



Additional Support Needs

**DECISION OF THE TRIBUNAL**

**1. Reference**

**1.1** By application dated 17 April 2018 the appellant lodged a reference under section 18(1) and 18(3)(da) of the Education (Additional Support for Learning) (Scotland) Act 2004 [as amended] (“the 2004 Act”) against a decision of the education authority (“the respondent”).

**1.2** The reference is in respect of the decision dated 10 April 2018 whereby the respondent refused a placing request made by the appellant under paragraph 1 of Schedule 2 of the Act for his son (“the child”) to attend a special school, School A.

**2. Summary of the Decision**

**2.1** The tribunal confirm the decision of the respondent to refuse the placing request in terms of section 19(4A)(a) of the 2004 Act, being (firstly) satisfied that one or more grounds of refusal specified in paragraph 3(1) of Schedule 2 of the 2004 Act exists and (secondly) that in all the circumstances it is appropriate to do so.

**2.2** The decision of the tribunal is unanimous.

**3. Summary of Evidence and Proceedings**

**3.1** The bundle consists of pages T1-T130 (Tribunal papers) A1-A153 (appellant’s papers) and pages R1-84 (respondent’s papers). A joint minute of admissions was entered into by the parties, the final version of which is at pages T127 - T130. In addition, both parties prepared written submissions after the conclusion of the evidence. We took into account all of the information in reaching our decision.

**3.2** Oral evidence was heard over three days. The respondent led at the hearing and evidence was heard from:

**3.3** Witness A, Inclusion and Wellbeing Manager at the education authority. A statement of Witness A is provided at R27-29. The witness gave evidence in support of the statement and was cross-examined.

**3.4** Witness B, acting head teacher at the specified school, School A. A statement of Witness B is included at R30-33. The witness gave evidence in support of the statement and was cross-examined.

**3.5** Witness C, teacher at Nursery A. Her CV is found at page R 84.

**3.6** Witness D, head teacher of School B. Her CV is found at page R 83.

**3.7** Witness E, educational psychologist, the education authority. Her CV is found at page R 82.

**3.8** The appellant's witnesses were as follows:

**3.9** Witness F, Speciality Doctor, Community Child Health, NHS Lothian. Her CV is found at page A 149. She gave her evidence by telephone.

**3.10** Witness G, clinical psychologist, Child and Adolescent Mental Health Service ("CAMHS") – learning disability team, NHS Lothian. Her CV is found at page A148. She also gave her evidence by telephone.

**3.11** The appellant, the child's father gave evidence in person. His statement was prepared by his solicitor and lodged at pages A134-139.

**3.12** Given the child's age and level of understanding it was not considered appropriate that he give evidence directly to the tribunal. An independent advocate from Partners in Advocacy was instructed and the report from the independent advocate is found at pages T122 -123.

#### **4. Issues in Dispute**

**4.1** Shortly prior to the hearing the respondent's agent indicated that the respondent was no longer relying on all the grounds of refusal included in the case statement for the respondent. In particular, it was confirmed that one child had left School A and therefore the respondent was no longer relying on the grounds contained in Schedule 2 paragraphs 3(1)(a)(i), 3(1)(a)(ii) and 3(1)(a)(vii) of the 2004 Act.

**4.2** The remaining issues in dispute were 1) whether either (or both) of the remaining two grounds of refusal relied upon by the respondent exist and 2) if the tribunal did so find that a ground existed whether it was appropriate in all the circumstances to refuse the placing request.

**4.3** The grounds relied upon by the respondent were as follows:

**4.4** Schedule 2, paragraph 3(1)(b): "the education normally provided at the specified school is not suited to the age, ability or aptitude of the child";

**4.5** Schedule 2, 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").

**4.6** For completeness it is necessary to narrate the terms of section 15(1) of the 2000 Act.

Section 15(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."

Section 15 (3): The circumstances are, that to provide education for the child in a school other than a special school—

- (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.

**4.7** The powers of the Tribunal are found in section 19 of the 2004 Act as follows:

#### **Section 19: Powers of First-tier Tribunal in relation to reference**

(1) This section specifies the powers of the First-tier Tribunal in relation to a reference made under section 18...

