

**Health and Education Chamber**  
First-tier Tribunal for Scotland

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**Additional Support Needs**

**DECISION OF THE TRIBUNAL**

**ORDER**

1. The appeal against a decision of the respondents refusing the appellant's placing request with respect to her son, the Tribunal allows the appeal.
2. The Tribunal directs that the child be placed in the specified school so that he is on the school roll and permitted to begin attendance within four weeks of the date of this decision.

**SUMMARY OF DECISION**

3. This case concerns a six-year old boy with Prader-Willi syndrome with related difficulties with mobility and coping with a typically busy classroom environment. He is currently attending part-time the catchment mainstream school close to his home. The child's mother made a placing request specifying a specialist unit for children with special language and communication needs, forming part of a mainstream school run by the respondents. The respondents refused this request. The respondents proposed that the child be placed at an alternative school, which has a similar specialist unit.
4. The appellant seeks placement at her choice of school due principally to what she considers to be greater physical accessibility for her son, easier access for her son to a safe space at times of distress, and a shorter travel time from home. The respondents

contended that that placement in the specified school would necessitate employment of an additional teacher, that the advantages of the specified school over their proposed alternative are slight, and that such advantages would be outweighed by the cost of an additional teacher.

5. The Tribunal is satisfied that placing the child in the specified school would make it necessary for the authority to take an additional teacher into employment [Education (Additional Support for Learning) (Scotland) Act 2004, Sch 2, para 3(1)(a)(i)]. Notwithstanding this, the Tribunal is not satisfied that it was appropriate in all the circumstances to confirm the respondents' decision [2004 Act, s 19(4A)(a)(ii)].

#### THE PROCEEDINGS

6. A telephone conference call took place on 6 November 2018 and directions were issued. Statements or (in the case of the consultant endocrinologist, a letter) were lodged in respect of each witness. A brief telephone case conference took place on Monday 18th February 2019, shortly before the hearing, to confirm arrangements - no directions were made and no note was issued.
7. The appeal was heard on Wednesday 20th, Thursday 21st and Friday 22nd February 2019. The hearing was electronically recorded in its entirety. The appellant was represented by her solicitor, and the respondents were represented by their additional support needs manager. The appellant was present throughout.
8. Parties confirmed that the papers before the Tribunal consisted of T1-48, A1-183 and R1-106. The following additional papers were received without objection:-

For the appellant, papers marked:

B1-17 (Google Maps printouts with table);

C1-13 (Child & Young Person Planning Document of 1 February 2019)

For the respondent, papers marked:

D1-D3 (E-mails within the respondents' education department)

The appellant's solicitor also sought to lodge a printout setting out the dates on which the Scottish Negotiating Committee for Teachers Handbook had been revised. The tribunal refused to receive this. No notice had been given of the intention to lodge it, there was no reason it could not have been lodged earlier and it was unclear in what way it would assist the tribunal with its decision.

9. The Tribunal heard the following witnesses (in order of appearance):-

Day 1

(For the respondents)	The acting head teacher of the specified school
	The head teacher of the alternative school

Day 2

(For the appellant)	The consultant endocrinologist
(For the respondent)	The head teacher of the alternative school (continued)

Day 3

(For the appellant)	The head teacher of the current mainstream school
	The appellant

Due to the consultant endocrinologist's limited availability, she gave evidence on the morning of day 2, with the alternative head teacher's cross-examination interrupted to facilitate this. No objection was made by the respondents to this course of action.

10. The child's views had been obtained by an independent advocacy worker, who provided a report to the Tribunal (T46-48).

11. After the witnesses' evidence was concluded, oral submissions were heard and completed on the third day.

#### FINDINGS-IN-FACT

12. The Tribunal found the following facts admitted or proved.

13. The child attends his local primary school. His attendance is on a part-time basis. He is in Primary 2.

14. The child has Prader Willi Syndrome. That syndrome results in insatiable appetite and consequent weight gain. It also results in a degree of global cognitive impairment that will increasingly affect his ability to cope with demands of schoolwork. Adults with Prader-Willi Syndrome generally require supported living arrangements.

15. The child is heavy for his age. He has double spinal scoliosis (curvature of the spine), which is affected by his weight and lack of muscle tone. He occasionally has flare ups of Sever's disease (painful heel inflammation). He has delayed motor development. He has bilateral talipes.

16. He ascends and descends stairs far more slowly than his peers. He takes stairs one step at a time (*i.e.* he will put one foot one step ahead before bringing the other foot to the same step, rather than the step beyond). At home, the child uses hand rails on both sides

of the flight of stairs between the ground floor and his bedroom. He prefers to slide down the stairs at home. At his current school, he has to ascend and descend two small sets of stairs of around four or five steps. He has an adult with him to provide reassurance using those steps. He occasionally falls using these steps. He engages in physical activity, such as climbing stairs or playing football, when sufficiently motivated, otherwise he can be very reluctant and unwilling to make the effort.

