



**DECISION OF THE TRIBUNAL**

**Reference Number:** FTS/HEC/AR/24/0021

List of witnesses

**Witnesses for Appellant:**

Clinical Psychologist (**witness C**)  
The Appellant

**Witnesses for Respondent:**

Head of Pupil Support of School A (**witness A**).  
Educational Psychologist (**witness B**).

**Reference**

1. This is a reference by the appellant challenging the respondent's decision to refuse the appellant's request to place the child in school B.

**Decision**

2. We overturn the decision of the respondent to refuse the appellant's placing request, in accordance with section 19(4A)(b) of the Education (Additional Support for Learning)(Scotland) Act 2004 (**2004 Act**). We therefore require the respondent to place the child in school B by November 2024, or by such other date as the parties agree.

**Process**

3. The reference was made in February 2024. A hybrid hearing on this reference took place over two days with the tribunal, the party representatives and the appellant in person, and all other witnesses giving their evidence remotely. The respondent was instructed throughout by the Education Officer, who also attended remotely. The parties provided outline and then oral submissions.

4. We considered all oral and written evidence of all witnesses and the written material available. The written material in the bundle consists of the following page numbering: T1-071; A1-089; and R1-097.
5. The child provided us with his views via an advocacy report (T067-069).
6. The child's views, as recorded in the advocacy report directed by the Tribunal and compiled in July 2024, can be summarised as follows:
  - a. School is not OK for the child due to the way it is structured.
  - b. The child's first year at school A has been 'miserable'. He has not achieved anything during that year.
  - c. The child can do the work, but the social aspects are stopping him from attending school.
  - d. The child was being bullied at school, including incidents in which water was thrown over him and mean things were said about him. This makes him feel annoyed, upset and overwhelmed.
  - e. The child has one friend at school, but since going onto a part-time timetable he does not see much of that friend.
  - f. The child feels sad about school most of the time.
  - g. The child doesn't like maths, but he enjoys English, History and Music.
  - h. The part-time timetable at school A is not working well for the child.
  - i. The support base (at school A) is not great for the child since there are so many people coming and going all the time, it is difficult to concentrate.
  - j. The child would have preferred school work to do at home in the afternoons while on his part-time timetable, to give him something on which to focus.

## **Findings in Fact**

### *General findings in fact*

7. The appellant is the mother of the child. The child lives with his mother. The child was born in January 2011. The child is enrolled as a secondary year 2 pupil at school A, and has been since August 2023.
8. The appellant made a placing request to the respondent asking that the child is placed in school B. That request was refused in December 2023.
9. The child was diagnosed as having Autism Spectrum Disorder (**ASD**) when he was three years old. He finds social situations difficult. For example, he has difficulty knowing when his peers are joking and this causes him to become anxious.
10. The child has sensory needs meaning that he struggles with loud and sudden noises and being in loud places. He feels overwhelmed when he cannot move to a quiet place to be on his own. The child finds noises, including other children chatting, irritating. He does not like to wear ear defenders due to the feel of them and since it marks him out as being different. In general, the child is anxious about appearing different from his peers.
11. The child likes things to be organised and settled. He is very particular about what he wears and prefers soft clothing. School A has accommodated this need.
12. The child has a strong work ethic. He is highly motivated to learn. Sometimes he sets overly high standards for himself.