(4A) Where the reference relates to a decision referred to in subsection (3)(da) of that section the First-tier 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,

- (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 First-tier Tribunal may require, and
  - (ii) make such amendments to any co-ordinated support plan prepared for the child or young person as the First-tier Tribunal considers appropriate by such time as the First-tier Tribunal may require.

**4.8** The tribunal made the following findings in fact relevant to the issues in dispute.

## **5. Findings of Fact**

**5.1** The appellant is the parent of the child, born January 2013.

**5.2** The child has a chromosomal disorder. In October 2017 he was diagnosed with an autistic spectrum disorder. He has speech and language delay. He has some learning difficulties but is too young to have been formally diagnosed with a learning disability.

**5.3** The child has additional support needs in terms of section 1 of the 2004 Act.

**5.4** The child has difficulty sleeping and is prescribed melatonin. He can be self-directed and can lack focus. He mimics the behavior of others. He has sensory issues with certain food types and will only consume soft foods. He has difficulty using the toilet to defecate. At home he can display behavioural problems such as growling and trying to escape.

**5.5** In May 2018 when he was 5 years and 4 months old the child was assessed by the respondent's educational psychologist. She carried out a developmental assessment measuring the child's receptive understanding of pre-school concepts and general readiness for school. Scores were given in six key areas and when translated to an age equivalent score the child's scores ranged between 3 years 4 months and 4 years 7 months.

**5.6** The child resides at home with his father, mother, maternal grandmother and 7 siblings. A number of the child's siblings have developmental or behavioural problems. Two of his older siblings currently attend School B and one of his younger siblings attends the nursery at School B ("Nursery B"). None of his siblings currently attend or have previously attended School A.

**5.7** The child attended Nursery B from June 2016 until June 2017. This is a mainstream nursery and the child was in a class with the ratio of one staff member to 10 children. The child was observed to be sociable with his peers and would imitate them. He had an Individualised Education Plan ("IEP") in place and made progress towards his targets. He was observed to be self-directed and delayed in development, particularly speech and language. He required adult focus to remain on task. Although the child could have attended primary 1 in August 2017, given his January birthday (meaning he would be one of the youngest in the class), it was recommended that he have another year at Nursery B before transitioning to primary school.

**5.8** The appellant requested that the child be placed in School A for Primary 1 commencing August 2017. The request was considered by the respondent's Education Placement Group ("EPG"), which considers all requests for placement in specialist provisions.

**5.9** The EPG use information gathered from the professionals involved in the child's education to assess the needs of the child. Children are assessed according to four criteria, namely: knowledge and understanding; social, emotional and behavioural; medical and physical; and speech and language. The level of a child's needs are scored from 0 to 4 in each category with 0 indicating the lowest level of need and 4 indicating the highest. A child can have a total score between 0 and 16.

**5.10** When the child was assessed in 2017 he had a total score of 4. Although there are no definitive cut-offs children placed at School A would tend to score in the range of 7 to 10. The appellant's request for the child to be placed at School A in August 2017 was refused and ultimately the child was instead offered an additional year of nursery provision at Nursery A, which is a specialist nursery with a high staff to pupil ratio.

**5.11** The child attended Nursery A from August 2017 until June 2018. He attended five mornings per week and was in a class with five other children. There was one teacher, one nursery nurse and two advanced pupil support workers ("PSW"). The nursery had a sensory room and small soft play area, both of which the child enjoyed. Given the smaller numbers and needs of the children attending, Nursery A had more routine and structure than the mainstream nursery; Nursery B. Nursery A was more similar to a school environment.

**5.12** The child settled well at Nursery A. He benefited from the structure and routine. He formed strong relationships with the staff and with the other pupils. He was a sociable child who liked to help other children, particularly those less able than himself. In the very early days he would occasionally growl at staff but this behaviour stopped quickly and the staff did not observe any challenging behaviour. The child was gentle and affectionate with staff and other pupils. The child could move quickly but he did not attempt to escape from Nursery A. He managed transitions well. The child made progress in learning to eat with other pupils at snack time although he would only eat soft textured foods. The child was able to use the toilet to urinate but did not use the toilet at nursery to defecate. He would either use a nappy or wait until he got home to empty his bowel. On 3 occasions the child was tired at nursery and had a short nap but on the majority of days he did not show signs of excessive tiredness.

