Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DETERMINATION OF THE TRIBUNAL ON PRELIMINARY MATTER

Reference

1. This is a placing request reference, lodged with the Tribunal in May 2023.

2. A preliminary matter arises under rule 22 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2027/366) (**the rules**) since it must be determined prior to a substantive hearing on the reference and cannot be determined by the giving of directions (the rules, rule 22(1)).

3. The preliminary matter is the question of whether a valid placing request has been made by the appellant or received by the respondent.

Determination

4. The appellant made a valid placing request. It was received by the respondent. This reference is therefore competent.

Process

5. The respondent raised the preliminary matter following the reference being lodged. In June 2023, I issued directions for the lodging of witness statements and written submissions. In those directions, I asked the parties to address certain questions.

6. The parties lodged written submissions, one written statement each and a number of authorities to support their submissions.

7. Having considered all of this material, I determined the preliminary matter as indicated above. I intimated my determination to the parties in July 2023, with a promise of reasons to follow.

8. I then consulted with the parties on fresh case statement dates, and having done so, fixed those dates in directions issued in August 2023.

Findings in fact

9. The appellant is the child's mother. The child is 11 years old.

10. At the time the reference was lodged, the child was being educated at school A. He completed primary 7 there in June 2023.

11. In January 2023, the appellant sent an e-mail to the head of service of the education authority.

12. In that e-mail, the appellant asked that the child be educated at school B. Reasons for this wish were expressed in the e-mail.

13. The appellant did not receive a response to that e-mail. The appellant did not receive any automated reply to the message. The appellant did not contact the head of service or anyone else with the respondent, to enquire about the e-mail request.

14. The head of service did not initially receive the e-mail. When she heard that it was claimed that an e-mail had been sent by the appellant in January 2023, she searched her outlook e-mail box. This search located an e-mail sent by the appellant in November 2022, but there was no sign of any other e-mail from the appellant.

15. In around July 2023, the head of service arranged for the respondent's e-mail server to be checked by the respondent's information technology partners. They found the e-mail of January 2023 and they forwarded it.

16. The e-mail of January 2023 was received by the respondent's e-mail server, and reached the head of service's e-mail inbox. The e-mail was deleted from the inbox, but had not been read prior to its deletion. This is likely to have happened when the head of service lost all of her inbox e-mails due to a technical problem. With assistance, these were retrieved, but with no guarantee that all lost e-mails had been recovered.

17. After a period of time passed with no response to the e-mail, the appellant instructed her solicitor to lodge a reference with this Tribunal.

Reasons for the Determination

18. A placing request is defined in paragraph 2(3) of schedule 2 of the Education (Additional Support for Learning)(Scotland) Act 2004 (**2004 Act**) (section 29 of the

2004 Act). Such a request is one made either under schedule 2, paragraph 2(1) or schedule 2, paragraph 2(2).

19. The wording of schedule 2, paragraph 2(3) of the 2004 Act makes it clear that a placing request is a type of request. A request is defined in s.28(1) of the 2004 Act. A request must be in writing (or in another form which is capable of being used for subsequent reference) and it must contain a statement of the reasons for making the request.

20. The e-mail is 'in writing' (as defined in s.29(5) of the 2004 Act) and it contains reasons (both are required for a request under s.28(1) of the 2004 Act). These points are not in dispute. The e-mail is therefore a 'request' under s.28.

21. It is also clear that the request is a placing request under schedule 2, paragraph 2(1) of the 2004 Act since it is a request from a parent of a child having additional support needs made to the respondent as an education authority, to place the child in a school under their management. Again, none of this is disputed.

22. However, a placing request must be communicated to the respondent, in order to be a valid one under the 2004 Act. This is obvious from the nature of a request – a request is something communicated to a person who is being asked for something. The wording of the 2004 Act supports this where there is mention of a placing request 'made' or that a parent 'makes' (schedule 2, paragraphs 2(1), (2) and (3)) and a request 'made to them' (referring to an education authority) (s.28(2)).

23. Since the appellant did not receive a response to her e-mail, she instructed the current reference to be lodged. The appellant's representative relies on The Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005 (SSI 2005/515) (**deemed decision regulations**), regulation 3 and argues that the placing request made by the appellant was deemed to have been refused on 30 April 2023 (regulation 3(a)). In order for that regulation to apply, the placing request must have been 'received by the education authority' (first line of regulation 3(a)). In addition, in order to be 'in writing' (and therefore be a request under s.28(1)), a communication must (among other requirements) be 'received in legible form' (2004 Act, s.29(5)(b)).

24. So, two related questions arise:

    a. Was the request by the appellant, as contained in the e-mail of January 2023 'made' by her?

    b. Was that request received by the respondent?

