

**Health and Education Chamber**  
First-tier Tribunal for Scotland

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**Additional Support Needs**

**DECISION OF THE TRIBUNAL**

**A. Summary of the Decision**

1. In terms of section 19(4A)(a) of the 2004 Act, the tribunal overturns the decision of the education authority of 10 April 2018 refusing the appellant's placing request and requires the education authority to place the child in Nursery A by no later than 7 January 2019. The decision of the tribunal is unanimous.

**B. Introduction**

2. The reference is in respect of the child aged 3 years. The Appellant is the child's mother. The Respondent is the Education Authority. The Appellant was represented by a solicitor. The Education Authority was represented by a solicitor.
3. The Appellant made a placing request in terms of paragraph 2(2)(a) of schedule 2 to the Education (Additional Support for Learning) (Scotland) Act 2004 ('the 2004 Act') requesting the Education Authority place the child in Nursery A. The Education Authority wrote to the Appellant by letter dated 10 April 2018 refusing the placing request on the basis that the duty of the Education Authority to place the child in the Nursery did not apply by virtue of paragraph 3(1)(a)(i),(ii),(iv) and 3(1)(g) of schedule 2 of the 2004 Act
4. The Education Authority's decision refusing the placing request is a decision specified in section 18(3)(da)(ii) of the 2004 Act. The Appellant is a person specified in section 18(2)(a) of the 2004 Act. In terms of section 18(1) of the 2004 Act, the Appellant referred the decision of the Education Authority to the Tribunal. This reference now falls to be determined by the Tribunal.

**C. Matters in Dispute**

5. The dispute between the parties is whether the grounds of refusal relied upon by the Education Authority in refusing the placing request and maintained before the Tribunal apply. Those conditions being those contained in paragraph 3(1)(a)(i),(ii),(iv) and 3(1)(g) of schedule 2 of the 2004 Act. In terms of the condition in paragraph 3(g) the area of dispute is limited to whether placement in a mainstream nursery would or would not be suited to the child's ability or aptitude.
6. It was a matter of agreement between the parties that the onus was on the Education Authority to satisfy the Tribunal that the grounds of refusal applied as at the date of the hearing before the Tribunal.

**D. Procedural History**

7. A case conference took place by telephone on 24 August 2018. The case conference took place between the Convener and the representatives of the parties. At the case conference a number of procedural matters were discussed and agreed with directions made. It was agreed by all parties that due to the child's young age and non-verbal communication no further steps were available to the Tribunal or anyone else to obtain the child's views.
8. An oral hearing took place over three days on 2 and 3 October and 9 November 2018.
9. The representatives of the parties lodged a joint minute of agreement agreeing a number of material facts which were not in dispute prior to the oral evidence. Some of the matters covered in this joint minute are reflected in the Tribunal's findings in fact.
10. Statements were lodged in advance of the hearing and evidence was heard at the evidential hearing from the following witnesses for the Appellant:
  - (i) Witness A, Nursery Nurse, Pre-school Home Visiting Service, The Education Authority (A17 – A21);
  - (ii) The appellant (A13 – A16).
11. Affidavit evidence was lodged in advance of the hearing and additional evidence was heard at the evidential hearing from the following witnesses for the Respondent:
  - (i) Witness B, Educational Psychologist, The Education Authority (R32- R35 and R50 - R52);
  - (ii) Witness C, Head Teacher Nursery B, The Education Authority (R39 - R42);
  - (iii) Witness D, Head Teacher, Nursery A, The Education Authority (R43 - R46);
  - (iv) Witness E, Inclusion & Wellbeing Manager, The Education Authority (R36 - R38 and R47- R49).
12. Following the conclusion of the oral evidence the Tribunal requested written submissions to be received within 10 days.

## **E. Evidence before the Tribunal**

13. The Educational Psychologist gave evidence in relation to the process of placing a child within nursery provision. She gave evidence in relation to her role in the completion of the Early Years Transition Scoring Tool for pupils with Additional Support Needs (A9 – A12) and how the tool is broken down. She also gave evidence about the Inclusion and Wellbeing Form recommendations contained within the Early Years Transition Scoring Tool. The Inclusion and Wellbeing Form (IWF) made a number of recommendations. She gave evidence about the nature of these recommendations and the effect if they were not followed. She also gave evidence regarding how, in her view, each of these recommendations could be met in a mainstream nursery.