**5.13** The child was delayed in speech and language and in his listening and attention skills. He required support to remain on task but did not require one to one support for the majority of the time. He benefited from a visual timetable and use of the TEACH method.

**5.14** The child had an IEP and by the end of the nursery year made good progress towards his targets. He made progress in speech and language. He was able to talk at sentence level and was beginning to develop an understanding of concept vocabulary. He could recognise numbers 1 to 10 and was starting to work on numbers 10 to 20. He was able to recognise colours and identify sounds. He developed stronger listening and attention skills and would be able to focus on tasks for longer periods. He was working on the Early Level of the Curriculum for Excellence (“CFE”) and was able to achieve some of the outcomes. He has the potential to move through the First Level of the CFE.

**5.15** The other children in his class at Nursery A had a range of needs. He was cognitively the most able. Three of the other children were non-verbal and one other child could use single words only. One child had similar language skills to the child. The child would tend to communicate with the adults as most of the other children were unable to communicate on his level.

**5.16** The appellant made a further request for the child to be placed at School A, to commence Primary 1 in August 2018. The application was again assessed by the respondent’s EPG. The child’s nursery teacher had significant involvement in providing the information used to assess the child’s level of need according to the criteria outlined at paragraph 5.8 above. In 2018 his total score was 4.5. The placing request was refused. The children placed in School A had scores in the range of 7 to 10.

**5.17** School A is a specialist resource providing education to children with severe and complex needs. The children at the school are from primary 1 to primary 7 age range. There are a range of needs within the school including ASD, Down’s syndrome, learning disabilities and other physical and developmental delays. There is a capacity of 80 children, divided into 10 classes of 8. One child left the school during the academic year and by the date of the hearing there were nine classes of eight and one of seven. The school has a sensory room, soft play area and adapted toilets.

**5.18** The children are grouped into classes according to their needs and not just according to their chronological age. The majority of the children in the school are non-

verbal. All the children in the primary 1 intake for the academic year 2018/19 are non-verbal. Of the few children in the school who are verbal most are at single word stage only. Developmentally children throughout the whole school range from a developmental age of three months to 4 years 6 months. The school focuses on life skills and very few of the children are able to work through the stages of the CFE. There are a few children in primary five and six stage working towards Early Level and three primary six children working towards First Level in numeracy but none in language.

**5.19** A number of the children at School A exhibit distressing behaviour. There are children who shout, swear, rock, spit, scratch, throw things and the children can injure themselves and others. Some of the children mimic the behavior of others which can cause further difficulties. The children require intensive support, some on a 1:1 or even a 2:1 basis. It is difficult to recruit and retain staff at School A.

**5.20** Following the refusal of the appellant's placing request the child was offered a place at School B. The child's nursery teacher at Nursery A, his parents, the respondent's educational psychologist and the head teacher of School B were all involved in transition planning to assist with the Child's move from Nursery A to School B. The child's nursery teacher recommended as part of the transition planning that the child should have a phased start to school, that the child should have access to a visual timetable, and that the school should be aware of the child's sensory issues with food. She offered to assist the staff in relation to developing strategies to support the child. Following the start of the school year the PSW assigned to the child contacted his nursery teacher and attended at the nursery to observe the strategies. The child's class teacher also attended. The PSW is also undertaking additional training in sign along methods.

**5.21** School B does not have an adapted toilet where the child could be changed if soiled, and it was suggested that the child could be taken to use the facilities in the Nursery attached to School B. The appellant requested that staff at School B would agree to the child being taken home from school if he required to defecate or was soiled and needed to be changed. The appellant also asked for a lunch tray to be sent home so that he could practice with the child to get him used to eating from the tray. It was also suggested that the child might require an individual workstation, but the appellant was concerned that this might single the child out.

