Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

Reference

1. The appellant is the mother of a six-year old boy currently enrolled at a mainstream primary school run by the respondent. The appellant requested that the respondent place her son at a school ("the specified school") with mainstream and special classes, in one of the school's special classes. On 6 July 2020, the respondent refused the request. On 28 August 2020, the appellant referred that decision to the Tribunal (Education (Additional Support for Learning) (Scotland) Act 2004, sec 18(1), (3)(da)(ii)).

Decision

2. The Tribunal is not satisfied that it is appropriate, in all the circumstances, to confirm the respondent's decision (2004 Act, sec 19(4A)(a)(ii)).

3. Accordingly, Tribunal overturns that decision. The respondent is required to enroll the child at the specified school, and to provide him with education from that school, on or before Monday, 22 February 2021 (2004 Act, sec 19(4A)(b)(i)).

Process

4. References in this decision to a page number (HEC/#) are to the combined electronic bundle, of 132 pages, compiled by the Tribunal. HEC/130-133 were a clearer copy provided by the respondent of e-mails lodged by the appellant, set out at HEC/21-23. There was no objection on the basis of timeliness or otherwise to consideration of the documentary material lodged.

5. The bundle included an advocacy worker's statement on behalf of the child (pp 33-38) and a joint minute of admissions (HEC/39-40). No party relied upon the contents of the advocacy statement in submissions and we did not find it material to our deliberations.

6. The respondent led evidence from the head teacher of the current school, followed by the head teacher of the specified school. The appellant led evidence from a service manager of a charity which had assisted with provision of some education to the child at home. The appellant was examined thereafter. In respect of each witness, a statement of their evidence had been lodged in advance of the hearing.

7. During her examination-in-chief, the appellant commented that the current school had agreed to provide a quiet space for her son, outside of class, in the school corridor, which had not been honoured. The respondent's representative said this was a new

development in the evidence. The respondent invited us to give little weight to this answer. We say more about this below (para. **15**).

8. As agreed at the hearing, written submissions were provided subsequently by each party on 20 January 2021. The respondent took up the opportunity allowed by the tribunal to make a further submission in response on 22 January 2021. The tribunal intimated that it did not require any further response from the appellant's solicitor. The tribunal were satisfied that the respondent's submission was properly confined to points, that were reasonably not anticipated, arising from the appellant's submission. The tribunal were further satisfied that everything said by the respondent could and should have been anticipated by the appellant's solicitor, so that natural justice did not require the opportunity to reply.

9. On 5 February 2021, a summary decision was issued.

Findings in Fact

10. The Tribunal found the following facts admitted, or proven on the balance of probabilities:

The child

(1) The child is six years old.

(2) The child has autism spectrum disorder, hyperacusis, hereditary multiple exostoses, and a sleep disorder.

(3) The child has speech and language delay. He has difficulty communicating. He has difficulty processing sensory stimuli. He is sensitive to noise and has anxiety in busy environments. He does not understand personal safety. He displays dysregulation due to frustration caused by his communication difficulties.

(4) The child can experience distress from being in crowds or large groups.

(5) The child requires supervision for his safety. He requires a strict routine to be in place. He requires a whole school learning environment that is structured to provide predictability, routines and boundaries.

(6) The child requires the "additional supports for learning" listed by the respondent's educational psychologist in her report of 1 April 2020, at page 8 (HEC/76).

The current school

(7) The child's present school is a mainstream school.

(8) The child has not attended classes at that school since November 2019.

(9) The child's attendance before November 2019 had declined to around 30%. The child would arrive at the school mid-way through the school day, at varying points.

(10) Since September 2020, the child has attended at the school twice a week for short, informal sessions with one or two other pupils.

a. Most of these short sessions have been of around fifteen minutes, in the playground or other outside activity areas of the school.

b. On 25 November, 30 November, 2 December and 7 December 2020, longer sessions took place involving some time in the classroom.

c. Subsequent to the session of 7 December 2020, the appellant found her son to be in an upset state. The appellant requested that the sessions revert to the shorter, playground format.

(11) Before he was enrolled there, the appellant was informed by the current school that her son would be provided with a quiet place to resort to.

