DECISION OF THE TRIBUNAL

Reference:

Gender: Male

Aged: 10

Type of Reference: Placing Request

Reference

1. This Reference, made by application dated May 2016 (T1-12), is made under s.18(1) and 18(3)(da)(i) of the Education (Additional Support for Learning)(Scotland) Act 2004 ('the 2004 Act').

Decision of the Tribunal

2. The Tribunal overturns the decision of the Respondent to refuse the Appellant's placing request, and requires the Respondent to place THE CHILD in School A, by 23rd January 2017, or such other date (earlier or later) as the parties may agree, all in accordance with s.19(4A)(b)(i) of the Education (Additional Support for Learning) (Scotland) Act 2004.

Preliminary/Procedural Matters

3. A hearing took place on November 2016. Two conference calls between the Convener and the parties' solicitors took place prior to the hearing (see Directions of 5th September 2016, T22-23). The placing request in question seeks placement of THE CHILD in School A.

4. Following the hearing, written submissions were directed, with an opportunity for comment on the submissions of the other party. These submissions, plus comments from both parties, were delivered by the deadline set for those (see Appellants' submissions at A107-151; Respondent's submissions at R89-105). Further submissions were directed, in particular on one of the grounds of refusal, and these were delivered by

December 2016 (see directions of November 2016 at T26-27). The Tribunal panel deliberated further on December 2016, reaching a final decision. Given the time of year and the need to communicate the decision as soon as possible, a Summary Decision was issued on December 2016, the following working day. Thereafter, these reasons were prepared, and this document represents the final decision with reasons.

5. Some documentation arrived close to the hearing from both parties. We allowed all of that documentation to be lodged since it was all relevant to the issues we had to decide. Various documents came in during/just following the hearing, namely: an e-mail exchange between Representative for the appellant and M, obtained overnight between the two hearing dates, read out to the Tribunal on 2nd November and e-mailed by Representative for the appellant to the Respondent and the Tribunal on 3rd November 2016 (A104-106); a letter of 28th September 2016 (R88); and a minute of a meeting of the Children's Specialist Services Forum which took place on 5th April 2016 (R87). The latter two documents were requested by the Tribunal. The parties lodged a Joint Minute of Admissions (T24-25) and the main facts agreed in that document are included in the Findings in Fact below.

Summary of Evidence and Proceedings

6. The bundle consists of: pages T1-29 (Tribunal papers), pages A1-151 (Appellants' papers) and pages R1-110 (Respondent's papers). We took into account all of the information in the bundle in reaching our decision.

7. Oral evidence was led from the witnesses listed above over two days. THE CHILD did not give evidence directly to the Tribunal. However, his views were taken and recorded by Advocacy Coordinator with Advocacy Service (her Report dated 28th October 2016 is at A65-68). It is clear from that report that THE CHILD wishes to return to school and believes he is going to attend School A and that he wishes to go there.

The submissions of the parties

8. Respondent representative asked us to confirm the refusal decision, in terms of s.19(4A)(a) of the 2004 Act. She urged us to find that both grounds of refusal in paragraphs 3(1)(b) and 3(1)(g) of Schedule 2 to the 2004 Act exist and that it is appropriate in all of the circumstances to confirm the refusal decision. Her reasons and the evidence she relies upon to support these reasons, are set out in detail in her written submissions (R89-110). The Respondent concedes that the refusal is a deemed refusal, intimation of the decision, and the grounds, having been sent to the Appellant by letter on 24th June 2016 (see regulation 3 of the Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations SSI 2005/515).

9. Representative for the appellant urged us to find that neither ground of refusal relied upon by the Respondent exists and that, if we find that either or both do exist, we ought to find that it is not appropriate in all of the circumstances to confirm the refusal decision. If she succeeded in either of

these arguments, we would be obliged to overturn the refusal decision and place THE CHILD in School A. Representative for the appellant's arguments in support of her position are set out in her written submissions (A107-151). It is clear from previous case law that the Respondent bears the burden of proof, and this was the basis on which we approached the analysis of the evidence. The parties confirmed, during the hearing, that this was their understanding of the burden of proof.

Findings in Fact

10. The Appellant is the mother of THE CHILD.

11. THE CHILD was born in 2006.

12. THE CHILD has additional support needs ('ASN') as defined in s.1 of the 2004 Act. THE CHILD has Attention Deficit Hyperactivity Disorder ('ADHD') and Oppositional Defiance Disorder ('ODD'). He has a mild learning difficulty and a cognitive processing difficulty. THE CHILD also has an extreme bowel control problem stemming back over many years which puts him at risk of a ruptured bowel. He refuses to accept treatment for this issue and can be incontinent up to four times per day. THE CHILD has very low self-confidence and significant anxiety around school attendance. THE CHILD exhibits high levels of rigid and inflexible behaviour which can manifest with rapidly escalating levels of aggressive, disruptive or avoidant behaviour. THE CHILD's needs are similar to those of a child with autism spectrum disorder. THE CHILD is currently prescribed risperidone and methylphenidate medication.

13. The Appellant made a placing request seeking placement of THE CHILD in School A (R8-10). The statutory deadline for a decision on that request (30th April 2016) passed with no response. The Respondent is deemed to have refused that request under the relevant regulations (SSI 2005/511, reg 3). On 24th June 2016 the Respondent intimated its decision on the request (albeit late) and set out its reasons for refusal (R15-16).

14. THE CHILD is on the roll at School B Primary School, ('School B'), a school managed by the Respondent. THE CHILD attended there on a full time basis from August 2011 until May 2015. THE CHILD did not attend School B between May and September 2015. THE CHILD attended School B on a few occasions in September 2015. THE CHILD has not attended School B or any other school since 24th September 2015. The Respondent has offered no other school placement to THE CHILD since September 2015.