14. The Head Teacher of Nursery B, the mainstream nursery, gave evidence to the Tribunal about her knowledge of the mainstream nursery including the size and layout. She also gave evidence about her knowledge of the provision of the nursery and the ability of the mainstream nursery to implement the IWF recommendations.
15. The Head Teacher of Nursery A gave evidence regarding her knowledge of Nursery A including the size and composition of the current classes. She gave evidence in relation to whether an additional child could be accommodated at Nursery A and what the barriers to this were. She gave evidence as to what effect having an additional child within Nursery A would have on how it operated and what requirements there were for an additional teacher to be employed. She also gave evidence regarding previous experience of having an additional child within Nursery A.
16. The Inclusion and Wellbeing Manager gave evidence about the process for the allocation of places for children with additional support needs within the resources of the Education Authority and her role in this. She gave evidence in relation to the requirement to take into employment an additional teacher if the child was placed in Nursery A. She gave evidence about the capacity of Nursery A and the physical space available. She also gave evidence on the cost to the Education Authority should they require to accommodate the child within Nursery A.
17. The Nursery Nurse from the Pre-School Home Visiting Service had worked with the child 1:1 and gave evidence as to her knowledge of the child and his needs. She also gave evidence about her observations of the child within the mainstream nursery.
18. The Appellant gave evidence about her knowledge of the child's needs and his experiences within the mainstream nursery placement. She gave evidence regarding her observations of him in nursery and changes in his behaviour since commencing the mainstream nursery.
19. In addition to the oral evidence of the witnesses the Tribunal has taken into account all of the documentary evidence and statements lodged by the parties in determining its findings in fact and in reaching its decision.

## **F. Findings of Fact**

In coming to our decision we found the following facts established.

1. The child is 3 years old. The Appellant is the mother of the child. The child has a twin brother.
2. The child has additional support needs in terms of Section 1 of the Education (Additional Support for Learning) (Scotland) Act 2004 ("the 2004 Act"). The child has a diagnosis of Autism Spectrum Disorder and significant delay in social communication and language skills. The child is non-verbal. The child does not engage with other children and his behavior can be self-directed. The child is delayed in his play skills. The child is not yet toilet trained and wears nappies. The child requires support with dressing, undressing and feeding. The child

requires adult supervision to keep him safe and to allow him to participate in learning.

3. The child's twin brother also has an Autism Spectrum Disorder and has a significant delay in his social and language skills.
4. The child and his twin attended playgroup together from September 2017 until June 2018. The child and his twin received a weekly teaching session from a pre-school home visiting service which commenced in January 2018 and lasted until June 2018.
5. The Appellant made a placing request for both the child and his twin to attend Nursery A for the academic year 2018/2019. Nursery A is a special school within the local authority. It provides nursery education for children with severe and complex learning difficulties. The child's twin was successful in securing a place at Nursery A. The child's twin began Nursery A in August 2018. The child was not successful in securing a place at Nursery A and was placed in Nursery B.
6. Nursery B is a mainstream nursery provision. The child has attended Nursery B since 23 August 2018. He attends on Mondays to Fridays between 8am and 11.05am. The child has an Advanced Pupil Support Worker with him at all times at Nursery B.
7. The child requires an individual approach to learning which is reflective of his additional support needs to allow him to access the curriculum appropriately. The child is unable to access the curriculum without significant support. The child has an Individualised Education Programme (IEP) The IEP initially opened in May 2018.
8. A Child's Planning meeting took place on 19 June 2018 to discuss the child's transition to Nursery B.
9. A further Child's Planning Meeting took place on 27 September 2018 to discuss targets for the child's IEP. The child has settled at Nursery B but has not made progress since he started at Nursery B in terms of his speech and language and social interaction skills. The child is failing to thrive within the mainstream nursery provision.
10. The child requires significant support with his speech and language. The child would benefit from a joint working approach between his nursery and speech and language therapy. The child did not have input from speech and language therapy from 4<sup>th</sup> September 2018 until the beginning of November 2018. There are speech and language strategies that the child benefits from. These strategies were not in place at Nursery B when the child commenced nursery there.
11. The child benefits from structure and routine. The child is not provided with an appropriate level of structure and routine at Nursery B to meet his needs. The nursery operates free flow play. There is no set timetable of events.

