Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

ORDER AND SUMMARY DECISION

1. By summary decision dated June 2018, in the application against a decision of the respondents refusing the appellant's placing request with respect to her son, the tribunal refused the application of the appellant.

2. At paras. 9-14 below, we repeat and adhere to the reasons set out in our summary decision.

THE PROCEEDINGS

3. The appeal was heard on Tuesday 29th May and Monday 11th June 2018. Although originally fixed for a diet of 29th and 30th May, the hearing was initially confined to the 29th (with a further day to be fixed if required) due to the appellant having another commitment. The respondents did not object to this. The hearing was electronically recorded in its entirety. The appellant was represented by her solicitor, and the respondent were represented by their additional support needs manager. The appellant was present throughout, as was her mother: no objection was taken by the respondents to this.

4. Parties confirmed that the papers before the tribunal consisted of T1-58, A1-23 and R1-85. There were no objections to those papers being before the tribunal and considered by us, albeit some had been produced late.

5. The tribunal heard the following witnesses (in order of appearance):-

Day 1

(For the respondents) The current head teacher of the specified school

The head teacher of the original school

Day 2

(For the appellant) The appellant's mother

The appellant

6. The child's views had been obtained by an independent advocacy worker, who had provided a report to the tribunal.

7. After the witnesses' evidence was concluded, oral submissions were heard and completed on the second day. The respondents' representative was stopped from making a submission regarding the respondents' willingness to place the child in another mainstream school, after he conceded that there had been no evidence led on this issue. After having heard and considered the respondents' submissions, the tribunal decided :

- The tribunal would not be sustaining the ground of refusal contained in the 2004 Act, Sch 2, para 3(1)(a)(v) (serious detriment to other pupils).
- The Tribunal had concluded that the findings of the clinical psychologist made following an assessment of July 2017 were the best evidence before the Tribunal as to whether the child had a learning disability, and that there was no sufficient basis to controvert that evidence (albeit that the clinical psychologist's finding was not necessarily determinative as to the suitability of mainstream or special needs education for the child).

- The tribunal did not accept the respondents' submission, with respect to their reliability as witnesses, that the appellant and her mother had acted in an especially unreasonable and uncooperative manner and had made serious but unfounded criticisms of the school and the respondents (albeit that it remained arguable that their accounts might be influenced in the same way as that of any family member seeking what they perceive to be best for their child).

The appellant's solicitor then addressed the tribunal on the remaining issues. As those submissions were not concluded till around 5pm, the appellant's solicitor was offered the opportunity to supplement her address by written submission should she think this necessary. She declined. There was a short reply from the respondents' representative.

SUMMARY OF REASONS

8. This case concerns a child of ten years of age who has ceased attendance at his original school: a mainstream school close to his home. The child's mother made a placing request specifying a special needs school run by the respondents. The respondents refused this request.

9. The only issues disputed before the tribunal were as follows:

I. If the child is placed at the specified school, is that likely to be seriously detrimental to the educational well-being of pupils attending the school? [Education (Additional Support for Learning) (Scotland) Act 2004, Sch 2, para 3(1)(a)(v)]

II. Is the education normally provided at the specified school suited to the age, ability or aptitude of the child? [2004 Act, Sch 2, para 3(1)(b)]

III. Would the provision of education for the child in a school other than a special school not be suited to the ability or aptitude of the child? [2004 Act, Sch 2, para 3(1)(g); Standards in Scotland's Schools etc. Act 2000, sec 15(3)(a)]

IV. Is it appropriate in all the circumstances to confirm the respondents' decision? [2004 Act, s 19(4A)(a)(ii)].

10. We refused the appeal, because the respondents satisfied the tribunal that question II should be answered "no", question III should be answered "yes", and question IV should be answered "yes". (We were not satisfied that the respondents had established that question I should be answered "yes").

11. Having considered oral evidence of the current head teacher at the specified school as well as the reports regarding the child (from the school in which he is currently enrolled, the Child and Adolescent Mental Health Service (CAMHS), the educational psychologist and the independent advocacy worker), we were satisfied that the other pupils in the child's prospective class at the specified school would have significantly higher levels of need than the child. Insofar as the evidence of the appellant and her mother suggested a higher level of need than that which was either reported or could be inferred from that documentary evidence, we rejected the evidence of the appellant and her mother as unreliable. The child would be comparatively very able among his peer group at the specified school; were he to be educated there he would lack peers of similar or greater ability with whom he might learn, be challenged by or seek to emulate.

