Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

Reference

1. The reference is brought by the appellant in terms of Section 18(3) of the Education (Additional Support for Learning) (Scotland) Act 2004 ("the 2004 Act") on the basis of a refusal of a placing request for the child to attend the specified school, a special school run by the respondent. The placing request was resisted by the respondent on the grounds specified in paragraphs 3 (1) (a) (iii) and 3 (1)(b) of schedule 2 of the 2004 Act, respectively, that placing the child in the specified school would be seriously detrimental to the continuity of the child's education and the education normally provided at the specified school is not suited to the age, ability or aptitude of the child. The reference was also resisted on the basis specified in paragraph 3(1)(g) of schedule 2 of the 2004 Act namely where the specified school is a special school, placing the child in the school would breach the requirement in section 15(1) of the Standards in Scotland's Schools etc. Act 2000 (the requirement commonly referred to as the presumption of mainstream).

Decision

2. The appeal is refused and the decision of the respondent is accordingly confirmed in terms of section 19(4A) (a) of the Act.

Process

3. The reference was lodged after the deadline specified in the rules. Another legal member determined that it was fair and just to excuse the late lodging of the reference and waived compliance with the relevant rule (rule 14(5)). A copy of his decision is in the bundle at T35-37.

4. The child's views were taken by an independent advocate and are in the bundle at T41-43.
5. We considered all the written evidence numbered in the bundle. This includes two witness statements from witness B [R68-81] and [R95-97], a statement from witness C [R82-94] and a statement from witness D [A29-35]. A report from witness A is at A15-23.

6. A statement for the appellant is at A24-28. A joint minute of agreed facts is in the bundle at T44-47 which is the basis for many of the findings in fact that follow. In relation to the other factual matters that enabled us to come to our decision there were no material differences between the witnesses other than those which we address in our decision

below – such as the different accounts of the child's first visit to the nominated school and the reason for the transition visits to the nominated school being stopped. There were of course different views on the interpretation of the facts.

7. During a telephone conference call on 10 January 2020 the respondent's representative stated that she might make submissions regarding the admissibility of the evidence of witness A. At the hearing on 6 March 2020 she made those submissions which are discussed in the reasons below.

8. Parties submitted written submissions on 6 March which were supplemented orally. Those written submissions are in the bundle at A36-41 and R98-118.

Findings in Fact

9. The child is twelve year old boy.

10. The child resides with the appellant and his three siblings.

11. The child is currently enrolled at the nominated school which is a mainstream school under the control of the respondent.

12. The child initially had a split school placement between a mainstream primary school and a Language Resource Unit from P1-P3, during which he gradually increased the time in the mainstream setting. Initially he required 1:1 support from teaching staff to help him stay focused on school work.

13. During the early part of his primary education the child had difficulty interacting with peers and did not like performing in front of others. These difficulties were no longer apparent in the latter part of his primary education.

14. From primary 4 the child attended a mainstream primary school full time.

15. From May to August 2013 the child was assessed by the North Autism Team who concluded that "his current profile fulfils criteria for a diagnosis of Autism". At that time the child showed significant qualitative impairments in the areas of social interaction, social communication, imagination, and flexibility of thought and behaviour.

16. The child has a higher level of anxiety than other pupils.

17. The child did not receive additional support between primary 4 and 7 and did not have an individualised education plan.

18. The child's autistic spectrum disorder did not present a barrier to his accessing education in primary school.

19. The child finished his primary 7 year at a mainstream primary school which he had attended full time since primary 4.

20. The child's primary 7 class was a composite P6/7 class consisting of a total of around 14 pupils.

21. It was planned that the child would have an enhanced transition to the nominated school, specifically tailored to the child's needs.

22. The child and the appellant attended the nominated school for a transition visit in November 2018 along with the child's head teacher, witness C, when he met witness B. The appellant went for a small tour of the school. The child was keen to see the science class. He was introduced to one of the science teachers and the child seemed to enjoy chatting to her.

23. Very shortly after this first transition visit in November 2018 the appellant advised the respondents that she believed the child would not cope in the nominated school and that he would not attend further transition visits.

24. In December 2019 the appellant visited the nominated school with the child. He met the head of first year.

25. The child has not visited the specified school and a request to visit the specified school was refused by the respondent.

