DECISION OF THE TRIBUNAL

Reference

1. This Reference, made by application received on 26th June 2015 (T1-11), is made under s.18(1) and 18(3)(da)(ii) of the Education (Additional Support for Learning)(Scotland) Act 2004 ('the 2004 Act').

Decision of the Tribunal

2. The Tribunal confirms the decision of the Respondent to refuse the Appellant's placing request, in accordance with s.19(4A)(a) of the 2004 Act.

Preliminary/Procedural Matters

3. A hearing took place over three dates: 4th, 7th and 11th December 2015. Prior to this hearing, a pre-hearing conference call took place on 26th November 2015 (see note of the call at T40).

4. Following the hearing, on 15th December 2015, written submissions were directed in relation to the current Reference (T45) with an opportunity for comment on the submissions of the other party. These submissions, plus comments from the Appellant, were delivered by the deadline set for those (see Appellant's submissions at T46-78; Respondent's submissions at T79-103). Thereafter, the Tribunal panel members deliberated and reached a decision. The current document is the final decision with reasons.

5. On the first day of the hearing, the Respondent sought to lodge a Wellbeing Assessment and Plan dated 15th September 2015 (R293-328) and minutes of a School Review meeting which took place on 27th November 2015 (R329-332). The Appellant opposed the lodging of these documents, due to lack of fair notice and since it would be difficult to take instructions on them at this stage of the hearing. We allowed these documents into the bundle and gave the Appellant some time at the start of the first day to consider them. In the event, however (and in relation to the meeting minutes, the accuracy of which was disputed by the Appellant) we decided to place no weight on these documents in reaching our decision (except where the Appellant sought to do so in support of her case). Instead, we relied on the oral evidence and all of the other documents. We took this approach in order to avoid any prejudice to the Appellant, and since we had sufficient information otherwise to enable us to reach a proper conclusion on the statutory tests.

Summary of Evidence and Proceedings

6. The bundle consists of: pages T1-103 (Tribunal papers), pages A1-A154 (Appellant's papers) and pages R1-R332 (Respondent's papers). We took into account all of the information in the bundle in reaching our decision, with the exception of the documents at R293-332 (for reasons explained in paragraph 5, above). Oral evidence was led from the witnesses listed above over three days. Witness A is listed as a witness for the Respondent; however, she was called by both

parties, although led in evidence by the Respondent, by agreement. She is, in a sense, a neutral witness.

7. Prior to the hearing, both parties were clear in their view that the child does not have the capacity to state his views in relation to the Reference. We did consider, during the hearing, whether the Tribunal would, despite this joint position, like the views of the child to be taken. We canvassed this with the parties during the hearing. The Appellant indicated that she would not object to an Advocacy Report being directed to, if possible, capture the views of the child. The Respondent's position on this was the same at the hearing as it had been previously. Having closely considered this option following the oral evidence, we decided that we would not take any steps to gather the views of the child in this case. We took the view that we had sufficient information from the oral and documentary evidence to enable us to reach a view on the statutory tests. Further, we heard evidence from a number of witnesses who had had direct contact with the child in connection with the subject matter of this Reference, most notably, of course, the Appellant, but also Witness A, Witness B, Witness C and Witness D. There was, then, ample opportunity for any views of the child to be aired during the evidence. Had we directed an Advocacy Report, this would have led to delay, and may have led to hearing more evidence, necessitating further delay, and we are mindful of our obligation to avoid delay, so far as compatible with the proper consideration of the issues (rule 3(2)(e) of the Tribunal rules). We note also the strong pre-hearing position on this question as adopted by both parties.

The submissions of the parties

8. Counsel and Solicitor for the Respondent asked us to confirm the refusal decision, in terms of s.19(4A)(a) of the 2004 Act. They urged us to find that the ground of refusal in paragraph 3(1)(f) of Schedule 2 to the 2004 Act exists and that it is appropriate in all of the circumstances to confirm the refusal decision. Their reasons and the evidence they relied upon to support these reasons, are set out in detail in their written submissions (T79-103).

9. Solicitor for Appellant urged us to find that the ground of refusal relied upon by the Respondent does not exist and that, if we find that it does, we ought to find that it is not appropriate in all of the circumstances to confirm the refusal decision. If she succeeded in either or both of these arguments, we would be obliged to overturn the refusal decision and place the child in ('School A'). Solicitor for Appellant's arguments in support of her position are set out in her written submissions (T46-78). It is clear from previous case law that the Respondent bears the burden of proof, and this was the basis on which we approached the analysis of the evidence. We should add here that the child's father, who attended the hearing throughout with the Appellant, did not give evidence, as such. However, he was asked if he wished to add anything to the evidence of the Appellant and he expressed the view that he was not satisfied with the child's learning progress at School B ('School B') and that he felt he should be placed in School A. These comments were in the nature of a submission, and so are recorded here. We took account of these views along with all of the evidence and other submissions.