13. The child struggles with processing and understanding language. This causes difficulties with, for example, maths as his recall ability is limited. He can feel overwhelmed by too many instructions.
14. The child's ability to concentrate improves when he has something to hold. His choice of conversation topic tends to be focused on his favourite subjects.
15. The child's handwriting is difficult to read. His handwriting skills are not improving at school.
16. **This paragraph has been removed by the Chamber President for reasons of privacy under rule 55(3)(a)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018.**
17. While the child can speak fluently and articulately, he finds it very difficult to speak to strangers. It takes him a long time to build relationships and trust people.
18. The child attended six appointments at the Child and Adolescent Mental Health Service (**CAMHS**) between May and July 2024. He was discharged from CAMHS in July 2024.
19. The challenges the child faces are environmental in nature (as a result of his ASD) and are not due to any underlying mental health disorder.
20. Due to the impact of the child's ASD, he benefits from concrete plans, predictable routines, quiet and small group settings and flexible learning opportunities that combine his personal interests, motivations and strengths with opportunities to regulate in a safe environment.
21. The child struggles to sleep well. He wakes every night for a long period when he wanders around the house. This means that he can be very tired when he attends school.
22. The child is sometimes distressed at home, leading to significant physical and verbal negative behaviours. These episodes can last for hours before the child becomes calm. The child can then become angry and further distressed when he reflects on these behaviours. These episodes became less common and less intense when a part-time timetable was introduced between January and June 2024 at school A.
23. School A staff referred the child to Agency A. Agency A is a charity that provides community-based support for families and children experiencing emotional concerns. A Child and Family Worker with Agency A met the child over six sessions between February 2024 and May 2024. The first session took place at school, the others at home.

#### *The child and school A*

24. The child has attended school A since August 2023. There are 1198 pupils at that school. A number of pupils attending school A have autism. School A is a mainstream school, under the management of the respondent. It has a Pupil Support Base (**PSB**).
25. The PSB consists of a number of rooms along a corridor. These rooms include a nurture base (**the Base**), sometimes used by pupils as a safe space. It also includes a sensory room. A room for alternative assessment arrangements is also in the PSB. There is a reading room and a pastoral base. Room F02 is a classroom which pupils attend for

short periods, sometimes for longer periods, when returning to school after a long absence or when the pupil has medical needs. Finally, room F08 is a classroom.

26. Staff in school A have been trained in Level 1 Autism. The school has worked with colleagues in the Speech and Language, Educational Psychology and Pupil Support services to train staff in the best approaches to autism. A whole school audit has been conducted, to ensure that the school provides an autism friendly environment.

27. The measures in put place for the child at school A include:

- a. Bespoke, enhanced transition process between primary and secondary schools;
- b. Personal learning profile (a document shared with staff across the school identifying key learning barriers and strategies to overcome these) was in place;
- c. Appointment of a key teacher for the child;
- d. Access to school A's nurture base (a supervised, safe, caring and nurturing environment), available to the child before school, during break and at lunch to provide an environment in which the child could self-regulate, and avoid over stimulation;
- e. Access to a sensory room (although following an incident in April 2024, the child no longer wanted to go there);
- f. Breaks for self-regulation, as required;
- g. Access to a variety of Targeted Support Programmes, as required;
- h. A taxi to take the child to and from school;
- i. A 'five-minute early card', to allow the child to leave class before the end of each period to avoid having to navigate crowded corridors between classes;
- j. Weekly telephone calls to the appellant;
- k. Weekly check-ins with his key teacher in the PSB to develop a relationship, discuss concerns and to plan for any changes;
- l. Four weekly TAC meetings to discuss how the child could be best supported in school A; and
- m. Contact with a staff member's dog to help with the child's wellbeing.

28. During the period from August – December 2023, the child did not want to use any of the additional supports offered. He did not wish to be taken out of class and preferred to be with his peers and be treated the same as his peers. This was the case despite offers of discreet support. He was very keen not to stand out as being different.

29. The child was absent from school from around the middle until the end of November 2023. He was also absent for a two week period in December 2023.

30. In January 2024, the appellant agreed with school A that the child should return to school on a reduced (part-time) timetable, attending for the first three or four periods of the day, going home at lunchtime or early afternoon (with some exceptions to accommodate the child's attendance for certain subjects).

31. From January to June 2024 the child was mainly attending mainstream classes.

32. The main challenge for the child at school A has been forming and maintaining friendships and relationships with both peers and staff. The child's relationship with staff at school A has improved over the last 2 years.

33. The child has been working at an appropriate learning level for his age and stage. He completed Curriculum for Excellence (CfE) level 2 at primary school. He is working at

CfE level 3 across all subject areas. He is performing very well academically, although he finds maths challenging. His independence skills have improved.

