



2026UT72

Ref: UTS/AP/25/0158

DECISION OF

Lady Carmichael

**ON AN APPEAL
IN THE CASE OF**

North Lanarkshire Council

Appellant

- and -

LM
per Cairn Legal Limited

Respondent

FTS Case Reference: FTS/HEC/AR/25/0022

Appellant: Scott Blair, Advocate, instructed by North Lanarkshire Council
Respondent: Iain Nisbet, Solicitor, Cairn Legal

15 September 2026

Decision

The Upper Tribunal for Scotland refuses the appeal and upholds the decision of the First-tier Tribunal for Scotland.



Reasons

Introduction

1. This is an appeal from a decision of the First-tier Tribunal for Scotland ("FTS"). It relates to a reference brought by the respondent to the FTS in which she challenged the appellant education authority's decision to refuse to place her daughter ("the child") in school B.
2. The FTS dismissed the reference because it held that it did not have jurisdiction to determine it. It had, however, heard evidence, and it made findings on the merits of the reference. Had it found that it had jurisdiction, the FTS would have overturned the appellant's decision to refuse the placing request, and would have required the appellant to place the child in school B.
3. I have decided that the FTS was correct to hold that it did not have jurisdiction to determine the reference. No question of remitting to the case to the FTS arises.
4. I record here what I would have done if I had decided that the FTS did have jurisdiction to decide the reference. Although the respondent asked this tribunal to quash the decision of the FTS and to remit the case to the FTS, the grounds of appeal related only to the decision on jurisdiction, and made no criticism of the findings of the FTS on the merits of the appeal. There was no ground of appeal directed to the merits of the decision. The appellant's submission was that the matter should be remitted to the FTS, in the event of a successful appeal, because the FTS had not made a binding determination on the merits.
5. Had I been persuaded that the FTS was wrong to hold that it did not have jurisdiction, I would have declined to remit the matter for a further decision. The FTS made detailed findings on the merits of the matter. The appellant submitted that they were not effective findings because they were made obiter. The appellant did not identify any error in the approach of the FTS to the findings on the merits. I would have remade the decision of the FTS (a) so as to hold that the FTS had jurisdiction; and (b) by applying the findings of the FTS on the merits so as to overturn the decision to refuse the placing request. I would have required the appellant to place the child in school B.

Background

6. The child has severe neuro-disability secondary to early infantile developmental and epileptic encephalopathy associated with a very rare gene variant. She has global developmental delay and a learning disability. She has epilepsy. She experiences gastro-oesophageal reflux/gastrointestinal dysmotility. She has suspected cortical visual impairment. She is non-verbal, has very impaired mobility and cannot stand unaided. She uses a specialist wheelchair and other equipment.



7. School B is an “all through” school. It is not a local authority school. The education authority requires to pay fees for the child to attend. School B provides nursery education and education for children aged between 5 and 18 years. The child has attended nursery at school B since January 2024 – just before her fourth birthday. That followed a decision of the FTS on 14 November 2023 in which the FTS overturned the education authority’s decision to refuse the respondent’s placing request for the child to attend school B.
8. In September 2024 the respondent made a placing request for the child to join primary 1 at school B. The education authority refused that request. I was told that the respondent believed that such a request was necessary.
9. Following a meeting of the appellant’s transition pathway review panel on 2 December 2024, and another meeting of members of the appellant’s inclusion team during the week commencing 27 January 2025, the appellant advised school B by e-mail on 7 February 2025 that school A was the allocated school for the child for the start of the new academic year in August 2025.
10. The FTS itself raised the question of whether it had jurisdiction. It formulated the question it had to answer as follows:

“In an ‘all through school’ is a placing request required in order to move from the nursery provision to the primary provision of that school?”
11. The FTS expressed its conclusions in two ways. First, it decided that the matter was *res judicata*, in the sense that the tribunal had made a decision in 2023 about the matter of where the child was to be placed. She had not been placed in nursery, but in school B. She was entitled to remain there unless moved by consent or permanently excluded from the school. Alternatively, there was no necessity for a judicial decision, as the tribunal had already made a decision about where the child was to be placed.
12. Although the FTS expressed its conclusions in that way at paragraphs 76 and 77, what it did to reach those conclusions was to embark on a process of statutory construction, as is apparent from paragraphs 80 to 101. By the time of the hearing in this tribunal, parties agreed that whether the FTS had jurisdiction turned on the construction of the statutory provisions that confer jurisdiction on the FTS. Although my decision turns on a small number of provisions it is necessary to set out a wider range that featured in the submissions.



Statutory provisions

13. Section 4(1) of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”) imposes duties on education authorities, subject to the matters mentioned in section 4(2).

“4(1) Every education authority must –

(a) 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

(b) make appropriate arrangements for keeping under consideration –

(i) the additional support needs of, and

(ii) the adequacy of the additional support provided for,

each such child and young person.

(2) Subsection (1)(a) does not require an education authority to do anything which –

(a) they do not otherwise have power to do, or

(b) would result in unreasonable public expenditure being incurred.”

14. Section 18(1) and (3)(da) of the 2004 Act confer jurisdiction on the FTS in relation to placing requests where the school is not a public school but a special school the managers of which are willing to admit the child. The powers of the FTS in a reference of that sort are set out at section 19(4A).

15. Schedule 2, paragraphs 2(2)(a) and (3) of the 2004 Act provide:

“2(2) Where the parent of a child having additional support needs makes a request to the education authority for the area to which the child belongs to place the child in the school specified in the request, not being a public school but being–

(a) a special school the managers of which are willing to admit the child,

(b) ...

(c) ...

it is the duty of the authority, subject to paragraph 3, to meet the fees and other necessary costs of the child's attendance at the specified school.

(3) A request made under sub-paragraph (1) or (2) is referred to in this Act as a “placing request” and the school specified in it is referred to in this schedule as the “specified school”.”

16. Paragraph 3 provides:



3(1) The duty imposed by sub-paragraph (1) or, as the case may be, sub-paragraph (2) of 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,
- (ii) give rise to significant expenditure on extending or otherwise altering the accommodation at or facilities provided in connection with the school,
- (iii) be seriously detrimental to the continuity of the child's education,
- (iv) be likely to be seriously detrimental to order and discipline in the school,
- (v) be likely to be seriously detrimental to the educational well-being of pupils attending the school,
- (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, or
- (vii) though neither of the tests set out in paragraphs (i) and (ii) is satisfied, have the consequence that the capacity of the school would be exceeded in terms of pupil numbers,

(b) if the education normally provided at the specified school is not suited to the age, ability or aptitude of the child,

(c) if the education authority have already required the child to discontinue attendance at the specified school,

(d) if, where the specified school is a school mentioned in paragraph 2(2)(a) or (b), the child does not have additional support needs requiring the education or special facilities normally provided at that school,

(e) if the specified school is a single sex school (within the meaning of paragraph 1(2) of Part 1 of Schedule 11 to the Equality Act 2010) and the child is not of the sex admitted or taken (under that paragraph) to be admitted to the school,

(f) if all of the following conditions apply, namely —

- (i) the specified school is not a public school,
- (ii) the authority are able to make provision for the additional support needs of the child in a school (whether or not a school under their management) other than the specified school,
- (iii) it is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in the specified school and in the school referred to in paragraph (ii), to place the child in the specified school, and
- (iv) the authority have offered to place the child in the school referred to in paragraph (ii), or



(g)if, where the specified school is a special school, placing the child in the school would breach the requirement in section 15(1) of the 2000 Act.

(2) An education authority may place a child in the specified school notwithstanding sub-paragraph (1)(a) to (e).

(3) The duty imposed by sub-paragraph (1) or, as the case may be, sub-paragraph (2) of paragraph 2 does not apply where the acceptance of a placing request in respect of a child who is resident outwith the catchment area of the specified school would prevent the education authority from retaining reserved places at the specified school or in relation to any particular stage of education at the school.