12. The child would benefit from a small group setting. Nursery B are unable to provide this. There are 47 children enrolled within Nursery B. The nursery has group time once per day. Each group has ten children.
13. Nursery B is a busy and noisy environment. There is one main room within the nursery that accommodates the children. There is a quiet room which is used by children within the nursery as they wish. The child has no designated area within the nursery. The child takes himself to the bathroom when the nursery is too noisy for him and spends time within the bathroom.
14. The child does not interact with other children in Nursery B. The child is socially isolated from his peers in Nursery B. He is not benefiting from role modelling in the mainstream nursery.
15. There are no other children with autism at Nursery B. There are no other children with the same or similar needs as the child within the nursery. The child does not have the opportunity to learn with similar peers in the nursery.
16. There are three nursery classrooms within Nursery A. The nursery classrooms are called Room 1, Room 2 and Room 3. Room 1 and Room 2 classrooms are the same size. Room 3 classroom is smaller.
17. There are currently 36 children attending Nursery A. There are three nursery classes in the morning and three in the afternoon. Each class has six children.
18. Within the nursery classes at Nursery A there is a qualified teacher. There is no lawful requirement to have a qualified teacher within a nursery class. The Education Authority are withdrawing qualified teachers from their mainstream nursery provision classes.
19. The children in Room 1 have complex health needs. There are children in Room 1 who have health conditions such as tracheostomy, and cerebral palsy. This requires the classroom to have equipment within it such as standing frames and wheelchairs. There are children in Room 1 who require oxygen and feeding tubes. Room 1 has one qualified teacher, a nursery nurse and three advanced pupil support workers.
20. In May and June 2017 an additional child was accommodated in Room 1. This resulted in there being seven children in Room 1 during that period. During that period there was one qualified teacher in the classroom. An additional Pupil Support Worker was added to the classroom to accommodate the child in Room 1. There were no health or safety incidents during the period the child was within Room 1.
21. The children in Room 2 are made up of children with Autism Spectrum Disorder. The classroom is quieter, has less stimulation and lighting than Room 1 and Room 3. This environment is suited to the additional support needs of the children in Room 2. The classroom has one qualified teacher, a nursery nurse and two advance pupil support workers.

22. The children in Room 3 have a wide range of additional support needs with some children having Autism Spectrum Disorders and others having medical needs. This requires the classroom to have equipment within it such as standing frames and wheelchairs. There is one child in Room 3 who requires a feeding tube. The classroom has one qualified teacher, a nursery nurse and two advanced pupil support workers.
23. There is sufficient physical space for the child to be accommodated within Room 2 in Nursery A. The classroom would not require to be adapted to accommodate the child. An additional Advanced Pupil Support Worker is required to ensure that the children in Room 2 will continue to be able to learn in the classroom with an additional child.
24. There is a classroom within the Nursery A School campus which is used by Playgroup A. The playgroup is a health resource. This classroom can be used by Nursery A School Campus. If used as a classroom by Nursery A it would not require any significant expenditure to make use of it. There are no other rooms or spaces within the Nursery A school campus that are capable of being used for the purposes of a classroom.

## **G. Relevant Law**

20. The law in relation to this matter is governed by the 2004 Act.
21. A child or young person has additional support needs in terms of Section 1(1) of the 2004 Act if, “for the purposes of this Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the child or young person.”
22. In terms of the 2004 Act where a parent of a child with additional support needs makes a request to an Education Authority to place the child in a school under their management the Education Authority have a duty to place them there unless the circumstances set out in schedule 2, paragraph 3 of the 2004 Act apply.
23. The grounds of refusal relied upon by the Education Authority in the circumstances of this case are contained in schedule 2 of the 2004 Act and in particular are:
- (i) paragraph 3(1)(a)(i), “placing the child in the specified school would make it necessary for the Education Authority to take an additional teacher into employment”;
  - (ii) paragraph 3(1)(a)(ii) “placing the child in the specified school would give rise to significant expenditure on extending or otherwise altering the accommodation at or facilities provided in connection with the school”;
  - (iii) paragraph 3(1)(a)(vii) “placing the child in the specified school would though neither of the tests set out in paragraphs (i) or (ii) is satisfied, have the consequence that the capacity of the school would be exceeded in terms of pupil numbers”; and
  - (iv) paragraph 3(1)(g) “if, where the specified school is a special school, placing the child in the school would breach the requirement in Section 15(1) of the Standards in Scotland’s Schools etc. Act 2000” (“the 2000 Act”).

24. Section 15(1) of the 2000 Act states, “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.” The circumstances at Section 15(3) of the 2000 Act which may arise where the child should not be placed at a mainstream school are as follows: “(a) would not be suited to the ability or aptitude of the child; (b) would be incompatible with the provision of efficient education for the children with whom the child would be educated; or (c) would result in unreasonable public expenditure being incurred which would not ordinarily be incurred, and it shall be presumed that those circumstances arise only exceptionally.”
25. Where a placing request is refused, a parent has the right to appeal this decision to the Tribunal. Section 18(1) of the 2004 Act states that, “Any of the persons specified in subsection (2) may refer to a Tribunal any decision, failure or information specified in subsection (3) relating to any child or young person for whose school education an education authority are responsible.” Section 18(2)(a) states the persons specified as being “where the decision, failure or information relates to a child, the parent of the child,”.
26. Section 18(3)(da) of the 2004 Act states the decisions, failures and information referred to in subsection 18(1) include “a decision of an education authority refusing a placing request made in respect of a child or young person (including such a decision in respect of a child or young person for whose school education the authority refusing the request are not responsible) (i) made under sub-paragraph (1) of paragraph 2 of schedule 2 in relation to a special school, or (ii) made under sub-paragraph (2) of paragraph 2 of schedule 2 in relation to a school mentioned in paragraph (a) or (b) of that sub-paragraph.”
27. The definition of a special school in terms of the 2004 Act is defined at Section 29(1) as being: “(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,”.
28. In respect to placing requests, the Tribunal has the power to confirm or overturn the decision of the education authority. Section 19(4A)(a) of the 2004 Act states “Where the reference relates to a decision referred to in subsection (3)(da) of that section the Tribunal may—(a) confirm the decision if satisfied that (i) one or more grounds of refusal specified in paragraph 3(1) or (3) of schedule 2 exists or exist, and (ii) in all the circumstances it is appropriate to do so; or (b) overturn the decision and require the education authority to— (i) place the child or young person in the school specified in the placing request to which the decision related by such time as the Tribunal may require, and (ii) make such amendments to any co-ordinated support plan prepared for the child or young person as the Tribunal considers appropriate by such time as the Tribunal may require.”

