



Additional Support Needs

DECISION OF THE TRIBUNAL

Reference

1. By application dated 10 July 2018 the appellant lodged a reference under section 18(1) and 18(3)(da) of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the 2004 Act”) against a decision of the respondent.
2. The reference is in respect of the decision dated May 2018 whereby the respondent refused a placing request made by the appellant under paragraph 2 (1) of Schedule 2 of the 2004 Act for her son (“the child”) to attend a special school, namely the specified school.

Decision

3. The tribunal confirms 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.
4. The decision of the tribunal is unanimous.

Process

5. The bundle consists of pages T1-T140, A1-A121 and pages R1-R94. A joint minute of admissions was entered into by the parties, the final version of which is at pages T131-132.

6. This case has a lengthy procedural history which it is necessary to summarise. The reference was lodged on 10 July 2018 on the appellant's behalf by her appointed representative. Following a case management period a hearing before the original tribunal members took place in January 2019. A decision allowing the reference and overturning the decision to refuse the placing request was issued in March 2019.
7. The respondent sought permission to appeal the tribunal's decision, which was ultimately granted by the Upper Tribunal. Following an appeal hearing a decision was issued in November 2019. The Upper Tribunal quashed the decision of March 2019 and remitted the reference to be redecided by a differently constituted tribunal. By direction dated December 2019 the Chamber President of the First-tier Tribunal appointed the current tribunal members to redecide the reference.
8. An initial case conference call was held in January 2020 and hearing dates assigned for March 2020. The appellant's solicitor thereafter withdrew from acting on her behalf and a further conference call was held in February 2020. The appellant and her husband, the child's father, took part in the call with a supporter present, Head of Direct Help and Support from charity A, who had worked with the family for a number of years. The appellant wished time to seek alternative legal representation and the hearing assigned for March 2020 was discharged.
9. A further conference call was held on 16 March 2020 and it was noted that the appellant had been unable to secure alternative legal representation.
10. It was decided that, notwithstanding the lack of legal representation, it was important to reach a decision without further delay and a hearing was assigned for May 2020. The conference call note is at T133-134.
11. Due to the outbreak of Covid-19, school closures and government lockdown a direction was issued to the parties on 25 March 2020 converting the hearing scheduled for May 2020 to a remote hearing. It was also determined that given a significant amount of evidence had already been heard at the original hearing and recordings of that evidence were available that it was appropriate for the newly appointed tribunal members to listen

to the recordings of the previous hearing in 2019 and for that evidence to form part of the proceedings.

12. We listened to all the recordings of the evidence of the previous hearing and considered all documents including the written submissions of both parties and the Joint Minute which was lodged at the last hearing. We decided that further written evidence pertaining to events between the last hearing and the redecision was necessary and a direction detailing this additional evidence was issued on 15 April 2020. The parties were also given the option of dispensing with the remote hearing in May if they were agreeable to the tribunal reaching a decision based on the previous recordings and all written evidence.
13. The appellant lodged an additional statement prepared by her husband summarising her position in relation to the reference and also providing the additional information requested by us. The statement also included submissions and the consolidated document is at A110-A121. At A118 it is stated that the appellant would find the proposal to proceed without a further hearing difficult to accept.
14. The respondent lodged supplementary witness statements and submissions. These documents are at R74-93. The respondent's representative confirmed that the respondent was content to rest its case based on the previous oral evidence and all written evidence.
15. A case conference call was proposed to discuss the appellant's concerns about the tribunal proceeding without a further oral hearing. Initially, the appellant advised that she and her husband could not participate as all of their children were at home due to school closures. The tribunal case work team advised the parties that the legal member could be flexible regarding the timings of the conference call and a call was arranged at a time suitable to the appellants and proposed by them. However, approximately 45 minutes prior to the scheduled call the appellant emailed the case work team to say they were unable to participate and wished their supporter to take the call on their behalf.
16. The call took place on 4 May 2020 with the appellant's supporter and the respondent's representative. The appellant's supporter was unable to advise if the appellant agreed

to the case being decided without a further hearing or if she or her husband wished an opportunity to address us on any issues arising from the supplementary statements or submissions from the respondent. It was explained that we could adapt proceedings to accommodate, as far as reasonably practical, the appellant's domestic circumstances. The appellant's supporter agreed to discuss the matter with the appellant and her husband and explain the options outlined to them.