Findings in Fact

10. the child currently attends School B. The placing request seeks placement of the child in School A. That placing request was refused by the Respondent by letter dated 28th April 2015 (T14).

11. The Appellant is the mother of the child, who lives with his mother and father.

12. the child was born in 2005.

13. the child has additional support needs ('ASN') as defined in s.1 of the 2004 Act. the child has been diagnosed with Autistic Spectrum Disorder ('ASD') and has significant learning difficulties (R21-22). As a result, the child faces physical challenges, namely double incontinence and mobility issues. the child also has difficulty in communicating; he has limited verbal language ability. His social interaction skills are impaired. He has difficulty in understanding language and how others interact socially. He has difficulty in understanding his environment and how he should respond to it. His development of independent living skills is affected by his learning difficulties. These difficulties impact on the delivery of education to the child. the child does not present with challenging behaviour at School B.

14. the child has attended School B since August 2012**.** He is currently in Primary 5. He previously attended a different primary school, ('School C'). In May 2012, the Respondent decided, following an application supported by the child's parents (R37-38), to place the child in School B (R39-40). School C is managed by the Respondent and is a primary school for children with additional support needs. It is an Additional Learning Needs school (ALN). The staff:pupil ratio at such a school is usually 1:10.

15. School B is managed by the Respondent and is a specialist school for children with complex learning needs. It is a Complex Learning Needs school (CLN). The staff:pupil ratio in such a school is normally 1:6. There are 42 pupils currently attending School B, aged between 5 and 12. School B, as a CLN, provides a more elaborate and sensory based curriculum than an ALN, like School C. The majority of pupils at School B have a diagnosis of ASD in addition to other diagnoses. School B was inspected by Education Scotland in March 2013, leading to a report issued in May 2013 (R271-282). That report identifies a number of strengths as well as areas for development. School B is assessed in that report as 'Very Good' across all four assessed questions.

16. The Headteacher at School B is Witness B. She is employed by the Respondent. She has held the post as Headteacher since January 2013, although she has been a Headteacher with the Respondent for four years. She is an experienced teaching professional. She has taught children in special educational settings for 18 years. She has experience of teaching children in a complex learning needs setting. She has considerable experience in teaching children with additional support needs. She has postgraduate teaching qualifications in support for learning. Details of Witness B' career and qualifications are at T21.

17. Witness E is an Educational Psychologist employed by the Respondent. Witness E was a teacher for 19 years before moving into educational psychology, where she has worked for the last 9 years. She has acquired postgraduate qualifications in educational psychology, including in relation to support for learning. A summary of Witness Es' qualifications and career is at T20. Her current responsibilities include educational psychology input for the teachers and pupils at School B. Witness E has known the child for around the last seven years (although not throughout that period); she was his first educational psychologist. He was referred to educational psychology for the first time at around the age of two. Witness E was involved with the child as a nursery place was being identified, and then as Educational Psychologist at School C while the child attended there. Witness E was also involved in the process whereby the child was transferred from School C to School B. Witness E observed the child in

his class in School B in May 2015, for the purpose of this Reference. This observation lasted for around two hours. Witness E has seen the child twice in the last year, the other occasion being an indirect observation. Witness E was unable to attend the Review Meeting on 27th November 2015. She was not involved in the preparation of the child's most recent Wellbeing and Assessment Plan (R293-328). Witness E has had no contact with the child's parents during 2015, prior to the Tribunal hearing.

18. Witness A in a Speech and Language Therapist (SLT) employed with NHS Greater Glasgow and Clyde. She has been an SLT for six years. Since January 2015, she has been the SLT link for School B (as well as having this role for other schools). The SLT service provided by the NHS Trust which employs Witness A consist of two stages, Stage 1 and Stage 2, as outlined in her report of September 2015 at R283. the child is currently being provided with support at Stage 2. Witness A visits School B twice per week, for the equivalent of one full day per week, and spends around 1.5 hours in class with the child each month. She observes the children in class and in other areas of the school, such as in the playground. She offers guidance and support to teaching staff on SLT techniques. She visited the child at home on one occasion in July 2015, and observed him there for around 1 hour.