26. During his primary 7 year, the child participated in a nurture session each week as part of his transition to secondary school.

27. In primary 7 the child was working to the second level in numeracy and the top of the first level in literacy in curriculum for excellence.

28. In primary 7 the child's classmates voted for him to win the school's citizenship award which he won on the basis of being a good friend and demonstrating school values of honesty, respect, responsibility and co-operation.

29. The child has benefitted from being educated with neuro-typical children.

30. The appellant made a placing request to the specified school, a special school under the control of the respondent. The request was refused by the respondent by letter dated 30 April 2019.

31. The specified school supports 60 young people with additional learning needs who cannot access mainstream education.

32. All children in the first year of the specified school have a global learning delay along with one or more other difficulties.

33. The pupils in S1 at the specified school are not working at the second level of curriculum for excellence for literacy. That level is currently being achieved by pupils in S2 and S3 at the specified school.

34. The specified school does not offer the same breadth of subjects as the nominated school due to the smaller number of teachers. Children who want to study a broader range of science subjects, for example, access this by going to other schools.

35. The child's academic ability is within the range normally catered for at the nominated school.

36. The child's academic ability and cognitive profile is outwith the norm for other pupils in S1 at the specified school and, unlike the current S1 cohort in the school, he does not have any additional difficulties apart from Autism.

37. The child would not have an appropriate peer group at the specified school in relation to both his academic and social needs.

38. The child has not attended any school since June 2019.

39. Since September 2019 the child has been tutored by witness B approximately once per week. Initially these meetings took place at the child's home, before moving to a library around November 2019 and to the nominated school in December 2019.

40. Witness B does around one hour of literacy and numeracy work with the child and has built up a trusting relationship with the child.

41. The child will require additional support to transition to either the nominated or the specified school.

42. The child has made visits to the nominated school in November 2018, December 2019 and on 18, 21 and 28 February and 3 March 2019.

43. The child was initially nervous on his visit to the nominated school on 18 February 2019 but settled quickly.

44. On the child's visit to the nominated school on 21 February he spent time away from the appellant, and did so again on 28 February and 3 March.

45. The child enjoys reading and learning things. He has great ideas and responds well to a scribe. He is curious and eager to learn. At the library he was keen to choose books. He was excited about using the dictionary. He loved choosing books at the library. The appellant has witness B's personal mobile number, so that they can make arrangements to discuss the child's progress.

46. The nominated school has approximately 40 pupils with autistic spectrum disorder, some with higher levels of anxiety than the child.

47. All staff within the nominated school are trained in nurture principles and some have achieved an accredited qualification.

48. The child's academic ability is comparable to those in the S1 class in the nominated school.

Reasons for the Decision

Admissibility of evidence of Witness A

49. The solicitor for the respondent argued that we should consider witness A's evidence as a skilled or expert witness to be inadmissible in its entirety. In making this argument she referred to the well known case of *Kennedy v Cordia [2016] UKSC 6* and argued four separate points in challenge to his evidence based both on that case and legal texts. As can be seen from our decision when we deal with the various grounds for refusing the placing request, we did not consider the evidence of witness A to be material to our decision and consequently it is not necessary for the purpose of this decision to address the challenge. Nevertheless, we consider for completeness that it is appropriate to do so. Accordingly we will deal with each of the arguments in the respondent's submission.

50. It was argued that "a question is normally inadmissible if its purpose is to elicit an opinion on the actual issue before the court." This is of course a well established legal principle and is sometimes referred to as the "ultimate issue" rule. In particular it was highlighted to us that at paragraph 1 of witness A's report (A16) he was asked to provide a report on the relevant merits of the 2 schools in terms of meeting the child's needs and in evidence said he had to determine whether the nominated school was suitable for the child.

51. In terms of considering the ultimate issue rule there is in our view a very fine line between what we are entitled to consider from a skilled witness and what we should ignore. We are of the view that it is perfectly acceptable for witness A to express a view about the capacity of a school to meet the child's needs, but expressing a view about the suitability of a school goes beyond what we should consider. From his report and evidence, we are not convinced that the witness went so far as to express a view on the ultimate issue in any of the tests we required to consider. Indeed he was reluctant to express a view on which school was most suited to the child's needs. He was of the view that there would be compromises in both schools, but given the child's anxieties about attending the nominated school (also expressed in the independent advocacy report at T41-43), he considered a transition to the specified school was more likely to be successful. In any case, were witness A to have expressed a view regarding one of the ultimate issues, we consider that we should simply ignore it, and that this is not sufficient reason to render the entirety of his evidence inadmissible.

