



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/22/0027

Reference

1. This is an application for an order for expenses in terms of rule 6 (expenses) of the First-tier Tribunal for Scotland Health and Education Chamber (Procedure) Rules 2017 (**the 2017 Rules**). The claim arises from a reference in respect of a placing request. The substantive matter was resolved by agreement between the parties.

Decision

2. The application for an order for expenses in terms of rule 6 of the 2017 Rules is refused.

Process

3. Short hearings for the application for an order for expenses took place on two mornings in August. Both hearings were attended by the appellant, the appellant's representative and the representative for the education authority.
4. It was apparent at the hearing on the first date in August that the parties had not agreed the procedure as had been directed. The matter was discussed and it was agreed that we would proceed with submissions on the application. In the event that evidence required to be heard to allow the matter to be fully determined that could be done later. Written submissions were lodged along with the papers before the tribunal and oral submissions were heard on the second date in August 2022. I am satisfied that I can determine the application on the submissions and that no further procedure is required.

Findings in Fact

5. The child is 5 years old.
6. On 12 December 2021 the appellant made a placing request to the education authority requesting that the child be placed at school A.
7. The education authority followed the process set out at paragraphs 1, 2 and 3 on page R003 of the papers before the tribunal.
8. On 18 March 2022 the education authority intimated in writing to the appellant that it had refused the placing request on the ground set out at paragraph 3(1)(f) of schedule 2 to the Education (Additional Support for Learning) (Scotland) Act 2004 (**the 2004 Act**). In terms of paragraph 3(1)(f)(iv) of schedule 2 to the 2004 Act the education authority

offered to place the child in school B being the school it had identified in terms of paragraph 3(1)(f)(ii) of schedule 2 to the 2004 Act in which it could make provision for the additional support needs of the child.

9. The education authority did not seek the views of the child's parents on school B before it made the offer to place the child there in terms of paragraph 3(1)(f)(iv) of schedule 2 to the 2004 Act.
10. Subsequently the parties agreed that the child should be placed in school C.

Reasons for the Decision

11. Rule 6 of the 2017 Rules allows the tribunal to make an order for expenses where a "party's act, omission or other conduct has caused any other party to incur expense which it would be unreasonable for that other party to be expected to pay ...".
12. The appellant's position is that the education authority's failure to seek the views of the child's parents on school B before it offered to place the child in that school in terms of paragraph 3(1)(f)(iv) of schedule 2 to the 2004 Act is an act, omission or other conduct that caused the appellant to incur expense, such as the cost of a specialist report, which it would be unreasonable for the appellant to be expected to pay.
13. The appellant's position is that the education authority required to seek the views of the child's parents on school B itself for two reasons. First, it was under a duty to do so in terms of section 12 (duties to seek and take account of views, advice and information) of the 2004 Act. Second, it was required to do so by the provisions of Supporting Children's Learning: Statutory Guidance on the Education (Additional Support for Learning) Scotland Act as amended (**the Code of Practice**).
14. In respect of section 12 of the 2004 Act the appellant relies in particular on section 12(1)(d) and (2)(b)(i). The appellant's position is that in "determining in pursuance of section 4(1) what provision to make for such additional support as is required by any child or young person having additional support needs" the education authority must "seek and take account of the views of ... in the case of a child, the child (unless the authority are satisfied that the child lacks capacity to express a view) and the child's parent".
15. The appellant's interpretation is that section 12(1)(d) and (2)(b)(i) imposed a duty on the education authority to seek the views of the child's parents on school B – being the school in which the education authority offered to place the child in terms of paragraph 3(1)(f)(iv) of schedule 2 to the 2004 Act in response to the request to place the child in school A – before offering to place the child there. I am not persuaded by that interpretation.
16. Section 12(1)(d) specifically imposes the duty on the education authority set out in section 12(2)(b)(i) where the education authority is determining what provision to make for such additional support as is required by any child or young person having additional support needs "in pursuance of section 4(1)" of the 2004 Act. This is different from for example section 12(1) which imposes the section 12(2) duties where the education authority is establishing whether any child or young person has additional support needs or requires or would require a co-ordinated support plan "in pursuance of any provision of" the 2004 Act.