19. the child is currently in a class of six pupils at School B, comprising five boys and one girl. This class is supported by an experienced class teacher and two support for learning workers. The support for learning workers receive training in, for example, autism, Makaton augmentative and alternative communication and CALM (Crisis and Aggression Limitation and Management). Also used in School B is a form of educational approach for children with autism known as 'TEACCH', an abbreviation for: 'Treatment and Education of Autistic and related Communication-Handicapped Children'. This form of teaching involves maintaining a consistent environment and identifying existing and emerging skills and working on those. It allows teaching to focus on the strengths of individual children. All children attending School B School, including the child, have an Additional Support Plan (ASP) with long term and short term targets in core curricular areas.

20. School B operates a speech and language approach referred to as 'total communication'. This approach involves using every available means to enable a child to communicate both receptively and expressively. Part of that strategy involves the use of Makaton. This is an augmentative communication used alongside speech and involves the signing of key words. It is helpful for children with complex learning needs. It is not a language, and so it is different from British sign language, in which each word is signed. Makaton is used with the child at School B. Other techniques used to assist the child to communicate include: a communication board (recommended by Witness A) to assist with sequencing; a task board, showing a sequence of visual steps; visual schedules, such as 'Now and Next' boards. the child has benefitted from access to local facilities outwith the school while at School B, for example trips to shops when learning about money, a trip to a School in connection with his 'People from the Past' topic, swimming lessons at a local public swimming pool and trips to the local playpark.

21. The progress of the child at School B is measured through Wellbeing Assessment Plans, which are reviewed each year. the child was assessed using the PEP-3 assessment in August 2014 (A47-49). This is a form of assessment used to assess skills and behaviours of children with autism and used as part of the target setting process. Informal assessment is also conducted by the teaching staff, who

report to each Annual Review Meeting. Witness A also carries out an ongoing assessment of the child in respect of his communication skills.

22. Witness C is the Head of Education at School A. She has over 27 years of working with learners with complex needs in various settings, namely schools, health boards, social work and further education. Her qualifications and career path are outlined in her CV at A107-108. School A is an independent school, not managed by the Respondent. It provides education for children aged between 5 and 19 with significant learning difficulties. There are currently 23 pupils at School A. Thirteen are day pupils, aged 10-17. Residential pupils are aged 9-16. Of the 23 pupils attending School A, 21 have a diagnosis of ASD. The philosophy of provision at School A involves teaching being focussed on the development of abilities, behaviour, knowledge and skills of each child, to underpin participation in everyday life, at present and in the future. Life skills hold a key place in the curriculum. A number of teaching methodologies are used to support this philosophy including: a total communication approach (see above); Makaton (see above); TEACCH (see above); Boardmaker symbols; PECS (Picture Exchange Communication System); signs; symbols; photographs; and key words (where appropriate). Pupil progress at School A is carefully recorded and monitored. The staff there are very experienced in supporting children with complex learning needs. The school encourages independence among its pupils. The school also encourages regular (daily) communication with parents of its pupils via a Home/School diary, and parents are encouraged to be in contact with staff whenever the need arises. School A has a number of specialist physical facilities for its pupils, such as a soft gym, sensory room, hydrotherapy pool, garden and home economics kitchen. The school maintains links with local community resources, such as shops and a swimming pool. School A organises access for its pupils to other local resources such as visits to theatres, museums, galleries, an adventure playground and Riding for the Disabled.

23. School A is an accredited school under a scheme operated by the Autism Accreditation organisation. That accreditation was reviewed in 2015, leading to an Autism Accreditation Review Report (A110-152) following a three-day visit by that body at the end of April 2015. The report identifies progress on previous recommendations, potential areas for development and potential areas of strength. The school's provision is then scored across four 'Specialist Standard' areas. In all of these areas, School A is assessed as either meeting or meeting and exceeding the indicators of these standards.

24. If the child were to join School A, he would be placed in a class with three other children, a 9 year old and two 12 year olds. There would be one teacher in that class and three learning support teachers. Were the child to be placed in School A, the school would consider whether 1:1 support would be required for the child, and for how long that support would be needed. The class would comprise a mixture of verbal and non-verbal pupils.

25. School A staff have had contact with the child's family over an 18 month period, comprising meetings and discussions. The Appellant and her husband met with the former Headteacher at School A in October 2014, the Depute Headteacher in February 2015 and Witness C in February 2015. Witness C has also spoken with the child's parents on the telephone in December 2014 and February 2015. On 20th February 2015, the child, the Appellant and her husband visited School A. That visit lasted for around half a day and enabled Witness C to observe the child, although he did not spend any time in a classroom setting during that visit. As a result of these contacts, Witness C is satisfied that School A can meet the child's educational needs.