(4) Nothing in sub-paragraph (3) prevents an education authority from placing a child in the specified 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 regulations 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 1st 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.

17. Section 29 of the 2004 Act defines “special school” in the following way:

““special school” means–

(a) a school, or

(b) any class or other unit forming part of a public school which is not itself a special school

the sole or main purpose of which is to provide education specially suited to the additional support needs of children or young persons selected for attendance at the school, class or (as the case may be) unit by reason of those needs”

School B does not fall within paragraph (b).

18. By virtue of section 29, the expressions “school” and “school education” have the meanings given in section 135(1) of the Education (Scotland) Act 1980 (“the 1980 Act”); in relation to “school education” section 135(1) refers back to section 5(1)(a) of the 1980 Act (as amended by the 2004 Act).



““School” means an institution for the provision of primary or secondary education or both primary and secondary education being a public school, a grant-aided school or an independent school, and includes a nursery school and a special school; and the expression “school” where used without qualification includes any such school or all such schools as the context may require.”

““school education” means progressive education appropriate to the requirements of pupils regard being had to the age, ability and aptitude of such pupils, and includes —

- (i) early learning and childcare”

19. Section 135(1) of the 1980 Act defines “nursery schools”:

“nursery schools” and “nursery classes” are schools and classes which provide early learning and childcare.

20. The same section provides that “early learning and childcare” has the same meaning as in Part 6 of the Children and Young People (Scotland) Act 2014, namely:

“a service, consisting of education and care, of a kind which is suitable in the ordinary case for children who are under school age, regard being had to the importance of interactions and other experiences which support learning and development in a caring and nurturing setting.”

21. A person is of school age if she has attained the age of five years and has not attained the age of sixteen years: section 31 of the 1980 Act.

22. Section 135(2) of the 1980 Act provides:

“135 (2) Any reference in any enactment or other instrument (including this Act and, unless the contrary intention appears, any enactment or other instrument passed or made after the commencement of this Act) to—

- (a) primary education shall be construed as a reference to school education of a kind
 - (i) which is appropriate in the ordinary case to the requirements of pupils who have not attained the age of twelve years; and
 - (ii) which is, in the case of a pupil having additional support needs, within the provision made for the purpose of meeting those needs until he is transferred to the stage of secondary education;
- (b) secondary education shall be construed as a reference to school education of a kind
 - (i) which is appropriate in the ordinary case to the requirements of pupils who have attained that age; and



(ii) which is, in the case of a pupil having additional support needs, within the provision made for the purpose of meeting those needs until he ceases to be of school age or to receive school education, whichever is the later.

and any reference in any such enactment or other instrument as aforesaid to primary or secondary schools or departments or classes shall be construed accordingly.”

23. The Additional Support for Learning (Changes in School Education) (Scotland) Regulations 2005 (“the 2005 regulations”) identify “specified changes” in the school education of children. One of those changes is where a child begins to receive primary education: regulation 2(b). Regulation 3 imposes duties on the education authority to seek advice and information and the views of children and parents at specified times before a child or young person is likely to have a change in school education. Those include beginning to receive primary education and secondary education. They include also other situations in which a child or young person transfers other than temporarily from a school under the management of an education authority to another school under the management of the authority, or otherwise transfers from such a school in pursuance of arrangements entered into by the authority: regulation 2(d).
24. The Education (School and Placing Information) (Scotland) Regulations 2012 (“the 2012 regulations”) require education authorities to supply and make available information about schools and about arrangements for placing requests. Regulation 2 provides that “school” in relation to an authority, means a school under their management. Regulation 17 requires education authorities to provide information to parents of children with additional support needs about the effect of the provisions in Schedule 2 to the 2004 Act regarding placing requests. Regulation 17(4) and (6) provide:
- “17(4) Subject to paragraph (6), where an authority are required by the provisions of sections 28B(1)(b)(i) of the 1980 Act to inform a parent of a child having additional support needs of the school in which the authority propose to place the child, the authority must give notification in writing.
- ...
- (6) A notification to a parent under paragraph (4) must be given at least 2 months before any date upon which the authority propose that a child should commence attendance at a school or transfer to one school from another; but nothing in this paragraph will prevent such commencement or transfer taking place at such earlier date as may be agreed between the authority and the parent.”
25. The broadly equivalent provisions in the 2012 regulations regarding notification to parents whose children do not have additional support needs appear in regulation 16. As to the timing of notification, regulation 16(4) provides:



“(4) A parent to be informed under paragraph (1) includes a parent whose child is, in accordance with arrangements made by the authority and for the time being in operation —

- (a) due to commence attendance at a primary school;
- (b) due to transfer from the stage of primary education to the stage of secondary education at the commencement of that stage of secondary education; or
- (c) due to transfer from a school to another school at any time during the course of the stage of primary or secondary education.

Codes of practice

26. Section 27 of the 2004 Act provides that the Scottish Ministers must publish, and may from time to time revise and re-publish, a code of practice providing guidance as to the exercise by education authorities and appropriate agencies of the functions conferred on them by the Act. The Scottish Ministers have published such guidance on four occasions. The edition in force at the relevant time was the third edition, issued in 2017. A further edition was published in 2026.

Appellant’s submissions

27. The FTS had erred in failing to interpret the legislation so as to recognise that a placing request was required in respect of a school placement at each separate and distinct state of education. Its decision was a “radical departure” from the accepted interpretation of the law, and practice in the field of support for additional needs. Parliament had intended that there be a realistic comparison between different schools with respect to a child’s stage of education and their current needs. Cost was relevant. In the instant case primary education at the school was very much more expensive than a nursery place. The duty to have regard to the principle that children were to be educated in accordance with the wishes of their parents was subject to compatibility with the avoidance of unreasonable public expenditure: 1980 Act, section 28(1). The duty to make adequate and efficient provision for additional support required by a child did not extend to doing anything that would result in unreasonable public expenditure: 2004 Act, section 4.
28. The statutory regime for the resolution of disputed placing requests for places in schools other than public schools envisaged a comparative assessment of both the suitability and the cost of the provision in the specified school and another school in which the authority were able to make provision for the child’s additional support needs: 2004 Act, Schedule 2, paragraph 3(1)(f). If costs escalated at the stage of transition to primary school, that comparative assessment could not, on the FTS’s analysis, take place. The issue arose starkly on the facts of this case. The fees for early learning and childcare at school B were £66,746.32 in 2023 (when the FTS granted the placing request for the child). The cost of primary provision in 2025 was £104,363.58. An education authority could decide to cease to fund



ASN provision. It could not be compelled to do so where that would incur unreasonable public expenditure.

29. The FTS had conflated the provision of school education, and the question of where the provision was made. The placing request in 2023 related to early learning and childcare, whereas the present reference was brought in relation to the “primary stage”. The approach of the FTS ran counter to articles 3, 28 and 29 of the United Nations Convention on the Rights of the Child (“UNCRC”). Nursery, primary and secondary stages of education were long-embedded in Scots law. Primary and secondary legislation were referred to in Article 28(1)(a) and (b) of the UNCRC. Most children started primary school between the ages of 4.5 and 5.5 years.
30. The education authority had to be able to review provision in a non-public school and in appropriate cases to make provision, where provision was no longer appropriate. Mr Blair relied on the terms of regulation 17(6) of the 2012 regulations, which referred to a proposal by an education authority that a child transfer from one school to another, and placed some emphasis on that provision in his oral submissions. The mention of such a proposal could be given content only if the authority had power to require a child with additional support needs to change schools.
31. The FTS failed to recognise the role of Codes of Practice issued under section 27 of the 2004 Act. The 2017 Code of Practice (*Supporting Children’s Learning: Statutory Guidance on the Education (Additional Support for Learning) Scotland Act 2004 (as amended)*) and in particular chapter 8 of it, showed that the transition from nursery to primary school for children with ASN was a structured and collaborative process. Counsel referred in written submission, but without reference to a particular chapter of the Code, to paragraphs 1-96, and particularly 92. This appears to be a reference to Chapter 3, which deals generally with the topic of meeting additional support needs.
32. By way of context it was relevant to note that early learning and childcare was the subject of curricular guidance (*Realising the Ambition: Being Me*) separate from that applicable to learners aged 3 to 18 years (*Curriculum for Excellence*). Early learning and childcare settings operated with flexible opening patterns distinct from the legal requirements as to the days on which schools required to be open. They were inspected by the Care Inspectorate rather than His Majesty’s Inspectors of Education. Public funding was allocated on different bases to early learning and childcare on the one hand and primary education on the other. There was no legal requirement to attend early learning and childcare. Progress reporting to parents was the subject of statutory obligation so far as primary education was concerned, and that was not the case in early learning and childcare settings. The qualifications of staff in each setting were, respectively, different.