## **H. Submissions for the Appellant**

29. The Appellant submitted that grounds for refusal did not apply and the decision of the Education Authority should be overturned.
30. Firstly, it was submitted by the Appellant that no additional teacher required to be taken into employment to accommodate the child at Nursery A. The Appellant submitted the evidence of the Head Teacher of Nursery A, that an Advanced Pupil Support Worker and not an additional teacher would require to be taken into employment should the child be placed at Nursery A, should be preferred over the evidence of the Inclusion and Wellbeing Manager. The Appellant also submitted that the case of *Parents of Child J v Dumfries and Galloway Council 2015 WL 6757800* and *East Lothian Council, Petitioner 2008 CSOH 137* were applicable and that if the child was placed in Nursery A by the Tribunal this would not count towards the maximum class size in terms of the Education (Lower Primary Class Sizes) (Scotland) Regulations 1999 ('1999 Regulations') and therefore no additional teacher would require to be employed by The local authority.
31. Secondly, it was submitted by the Appellant that placing the child in Nursery A would not give rise to significant expenditure on extending or otherwise altering the accommodation or facilities provided in connection with the school. The Appellant submitted that the child could be placed within Nursery A without the need to extend or alter the accommodation. In this regard the Appellant submitted that the evidence of the Head Teacher of Nursery A, that it would not be necessary to create an extra class for the child to be placed in Nursery A, should be preferred to the evidence of Inclusion and Wellbeing Manager. Further, the Appellant submitted that a seventh child had already previously been accommodated within Nursery A albeit for a temporary period.
32. Thirdly, it was submitted that placing the child in Nursery A would not result in the capacity of the school being exceeded. The Appellant submitted that the Scottish Negotiating Committee for Teachers Handbook of Conditions of Service ('SNCT Handbook'), which the Respondent sought to rely on in relation to this ground, did not require to be applied to nurseries. The Appellant submitted that there had previously been a '7<sup>th</sup> child' placed in Nursery A by the Education Authority demonstrating this. The Appellant submitted if the Tribunal were to make an order that the child be placed within Nursery A the child would be an '*excepted child*' and therefore the Education Authority would not be acting contrary to the SNCT Handbook.
33. Fourthly, it was submitted that a mainstream nursery placement such as the placement the child is currently in is not suited to his ability or aptitude. The Appellant submitted that the outcomes selected in the Early Years Transition Scoring Tool did not reflect the provision of support the child was being afforded in the mainstream nursery. In particular the Appellant submitted that the nursery did not offer high levels of structure and routine, a small group setting, or an opportunity to learn with similar peers. The Appellant submitted that the Tribunal should place weight on the Appellant's evidence that the child was 'coping' with the mainstream nursery placement but not thriving.