52. The second basis of challenge to witness A's evidence is described in R110-111 and can be summarised as a challenge to the basis of witness A's opinion which is that, while he has both qualifications and experience relating to autistic spectrum disorder, he did not explain the process of reasoning which led to his conclusions with reference to a body of knowledge or his experience.

53. We have looked carefully at witness A's evidence, and there is no doubt that witness A has appropriate and relevant professional experience. To consider this challenge to his evidence we considered the content of his evidence and the extent to which the evidence could be considered as requiring support from a body of knowledge and experience. A lot of what witness A said was not particularly controversial; indeed he agreed with the respondent that the nominated school could meet the child's needs. He offered a view that the specified school could also meet the child's needs - broadly similar to the evidence of the Head teacher of the specified school, witness D, who, while not aware of the specific needs of the child gave evidence regarding the width of provision available within the specified school. So again the evidence was not in our view particularly controversial. We do not consider, for example, that comparing the child's needs with the provision available at a particular school necessitates a skilled witness of witness A's experience to narrate the branch of knowledge that enabled him to reach that conclusion,

particularly when, as in this case, the child's needs are less complex than many of the children we hear about at a tribunal. Accordingly we considered such evidence to be admissible.

54. Witness A's evidence is more controversial when he concludes that "a lack of adequate transition planning has now led to a situation in which attendance at [the nominated school] is more likely to be problematic" and more particularly in relation to his view that he doubts the child will manage to re-integrate with his peers in a mainstream school. Witness A's evidence in relation to the transition process is more problematic than simply lacking authority as there are issues regarding it's factual basis, which we will come to presently. In relation to his doubt that the child will manage to re-integrate with his peers in mainstream, we would have expected to have some reference to the authority for this opinion (whether from research or his own experience) particularly since it is not obvious from the facts of the case. For the evidence of a skilled witness to be of value to us, we are of the view that it should have been supported by reference to the authority behind that view. As the solicitor for the respondent pointed out "how then is the Tribunal to assess the weight to be attached to his opinion that it cannot now be done?" Accordingly we considered witness A's evidence about transition to be irrelevant.

55. The next challenge to witness A's evidence was that he was not impartial in his presentation and assessment of the evidence. The respondent's solicitor was clear that she was not seeking to challenge the integrity of the witness in any way and neither do we. However it was clear to us that by not checking the facts in relation to his conclusions on the transition process, which would have been easy to do, his evidence about that process cannot be said to be impartial. Witness A has accepted a view of the transition process obtained from the appellant without checking what happened by asking for further information from other sources. He attended the nominated school and spoke to witness B, but did not ask her about the planning of the transition process or why it did not succeed. Witness B's evidence was clear that the child was offered an enhanced transition tailored to the child's needs. Witness C gave unchallenged evidence that after an initial visit the appellant informed the school that the child would not be attending any other transition visits. Accordingly, witness A's views were not based on facts that he could have checked and consequently were not impartial. We do not conclude that his evidence on this issue was inadmissible – as we could only assess its relevance by hearing from how he arrived at his conclusion - but we do conclude that his evidence on this issue is not reliable as it is not supported by the facts and is not impartial. His opinion about the transition process to the nominated school was clearly material to his further conclusion that the child would not "manage to re-integrate with his peers into mainstream" and therefore we must disregard that opinion.

56. Even if we had considered witness A's evidence about the likelihood of the child re-integrating into a mainstream setting, we would have regarded the contrary evidence of witnesses B and C as more reliable given their greater knowledge of both the child and the nominated school.

57. The solicitor for the respondent's final point in relation to witness A's evidence was in our view simply about proliferation of expert reports rather than a challenge to the admissibility, reliability or relevance of witness A's evidence and accordingly we do not consider it necessary to make any comment on this point.