15. School A is an independent special school. In January 2016, the Appellant approached the managers of School A and requested that THE CHILD be accepted as a pupil there on a day placement basis. The managers at School A indicated, by letter of 1st February 2016, that a place would be available for THE CHILD (A23). The availability of a place for THE CHILD was recently confirmed on behalf of School A in his statement dated 25th October 2016 (A60-62). The vast majority (95%) of the pupil population at School A are on

the autistic spectrum. Some pupils at School A are academically able to access mainstream education, but are not able to participate in such an education due to factors such as social difficulties or sensory issues. There are academically able children who are around the same age as THE CHILD and who attend School A. On 9th February 2016, Education Scotland issued an inspection report following an inspection of School A (R54-62).

16. THE CHILD made good educational progress in School B until May 2015. He had difficulties with reading and received PSA support to assist with this (see statement at R68-69). Prior to May 2015, THE CHILD was also supported in class in School B by Pupil Support Assistants ('PSAs'), who would assist THE CHILD with his bowel problems. The Appellant would often attend school to change THE CHILD when required. On such occasions, the PSAs would provide initial support to THE CHILD. From around the start of 2015, THE CHILD would sometimes ask for his mother to be brought to school. On some of these occasions, THE CHILD would not require help with his toileting. On around April 2015, THE CHILD expressed reluctance to the Appellant about attending school. On 8th May 2015, THE CHILD ran away from the Appellant while arriving at school and left the school playground, attending school later that day. On 11th May 2015, THE CHILD displayed violent behaviour in the Headteacher's office. On 13th May 2015, THE CHILD again displayed violent and aggressive behaviour in the Headteacher's office, removing items from the office walls. THE CHILD calmed down and expressed shame over this incident and helped to clear up the office. Following these incidents, an previously planned GIRFEC meeting took place on 21st May 2015 (minutes at A42-43). Following May 2015, support was made available both outwith School B and, in the new 2015-16 school term, in the school, as outlined in statement at R67-68. The events of THE CHILD's last day at School B (24th September 2016) are outlined in statement at R68.

17. On 3rd February 2016, a GIRFEC meeting took place to discuss THE CHILD's education (minutes of the meeting are at A44-46). The Appellant attended along with professionals from social work, education, educational psychology and advocacy. One action point agreed unanimously at that meeting was to request authority to explore the possibility of a placement at School A for THE CHILD. That request was made to the Respondent's Child Specialist Services Forum. That request was denied at a meeting of that Forum on 5th April 2016 (minute of meeting at R87) in favour of devising a flexible package of educational support.

18. On 30th June 2016, a Compulsory Supervision Order was made in respect of THE CHILD by the Children's Panel (A52). One condition of that Order was that THE CHILD was to attend a day placement at School A for a six week trial. The Panel which made that Order had available to it a Safeguarder's Report dated 24th June 2016 (A53-58). That Report recommends that THE CHILD should attend School A. On 21st July 2016, The Respondent wrote to the Locality Reporter (A52) indicating, with reasons, that the Respondent would not be implementing this part of the Order. The Respondent requested a review of that Order. Three further children's panel hearings took place, on 15th August, 13th September and 27th October, all 2016. On 15th August, a

decision on the review application was deferred in order to allow a plan to be devised for THE CHILD's education, to meet his educational and health needs. The reasons for this decision are summarised in the Respondent's letter of 7th September 2016 (A69-70). On 13th September, the decision on the review application was again deferred, on the basis of a child's plan presented to the panel, to allow for further progress and for discussion of acceptance by THE CHILD and the Appellant of the plan. The reasons for this decision are summarised in the Respondent's letter of 18th October 2016 (A71). On 27th October, the review application was deferred further. The Supervision Order issued on 30th June 2016 remains in place.

19. Witness A is the Headteacher of School B. Her qualifications, experience and involvement with THE CHILD are outlined in her statement at R63-70. Witness B is the Service Manager, Inclusion with the Respondent. Her qualifications, experience and involvement with THE CHILD, as well as the Respondent's plan for THE CHILD's future education are outlined in her statement at R74-82. Witness C is an Educational Psychologist who was formerly employed by the Respondent. His qualifications, experience and involvement with THE CHILD are outlined in his statement at R71-73. Witness D is a Clinical Psychologist. Witness D' experience, qualifications and involvement with THE CHILD are outlined by Representative for the appellant in her submissions at A121-122. Witness D wrote a report on THE CHILD's mental health on 5th June 2015 (A16-22). Witness E is an Associate Specialist in Community Child Health. Her qualifications, experience and involvement with THE CHILD are outlined in her statement at A63-64.

Reasons for Decision

20. The 2004 Act provides that where a placing request is made by a parent of a child with additional support needs, it is the duty of the education authority to grant that request (Schedule 2, para 2(2), which applies here and which refers to meeting the fees of attendance, but given the terms of s.19(4A)(b), the duty is to effectively grant the request), unless at least one of a number of specified grounds of refusal apply (the refusal grounds are in Schedule 2, para 3). If one of those grounds applies, the education authority is entitled to refuse the request. In this case, the Respondent, as the relevant education authority, refused the request on the basis of its assessment that the grounds in Schedule 2, paras 3(1)(b) and 3(g) applied. At this stage of the exercise, we need to consider whether one or both of these grounds of refusal exists or exist. It is only if this is the case that we may confirm the decision of the Respondent (s.19(4A)(a) of the 2004 Act). If we find that neither ground exists, we must overturn the refusal decision and place THE CHILD in School A (s.19(4A)(b)). We require, for these purposes, to consider the situation at the date of the hearing, not at the time of the Respondent's decision, nor on the basis of the anticipated position at any future date. For reasons we will now explain, we decided that neither ground of refusal existed at the date of the hearing. This led us to the decision to overturn the refusal of the placing request.

(a) The first placing request refusal ground (2004 Act, Schedule 2, paragraph 3(1)(b)): suitability of the education at School A for THE CHILD.