#### **I. Submissions for the Respondent**



34. The Respondent maintained that the grounds of refusal applied and continued to apply at the time of the hearing and their decision should be confirmed.
35. The Respondent submitted that placing the child within Nursery A would result in the Education Authority requiring to take an additional teacher into employment. The Respondent submitted there were two reasons for this. Firstly placing a child within Nursery A would breach the SNCT Handbook and secondly there was insufficient space within the classrooms at Nursery A. The Respondent submitted that the class sizes set out in the SNCT Handbook applied to special nurseries because the definition of special schools at paragraph 3 of s29(1) of the 2004 Act could be deemed to include Nursery A.
36. The Respondent submitted placing the child in Nursery A would give rise to significant expenditure on extending or otherwise altering the accommodation or facilities provided in connection with the school. The Respondent submitted that there was no capacity within the school to have another classroom and that the capacity of the classes had been reached and that their witness evidence reflected this.
37. The Respondent submitted that in terms of schedule 2 paragraph 3(1)(vii) the placing of the child in Nursery A would result in the capacity of the school being exceeded for the reasons given above. The Respondent submitted that the case of *East Lothian Council Petitioner 2008 CSOH 137* was distinguishable and not applicable to the 2004 Act. Similarly, the Respondent submitted that the case of *Parents of Child J v Dumfries and Galloway Council 2015 WL 6757800* could be distinguished. Further the Respondent submitted that the 1999 Regulations are only applicable to primary 1 to primary 3 classes.
38. In relation to the grounds of refusal set out above the Respondent's relied on the evidence of the Head Teacher of Nursery A and the Inclusion and Wellbeing Manager. Where this evidence was inconsistent they submitted that the evidence of the Inclusion and Wellbeing Manager should be preferred.
39. The Respondent submitted that the child's additional support needs could be met in the mainstream nursery placement. The Respondent placed weight on the evidence of the Head Teacher of the mainstream nursery placement. In particular they submitted that the child benefited from having an IEP; one to one support from an Advanced Pupil Support Worker; access to a Speech and Language Therapist and the benefit of role modelling. Further the Respondent submitted that s15(3) of the Act only applied in exceptional circumstances and that no such exceptional circumstances arose.

#### **J. Tribunal Observations on the witnesses and oral evidence**

40. The Tribunal heard first from the Educational Psychologist. The Tribunal noted that the Educational Psychologist had not had any involvement in the child's education since February 2018. The Educational Psychologist's evidence was based on only one meeting which took place in February 2018 with the passage of eight months from then until the date of the hearing. The Tribunal also noted that the Educational Psychologist had not attended, nor was she familiar with, the mainstream nursery placement. The Educational Psychologist was unable to give any specific details to

the Tribunal on the specific provision currently provided to the child in the mainstream nursery provision. Her evidence in relation to the provision of mainstream nursery was given very generally and whilst based on her experience as an Educational Psychologist but was not based on a knowledge of the mainstream nursery provision being provided to the child. There were areas of her evidence where she made general comments about the provision of mainstream nursery which the Tribunal did not find to be supported by the evidence in this particular case. The Tribunal could not therefore place much reliance on her evidence in relation to how suitable the provision of mainstream nursery was to the child. We did however appreciate the assistance of the Educational Psychologist in explaining the methodology in relation to the Early Years Transition Scoring Tool and the IWF recommendations. We considered that this provided the Tribunal with a framework to assess how capable the child's needs were of being met in the mainstream nursery.

41. The evidence of the Head Teacher of Nursery B was helpful to the Tribunal in understanding the provision offered. This evidence informed the Tribunal's assessment. The witness conceded appropriately that there were some areas where others who know the child, such as the Pre-School Home Visiting Nursery Nurse, would be better placed to offer a view given they had a longer relationship with the child. We considered her to be a credible and reliable witness.
42. The Tribunal also found the evidence of the Head Teacher of Nursery A of assistance. The Tribunal found her evidence to be both credible and reliable. It was clear that she had an in depth knowledge of Nursery A, the space within the classrooms and the needs of the individual children who attend Nursery A. It was also clear that she was well placed to offer an opinion in relation to additional support needs education. She had over 24 years of experience working and teaching within additional support needs schools and had worked within Nursery A since 2006. Therefore she was able to provide the Tribunal with evidence not only informed by her professional expertise as a Teacher but specifically based on her working and detailed knowledge of Nursery A.
43. The Tribunal accepted that the Inclusion and Wellbeing Manager is responsible at a strategic level for decisions in relation to the capacity of schools and nurseries. However the Tribunal considered that the Head Teacher of Nursery A was best placed to judge the limits on how many children could be accommodated due to her in-depth knowledge of the nursery environment including the size, layout and composition of the classrooms within the nursery and her professional experience as an additional support needs teacher. The Inclusion and Wellbeing Manager although having visited Nursery A did not have the same knowledge and experience as the Head Teacher. Her qualifications and experience were in relation to public administration and not teaching. We were not persuaded that her knowledge of Nursery A was such that we should prefer her evidence to that of the Head Teacher. Furthermore the Tribunal did not consider that it could place any weight on the Inclusion and Wellbeing Managers confidence in the mainstream nursery meeting the child's needs given she did not have qualifications and experience in relation to teaching and education.
44. The Tribunal considered the evidence of the Pre-School Home Visiting Nursery Nurse. She was employed by the Education Authority and had no interest in the

case other than seeking to secure what was in the child's best interests. We considered her to be objective in her evidence. She was able to provide detail of the child's specific needs based on her knowledge of him and had also observed him in the mainstream nursery placement. The Respondents submitted that the Pre-School Home Visiting Nursery Nurse was based on knowledge of the child up until the period June 2018, which is when she stopped working with him and that her observation of the child at Nursery B was not a true indication of how he presented within the nursery as she had directed the attention of the child's Advanced Pupil Support Worker away from him. However the Pre-School Home Visiting Nursery Nurse had spent two days at the nursery when the child commenced there and had attended for a further visit. The Tribunal do not accept that she distracted the Advanced Pupil Support Worker's attention away for the whole time that she was present in the nursery and it was clear that she had the opportunity to observe the child within the nursery being supported by the Advanced Pupil Support Worker. Furthermore, the Pre-School Home Visiting Nursery was the witness who had known the child for the longest period and had the most knowledge of his needs aside from the Appellant. The Tribunal were satisfied that she was able to give credible and reliable evidence.