25. It is in theory possible for the answer to question a. to be 'yes' and the answer to question b. to be 'no', which could give rise to a difficult legal question. However, in

this case, the answer to both questions is 'yes'. Before explaining why, I will deal with the issues of burden of proof and the form of communication.

26. I can deal with the question of burden of proof in brief terms. Both parties agree that the appellant bears the burden of proving that the appellant's e-mail was a request 'made' or 'received'. This question is not a simple one, especially when the respondent has control of its e-mail server and the relevant e-mail inbox. However, given that the parties agree on this point, I need not dwell on it. The appellant bears the burden of proof on the preliminary matter in this case.

27. On form of communication, the appellant's representative sets out an argument that communication by e-mail is equivalent in status to communication in written form. I do not have any difficulty with this proposition, and the respondent's representative does not argue otherwise. This in any event is clear from the terms of s.29(5)(a) of the 2004 Act.

28. Coming back to the main questions (set out at paragraph 24 above), both representatives provided very detailed, well-argued and helpful legal submissions. The relevant legal sources were lodged, in particular statutory provisions and case law. The more difficult question is question b, and so I will concentrate on that for most of the reasons below. I will then come back to question a. I will deal with the main arguments under a series of headings.

What does 'receipt' mean?

29. The respondent's representative developed an argument that the concept of 'receipt' of an e-mail (or other written communication) is more than receipt of the e-mail on the respondent's e-mail server. She also argued that for a communication to be 'received' it has to be opened by the recipient and some form of action has to be taken.

30. I do not accept either of these points.

31. On the first point, of key importance is the fact that the recipient of a placing request is not an individual: it is the relevant education authority. There is no need to address a placing request to an individual at all; such a request would be validly received if communicated to the respondent on a 'To whom it may concern' basis. For example, suppose a written request to place a child is left with a receptionist in the main education office of an education authority, in an envelope addressed to no-one in particular. It is then misplaced and never reaches the relevant person, until it is discovered later (as in this case) after the deemed refusal deadline. It would be absurd to suggest that the request had never been 'received' by the education authority. Such a request has been received by the education authority, and was then misplaced. That is the correct analysis in that situation, as it is in the current

(broadly similar) one. In any event, the evidence here suggests that the e-mail reached the head of service's inbox, and was then mistakenly (perhaps due to a technical issue) deleted from it. This means that the e-mail was not just received in the respondent's server. To be clear, even if the e-mail was received by the respondent's server, and never reached the e-mail inbox, this would not change the position: it has been received by the respondent in this situation. I will say more about receipt later when considering some of the formation of contract case law referred to.

32. On the second point, this would mean that where an e-mail is not opened, it has not been received. This would, in turn, mean that in theory an education authority could simply refuse to open an e-mail, thereby avoiding any legal obligation to deal with it (as long as that obligation required it to be received). This cannot be correct, and cuts across the ordinary and natural meaning of the word 'received'. The word 'received' denotes something which is in the hands of the recipient (in this case the respondent).

33. The respondent's representative refers to certain obligations that follow where an education authority decided not to comply with a placing request (s.28(2) of the 2004 Act). But this is not relevant to the preliminary matter. I accept that once a placing request is received, certain obligations apply. The question here, however, is only whether the placing request was or was not received. Once that question is resolved, the deemed decision regulations apply, making a reference submitted on time to this Tribunal competent.

Intention of Parliament

34. The respondent's representative argues that it was never the intention of Parliament to hold an education authority to account for a placing request about which it was unaware. However, this is not the correct question. The question is whether or not the placing request was 'received', not whether or not the education authority was aware of it. I refer to my example above (paragraph 31) of the request delivered in an envelope that is then temporarily mislaid.

35. It is not appropriate for me to second guess what was in the mind of the legislative drafters when the words used by them are clear. In any event, when Parliament legislates for a particular situation, there are a range of possible outcomes not precisely covered by the wording, and that require interpretation in the context of those words. The question in such cases is not what Parliament intended (as it most likely did not consider a situation of mishap like the one in this case) but instead what it meant by the words chosen. Even if it were appropriate to consider Parliamentary intention in the way urged by the respondent's representative, it could be said that Parliament most likely did not intend a parent to be disadvantaged by an electronic mishap for which she bore no responsibility.

Prior knowledge of the appellant

36. The respondent's representative suggests that since the appellant previously lodged a placing request with the respondent for a different school in December 2022, using the respondent's online form, she ought to have been aware of the process set up for the submission of placing requests. This is not a relevant argument. The question here is whether a valid placing request was 'made' and then 'received'. The fact that the appellant chose to e-mail her request this time, rather than use the respondent's online form is legally irrelevant. There is no requirement to use the online form, so the appellant cannot be legally disadvantaged by her choice not to follow this course.