21. This ground of refusal is established where there is sufficient evidence to lead us to conclude that the education normally provided at School A is 'not suited to the age, ability or aptitude' of THE CHILD. A number of preliminary observations about this ground of refusal should be noted:

(a) This refusal ground involves a consideration of the suitability of School A only, and not a comparative suitability assessment of School B and School A;

(b) The ground involves the suitability of the education specifically for THE CHILD;

(c) We require to consider the education 'normally provided' at School A;

(d) It is evident that lack of suitability on any one of the three variables of age, ability and aptitude (or a combination of more than one) is sufficient to lead to the conclusion that the ground exists and that we may not consider any other variables;

(e) The use of the term 'not suited' suggests to us that the focus is on an overall lack of suitability (against the three specified variables);

(f) We are not tasked with considering whether the education normally provided at School A <u>is</u> suited to THE CHILD across the variables specified; the focus of the ground of refusal is whether the education at School A <u>is not</u> so suited.

22. The significance (and sense) of this last observation is clear when one considers the burden of proof. The Respondent must persuade us that (to paraphrase the wording of the ground) the education at School A is <u>not</u> suited for THE CHILD. The Appellant need not establish that the education normally provided there <u>is</u> so suited. To put it another way, it is possible that the Tribunal may reach the conclusion that it is not satisfied that the education normally provided at a school is not suited to the child on any of the three variables, while being unable to conclude that the education normally provided there is so suited. In essence, the Respondent needs to satisfy us of a negative conclusion (not suited). The reason for dwelling on this point will become clear as we develop our reasons.

23. In our view, there is insufficient evidence to justify the conclusion that the education provided at School A is not suited to a child of THE CHILD's age. There are children from a wide range of ages, including those of a similar age to THE CHILD, currently attending School A. Respondent representative points out that THE CHILD may not be in a class with other 10 year olds since a class had not been identified for THE CHILD, and that this means that he

may not be exposed to a suitable peer group. This may be the case. However, there is no way to tell, since THE CHILD had not been assigned to a class at School A. In any event, even if there was definitive evidence that THE CHILD would not be in a class with any other children of his age, this does not mean that the education normally provided at the school is not suited to a child of THE CHILD's age. There is no requirement that all children are educated in a class with other children of similar age. Indeed, it is within judicial knowledge that some children (especially in rural areas) are educated in the same class as children from a relatively wide age range. Further, we come back here to the burden of proof; it is for the Respondent to satisfy us that the education provided at School A is not suited to THE CHILD's age. Lack of information on the age range of THE CHILD's likely class is therefore a barrier to the Respondent, not the Appellant. Further, there is evidence which suggests that School A would be suitable for someone of THE CHILD's age; (in his response to questions put by Representative for the appellant – A101, final para) that there are other children of a similar age to THE CHILD attending the school; this points to (but is not definitive of) School A's suitability for education of children of THE CHILD's age.

24. Turning to words 'ability' and 'aptitude', in our view these words (being words in common usage) should be given their ordinary and natural meaning, but in the context of the education of a child with additional support needs. In other words, what we are considering here is the educational ability and aptitude of THE CHILD. It is also important for us to consider that we are dealing with an assessment of likely ability and aptitude, in the context of the education normally provided at School A; THE CHILD has not attended that school as a pupil, so we require to form a view, based on all of the evidence, about how THE CHILD might fare if educated there. Also, as noted above, this is not about School B or even about a comparison between School B and School A; our attention must be focussed solely on School A. Finally, we need to consider THE CHILD's current ability and aptitude, and not his aptitude or ability in an ideal situation. This latter point is important here, since it is clear that THE CHILD is not ready at this point to return to mainstream education. It would not be appropriate, therefore, to consider his aptitude or ability as if he were ready for a mainstream setting.

25. On the question of aptitude and ability, Respondent representative points to a number of adminicles of evidence to support her general assertion that THE CHILD was making good progress at School B (R92-93). She refers to the evidence of Witness A, Witness C and Witness D. However, all of this evidence relates to the period prior to September 2015, while THE CHILD was being educated (prior to May 2015 on a full time basis) at School B. It is clear from the plan developed by the Respondent (R79-82) that THE CHILD is not (in the Respondent's view) yet ready for a return to mainstream education (this is a matter we will return to in discussing the other ground of refusal, below). In considering THE CHILD's current ability and aptitude, as noted above, this has to be considered on evidence of the current position. For this reason, much of the evidence of THE CHILD's good educational progress while in mainstream education is not directly relevant to the question of his ability or aptitude today. On that question, the evidence suggests that special

and intensive provision for THE CHILD is required; that is the position of the Respondent, in formulating its plan for THE CHILD's education (R79-82). Even if that evidence (of good educational progress) were relevant, in the sense that it demonstrates that THE CHILD can, in the right conditions, do well in a mainstream environment (and the evidence suggests that this is the case), this says nothing about his ability or aptitude to do well in the School A environment. In other words, this evidence focusses on the suitability of School B (albeit in the future) and not lack of suitability of School A. It is not inherently obvious that a child who can do well in a mainstream environment would not perform well in a particular non-mainstream environment. It is even possible that such a child might perform to a higher standard in the latter setting than in the former.