45. With regards to the evidence which the Tribunal heard from the Appellant, the Tribunal noted that the Appellant had a balanced attitude and approach to seeking the best nursery placement for the child. Her answers were considered and measured and she made concessions when appropriate. The Tribunal found the Appellant to be a credible and reliable witness.

#### **K. Reasons for the Decision**

46. The Tribunal concluded that none of the grounds of refusal existed as at the date of the hearing. This led us to the decision to overturn the refusal of the placing request. It is not appropriate to narrate all of the aspects of the evidence in this decision. However, the Tribunal considered all the evidence placed before it, both written and oral. Our reasons for the decision follow.

#### **The first placing request refusal ground (2004 Act, Schedule 2 paragraph 3(1) (a)(i)): necessary for an additional teacher to be taken into employment.**

47. The Education Authority relied on two arguments in relation to this ground. Firstly they argued that no more than six pupils could be accommodated in a class within Nursery A as this would breach the guidance in the SNCT Handbook. Secondly they argued that there was insufficient physical space within Nursery A to accommodate an additional child. The Tribunal rejects both arguments and determines that the ground of refusal does not apply.
48. The Education Authority submitted that the SNCT Handbook was applicable to special nurseries, by nature of the definition of special schools. However the evidence of the Inclusion and Wellbeing Manager was that there is no lawful requirement to have a teacher within a nursery class. She gave evidence that there had been a decision to remove teachers from mainstream nurseries but that this decision '*is not being applied to specialist nurseries*' but accepted that this was not a legal requirement. It is therefore a policy decision of the Education Authority to place

teachers within specialist nurseries. It is this decision which results in the application of the guidance.

49. The Tribunal consider that the SNCT Handbook provides guidance which the Tribunal may have regard to but is not binding either on the Education Authority or the Tribunal. This can be distinguished from a class within a primary school where the maximum class sizes are set out in secondary legislation namely the 1999 Regulations as amended. In addition, the Tribunal heard evidence that the Education Authority have, on occasion, departed from following this guidance in respect that they had accommodated an additional child within Nursery A previously.
50. The Tribunal considered the Respondent's position in relation to the physical space within Nursery A. The Tribunal was not persuaded on all the available evidence that there was inadequate physical space for the child to be accommodated within Nursery A. The Head Teacher was asked by the Tribunal what would happen if another child was added to one of the classrooms. Her evidence was that she would have to add another adult – an Advanced Pupil Support Worker which would cause 'potential problems' in relation to 'space and dynamics'. She said that it was 'astonishing how quickly it could become crowded' and explained that there was a danger if the classroom was overcrowded. When asked further about this she elaborated that overcrowding would be a safety issue. She specifically referenced Room 3 and Room 1. She described Room 3 as a small room with wheelchairs, standing frames and moving equipment and Room 1 which had the same types of equipment as well as children with oxygen and feeding tubes.
51. The Tribunal heard evidence from the Head Teacher as to the nature of the classroom she would place the child in and noted that this was Room 2 classroom which was a much calmer environment where all the children had a diagnosis of Autism Spectrum Disorder or were awaiting diagnosis. The same concerns in relation to complex health needs did not arise in Room 2 nor was there equipment within the room taking up additional space as there was in Room 3 and Room 1. She described the changes that would need to be made to Room 2 classroom to accommodate the child as 'silly things' and 'not major'. She gave an example of the children in the classroom working towards sitting in a group and there being a 'small logistical issue with chairs around the table'. She went on to say that they would 'deal with it'.
52. The Tribunal asked the Head Teacher why an Advanced Pupil Support Worker would require to be placed in the class if an additional child was added. She said the current ratio in the class was six children to four staff for the safety of the children. She stated that 'it would be a struggle for four staff to deal with seven children' that they could keep them safe but not accommodate learning. Her evidence was that an additional Advanced Pupil Support Worker was required to accommodate learning.
53. The Tribunal noted that it was in Room 1 a seventh child had previously been placed into temporarily and that this had required an addition of an Advanced Pupil Support Worker as well as the existing staff complement. Even within this environment, with the additional equipment and the additional staff member, there were no health and safety incidents during the period the child attended and no evidence that the teaching and learning within the class was impacted.