12. Based on the same evidence, we concluded that the child could receive education in a mainstream school suited to his ability and aptitude.

13. Even assuming that the criticisms advanced on behalf of the appellant (both concerning the original school and of the respondents more generally) were well founded, we did not think these provided circumstances that would make it inappropriate to confirm the respondents' decision. We did not give weight to the family's statements that the child would not attend a mainstream school. Even if such statements were meant in sincere and absolute terms (*ie* that

the child would be kept out of school despite refusal of the application by the tribunal), it would not be appropriate to take account of such a position. As a matter of public policy, a family ought not to be able to compel approval of their choice of school by otherwise keeping their child out of school. As we thought the child's interests would be best met by his attendance at a mainstream school, and as we did not think there were any countervailing circumstances to which we ought to give material weight, we concluded that it was appropriate to confirm the respondents' decision in all the circumstances.

REASONS FOR FINDINGS AND DECISION

14. We explain here more fully our reasons for refusing the appeal, which we have set out summarily above.

15. The current head teacher of the specified school had taken up post six weeks prior to the first day of the hearing, though she had extensive experience of special needs education at other schools. We accepted her evidence as to the level of needs of the pupils at the specified school in the child's prospective class. She spoke to the pupils at the school having a very substantial level of need, considerably higher than that indicated by the reports she was familiar with regarding the child. She also opined that the level at which the child's views were articulated by him demonstrated a level of functioning that the pupils in the prospective class were not capable of. The independent advocacy worker's report quoted the child as having said he was "very stressed" at school and that he would not like to go back to his original school "because of all the rushing that made me stressed", comments which display an ability to describe his emotions and to think about the future. We heard no evidence which contradicted the evidence of the head teacher on these matters and saw no reason not to believe and rely upon it. The appellant's solicitor observed in submissions that the appellant's mother spoke of some children in the school being verbal when she visited there, but the head teacher's note of 23 May 2018 is consistent with that, indicating that the pupils were "verbal, but at a basic functional level".

16. We did not rely on matters that went beyond what the current head teacher had direct knowledge of. She made observations as to the timing of the child's two cognitive assessments (in line with the views of her predecessor recorded at R70) and the variance in test scores between those assessments, to the effect of questioning the validity of the findings made in the clinical psychologist's assessment of 7 July 2017. But we placed no weight upon this. To the extent that her observations were derived from the advice of educational psychologists, we would not place any reliance upon what is effectively hearsay opinion evidence. There was no evidence as to the exact terms of that advice or its underpinnings, there was no opportunity to cross-examine the psychologists on it, nor could we assume that an educational psychologist was appropriately qualified or experienced to question matters of clinical assessment, as there is good reason why the occupations of clinical and educational psychologist are distinct. The current head teacher's own familiarity with a substantial number of such assessments gained in the course of her work did not, in our view, qualify her as an expert able to evaluate the soundness of the findings made from the assessment of 7 July 2017: Experience viewing the end product does not necessarily give one insight about the process leading to that product. (Much the same criticisms are relevant to the statement of the former head teacher at R70).

17. The current head teacher also surmised that, as there was no record or mention of the appellant being told not to bring her son when visiting the school, nothing of that kind would have been said to the appellant by her predecessor. We preferred the evidence of the appellant on this, which appeared to us to be convincing, that she was told not to bring her child. As we explain later, we also did not find the head teacher's evidence sufficient to satisfy us that the child's admission would be to the serious detriment of the current pupils.

18. We still felt able to rely upon the current head teacher's evidence on the matters critical for disposal of this appeal, all being matters on which she had direct knowledge (the current pupils' needs and abilities) or which were supported by other evidence we accepted (the child's needs and abilities).

19. Our conclusions regarding the child's abilities are in line with the reports from the school produced by the appellant as to his educational progress, and the report produced by the respondent noting that he was "within the expected range for primary 4" (albeit that a child of his age would normally be placed in primary 5). The head teacher of the original school described him as being in a lower attainment group, but not the lowest, and this appears to us to be a fair characterisation of his ability as indicated in those reports. This means his performance is relatively poor, being below average for the age cohort one year below him. But this is not so pronounced as to bring him within the range of limitation typical of the pupils at the specified school.