26. More relevant is the evidence of Senior Educational Psychologist and, Educational Psychologist/Probationer, as set out in their joint report of 27th October 2016, at R84-86. This report sets out an account of a visit by the authors to School A on 26th October 2016. The authors observed and discussed with staff members the education at School A. The first point to note about the visit was that it took place for one hour (between 2pm and 3pm). We assume that this time included time for observation and discussion with staff. The authors then describe their observation of 'the main teaching lesson in the afternoon in the class that [THE CHILD] would be in'. It is not clear to us how the authors are aware that THE CHILD would be in this class, but we are prepared to give the Respondent the benefit of the doubt on the matter and assume that this is correct. The authors describe how the class progresses. A number of concerns are then noted, as to how the teaching style observed would meet THE CHILD's needs. These concerns were over the level of learning; support to help reengage pupils; challenging behaviours; lack of differentiation and lack of learning consolidation. It is not clear to us whether the last three concerns were reached as a result of the observation or whether they arose from discussions with staff or other sources. The examples of challenging behaviour given do not appear to come from the class observation as there is no mention of any of the listed behaviours in the description of the class. On the first two concerns expressed, they appear to relate to the observed class. However, these concerns are based on an observation of one class for a maximum of one hour. It is difficult, in our view, to draw any reliable, general conclusions about the education on offer at School A on the basis of such a limited observation. It is certainly not possible to reach the conclusion that the education normally offered at School A is not suited to THE CHILDs aptitude or ability based on such a limited observation/discussion. While this kind of evidence is directly relevant to the question we must consider under this ground of refusal, it is too limited, and so is of little weight.

27. Earlier in her submission, Respondent representative outlines what education normally provided means in this context (R90, first three full paras) and we accept her definition. Respondent representative refers to a number of factors about School A, including the fact that 95% of pupils are on the autistic spectrum (R90). She also refers, on the same page of her submissions, the statement that pupils at School A require a high level of support and may

have sensory issues. While we accept that THE CHILD does not have an autism spectrum disorder diagnosis, this is not, in itself, an indication of the lack of suitability of School A for THE CHILD. M's in his statement indicates that he stands by his decision to offer THE CHILD a place in School A. He is well qualified to make that assessment. He has qualifications in autism and chairs the School A Admissions and Review Committee. He has worked at School A for 37 years. He has met THE CHILD and the Appellant. It is fair to note that M's does not indicate an unqualified view that THE CHILD would thrive at School A. He says that in providing a place for THE CHILD he 'would give it a go' (A60, final para). This suggests that there is a degree of uncertainty in his mind about offering a place to THE CHILD. That uncertainty is revisited later in his statement when he states "I need more information about [THE CHILD's] difficulties to advise in more detail how School A could meet his needs." (A61, first para). He also states that "..we would need to assess [THE CHILD] fully in order to determine which group to place him in." (A62, final para). However, none of this affects the assessment made by M's (following consultation with others on the Committee – A23) that a place should be offered to THE CHILD. The responses (albeit limited) to questions posed by e-mail by Representative for the appellant (see A104-106) confirm M's view on the offer. Had M's attended to give evidence in person, his views may have been challenged, but since he did not, we require to consider his evidence as it is presented. We see no reason to doubt his evidence, and the Respondent did not suggest that his reliability was in question. Indeed, the fact that M's offers some clear qualifications to his assertions lends those assertions weight.

28. We should add that the Appellant does not require to establish that School A is suitable for THE CHILD, so there is no need for concrete evidence of suitability to be led. What is clear from the written evidence of M's is that School A may be able to offer a suitable level and content of educational experience for THE CHILD.

29. On the absence of a diagnosis of ASD for THE CHILD, this was this not a barrier to an offer of a place for him at School A. In addition, require to consider the evidence presented by Dr J. Dr J is a Consultant Child Psychiatrist and has met with and treated THE CHILD. Dr J did not provide oral evidence, nor was he asked to provide a written statement, but a number of his written reports were lodged. The most recent was written very close to the hearing, on 17th October 2016 (A101-103). Earlier reports from Dr J are dated 15th February 2016 (A4-5), 5th June 2015 (A16-22) and 9th November 2015 (A32-33). Dr J was kept appraised of the outcome of various GIRFEC meetings (by being copied into the minutes – see those of 3rd November 2015 at A50-51; 15th December 2015 at A47-49; 3rd February 2016 at A44-46). In addition, Dr J' views are recorded in THE CHILD's Child's Plan of 21st July 2016 (A72-91, at A83). He attended a meeting on 8th September 2016 (see Witness B's summary of that meeting in her statement at R79, 2nd para). Coming back to Dr J' most recent report of 17th October 2016, (written in response to a letter from Witness B, not lodged but written in September 2016, seeking assistance under s.23 of the 2004 Act), while acknowledging that colleagues had indicated that THE CHILD does not have ASD, he states

that '…my opinion, albeit based on indirect evidence, is that [ASD] remains a possibility'. (A102, first para). He goes onto mention the possibility of further assessment. In concluding, Dr J states that:

> "..it does make sense to understand that The Child's needs are similar to a child with [ASD] who has difficulties integrating with other children, who can be emotionally very sensitive, and who can show rapidly escalating emotional responses in the face of adversity." (A102, final para).

It seems to us then that there is some doubt over whether THE CHILD has ASD. This doubt is confirmed in Witness B's statement where she refers to a meeting on 25th August 2016 between NHS, social work and education professionals and where she notes that it was confirmed there that assessment for autism is 'incomplete' (R78, penultimate para). Even if that doubt were removed, Dr J, who has been treating THE CHILD since at least November 2015, has indicated that THE CHILD has similar needs to a child with ASD. We have no reason to doubt Dr J' conclusion. Again, he did not give oral evidence, and so his conclusions were not fully tested; on the other hand, the Respondent did not argue that his evidence was unreliable. This evidence significantly limits the Respondent's argument that the absence of an ASD diagnosis points towards the lack of suitability of School A for THE CHILD.

30. Respondent representative relies on the evidence of Witness C to support the lack of suitability of School A. We accept that of all of the witnesses (who gave oral evidence or who provided a statement/report) Witness C is in the best position to comment on provision at School A, aside from M's. As Depute Principal of Educational Psychology for the Respondent, he had visited School A around every six months for a 10 year period, having last visited in early 2016. Respondent representative relies, in part, on Witness C's evidence about children who attended another special school in the authority, School C, and how some of those children had needs which were so extreme, they had to be placed in School A. The argument here is that the needs of the children who attend School A are very extreme, and that since THE CHILD's cannot be said to be, this is an indicator of lack of suitability. While we understand the general thrust of this argument, we do not find it persuasive. We do not know what the needs of the children who could not be accommodated at School C were. Further, it does not necessarily follow that because School A caters for the needs of children which are greater than THE CHILD, that they would not be able to meet THE CHILDs needs also. Indeed, Respondent representative notes that Witness C indicated that a small number of children who were 'more able' had attended School A. M's confirms in his response to Representative for the appellant that there are children at School A who are academically able to access mainstream education (A105).