17. The child has anxiety and behavioural issues. He can be argumentative, non-compliant and sometimes be aggressive in class. The busy environment of a mainstream classroom is a contributing factor to such behaviour. Over time, in a smaller class room setting such as is offered by the specified and alternative schools, the child's anxiety and behavioural issues are likely to abate.

18. The child's part-time curriculum has been arranged to assist with managing the child's anxiety and behaviour. The appellant has been required to attend school to take the child home because of behavioural difficulties.

19. The child is very sociable. He enjoys playing with children both of his own and of different ages. He enjoys playing football. For these reasons break times are very important for the child. He is very keen to participate in what his classmates are doing.

20. The specified school has two floors. On the ground floor are the two classrooms making up the specialist unit, classrooms for mainstream Primaries 1 and 2, a sensory soft-play room, a therapy room, a lunch hall and a PE hall. On the upper floor are the classrooms for Primaries 3 to 7, a music room, a library and a general purpose room. It has two playground areas, all on one level.

21. In the specified school, there is no room suitable to be converted into an additional classroom. The rooms are under intense use; there is little spare capacity. The sensory soft-play room is the typical room used as a safe space for the children in the special unit.
22. The alternative school has four floors. On the ground floor are two classrooms forming the specialist unit, classrooms for Primaries 1 and 2, a hall/dining-room, general purpose room, a medical room, and an enclosed corridor which can serve as a break-out space. The second floor is used for school offices. On the third floor are classrooms for Primaries 3 to 7, a support for learning room, and a pupil support assistant work area. On the top floor there is a work space, library, and therapy room.
23. The alternative school uses its rooms in a flexible manner to facilitate giving children in distress a safe space when required. This might require moving individual children or classes around. This is a fairly common occurrence. The general purpose and medical rooms are often used for this purpose, but other rooms might be used.
24. The alternative school entrance has several steps, but ramps could and have been put in place (when the school has been used as a polling station).
25. The alternative school has two playground areas. One area, the smaller of the two, is immediately outside the school. The larger area is accessible only by descending a flight of stairs with a handrail. That latter area has the playground equipment. School pupils predominantly use the larger playground.

26. The alternative school could provide a member of staff to escort the child up and down the stairs ahead of his classmates at play-time.
27. The specified school has one class of six pupils (which we dub “Class 1”), and a second class of five pupils (“Class 2”). The pupils are not allocated solely according to age or years of primary education, but with some consideration as to how those classes can be most harmoniously composed. In years past, there was severe disruption due to interactions between certain pupils, which was resolved by moving pupils between classes. In Class 2, which has five pupils, one child is of an age where he will be expected to move to a secondary school at the end of the current school year. The composition of the two classes is reviewed (and potentially adjusted) before the start of each new school year to take account of children leaving the school and children being placed there.
28. The Scottish Negotiating Committee for Teachers Handbook of Conditions of Service specifies a maximum class size of six pupils for classes in special schools for children with “Language and communication difficulties” (R100). The respondents do not regard that limit as a guideline. They invariably adhere to that limit. If such a class had more than six pupils, the respondents would consider it necessary to allocate another teacher to that classroom. The provision of pupil support assistants or other non-teaching staff is not relevant to this ratio.
29. If an additional teacher was required for the specified school, that would require taking another teacher into employment for the period until the conclusion of the current school year only. The cost would be approximately £44,000 per year.

30. Pupils in the special units for both the specified and alternative schools follow a highly individualised curriculum. In both schools, special class pupils are attached to a mainstream class and will engage in some activities with pupils from that class, with the intent of partially integrating them with the mainstream pupil population.
31. The journey between the child's home and the alternative school will likely take longer than the journey between the home and the specified school. The average difference is about ten minutes, but this will vary depending on time of day and traffic.

### REASONS FOR FINDINGS AND DECISION

32. The Tribunal found all of the witnesses to be credible and reliable as to the primary facts. The appellant's solicitor submitted that the evidence of the acting head teacher of the specified school and the head teacher of the alternative school ought to be discounted. We did not find their evidence on the primary facts to be weakened to any material extent. The acting head teacher impressed us with his detailed recollection of the individual needs of the children in the classes of the special unit. To the limited extent that he hesitated or was unsure, this was readily understandable in the context of having little reason to expect to be questioned on this particular matter. We perceived no material inconsistency (contrary to what was suggested on behalf of the appellant) in his evidence regarding the impact of a pupil support worker, which was that it would alleviate pressure on the class but would not be a direct substitute for a teacher and would not be relevant to assessing maximum class sizes. Indeed, he impressed us with his candour when describing the challenges the special unit in the school had faced in recent years. The credibility and reliability of the head teacher of the alternative school as to the primary



facts was not material to the outcome. The respondent's representative made no criticism of the credibility or reliability of the appellant or her witnesses.

