Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

Reference

1. This Reference, 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 15th January 2018, or such other date (earlier or later) as the parties may agree, all in accordance with s.19(4A)(b)(i) of the 2004 Act.

Preliminary/Procedural Matters

3. A hearing took place over two days. One conference call between the Convener and the parties' solicitors took place prior to the hearing. 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. The final submissions were delivered by the deadline set for those. The Tribunal panel deliberated in December, 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. Thereafter, these reasons were prepared, and this document represents the final decision with reasons.

Summary of Evidence and Proceedings

5. The bundle consists of: pages T1-24 (Tribunal papers), pages A1-115 (Appellants' papers) and pages R1-145 (Respondent's papers). We took into account all of the information in the bundle in reaching our decision.

6. Oral evidence was led from the witnesses listed above over two days. Partners in Advocacy were directed to take the child's views and prepare a report for the Tribunal. However, Partners in Advocacy confirmed that despite several attempts,

the child did not wish to engage with advocacy services and so no report on his views could be prepared. However, the child's views were taken by another advocacy service around April. The relevant paragraph in that e-mail is worth setting out:

> [the child] has said that he is feeling very anxious and nervous about the future he finds his school work incredibly hard and is feeling overwhelmed – he is concerned about the size of the high school and how he would manage. He is worried for his future and about being singled out because he feels different. [the child] has some trouble with words he gets confused with B & D and [the child] would like help and support with his school work.

7. These views are relevant to our consideration of the suitability of school A, as we explain later.

8. Biographies of witness B, witness D, witness C and Educational Psychologist were made available by the Respondents. The latter did not give oral evidence. It is clear from these documents and from the written statements of these professionals that they have considerable experience in their fields. This is not a case where there were any credibility or reliability issues; it is a case which revolves around the interpretation of the legislation and the facts. These witnesses largely gave oral evidence in accordance with their written statements. Where additional, relevant material emerged during the oral evidence, this is indicated below.

9. The Appellant also gave evidence, as did her only witness, witness A. In our view the Appellant gave her evidence in a clear, natural and genuine way. She was an impressive witness. It seemed to us that she took a measured and proportionate approach to the issues she and her son have faced in relation to his education. The Appellant is clearly worried about the child not attending school at all at the moment. She is also worried about the prospect of the child attending school B.

Findings in Fact

10. The Appellant is the mother of the child who lives with his family.

11. The child has additional support needs ('ASN') as defined in s.1 of the 2004 Act. The child has Global Developmental Delay. He has difficulties with: short term and working memory; gross and fine motor skills; processing speed; attention and concentration; vulnerability in large social contexts; auditory, phonological and processing skills. He has a mild learning difficulty and cognitive processing difficulty. The child's literacy aptitude is at the First Level, which is associated with primary 1 to the beginning of primary 4. More specifically, he is operating at around the primary 2 level for literacy and higher than primary 2 level for maths. He has difficulties in the area of receptive and expressive language. The child is uncomfortable in large crowds.

12. The child attended an enhanced provision unit at school C. He attended that unit from the beginning of Primary 4, having attended school D for his first three years of education. The enhanced provision unit at school C consisted of 10 children supported by one teacher and one support for learning assistant. His time at school C was split equally between the enhanced provision unit and a mainstream class. The child was due to begin attending secondary school at the beginning of academic year.

13. In May, the Appellant made a placing request for the child to attend school A. That request was refused by the Respondent.

14. The child benefits from the input of the Team Around the Child ('the TAC'), a group of professionals who support the child in relation to his educational needs. Prior to the start of academic year, the TAC had been considering, with the Appellant, the child's requirements for secondary education. Two options were under consideration by that group: placement at school B, the child's catchment secondary school and school A. School B is known as a 'mainstream' secondary school. School A is a specialist school for secondary aged children with additional support needs.

15. School B is a mainstream secondary school with a school roll of around 1000 pupils. Within the school there is an assisted class. That class is designed for year 1 pupils working at First Level on English, Maths, social subjects and modern languages. There are 14 pupils in the assisted class. The staff: student ratio in the class would be around 1:5, since three staff members would be in attendance at any point in time. The plan prior to the start of academic year 2017-18 was that the child would attend the assisted class for 50% of his timetable, and he would attend mainstream classes for the other 50%. While in mainstream classes, the plan was that the child would have a support for learning assistant with him who would be dedicated to the child whenever he needed support in that environment. School B made the decision that this arrangement would be appropriate for the child. This arrangement was similar to the arrangement in place for the child at while in primary school at school C. The child has been allocated a Key Teacher at school B, who would be responsible for ensuring that his learning is on track.