31. Respondent representative also relies on Witness C's view that THE CHILD does not have the level of learning difficulty that which indicates that a special school education is required (see his statement at R71 and repeated in his oral evidence). However, the fact that a special school is not required to

meet THE CHILD's needs does not mean that the education normally provided there is not suitable for his needs. In other words, a child might benefit from education in a special school even although such education is not required. The test is suitability, not need.

32. Although not mentioned in submissions, Witness C does suggest that School A might not be the best environment for THE CHILD. In his statement (which he did not depart from in oral evidence), Witness C refers to most of the children in School A having more severe needs than THE CHILD. A similar point is considered above (the point about School C children attending School A). Again, the fact that the needs of most children at School A are greater does not mean the education there is not suited to THE CHILD. It may be that the greater needs of most children means that THE CHILD's educational potential might not be realised, for example due to distraction caused by the needs of other children or a lack of staffing time for THE CHILD since teaching staff time would be unduly taken up by meeting the increased needs of others. However, specific points like this were not explored. Further, again we come back to M's's written evidence, where he is of the view that School A might be suitable for THE CHILD. Witness C does go onto comment on the width and content of the curriculum (R72, penultimate paragraph) and indicates that this could limit THE CHILD's opportunities. Witness C, as pointed out by Respondent representative (R91-92), indicates that School A provides a less formal, less structured curriculum and with a limited range of courses. However, there is no indication that this means that School A would offer a curriculum which would not be suited to THE CHILD's aptitude or ability. His aptitude or ability should, in our view, be viewed in the context of applicable learning barriers. A wide curriculum which is offered in a structured and formal environment may not be what THE CHILD needs; indeed such a curriculum was in place at School B, and it is accepted that THE CHILD is unable to return there due to his additional support needs. Respondent representative goes onto cite Witness C's observation that THE CHILD might be on his own or in a very small group at School A, and that he would benefit from a 'pool of peers' (R92, submissions). However, the Respondent's three-phase plan (R79-82) involves 1:1 education and so education in the absence of peers. While it is clear that this is only Phase 1 of a plan which involves the introduction of peers in later phases, it is not clear how each phase will operate, and how long each will take. It is possible that under the Respondent's plan, THE CHILD would have spent a considerable period in 1:1 education. We also note here the apparently genuine wish of the Appellant for THE CHILD to return to mainstream education as soon as he can. Further, M's indicated that the group THE CHILD would join had not been identified, and so any discussion around the size of the group (or its composition) is necessarily speculative.

33. In his oral evidence, as pointed out by Representative for the appellant, Witness C did not indicate that School A would not be able to properly meet THE CHILD's needs. Indeed, he indicated that School A was a possible option. In his oral evidence, Witness C did not indicate a preference from an educational psychology perspective for any of the possible available options. When commenting on the Respondent's plan for THE CHILD's future

education (R70-82) he stated that “it looks good on paper” suggesting that he had reservations about the likelihood of its successful implementation. Further, Witness C attended the meeting in February 2016 at which a recommendation was made to request consideration of a placement at School A (see paragraph 17 above, where the meeting is described), as a ‘stepping stone’ back into mainstream education. This suggests to us that at that point in time (just as Witness C’s direct experience of School A was coming to an end) he regarded a placement there as a viable possibility, albeit for limited purposes.

34. Staying with Witness C’s evidence, we should note that he has visited THE CHILD only twice, on both occasions in his home. This necessarily limits his ability to gauge how THE CHILD would react in a particular educational environment. Witness C has never observed THE CHILD in such an environment. This does not mean that he cannot comment in general terms; it does mean, however, that the value of his observations are reduced.

35. Respondent representative also relies on the evidence of Witness B on the education offered at School A. Witness B concedes that she is not personally familiar with the provision at School A (R76, final para). However, she reaches certain views about the provision there based on information from colleagues who have knowledge of School A and from the school’s website (R77, first para). She goes onto express concerns about the way the curriculum is taught at School A (R77, 4th para) and Respondent representative relies on these concerns in her submissions (R91). However, the concerns expressed by Witness B, as well as not deriving from her own experience (which weakens their impact) are general in nature, and do not translate into concerns which we can be satisfied are likely to face THE CHILD if he is placed there. There is no information about the class in which THE CHILD would be placed, about their ages, or ability or functioning levels (all concerns voiced by Witness B). Witness B also relies on parts of the most recent inspection report by Education Scotland, from February 2016 (R77-78), but again these concerns are general in nature and there is no way of telling whether or not they would impact on THE CHILD’s education (assuming that those concerns, or some of them, have not been tackled). Further, we have no information on the reliability of the views expressed to Witness B about School A, so it is difficult to measure the weight of that evidence. Finally, we note that Witness B concedes that by 5th April 2016, a placement at School A had not been ruled out (R76, 4th para). There is no indication of what led to that option being removed by 24th June 2016, when the intimation that the ground of refusal was met took place. It could be that Witness B gave careful consideration to all of the relevant factors by that date, but it is hard to see why, as the plan evolved, School A became ruled out. Indeed, we note that the draft three-phase plan was produced on 30th June 2016 (A96-99), after the intimation that School A was regarded as not suitable. This suggests that School A was taken off the table as an option as far as the Respondent was concerned before a plan involving ‘a flexible package of educational support’ (to summarise the outcome of the 5th April 2016 meeting – R87) was prepared in draft. This further diminishes the weight of Witness B’s conclusion.