26. Witness D is an expert in children with autism. He is an experienced teacher and Headteacher in schools with pupils with a diagnosis of autism. He is a self-employed autism consultant. A summary of his career and qualifications can be found in the first paragraph of his statement at A101. Witness D has known the Appellant and her family for around a year. He has met the child on three occasions, in February, May and November 2015. He spent around two hours with the child and his family on each occasion. He has had considerable contact with the child's parents over the last year and has met the family on around two other occasions (around five in total, including the visits with the child). He has examined the educational papers for the child and the Tribunal papers in the bundle.

27. In March 2015, Witness B and Witness E attended School A in connection with the Appellant's placing request. The purpose of the visit was to assess the suitability of School A for the child. They were unable to see any children in classrooms. The visit lasted for around 90 minutes.

28. Witness F is Head of Quality Improvement and a Head of Service with the Respondent. He is a qualified teacher. He is responsible, along with others, for the management of education services delivered by the Respondent. The Respondent takes a decision each year to allocate its education budget among schools. Almost all costs incurred by each school are fixed costs (staffing, lighting, utilities, for example). If the child were to be placed in School A, his departure from School B would have virtually no impact on the cost of provision of education at School B (due to the dominance of fixed costs). The current annual full running cost of School B incurred by the Respondent is £1,027,140. The current pupil roll is 43. This makes the annual cost per pupil figure £23,887.

Reasons for Decision

29. We should note here that we accepted the evidence of all of the witnesses as being credible and reliable. This was not a case where any of the central facts were disputed; our decision involved an interpretation of the relevant facts and circumstances. Having said this, we should note here that there were two witnesses whose evidence attracted limited weight: Witness E and Witness D. We will explain the reasons below for our approach to Witness D's evidence. In the case of Witness E, we decided to place little weight on her evidence due to her limited involvement in planning for the child and in observing him. As noted above, she had only seen the child in an educational setting once more recently, in May 2015. She had not been involved in the most recent planning exercise and did not attend the most recent Annual Review meeting (although she did attend the previous one, on 30th January 2015, R201-205). Her limited direct involvement meant that we did not feel we could place weight on her conclusions.

(a) The placing request refusal ground (2004 Act, Schedule 2, paragraph 3(1)(f))

30. This ground contains a number of constituent parts, numbered in paragraphs (i)-(iv). The Respondent must satisfy us that each of the paragraphs apply, in order that we may be persuaded that the ground of refusal exists. We are persuaded that this ground of refusal has been established. We will deal with each of the four constituent parts of this ground in turn.

Paragraph 3(1)(f)(i)

31. This paragraph requires that the specified school (School A) is not a public school. We are satisfied that this is the case, and this was not disputed.

Paragraph 3(1)(f)(ii)

32. This paragraph requires that the Respondent is able to make provision for the child's additional support needs in a school other than the specified school. In this case, that other school is School B. We are satisfied that School B can make such provision. The application of this paragraph is disputed.

33. The first point to note is that there was no skilled evidence to the effect that School B could not meet the needs of the child. Indeed, the skilled evidence which does exist is to the contrary effect.

34. In considering this question, we relied to a significant extent on the evidence of Witness B and Witness A, as supplemented by some of the written evidence.

35. Witness B was an impressive witness. She is a very experienced teacher, and it is clear that although she does not currently teach the child, she knows him well. Witness B faced a long and robust cross-examination process (with further questions from the Tribunal) but she did not depart from the main points she makes in her written statement (T26-38). From her evidence, it is clear to us that School B provides a comprehensive and appropriate curriculum for pupils such as the child, underpinned by a number of tools and strategies for learning. In particular, the child faces communication difficulties. It is clear that a number of strategies are in place to assist the child in this area. According to Witness A, who also gave her evidence in a clear and professional fashion, these strategies are appropriate and are working well, as she confirmed in her oral evidence and as noted in her report of September 2015 (R283-284). There is evidence of ongoing work in this area, which in our view demonstrates a lack of complacency around the child's communication development. In the Speech and Language Therapy Care Plan (T43-45) submitted by Witness A (at the request of the Tribunal) there are clear goals, and tasks which are specified to meet those goals. Witness B was of the clear view that School B is appropriate for the child, and that he is a happy, settled and well-educated child.