17. Section 4 of the 2004 Act is concerned with the duties of the education authority to make adequate and efficient provision for additional support as is required by a child or young person and for making appropriate arrangements for keeping under consideration the additional support needs of and the adequacy of the additional support provided for a child or young person.
18. It appears that the duties imposed on the education authority by section 12(1)(d) are in respect of more general matters concerning the provision and adequacy of additional support rather than imposing a duty to seek the views of the parents of the child in respect of the specific school that the education authority may offer to place the child in in terms of paragraph 3(1)(f)(iv) of schedule 2 to the 2004 Act. Those views on more general matters concerning the provision and adequacy of additional support were addressed in the process undertaken by the education authority as set out at paragraphs 1, 2 and 3 of page R003 of the papers before the tribunal.
19. It was not submitted that the education authority had failed wholly or absolutely in its duties under section 12 to seek and take account of the views of the parents of the child in respect of additional support. The submission was narrower: namely that the education authority had not sought or taken account of the views of the parents of the child specifically in respect of offering to place the child at school B. I do not see anything in the wording or context of section 12 of the 2004 Act to support the contention that the duties under section 12(2) extend to seeking the views of the child's parents on the specific school in which the education authority might offer to place the child in terms of paragraph 3(1)(f)(iv) of schedule 2 to the 2004 Act.
20. In respect of the Code of Practice I was referred to its provisions and in particular to paragraph 7 of Chapter 9 which provides that where the education authority "propose that the child should, for any reason, be moved to a new or different school" the education authority should notify the parents of the child of the right to make a placing request, invite them to take part in consultations and provide the parents with the opportunity to visit the proposed school.
21. It appears to me that this part of the Code of Practice is concerned with a situation where the education authority is the principal actor. Where, for example, an education authority proposes moving a child to a different school because of an assessment of the child's needs or to better address behaviours of the child. In such a circumstance the education authority, clearly, cannot just move the child to a different school but requires to consult with the child's parents about the proposed move.
22. In this reference however the education authority was not the principal actor. The education authority did not propose to move the child to a different school. Rather, in this case in response to the appellant's placing request and having gone through its own process the education authority "offered to place the child" in school B. It was for the appellant to accept that offer, reject it, reject it and challenge it before this tribunal or, as happened here, at some point to settle with the education authority on a different solution.
23. With regard to schedule 2 itself it appears to me that on receiving a placing request an education authority requires to consider whether there exist any of the circumstances in schedule 2 which mean that the education authority's duty to comply with the placing

request does not apply (albeit that the education authority may still accept the placing request).

24. The requirement in paragraph 3(1)(f)(ii) of schedule 2 to the 2004 Act for the education authority to consider whether it is “able to make provision for the additional support needs of the child in a school (whether or not a school under their management) other than the specified school” is a matter for the authority and the professionals employed by it to assess and determine and that the education authority did. I do not see anything requiring the education authority when responding to a placing request to seek the views of the child’s parents on the school in which it may intend to offer to place the child in terms of paragraph 3(1)(f)(iv) of schedule 2 to the 2004 Act.
25. The appellant made a placing request which was refused by the education authority. In refusing the placing request and relying on paragraph 3(1)(f)(iv) of schedule 2 to the 2004 Act the education authority offered to place the child in a school in which it determined that it could make provision for the additional support needs of the child, namely school B. The appellant made a reference to the tribunal and each party lodged papers setting out their respective cases. The substantive matter of the reference was settled subsequently by agreement between the parties.
26. I am not persuaded and do not discern that there has been any act, omission or other conduct on the part of the education authority which has caused the appellant to incur expense which it would be unreasonable for the appellant to be expected to pay.
27. I refuse the application for an order for expenses for the reasons given above.