**5.22** The head teacher of School B made arrangements to provide for the child's needs in advance of his start date. She placed him in the smallest primary one class (18 pupils in total) with a teacher she considered to be particularly nurturing and skilled in dealing with children with additional support needs. She selected the classroom in the area of the building which was considered most secure. She allocated a full time PSW to work with the Child.

**5.23** The child started primary 1 at School B in August 2018. He had a phased start over a period of approximately six weeks. By the date of the hearing he was in school on a full-time basis and was progressing well. He had made friends and was coping well in school. He was able to take off his jacket and hang it up and to change into his gym shoes. He was able to manage transitions within the school to the lunch hall or to assembly. The school had not experienced any difficulties with his behaviour. The child

was eating well and was supported at lunchtime by his PSW or a Primary 7 buddy. A tray was sent home for the child to practice with prior to commencing school lunches, albeit at a later date than the appellant had originally requested.

**5.24** The child was provided with a visual timetable which worked well. He was contributing in class and his teacher or PSW had been able to keep him on task. He was coping in small nurture groups and had not required an individual workstation. His PSW would mainly work with the child but on occasion was able to work with other children as the child was managing well in groups. He has an IEP with focused targets which he is working towards.

**5.25** Since starting in Primary 1 the child has been reviewed by Speech and Language Therapy. It was determined that it was too early for formal intervention, but the child would be kept under review. The Speech and Language therapist has provided advice to the class teacher and PSW. She has also provided materials for them to work through with the child. The child was also seen by Occupational Therapy who worked with him on his pencil grip and provided him with a special pencil with a light which would illuminate when he used enough pressure. An Inclusion and Wellbeing teacher has also assisted with nurture groups including the child.

**5.26** On one occasion the child locked himself in the toilet and would not come out for his PSW. His class teacher was able to coax him out of the toilet. When he came out of the toilet he gave his class teacher a cuddle. On another occasion the child made his way to the gym hall and started to run around. His teacher put her head round the door of the gym hall and the child immediately went back to class. The child is supervised in the playground and has not attempted to run away. He injured himself on one occasion in a collision with another child and the school telephoned his parents to inform them.

**5.27** The child has not asked to use the toilet to defecate at school and the school had not required to phone home for his parents to collect him. On one occasion he came home from school complaining of stomach pains as he had been "holding in his poo". His parents kept him off school the following day due to stomach pain but did not require to consult a doctor.

**5.28** The child is in a class with 17 other children. There is one other child in the class with some additional support needs. All the children are verbal and are working on the Early Level of the CFE. The child was working through his first six sounds and developing his pencil skills.

## **6. Reasons for the Decision**

### **Assessment of the Evidence**

**6.1** The tribunal had regard to all the evidence before it and weighed it appropriately. The tribunal derived significant benefit from the oral evidence of the witnesses and are grateful to each of them for their assistance and the manner in which the evidence was given. The tribunal considered all of the respondent's witnesses to be credible and reliable.

**6.2** Witness A's evidence was of assistance in understanding the process by which the respondent considered placing requests and the scoring methods used. Her evidence

was in accordance with her statement and she also provided some additional background in relation to the comparative scorings between the various schools.

**6.3** Witness B's evidence was of great assistance in understanding the pupils attending and the education normally provided at School A. Although she had only started in her role in June 2018, she was knowledgeable about the school and gave a clear picture of the levels of need of the children at School A and the type of educational provision given at the school.

**6.4** Witness C's evidence was of significant assistance in understanding the child and how he performed in an educational environment. She was clearly very fond of the child and in her evidence referred to him as a "wee angel". Her knowledge and understanding of his needs was clear to see. She had direct first-hand knowledge of the child and his progress at Nursery B. She was clear that he had a capacity for learning and the potential to move through Early and First Level of the CFE. She was also clear that he tended to communicate with the one verbal child and the adults at Nursery A and expressed concern that he could become frustrated if placed with non-verbal peers at School A. She was concerned that he would not have the same opportunities to develop his communication skills if the majority of his peers were not able to communicate with him. She was also concerned that the child may mimic some of the more extreme behaviours exhibited by other children at School A.