36. The Appellant makes certain criticisms of the education being provided at School B.

37. Firstly, it was argued that there is evidence that the child tends to observe, rather than be involved in class activities; part of the child's Post Placement Report of 11th January 2013 is relied upon as evidence of this tendency (R44). The full sentence there is as follows:

> "[the child] often prefers to observe others before engaging in activities himself, and often when asked to do something, will point to one of his peers suggesting that he wants them to do it first or as well."

However, the context in which this observation is made should be considered. This is a report dated January 2013, almost three years ago, and only a few months after the child started attending School B. Further, it is clear that when the report is read as a whole, part of its purpose it is identifying areas where further work is needed. This is clear from the paragraph before the one from which this sentence is taken. This report reflects on the child's first two terms at School B (which are said to have gone well- he is settling in). The report identifies that there is more work to be done and his time at School B is at an early stage. In our view, a more reliable indicator of

the child's engagement in class activity is evidence of how the child has been engaging more recently. It is clear that by January 2014, the child's confidence and participation in class had improved (see the account under 'Class Report' in the minutes of the Annual Review Meeting held on 10th January 2014, at R54-56). The targets set for the child by the school reflect that the child's tendency to be an observer is an issue – see the Wellbeing Planner for 2014-15 at R74, where it is noted:

> "[the child] lacks confidence in his learning; he prefers to be an observer and he is very easily distracted."

38. However, the Planner goes onto address how that problem is being tackled and that the child achieved all targets. This theme is continued in the Wellbeing Planner for 2015-16 (R236-244) where, at R236, FRs tendency to observe is noted. However, again, this issue is set out as one to be tackled by certain long and short term targets. the child's tendency to observe is referred to (as noted by Solicitor for Appellant in her submission) twice in the most recent Wellbeing Assessment and Plan (R293-328, only used where specific reference to it is made by the Appellant – see para 5. above) both times at R298, in the 'Healthy' box. However, the context is clear: that this is an aspect of the child's behaviour arising from his additional support needs and that the child responds well to support to engage with his peers. The corresponding long and short term targets in this area are set out at R303, suggesting that this is an area which is being developed. Witness A is of the view that the communication strategies employed at School B are appropriate and working. Witness B was clear that progress with the child will be gradual. There was no skilled evidence to suggest that the targets are inappropriate or not being met. In our view, then, evidence that the child tends to observe rather than take part does not detract from the general conclusion of those working with the child in an educational setting that he is progressing well, and is happy and settled at school. Indeed, the evidence suggests that this is an area which is being addressed at School B.

39. Secondly, the Appellant criticises School B for impaired home-school communication. Some specific examples were provided by the Appellant in her evidence, such as: repeated requests to send home Makaton signs that are being used in class; delayed communications between School B and Witness A; school diary is vague and unhelpful; failure to respond to concerns; minutes of meetings do not always reflect parental concerns; disorganised, unproductive review meetings. While it does seem to us that there are certain difficulties in this area (see our 'Further comments' below), we are not persuaded that any problems in this area have detrimentally impacted on the child's education such that we can conclude that School B is unable to make provision for the child's additional support needs. The evidence available from Witness B, Witness A and the written evidence suggest that targets are being set and met in a general sense. This does not, of course, mean that there are no issues or that there is no room for improvement.

40. Thirdly, the Appellant criticises the use of Makaton at School B as unstructured and suggests that teachers are not as well versed in this technique as they might be. However, we heard clear evidence from Witness A to the effect that the communication strategies employed at School B are appropriate and are working, evidence which we accept. Makaton is just one of those strategies. There are clear long and short term strategies in this area and evidence of progress.

41. Fourthly, the Appellant raises the issue of assessment of the child's needs. She argues that his needs have not been properly assessed, especially since the

diagnosis of autism in August 2013 (R21-22). She criticises the PEP-3 assessment as a 'snap shot' taken in August 2014, which ought to have been repeated every 6 months. We are not persuaded that assessment of the child's needs is a problem. It is clear to us from the written evidence that the child's needs are assessed on a regular basis, for annual school reviews and reports, in class activities, by Witness A and for Wellbeing Assessments. Those needs are identified and long and short term targets to address them are specified. In our view, following the diagnosis of autism (and the information which came with it – see Dr M's report at R21-22) there is no requirement, in a case like this where needs are being assessed regularly, to carry out further autism specific testing. In the child's case, some further assessment was conducted using the PEP-3 assessment tool. Witness D emphasised the need to address the child's autism (while not criticising PEP-3 as an autism assessment tool). However, we are satisfied that this does not require regular autism-specific assessment.

