

# DECISION OF THE TRIBUNAL

FTS/HEC/AR/22/0115

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| **Witness List:** **Witness for Appellant:**The appellant, mother of the child (Witness A)Project worker from charity (Witness B)**Witness for Respondent:** Depute head of School A (Witness C)Acting Head Teacher of school B (Witness D) |

**Reference**

1. This is a placing request lodged with the tribunal in June 2022. It is made under section 18(3)(da)(i) of Education (Additional Support for Learning) (Scotland) Act 2004 (**the 2004 Act**). The appellant asks the tribunal to require the respondent to place the child in the specified school, **school B**.

# Decision

1. The tribunal overturns the decision of the respondent to refuse the placing request. The placing request is therefore granted. The tribunal requires the respondent to place the child in school B by February 2023 or such other time as agreed between the parties in terms of section 19(4A)(b) of the 2004 Act.

# Process

1. A hearing took place by video conference over two days in November 2022.
2. A case management call took place in September 2022, during which procedural matters were discussed and agreed with directions made to regulate the hearing and the pre-hearing process. A direction was issued for a joint minute of agreement (T40 –T41). Some of the matters covered in the joint minute are reflected in our findings in fact. A direction was issued that the child’s views were to be ascertained by an independent advocate. The independent advocate carried out an observation of the child due to child’s communication difficulties (T034-T39).
3. The bundle of evidence comprises T001-T050, A001- A039, and R001-R063. Statements were lodged in advance of the hearing and evidence was heard at the hearing from witnesses for the appellant and respondent.
4. Following the conclusion of the hearing, written submissions were directed, with an opportunity for each party to comment on the submissions of the other. The respondent submitted that one part of the appellant’s oral evidence was hearsay and should not be given any weight. The appellant recalled in oral evidence that the child’s class teacher had told the appellant that the child would benefit from a specialist provision, but this was not in the appellant’s written statement. The appellant asked us to place weight on this oral evidence. It would have been open to the appellant to call the class teacher as a witness. As they did not, and no reason was offered, we have not considered the hearsay evidence.

# Findings in Fact

1. The child is 5 years old. The appellant is the child’s mother.
2. The child started primary 1 at **school A**, a mainstream primary school, in August 2022.
3. The appellant made a placing request for school B, a special school managed by the respondent. The respondent refused the placing request in May 2022.

*The child’s additional support needs*

1. The child has complex needs. She has a genetic condition (T040). Children born with this condition have mild to moderate learning problems (A028). Due to the child’s communication and attention difficulties it has not yet been possible to carry out a formal cognitive assessment. The child has a diagnosis of Autistic Spectrum Disorder (**ASD**) (T040). **[Part of this paragraph has been removed 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 (schedule to SSI 2017/366)]**.
2. The child has speech and language delay. Most of the child’s communication is non- verbal, with a limited range of single words (T040). The child needs ongoing support for the development of early communication and interaction skills, such as turn taking.
3. There has been a marginal increase in the child’s use of single words since starting primary school. This is due to the modelling of single words by the adults who support the child. The child needs ongoing support for language development in order to promote her ability to communicate and to minimise dysregulation as a result of not being understood. Given the child’s significant communication difficulties, she would benefit from a total communication environment and input from Speech and Language Therapy (**SALT**).
4. The child struggles with transitions between tasks and locations. The child needs strategies to support her understanding of transitions. The child is not yet able to use strategies such as a visual timetable. The child can become distressed if not supported during transitions. The child needs a learning environment with predictable structure and routine (T040).
5. The child finds large, loud and busy environments distressing and struggles to regulate her emotions in such environments. The child needs ongoing support for her sensory needs (T040).
6. The child does not have a sense of danger (T040). The child often places items in her mouth. The child runs off when distressed, or when playing outside. The child is at risk of choking and absconding in a school environment. The child needs staff to be aware of her lack of sense of danger and ensure supports are in place to keep her safe.
7. The child enjoys spending time outside. She likes to explore her environment independently. The child also loves to listen to songs and nursery rhymes and to sing. This helps to support her learning and development. The child needs a curriculum with motivating and sensory based activities to support the development of her early skills in literacy, numeracy and problem solving (T040).
8. The child needs support with life skills such as dressing herself. The child needs a curriculum which focusses on development of her life and self-care skills. **[Part of this paragraph has been removed 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 (schedule to SSI 2017/366)]**.