36. Overall, then, there is insufficient evidence to satisfy us that the education normally provided at School A is not suited to THE CHILD's age, ability or aptitude. What is missing is specific evidence which indicates how THE CHILD would be likely to be affected in the event that he attends School A. We did not have the benefit of any oral evidence from someone who is familiar with provision as it currently stands at School A. While such evidence is not essential, it did leave us having to rely on witness statements and hearsay evidence along with general conclusions about the school and its provision. Taken together, this evidence did not persuade us that the relatively high test this ground presents was satisfied. In addition, there was current and reliable evidence to suggest that School A may be suitable for THE CHILD's age ability and aptitude (M's's evidence). There is some support from the suitability of School A from the terms of the Supervision Order placed by the Children's Panel. That decision was based on a hearing and on a Safeguarder's Report which favoured a placement at School A (see para 18 above). While that decision was for a trial period at School A only, and while the decision of another body on the educational welfare of a child offers limited support on the suitability of School A for our purposes, that support is an indication against lack of suitability. In all of the circumstances, this ground of refusal does not, therefore, exist.

(b) The second placing request refusal ground (2004 Act, Schedule 2, paragraph 3(1)(g)): presumption of mainstream education.

37. This ground of refusal applies if (and we paraphrase the ground here) placing THE CHILD in School A would breach the requirement (in s.15(1) of the Standards in Scotland's Schools etc Act 2000, s.15(1)) that children of school age must normally be educated in a school other than a special school. The requirement in s.15(1) is sometimes referred to as the 'presumption of mainstream' and it reads in full as follows:

> **15 Requirement that education be provided in mainstream schools**
>
> (1) Where an education authority, in carrying out their duty to provide school education to a child of school age, provide that education in a school, they shall unless one of the circumstances mentioned in subsection (3) below arises in relation to the child provide it in a school other than a special school.

Subsections 15(2) and (4) do not apply in this case. Subsection 15(3) sets out the exceptions to this requirement, which are presumed to arise exceptionally.

38. In order for this ground of refusal to exist, the requirement in s.15(1) of the 2000 Act must apply. Further, the placing of THE CHILD in School A must be an event which, if carried out by the Respondent, would directly lead to a breach of this requirement.

39. In our view, the requirement in s.15(1) of the 2000 Act does not apply in this case. The initial submissions on this ground of refusal required further focus, and after deliberating, we decided that further written submissions were

necessary. These were directed (T26-27) and three questions were posed to help us consider the proper scope of s.15(1). The submissions in response are at A140-A151 and R106-110.

40. It is common ground between the parties that the word 'mainstream' is not defined in the 2000 Act or elsewhere. Although that word does not appear in the section itself, it is referred to in the section heading (see above). Both parties are in agreement also on the point that a mainstream school is one which is not a 'special school'. On both of these points, we agree with the parties. On the latter point, s.15(1) makes it clear that the requirement the education authority faces is to provide the education 'other than in a special school'. Such a school (one which is not a special school) must, in our view, be a mainstream school, as that phrase is used in the s.15 heading. Support for this interpretation comes from the definition of 'special school' (found in s.29(1) of the 2004 Act):

> "special school" means—
> (a) a school, or
> (b) any class or other unit forming part of a public school which is not itself a special school,
> the sole or main purpose of which is to provide education specially suited to the additional support needs of children or young persons selected for attendance at the school, class or (as the case may be) unit by reason of those needs.

41. This definition suggests that a special school could be a local authority specialist class or unit, or a separate school offering special provision. This definition applies to the 2000 Act as one adopted in s.135 of the Education (Scotland) Act 1980; any such definition applies to the same term in the 2000 Act (see s.58(2) of the 2000 Act). It seems clear that the only provision not covered by this definition is provision in a mainstream classroom. Respondent representative cites a number of sources in support of this interpretation (R108-109). It is clear to us that this is the correct interpretation. We could attempt to define 'mainstream' positively (rather than by reference to what it is not) but this is not required for a decision in this case, and would not be an easy task; we therefore decline to do so.

42. There are two alternative reasons for our decision that the requirement in s.15(1) does not apply.

43. Firstly, the requirement applies only when an education authority is carrying out its duty to 'provide school education to a child'. In our view, the Respondent is not currently carrying out this duty in relation to THE CHILD. THE CHILD has not been in school since 24th September 2015. Respondent representative argues that since THE CHILD is on the roll at School B and he has not been excluded, and since the school remains open for him to return there at any time, school education is 'available' to THE CHILD. We do not agree that making school education 'available' in this sense amounts to 'providing' a school education. In our view, Parliament chose to refer to 'provide' and this word should be given its ordinary and natural meaning

unless the context suggests otherwise. The ordinary and natural meaning of 'provide' in the context of a service is to be currently delivering such a service. It is not apt to describe an intention to deliver it in the future. In our view, the context supports our interpretation. The context would include children who are being educated at home. Such children would not be being 'provided' with a school education, and so, for obvious reasons, the requirement to provide mainstream education would not apply. We are not suggesting, of course, that THE CHILD is being educated at home, but he is in a similar position for present purposes.

44. Secondly, if we are wrong about the meaning of 'provide' in s.15(1), there is another reason for the non-application of the s.15(1) requirement. For the purposes of this point, we will assume that 'provide' means 'available' in the sense Respondent representative describes in her submissions (R106). In reality, education in a mainstream setting is not available. Technically, THE CHILD remains on the roll at School B. If the Appellant insisted that he return there, the Respondent would require to accommodate him in a mainstream classroom. However, the Respondent does not plan to do so. What is planned is provided for in the three-phase plan as set out at R79-82. Indeed, Respondent representative concedes that THE CHILD is not attending School B "for reasons connected with his additional support needs" (R106, final para) and that THE CHILD is "unable to access" provision at School B (R107). The evidence suggests that it is for this reason that the three-phase plan has been devised. In our view, the availability of certain education should be considered from the perspective of what is in reality available and not what is theoretically available. Taking the example of the home educated child again, in theory, education in a mainstream setting is available (should the child's parents choose to turn up with the child at his local school one day), but the requirement to provide a mainstream education clearly does not apply.