17. The appellant's supporter contacted the casework team later that morning to confirm that the appellant was happy for the tribunal to proceed on the basis of all of the evidence and did not wish a further opportunity to make oral submissions to the tribunal members. A direction was issued on 4 May 2020 discharging the remote hearing scheduled.
18. We were satisfied that we had sufficient evidence to reach a decision and noted that the child's circumstances remain largely unchanged since the date of the first hearing. We convened remotely to consider the evidence to reach our decision.
19. In addition to the written evidence we listened to the recordings of the oral evidence of the following witnesses:
20. Witness A. A statement for this witness is included at A90-92. The witness confirmed the contents of her statement and was asked additional questions.
21. Witness B. A statement for this witness is included at R16-R18. The witness confirmed the contents of his statement and was asked additional questions. We also considered an additional statement lodged after the initial hearing from witness B which is found at R42-48.
22. Witness C. A report and transition plan prepared by this witness is included at R6-R14. The witness confirmed the contents of her report and transition plan and was asked additional questions. We also considered a written statement lodged after the initial hearing from witness C which is found at R82-84.
23. Witness D. A statement for this witness is included at A93-95. The witness confirmed the contents of his statement and was asked additional questions.

24. The child's father also gave evidence. A statement for this witness is included at A16-20. The witness confirmed the contents of his statement and was asked additional questions. We also considered an additional statement lodged after the initial hearing from the child's father which is found at A110-121.
25. An independent advocate was appointed to seek the child's views. The report is at T88-89. An updated report was instructed prior to the redeciding of the reference but the independent advocate reported that this was not possible due to a lack of engagement by the child and/or his parents.
26. In addition to the oral evidence of the witnesses outlined above we also considered a witness statement from Witness E which is found at R52-56 and a statement and supplementary statement from Witness F which is found at R49-51 and R74-81.

Issues in Dispute

27. The appellant asked the tribunal to overturn the respondent's decision to refuse the placing request for the specified school and the respondent asked the tribunal to confirm its decision. The respondent's position was that the grounds of refusal relied on were established and that in all the circumstances it was appropriate to refuse the placing request. The appellant's position was that the grounds of refusal were not established and the tribunal should require the respondent to place the child in the specified school.
28. The grounds of refusal relied upon by the respondent are set out at paragraphs 3(1)(a)(i), 3(1)(a)(ii), 3(1)(b) and 3(1)(g) of schedule 2 to the 2004 Act, all of which are set out below in the reasons for the decision.
29. In reaching our decision we considered all the available evidence and made the following findings in fact relevant to the issues in dispute.

Findings in fact

The child

30. The appellant is the mother of the child.

31. The child was 14 years of age at the date of the re-hearing.

[Paragraphs 32-34 inclusive have been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]

32.

33.

34.

35. One of the child's younger sisters attends the specified school. She has autistic spectrum disorder ("ASD") and complex needs.

36. The child has a general learning disability and has significant difficulties with perceptual reasoning, working memory and processing speed. He has dyslexia and impaired fine motor skills. The child has sensory difficulties, difficulties managing peer interactions and regulating his emotions.

[Part of paragraph 36 has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]

37. The child is articulate and has a good vocabulary. He can engage in adult conversation, although his understanding of situations and comprehension is not as developed as his use of language may suggest. He is reflective and has the capacity to engage in learning activities with support, especially in areas of interest to him. He has good general knowledge, particularly about the natural world. He enjoys practical activities and is able to engage with gardening or baking with adult supervision.

38. The child can use technology such as a tablet or mobile phone but requires supervision to ensure he accesses information in a safe way.
39. The child is capable of looking after his own personal care but requires considerable prompting and encouragement by his parents which can result in refusals and arguments.
40. The child is able to express his views to adults he feels comfortable with. He expressed his views to the Independent Advocate in September/October 2018, prior to the initial hearing.
41. The child wants adults to listen to him and get to know him and understand how he learns. He wants them to notice the signs when he has had enough. He wants people to be honest with him. He wants work broken down to his level with frequent breaks.