20. We recognise that the perception of the appellant and her mother of the level of the child's abilities is somewhat different, and that the original school's management of the child's education was the subject of criticism by them. So we do not accept those reports unquestioningly; we have examined the extent to which other evidence (oral and documentary) contradicts or supports the reports from the original school. As we shall explain in a moment, we place substantial reliance upon the report of the educational psychologist and of the independent advocacy worker, both reports suggesting a level of intellectual function consistent with the level of attainment recorded in the school reports.

21. The evidence of the appellant's mother (we concentrate upon her as her account in oral evidence was more detailed than that of her daughter) was of a child with very profound needs, obviously distressed and depressed, and with a vocabulary more limited than was contained in the answers attributed to him in the independent advocacy worker's report. But this account did not appear to us to fit with the documentary evidence.

22. The appellant's mother's account of the visit from the educational psychologist was that the child hid himself under a blanket for some time before being willing to speak to the psychologist. Nothing to that effect was recorded in the psychologist's report. Rather, he stated

that: “During this conversation … [the child] was smiling, had good eye contact and he seemed to relax fairly quickly after meeting a new person (myself).” The psychologist reported that they spoke for more than 45 minutes. The psychologist’s view, which we accept, was that a remark about his sister trying to give him an advantage when playing a board game provided “evidence of … [the child] being aware of others intentions and being able to follow the course of a piece of social thinking”.

23. The independent advocacy report attributed comments to the child that he got “stressed” at school, a word that the appellant’s mother thought he would not know the meaning of. She said in oral evidence that it might be he was unthinkingly repeating what he had heard his family say. We reject this possibility. The breadth and nature of the topics described by the educational psychologist in his conversation, such as the books the child had read and his thoughts on school, together with the remark about playing board games with his sister, suggest to us that he is able to articulate thoughts at a level consistent with the comments reported by the independent advocacy worker. Both reports suggest a level of functioning consistent with that recorded in the school reports.

24. There was nothing in the documentation from CAMHS indicating that the child had or was suspected as having depression, and there was little said about anxiety. A letter from CAMHS of May 2017 indicates that therapy for the child for anxiety was offered but not taken up; one appointment being cancelled because the child had a play-date. The offer of therapy seems to have been as a result of the family’s reported concerns rather than as a result of CAMHS’ observations of the child (“given the concerns raised by [the child’s grandmother and mother] … start work … to look at supporting him with some anxiety management strategies”). If the clinicians had substantial reason to think the child might be suffering from clinical depression or anxiety, we would have expected a matter of such importance to have been stated in writing. The appellant disclaimed a comment in her witness statement that it was CAMHS’ opinion that her son had “*severe* anxiety” rather than just “anxiety”, but we have seen nothing suggesting it was their opinion (rather than the family’s report) that the child had anxiety of any degree.

Given the discrepancy between her written and oral evidence, we place no reliance on the appellant's evidence on this point.

25. To these documents we add the report of the occupational therapist. The level of the child's motor skills are perhaps less important than the other matters we have described as to whether he should be in mainstream or special schooling. But it provides another example where the family have perceived a level of limitation inconsistent with what has and has not been reported by professionals. The appellant's mother's oral evidence was that he was unable to use scissors but the occupational therapist's observation was that he could use scissors to cut in straight, zigzag and curved lines whilst using another hand to steady the paper.

26. We would not place much significance on any one of these documents in isolation. For instance, it is within our specialist experience that lay people might try to demonstrate to a child how to use scissors in a manner which the child finds unhelpful, whereas an occupational therapist would know to allow the child to attempt the task in the manner that best suited them, which might explain the differing experiences of the appellant's mother and the therapist. We cannot rule out the possibility that the independent advocacy worker has inadvertently paraphrased what the child said to her, or that the educational psychologist forgot to record the child having hidden under a blanket for some time before speaking to him, or that CAMHS was of the opinion that the child suffered from anxiety or depression but omitted to mention this in their reports. However, the indications we have noted are from a variety of sources, two of which are entirely independent of the respondent. We think it more likely that the family's perception of the child's needs is inadvertently exaggerated than that one or more of the documentary sources is effectively inaccurate (whether in its explicit terms, its implication or by omission).