**6.5** Witness D's evidence was also of significant assistance to the tribunal. The tribunal was impressed by her knowledge of the child and the wider family and also her commitment to taking all necessary steps to meet the child's needs at School B. It was clear that she had given serious thought to how to cater to the child's needs at the planning and transitioning stages and that she was constantly reviewing his needs. The tribunal had confidence that she would continue to do so. She had direct knowledge of the child and had observed him in class, at lunch and in the playground. The tribunal accepted her evidence that as the child developed she would continue to assess his needs and would seek further support and additional resources from the Inclusion & Wellbeing Service if required. She was already thinking forward in relation to how his needs would be catered for in subsequent school years.

**6.6** Witness E was also an impressive witness who clearly had in-depth knowledge of the child. She explained that she had observed and assessed the child in the home and in the nursery setting. She had worked with the family for a number of years and was very positive about the relationship with the appellant. She spoke of the appellant attending various classes and groups and being very receptive to support in managing the child's condition. She spoke of assessing the child and his level of need to help with the child's transition to primary school and to give guidance to the teachers on how to pitch his education. She also spoke about her concerns for the child if he were to attend School A. In particular the tribunal accepted her evidence that it could be detrimental to the child to be placed in a learning environment where none of the children could be considered an appropriate peer group. In particular the fact that most of the children were non-verbal could have a detrimental impact on the child's speech development and his social communication skills. Furthermore she was concerned that the child could mimic the more extreme behaviour exhibited by some of the children at School A. She was also concerned that School A would have less expectation of the child in terms of learning outcomes and considered that he would benefit from being

placed at a mainstream school with more able peers where he would be encouraged to achieve more.

**6.7** The tribunal was also grateful to the assistance of the appellant's witnesses, who were also credible.

**6.8** The tribunal was grateful to Witness F who gave evidence by telephone after completing a clinic. She clearly had significant expertise in the diagnosis of autism and was able to explain the child's diagnosis and the range of needs he had. She had met the child on one occasion and had consulted with his parents and considered reports from colleagues who had met with the child on several occasions. She also explained that although the child was showing signs of a learning disability that guidelines suggested that a child could not be given a formal diagnosis in relation to learning disability until they were approximately seven years of age. She had not observed the child in an educational setting. She indicated that the role model of neurotypical peers may be beneficial and have a powerful learning impact. She also indicated that at his current age the child would probably not have an awareness of his own limitations but as he gets older and his awareness increases it may have a negative impact on his self-esteem if he compares himself to neurotypical peers. She also indicated that if the child was not having his needs met this would have a negative impact in terms of his ability to access learning and his overall well-being and behaviour.

**6.9** The tribunal also considered the evidence of Witness G to be of assistance. She had worked with the child and the family for some time, initially the referral had come to her due to the child's restricted diet and she assisted with strategies to address this. Her role was more as a support to parents and families in the home rather than focusing on the child's educational environment. She spoke of assisting with practical issues such as liaising with OT for safety aids within the house and providing supportive correspondence for benefit applications. She also provided support to parents in managing the child's needs and was very positive about the steps taken by the appellant such as attending various parenting courses. She also spoke of assessing the child's level of need and her opinion was that he had a similar level of need to a number of the children in School A. She spoke of running some clinics at School A and her recollection was that of the previous year's primary one there were a number of children with similar needs to the child, and with similar language skills. The tribunal however placed more reliance on the evidence of the acting head teacher of School A who had in-depth knowledge of the whole school population as at the date of the hearing and was also able to speak about the education provided at the school including the levels of the CFE which was not something that Witness G gave evidence on. In addition, the assessment method used by Witness G was a different one to the one used by Witness E. The Tribunal preferred the evidence of scoring from Witness E as being the most relevant for assessing educational needs because the assessment method used by her was the one used most often in an educational setting and was considered a useful predictor for informing teaching strategies and outcomes.