*School A*

1. School A has a roll of 480 pupils with around 86 primary 1 pupils. There are currently 23 pupils in the child’s class. Class sizes increase to 30 in primary 2 and primary 3. In primary 4 to 7 the maximum class size is 33.
2. Primary 1 classes are in a separate infant building. The sensory architecture of the school will change once the child transitions to primary 2 as these classes are not in the infant building. There will be more children in the child’s class in primary 2. The child will struggle to transition to primary 2.
3. Adjustments need to be made to the school day as a consequence of the child’s sensory profile. The child has a soft start and finish time to support calmer transitions (R052). The child does not go to the lunch hall with her peers to minimise the impact of transitions and to reduce sensory stimulation (R053).
4. The child’s peers in primary 1 are working on Early Level of Curriculum for Excellence, and the majority are expected to have achieved this by the end of primary 1. There is a significant gap between the child and her peers in relation to the level of work they are able to participate in. There are no other children in primary 1 who are non-verbal
5. The child has a highly differentiated and individualised timetable for which she needs 1:1 full-time support from a Pupil Support Assistant (**PSA**) allocated to her. She does not participate in the wider class teaching in a meaningful way. The child’s learning is self- directed and play based (R053). The child does not tolerate adult led activity without becoming distressed.
6. The child has been heard to recite numbers 1 to 20, but within this range of numbers is not able to indicate if a number is bigger or smaller than another number, or to start her recitation at a number other than 1. Given a choice of two shapes of different sizes, the child is not able to indicate which one is bigger. The child has made limited progress in numeracy since starting school.
7. The child is unable to participate in the full mainstream school curriculum. The child does not participate in PE and has only attended a short part of school assemblies on a few occasions. She has recently started to access outdoor learning sessions with her class however she does not participate in a meaningful way in these sessions.
8. There is a significant gap between the child and her classmates in relation to socialisation. The child engages in solitary play activities that interest her. She rarely watches other children and largely acts as if she is not aware of them. At times she engages in an activity she likes, such as painting, alongside other children. If another child comes into her play space she may tolerate this or leave the activity. She makes very limited eye contact.
9. The child’s needs to be closely supervised to ensure her safety. In November 2022 the child came home with a large button in her mouth. During November 2022 the child tried to run out of the school gate. School A are unable to ensure the child’s safety at all times.
10. When not understood or feeling frustrated, the child displays a range of distressed behaviours at school. Incidents of distressed behaviour occur two to three times a week at school. The child has displayed self-injurious behaviour including throwing herself to the floor and banging her head. More frequently the child bangs her head on an adult’s stomach. The child’s PSA is familiar with the child’s needs and can support the child during these times which helps to limit the impact on other children in the class. There has been an increase in distressed behaviour at home since starting school. The child’s intake of food at school A is limited (R053). The child eats a range of foods at home which she will not or cannot eat in school. The child’s minimal food intake at school has a negative impact on her ability to learn.
11. There are 11 full time PSAs and 1 part time PSA at school A. The cost of a PSA is

£19,500 per year (R063). Funding for the PSA allocated to the child comes from the school’s discretionary budget. The cost of the full-time PSA allocated to the child has an impact on the availability of PSA support for other children at school A who may need it. The child is not the only child in primary 1 at school A to have a 1:1 PSA.