Respondent’s submission



33. The priority from the respondent's point of view was that the child's education not be disrupted. She was settled and doing well. If the FTS had erred as to its jurisdiction, the appropriate remedy would be to remake the decision of the FTS in the terms suggested by the FTS in its own consideration of the merits of the matter.
34. Where a child was placed at a school following a reference to the FTS, they would remain at that school indefinitely. It might be open to an education authority which had granted a placing request to change its mind. If that happened, the remedy for the parent would be to make a further placing request, which, if refused, could be referred to the FTS. Where the FTS had made the decision, there was no scope for variation at the instance of the education authority. There was no statutory route to such an outcome. The education authority's submission amounted to a plea for legislative change.
35. In oral submissions Mr Nisbet sought to address the education authority's concern about additional expenditure. He suggested that in the event that fees became exceptionally high, it might be possible to invite the FTS to review its own decision under rule 11 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018.

Decision

36. Although a great many statutory provisions are relevant more generally to the provision of education for children with additional support needs, this appeal turns only on the correct construction of section 18 and schedule 2 of the 2004 Act.
37. The FTS did not err in law when it held that it had no jurisdiction, having already determined a placing request in relation to the same child and the same school in a way that required the education authority to place the child in the school. The education authority's argument depended on the notion that the earlier decision of the FTS was in relation only to a place for early learning and childcare.
38. Paragraphs 2 and 3 of Schedule 2 to the 2004 Act make no mention of early learning and childcare, primary school or secondary school. They refer to a request to place a child in a school. That school may be a special school other than a public school. School B is such a school. There is no dispute that it is a special school. School B falls within the definition of school in section 135(1) of the 1980 Act because it is a special school. In 2023 the FTS determined a reference in relation to a refusal to place the child in the school, and required the education authority to place the child there.
39. In the case of a school under the management of an education authority, it would have the power to exclude a pupil in accordance with regulation 4 of the Schools General (Scotland) Regulations 1975. Counsel was unable to identify any provision of the statutes to which I



have referred for the termination, at the instance of the education authority, of a placement at a school which is not a public school.