16. School A is a secondary school within the management of the Respondent which supports pupils with enduring and lifelong physical, cognitive, communication, and sensory needs. The school provision at school A is described in more detail in the Respondent's PSRG Guidelines. There are 164 pupils at school A from years 1 to 6. There are 33 children in year 1. Fifteen of those children have extremely complex needs and would not be a suitable peer group for the child. The remaining 18 children in year 1 have a significant range of needs. This group of 18 children are split into two groups (10 and 8) and most of these children are operating at the Early to First Level.

17. Placing requests for schools managed by the Respondent which offer specialist provision are processed by the Pupil Support Resources Group ('PSRG'). The remit of this group is to meet and make decisions on applications for the admission of children to schools managed by the Respondent which make special provision for children with particular needs. The PSRG's role is to make the best match between the needs of children and the resources available.

18. Following discussion within the TAC and having heard from representatives of school B and school A, the TAC supported the Appellant in an Application for additional resource. This application recommended placement at school A, but with school B as secondary option. This application was supported by members of TAC including the child's Educational Psychologist, teacher A from school A, teacher B from school B and the Depute Head Teacher from school C. The decision of the TAC to support this application was made at a meeting in September. The decision of the PSRG was that the child should attend school B and not school A. Six professionals considered this application. They scored the application in accordance with the record of the meeting. These scores (one per grade per member of the group) are based on the scoring guide in the Respondent's PSRG Guidelines document. The outcome of the meeting is explained in the Respondent's letter at R79.

19. The Appellant, being dissatisfied with the PSRG decision, appealed to the PSRG to reconsider. She submitted a further application to the PSRG. The PSRG came to the same conclusion at its meeting on February which was explained by the Respondent in a letter of March. The Appellant made one final application in March and the outcome of the PSRG meeting on April was the same again as explained in the Respondent's letter of April. In the case of this latter application, this was made with the support of the TAC.

20. In May or June, the child attended two induction days at school B to prepare him for attending there at the start of the academic year. The induction days appeared to go well and the child exhibited no difficulty. The Appellant took the child to school at the start of the academic year. The child attended for the first day. He has not attended at school B or at school since that day. The Appellant has been taking the child to school each day. The child has refused to leave the Appellant's car. The Appellant and staff at school B have tried to persuade the child to leave the Appellant's car and enter the school. The child has, on some of the occasions when the Appellant takes him to school, exhibited distress. Various alternatives have been attempted or suggested to the child such as attending at times when there are no other pupils at the school or after the other pupils have gone into school. The efforts to persuade the child to attend school B are not making any progress. He continues to refuse to leave the car. The Appellant has persistently cooperated with efforts to encourage the child to attend school B and takes him to school every day. School B staff have sent homework home for the child to complete and some has been returned completed. The child has been referred to the Respondent's Interrupted Learners Service ('ILS') since the Respondent has taken the view that the child's inability to attend school stems from a mental health condition. This is despite (as would normally be the case) the usual process of a referral to that service only for children who have physical or mental health needs. No referral for the child has yet been made to the Child and Adolescent Mental Health Service (CAMHS) despite a diagnosis of anxiety by the child's GP. The approach taken by the ILS is to assign a teacher to spend several hours per week on two occasions during the week with the child on a one to one basis to encourage the child to attend school. At the time of the hearing, the ILS teacher had not yet been assigned.

Reasons for Decision

21. 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(1)) 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. 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.

22. 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, in considering this ground of refusal, tasked with considering whether the education normally provided at school B <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.

23. 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.

24. 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. This is not in dispute.

25. 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. One reliable way of performing this exercise in our view is to consider the child's needs and how well

they will be met at school A. If a child's educational and additional support needs are likely to largely be met in a school, it seems to us that that the education provided by that school could be regarded as suited to the child's aptitude and ability. In other words, it seems to us that there is a direct connection between needs being met and on one hand and likely aptitude and ability being catered for on the other. 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 to us that the child is not ready at this point to return to mainstream education. It would not be appropriate to consider his aptitude or ability as if he were ready for a mainstream setting.

26. The respondent's representative deals with the question of aptitude and ability in his submissions. He makes a number of points there.