*School B*

1. School B has a roll of 51. School B has 6 classes.
2. The class identified as suitable for the child is class C. Class C has 7 children (five pupils in P1 and two pupils in P2) and 4 staff members. Class numbers range from 7-9 pupils with 4-5 staff (R045, R049). Class C has previously had 8 pupils. Other classes in school B have either 4 or 5 members of staff. There is a high adult to pupil ratio in class C and in all classes at school B. Within this environment the child would not require a 1:1 PSA.
3. Each classroom in school B is approximately the same size with varying layouts (R040, R043-44 and R048). The physical space in class C could accommodate an additional child if furniture is rearranged. The addition of another child would not impact on the use of space outwith the classroom, such as the gym hall.
4. Class C has access to an outdoor secure enclosed courtyard play area situated in the centre of the school at all times (R042).
5. The majority of pupils attending school B have a diagnosis of ASD, as well as a learning disability. All children in class C have speech, language and communication needs. Six of the 7 children have a diagnosis of ASD. The majority of children in the class are non- verbal; two children use single words. The children in class C struggle with emotional regulation and with transitions between tasks and locations and need ongoing support for their sensory needs. The pupils in class C all have additional support needs in relation to language and communication. They have a similar profile of needs to the child.
6. **[This paragraph has been removed by the Chamber President for reasons privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**.
7. The children in class C are learning within an adapted version of Curriculum for Excellence. The children are working to achieve milestones which is pre-Early Level of Curriculum for Excellence. Pupils in other classes are working at differing levels of Curriculum for Excellence including a mixture of Early Level and milestones. All children have an individualised learning plan.
8. School B adopts a total communication approach using visuals, songs, signing and other structured support for communication. The school benefits from SALT who visit the school twice per week. SALT carry out small group work with children, provide advice to teachers, and support setting up learning in relation to speech and language.
9. School B has a focus on life skills including eating, toileting, health and wellbeing and dressing. School B staff are experienced in supporting pupils who struggle with eating in school, using various strategies such as sensory play with food. The children in school B eat lunch in their classroom. The child would be able to have lunch with her peers in school B.
10. School B has a range of visiting teachers including a PE teacher (twice weekly), an art teacher (twice weekly) and a Music teacher. At school B the child would be able to participate in all lessons, including PE and yoga. School B has an art room and also a kitchen area where pupils participate in cooking. Pupils go on frequent trips as the school has the use of a minibus once or twice a week. Each class has two sessions per term at The Yard, which is an adventure play area designed for children with additional needs.
11. Pupils in class C have attended school B since the beginning of the school year. The addition of another child would have an impact on the pupils in class C. The children are likely to be unsettled to varying degrees. This impact would be temporary and could be mitigated by careful planning and additional support from staff at school B.

# Reasons for the Decision

1. There was no dispute between the parties on the question of whether the child has additional support needs, as defined in section 1 of the 2004 Act. Given our findings, it is clear to us that this is the case.
2. The respondent relies on three grounds for refusing the placing request which will be dealt with in turn, namely:
	1. placing the child in the specified school would be likely to be seriously detrimental to the educational well-being of pupils attending the school. (Schedule 2 paragraph 3 (1)(a)(v) 2004 Act)
	2. placing the child in the school would breach the requirement in section 15(1) of the Standards in Scotland's Schools etc. Act 2000 (**2000 Act**) (Schedule 2, paragraph 3(1)(g) of the 2004 Act) usually referred to as the presumption of mainstream education; and
	3. the education normally provided at the specified school is not suited to the age, ability or aptitude of the child (Schedule 2, paragraph 3(1)(b) of the 2004 Act).
3. The onus of establishing each ground of refusal lies with the respondent. The appropriate assessment point is at the time of the hearing.
4. If the respondent satisfies us that a ground of refusal exists at the date of the hearing, we must then consider whether it is appropriate in all the circumstances of the case to confirm the decision. This is referred to as stage 2 of the legal test.
5. It is not appropriate to narrate all details of the evidence in this decision. We considered all the evidence, both written and oral. Our reasons for the decision follow.

## The first ground of refusal (2004 Act, Schedule 2, paragraph 3(1)(a)(v): placing the child in the specified school is likely to be seriously detrimental to the educational well-being of pupils attending the school)

1. This ground of refusal exists if there is a real possibility that placing the child in school B will be *seriously* detrimental to the educational well-being of the pupils attending there. The respondent relied on two arguments in relation to this ground. Firstly, they argued that no more than six pupils can be accommodated in the class identified for the child in school B as this would breach the guidance in the Scottish Negotiating Committee for Teachers – Handbook of Conditions of Service (**SNCT Handbook**). They argued this would give rise to the danger of industrial action and would overstretch the staffing and accommodation of the class and the school. Secondly, they argued that introducing an additional child into the class would be unsettling for the children already in the class.