34. The child currently requires Stage 3 Enhanced Support within the respondent's Framework for Staged Intervention at school A. This category applies to children with significant additional support needs, who need an enhanced level of support.
35. Between January and June 2024, the child's attendance at school was very sporadic. For example, he was absent for a two week period prior to the Easter break. Following that break, between April and June 2024, he was rarely in school.
36. Between May and June 2024, the child chose to spend more time in the PSB than he had at any other point in the 2023-24 school year.
37. The child has been bullied at school A. He has been called names by other pupils.
38. The child sometimes finds the mainstream environment overwhelming and he struggles to cope with the noise, busyness and lighting.
39. In August 2024, the child started secondary year 2 at school A on a similar reduced timetable. He has not attended school A since September 2024 and is unwilling to return.
40. All of the child's classes in school A in the current academic year (from its start until September 2024) have been in room F08 in the PSB. No other pupils were in room F08 while the child was there. A member of staff was timetabled to be with him for the second period of the three periods. Another member of staff periodically checked on him during periods one and three. The child completed work for period 1-3 subjects. He initially saw his peers at break and at lunchtime while in F08, but latterly he was there alone.
41. The child chose to attend some school events, such as a school trip to the cinema (during which he walked with other pupils and spent his lunch break with his peers, with minimal adult assistance required during the whole day). The child also attended the school disco.
42. The plan on the pupil's return to school in August 2024 was to transition the child from room F08 to other rooms in the PSB and then gradually introduce more PSB periods and mainstream classes. During that period, other pupils would be introduced into the child's classes. The child's education will benefit from interacting with other pupils.

#### *The child and School B*

43. School B is a unit within a mainstream secondary school (**school C**) managed by the respondent. School C has a roll of around 810 pupils. School B's roll is around 36 (6 classes with around 6 pupils in each).
44. School B provides specialist support for a small group of pupils with significant social communication difficulties. The majority of the pupils attending school B are supported in mainstream classes within school C for up to 80% of the time. The focus for pupils in school B is to develop social awareness and competence, independence, confidence and the ability to work with others.
45. The time balance between school B and the mainstream part of school C varies from child to child. Some spend almost all of their time in school C, while others spend less

time in school C. Some pupils who attend school B may not attend classes in school C in their own year group (although this would only be occasional). The structure of this dual access arrangement varies widely as each child has a personalised and individualised plan.

46. Pupils attending school B and who are attending mainstream classes work at age and stage appropriate levels, with adult assistance.
47. Witness B has some familiarity with pupils at school B. She was the link psychologist for school C 8 years ago. She has been involved in the selection of some pupils to attend school B. She therefore is familiar with some of the pupils who are in secondary year 1 at school B. She is familiar with one of the pupils who is in secondary year 2 at school B. She attends school C around 2 or 3 times a year and on some of those visits she sees children in class.
48. The appellant has visited school B twice. The first time she went on her own. This was during the child's primary 6 school year. The child accompanied her on the second visit, when he was in primary 7. On both occasions, the appellant/appellant and the child were shown around school B by the teacher who is head of that school. The purpose of both visits was to consider the suitability of school B for the child's secondary education. Following the second visit, the child did not express a view about his preference between schools A and B since he had not seen school A yet.
49. During one of these visits, the head of school B expressed the view that he could not see any reason why the child would not be a fit for school B. This view was based on information given by the appellant.

## **Reasons for the Decision**

50. The parties agree that the child has additional support needs, as defined in section 1 of the 2004 Act. We agree, as supported by our findings in fact at paragraphs 9-17 and 20-23 above.
51. The appropriate point in time for consideration of the evidence is at the date of the hearing: the law is clear on this. The burden of establishing that the respondent's decision should be confirmed falls on the respondent.
52. A few points about the evidence follow.
53. Firstly, the appellant's representative submitted that witness B was defensive in some of her answers. In general, witness B was evasive in some answers. We are not convinced that witness B was always mindful of her duty to present independent evidence. Having said that, witness B's most recent report (R072-076) presents as fully objective. For this reason, we place more weight on witness B's report than on her oral evidence, except where witness B gave factual, uncontested oral evidence.
54. Secondly, in answering a question about school B, witness B referred to selection criteria in a 'descriptor' issued by the respondent. She explained that the criteria in this descriptor are different to that stipulated in school B's handbook (A022 under the paragraph starting 'The Additional Support Centre..'). Witness B explained that the criteria in the descriptor refer to severe learning and social communication difficulties. During the tribunal's questions and later in oral submissions the appellant's representative pointed out that