27. Firstly, he refers to evidence that the child's social and communication needs would not be met at school A. However, there is no direct evidence that this is the case. The respondent's representative points to evidence from witness B and witness D. However, neither witness has any real experience of the education offered at school A. In witness B's witness statement, she says very little about school A and did not add in any significant sense to what she says there in her oral evidence. In fact, she accepted during her oral evidence that she does not have any direct knowledge of school A, having not visited the school and having not asked any questions about the school. Even in the relevant paragraph of her statement, witness B indicates that there are elements of school A which might benefit the child. The point then made is that the school now caters for children with more significant and complex needs. She concludes by making an unfavourable comparison (for the child's purposes) between school B and school A from a social interaction point of view. That last sentence is not relevant to this ground of refusal.

28. In our view, a statement that the profile of a school has changed such that it now caters for children with more significant and complex needs than before is of limited value in considering its suitability for the child. It may be that a school can provide perfectly well for a child with less complex needs than the majority of the children at the school. In any event, there was no evidence about the nature of the needs of other children at school A, such that an assessment of the impact of this factor could be undertaken.

29. Turning to witness D's evidence, she says very little in her witness statement about school A. However, in her oral evidence she was able to say more about the school. Witness D has spent five full days in school A, while participating in an inspection of the school. She was previously the link educational psychologist for the school between 2006 and 2010. She knows about the school through her involvement in applications which come before the PSRG. She also knows about the school via her strategic roles and in ongoing liaison with the school's staff. She explained the composition of the classes in 1st year. While this indicates that witness D does have some experience and knowledge of the school, as the appellant's representative indicates in her written submission, witness D was unable to discuss the cohort in either of the first year classes to any significant degree. She was not able, again as pointed out by the appellant's representative to provide any specific details about the needs of the children with whom the child would be educated at school A. The respondent representative discusses the purported differences between the child's needs and the needs of the children at school A (submissions, paras 6.6-6.8 inclusive) but all of that content is in very general terms, with no reference either to evidence of the specific needs of the children at school A or to

evidence from anyone who has direct experience of the children there and with whom the child would be educated.

30. Secondly, the respondent representative refers to the use of certain teaching approaches such as TEACCH and PECS which are used at school A and are not suited to the child. However, there is no evidence to suggest that such techniques would be used with the child. Given that, according to witness D, there is a wide range of needs within the group into which the child would be placed, one can readily assume that a range of communication techniques would be needed.

31. Thirdly, the respondent's representative refers to the lack of access to mainstream education at school A and that the child had benefitted from this at school C and would do if he attended school B. We can see that this is one element that would be more difficult to provide for at school A. However, there is a long way between provision which is not ideal and provision which is not suitable. In any event, witness D in her evidence indicates that one school A pupil has accessed mainstream provision. While not common, it would appear that access to mainstream for a school A pupil, if deemed necessary, seems to be possible. The respondent's representative develops the access to mainstream education point further (submissions, paras 6.13-6.14). However, access to mainstream education in itself is a rather bland factor on which to weigh suitability; much more instructive is an examination of the needs of the child and measuring those needs against the provision in the school in question (see below). The fact that the child has benefitted from exposure to a mainstream environment does not mean that its absence will be detrimental. Again, we stress that it is for the Respondent to prove a negative (non-suitability of school A). In connection with his mainstream influence argument, the respondent's representative refers to an earlier Tribunal decision, a redacted version of which he has produced. However, that decision simply confirms that lack of access to a mainstream environment may be a factor in considering suitability. We accept that and we deal with this factor above, and in the discussion below. The respondent's representative appears to suggest (submissions para 6.15) that the existence of the presumption of mainstream in itself is a factor to consider when examining suitability. If that is what he suggests (and there seems to be a hint of that in the previous decision he refers to) then we disagree. The question is about suitability; access to mainstream education can be a factor in that question, that is all. The presumption of mainstream is the subject matter of a different ground of refusal. We see no direct connection between suitability and the presumption itself. Beyond this general point, the previous decision referred to is of no assistance to us on this ground of refusal; the circumstances of each case are different and it would be inappropriate to try to compare that case and this one too closely.