Schooling to date

42. The child attended primary school 1 from Primary 1 to Primary 5, between 2010 and 2014.
43. Primary school 1 is a mainstream school run by the respondent.
44. It was identified early on that the child had barriers to his learning. He was referred to an Educational Psychologist in Autumn 2011.
45. The child was referred to CAHMS in early 2012 but discharged in January 2013 due to missed appointments.
46. He was assessed by an Occupational Therapist in 2012 and again in 2015. Difficulties with fine and gross motor skills were identified.
47. The child had an Individualised Education Plan ("IEP") from September 2013.
48. The child was assessed at his parents request by an Independent Educational Psychologist in May 2014. The conclusion was that the child had general rather than

specific learning difficulties and it was recommended that his needs would be best met by a “well-differentiated and individualised learning experience”.

49. In September 2014 the child was referred to the primary behaviour support team.

50. In Autumn 2014 he started to refuse to attend school.

51. In November 2014 a Child and Young Person’s Multiagency Assessment and Plan (“CYPMAP”) was prepared. It was noted that the child experienced barriers in all areas of his learning but that with differentiation, the preparation and implementation of an IEP and significant levels of adult support there was evidence of progress in numeracy and literacy within the early phase of Curriculum for Excellence (“CFE”).

52. The CYMAP also identified concerns about the child’s emotional and social development and difficulties engaging appropriately with his peers. It was noted that the child had started to develop an awareness of his learning and social difficulties compared to his peers. He had difficulties coping with the demands of school and started to disengage from learning and had a tendency to run away from school.

53. The child was re-referred to CAMHS, SLT and OT in November 2014.

54. The child’s parents made a placing request for him to attend the enhanced provision at primary school 2 and the request was granted with the child transferring to primary school 2 around March 2015 in primary 5.

55. The enhanced provision at primary school 2 caters for children with social, emotional and behavioural difficulties. It supports approximately 8 children and is separated from the mainstream part of primary school 2.

56. The child transitioned reasonably well to primary school 2. Initially, he made some progress with his learning. On occasions when pupils from the mainstream part of the school came in to the provision he interacted with the children with supervision by staff. He was good with real-life learning in areas that interested him. He made some academic progress and was working at early to first level of CFE.

57. A further assessment by CAMHS in May 2016 confirmed the general nature of the child's difficulties which were found to be largely within the 1st - 2nd percentile, with verbal comprehension being his strongest ability (8th percentile).

58. The child started primary 7 in August 2016. Towards the end of 2016 and in the early part of 2017 there were a number of incidents when the child was distressed and displayed unsafe behaviour.

[Part of paragraph 58 has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]

59. On more than one occasion he left the school grounds. He climbed over the fence and into the woods. He ran towards the main road and crossed busy roads without checking for traffic. The Police were called on one occasion. The child's parents were called to the school on several occasions and the child's father spent time with him in the school to support staff.

60. In February 2017 the child was re-referred to CAMHS due to self-harming behaviour.

61. In April 2017 an adapted timetable was put in place to focus on practical activities the child could engage with such as cooking and gardening. He was attending school for short periods each day.

62. In May 2017 transition plans were discussed with a view to the child attending an enhanced provision in High School A. The child was introduced to an outreach worker from Pathways to Success but failed to build a positive relationship with the allocated worker.

63. In June 2017 the child's parents were informed that the enhanced provision identified was no longer going to open as planned and it was suggested that he could attend an enhanced provision at High School B.

64. At the end of primary 7, when the child stopped attending school he was working at early/1st level of CfE for literacy and numeracy. In other areas, such as geography and history, although he might not have had the ability to produce written work, he was able to use learning opportunities to develop his abilities and interests. He particularly benefited from outdoor learning experiences. The child needed a high level of support to engage in learning activities.
65. The child's parents requested that he be allowed a further year at primary school 2 before transitioning to high school but the respondent did not permit this.
66. The family did not enrol the child at any high school for August 2017.
67. An updated assessment by CAMHS in September 2017 described the child's overall functioning "within the borderline between low and extremely low" and with a relative strength in communication skills.
68. The family moved house in October 2017 and all children were removed from schools in the respondent's area as the family thought their new address was within another local authority area. The family then discovered that their house was near the border between two authorities but they were in fact still within the respondent's area.
69. In March 2018, with the help of witness C, the child was enrolled at school A but he did not attend.
70. On 29 March 2018 the child, his father and the family supporter attended a meeting with witness C to discuss options for the child's schooling. The child was able to participate in the meeting and expressed his views. He stated that he wished to get back to school and said that he had matured and grown out of behaviours such as running away. He also stated that he needs people to get to know him and understand how he learns so that they can help him.
71. In May 2018 the child's parents made a placing request for him to attend the specified school. This was refused by the respondent on 29 May 2018 and it is that refusal that is the subject of this reference.