**6.10** The tribunal also found the appellant's evidence to be of assistance. In examination-in-chief he was very open and honest in his evidence. The tribunal formed the impression from his evidence and from the evidence of a number of other witnesses that the appellant was a very committed and supportive parent who wanted the best for his child. He stated in his evidence that he realised that School A was perhaps not "the best thing" for the child, however he had concerns that the child's

needs may not be met at School B. He did however state that he felt the child had “coped brilliantly” since starting School B. He also stated that a lot of support had been put in place at School B, but he felt he required greater communication by way of a home to school diary and he remained concerned about toileting and safety issues. He was also concerned that the child would be the least able in the class and that this might single him out. He spoke of some concerns regarding his older children and his regret that supports were not put in place sooner. He stated that he wanted to make sure that he tried everything for the child as early as possible and that appeared to be his primary motivation for making the placing request and the appeal to the tribunal. In cross-examination the appellant became more negative in his assessment of the supports in place for the child and his concerns appeared magnified, however, overall the tribunal formed the impression the appellant was doing his best to provide accurate information under difficult circumstances.

**6.11** The tribunal also had regard to the report from Partners in Advocacy in respect of the child’s views. Given the child’s age and level of understanding it was not surprising that the child focused on things that he liked about nursery. The tribunal did not consider it unusual for a child of his age to be daunted at the idea of attending school. While the tribunal considered the report was of assistance it was clearly of limited assistance in relation to the fundamental issues in this appeal which the child could not be expected to understand given his age.

## **7. Grounds of Refusal**

**7.1 Paragraph 3(1)(b):** “the education normally provided at the specified school is not suited to the age, ability or aptitude of the child”

**7.2** The tribunal found that this ground of refusal did exist at the date of the hearing. In considering this ground the tribunal had regard to the normal meaning of the statutory language. The tribunal considered firstly the education normally provided at the specified school. The tribunal placed reliance on the evidence of Witness B who was the acting head teacher of School A. The tribunal found that the school focused mostly on teaching pupils life skills. The tribunal also found that the majority of the children at School A were non-verbal and that the age equivalent developmental stage of the whole range of pupils was from 3 months to 4 years 6 months. The tribunal also found that there were no children at all below primary five stage working towards the Early Level of the CFE and only three children in primary six working towards the First Level in numeracy only. The tribunal also found that a number of the pupils in School A displayed extreme behaviour and considered that a significant amount of staff time would be devoted to managing the behaviour. The education normally provided at the school is necessarily geared towards the needs of the pupil body and the pupil body at School A on the whole has significantly more severe and complex needs than the Child.

**7.3** The tribunal then considered the ability and aptitude of the child (age was not a factor). The tribunal noted that the child did have the ability and aptitude to learn and was making progress in communication skills. He was talking at sentence level and was developing an understanding of concept vocabulary. He could recognise numbers 1-10 and was working on 11-20. He could recognise colours and sounds. He was working towards some of the targets in the Early Level of the CFE. His age equivalent developmental stage was in the range of 3 years 4 months to 4 years 7 months.

**7.4** Having considered the education normally provided at the school and having also considered the child's ability and aptitude the tribunal concluded that the education normally provided at School A was not suited to the ability and aptitude of the child. The tribunal had regard to the evidence that it would be detrimental to the child's development if he was placed with a group of peers who were significantly less able, particularly in language and social communication. Furthermore, the tribunal accepted the evidence that it was likely that less would be expected of the child in terms of learning outcomes if he were to attend School A. If the child were to attend School A, he would not have an appropriate peer group to model both his language development and his behaviour on. There would be a risk that he would mimic extreme behaviours exhibited by pupils in the school. Overall the tribunal considered that the education normally provided at School A was suited to children with much more severe and complex needs than that of the child and that having regard to all the factors outlined above the education normally provided at School A was **not** suited to the ability or aptitude of the child.

**7.5** The tribunal has found that the ground in paragraph 3(1)(b) exists but even if the Tribunal were wrong to do so, having considered all of the evidence the tribunal found that the ground in paragraph 3(1)(g) also exists and the reasons for same are given below.

**7.6 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".

**7.7** The ground in paragraph 3(1)(g) is sometimes referred to as the presumption of mainstreaming ground. The text of the statutory provisions is included at paragraph 4.6 above. Read short, in order to establish this ground, it was for the respondent to show that the presumption of mainstreaming should not be displaced because the child did not fall within one of the exceptions in section 15(3). In this appeal it was the exception in 15(3)(a) which was relevant, which essentially provides that the presumption of mainstreaming should be displaced if mainstream education would not be suited to the ability or aptitude of the child. Thus, it is a similar test to the ground of refusal in paragraph 3(1)(b) above but is rather placing the responsibility on the respondent to effectively show that mainstream education is suitable to the ability or aptitude of the child.