40. In large part the submissions of the education authority were directed at demonstrating, by reference to a broader context of statutory provisions, guidance and practice in the field of education in Scotland, that paragraphs 2 and 3 of Schedule 2 to the 2004 should be construed in the way that they contended. Nothing in that broader context in my view assists the education authority. It does not, and cannot, innovate on the plain language used in Schedule 2.
41. There are in any event a number of ways in which the provisions for the education of children with ASN are less closely defined by reference to age and a related stage of education than are those for children who do not have ASN. In the case of children who do not have additional support needs and who are educated in schools managed by an education authority, the duration and timing of their education in a particular school is likely to be determined by their age. That is not necessarily the case for children with ASN, as is apparent from, for example, the provisions of section 135(2) of the 1980 Act, or regulations 16 and 17 of the 2012 regulations.
42. There are other differences between the provisions relating to children with ASN and children without ASN. The statutory regime permits placing requests for early learning and childcare for children with ASN. By contrast, at least since 13 October 2000, it has not been possible to make a placing request for a child who does not have ASN so far as a nursery school or nursery class is concerned: see section 28A of the 1980 Act (as amended by section 43(2) of the Standards in Scotland's Schools etc. Act 2000). Section 28A as it formerly applied to "recorded" children did not exclude placing requests regarding nursery schools or classes. As the FTS observed, that reflects a choice made by the Scottish Parliament to distinguish between placing requests for children with ASN and children without ASN.
43. Placing requests for children without ASN only relate to placing in schools managed by the education authority in question. As paragraph 2 of Schedule 2 to the 2004 Act makes clear, that is not the position for children with ASN. Placing requests for children without ASN will in practice relate to places in local authority primary schools and secondary schools. Those will generally involve changes of school at times dictated by the chronological age of the child.
44. Regulation 17(6) of the 2012 Regulations does not assist the appellant. Although it refers to a proposal by the education authority that a child transfer from one school to another, that must be read, by reason of the definition of school, in relation to an education authority and for the purposes of those regulations, as a reference to schools in each case managed by the authority in question. It does not support the proposition that the education



authority has power unilaterally to bring to an end a placement in a non-public school, which has followed upon a decision on a reference to the FTS. There are a number of situations in which a child might transfer from one school managed by the education authority to another. That might be on starting primary or secondary education, or following an exclusion. The 2017 Code of Practice provides some context in this connection. Paragraph 16 of chapter 3 narrates that transitions include not only starting pre-school provision for the first time, and transferring to primary school and secondary school, but moving from one school to another as a result of a change of address, or being excluded from school; see also paragraph 16 of chapter 6.

45. I did not find the references to Chapter 8 of the 2017 Code of Practice of assistance. Chapter 8 is entitled “Resolving Disagreements”. Nothing in chapter 8 specifically supported the education authority’s arguments. Chapter 6 deals with transitions. It provides further explanations and helpful context as to the duties imposed by the 2005 regulations, but again does not provide any specific support for the statutory construction proposed by the education authority.
46. It is true that the 2005 regulations require the education authority to take steps to gather information and take advice at times calculated by reference to when a child is likely to have changes in education. Those changes include beginning to receive primary education. Paragraph 92 of Chapter 3 of the Code deals with monitoring and review, and makes the point that where additional support needs prove to be of short duration, additional support provision will no longer be required, and children will benefit from school education through support within universal provision. Education authorities undoubtedly require to inform themselves and keep under review the needs of children with ASN: 2004 Act, section 4(1)(b). That does not, however, assist with the construction of the provisions relating to placing requests.
47. It may be unsatisfactory, from the point of view of an education authority, that there is no provision that limits the duration of the placement of a pre-school age child in an “all-through” school, particularly where the cost of primary education in that school is higher than the cost of early learning and childcare. Counsel, was, however, unable to point to any provision that did limit the duration of the placement in that way. He was similarly unable to identify any provision that permitted the education authority to terminate the placement of a child in a school that was not a public school, following a decision of the FTS requiring the education authority to place the child there.
48. I do not accept Mr Nisbet’s submission that the FTS might be asked to review its decision on a change of circumstances such as a large increase in costs. Rule 11 of the 2018 rules enables the FTS to review its decision on an application in writing within 14 days. It provides a procedure for the review of a decision by the FTS of “a decision made by it in any matter in a case before it”: Tribunals (Scotland) Act 2014, section 43. Although the



expression “any matter in a case before it” is a broad one, the provision is designed to allow the FTS to consider whether it has made an error, and, if necessary, rectify an error without the need for an appeal. It is not a vehicle whereby a reference might be reheard of new at a much later date on a changed factual basis.

*A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within **30 days** of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.*

Lady Carmichael

Member of the Upper Tribunal for Scotland