42. To expand on this, the Appellant's view appears to be that following the diagnosis of Autism further regular assessment of the child's condition and a revised approach to his learning was indicated by this diagnosis. The evidence presented suggests that the Respondent's approach has been to assess and meet the needs of the child in the context of his wider developmental needs, rather than specific to the additional diagnosis of autism. In our view, this is a sound approach. If needs were assessed in accordance with a partial diagnosis, this, in our view, could lead to a child who has certain communication needs (to choose an example) not having these needs fully met, since he/she does not meet the diagnostic criteria for a condition which might impact on communication ability (such as autism). Equally, we heard a number of times during the evidence that children are individuals, and that each needs to be treated in a bespoke way. If a diagnosis of autism dictated the needs of a child, and therefore the support required, this could lead to a child with such a diagnosis being provided with an imbalanced support package. To put it another way, it seems to us that a diagnosis of autism, while important, is not on its own determinative of the level or nature of need and should not, therefore, be the sole factor used to determine the support required to meet that need. This point is further underscored when consideration is given to the fact that among children diagnosed with autism, there are a range of needs, both in terms of nature and levels. In our view, then, the approach by the Respondent to this question (of assessment of needs) is sound. Further, in considering the Respondent's legal obligations under the 2004 Act, its duty is to 'make adequate and efficient provision for [additional support needs] as is required by that child' (s.4(1)(a)). The focus is therefore on needs, whatever their genesis. This does not mean, of course, that the diagnosis of autism is not relevant – it is an indicator of likelihood of needs in particular areas; we simply make the point that it is not determinative.

43. Fifthly, the Appellant argues that School B is not doing enough to progress the child's toilet training. Witness B' position was that the child was not showing signs of being ready to be toilet trained. The Appellant's position was that more could be being done by the school to move the child closer to being ready. In our view, the issue of toilet training is something which should be tackled in a partnership between a school and parents, with appropriate support from relevant health services; it is clear that a consistent approach is required at home and school. However, the question of when a child is ready to be toilet trained is a matter of judgement. If the school staff take the view that the child is not ready, then in the absence of independent skilled evidence to the contrary, or evidence from parents that progress is being made at home but not at school, it is not possible for us to reach the view that the school's exercise of professional judgement is wrong. We note here that Witness D would not be drawn on the issue of timing of toilet training for the child.

This is one area where enhanced communication between home and school might take place – again, see our 'Further comments' below. On the evidence presented, we are not persuaded that this is an area in which the school can be criticised.

44. Sixthly, and finally, the Appellant argues that there is evidence of a lack of sufficient progress in general terms with the child's education at School B. A number of specific examples are cited: development of spoken language, number and money skills; dressing skills; hygiene skills; technology; reading; turn-taking; following instructions; phonics; shapes; counting; open and holding doors for others; PE. The detail of some of the Appellant's points in these areas can be found in her statement (A6-11) at A7-10. For some of the examples, even taking the Appellant's quotations in isolation (removed from the context of the documents in which they appear), progress does appear to be being made. Here, we refer to the following areas (using the helpful headings employed by the Appellant in her statement): 'Dressing skills-coat'; 'Dressing skills- shoes'; 'Technology'; 'Reading books'; 'Turn-taking'; 'Following instructions'; 'Phonics'; 'Shapes'; 'Counting'; 'PE'; and (in a more general sense) 'Head teacher's comments'. The only area where, on the face of the comments quoted, no progress appears to have been made, is under 'Hygiene skills' around the use of a damp cloth. The area 'Open and hold doors for others' is relied upon only for a comment in 2014-15, so there is no mention by the Appellant of improvement or otherwise from year to year. It seems to us that evidence of progress across 12 of 13 identified areas is an indication of successful learning at School B.

45. However, remaining with this sixth argument, the Appellant contends that this progress, where it exists, is too slow. She employs three main sources of evidence to support this argument.

46. The first is that progress in some of these areas manifests itself more at home than in school. She suggests, for instance, that the child has at least 100 words at home (her statement, A9, final paragraph). She also casts doubt on the page turning progress statement (her statement, A8, referring to a home visiting teacher). In our view, evidence of a disparity between behaviour at home and school is of limited value for present purposes. We heard evidence (including from Witness D) to suggest that children sometimes behave differently at home than at school. In our view, this must be the case. Perhaps the child is more relaxed at home, and so feels able to freely communicate; perhaps he follows his peers in turning pages at school, but does not have that facility at home. It is difficult for us to speculate on what the reasons might be for such differences. What we are tasked with deciding (for the purposes of the present question) is whether or not School B is able to meet the child's additional support needs in an educational setting. Given the progress noted against a number of areas, and the generally positive evidence about the child's school life from those who deal with the child in the classroom, we are not convinced that isolated areas of home-school disparity are indications of problems at school.