72. The child has not attended school since finishing primary school in June 2017 and has been at home with his parents. They have tried to engage him in activities but have found this difficult. He has engaged in some practical activities such as helping the local gamekeeper but has been unable to sustain these activities. His self-esteem is low and he has continued to self-harm.

The specified school

73. The specified school is a special school run by the respondent. It caters for primary and secondary school age pupils with additional support needs.

74. At the date of the previous hearing the school roll was 109 and there were two older pupils in S4 who could be said to have similar profiles to the child. The profile of the pupils who attend the specified school has changed over the years and the school has increasingly catered for pupils with severe and profound needs. This has continued since the since the date of the previous hearing; the two pupils mentioned as well as other more able and verbal pupils have moved onto other high schools.

75. The specified school now has 95 pupils. There are 57 primary pupils and 38 secondary pupils. There are 17 classes in the school and a total of 110 members of staff. This includes teachers, child development workers, nursery nurses and learning assistants.

76. On site the school has access to a nursing team, speech and language therapy ("SLT") OT and physiotherapy. The school also works closely with the Community Learning Disability Nursing ("CLDN"), CAMHS and Community Child Health Paediatric ("CCH") team.

77. 17 pupils in the school are in wheelchairs and have complex or multiple physical health needs and almost all require 24-hour support to access daily activities and personal care routines. Almost all of these pupils are non-verbal.

78. 55 pupils in the school have a diagnosis of ASD. Some of these pupils also have other conditions such as epilepsy or ADHD. Some of the pupils have basic verbal abilities but

would be considered non-verbal in terms of their ability to communicate in new or unknown situations.

79. 23 pupils have a range of different conditions, including cerebral palsy, Down's syndrome or other specific chromosomal conditions.

80. A significant part of the school day is spent assisting the pupils with their physical and personal care needs. A significant number of the pupils require assistance with transfers for toileting and feeding. Some also require support with other physical health needs such as physiotherapy or breathing exercises. A number of the pupils have specialised equipment such as chairs, frames and trolleys

81. The number of staff and additional healthcare professionals supporting pupils makes it a busy and noisy environment.

82. Approximately 90% of the pupils in the specified school are likely to work within the early level of CFE for the duration of their school career, with the senior phase pupils working towards National 1 or National 2 qualifications. The majority of pupils have a developmental age of 0-4 years and follow an elaborated curriculum, often involving sensory based learning.

83. The main focus for most of the pupils is on developing the skills to be able to accept support from adults and to better understand their environment. None of the pupils currently at the specified school will leave fully independent or be able to engage in employment. All of the pupils will have an adult package that involves specific support to access daily living skills and input from specialist adult support centres.

84. It would not be appropriate for the child to be placed within any of the existing classes at the specified school. He would require an individualised curriculum and would need to be taught individually by a teacher in a separate teaching space.

85. The specified school does not have any additional teachers who would be available to educate the child. The respondent does not have any spare teachers and would require

to take an extra teacher into employment to educate the child if he was placed at the specified school.