the document witness B referred to (the descriptor) is not in the bundle, nor is it mentioned in her report or anywhere in the written evidence, while the handbook excerpt is.

55. We decided that it would not be fair to take witness B's evidence about the respondent's descriptor into account. We do not have the descriptor available, only witness B's recollection of it. In any event, the appellant had no notice that the document exists or would be referred to. The respondent was aware that the entry criteria for school B would be a likely issue, as the appellant lodged the relevant pages of the school handbook. In any event, given the reliance of the respondent on the 'age, ability and aptitude' ground of refusal, discussed below, this is an issue that is highly relevant to our decision. This leaves us with the school handbook excerpts as the only reliable source of evidence of school B's entry criteria.
56. The appellant's evidence was clear, credible, reliable and measured. She showed no ill feeling towards school A, indeed she stated that they are doing the best they can for the child. She presented as genuinely worried for the child's current situation.
57. Witness C also gave clear, credible and reliable evidence. We accept that her evidence is limited by the fact that she has had no direct contact with the child in school and she has based her opinions on information provided by the appellant and the child. Despite this, her conclusions are based on her professional qualifications and experience. They are relevant to some issues in this case.
58. The decision of the Tribunal in a previous reference is included in the bundle (T030-T045). We have not taken into account the facts or reasons expressed there: we reach and reason our decision purely on the basis of the other written (and all of the oral) material available to us. We do make reference to the earlier decision on one procedural point (the number of witnesses for the respondent), which is justified as it is a narrow point about process, and entirely unrelated to the merits of that decision.
59. After all of the evidence was led, the respondent's representative confirmed that the respondent no longer relies on the grounds of refusal in Schedule 2, paragraphs 3(1)(a)(i) and (ii) of the 2004 Act, leaving only two grounds of refusal.
60. The respondent's representative indicated that she was content for us to take into account the witness statement a child and family worker from Agency A(A059-068), although he did not give oral evidence. We did so, but this evidence has limited weight, since it could not be tested.
61. Finally, some of the evidence we heard related to the steps taken by school A for the transition of the child, the measures taken to meet his needs, and the TAC planning process. These may have been relevant to the 'appropriateness in all of the circumstances' test had we found that a ground of refusal exists. Since we do not, we have not made detailed findings in facts on these matters or reasoned about them. We would only say that it is clear that considerable efforts have been made by school A in its provision for the child (as supported by our findings in fact at paragraph 27 above).

**The first ground of refusal: specified school education not suited to age, aptitude or ability of the child (2004 Act, Schedule 2, paragraph 3(b))**

62. The relevant wording of this ground of refusal is as follows:

[the duty to place the child in the school does not apply] if the education normally provided at [school B] is not suited to the age, ability or aptitude of the child.

