSI 2017/366).

88. *Rule 40* states that evidence at a hearing may be given in person or by written statement. It was open to the respondent to provide written statements from other witnesses.
89. *Rule 33 (6)* deals with the restriction on the number of witnesses permitted.
90. *Rule 33 (1&2)* states that when a party wishes to call witnesses to attend a hearing to give evidence, that party shall provide the tribunal with a list of the names of witnesses prior to the end of the case statement period. A party may not call and lead evidence from any witness who is not included on this list except with the permission of a legal member or the tribunal at a hearing.
91. *Rule 33 (part 1 and 2)* deals with the exception to the general rule that two witness are permitted. No such permission was sought by the respondent. If such a request had been made, we would have considered it in line with the overriding objective of the tribunal (*Rules 2 and 3*).
92. It is a matter for parties to present their case to the tribunal in a way that they consider appropriate. The respondent did not ask the legal member or tribunal to allow further witnesses.
93. The final point to be made is that case statements, responses to these and legal submissions are not evidence and cannot be treated as such. The appellant called upon the respondent to substantiate this matter with evidence (oral or written). It is our view that it was not substantiated.
94. Taking all of this together, we conclude that placing the child at school A does not make it necessary for the authority to take an additional teacher into employment.

The ground of refusal: 2004 Act, schedule 2 para 3(1)(a)(v)

“placing the child in the specified school would be likely to be seriously detrimental to the educational well-being of pupils attending the school”

95. Witness B gave evidence that school A has a capacity of 80 and that she thought that this was excessive. Witness B was unable to specify how this figure was arrived at beyond saying that it was set in 2008 at the time the school was built. Even if we were to accept this evidence, there is nothing to link it to the legal tests before us.
96. There was clear evidence (witness B) that there is physical space in classrooms for the child. Therefore, placing the child in school A will not restrict the physical space of the other children.
97. We accept the evidence of witness B that the complexity of the additional support needs of pupils attending school A creates great challenges. Witness B would like to see adaptations to toilets to accommodate pupils with toileting difficulties and advised that this matter had been reported to senior management.

98. The witness would like a great deal more space in school A to allow her to return to delivering art and play therapy. She thinks that the accommodation is overstretched due to the complexity of pupils' needs and the number of pupils who require individual breakout rooms. None of these are difficulties which arise as a result of placing the child in school A.
99. There was no evidence that the child presents in a way that staff in school A are not familiar with. Her educational stage is similar to other pupils.
100. There was insufficient evidence to suggest that placing the child at school A would have a negative impact on other children, far less that it would be likely to be *seriously* detrimental to the educational well-being of other pupils at the school.
101. Taking all of this together, we conclude that placing the child at school A would not be seriously detrimental to the well-being of other children attending the school.

Appropriate in all the circumstances: 2004 Act section 19(4A)(a)(ii)

102. Having concluded that a ground of refusal does not exist, we do not need to consider stage two of the statutory test: that it is, nonetheless, appropriate in all the circumstances to confirm the decision of the respondent to refuse the appellant's placing request.
103. There were two points raised by the respondent, however, that we wish to deal with to ensure clarity.
104. The respondent argued that the tribunal was being asked to compare schools A and B. There is a ground of refusal for which such a comparison is needed, but this was not relied upon and is therefore not applicable in this case. A comparison of schools A, B and/or C was not appropriate or necessary in relation to the particular grounds of refusal relied on.
105. The respondent made an argument about unreasonable expenditure and drew a comparison between the cost of employing a PSA and the cost of employing a teacher. As unreasonable expenditure refers to a ground of refusal that was not relied upon and since the grounds of refusal were not established, we did not need to consider this argument.

Other Comments

We are grateful to the representatives for their efforts in preparing and conducting this case.