(12) The child has not been given a quiet space outside of the classroom.

(13) The nature of the current school's building makes it difficult to give the child a quiet space.

The specified school

(14) The school ("the specified school") at which the appellant wishes the child to attend consists mostly of mainstream classes, but has additionally a unit consisting of two language and communications ("L&C") classes. The appellant has specified that unit in her placing request. That unit provides education specially suited to children with additional support needs, and the children attending there have been selected on the basis of such needs.

(15) The L&Cs have smaller class sizes and less sensory stimuli than a typical mainstream class.

(16) Each L&C has one teacher and a nursery nurse. There is also one pupil support assistant between the two L&C classes.

(17) Each of the L&C classes has six pupils.

(18) The specified school would not permit an L&C class to have a ratio of more than six pupils for every teacher.

(19) Should an L&C class have more than six pupils, a further teacher would be taken into employment to work at the school.

(20) The entire cohort of one of the L&C classes will move to secondary education, and leave the specified school, at the end of the current school year.

Reasons for the Decision

Comments on findings-in-fact

11. Findings-in-fact **(2), (3), (5), (8)** and **(15)** were made in line with the joint minute of admissions (HEC/39-40).

12. Finding **(4)** was made on the basis of the appellant's examination-in-chief.

13. Finding **(9)** was made on the basis of the evidence of the head teacher of the current school. The appellant said in her statement that her son was "not … able" to attend (HEC/047, para. 7), though the nature of the inability was never precisely specified; the appellant was not questioned about this at the hearing. There was no suggestion made on the respondent's behalf that there was any culpable failure by the parents to secure the child's attendance. The burden of proof falling generally upon the respondent, it would be for it to clearly articulate any contention that there was some significant factor unconnected to the child's conditions or his schooling that might account for this.

14. Finding **(10)** is derived from a note of staff at the current school (HEC/123-HEC/128) though there was also evidence from the appellant coinciding with it.

15. Findings **(11)** and **(12)** were made on the basis of the appellant's witness statement (HEC/047, para. 6). This was also put to the head teacher of the current school in examination-in-chief, who did not dispute this. Although the appellant commented further on this in examination-in-chief, leading to the comment of the respondent's representative we have noted above (para. **7**), it is unnecessary to place any weight on that answer to make these findings. Finding **(13)** is based on the head teacher's examination-in-chief.

16. The significance of the last part of finding **(14)** is that the L&C classes are deemed themselves to constitute a special school, albeit forming part of an otherwise mainstream school (Education (Additional Support for Learning) (Scotland) Act 2004, section 29(1)). Thus, the appellant specified the L&C classes as the "school" in which placement of her son was sought. Nonetheless, for ease of expression, we refer to the mainstream and special parts of the school collectively as the "specified school".

17. Findings **(15)** to **(19)** were made on the basis of the oral evidence of the head teacher of the specified school.

Additional teacher

18. We are satisfied that placing the child in the specified school would make it necessary for the respondent to take an additional teacher into employment.

19. An extract from the Scottish Negotiating Committee for Teachers' Handbook, Appendix 2.9 was produced (HEC/110-111). A maximum class size specified for a class of children with additional support needs arising from language and communication difficulties is six. The evidence of the head teacher of the specified school (who had held that position for twelve years, and also had relevant experience predating that) in

cross-examination was that such a class in her experience had never been permitted, in her school or elsewhere, to have more than six children.

20. There was no evidence led before us that, either with this respondent, or with other education authorities, the limits in the SNCT handbook for classes for children with additional support needs were ever departed from. Absence of evidence is not necessarily evidence of absence. But we were left with no evidence contradicting or qualifying the effect of the evidence for the respondent, that the maximum ratio of six children for every teacher was a standard that would not be departed from, rather than a guideline in respect of which adherence was optional.

21. The head teacher gave evidence in response to the tribunal's questions that, in the event of long-term absence of a teacher for one of the language and communication classes, she would have to "turn to the supply list". The implication of that answer is that the staff at the specified school could not be re-allocated to cover the absence, nor would one expect a teacher to be available from another of the respondent's schools.