86. The specified school does not have any unused space which would be appropriate for the child to be educated in. If the child were to be educated at the specified school, additional accommodation would have to be built. A single one unit pod in the playground with no toilet or breakout room would cost a minimum of £25,000 and a larger temporary unit with toilets would cost at least £520,000.
87. The specified school has switch access doors which provide a level of security, however there is a manual override on the switch panel which can be activated by anyone to allow them to leave, meaning it is not 100% secure. Most of the children within the specified school would be unable to operate the manual override but a more able child would be able to do so.
88. The specified school does not have a garden area and does not usually employ youth workers to support pupils

School A

89. School A is a mainstream high school with a Complex Needs Provision (CNP) and a Creative Learning Department (CLD).
90. It has a roll of approximately 1500 pupils from S1 to S6.
91. The CNP has approximately 20 pupils and is in a separate area of the school.
92. The CLD is a resource for the whole school with pupils able to access the Department for a variety of reasons. Some pupils, like the child's older brother access CLD a few periods per week. Others access the CLD for greater periods of time. Around 20% of the pupils accessing the CLD are principally based within it.
93. The CLD has a principal teacher and a principal teacher support part-time. The CLD also has two full-time support for learning teachers, three part-time support for learning

teachers and one outdoor learning teacher. It has 2.5 youth workers and 10 learning assistants.

94. The main part of the CLD is located on the first floor of the school. There are two full-size classrooms and one smaller group work room.
95. On the ground floor of the school the CLD also has a Nurture area. This is a small suite of rooms which has been created to resemble a home environment. The area has recently been fobbed and has an alternative route into the school which provides a quieter entrance/exit.
96. The number of pupils accessing the nurture area is limited to a maximum of 15 to 20 and there are two learning assistants there all the time.
97. School A has a school garden and access to swimming pool and fitness suite at the sports centre.
98. If the child attends school A it is likely that he would initially spend most of his time within the CLD and is likely to spend a substantial amount of time outside of the classroom. He could have additional support from the respondent's well-being team, who could work with him on a one-to-one basis, taking part in practical and outdoor activities. There would be the opportunity to access mainstream classes as appropriate in order to work towards national qualifications.
99. The child could also be given opportunities to obtain work experience or a volunteering role and could be considered for a place on the "Introduction to College" course which is a supported course at College A. A referral could be made to the school nurse if the child required support with personal care and a referral could also be made to the respondent's Young People's Advisory Service.
100. Teachers at school A have experience of dealing with pupils with a similar profile to the child. They have experience of dealing with children who attempt to abscond from the school grounds and have procedures and risk plans in place. They have been provided with training and use appropriate strategies as necessary.

Reasons for the Decision

101. The tribunal found the witnesses to be largely credible and reliable and their evidence extremely helpful. We considered the oral and written evidence and we were satisfied that there was sufficient evidence available for the tribunal to reach a decision on the reference.

102. In reaching our decision we applied the findings in fact to the relevant statutory provisions.

Statutory Framework

103. Section 1 of the 2004 Act provides:

“(1) A child or young person has additional support needs 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.

(2) In subsection (1) the reference to school education includes, in particular, such education directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential.

(3) In this Act, “additional support” means –

(a) in relation to...a child of school age or a young person receiving school education, provision (whether or not educational provision) which is additional to, or otherwise different from, the educational provision made generally for children, or as the case may be, young persons of the same age in schools (other than special schools) under the management of the education authority”.

104. The parties agreed, and we found as a matter of law, that the child has additional support needs in terms of s.1 of the 2004 Act.

105. The remaining parts of section 1 detail the meaning of school education and additional support needs and we applied those meanings when reaching our decision as more fully explained below.

106. Paragraph 2(1) of Schedule 2 of the Act provides:

“2(1) Where the parent of a child having additional support needs makes a request to an education authority to place the child in the school specified in the request, being a school under their management, it is the duty of the authority, subject to paragraph 3, to place the child accordingly”.

107. It was agreed that the appellant made a placing request to the respondent and the specified school was a school under their management. The respondent’s position was that they had established four of the grounds in paragraph 3 to refuse the request.

108. The relevant parts of Paragraph 3 of Schedule 2 of the Act are:

“3(1) The duty imposed by sub-paragraph (1) or, as the case may be, sub-paragraph (2) of paragraph 2 does not apply—

(a) if placing the child in the specified school would—

- (i) make it necessary for the authority to take an additional teacher into employment,
- (ii) give rise to significant expenditure on extending or otherwise altering the accommodation at or facilities provided in connection with the school

(b) if the education normally provided at the specified school is not suited to the age, ability or aptitude of the child

(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 2000 Act”.