33. The findings at §§ 14-15 above were made primarily on the basis of the consultant endocrinologist's evidence and supplemented by the joint minute of agreed facts (T44, § 3). The finding at § 16 was based on the appellant's account of the child at home, the head teacher's account of the child at his current school, and the knowledge of the consultant endocrinologist gained, we understand, partly from direct experience and second-hand from other health professionals such as the child's physiotherapists. The consultant spoke specifically of the child's need to be motivated to engage in physical activity, a point supported by the appellant's account of her having to create games in order to get her son to do things.

34. The findings at § 18 and § 19 were made on the basis of the evidence of the appellant and the head teacher of the current school. The importance of play-times for the child appears to have been evident to the school staff, in that his part-time attendance is arranged so that he is picked up after play-times. The importance of friends and play to the child is also strongly supported by the report of the independent advocacy worker. Asked whether he could tell the independent advocacy worker anything about his friends, he listed the names of eighteen of them, all of whom were in his class (T46). When asked what made him happy at school, he said: "I usually play with my friends" (T47). Our strong impression from the oral evidence, supported by the independent advocacy report, is that spending time with his classmates and friends more generally is something of great importance to the child. This will have further indirect benefits in that, if he is keen to play football or engage in other physical play with friends, it will contribute to improved health (such as muscle tone). In our view, it is therefore a very important

consideration that he can fully socialise and play with friends at school and involve himself in what they do.

35. The findings at §§ 20-21 and 27 were made on the basis of the evidence of the acting head teacher of the specified school. The findings at § 22-26 were made on the basis of the evidence of the head teacher of the alternative school.

36. The finding at § 28 was made on the basis of our reading of the Scottish Negotiating Committee for Teachers Handbook (R99-100) and the evidence of the respondents' witnesses. The Handbook states conditions of service, *i.e.* conditions in the teachers' contract of employment the breach of which could give rise to various rights of those teachers to sue, to withhold performance of their obligations or to treat their contract as having been repudiated by the employer (constructive dismissal), depending on the severity of the breach. There was nothing in the handbook extracts produced or in the oral evidence to suggest that the provision of other staff would be relevant to calculating the limit. That a pupil support worker might ease the pressure of practically managing the class does not address the need for qualified teaching staff, especially given that pupils in such classes typically have highly individualised curricula. Both the acting head teacher of the specified school and the head teacher of the alternative school said they had no experience of the respondents permitting class size maxima to be exceeded without employment of another teacher. The acting head teacher of the specified school acknowledged that a class might have more than six pupils in a class room when taking pupils from the other class for a limited time for the purposes of a particular activity, but we think this has no relevance to the viability or propriety of running a class with more than six pupils on a constant basis. That the respondents would treat this maximum as an invariable standard accorded with the tribunal's collective experience of how teachers

and education authorities view these limits. The respondents would not merely add another teacher because they thought it desirable, but because they thought it necessary. In our opinion, the respondents would be correct to regard adding another teacher to a language class exceeding six children to be a practical necessity.

37. The finding at § 29 was based on the respondents' case statement (R5 at §13). There was no evidence as to the lack of availability of teachers from other schools who could be re-allocated. A party's pleadings do not constitute evidence. But there was no evidence advanced on behalf of the appellant that the figure given for that cost was wrong, or that in fact other teachers from other schools could be transferred, nor any suggestion in any form ahead of the hearing that this was contested. In the absence of any challenge articulated to this either in advance of or during the course of the examination of the witnesses, we think the proper course is to treat the assertion made in the case-statement as undisputed, and to proceed upon the assumption that it is correct.

38. We are not satisfied that employment would be required for the period beyond the current school year. Class 2 is due to become a class of four pupils at the end of the school year. The specified school's acting head teacher expressed, repeatedly, a concern that employing another teacher at the school would be taken as licence by the respondents to increase the size of the class by several pupils. We infer from this that the acting head teacher expects the respondents to place further pupils in his school should there be capacity. If a younger child is placed there (eg of Primary 1 or 2 age), that child would be placed in Class 1, necessitating one child being moved to Class 2, and indeed the appeal proceeded on the basis that if it was successful this child would be placed in Class 1 given his age. The acting head teacher described the delicacy in composing the class

and the great need to ensure harmony among the pupils of a kind that, in recent years, had been lacking resulting in the teaching staff being placed under very intense pressure. We think it would be impractical to move a pupil between classes during the school year. Transition tends to be more taxing for children with conditions such as autism spectrum disorder. It needs to be carefully planned. It can place burdens on the pupil and on the class to which they are introduced. But some adjustment to the composition of the classes will be required at the end of the school year anyway, either simply to even-up the size of the classes or to accommodate the placement of a younger pupil in Class 1. A teacher could be employed on a temporary contract, or on a permanent contract and then be transferred to some other school wherever a vacancy arose.