Appellant's failure to follow up the e-mail

37. The respondent's representative advances an argument that, when the appellant did not receive a response to the e-mail, she ought to have been in touch with the respondent. I do not agree that such lack of contact is legally relevant. It is true that if the appellant had contacted the head of service after a period of no response, the missing e-mail would have come to light. But that does not mean that there is any legal significance to that lack of contact. The appellant sent an e-mail. That e-mail was not returned (since it was, in fact, received by the respondent). The appellant is entitled to conclude that it has been received by the respondent, and that the delay in responding was due to some other cause. Indeed, the prospect of a lack of response to a placing request within a reasonable time is the very situation catered for by regulation 3 of the deemed decision regulations. There is no obligation on the appellant to contact the respondent to check if the placing request has been received by a particular individual and is being dealt with.

Formation of contract cases

38. Both parties rely on some case law on formation of contract. I am not persuaded that these cases are helpful. These cases are about whether or not, and if so how, a contractual obligation arises. It is not surprising that a particular approach is taken to communications in this area. The preliminary matter here is about the interpretation of existing (statutory) obligations. I can see how case law on contractual interpretation might in theory be relevant (although the same approach is not necessarily applicable to interpreting legislation), but case law on contract formation is not.

39. Even if such case law were relevant, it does not assist with the preliminary issue. None of the cases cited deals with an e-mail delivered, and which was deleted due to a technical issue and so was not read by the intended recipient. It is important to note here that the evidence indicates that the e-mail did reach its intended destination (the head of service's Inbox) but was (for reasons not clear) deleted without being read. None of the contract law cases referred to deals with this situation, or one

comparable to it. The respondent's representative argues that the contract formation case law suggests that receipt requires more than an e-mail entering a server. This is not the situation here: the head of service's evidence indicates that the e-mail was found to have been deleted before it was opened. She explains how she thinks this may have happened (a loss of e-mails followed by their recovery). This suggests that the e-mail went further than the server, that it reached the inbox and was then deleted.

40. In any event, I do not agree that the case law suggests that receipt requires more than an e-mail entering a server. A key case cited by the respondent's representative for this is *Bernuth Lines Ltd v High Seas Shipping Ltd* [2006] 1 C.L.C 403, an English High Court decision of Mr Justice Clarke, in particular at paragraphs 29-30. The court in that case held that an e-mail must be despatched to the e-mail address of the intended recipient for it to have been received. That is what happened here. In *Bernuth*, the e-mail reached the inbox of the intended recipient but was ignored. The e-mail here appears to have reached the inbox of the intended recipient, followed by accidental deletion due to a technical issue. *Bernuth* does not deal with a situation where an e-mail disappears from an inbox, to be found later on the recipient's server. The fact that the e-mail in *Bernuth* was opened (but ignored) does not mean that an e-mail must be opened before it is regarded as having been received: that is not what the case says at all. In fact, Mr Justice Clarke states that 'Someone looked at the e-mails on receipt..' (paragraph 30). This suggests that the e-mails were regarded as having been received <u>before</u> they were opened. To the extent that there are similarities between *Bernuth* and this case, these suggest that the e-mail here was received. Even if the e-mail had never reached the head of service inbox, only the respondent's server, the formation of contract case law cited does not cover this situation.

Was the request 'made' by the appellant?

41. For the reasons above, I conclude that the placing request e-mail was received by the respondent, as required under the deemed decision regulations. The 2004 Act refers to a request which is 'made to' the respondent or which a parent 'makes' (2004 Act, s.28(2) and schedule 2, paragraph 2(1) and (2)). I do not agree with the appellant's representative that s.28(2) is not relevant since it applies only where the education authority decides not to comply with the placing request; the wording indicates that a request (such as a placing request) must be 'made' to the education authority where it refers to 'any request made to them'. It stands to reason that a request must be made to the intended recipient: otherwise it is not a request at all. The request here (a placing request) was undoubtedly 'made' to the respondent. Making of a request must (to give the term its ordinary and natural meaning in context) mean that it is sent to the intended recipient by a reliable method, and where there is no indication of it not having been received (such as its return by post or its rejection by an 'undelivered' e-mail message). Judged against that definition, a placing

request was made by the appellant. Indeed, where a request has been held to have been 'received' (under the deemed decision regulations), it must also, logically, have been 'made'.

Other sources referred to

42. Both representatives refer to a range of additional legal sources, but I need not cover all of them: the main points are covered above. The appellant's representative referred to a number of statutory examples, but in the main this was to make the point about the equivalence in status for e-mail correspondence. Also, in fairness to the appellant's representative, her written submission was prepared before she was aware that the e-mail had been found on the respondent's server, having been deleted. No doubt her submissions would have had a different focus had she been aware of that. In the circumstances, I decided that a right of reply for the appellant's representative to the respondent's submission was not necessary.