32. Taking all of these points together, overall we find that 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 directly familiar with provision as it currently stands at school A. While such evidence is not technically essential, it did leave us having to rely on general conclusions about the school and its provision from witnesses who have no direct experience of the profile of the children in the child's likely class at school A. We note that teacher A, a Principal Teacher at school A, gave an account of the education the child would receive there, to the TAC meeting in September. There is no hint in that account that teacher A was of the view that school A is not suited to the child. If that had been the case, one would have thought that he would have said so, since such information would have been of direct relevance to the question the TAC was considering.

Indeed, quite the reverse, the tone of the account recorded there suggests to us that teacher A was of the view that school A could provide a good educational experience for the child. While teacher A did not give oral evidence, we can take his account (as summarised in the minutes) as an indication from someone with direct experience of the provision at school A, as being indicative of its suitability for the child. Taken together, then, the evidence did not persuade us that the relatively high test this ground presents was satisfied.

33. While that is sufficient to deal with this ground of refusal, we would add that there is evidence available to us which suggests that the education normally provided at school A is suited to the child from the ability and aptitude perspectives. This evidence comes from five sources.

34. Firstly, the TAC supported the Appellant's applications to the PSRG for placement of the child at school A. All of the professionals attending each of the meetings agreed that such applications were appropriate. Witness D suggested in her evidence that the group had to 'read between the lines' of the TAC's support for those applications, since there was an impression that the TAC view had been affected by the Appellant's strength of feeling in favour of school A. It is not clear that this is an appropriate way for a decision making body to behave. How is one to know that this exercise of 'reading between the lines' gets to the truth? On the face of it, the TAC was supportive. It is true to say that the minutes of the meetings of TAC do suggest that the group was closely considering the merits of school B and felt that the child would be suited to attending at school B. However, this does not change the fact that the group agreed to support an application for the child to be placed at school A. It would be very surprising indeed to find a number of specialists who know the child well and who have gathered evidence about his needs to agree to recommend a placement to a school which is not suited to the needs of the child. It is safe to assume, then, that the TAC's support for the Appellant's applications to the PSRG is evidence that in the view of the professionals on TAC school A would be a suitable placement for the child.

35. Secondly (on the question of positive evidence of suitability of school A) we come to the PSRG decisions. Much was made in the evidence about the outcomes of these meetings. However, the outcomes are of limited value in this case. The exercise being conducted by the PSRG was essentially a comparison between school B and school A. This is not the exercise we are conducting. Nor is this case an appeal against the PSRG decisions. Those decisions in terms of their outcome are technically irrelevant to this case. Even if the outcomes were relevant, they are out of date. The evidence we heard was about a boy who is too frightened to attend school B or even to emerge from the Appellant's car; and that no progress is currently being made to persuade him to do so. Witness A was clear in her evidence to this effect. Had the PSRG had evidence of this at their meetings, one would assume it would be relevant to their consideration of school B. It is impossible to speculate about what their decision would have been on the current evidence. What is of interest, and directly relevant to this ground of refusal, is the scoring of each of the members of PSRG. The scores were as follows:

26th October 2016

4,5,4,4,5,4 (R85)

8th February 2017

6,5 (R78)

20th April 2017

5, 5, 5, 3 (R91)

36. This scoring was on the scale produced in the Respondent's PSRG Guidance. The scoring guidance from 3-6 (the range represented above) is:

> "3 – Additional support needs identified within the application; should be met in mainstream"
>
> "4- Additional support needs identified; could be met in mainstream"
>
> "5- Additional support needs identified; could be met in mainstream or specialist facility"
>
> "6- Additional support needs identified; specialist facility is preferred – mainstream a viable alternative"

37. Witness D indicated that there were 11 people involved in producing the 12 scores above (one person scoring on two occasions).

38. The distribution of scores is as follows:

Score of 3: 1
Score of 4: 4
Score of 5: 6
Score of 6: 1

39. Of those 11 professionals, only one chose a score of 3 – that the child should be educated in a mainstream setting. The remaining 10 professionals avoided that conclusion. Of the 12 scores returned, the majority (7) scored the application on the basis that the child's needs could be met in school A (one of whom preferred the specialist provision). In our view, this is clear and direct evidence of the suitability of school A for the child. The professionals on the PSRG (from a variety of professional backgrounds) were considering the evidence presented in the TAC reports, and using their experience and expertise to score the facilities being considered (school B and school A). Although the outcome of the meetings involved taking an average and judging it against a required average score of 8 for placement at school A, the individual scoring points in favour of a majority view that school A can meet the child's needs. In our view, it is perfectly logical (and important) to isolate this evidence (which is evidence of the suitability of school A) from evidence of the outcome of the applications to the PSRG (which is a comparative exercise).