54. The Tribunal were satisfied having regard to all of the available evidence and in particular that of the Head Teacher of Nursery A that the child could be accommodated in an existing classroom within Nursery A safely, namely Room 2. Further, that the integrity of learning within the class could be safeguarded without the employment of an additional teacher. We were not persuaded as was submitted by the Respondent that her [the Head Teacher's] '*magnanimity cannot be matched by the realities and obligations of the current situation*'. The Tribunal considered the Head Teacher to be a credible witness whose in-depth knowledge of Nursery A enabled her to provide the Tribunal with reliable evidence informed by her professional expertise as a Teacher but specifically based on her knowledge of Nursery A.
55. The Tribunal rejected the evidence of the Inclusion and Wellbeing Manager as it was not informed by professional teaching experience. Furthermore, she was unable to distinguish between each class within Nursery A and in particular her evidence was that all the classrooms were the same size when the evidence of the Head Teacher was that Room 3 classroom was smaller. Therefore we did not consider her evidence in relation to the size and capacity of the nursery was reliable.
56. Given the reasons for our decision we did not consider that the submissions made by parties in relation to case law required to be addressed.

**The second placing request refusal ground (2004 Act, Schedule 2 paragraph 3(1)(a)(ii)): placing the child in the school would require significant expenditure on extending or otherwise altering the accommodation at or facilities provided in connection with the school.**

57. The Tribunal was not satisfied that placing the child in Nursery A would require significant expenditure for two reasons. Firstly, with reference to the preceding paragraphs 47-56 above the Tribunal was not persuaded that there is inadequate space available to accommodate the child in Nursery A currently within an existing classroom, this being Room 2. Furthermore, the evidence from the Head Teacher of Nursery A was that no adaptations would be required to Room 2 if the child were to be accommodated within it.
58. The second reason for the Tribunal's decision was that even had the Tribunal been persuaded there was insufficient space to accommodate the child within one of the existing Nursery classrooms the Tribunal considered that the child could be accommodated within the room currently occupied by Playgroup A. The Tribunal heard evidence from both the Head Teacher and the Inclusion and Wellbeing Manager that [name removed] was a specialist play group charity. Further that the play group was a health resource. The relocation of Playgroup A would have no impact on any other education service. It appeared to the Tribunal therefore that the playgroup could be required to relocate should the classroom be required for use by Nursery A. The evidence of the Head Teacher of Nursery A was that there would not be a requirement for any significant expenditure to repurpose this room.

**The third placing request refusal ground (2004 Act, Schedule 2 paragraph 3(1)(a)(vii)): whether placing the child in the school would result in the capacity being exceeded.**

59. The Tribunal was not persuaded that placing the child at Nursery A would result in the capacity of nursery being exceeded. The Tribunal was not persuaded on the facts of the case that there was insufficient physical space to accommodate an additional child within the class identified for the child, reference is made to the proceeding paragraphs 47- 58.
60. Room 2 is the same size as Room 1. Room 1 has the same number of pupils as Room 2 – six. However, Room 1 has an additional adult within the classroom as compared to Room 2. In addition, Room 1 has physical equipment which takes up additional space within the classroom. It was accepted by the witnesses that no additional equipment would be required to accommodate the child within a class at Nursery A. The addition of an Advanced Pupil Support Worker to Room 2 would mean it had the same number of adults in the class as Room 1 does. Therefore, the only difference in head count between Room 1 and Room 2 would be the addition of the child himself who was described as ‘small’ by the Head Teacher of Nursery A.
61. Further although when a seventh pupil was accommodated in Room 1 the parents of that child considered the class to be overcrowded there was no evidence that the addition of a seventh child jeopardised the safety or learning of the children within that class. The Tribunal are not persuaded on the basis of all the available evidence that the child could not therefore be accommodated in Room 2 and as such are not persuaded that the capacity of the nursery would be exceeded if the child was placed there.

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

62. The Tribunal considered a helpful starting point in relation to this ground of refusal was to assess whether the mainstream nursery provision was able to meet the child’s needs with reference to the IWF recommendations.
63. In relation to ‘Knowledge and understanding’ the Tribunal consider that the child is not benefiting from a ‘small group setting with an enhanced level of attention’ as recommended in the IWF. The Tribunal was not persuaded that the mainstream nursery were able to offer this based on the evidence heard. Nursery B has 47 children enrolled within it. It is a busy and noisy environment with no space designated specifically for the child. The group time is once per day with a group of ten children. The Tribunal did not consider that this satisfied the need for the child to have a small group setting with an enhanced level of attention.
64. In relation to the ‘Social/ Emotional’ outcomes the Tribunal considered that three of the five outcomes were not being delivered in the mainstream environment these being: ‘High level of structure and routine’, ‘Opportunities to learn with similar peer group’, ‘Opportunities to socialise with mainstream peers’. The Respondent submitted that because the Appellant when asked what the child did in the mainstream nursery responded that it was “pretty similar” this meant the child was in a routine. However the evidence from the Head Teacher of the mainstream Nursery when asked what happened day to day was that there was no ‘set timetable of events’ as it was ‘not that kind of environment’. The Appellant accepted she did not know what the child did every day in nursery as she wasn’t present. The evidence of the Head Teacher of the mainstream nursery who is familiar with the nursery day to