109. The respondent relies on these 4 grounds. The appellant’s position is that the grounds of refusal were not established.

The tribunal's powers

110. In reaching our decision the starting point is the tribunal's powers in relation to a reference which are found in section 19 of the 2004 Act.

111. Section 19(4A) of the Act provides:

"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 of the 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, and by such time as the First-tier Tribunal may require."

112. There is a two-stage test in terms of section 19(4A) as set out above. Firstly, the tribunal needs to determine if the respondent has established one or more of the grounds of refusal. Secondly, the tribunal has to consider whether in all the circumstances it is appropriate to confirm the decision of the respondent.

113. We had to consider whether each ground of refusal existed at the date of the rehearing.

Stage One: Grounds of refusal

Ground 1: Additional teacher

Schedule 2, Paragraph 3 (1)(a)(i) - placing the child in the specified school would make it necessary for the authority to take an additional teacher into employment.

114. This is the first ground of refusal relied upon by the respondent and we accepted the evidence of witnesses B and F. Witness B is the Headteacher of the specified school and his evidence about this was compelling. He knew the school, its pupils and teaching staff well and he was clear that the child would need to be taught separately from the existing pupils at the school as he required a different curriculum experience. Witness F

confirmed the staffing levels available within the authority and we accepted his evidence that an additional teacher would need to be employed. None of this evidence was challenged and we found this ground of refusal existed at the date of our decision.

Ground 2: Significant expenditure on extending or altering accommodation

Schedule 2, 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.

115. This is the second ground of refusal relied upon by the respondent and we accepted the evidence of witnesses B and F. Witness B was clear that the child would need to be taught separately from the existing pupils at the school as he would need a different curriculum experience to that offered to the pupils in the school. He described the physical environment at the school and the facilities and confirmed there was no available teaching space suitable for the child. Witness F confirmed in his supplementary statement that the option of adding an additional teaching space to the specified school was priced by the respondent and we accepted this evidence. We considered that the cost can properly be described as significant and found that this ground of refusal existed at the date of our decision.

Ground 3: Education normally provided at the specified school not suited to age, ability or aptitude of the child

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”

116. This is the third ground of refusal relied upon by the respondent. In considering this ground we had regard to the normal meaning of the statutory language. Firstly we considered the education normally provided at the specified school. We relied on the evidence of witness B in relation to the education normally provided at the specified school. We noted that the pupils at the specified school have severe and profound additional support needs. We also accepted the evidence that the profile of the pupils was becoming more severe and complex over time and that by the date of our decision, the more able and verbal pupils had left or been transferred to other schools or provisions.

117. We considered that the education normally provided at the specified school is necessarily geared towards the needs of its current pupils. We accepted the evidence of Witness B who stated that the main focus of the specified school is to develop pupils' skills to be able to accept adult support, to better understand the world and environment they live within and to live as an adult within their local community. For many of the pupils a significant part of the school day is spent on personal care tasks such as toileting and eating.
118. We also accepted witness B's evidence that the majority of the pupils are working at the early level of the CFE or national 1 or 2 stage in the senior phase, with an elaborated curriculum often based on sensory activities. The specified school is likely to no longer need subject specific teachers to deliver their curriculum. The specified school's curriculum is described as "elaborated" to suit children with severe and profound needs. None of the children are expected to go into any type of further education or employment and all are expected to need adult support throughout their lives.
119. Next we considered the child's age, ability and aptitude. The specified school caters for both primary and secondary pupils and therefore would be suited to the child's age.
120. In relation to the child's ability and aptitude we relied on the evidence of witness A and C. Witness A had been the Headteacher of primary school 2 and knew the child well. She spoke of the academic progress he had made in primary 5 and 6 before his ability to access the curriculum became significantly impaired towards the end of primary 7. It appeared to us that the main barrier to the child's progress was his inability to access the curriculum at times of distress. We accepted witness A's evidence, which was supported by the evidence of witness C, that the child has the ability to learn and progress in some subjects, particularly those which are of interest to him.
121. Witness C is an experienced educational psychologist and her evidence was compelling. We relied on her report at R6-8. Although she only met with the child once, she knew the family well, had access to a significant volume of information on the child and knew both the specified school and school A well. She identified barriers the child has for learning but also highlighted his areas of strength. We accepted her opinion that

the child's expressive language skills and ability to be reflective shows an ability and aptitude far beyond the ability and aptitude of the pupils who attend the specified school.