40. Thirdly (on the question of positive evidence of suitability of school A) when one considers the child's needs and considers the evidence of provision at school A, it would seem that school A is a suitable school for the child. The child's educational needs are set out in the educational psychology report at R102 under 'Educational Needs'. The author's views on his additional support needs appear in the R papers. Witness D (herself a trained educational psychologist) was taken through each point on the 'Educational Needs' list at R102 and asked to comment on which of the needs listed there would not be met at school A. She confirmed that all could, except access to a mainstream environment (second bullet point under 'Educational Needs') and the child's social and emotional needs and engagement with peers (seventh

bullet point on that list). All other needs on that list would, in witness D's view, be met at school A. Further, witness D was taken through the key features of provision at school A, listed in the Respondent's PSRG Guide. She confirmed that there are some points listed there which the child does not require (namely 'specialist teaching approaches such as TEACCH, PECS, sensory curriculum', bullet point 3; 'alternative and augmentative communication systems', bullet point 4; and '…curriculum beyond the support available in the respondent's Mainstream Secondary School or Secondary Specialist Units', bullet point 1) but that all other key features there would be suitable to meet the child's needs. She also confirmed that there was nothing absent from the list that the child would need. This is all further evidence to support the view that school A would be suited to the child's aptitude and ability, since many of his needs would be met by the provision there.

41. Fourthly, there is the inference taken from the summary of teacher A account to the TAC meeting of September (discussed above at para 33) that school A would be suitable for the child.

42. Finally, it is clear from at least two sources that the child struggles to cope in large groups. The passage in the e-mail from the advocacy service, summarising the child's views refers to worries about a large high school. These worries also come through in the child's views as gathered for the TAC meetings (see, for example, the views conveyed at the meeting in September where he refers to liking 'small groups, a calm place with quiet areas'). The Appellant refers in her statement to the child not being able to cope with crowds, in relation to the child's first (and only) day attending school B. While we must be careful not to speculate, it does seem likely that the child found some aspects of his day at school B on the first day of the academic year uncomfortable. This would explain why he attended that day, but has since refused to emerge from the car. It may well be that part of the reason for this is the child's dislike of crowds. Given that school A is a much smaller school (with 164 pupils compared with around 1000 pupils at school B), this points (admittedly in only a limited sense) to its suitability for the child.

43. Taking all of the evidence together, we are, in fact, satisfied that the education normally provided at school A is suited to the age, ability and aptitude of the child.

44. 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.

45. 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.

46. 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.

47. 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.

48. In our view, the requirement in s.15(1) of the 2000 Act does not apply in this case.

49. 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). It is also clear that a mainstream school is one which is not a 'special school'. 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 especially 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.

It is clear (and not disputed) that school A is a special school within this definition.

50. 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. 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.

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

52. 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 the first day of the 2017-18 academic year, in August 2017. The respondent's representative argues (submissions para 3.7) that since the child is on the roll at school A 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. He points out that the Respondent is under a duty to provide school education to the child. Reference is also made to school work being provided to the Appellant and some being completed and returned by the child and the referral to the ILS (submissions, para 3.8). 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. The sending home of work and receiving some of it back cannot, in our view, be regarded as providing a school education. It seems to us that providing an education would require much more than this.

53. 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 effectively described by the respondent's representative. In reality, education in a mainstream setting is not available to the child at school B. It is clear from the evidence that what is planned is as follows: (1) that the child will initially benefit from one to one input from a teacher assigned by the ILS; (2) that if he is persuaded to attend school B, he would spend all of his time in the 'nurture base' where he would be educated on his own initially until he could return to classes; and (3) if that goes well, he would then move onto the arrangement originally planned, namely 50% in the assisted class (with support in mainstream class) plus another ten hours of support for the child per week following an application by the school for that additional support. In our view, even assuming that the child is able to get to the final stage, his education would be being provided in a special school, as defined above. In our view the assisted learning class is a

> 'class.. the sole or main purpose of which is to provide education especially suited to the additional support needs of children or young persons selected for attendance at the…class…by reason of those needs.