45. Further to this point, in our view, Phase 1 of the Respondent's plan would involve THE CHILD attending a 'special school' as that phrase is defined above. It is clear that this phase would involve 1:1 sessions in a location to be agreed, in order for THE CHILD to 're-engage in learning' (R79, under 'Actions'). Only when THE CHILD reaches Phase 2 (and only if he did so) does the plan envisage THE CHILD accessing provision 'with peers from a mainstream setting'. Phase 2 appears to envisage a mainstream setting, although it is not until Phase 3 that THE CHILD will 'transition to a mainstream provision'. In our view, and giving the Respondent the benefit of the doubt about Phase 2, it is not until that phase that mainstream provision for THE CHILD would be available. Until that stage, the plan is to provide education in a 'special school'. Phase 1 involves provision in "a school…the sole or main purpose of which is to provide education specially suited to the additional support needs of children or young persons selected for attendance at the school, class or (as the case may be) unit by reason of those needs." The provision would be in a "school" as defined in s.135 of the 1980 Act, since the physical place where the education would take place would be an institution for the provision of primary education. There is no minimum number of pupils to constitute a "school", and so a school can have a single pupil. The sole purpose of the school would be to provide education specially suited to the

additional support needs of THE CHILD, who has been selected to attend there.

46. Since the education being provided to THE CHILD (being made available to him according to the Respondent's interpretation) is an education in a special school, the Respondent cannot be required to provide an education in a school other than a special school.

47. It is argued by Respondent representative that it is sufficient for the Respondent's plan to have as its general aim the return of THE CHILD to mainstream education. We do not doubt that this is the aim of the three-phase plan. However, there is no guarantee that the plan will work; certainly no witness indicated this view, and it is not obviously the case. This means that, under the plan, THE CHILD may never return to mainstream education. Even if a return could be guaranteed, there is no way to predict when that would happen. Phase 1 may last for a significant period. Section 15(1) refers, in our view, to the current provision of education. It is framed in the present tense, and there is no indication that a future, possible provision of mainstream education gives rise to the requirement.

48. Respondent representative also points out that the evidence suggests that Phases 1 and 2 may be conflated, depending on how the plan is put into place. There was evidence to support this possibility, but it is speculative. Presumably the Respondent takes the view that it is more likely that Phase 1 will happen on its own, followed by Phase 2, and that is why the plan is arranged in this way. We have to take the plan as it is currently presented, and we cannot assume that Phases 1 and 2 will be (or are even likely to be) conflated.

49. Looking at s.15(1) more broadly, it is clear to us that it would not be appropriate for the Respondent to be able to argue that in placing THE CHILD in School A, they would be in breach of a requirement to educate him in a mainstream setting, when there is no immediate intention to introduce THE CHILD to a mainstream environment. Respondent representative refers us to an earlier Tribunal decision relating to another reference in which the presumption of mainstream ground was considered (R/15/0052) (R107). We obtained an anonymised copy of that decision, but it does not assist us here since the question of the applicability of s.15(1) discussed above did not arise there.

50. If we are wrong in our interpretation of s.15(1), then the requirement under that subsection does not, in any event, apply. That provision indicates that if one of the circumstances in s.15(3) arises, the s.15(1) requirement does not. In our view, the circumstance outlined in s.15(3)(a) arises in this case. This part of s.15(3) applies where the education which would be provided in a school other than a special school would not be suited to the ability or aptitude of the child. This wording is similar to the ground of refusal in Schedule 2, para 3(1)(b) of the 2004 Act, discussed above (except with the absence of a reference to 'age'). Our general comments on that ground of refusal apply here, in as far as they relate to ability and aptitude. The question here is

whether we are satisfied that the mainstream (non-special school) education which would be provided to THE CHILD would not be suited to his ability or aptitude. The only possible mainstream education which could be provided to THE CHILD (in the sense of being available, if that is the correct interpretation) is in School B. In our view, the ability or aptitude of a child can change from time to time. THE CHILD is a good example of this; his ability and aptitude in a mainstream setting posed no serious problems until May 2015; thereafter serious issues related to his additional support needs arose. In our view, the Respondent has effectively conceded that the education on offer at School B (or indeed that available in any other mainstream setting) is not suited to THE CHILDs current aptitude or ability, when it formulated its three-phase plan (R79-82). It is clear to us, given that ability and aptitude can change over time, that current ability and aptitude is what counts, not what the child is capable of in ideal circumstances with no impaired ability or aptitude. This approach makes sense, since what is clearly envisaged is the question of whether the requirement to educate the child in a mainstream setting applies now, not at some future point when the situation may be better. The plan at Phase 1 involves THE CHILD re-engaging in learning (R79). This seems a sensible approach since THE CHILD has not been in any educational setting for over a year, and given his reluctance to attend school between May and September 2015 and since then. However, the Respondent, in formulating this plan and in accepting that THE CHILD is not attending mainstream school "for reasons connected with his additional support needs" (R106 final para) and that he is "unable to access" provision there (R107), leads us to the conclusion that a mainstream education is not suited to THE CHILD's current ability and aptitude. To put it another way, if a mainstream setting is suitable to his aptitude and ability, presumably the Respondent would be offering access to such a setting. As we note above, in connection with s.15(1), we require to consider the position at the date of the hearing, and so the argument that mainstream education is intended for the future does not assist in interpreting s.15(3). There is a presumption against the circumstance in s.15(3)(a) arising: such a circumstance is presumed to arise only exceptionally. In our view, the position here is exceptional. The lack of suitability of mainstream education for THE CHILD arises where an intensive, bespoke plan has been put in place for his education outwith his school. He requires to re-engage in learning. He has complex additional support needs, and it appears to be accepted that mental, physical and educational factors contribute to those needs. THE CHILD has been out of school education for almost 15 months (at the time of writing). All of this make this situation exceptional; it is far from being a situation which could be described as ordinary or common. Since the circumstance in s.15(3)(a) arises, the requirement in s.15(1) does not apply. For this reason, the Respondent would not be in breach of the s.15(1) requirement by placing THE CHILD in School A. For this reason (as well as for the reasons above) this ground of refusal does not exist. For the reasons set out by Respondent representative in her submissions (R94-96), the circumstances in s.15(3)(b) and (c) do not, in our view, arise.