22. The head teacher was not questioned further, by the tribunal or by the parties, as to what 'turning to the supply list' would entail. The appellant's solicitor submitted that there was no evidence to say why a supply teacher could not be taken on (written submission, 3rd page, para. 2): though this submission seems predicated on the teachers on the supply list being currently employed. However, in the respondent's case statement, it is asserted that:

> "Supply teachers are not employed by the Education Authority unless and until they are employed from supply – therefore using a supply teacher amounts to taking a teacher into employment." (HEC/62: § D.12)

The case statement's author was the respondent's representative, who is designed in that statement as: "Parent and Pupil Support Manager". In that role, the author would have particular knowledge of how his employer's supply list operates. We explain below (paras. **54**-**57**) why we advise against a party relying upon either: (a) assertions by a representative and (b) assertions in their case statement. But the statement is an unequivocal assertion of fact, which should be within the author's personal knowledge. In the discharge of his duties as a manager in the respondent's education department, he would need to know about the arrangements for supply teachers. By calling the head teachers as witnesses, the respondent also gave the appellant the opportunity for this point to be tested, but there was no specific question on this in cross-examination. In these particular circumstances, we rely on and accept the unchallenged and uncontradicted assertion in the case statement.

23. We have noted the appellant's submissions relying on *East Lothian, petitioner* [2008] CSOH 137, 2008 SLT 921 and *J's Parents* v *Dumfries and Galloway Council* 2015 SLT (Sh Ct) 253. Those case do not have any bearing on the present case. Those cases concerned limits to class sizes, and exceptions to those limits, set out in legislation. The present case concerns a limit deriving from a standard in a staff handbook, which has been consistently applied by the respondent, where we have no evidence of this

or other education authorities departing from that standard. This case concerns a practical need, rather than a legislative requirement, to employ another teacher.

Serious detriment

24. We are not satisfied that placing the child in the specified school would "be likely to be seriously detrimental to the educational well-being of pupils attending the school" (2004 Act, sch. 2, para. 3(2)(v)).

25. We take "likely" not to mean probable, but rather "a real possibility that cannot be ignored of harm occurring, having regard to the nature and gravity of the feared harm in the particular case" (*RJ* v S*ecretary of State for Work and Pensions (PIP) (Personal independence payment – general)* [2017] UKUT 105 (AAC), [56]). So, it is not necessary for the respondent to establish a probability of serious detriment to educational well-being, only a real possibility.

26. The evidence on this aspect of the case rested entirely on what was said by the head teacher of the specified school. In many respects, the head teacher was an impressive witness, who spoke knowledgeably and candidly about her school. She was patently sincere. However, to the extent that the head teacher spoke of grave risks to the children arising from the admission of an extra pupil, we discounted that evidence because of the way it developed.

27. The head teacher, in her written statement, said that:

> "Introducing a new pupil would require staffing changes. This would be unsettling for the current population. It would also affect the occupancy of and space in the classrooms which are not designed to hold more that [*sic*] our current 6 pupils and 2 staff members. The furniture is designed for 6 pupils and introducing another work station would compromise safe movement in the rooms. This is of particular relevance currently." (HEC/129)

We take the 'particular relevance' to be the measures necessitated by the COVID-19 pandemic.

28. In cross-examination, the head teacher stated it would be "very difficult" to add an additional workstation into the classroom. When asked if it would be "possible", she answered, "personally, I think not", that some children find it "very difficult to have someone close to them", and that having another work station would "compromise" the "ability to have other children there safely and feel safe". But upon being asked what could be done to mitigate this, the head teacher said, after some hesitation, that she "suppose[d] we would have to consider" taking out some of the things the children used, such as books and equipment. The head teacher was asked as to how the limit of six children for the classroom was arrived at. She referred to the pupil/teacher ratio limit in the SCNT handbook, and to the limits required because of the COVID-19 pandemic.

29. In questions from the tribunal, the head teacher said that if an additional pupil was admitted, they would have to be "aware of increase in dysregulation, in behaviours

possibly aggressive or threatening or verbal, that could escalate" and that "mental well-being could be very adversely affected even in the shorter term."