*Staffing*

1. We consider that we may have regard to the SNCT Handbook guidance but that it is not binding either on the respondent or the tribunal. Further, we heard evidence from witness D that, although class C currently has 7 pupils, it has had 8 pupils in previous years. She has been in post since 2014 and conceded that the pupil ratio in the SNCT handbook had been exceeded most years since then. There was no evidence of current or proposed industrial action in relation to class numbers, despite the fact that all classes in school B currently exceed the guidance of no more than six children in a class (paragraph 32). We are not persuaded by the respondent’s submission that breaching the pupil ratio set out in the SNCT handbook would give rise to the danger of industrial action.
2. Witness D gave oral evidence that if the child was placed in school B she ‘*might* ask for another member of staff’ and later said that if a further pupil was added she would *need* another member of staff. However, she confirmed that the child would not require 1:1 support and did not give any details about what an additional member of staff would be required to do. Witness D’s evidence in relation to this point was vague. We formed the impression that witness D had given no consideration prior to attending the hearing, about what adjustments might be needed to the support the child if she was placed in school B. Further, there was no written evidence to support witness D’s oral statements on this point. For these reasons we did not consider her evidence on this point to be sufficiently convincing to allow us to conclude that the addition of the child to the class would overstretch the staffing.

*Accommodation*

1. We were not persuaded by the respondent’s argument that an additional child would overstretch the accommodation of the class or school B. Witness D accepted that each classroom is approximately the same size (paragraph 32). Her evidence was that the difference between the classes was that they have differing layouts. Witness D’s evidence was that the main challenge in class C relates to table workspace. She gave evidence that the two tables can accommodate a maximum of eight children and that currently one space is used by a member of staff to support one of the children. Witness D later conceded that the furniture would need to be rearranged to create a workspace for the child. Given that other classrooms of a similar size at school B can accommodate up to nine pupils, we were not persuaded that the physical layout of class C could not be adapted to accommodate an additional child. We did not consider that witness D’s evidence on this point was reliable in light of evidence about classroom sizes (paragraph 32). Witness D stated that an additional pupil would not impact on the use of other spaces at school B.

*Impact of introducing an additional child on existing pupils*

1. The evidence on this aspect rested entirely on witness D’s statement that ‘A further pupil in this class would mean more stress on the current class group and staffing. It takes time for our new pupils to settle into the school routine and this group are beginning to become more settled in school’ (R049). In oral evidence Witness D suggested that there would be a temporary period during which pupils in class C would be unsettled and might experience distress as a result of an additional child joining the class. However, this evidence lacked specificity. We are therefore not satisfied that there is a real possibility of *serious* detriment to the existing pupils in class C.

Overall conclusion

1. We are not satisfied that placing the child in school B is likely to be seriously detrimental to the educational well-being of pupils attending the school. We therefore conclude that the ground of refusal in Schedule 2, paragraph 3(1) (a)(v) of the 2004 Act does not exist at the date of the hearing.

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

1. This ground of refusal applies if placing the child in school B would breach the presumption of mainstream education in s15(1) of the 2000 Act. The presumption of mainstream education applies unless one of the exceptions in s15(3) of the 2000 Act applies, which it is assumed will arise only exceptionally. These are:
	1. that to provide education for the child in a school other than a special school would not be suited to the child’s ability or aptitude;
	2. that to provide education for the child 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; and
	3. that to provide education for the child in a school other than a special school would result in unreasonable public expenditure being incurred which would not ordinarily be incurred

If any of the three exceptions in s15 (3) of the 2000 Act apply, the presumption of mainstream education does not apply and the related ground of refusal does not exist. Therefore we must be satisfied that none of the exceptions apply to conclude that the ground of refusal exists. We deal with each in turn.