Further observations regarding the witnesses

58. Subject to the matters we have discussed in relation to witness A, all the witnesses gave their evidence in a credible manner and there were very few material differences. Indeed, the only material difference relates to the description of how the child presented in the latter years of his time in primary school. The appellant's evidence contradicted that of witness C about difficulties the child had in the school as she was of the view that the child continues to find noisy environments difficult to manage and friendships difficult. This evidence did not feature extensively in the appellant's evidence, and she gave far more evidence about difficulties the child has at home. Where the appellant's evidence contradicted the evidence of witness C, we considered the evidence of witness C to be more reliable as it was based on contemporary school reports and her personal observations of the child in school.

Grounds of refusal of placing request

59. There is no dispute that the child has additional support needs and that the specified school is a special school. We consider each of the grounds for refusing the placing request, in the order used in the respondent's submission.

Paragraph 3(1) (g) presumption of mainstream

60. The presumption of mainstream (to paraphrase the ground in paragraph 3(1) (g) of schedule 2 of the 2004 Act) applies other than in three specified circumstances which are presumed to arise only ***exceptionally***. The first of these being that to provide education for the child in a school other than a special school would not be suited to the ability or aptitude of the child. In our view this circumstance cannot be said to apply to the child. We accept the submission of the solicitor for the respondent that the child attended a mainstream primary school and, from the evidence of witness C, he was able to access that provision with no specific additional support (in contrast to many of the other pupils with an autistic spectrum disorder who attended the primary school). We were very impressed with witness B who is extremely experienced in supporting children with additional support needs (and specifically autism) to access the mainstream provision at the nominated school and has worked with the child to ensure some continuity in his education while he is not attending school. That witness, based on her knowledge of the child and experience of other similar children, was very confident that he will manage the transition to the nominated school and that the school is well suited to his education profile. Witness B told us that there are pupils in the school with higher levels of anxiety – the child's anxiety being suggested by the appellant as a reason for him not being able to attend – and higher support needs than the child. Staff in the school are well-versed in meeting the needs of children with autistic spectrum disorder. In terms of the child's academic ability witness B was clear in her evidence that the child would fit into class groupings for his work and would not require any particular adaptation that was not within the scope of what the school can provide. She did, of course, accept that the child might struggle to begin with due to the length of time he has not been at school – which is a factor for him attending any school – but witness B indicated she would be "keeping a close eye" on him and make sure that he has the support that he needs to settle at a pace that suits him. She has the luxury of being free of any teaching commitments, so can devote her time to supporting those children who need her help. She has built up a good relationship with the child and the appellant and has overseen

a steady progression during recent visits. She also mentioned supports that can be provided if necessary, such as a group room that children with anxiety issues can attend during breaks or allowing the child to come in and leave classes early to avoid any crowded situations. Despite the more demanding nature of a larger mainstream school environment compared to a smaller primary school, we were satisfied that appropriate supports would be available to the child to manage such a school setting.

61. On this point the solicitor for the appellant argued that the onus of proof is on the appellant to demonstrate that the nominated school can meet all of the child's needs and that the fact the child is not currently attending classes in the school highlights the nominated school's "inability to effectively support the child at the nominated school". We do not accept this submission as the evidence is overwhelmingly in favour of the mainstream setting being able to meet the child's abilities and aptitudes.

62. The other two exceptions to the presumption of mainstream can be dealt with simply. Firstly, there was no evidence at all that the child's attendance at the nominated school would be incompatible with the efficient education of other children, the child having had no additional support at his mainstream primary school and never having presented any notable behavioral issues. Similarly, there was no evidence to suggest any additional public expenditure would be incurred, let alone unreasonable public expenditure. The solicitor for the appellant accepted that she could not challenge the latter point, and simply argued that it is not known what disruption might be caused in relation to the first point. While clearly we cannot predict the future, we can rely on evidence about the past to suggest that disruption is unlikely to occur.

63. Accordingly we find the ground for refusing the placing request in schedule 2 paragraph 3(1) (g) of the 2004 act established.

Paragraph 3(1) (b) education normally provided at the specified school not being suited to the child's age, ability or aptitude

64. In considering this ground we considered ability and aptitude, age not being an issue. The most reliable evidence about the education provision at the specified school came from the Headteacher, witness D. He gave evidence that all children within the school have differentiated work with all seniors in the school working towards national level and one pupil currently working towards higher. The majority of pupils have a global learning difficulty as well as one or more other co-morbid diagnoses. Crucially, witness D gave evidence that his school is for children who are unable to access mainstream education; we have already stated our view that the child can access a mainstream provision.