30. In re-examination, the head teacher was asked about the effect of taking children's equipment out of the classroom. She said that it would impact upon their independence and organisation, and that it would necessitate a member of staff leaving the classroom to bring in the equipment when it was needed. She was asked whether an increase in dysregulation, aggression, and mental health problems would be probable. She answered: "I think it is likely, many of our children find proximity to others quite challenging. They need to have room of their own."

31. We are not satisfied that the evidence led was of sufficient cogency to establish the respondent's case on this issue. We think it significant that it was only as the head teacher's oral evidence developed that she spoke of serious effects on the mental well-being of the pupils. In her written statement she referred only to staffing changes being unsettling, and the classrooms not being designed for classes of more than six pupils and two staff members. The impression from her written statement and initially from cross-examination was that the difficulty was mainly a practical one about movement around the class. It was only after the question on mitigation that concerns of a graver kind were expressed. Indeed, the manner in which the head teacher answered that question suggested that she had not given any real thought to potential mitigation in advance of the hearing. We did not think all of the head teacher's views expressed at the hearing were the product of full and thorough consideration.

32. Whilst we accept the head teacher's evidence to the extent that there is some risk of an adverse effect on other pupils, we think if the risk was as large and as grave as her later answers indicated, it would have featured earlier and more prominently in her evidence, both in her written statement and her cross-examination. We are not satisfied that there is a *real* possibility of a *serious* detriment. There was no documentary evidence lodged, such as a floor plan of the classrooms, or written assessments as to their proper capacity, whether in the context of the COVD-19 pandemic or otherwise. The modesty of the effort in advance of the hearing to describe and document the adverse effect on pupils seemed to belie the extent of the risk ultimately claimed. The contention that adding another pupil and teacher to the class realistically could be seriously detrimental simply by dint of the greater demand on physical space or closer physical proximity is not one which has been adequately made out on the evidence.

Presumption of mainstreaming

33. We are not satisfied that placing the child in the specified school would breach the Standards in Scotland's Schools etc. Act 2000, section 15 (2004 Act, sch. 2, para. 3(2)(g)). This is because we are satisfied that, exceptionally, "education for the child in a school other than a special school … would not be suited to the ability or aptitude of the child" (2000 Act, sec 15(3)(a)).

34. Although the burden generally falls upon the respondent to establish a ground of refusal, the respondent can rely on the presumption of mainstreaming in the 2004 Act, section 15 to discharge that burden. As the duty in section 15 applies unless certain

exceptions apply, which are “presumed … [to] arise only exceptionally” (sec 15(3)), the burden must fall upon the party contending that an exception applies to establish this. Thus, in this context, the burden is on the appellant to establish the exception. The question posed by section 15 is in the generality, referring to “a school other than a special school” rather than any particular school, such as the one the child is currently enrolled at. Also, there may be adaptations to the standard mainstream education, so long as this does not entail “unreasonable public expenditure being incurred which would not ordinarily be incurred” (sec 15(3)(c)). Thus, if a child was suited to mainstream education generally, with the provision perhaps of an additional support for learning assistant (so long as this was not unreasonable expenditure not ordinarily incurred), then the exception would not be established, even if the child’s educational provision in his current mainstream school was unsuited to him. But the unsuitable nature of the current mainstream school might be highly material to whether it is appropriate, in all the circumstances, to confirm the respondent’s decision (2004 Act, sec 19(4A)(a)(ii)).

35. We did not find much assistance in the evidence of the head teacher of the current school. There were tensions between her evidence, the appellant’s evidence and the assessment of the educational psychologist. To the extent there was an inconsistency, we preferred that other evidence.

36. The head teacher’s written statement did not convey a detailed or clear account as to what plans were put in place to support the child’s transition into primary school, or as to his progress or presentation there. There was only limited reference in the statement to steps taken to adapt to the child’s needs.