*S15 (3)(a) – would not be suited to the child’s ability or aptitude*

1. The appellant argued that school A is not suited to the child’s ability or aptitude. They argued that the child is isolated from her peers and that her needs would be met more appropriately in school B, relying on evidence of the appellant and witness B. The respondent argued that school A is suited to the child’s ability or aptitude. In particular they argued that school A provides the child with an opportunity to develop language and social skills through interaction with children who are better able to model and reciprocate than children in school B, that the child’s behaviour is generally well-regulated in school A and that the curriculum taught in both schools is the same.
2. We heard evidence from witness C that the child has a highly individualised and differentiated timetable that is primarily delivered 1:1, and that although at times she appears to listen to wider class teaching, she does not participate. The child’s peers are working at Early Level of Curriculum for Excellence and the majority are expected to achieve it by the end of primary 1 (paragraph 21). Witness C described the child as working within the ‘very early stages of Early Level’ at a similar level to nursery. Witness C gave evidence that the child’s work is self-directed and play-based. We conclude that there is a significant gap between the child and her peers at school A, both in her level of learning and the manner in which she is able to learn.
3. The child will transition to primary 2 in August 2023. Witness C expressed concern about how the child would cope as she moves up the school to larger class sizes. In addition, the sensory architecture of the school will change in primary 2 (paragraph 19) and the child would not be in the ‘infant building’, which witness C described as ‘more suited’ for her needs. As the child progresses she will be exposed to busier environments with a greater number of children. This is likely to result in increased levels of dysregulation. Further, in primary 2 there is an expectation that work will be more adult-led. Witness C was not hopeful that the child would manage the transition to primary 2. Witness C also expressed uncertainty about whether she would be able to maintain full-time 1:1 support for the child, since it detracts from what other children in school A may need (paragraph 29).
4. Witness C expressed concern that the child would become more socially isolated from her peers as she progresses up the school due to her communication and social difficulties. Witness C gave evidence that the child is not developing social skills at the same rate as her peers. The child’s current social interactions are very limited and any that do take place with other children are initiated only by them (paragraph 25). The child does not seek out other children. It is likely that the child will become more isolated from her peers as she progresses through school.
5. There are elements of mainstream education, including assemblies, access to the dining hall and PE, and outdoor learning which the child is unable, or only marginally able, to participate in (paragraph 24). There are safety issues associated with these aspects of school life which mean that the child’s day-to-day involvement is limited and must be closely monitored. The main safety risks relate to the child running off and the risk of choking. She also likes to climb. The level of risk is currently managed with 1:1 supervision however, even with that high level of support, there have been several risky situations (paragraph 26).
6. We heard evidence from the appellant and witness B that the child continues to display distressed behaviour since starting at school A and there has been an increase in risky sensory seeking behaviour such as placing things in her mouth. We also heard evidence that the child is not eating sufficiently at school A. Witness C was concerned that this would have an impact on the child’s ability to learn. We heard from the appellant that the child eats a variety of foods at home. The appellant has provided the same food for the child to eat at school, but she has not eaten it. School A staff have tried different strategies to support the child’s eating including the child eating alone with a PSA in a classroom and eating with a small group of peers in a nurture class. Neither has resulted in improvement. We accept the appellant’s submission that the child’s behaviour is a form of communication and that these factors are relevant to our consideration of whether the environment in School A is meeting the child’s needs.
7. The respondent argued that there was evidence of ‘significant progress’ in literacy and numeracy since the child commenced primary school and asked us to accept the evidence of witness C and in particular to prefer this over witness B’s evidence. By contrast the appellant asked us to prefer the evidence of witness B to that of witness C in this regard. Witness B described the child as having made no progress over an 8 month period on the targets she was working on with her, in contrast to other children on her caseload. Witness B and witness C observe the child in different environments with differing intensity of contact. Witness C is not directly involved in the child’s learning or teaching and relies on feedback from other staff, while witness B has carried out direct assessment work with the child over an extended period of time, has observed the child in different settings, and has worked with the child both prior to and after starting primary school. Witness C was vague about some detailed aspects of the child’s ability, such as whether she has an understanding of 1:1 correspondence between numbers and objects, as opposed to rote recitation of numbers learned through song. In contrast witness B’s assessments have included detailed observations of the child as well as analysis of her behaviour, for example why the child struggles to complete a shape puzzle task. This led witness B to conclude that the child’s understanding is limited to knowing that a shape piece can go in a hole, but not that there is differentiation be between the shapes and holes. Her view was that the child would need considerable physical guidance to complete such as task, but becomes distressed when this is offered. Witness B impressed us with her detailed analytical descriptions of the child’s social interactions and abilities. For these reasons we gave the evidence of witness B more weight than that of witness C in relation to the child’s ability and aptitude.
8. There is no up-to-date report from SALT, but we accept there was evidence of a marginal improvement in the child’s language and communication skills: she is using more single words and can indicate when she needs to go to the toilet by gesture. However, we reject the respondent’s argument that this is likely to be due to modeling of language by the child’s peers. Given the limited interaction between the child and her peers, we consider it more likely that this is due to 1:1 support and modeling of language by adults. The only evidence we heard of the child using a word to communicate was from the appellant who stated that the child says ‘tickle’ when she wants her mother to tickle her. Apart from that there is no evidence about whether the child understands all of the words she is using and whether she uses them to communicate or is simply echoing words as described by the appellant.
9. We are satisfied that the exception in s15(3)(a) of the 2000 Act arises and that to provide education for the child other than in a special school would not be suitable to the ability or aptitude of the child. School A have made significant adjustments and adaptations to accommodate the child within a mainstream school, but these are unlikely to be sustainable. The child is making very slow progress and the distressed behaviour she displays is an indication that the mainstream environment is not suitable for her. The child’s needs are such that they make education other than in a special school unsuited to her. Her needs are of such an intensity and complexity that they can be said to be of a nature which arises only exceptionally.