63. The term ‘age, aptitude or ability’ is to be construed disjunctively, so that lack of suitability on any of the three variables will suffice (so the phrase should be read as ‘age OR aptitude OR ability’): *Coates v Lothian Regional Council* 1999 Fam LR 8 (this point was conceded in that case: para 8-05). We may not consider any other factors.
64. As noted above, the burden of establishing that this ground of refusal exists falls upon the respondent. It is not argued that school B is not suited to the age of the child – it is part of a secondary school and the child is of secondary school age. The respondent’s case focuses on the ability and aptitude of the child.
65. A number of preliminary observations about this ground of refusal should be noted:
- a. It involves a consideration of the non-suitability of school B only, and not the comparative suitability of schools A and B;
  - b. It involves the suitability of the education specifically for the child;
  - c. We need to consider the education ‘normally provided’ at school B;
  - d. The use of the term ‘not suited’ requires a focus is on an overall lack of suitability (against the two relevant variables);
  - e. Giving the words ‘ability’ and ‘aptitude’ their ordinary and natural meanings (which we must do where a different interpretation is not indicated) the term ‘ability’ refers to current capability, while ‘aptitude’ refers to potential (natural) capability; and
  - f. We are not tasked with considering whether the education normally provided at school B is suited to the child across the variables specified; the focus of the ground of refusal is whether the education at school B is not so suited.
66. During oral submissions, the respondent’s representative (correctly) accepted that the concept of something being ‘not suited’ is a more exacting one than the concept of ‘suitability’ (as that word is used, for example, in the ground of refusal in Schedule 2, paragraph 3(1)(f)(iii) of the 2004 Act).
67. The appellant’s representative relied on the very recently published decision of Lord Young, in the appeal from a case in this jurisdiction, *JH v Scottish Borders Council* 2024 UT 50. In that case, the education authority relied on the ‘age aptitude and ability’ ground of refusal. Lord Young made two comments about that ground that are relevant here. In the first, he commented on evidence not available to the First-tier tribunal (FTS) in that case, at paragraph 15 of his decision:

The short point is that the FTS were correct to express concern that the respondent, on whom the burden of proof lay, chose not to lead evidence from witnesses with direct knowledge of school B’s pupils and the educational environment at that school. The FTS ought to have been careful to clarify why a witness giving indirect evidence on school B was an acceptable alternative. That would involve the FTS making clear findings as to witness C’s knowledge and experience in relation to school B’s pupils; its facilities and curriculum; the practical application of the entry criteria; and the profiles of children at all ages throughout the [specified school]. It is not difficult to envisage circumstances in which no appropriate individual from the school for which the placing request relates is available to provide testimony and therefor an

alternative witness with a less direct connection has to be led. But if that occurs, and the FTS's decision rests on that witness's testimony, the FTS should be clear as to what qualifies that witness to give evidence of appropriate relevancy and weight on the workings of the school in question.

68. In the current case, the respondent chose not to lead evidence from someone with direct knowledge of school B's pupils and its educational environment. Witness B has some knowledge as a result of visiting 2 or 3 times per year, and she has knowledge of the profile of a small number of pupils there. She does not work in the school and does not spend a substantial period of time in classrooms in the school. She is an occasional visitor there. We appreciate that she can comment on the school in general terms given her qualifications and experience, but she does not have direct knowledge of school B's pupils (that is, the pupil body as a whole) or the educational environment there.
69. When the lack of a witness from school B was put to the respondent's representative during oral submissions, she referred to the usual limit of two witnesses in the rules, and stated that the respondent had chosen to lead evidence from witness B as opposed to someone from school B. This is not an adequate explanation for the respondent's failure to call a witness from school B. The respondent could have asked for permission to bring an additional witness under the rules, but did not. The respondent is well aware of the facility for leading more than two witnesses since (as the appellant's representative pointed out) they led evidence from four witnesses in the previous placing request reference brought by the appellant (see T030). In any event, as the respondent's representative stated, the respondent chose to lead oral evidence only from witnesses A and B. No reason was advanced as to why the respondent did not lead evidence from a witness with the kind of direct knowledge referred to by Lord Young.
70. This approach in the *JH* case was referred to by the tribunal as 'regrettable', an observation with which Lord Young agreed (paragraph 14 of his decision). We agree that it is also regrettable in this case.
71. However, we must still (as Lord Young did) consider the evidence of school B that was available. In our view, witness B was unable to provide any detailed insight into the education normally provided at school B. Her evidence about this rested on her limited knowledge of the child's likely peer group (one pupil in secondary year 2).
72. This connects with the second applicable point made by Lord Young in *JH*, namely on the value of an analysis of pupil profiles, at paragraph 21:

It seems to me that an analysis of the pupil profile of existing children within a particular school will often be a helpful guide as to what education is normally provided by the school. It may also assist the FTS in assessing matters such as whether the child under consideration is likely to be able to interact socially with those existing pupils. But the assessment of a placing request should not be reduced to a simple comparison of the child's profile with a profile of existing pupils at the school in question. There is a risk that an individual child whose profile differs to some extent from the current cohort may be excluded even though the school has the expertise to provide suitable education for that child and the child would benefit from being placed at that school. It is important to focus on the statutory test of whether the educational facility is, or is not, suited to the particular child's age, ability or aptitude. Where a comparison of pupil profiles forms part of the assessment undertaken by the education authority, it is crucial to ask the following up question of what, if anything, that comparison tells the authority about whether the school is suitable for the child

in question. If the authority is refusing the placing request, it should be able to explain in what respects it considers the child would not benefit, or may suffer actual detriment, from being educated in the school under consideration.....As a general observation, an education authority refusing a placing request on the basis that the child's profile differs in material respects from the general profile of pupils attending that school, needs to articulate in what respect it considers those differences would adversely affect the child's education if placed at the school.

73. Here, witness B concluded that the social communication skills of almost all children in school B exceed those of the child (see the third bullet point at R075 of her report). Two problems exist here.
74. The first is that it became clear in her oral evidence that witness B does not have the knowledge of the cohort in school B to be able to reach that conclusion. She knows some of the year 1 pupils and one year 2 pupil. She did not tell us about the social communication skills of any others.
75. Secondly, this is a comparison of pupil profiles (from one perspective, albeit an important one in this case, namely social communication). Witness B did not explain how that difference would lead to the child not benefitting from or suffering actual detriment from being educated there (to use Lord Young's words). This evidence becomes even more limited when considered in context: most of the pupils in school B spend a proportion of their time (up to 80%) in the mainstream part of school C. We gained no sense from witness B's evidence of how the child would fare in a split arrangement at school B.
76. This means that witness B's evidence is not such that we can conclude that the education normally provided at school B is not suited to the aptitude and ability of the child. Since witnesses A and C provided no evidence about school B, and since the respondent has not provided any written evidence about the provision at school B, there is a lack of evidence from the respondent in support of this ground of refusal.
77. In any event, we conclude that the education normally provided at school B is suited to the child's ability and aptitude. This is for the following reasons:
  - a. School B is a special school which is part of school C. The evidence indicates that the majority of pupils in school B attend some mainstream classes with support in school C. This means that if the child attended school B, he would have access to mainstream education alongside the education normally provided in school B. This is not dissimilar to the arrangement at school A, both in terms of what happened between January and June 2024 and what is planned should the child return there.
  - b. The respondent presented evidence that 'A curriculum appropriate to [the child's] aptitude and abilities can be provided in either school' (witness B's report, R075, first bullet point). Witness B did not alter this view in oral evidence.
  - c. There is direct evidence from school B to indicate that the education provided there would be suited to the child's ability and aptitude. This exists in the school C School Handbook for 2022-2023, where it describes the provision in school B (A022). It is clear from the evidence that the child's principal difficulty is with social communication. The Handbook describes school B as providing specialist support for pupils with 'significant social communication difficulties'. It is clear that the child's challenges in this area are significant since they have prevented him from

accessing education on a full-time basis since around December 2003 or January 2024, and since mid-September 2024, he has not been accessing education at all. It seems, then, that the child's needs are precisely those catered for in school B, judging by the description used by school B itself. The significance of these difficulties is highlighted by the fact that they are preventing the efficient education of a pupil who is very academically able.

- d. This conclusion is supported by comments made by the teacher in charge of school B during the appellant's visit: that he could see no reason that the child would not be a fit for that provision (see findings in fact at paragraph 49 above). We accept that this opinion was based on information provided by the appellant only. However, it is still one source of support for school B's suitability. We see no reason to doubt the appellant's account; she presented as a credible witness on this and all other points. Indeed, a conversation such as this would be a natural one to have during such a visit, given its purpose.