65. In terms of the academic abilities of pupils in the specified school, it is difficult to compare their level to the child, given the wide range of children educated at the specified school and the fact that the child has not been attending school since June 2019. Witness D stressed the specified school's ability to cater for a range of academic ability, but was not aware of the specific abilities of the child. The solicitor for the respondent argued that the child is academically more able than the other children in S1 at the specified school, which we accepted as the child would be the only S1 child working to the second level in numeracy. We were of the view that the difference academically between the child and others S1 pupils at the specified school would not be so great that on this basis alone the education normally provided at the specified school is not suited to his ability

and aptitude. Accordingly, in terms of academic ability or aptitude alone, we considered the school could meet the child's needs, albeit he would not necessarily have the same breadth of subjects available to him as in the nominated school and the lack of an academic peer group would in our view negatively impact on the provision.

66. However, ability or aptitude is not simply about academic achievement. One of the purposes of education is to prepare children for the world after school and help them to develop socially. Both representatives were in agreement that this ground should be looked at holistically, considering all of the aims of education. We agree with the solicitor for the respondent that it is relevant to consider whether the specified school normally provides the range of social contact and opportunities for ongoing development to enable the child to reach his full potential.

67. We conclude that the specified school is not suited to the child's overall needs. Based primarily on the evidence of witness C about the child's development in primary school (supported by the primary school reports in the bundle) and witness B's descriptions of her interactions with the child, it is clear to us that the child has an ability and aptitude to develop socially. He interacted very positively with mainstream children in primary school and the evidence of witness C was that he was happy and thriving, as well as being described as "popular". There was evidence from the appellant about the difficulties the child experienced early in primary school, only transitioning full time to a mainstream in primary four with some impairments in social communication, flexibility of thought and behaviour being recorded in a 2013 report by the NHS North Autism Team (R30-33). Witness C was of the view that the child is a good example of why there is a presumption of mainstream education for children, referring to him as a boy who early in his education found it difficult to focus on class work, interact with peers and who did not like to perform in front of others, contrasting this with the child's presentation in primary 7: a child who no longer struggled with such situations. Indeed, in the advocacy report at T41 the child mentioned winning a trophy in primary 7 for being one of the best students and being kind and helpful as a particular highlight for him.

68. Witness C, has both knowledge of the child and of the specified school, having assisted with a transition to the specified school from the child's year, including visits to classes. She gave evidence, having visited the specified school and seen the cohort the child would have in first year, that the child would not have an appropriate peer group at the specified school. Unlike other children there, he does not have a global learning difficulty or cognitive impairment. Based on all this evidence, it is clear to us that the child has benefitted from being educated alongside neuro-typical children and that the education provision at the specified school is not suited to his ability and aptitude to develop his full potential. The lack of an appropriate peer group is a crucial factor for us in reaching a decision that the specified school would not offer the daily opportunities to benefit from interactions with neuro-typical children and is therefore not suited to the child's ability and aptitude.

69. We find the ground for refusing the placing request in schedule 2 paragraph 3(1) (b) of the 2004 act to be established.

Paragraph 3 (1) (a) (iii), that placing the child in the specified school would be seriously detrimental to the continuity of the child's education

70. While there has been a break in the child's education, we considered it important to look at the progress the child made in a mainstream primary school and to consider his education holistically. It was apparent from school reports and the evidence of witness C that the child has benefitted enormously from the education provided in a mainstream primary school both in terms of his social skills and self-confidence. Witness B described a peer group that would be appropriate for the child both academically and socially at the nominated school. On the other hand, were he to attend the specified school he would no longer have neuro-typical peers and would be educated with children in a class where all the children have global learning difficulties. We consider this would be significantly detrimental to the continuity of his education.

71. The solicitor for the appellant argued that there would not be any serious detriment related to starting a new transition to the specified school, since the child had only recently started transitioning to the nominated school. While the evidence of witness B indicated positive steps are being made towards attending the nominated school, there is no reason why a transition to the specified school might also be managed positively. However, while we have no doubt that a transition to the specified school is possible the problem, in our view, is that the transition would be to a school that is less suited to his abilities and aptitudes is inappropriate.