*S15(3)(b) – would be incompatible with the provision of efficient education for the children with whom the child would be educated*

1. The appellant argued that placing the child in school A is incompatible with the provision of efficient education for the children with whom the child would be educated. They argued that her risk-taking behaviour puts her and others at risk of harm and that the level of support she requires draws resources from other pupils. We did not hear evidence that would allow us to conclude that this exception applies. The child has 1:1 support which minimises any impact of her behaviour on her peers. The child does display distressed behaviour at times when her needs are not met, she cannot make herself understood or there is something she wants from another child (paragraph 28). The appellant submitted that other pupils in the child’s class have to be removed for their safety during these incidents. We were satisfied from witness C’s evidence that this was not the case: as Depute Head Teacher she would have been aware if it was. Witness C accepted that the child’s distressed behaviour could be upsetting for her peers however the PSA is now more able to successfully distract and redirect the child. There was no evidence from witness C that the child’s distressed behaviour was having a negative impact on the provision of education to other pupils.
2. Given that the circumstances set out in s15(3) can arise only in exceptional circumstances, we conclude that providing education for the child in school A is not incompatible with the provision of efficient education for the children with whom the child would be educated.

*S15(3)(c) – would result in unreasonable public expenditure being incurred which would not ordinarily be incurred*

1. The appellant argued that the placement of the child in school A results in unreasonable public expenditure on the basis that she is allocated a 1:1 PSA. The respondent disputed that the expenditure incurred is unreasonable. Witness C told us that the cost of a 1:1 PSA for the child was having ‘quite a large impact’ on the discretionary budget the school is allocated to provide additional support needs across the school. Although she could not quantify the exact proportion of the budget used to support the child, she described the impact on the availability of PSAs further up the school and expressed concern about whether the level of support currently provided to the child could therefore be sustained (paragraph 30). She gave evidence that some children who previously had 1:1 support from a PSA are now no longer able to have this and the school is having to be creative with their use of other supports. However, given that at least two other children in primary 1 are allocated the same level of 1:1 PSA support, we conclude that the cost of the child’s PSA support is not unusual.
2. Given that the circumstances set out in s15(3) can arise only exceptionally, we conclude that providing education for the child in school A does not result in unreasonable public expenditure being incurred which would not ordinarily be incurred.