47. The second main source of evidence employed by the Appellant in order to substantiate her argument about slow progress is that the progress seems slow. We are not persuaded by this point. It is not possible to judge whether progress is too slow simply by considering the rate of that progress, in the absence of any other evidence. We would require to hear skilled evidence, which we could rely upon, to enable us to measure what good (or inadequate) progress would look like. This is especially the case where we are considering the progress of a child with additional support needs. The Appellant does present what is argued to be skilled evidence which we were asked to accept, which brings us to the third source of evidence relied upon – the opinion of Witness D.

48. Witness D expressed the view that he would have expected to see more progress by the child at school, especially in the areas of social communication and independence, given he has received more than four years of formal education. However, there are two issues with the evidence of Witness D which, even when taken separately, mean that we can place no weight on his opinion in this area.

49. The first is that Witness D is unable to identify, in specific terms, how more progress could or should have been made in educating the child. It seemed to us that the core of his evidence on this point is that looking at the child's needs, age and other circumstances, including his schooling, he should be further on now than he is. The problem is that, assuming we accept this conclusion, it does not assist us in the questions we must answer. One implication of Witness D's evidence (and one the Appellant seeks to draw) is that the school is doing something wrong or is not doing something it should be, and this has caused the lack of progress. The problem with drawing this implication is that Witness D explicitly refused to offer specific criticisms of the child's education at School B. In our view, he was right to resist doing so: he has never visited the school, nor its teachers. Nor has he observed the child in the school. In this context, specific, reliable conclusions are not feasible. The problem is that a general conclusion of lack of progress (with an implication that this must be the fault of the school) does not assist our task. This connects with the second issue around Witness D's evidence. We have no doubt whatsoever that Witness D is an authority on the education of autistic children. Indeed, he has more experience and expertise in this area than any other witness in this case. We also have no difficulty with the way in which Witness D gave his evidence – he was clear, professional and candid. However, our task (at this stage in the exercise) is to consider whether School B is able to meet the child's additional support needs. Evidence from a professional (however eminent) who has never been in the school, has never seen the child in the classroom and who has never spoken to anyone who provides educational input at the school, is of no real value. It is true that Witness D has examined the written evidence we have (and additional school records) and has met the child and his parents, but we are dealing with a question of the ability of a school to meet a child's needs, and only evidence that can inform that question is of assistance. Witness D himself recognised that his evidence carried certain limitations when he accepted that his lack of direct observation of the child's schooling 'undoubtedly' placed him at a disadvantage in giving his evidence.

50. For these reasons, interesting and well delivered though his evidence was, we have to, with great respect, discount it. We should add that Witness D did engage in some limited specific criticism of School B in his evidence. For example, he expressed the view that the majority of the written evidence available is non-specific and does not address the child's autism. However, as indicated already, while the documentation recording the child's needs, progress and targets is not easy to digest, it does contain statements against the various areas of activity and learning. Also, as indicated earlier, we do not feel that an emphasis on the child's autism, in itself, is a useful focal point; rather, the focus should be on the needs of the child, whatever their source.

51. Having considered the main criticisms expressed by the Appellant around the provision at School B, we are left with the conclusion that the Respondent (as managers of that school) are able to make provision for the additional support needs of the child there. In coming to this conclusion, although of limited direct application, we have taken into account the largely positive school inspection report at R271-282.

Paragraph 3(1)(f)(iii)

52. The application of the condition in this paragraph is disputed. This paragraph requires us to have regard to both the suitability and cost of the provision for the child's additional support needs at School B and School A respectively. Having carried out these comparison exercises, in order for this paragraph to apply, we must conclude that it is not reasonable to place the child in School A. This test does not require us to consider cost and suitability separately and apply a reasonableness test to each. If Parliament had intended each factor (suitability and cost) to be judged separately against a reasonableness test (with the result that reasonableness requires to exist on both before the condition is satisfied) each factor would be contained in a separate sub-paragraph within 3(1)(f). Further, this interpretation, as well as being clear from the words and structure adopted, is sensible. It would be absurd if the way in which this paragraph is interpreted could mean that a child must be placed in an affordable but completely unsuitable school. The reasonableness question must be viewed from the Respondent's standpoint, and this approach was confirmed by Sheriff Tierney in the case *M v Aberdeenshire Council* 2008 SLT (Sh Ct) 126, where he says at paragraph 54:

> "The matter in respect of which a decision on reasonableness is required is the placement of the child in the specified school. That placement would be made by the…education authority and accordingly it seems to me that the question is whether it would not be reasonable for the education authority to place the child in that school, not whether it would be reasonable for the parent to seek to have him so placed. The two factors which have to be taken into account are suitability and cost. It seems to me that suitability involves an assessment of the respective qualities of the provisions from which [the child] will benefit in each of the two schools. The respective costs, on the other hand, are the costs in respect of each of the two schools which the local authority will bear."