37. The head teacher did not, in our view, give a clear presentation in her oral evidence as to the child’s abilities and progress as to primary one and primary two. The head teacher’s oral evidence, at points, did not clearly distinguish between the extent to which her knowledge was derived from her own observations and that of other teachers. The head teacher was unable, we think understandably, to give an opinion that the child was suited for mainstream education in the absence of assessment made in light of lengthier and more regular attendance at school. But the attitude of the head teacher appeared to us to be curiously passive, or at best, reactive, rather than active. The lack of regular attendance appeared to be treated simply as an externally imposed circumstance, rather than a challenge which the school might have a role and responsibility in overcoming. The head teacher said that the school could implement the recommendations in the educational psychologist’s report (HEC/076). But we were left with the impression that the head teacher had not thought in depth about this, not least because she was momentarily at a loss to understand what was meant by the psychologist’s reference to “Colourful Semantics” (*ibid*). The head teacher did not, in our view, give a detailed or considered account in her oral evidence as to what support the child might receive in the future at the mainstream school.

38. The head teacher spoke of a lack of trust by the appellant in the school and appeared pessimistic as the prospect of the child returning to regular attendance at her school. This contrasted to some extent with the appellant’s evidence. The appellant appeared

measured in her observations as to the current school's efforts, and said she was open to suggestions so long as there were not "empty words". We think the appellant's sentiments were expressed sincerely.

39. The evidence of the educational psychologist, the charity services manager and the appellant all support the contention that the child has a high level of need. We focus particularly on the first of these because it is expert opinion and also because it was arrived at partly from information from the appellant and the charity.

40. The educational psychologist's analysis of the questionnaire ("ABAS-3") completed by the appellant indicate that the child, presently, has profound difficulties. For instance, he has a percentile score of 1 for conceptual skills (*i.e.* 99 in a 100 of children his age have better conceptual skills) and 0.2 for practical skills (*i.e.* 499 of 500 children have better practical skills). We think these scores are entitled to considerable weight. The manner and content of the appellant's answers in evidence led us to conclude she was a credible witness. Apart from the evidence of the head teacher of the current school (which we discount), we have no evidence contradicting what the appellant has said, both in oral evidence at the hearing and otherwise. The scores appear consistent with the psychologist's assessment, which was based on a variety of sources including the child's class teacher and visits to the child's home. If the appellant's responses to the questionnaire were out of kilter with what was indicated by other sources, we would expect the psychologist to have said so. We had no material to suggest the appellant might be exaggerating or overestimating her son's difficulties. Indeed, the appellant reported in the questionnaire that her son could sometimes read and write his full name, though the psychologist reported that the child did not manage this during her home visits (HEC/073).

41. A high level of need is no more than suggestive of a need for education in a special school setting. Much of what the educational psychologist recommended could be achieved with sufficient adaptation in a mainstream setting, at least in theory. But we conclude that, in one respect, the child probably requires a classroom environment incompatible with the size and nature of a typical class in a school other than a special school.

42. The appellant's evidence in examination-in-chief, when asked about the benefits of the specified school, referred to the smaller class sizes, and that her son was fearful of crowds and bigger groups, and had run away in the playground because of this. This is consistent with what is said in a report prepared on 16 March 2020 by a head teacher within the respondent's Additional Support for Learning Service, recording that the child had: "Sensitivity to noise and increased anxiety in busy environments" (HEC/064).

43. We think this is also consistent with the educational psychologist's identification of a need for: "Access to quiet spaces and/or adaptations to manage environments that pose high levels of sensory challenge" (HEC/076). We take the reference to "quiet spaces" to be something different from a "safe space" (which the psychologist recommended separately) or even a *quiet* safe space. We take this to mean an environment which would avoid upsetting stimuli rather than a refuge where calm and

composure can be regained after exposure to such stimuli. A safe space can only ever be a brief haven, rather than, for instance, a teaching environment.

44. We do not think the need for a quiet space or adapted environment of the requisite kind is something that could probably be met in a school other than a special school.

45. Finally, we note the evidence of the head teacher of the specified school, in cross-examination, that the child's profile was similar to other pupils in her school's language and communications classes. Had the head teacher said otherwise, that would have given us reason to revisit our evaluation of the other evidence relevant to this ground.

46. We are satisfied that the child has needs of an intensity and kind that would make education in a school other than a special school unsuited to him. We are satisfied that the extent of his needs are sufficiently uncommon as to be of a kind that arises only exceptionally.