*Overall conclusion*

1. We are not satisfied that placing the child in school B would breach the presumption of mainstream education. This is because we are satisfied that one of the circumstances in s15(3) of the 2000 Act exists, namely that providing education for the child in a school other than a special school would not be suited to the ability or aptitude of the child. We therefore conclude that the ground of refusal in Schedule 2, paragraph 3(1)(g) of the 2004 Act does not exist at the date of the hearing.

*The third placing request refusal ground (2004, 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)

1. This ground of refusal is established when there is sufficient evidence for us to conclude that the education normally provided at school B is not suited to the age, ability or aptitude of the child. The respondent submitted that this ground of refusal exists. They argued that the child has made significant progress since the placing request had been refused. The appellant disputed that this ground of refusal had been established and that school B is suited to the child’s age, ability and aptitude. **[Part of this paragraph has been removed 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 (schedule to SSI 2017/366)]**.
2. All of the children in class C have language and communication difficulties and, with exception of 1 pupil, all have a diagnosis of ASD. They all struggle with transitions, emotional regulation and require ongoing sensory support for their needs (paragraph 34). The child’s profile of needs matches this (paragraphs 11-14, 17).
3. **[This paragraph has been removed 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 (schedule to SSI 2017/366)]**..
4. In oral evidence witness D stated that all of the children in school B have a diagnosed learning disability and that this is a pre-requisite to attend school B. Whereas in written evidence she states that ‘the needs of leaners are *primarily* associated with learning disability and ASD’ (R049). We also heard conflicting evidence from the appellant whose son attends school B and received a learning disability diagnosis a year after his enrolment. Witness D described a learning disability as meaning that children are delayed in their development and function at a lower age than their actual age: the child fits this description. It is within the tribunal’s knowledge that a learning disability diagnosis cannot always be made in the pre-school years. We do not accept that a learning disability *must* be diagnosed prior to enrolment at school B and do not accept that a lack of such a diagnosis means that school B is not suited to the child. In any event the child’s genetic condition means that she is likely to have a mild to moderate learning problems (paragraph 10). We accept the appellant’s submission that the profile of the child’s needs aligns with those of children in school B.
5. Children in class C are working on milestones at pre-Early Level of Curriculum for Excellence (paragraph 36). Witness C said that the child’s literacy and numeracy skills would be ahead of children in class C. This was in response to questions by the respondent who summarised witness C’s evidence by suggesting that the child can count to 20, read a word and do a jigsaw puzzle. However, having now considered the evidence in full we do not agree with this summary of the child’s literacy and numeracy skills as it was put to witness D. In any event witness D has no direct knowledge of the child and was not aware of her genetic condition. She lacked a thorough understanding of the child’s ability and aptitude which means that we cannot rely on her opinion on this point. We do not consider the gap between milestones and the very early stages of Early Level of Curriculum for Excellence to mean that school B is not suited to the child’s ability or aptitude. The main barriers to the child’s learning are her social and communication needs. The environment at school B is a total communication environment, an all- encompassing environment in which the child would be able to access the full range of the curriculum including PE and life skills such as eating, dressing and cooking. Whilst she would have an individual learning plan, she would be able to participate in class teaching on the basis that this is adapted for the children at school B who have significant social and communication needs similar to the child’s.

*Overall conclusion*

1. We are not satisfied that the education normally provided in school B is not suited to the child’s age, ability or aptitude. We therefore conclude that the ground of refusal in Schedule 2, paragraph 3(1)(b) of the 2004 Act does not exist at the date of the hearing.

## Stage 2: Appropriateness in all of circumstances (s.19(4A)(a)(ii) of the 2004 Act).

1. Where we conclude that one or more grounds of refusal apply, we need to be satisfied that it is appropriate in all of the circumstances to confirm the decision to refuse the appellant’s placing request. As we have concluded that the respondent has not shown that a ground of refusal exists at the date of the hearing, there is no need for us to consider the stage 2 appropriateness test.