27. The clinical psychologist's assessment of July 2017 is not incompatible with our assessments of the child's needs and abilities. In view of that psychologist's assessment, we think the balance of available evidence at this point indicates the child likely has a learning disability, but

a child with a relatively minor learning disability could be capable of the level of attainment indicated by his school reports and the other documentary evidence. We also accepted the respondents' submission that the child's past record at school could provide a fuller indication as to his suitability for mainstream or special needs education than the findings of a cognitive assessment.

28. We need not and do not identify why the family's perception of the child's needs is, in our view, likely exaggerated. The respondents' representative (we think quite sensibly) did not challenge the credibility of the appellant or her mother. On the other hand, he did advance in submissions a sustained attack to the effect that the appellant and her mother had acted unreasonably and uncooperatively and had advanced serious but unfounded criticisms of the respondents and those in their employ, and that their evidence was accordingly unreliable. We considered this submission to be unfounded and extravagant, and particularly unhelpful given that (whatever the outcome of this appeal) there would need to be close working between the family and the respondents to further the child's education. We did not think what the family had said and done went outwith the spectrum of behaviour often seen of family members who are trying to do the best, as they see it, for their child. Even the best intentioned parents can sometimes be overly critical, imprudent or obstinate. But even rejecting the broad attack presented on behalf of the respondents, that still leaves the possibility that the family's eagerness to do the best for their child might have unconsciously affected their perception of his needs. Whatever the explanation, our evaluation of the reports suggests to us a level of need lesser than that spoken to in the evidence of the appellant and her mother, and we prefer to rely on what we think is indicated by those reports.

29. We accordingly find that the education normally provided at the specified school would not be suited to the child, in terms of the 2004 Act, Sch 2, para 3(1)(b). He would be comparatively very able amongst his peers at the specified school, and the tuition provided to him would require to be significantly different to that normally given to pupils there. He would also likely be disadvantaged from the lack of peers of similar or greater capabilities from whom he might be

challenged by or seek to emulate. The effect might well be to hold back his progress. We think this social aspect of schooling is also an important aspect of the education provided by the school, and in our view he would not be suited to that school in that respect also. We note the evidence of the appellant and her mother that the child tended to prefer play amongst younger children and also got on well with the other children at a specialist play centre for the disabled. But the balance of evidence is that this child has verbal skills significantly beyond the "basic, functional level" of the children at the specified school.

30. Based on the same evidence as to the child's level of need, we find that he could be suited to schooling other than in a special school. That is to say, he could be suited to mainstream education. Section 15(3)(a) of the 2000 Act is expressed in general, abstract terms, so that it is not necessary for the respondents to establish that the child is suited to education at his original school, or any other particular mainstream school. Unlike para. 3(1)(b) of Such 2 of the 2004 Act, it matters not that the appropriate education might not be what is normally provided at the mainstream school. The current head teacher of the specified school and the head teacher of the original school gave evidence that the recommendations of the clinical psychologist in her report of the assessment of 7 July 2017 could be implemented in a mainstream school. This accords with our knowledge and experience as a specialist tribunal.

31. Having considered all the relevant circumstances, we think it appropriate to confirm the respondents' decision. We start with our conclusion that the specified school would not be suited to the child, and that mainstream schooling could be made to work for that child. In that situation, we think it would be unusual that in all the circumstances it would be appropriate to cause the child to attend the specified school. The circumstances that are said to militate against confirmation of the respondents' decision appear to fall into two categories, namely the family's opposition to him returning to mainstream schooling and the management of the child's education by the original school and the respondent more generally.

32. We do not think we can give any weight to the possibility that the family might refuse to ensure the child's attendance at any mainstream school. Were we to take this into account, it would create an inducement to parents to threaten to withdraw their children from education in order to force the tribunal to decide the appeal in the manner they wished. It would be a disincentive to parents taking a co-operative and moderate approach to their child's education. The family's preferences are, we think, a relevant circumstance but these should be taken into account whether or not they are accompanied by a statement that the child will not be sent to a mainstream school, come what may.