39. The finding at § 30 was made on the basis of the evidence of the acting head teacher of the specified school and the head teacher of the alternative school.

40. The finding at § 31 was made after consideration of the appellant's evidence, printouts from AA Route Planner online (R84-85, R88-89) and from Google Maps (B6 *et seq*). Whilst not doubting the sincerity of the appellant's evidence regarding travel times, we thought evidence from an objective source (rather than her recollection based on the limited occasions when she had visited the schools) was likely to be a more reliable source of typical journey times. The AA Route Planner provides an estimate of 33 minutes to get to the alternative school, and 22 minutes to get to the specified school (i.e. 11 minutes extra each way). Google Maps provides different estimates depending on the precise time of day, expressed as a range. So, for example, at 9am, travel will take between 22 and 50 minutes for the alternative school, whereas at 3.50pm it will take between 20 and 30 minutes. The differences between the schools, according to Google Maps, vary from there being virtually no difference at all to 20 minutes each way. Whilst

the respondents' representative was correct to observe the inherent difficulties in predicting likely travel times, we think we must make some assessment. Overall, we think it right to assume additional travel time of about ten minutes in each direction, which is close to the figure suggested by the AA Route Planner and in the middle of the various differences that might be derived from the figures given by Google Maps.

41. On the basis of the finding at § 28 we hold that the ground of refusal set out in the Education (Additional Support for Learning) (Scotland) Act 2004, Sch 2, para 3(1)(a)(i), is established. But we do not find that it is appropriate in all the circumstances to confirm the respondent's decision.

42. On the one hand, employing another teacher till the end of the current school year is a significant cost. Also, having an extra teacher and pupil in the class will reduce the space available in class (though we think this ought to be manageable given that sometimes the number of pupils in the classroom will exceed six for the purposes of certain activities). The acting head teacher's concern in oral evidence seemed largely concerned with the prospect of the respondents placing children at the school additional to the appellant's child if another teacher was recruited. One should also note that the alternative school has a smaller school roll than the specified school, and that there might be some advantage to the child in being in a smaller, quieter school.

43. We think these matters are outweighed cumulatively by four considerations, the first of which is particularly important.

44. The child's access at the alternative school to the playground facilities that his peers would use is unsatisfactory. He could only with considerable time and effort ascend and

descend the stairs each playtime to go to the larger playground. Allowing him out early from class would address this problem to some extent, but would necessitate a reduction of his time in class and his being treated differently from his classmates. He might lack motivation to go up the stairs and return to class after playtime. And ensuring his return was accomplished safely would mean either effectively ending his playtime early by going up the stairs ahead of his peers, or ascending them later cutting down on classroom time. If he kept to the smaller playground he would not likely have most of his classmates to play with nor would he be able to use playground equipment. Although some might think these fairly minor considerations, the cumulative effect over five years of primary schooling becomes substantial.

45. An additional consideration concerns the fact that the classrooms for primary 3 to 7 in the alternative school are on the third floor, and pupils in the special classes often use the library on the fourth floor. Whilst the head teacher's evidence was that the school would make whatever necessary adjustments necessary (including relocating the mainstream classes) to both include the child in all class activities and avoid the need to use the stairs, we thought it improbable that the whole school layout and timetable could always be adjusted to entirely fit in with this child's needs over the course of his primary school years.
46. To the above, we add the ready access to a safe space in the alternative school and the moderately shorter travel time. For a child who has been experiencing breakdowns in behaviour, a safe space is important and the provision in the specified school appeared to be superior and more certain. There was no evidence in respect of the specified school of having to move children around or out of rooms so that a child could have a safe space. And the alternative school did not have a soft play/sensory room. A slightly shorter

travel time is a benefit in itself, but it also means the appellant could pick up the child more quickly, should he have a breakdown in behaviour requiring him to be taken from school. One would expect that in the smaller class setting that the need for a safe space and/or to be picked up early from school would diminish or disappear entirely over time, but it might persist for a while. These last two considerations were relatively minor but still of some significance.

## REVIEW OF DIRECTION

47. No submissions were made to us as to when any decision in the appellant's favour should take effect. We have allowed four weeks for the school to make arrangements to allow the child to start attending. This does not prevent attendance being limited to part-time as part of a transition. If either party seeks provision of a different period, application should be made to the Tribunal for review of this decision in terms of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018, rule 11.