47. Finally, we note that even if we had found this ground established, it would be a hollow victory for the respondent. We could only have found this ground established on the basis that some mainstream school, with sufficient adaptation, would be suitable for the child. We are satisfied that the child's current school is not suitable. There is no provision for a safe and quiet space outside the classroom, and given the physical layout of the school, we understood from the head teacher's evidence that there was no real possibility of an adequate space being provided. There is a dearth of evidence as to any detailed planning for the child's transition to primary school, as to strategies in the past to identify or tackle the causes of the child's lack of attendance, or as to what would be done in future to address this. The impression given is that the current school have limited hope and little idea as to how to further the child's education.

48. We are not satisfied that either of the other exceptions to the mainstreaming presumption has been established (2000 Act, sec 15(3)(b), (c)). There was no evidence that the child had exhibited behaviour *whilst in school* that would have negative effects on others, nor expert evidence that this would be probable in the future in a mainstream setting. No evidence was led to establish the exception regarding unreasonable expenditure not ordinarily incurred (sec 15(3)(c).

All of the circumstances

49. The respondent having established a ground of refusal in respect of the need to employ an additional teacher, the question then arises as to whether, in all of the circumstances, its decision should be confirmed. We conclude it should not.

50. The main circumstances in favour of confirmation are the cost of employment of the additional teacher, and also the impairment of the educational experience of the other children at the specified school. We are not satisfied that the impairment amounts to a likely (as in a real possibility) of *serious* detriment, but we do accept that the addition of another teacher and pupil will have some negative impact on the amenity of the classroom.

51. The main circumstances against confirmation are the lack of suitability of the child's current school and the likely impact upon the child of refusing the reference. There is no evidence that there is any prospect that some other school might be identified that would better suit the child. We are satisfied that it is improbable that the child will resume any sort of regular attendance at classes in the foreseeable future at the current school. Refusing the reference therefore would likely entail the denial of any real education to the child.

52. On the other hand, the cost and inconvenience occasioned by admitting the child will be for a limited period. The entire cohort of one of the specified school's language and communication classes will be moving on to secondary school next year. This opens up six vacancies from August 2021. Of course, admitting this child will mean some other child will not be admitted in August. But no placements had yet been made, and we have no basis to know whether the child would be more or less suited to or deserving of a place than any other child. The other option is to ensure the respondent's special school provision as a whole is adequate to ensure the education within it of all pupils who require it.

53. Our conclusion would have been the same had we found that the presumption of mainstreaming applied. In the absence of any satisfactory evidence that the child's current school could be made suitable, or of some alternative provision, the dilemma between imposing additional expense on the respondent and inconvenience on the school and its pupils, and denying the child any real education for the foreseeable future, is much the same.

Additional observations

54. We make three additional observations for the guidance of representatives. These observations are not part of the rationale of our decision.

55. First, best practice when preparing a witness statement is to invite the witness to comment on each part of each party's case statement upon which they might have relevant evidence.

56. Second, a representative should ensure that every assertion of fact in their case statement, if not admitted by the other party, is supported by a witness or by

documentary evidence. It is not good practice for any contention to be relied on in submissions to be based upon what is said in the case statement. That is so even if the author of the case statement is writing upon the basis of their own direct knowledge. A case statement serves as notice to the Tribunal and to the opponent as to the nature of the party's case, rather than a means of establishing that case. A case statement may contain a mixture of law and fact, argument and assertion, with some of the factual assertions derived from sources other than the author's direct personal knowledge. The Tribunal might be left uncertain as to whether any particular proposition in a case statement is set out as a statement of fact for which the author claims knowledge of and takes personal responsibility for as to its accuracy.

57. Third, it is not good practice for a party to rely upon an, as evidence, an assertion of fact made by a person who is or will be acting as their representative. That applies whatever the medium in which the assertion appears (*e.g.* case statement, witness statement, meeting minute, report). That applies even where the representative speaks from direct knowledge or on a matter within their managerial responsibility. An opponent would be entitled to invite the party to have the author of any contentious assertion give evidence, so that they might be cross-examined, failing which the opponent might submit that the assertion should be given little credence. Obviously, the participation of one person as both representative and witness is fraught with difficulty.