**7.8** Having considered all the evidence the tribunal found that as at the date of the hearing mainstream education is suited to the ability or aptitude of the child. The tribunal was satisfied that the arrangements made for the child in School B would meet his educational needs. The tribunal was particularly impressed by the evidence of Witness D and the range of supports that had been put in place for the child in order that his needs could be met in the mainstream setting. In particular the child had a full time PSW, had input from occupational therapy, input from the Inclusion and Wellbeing Service and input from speech and language therapy. He had the use of a visual timetable and staff were employing appropriate strategies to support the child. The tribunal also had confidence that the child's needs would be constantly reviewed, and additional support may be requested if that became necessary. The tribunal was satisfied that the child would benefit from more able peers on which to model his behaviour and his communication skills. The tribunal was satisfied that measures had

been put in place to manage risk factors. The tribunal found that the child had so far been making good progress in School B and although it was early days were optimistic that the child would continue to make progress.

**7.9** As outlined above both parties lodged written submissions which the tribunal considered in full. The appellant's agent referred to case law which was said to support the case for the appeal to be upheld. While the tribunal considered the case law assisted with the general approach to be taken when considering the statutory grounds, each case turned on its individual facts and circumstances and those cited were of limited assistance in determining the issues in this case.

**7.10** The main thrust of the appellant's argument seemed to be that even although the child would admittedly be significantly more able than the other children at School A that it could not be said that School A was not suited to his age, ability and aptitude. However, for the reasons noted above the tribunal did not consider this to be the case.

**7.11** Furthermore the appellant's submission was that by refusing the placing request and placing the child in mainstream schooling the respondent (and the tribunal if they refused the appeal) were setting the child up to fail. The tribunal did not accept that this was the case. The evidence which the tribunal accepted was that the child was progressing well in the mainstream school and that adequate supports were in place to meet his needs, and that his needs would constantly be reviewed. The tribunal did note the evidence which suggested that as the child grew older the gap between him and the other children in the mainstream school may get wider however the tribunal are tasked with considering the position at the date of the hearing and were satisfied that the child's needs could be met in the mainstream setting and that mainstream was suited to his ability and aptitude. While it is difficult to predict exactly what will happen in the future the tribunal did have confidence that the head teacher at School B would continue to review the child's needs and make appropriate adjustments.

## **8. In all the circumstances is it appropriate to confirm the respondent's decision?**

**8.1** The tribunal found in all the circumstances that it was appropriate to confirm the respondent's decision. Many of the factors which led the tribunal to the conclusion that the grounds of refusal existed were relevant in the overall determination of appropriateness. While the tribunal was not asked to consider the respective suitability test comparing the two schools as that ground did not arise in this reference, the tribunal did consider this was a relevant factor in the overall decision on appropriateness. The tribunal considered that the education provided in School B would be much more beneficial to the child than the education provided in School A. The tribunal considered that if the child were placed in School A there would be a serious risk that this would be detrimental to his education, well-being and behaviour. In particular the tribunal were concerned that the child would not have an appropriate peer group to model his communication skills on and he would become frustrated if he could not communicate with his peers. The tribunal were concerned that the child would mimic the extreme behaviours of the children in School A. Overall School A was catering for children with much more severe and complex needs than those of the child and the tribunal were concerned that the child would effectively get lost in that environment.

**8.2** The tribunal was pleased to have the benefit of hearing evidence on how the child had been progressing during his short time at School B. The tribunal was reassured that the child had been progressing well and this was acknowledged even by the appellant. The appellant's remaining concerns regarding safety, communication and issues with regarding toileting were issues that the tribunal felt could be addressed between the appellant and the school for the benefit of the child. It is of course open to the appellant to continue to assess the child's progress and make requests for alternative provision in the future, however, overall the tribunal considered that as at the date of the hearing it was appropriate to confirm the respondent's decision.