122. The best estimate of the child's ability is from his last experience of school upon leaving primary 7. He was assessed at early/first level of CfE. Witness C acknowledged that it is likely that the child has regressed due to the lack of education since then. However, she stated that the level achieved in primary 7 would be the starting point for planning his education upon reintegration to school. The child is articulate with a good use of vocabulary; indeed, his verbal and communication skills are described as a strength. He has a keen interest in particular subjects such as fossils and other science topics.

123. Taking into account the child's ability and aptitude we did not consider that the education normally provided at the specified school was suited to the child. We accepted witness B's evidence that the child would need to be educated separately from the other pupils at the specified school given the disparity between the child's abilities and those of the pupils at the specified school.

124. We accepted that the child requires an individualised and differentiated curriculum upon a return to education and not an elaborated curriculum as provided at the specified school. The child's profile is in contrast to the pupils who now attend the specified school, who are generally non-verbal and who are performing at a lower educational level.

125. The child was described as being a sociable and friendly boy. He was able to interact positively with other pupils in primary school at times, though he needed support to manage social relationships effectively. According to his father, the child wants "to be like any normal kid" and aspires to be like his older brother. Witness C described the child as reflective and self-aware. Witness B considered that the statements made by the child in the advocacy report were at a level that the majority of his pupils would not be able to manage. We are satisfied that there would not be a suitable peer group for the child at the specified school.

126. The specified school does not have outdoor or non-classroom learning spaces. The child enjoys being in the outdoors and is most likely to be able to re-engage in education

through learning activities that inspire his interest. The educational experience at the specified school would, however, be primarily classroom based.

127. Having considered the education normally provided at the school and the child's ability and aptitude we concluded that the education normally provided at the specified school is not suited to the age, ability or aptitude of the child and found that this ground of refusal existed at the date of our decision.

Ground 4: Presumption of mainstream education

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".

128. This is the fourth ground of refusal relied on by the respondent. The ground in paragraph 3(1)(g) is sometimes referred to as the presumption of mainstreaming ground. In order to consider the ground it is necessary to consider the terms of s.15 of The Standards In Scotland's Schools etc Act 2000 ("the 2000 Act).

129. Section 15 provides:

"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...

(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".

130. To establish this ground the respondent must 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). We considered each exception in turn. The first exception in 15(3)(a) is 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 respondent's third ground of refusal but it places the responsibility on the respondent to show that mainstream education is suitable to the ability or aptitude of the child.

131. We found that, at the date of the hearing, mainstream education is suited to the ability or aptitude of the child. In the appellant's submission at the original hearing, it was argued that the CLD within school A cannot be considered to be mainstream education, however we did not accept this. It was noted that the issue of whether school A or the CLD within school A can be defined as mainstream was discussed before the Upper Tribunal, and it was stated that it was common ground that the specified school is a special school as defined in the 2004 Act and that neither school A or the CLD within it is a special school. It was also stated that there is no statutory definition of "mainstream" but that parties proceeded on the basis that the expression was used to describe a school which is not a special school. We agree with this interpretation and consider that school A and the CLD within it are mainstream provisions.

132. We consider that the additional support provided by the CLD in the mainstream setting is suited to the child's ability and aptitude. We accepted the evidence from witness D that school A can provide the child with education suited to his ability and aptitude. We noted that the school provides education for a wide range of pupils of varying abilities and that there were a number of pupils within school A with similar profiles to the child. We also accepted the evidence of witness C who had experience of working with these children that school A is suited to the child's ability and aptitude. We also accepted the written evidence of witness E, principal of the CLD, who outlined the potential educational opportunities and additional support that could be provided for the child. Although this witness had not met the child, she had reviewed the significant amount of information about the child to form an opinion about his ability and aptitude.

133. We did not consider that providing education in a mainstream school was not suited to the child's age ability or aptitude and found that this exception did not apply at the date of our decision.