(c) Appropriateness in all of circumstances (s.19(4A)(a)(ii) of the 2004 Act).

51. Since we have decided that neither of the grounds of referral relied upon exist, we need not embark on an examination of the submissions and evidence relevant to this test. This is clear from the wording of s.19(4A)(a): in order to confirm the refusal decision at least one ground of refusal must exist, in addition to the confirmation of that refusal being appropriate in all of the circumstances.

52. We are prepared to say that had we decided that the ground of refusal in Schedule 2, paragraph 3(1)(b) of the 2004 Act exists (suitability of the education normally provided), we would have had no difficulty in reaching the conclusion that it would be appropriate in all of the circumstances for the refusal decision to be confirmed. Taking the evidence and submissions as a whole, we would not have been persuaded that placing THE CHILD in School A would have been appropriate in circumstances where the education normally provided there is not suited to THE CHILD's age, ability or aptitude. For such a conclusion to be reached, in our view, exceptional circumstances would have to exist. No such circumstances present themselves.

53. The same result would have followed had we decided that only the ground of refusal in Schedule 2, para 3(1)(g) of the 2004 Act existed. This outcome would have been less obvious, but it is one we are clear about. In our view, the three-phase plan adopted by the Respondent is a reasonable and proportionate reaction to the situation which has developed. We are of the view, however, that this plan could (and should) have been devised much earlier. Further, we are of the view that, given the Respondent's concerns about the involvement of NHS professionals, and given the clear and early evidence of a link between THE CHILD's mental health, bowel problems and his education, a formal request under s.23 of the 2004 Act for assistance could (and should) have been made earlier than September 2016. Witness E confirmed in her evidence that there had, prior to September 2016, been no formal approach made by the Respondent asking for assistance with THE CHILD's educational needs.

54. Given that THE CHILD's education has been delayed on account of a reaction which, in our view, was too slow, we did consider whether we would have found that it was appropriate to place THE CHILD in School A despite the presence of the presumption of mainstream ground of refusal (had we decided that it existed); in the end we decided that the delay would not have tipped the balance in favour of appropriateness of placing THE CHILD in School A. We do have doubts about whether School A is a suitable placement for THE CHILD. In reaching this conclusion, we would have had full regard to the clear views of the Appellant and her son. In our view, the Appellant is genuine and clear in her desire to obtain the best educational experience for her son. The evidence suggests that she has not reacted favourably to some suggestions made by the Respondents about other possible education authority provisions for THE CHILD. On the other hand, as is conceded in the Joint Minute of Admissions (T25, para 14), no formal offer of an alternative placement was put to her; these offers seem to have been made orally only. THE CHILD himself is clear in his view (as recorded by Advocacy Services –

A65-68) that he wishes to return to education, on a gradual basis and at School A. Taking everything into account, on balance, we take the view that the three-phase plan devised by the Respondent would have been the best way forward. It involves a gradual introduction back to mainstream education, and avoids the risk of exposing THE CHILD to a new placement at School A, where there are doubts around the curriculum, class composition and educational provision.

55. It is frustrating, in these circumstances, to have to reach the view we have come to. It is clear, however, that the sole test is not appropriateness in all of the circumstances; one of the grounds of refusal argued must be established as existing at the date of the hearing; since we found that neither of those relied upon existed, we are forced to conclude that the Respondent's decision must be overturned.

Other witnesses

56. We are conscious of the fact that we have not said much about the evidence of Witness D, Witness E or indeed of the evidence of the Appellant. On Witness D, he provided very helpful analysis of THE CHILD's psychological difficulties, including ODD, learning difficulties and cognitive processing difficulty (see para 12 above). He was unable to provide evidence on the suitability of the Respondent's plan or on School A, hence our limited reliance on his evidence. Witness E provided a statement (A63-64) and her evidence provided useful background facts on THE CHILD's medical treatment both from mental and physical health perspectives. Her evidence was helpful, but did not impact directly on the grounds of refusal (although her response on the question of supporting THE CHILD's education did impact on our appropriateness comments, above). The Appellant's evidence was again very helpful, but given the outcome of this reference, we have not felt it necessary to record her evidence in detail. A useful summary of the Appellant's evidence is set out in Representative for the appellant's submissions at A126-130, and we have considered this closely. Much of this summary is not controversial.

Further comments

57. We would make only two such comments here. It seems to us from some of the evidence that the Respondent has formed the view that the main reason for the non-attendance of THE CHILD at School B was the refusal of the Appellant to ensure that he attends school. Even assuming that to be the case, this does not absolve the Respondent from its statutory duties to do all it can to ensure that a child with Additional Support Needs has all of the assistance and input, educational and other, available as soon as possible. In our view, there have been delays in developing a plan, and in calling in the medical assistance which is so closely linked with THE CHILDs educational needs. It is unfortunate that these delays have occurred.

58. We are surprised to note that there seems to be no current consideration of a Coordinated Support Plan for THE CHILD. Such a plan was under consideration at an earlier point. Given the medical intervention which appears to be ongoing for THE CHILD, it may well be the case that CSP is justified and we hope that urgent consideration is given to this question.