33. Regarding the second matter, we assume (without deciding) that the criticisms of the original school are well founded. The main criticisms were that the head teacher had not read the occupational therapy report, that the school had failed to notice the child being able to properly clean himself after going to the toilet and had not taken steps to assist with this, that they had not assisted with child with cutting up his food and other similar tasks at lunchtime, and that he was shouted at inappropriately during a school swimming lesson. We also assume (without deciding) that the respondents could be legitimately criticised for not taking more active steps in offering assistance such as unconditional help with home schooling, and that no weight should be given to the fact that outreach teaching was offered to facilitate a return to school (at least at the child planning meetings on 8 and 23 March 2017) but not taken up by the family. Thus, on this aspect of the case, we have proceeded upon the interpretation of the evidence most favourable to the appellant. We take this course because: (1) even on that favourable view, we think the right course is to confirm the respondents' decision; (2) because there will need to be a close working relationship between the family and the respondents, it is desirable to avoid making judgements on the conduct of teachers or others in the respondents' employ, or of the family, where such judgements will not affect the outcome of this case.

34. We do not think the criticisms made of the respondents' management of the child's education are a material consideration where, whatever the outcome of this appeal, the child will be placed in a school run by the respondent. If his education has been mismanaged, sending him

to a school to which he is unsuited will not remedy this. We do not think any of the problems said to have existed in the original school, or with the respondents' management of the child's needs more generally, are incapable of being addressed with the child being in mainstream education, at the original school or elsewhere. We do take notice that the respondents will have duties to make reasonable adjustments for the child, and that a failure to do so might result in further tribunal proceedings. The respondents' duties under the Equality Act 2010 might require placement at another mainstream school if the child's needs cannot be met at the original school. We do not require evidence of the respondents' willingness to take this course; if the circumstances require it then the obligation arises as a matter of law under the Equality Act 2010. (We mention the 2010 Act because twelve months must pass between references to the Tribunal under the 2004 Act). Thus, for example, if the child has been lacking appropriate help with toileting needs, the answer is for those needs to be provided for at his original or other mainstream school, not for him to be sent to a school to which he is fundamentally unsuited.

OTHER MATTERS RELIED UPON BY THE RESPONDENTS

35. There was no satisfactory evidence led before us which would justify us in concluding that the child's admission to the specified school would be to the serious detriment of the other pupils there. The current head teacher of the specified school spoke of the child's prospective class being at full capacity, with nine pupils. However, the case statement for the respondents referred to the same class as being at capacity when consisting of eight pupils. The head teacher thought this might be explained by a pupil who was part-time who had changed to full-time attendance, but she was not able to assist the tribunal with whether the pupil was in attendance (part-time or full-time) on 29th December 2017 (the date of the statement), this having occurred prior to her tenure. There was accordingly an ambiguity or inconsistency as to the capacity of the class. The head teacher's evidence was that the entry in the Scottish Negotiating Committee for Teacher's handbook regarding class sizes was not used as a basis of determining class capacity. We were not given details as to how expanding the class by one

would put current pupils at a serious detriment. Admitting an additional and relatively able pupil would not obviously have a seriously detrimental effect on others.

36. The respondents did not advance any of the other statutory grounds potentially relevant to the effect on the school of admitting another pupil, such as the effect on levels of staffing or expenditure (2010 Act, sch 2, paras 3(a)(i), (ii)).

FINDINGS-IN-FACT

37. The tribunal found the following facts admitted or proved:-

1. The child is a boy aged ten years old at the time of the hearing.

2. The child's commencement of primary school was deferred by one year. He is now in primary 4 (children his age normally being in primary 5).

3. The child has additional support needs.

4. The child's needs include needs arising from having a learning disability and dyspraxia.

5. The child's educational ability is a lower, but not the lowest attainment group, for primary 4.

6. The child is capable of articulating his feelings, his likes and dislikes, of assessing the intentions of others, and of expressing thoughts about the future.

7. The pupils with whom the child would be educated at the specified school have language and communication difficulties and/or social, emotional and behavioural difficulties. They are not verbal beyond a basic functional level.

8. The child has substantially higher level of academic ability, and lower level of additional support need, than the pupils at the specified school.

9. The education normally provided at the specified school is not suited to the ability or aptitude of the child.

10. The provision of additional time, breaking down instructions into smaller phrases, repetition of learning, and provision of information in writing or pictures are all methods of support that are often used in mainstream schooling.

11. The provision of toileting assistance can be made in mainstream schooling.

12. The child could be provided education at a school, other than a special school, suited to his ability and aptitude.