day is to be preferred as she has first-hand knowledge of what happens in the nursery. The Tribunal therefore rejects the submission of the Respondent that there is evidence of the child being provided with a routine on the basis of the evidence of the Head Teacher of the mainstream nursery.

65. In relation to 'Opportunities to learn with similar peer group' the Tribunal heard evidence from the Educational Psychologist that within every mainstream nursery there will be an appropriate mix of children. This evidence was based on the generality and was not supported by the evidence in the circumstances of this case. The evidence from the Head Teacher of the mainstream nursery provision was that there were no other children with autism in the nursery and that there were two children with significant speech and language difficulties but their needs were different to the child's. In any event those children were not in the same group as the child. The Tribunal preferred the evidence of the Head Teacher of the mainstream nursery to that of the Educational Psychologist as the Head Teacher of the mainstream nursery has first-hand knowledge of the composition of the mainstream nursery. The Tribunal did not therefore consider that this outcome could be met in the mainstream nursery.
66. In relation to 'Opportunities to socialise with mainstream peers'. The Tribunal did not consider that this outcome could be met in the mainstream nursery. The Tribunal preferred the Appellant's evidence to that of the Head Teacher of the mainstream nursery in relation to the evidence regarding whether or not the child was interacting with peers by standing and observing other children. The Appellant's view was that the child was more likely to be 'staring into space'. This evidence was based on her knowledge of her child and having observed him with other children in the family home. It was clear to the Tribunal that the Appellant was in a better position to offer a view on this than the Head Teacher of the mainstream nursery who had only observed the child over a limited period of time in a busy nursery environment. The evidence of the Pre-School Home Visiting Nursery Nurse supported this in her statement where she stated that the child 'does not initiate play or contact and tends to wander about, keeping himself to himself.' In relation to this recommendation the Tribunal also placed weight on the evidence of the Head Teacher of the mainstream nursery whose evidence was that the child was socially isolated within the mainstream nursery and that he was not benefiting from role modelling.
67. In terms of speech and language the Tribunal considered that the IWF outcome in terms of 'Joint working between SALT and teaching staff' was an area which as at the time of the hearing had not been achieved. There had been no speech and language therapist input to the nursery from 4<sup>th</sup> September 2018 until the beginning of November 2018 due to staff illness. Whilst the Head Teacher of the mainstream nursery gave evidence of visual methods of communication that would be introduced as at 9<sup>th</sup> November 2018 there was no evidence available to the Tribunal that these had been implemented.
68. There is a presumption that the education authority will provide education in a school other than a special school unless the circumstances at Section 15(3) of the 2000 Act arise. This includes where a school other than a special school would not be suited to the ability or aptitude of the child. The Tribunal considered that based on the evidence before them the mainstream nursery was not suited to the child's ability and aptitude. The Tribunal considered that a number of the IWF recommendations

for the child could not be met in the mainstream nursery environment. The Tribunal considered that as a result of the number of the IWF recommendations that were not met within the mainstream nursery environment the education in the mainstream nursery could not meet the child's needs and was therefore not suited to his ability and aptitude. The Tribunal agreed with the Appellant that the child was not 'thriving' in the mainstream nursery environment. There was no evidence before the Tribunal which indicated continued progress had been made by the child in relation to his speech and language and social interaction since he had commenced nursery which the Tribunal considered to be an indicator that this was not an appropriate environment to meet the child's needs.

69. The legislation provides that the circumstances set out in Section 15(3) of the 2000 Act only arise exceptionally. The Tribunal considered that this was a case where the exception to the presumption of mainstream arose. The Tribunal considered this not only because the mainstream nursery provision was not suited to the child's ability or aptitude but because the child was socially isolated within the nursery. Further, the Tribunal considered that the mainstream nursery could not be adapted to meet the child's needs without further disadvantaging the child and increasing his social isolation. In particular the Head Teacher of the mainstream nursery said that in order for increased structure and routine to be offered to the child it would 'have to be in a quieter room away from the main flow' and that this would result in the child being further socially isolated within the mainstream nursery. For these reasons the Tribunal determined this ground of refusal did not apply.

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

70. Since we have decided that none 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) of the 2004 Act.