72. We considered that moving the child to the specified school would be seriously detrimental to the continuity of his education for the reasons articulated above and accordingly find the ground for refusing the placing request contained in schedule 2 paragraph 3(1) (a) (iii) of the 2004 act to be established.

In all the circumstances is it appropriate to refuse the appeal

73. The reasons which have led us to conclude that the grounds for refusing the placing request exist also lead us to consider it appropriate in all the circumstances to uphold the respondent's decision and refuse the appeal. Having concluded that the specified school is not suited to the child's ability and aptitude and that placing the child there would be seriously detrimental to the continuity of the child's education, we do not consider it appropriate to grant the appeal when there is a suitable educational provision in the nominated school. Nevertheless, there are a few further matters which we considered before coming to this view.

74. Firstly, we considered the views of the child in the advocacy report. [T41-43] which were expressed in the presence of the appellant at the child's request. The child expressed concerns about the nominated school, stating that it "is too big and I don't want to go". He referred to his first visit to the nominated school when he felt it was too noisy and that he was crying because it was so busy and big.

75. However these views expressed by the child, which are consistent with the appellant's description, contrast sharply with the accounts of witnesses B and C about his visit to the nominated school in November 2018 and witness B's account of more recent visits to the school over recent months. Witness C described the child as looking nervous at the start of the November 2018 visit but said that he wasn't any more nervous than any neurotypical peers would be. After the visit they returned to the primary school and the child did not appear nervous and was enthused by what he had seen. His reactions

were described as being typical of what witness C would expect to see of any children during a transition visit. Similarly, witness B, with whom he spent time on that visit, did not find the child to be overly anxious but described him as being a little shy, nervous and looking forward to seeing the school. She recalled him being excited and looking forward to attending and recalled thinking to herself "this will go well". She was extremely surprised to learn subsequently that he was reported as being "anxious". We do not consider it necessary to make any findings as to which account of that visit was correct as we believe the differences relate to different perspectives and witnessing things slightly differently.

76. To ensure some continuity in the child's education the child has been meeting with witness B since September 2019 at the start of the current school year, with regular visits to his home, then to a library and more recently to the nominated school. The child visited the nominated school on 18 February 2020 and, while initially nervous, settled very quickly. His mum accompanied him throughout those visits. He returned on 21 February and the visit went very well, with the child saying to witness B several times that he hoped he would come to the nominated school. Witness B was clear that she did not seek this information and that it was volunteered spontaneously. Similarly, on another visit on 28 February 2020 the child said to a Pupil Support Assistant that he enjoyed his session at the school and that witness B was a good teacher.

77. The appellant expressed a view that the child likes to please adults and it was argued by her solicitor that the child's views above were not necessarily accurate. Were that the case, it could also be argued in relation to the advocacy report. We suspect that the child has naturally mixed views about attending the school and will feel differently at different times. What is more significant in our view is how well the visits, which effectively constitute a stage in the transition process -the appellant's solicitor referred to them as transition visits- are going and which has resulted in witness B stating that she is very confident that the child can transition to the school during the remainder of S1. Unfortunately this confident prediction is now subject to what happens with school openings during the remainder of the Covid-19 emergency.

78. We also considered the appellant's concerns about the nominated school; her principal concerns were about the size of the school and the classes (A27) and the potential for noise and distractions in a bigger class. There was no evidence to suggest a bigger class size would be more distracting for the child; indeed there was evidence that there might be more distractions in the specified school caused by potential disruption by children with more complex needs. The evidence of the witnesses from both schools was that neither of the schools are particularly noisy environments.

79. Notwithstanding they have not been identified as significant issues by the respondent, we do not doubt that these are very real concerns for the appellant and the child. However, we are reassured by the measures the nominated school intends to put in place to minimise the risk of such issues impacting on the child. The plan would be to introduce him gradually to class subjects he likes with the support of a PSA (who he already knows) and having access to the "group room" should break or lunchtimes be difficult for him. We are confident that witness B has the relevant experience and skills to address any issues that might arise and that the child would be given all the assistance he needs to successfully integrate into the nominated school.

80. For these reasons we dismiss the appeal and uphold the respondent's decision to refuse the placing request.