78. Witness B's report refers to other 'key factors' in the placing request decision making process (R075, bulleted list). We have considered the factors captured in the first and third bullet points, above. The other points are not directly relevant to this ground of refusal, since they do not relate to the education normally provided at school B.

79. Taking all of this together, we are far from being satisfied that this ground of refusal exists; indeed, we are satisfied that the education normally provided at school B is suited to the child's ability and aptitude.

### **The second ground of refusal: breach of the 'mainstream requirement' (2004 Act, Schedule 2, paragraph 3(g))**

80. This ground of refusal exists where placing the child in the school specified in the placing request (school B) would breach the requirement in s.15(1) of the Standards in Scotland's Schools etc. Act 2000 (**2000 Act**). In order for this ground of refusal to exist, the specified school must be a special school (as defined in s.29(1) of the 2004 Act). The parties agree that school B is such a school, and given the evidence available, we conclude that this is the case.

81. The wording of this ground of refusal is clear: for it to exist, there must be a causal link between the placing of the child in school B and a breach of the requirement in s. 15(1) of the 2000 Act. This causal link does not exist here.

82. The appellant's representative argued that the education that is available to the child at school A is education in a special school. If that is correct, placing the child in school B would not cause a breach of the mainstream requirement (the requirement in s.15(1)), since the respondent would already be in breach of that requirement.

83. We are in no doubt that the requirement in s.15(1) is currently being breached in connection with the child. The PSB is without doubt a special school as that term is defined in s.29(1) of the 2004 Act. It is a unit (forming part of a public school which is itself not 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 unit. This is clearly the case given the purpose of the PSB and the nature of the facilities there (see the findings in fact at paragraph 25 above).

84. It is very clear from this evidence that the sole purpose of the PSB is to provide education specially suited to the additional support needs of pupils who attend. Nurturing needs, sensory needs, alternative examination needs, needs after coming back from an absence and medical needs are all examples of additional support needs, as defined in s.1 of the 2004 Act. Pupils are selected to attend the PSB: this is clear from the description of how the space is used. The child has certainly been attending there because of his additional support needs. Since we conclude that the PSB is a unit for the purposes of the definition of 'special school', we need not conclude whether this is the case for the classroom F08, a room in the PSB where the child spends his time. If we need to reach a view, we are in no doubt that F08 is a special school, as it is a 'class' that falls within the definition.
85. The respondent's representative argued that room F08 is used for purposes other than as a class for the child. However, this is not relevant to whether it is a special school. A classroom might be used as a special school for only part of the school day or week. It is still a special school for that period. In any event, we heard no evidence to suggest that room F08 was being used for purposes other than would fit the special school definition at any point. Also, it is in the PSB which, as we explain above, is a special school (unit).
86. Where a child spends part of their education in a special school, even a small proportion, the mainstream requirement is breached. However, in this case, the child was, from the start of the current academic year until September 2024, being educated on his own exclusively in a special school (F08 in the PSB). The plan is to return to that arrangement initially if he returns to school A (see the findings in fact at paragraph 42 above). There cannot be a clearer case of the mainstream requirement being breached: this educational arrangement is as far away from a mainstream one as it is possible to be.
87. Given this, the necessary causal element is not present, and so this ground of refusal does not exist. Had we reached the conclusion that the necessary causal element did exist, our decision on this ground of refusal would have been the same. We will now explain why.

*Application of the circumstance in s.15(3)(a) of the 2000 Act*

88. The requirement in s.15(1) of the 2000 Act is that the respondent must provide the child's education in a school other than a special school unless at least one of three circumstances set out in s.15(3) arise.
89. The respondent argues that none of the s.15(3) circumstances arise, meaning that it must provide the child's education in a school that is not a special school (school A). The appellant argues that the circumstance in s.15(3)(a) applies, namely that providing education for a child in a school other than a special school would not be suited to the ability or aptitude of the child.
90. Two general points to note. The circumstances in s.15(3) arise only exceptionally (s.15(3), last line). The burden of proof in relation to each of the s.15(3) requirements lies with the respondent, since these are part of the ground of refusal: the burden does not switch to the appellant.
91. A number of points of interpretation about the circumstance in s.15(3)(a) apply:

- a. We are not comparing two schools (in this case schools A and B) with one another. We must concentrate only on the provision of education for the child in a non-special school setting.
- b. The reference to 'a school other than a special school' in this provision (and in s.15(1)) does not refer to a particular school, but instead to a type of school. Usually, that type is referred to as a 'mainstream school'. That term is not defined anywhere in education legislation, but it does appear in the heading to s.15 and it is used widely in the Scottish school education field. This means that we are focusing on 'mainstream' education in general, not only the education being provided at school A in the mainstream portion of that school. The evidence of the child's education there is, of course, very important, since it is of the 'mainstream' type.
- c. The test here is 'not suited'. This suggests a general incompatibility between the child's ability or aptitude (or both) and the provision in a non-special school. Such an incompatibility relating to either ability or aptitude would lead to the circumstance arising.
- d. The words 'ability' and 'aptitude' are not defined and so should be given their ordinary and natural meanings, as outlined above in relation to the other ground of refusal.

92. Bearing all of this in mind, we now turn to consider the test in s.15(3)(a).

93. It is very clear to us that mainstream education is not currently suited to the child's aptitude and ability. That is the view formed by school A. This must be the case since the decision was taken to educate the child exclusively on his own, in F08 on his return to school in August 2024. Were he to return to school A now, he would continue, initially, to be educated exclusively and on his own in F08. Although the plan would be for the child to gradually move from F08 as his exclusive classroom (findings in fact at paragraph 42 above), witness A expressed this as a hope rather than as something that she was confident would happen. As explained above, F08 is not a mainstream environment (far from it). School A staff have, therefore, made a decision to educate the child in an environment which is not a mainstream one. Given that choice, it is very difficult to see how the respondent can justify the application of the requirement in s.15(1). This would require the respondent to argue that the educational arrangement chosen and implemented by school A staff was contrary to the child's ability and aptitude, and that an available setting (mainstream education at school A) which would be suited to his ability and aptitude (or at least one that would not be not suited to it) had been decided against.

94. The appellant explained the impact that the mainstream environment can have on the child (findings in fact at paragraph 38 above). The time the child spent in the PSB was highest at the end of the last academic year. The child is not willing to return to school A at the moment, even to the PSB, to be educated on his own. Given all of this, it is clear that education in a mainstream environment would not, currently, be suited to his ability or aptitude. He can manage the academic work, but from sensory and social relationships perspectives, he is unable to even manage attendance at school A's PSB. We do not know if he would be able to attend school B, but we are not comparing the schools, we must only consider whether or not the ground of refusal is met.

95. The child's absences from school A, which have increased over the last year, suggest that he struggles to cope even when there is a mixture of special school and mainstream classes. This is a further indication of the non-suitability of a mainstream environment.
96. The child expressed the view that the PSB is not good for him since there are so many people coming and going all of the time, meaning that he could not concentrate. Logically, a much busier mainstream environment would be even less suitable. It is obvious that learning requires an environment in which concentration is possible. We conclude that the child's ability and aptitude to be educated would be detrimentally affected by a busy mainstream classroom.
97. It is presumed that the circumstance in s.15(3)(a) arises only exceptionally. The situation for the child is exceptional: he was (and is to be) educated in a room on his own on a part-time timetable, due to sensory and socialisation issues, but cannot currently attend school even in this limited way. It is within our specialist knowledge that this is a highly unusual set of circumstances, even in the context of provision for additional support needs. This makes the situation an exceptional one.
98. If we had been required to do so, we would have found that the circumstance in s.15(3)(a) of the 2000 Act arises, and therefore that the requirement in s.15(1) would not apply. Since the requirement in s.15(1) would not apply, placing the child in school B (a special school) would not breach that requirement. For this reason also, this ground of refusal does not exist.

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

99. As we conclude that a ground of refusal does not exist, we decline to consider this test, as it is unnecessary.

**Paragraphs 24, 36, 38 and 93 in this decision have been edited by the Chamber President for reasons of privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018.**