134. Next we considered the exception in s.15(3)(b) that providing education in a school other than a special school would be incompatible with the provision of efficient education for the children with whom the child would be educated. We relied on the evidence of witnesses B and D who were both of the view that the child's behaviour could be managed within the CLD. Witness E also stated that the CLD had many pupils with similar behaviour to the child which are managed within the CLD. The child's parents were concerned there would be a negative impact on the child's older brother who attends school A if the child was also there. However, we noted that the child's brother is due to leave school in June 2020 and therefore it cannot be said that it would be incompatible with the provision of efficient education for him specifically, or more generally for the children with whom the child would be educated. Accordingly, we did not consider that this exception applied at the date of our decision.

135. The final exception is in s.15(3)(c) which is that providing education in a school other than a special school would result in unreasonable public expenditure being incurred which would not normally be incurred. This exception was not in dispute and we did not consider that it applied at the date of our decision.

136. We did not consider that any of the exceptions in s.15(3) applied and therefore found that the respondent's fourth ground of refusal existed at the date of the decision. Having found that all 4 of the grounds of refusal existed at the date of our decision we then considered stage 2.

Stage 2: Is it appropriate in all the circumstances to confirm the respondent's decision

137. We consider that in all the circumstances it is appropriate to confirm the Respondent's decision. Many of the factors which led us to the conclusion that the grounds of refusal existed are relevant in the overall determination of appropriateness, although we also considered a number of other factors. While the grounds relied upon did not require us

to consider the respective suitability of the specified school with school A we consider this a relevant comparison to make in the overall decision about appropriateness.

138. We consider that it is appropriate to refuse the placing request in part because the education provided in school A proposed by the respondent, fully described by witness E, would be more beneficial to the child than the education provided in the specified school and more likely to result in a better outcome for him.

139. We took into account the definition of school education referred to in s1 of the 2004 Act, and considered it appropriate to take a holistic view of the child's needs so that he develops his personality, talents and mental and physical abilities to their fullest potential. We did not consider that the child would have the same opportunity to reach his fullest potential if placed at the specified school. In particular we did not consider that there would be an appropriate peer group for the child in the specified school or appropriate opportunities to learn from others as he would effectively be taught apart from other pupils. We consider an appropriate peer group within an educational setting significant for adolescent development. We consider that placing the child at the specified school would be detrimental to developing his social and self-regulation skills. We also considered the placing of the child in a school with less able pupils may impact on his self-esteem.

140. The child's parents' concerns about his safety and lack of awareness of danger which places him at risk are completely understandable. This constitutes a main reason for their request for a placement at the specified school. The child's parents were of the view that the specified school is the only school which can keep him safe because there is a secure access door. While the security at the specified school was greater than the CLD at school A at the time of the first hearing, the security at the latter has increased in the intervening time with the addition of key fobs. We also took into account witness B's evidence that the specified school's security does not provide a guarantee that the child would not be able to abscond as it is possible that he could work out how to exit the school.

141. We accepted the evidence of witness C that the child is most likely to benefit in the long-term from the opportunity to develop self-regulation skills rather than rely on a more secure environment to keep him safe.
142. We accepted the evidence of witness C, D and E that staff in school A have experience and expertise supporting children who are likely to abscond as well as those who can be violent. Witness C confirmed that these behaviours were not uncommon in the CLD or CNP.
143. We were acutely aware of the fact that the child has not been in education for nearly 3 years and appreciate it will be very difficult for him to reintegrate into a school setting. We consider that the development of strong and trusting relationships, not just with the child but also with his family are vital in order to support the child to re-engage with education. We consider that this could be managed with the supports suggested by witnesses C and F. We consider that access to a wide range of supports, including youth workers and practical activities available at school A are likely to be of significant benefit to the child, and that he could potentially have 2 more years of education with access to college courses.
144. We also noted the child's parents concerns about the size of school A. However, the CLD, and in particular the Nurture area is accessed by only certain pupils and arrangements can be made for the child to enter/exit the school from a quieter location and at quieter times if required. We also noted that the specified school, although smaller, was described by witness C as "not a low stimulation environment".
145. Overall, taking into account all the factors above we consider that all four of the grounds of refusal did exist at the date of our decision and in all the circumstances it is appropriate to confirm the decision of the respondent.