54. The child has been selected (by school B staff) to attend that class by reason of his additional support needs and the sole purpose of the assisted learning class is to provide education especially suited to the needs of all of the children educated there. This means that for 50% of the time (at least) the ultimate plan is to educate the child in a 'special school'. The respondent's representative argues that a child can spend some time in a 'special school' (in this case a class) and still be being educated in a mainstream environment, in accordance with the mainstream presumption. He draws some support for his conclusion from an earlier Tribunal case ASNTS/R/17/0024 and quotes from that decision at page 6 (written submissions paras 5.7-5.9). However, with respect to the Tribunal in that earlier case, we disagree. It seems to us that the wording of s.15(1) is clear and unambiguous, and so must be applied as it stands. The reference to 'mainstream' (although not defined) is to an education which is provided in a school 'other than a special school' (in this case the inclusion class). In our view, this means that it must be provided entirely in a school other than a special school in order to qualify as mainstream education. Parliament could have qualified its wording, for example by referring to 'provide it [mainly] in a school other than a special school' or some other such wording. Since the wording is unambiguous, it is a well understood rule of statutory interpretation that an interpretation to avoid an absurdity cannot be applied (see, for example, *Magor and St Mellons RDC v Newport Corp* [1952] AC 189)**.** In any event, no absurdity exists here. The purpose of the presumption is clearly that children should be educated exclusively in a mainstream setting, unless good reason exists. That is the clear import of paragraph 6 of the Scottish Executive Circular No 3/2002 dated 5th April 2002 cited by the respondent's representative (written submissions para 5.2). The respondent's representative argues (submission para 3.9) that it would be premature to conclude that the presumption of mainstream cannot apply given the efforts underway to solving the child's non-attendance at school B. We disagree. It cannot be correct to conclude that since some efforts to return a child to school are underway, that the presumption cannot apply. We need to consider whether or not the ground of refusal applies at the date of the hearing on the basis of the evidence available. That involves looking at

the evidence about the plans in place at the time of the hearing and making a decision as to whether or not the presumption applies. This is the task we have performed.

55. The respondent's representative argues (submissions at para 5.16) that there is no separate enrolment of children in school B assisted class in the same way that children are enrolled in an enhanced provision unit. We accept this. However, this has no impact on this ground of refusal. The definition of 'special school' only requires that children are selected for attendance at the school (class) for certain reasons. It is irrelevant how they are selected or by whom, only that they are selected for attendance for those reasons. It is clear that a decision by school B staff to allocate a child (such as the child) to the assisted class qualifies as 'selection' for this purpose.

56. If we are wrong in our interpretation of s.15(1) and if it is possible for a child to attend for part of his/her education in a 'special school' (class) and part in a mainstream class, and still be regarded as being educated 'other than in a special school', our decision on this ground of refusal would be the same. It appears to us that where a child is to be educated for half his school time (not counting additional support in the mainstream class) in a 'special school' (class), he cannot reasonably be said to be being educated in a mainstream environment. If there is some flexibility in the terms of s.15(1), in our view there would need to be at least a majority of the time being spent in the mainstream environment (and something more than a bare majority) before the child could be said to be being educated in a school other than a special school.

57. Even if we are wrong about this too, it is clear that what is currently intended (at stages (1) and (2) of the re-integration plan outlined above) is, by any measure, education in a 'special school'. The plan at both stages involves no contact with other children in a class at all. Given that there is no evidence to suggest whether Stages 1 or 2 will be successful, there is no evidence from which we can deduce that the child will ever reach the 50%/50% split intended at stage 3. At best, if work continued for him to attend school B, the child would be likely to be attending what would undeniably be a 'special school' for some time.

58. Coming back to the ground of refusal, it is clear to us that by placing the child in school A, the Respondent would not be in breach of the requirement to educate the child in a mainstream environment under s.15 (1), in circumstances where there is no intention on the Respondent's part, immediate or otherwise, to introduce the child to a mainstream environment.

59. We do not require to address the exceptions in s.15 (3), given our conclusion that the requirement in s.15 (1) is inapplicable. We would only add that had we come to consider the exceptions set out in s.15(3), it is clear to us that none of them would have applied in this case. Indeed, the Appellant does not (in our view correctly) seek to rely on s.15 (3)(b) or (c) and the appellant's representative does not mount a strong argument in favor of s.15(3)(a) applying (written submissions, pars 100). The respondent's representative sets out a very clear and detailed case in relation to s.15 (3)(a) (written submissions paras 5.21-5.57).

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

60. Since we have decided that neither of the grounds of refusal 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.