53. We agree that this is the correct approach. We should add that we do not take the view that the comments of Sheriff Tierney at paragraph [47] of his judgement, quoted by Solicitor for Appellant in her submission at page 23 (T68) around a lack of assessment apply here. Although in all other respects Solicitor for Appellant's submission is very detailed and helpful, there is no explanation of how the approach in that paragraph applies here. If we assume that the argument is that there was no assessment of needs here, partly due to a lack of educational psychology input, we take the view that the case of *M* falls, in this respect, to be distinguished. In the current case, as explained above, there has been a clear and ongoing assessment of the child's needs, with targets and regular discussion of work towards those targets. While we do accept that there has been limited educational psychology input here, this does not translate across (as it did in *M*) to an inadequate assessment of needs.

Respective suitability

54. Returning to Sheriff Tierney's comments on respective suitability (which we adopt), we must embark on "an assessment of the respective qualities of the provisions from which [the child] will benefit in each of the two schools".

55. This exercise involves a direct comparison of the respective qualities as they relate to the child, and on the evidence available. It seems to us that this comparison exercise might involve a comparison between two schools, both of which could adequately meet the needs of the child in question; the comparison need not be between an unsuitable school and a suitable one. In our view, this is the situation in

this case: it is clear to us from the evidence that both School B and School A would be able to meet the child's additional support needs.

56. In our view, Witness C's evidence was given in a clear and honest fashion. She is very experienced in delivering education to children with autism and School A is clearly a very successful school; indeed, it has been assessed as such in its recent accreditation review. While the child did not spend any time in classes at School A, we accept the evidence of Witness C that the child's needs could be appropriately met at School A. However, there is no evidence from which we can reach the conclusion that School A might be more suitable than School B. Indeed, no skilled witness offered a reliable comparison. Solicitor for Appellant argues that School A is a school which specialises in the education of autistic children, whereas School B is not. Further, that School A is autism accredited. This is all correct. However, as noted above, it is unhelpful to define the child's needs purely according to his autism diagnosis. The evidence suggests that School B can continue to meet the child's needs (as it has been); there is no evidence (except in a theoretical sense) that School A can meet the child's needs. Further, the child's needs are wider than those deriving from his autism, since he also suffers from significant learning difficulties. Witness B and Witness E sought to compare School A unfavourably with School B with regard to educating the child. Witness B accepts that her view of School A is based on a 'very general impression' (T30, in her statement, 4th paragraph from the foot of the page). However, she then goes onto form certain conclusions. Witness E expresses some negative views too (her statement, T24). We have to say that we have some doubts about the propriety of skilled witnesses employed by the Respondent forming a view on the respective suitability question (whether informed by a visit to the other school or not). We note that Witness C refused state any view on School B. An independent skilled witness could perhaps legitimately form a view on this question, but otherwise, it seems to us to be a matter for the Tribunal, not for a skilled witness. It may even be the case, properly analysed, that an independent expert should not express such a view; there is an argument that this question is (for this part of the statutory test) the 'ultimate question' and so one upon which no witness should state a view. It might be said that such a visit, as here, coming before the decision on the placing request is legitimate as part of that decision making process; but that does not make the evidence competent in a later Tribunal. In any event, we need say no more about that general observation. We need only say that we place no weight on that part of the evidence of Witness B and Witness E, given the limited nature of their visit to School A, and given (by contrast) the extensive, reliable evidence of the education there offered by Witness C in her evidence.

57. In comparing the two schools, in our view, the quality of the provision from which the child will benefit in School B is greater than at School A. The evidence suggests that School B is meeting the child's needs, and that he is happy and settled there. In our view, in the absence of a clear advantage at School A over School B, the balance favours School B. That school is familiar to the child. Although in theory School A could provide for the child's needs, there is (as is always the case) a risk that the child will not be happy there, or that he will not settle there, or that his education will not progress there. We accept that these are only risks, and the reverse might happen, but when the schools are relatively evenly balanced in terms of suitability otherwise, the quality of the provision at School A carries with it a risk which does not exist in the quality of provision available now at School B. Witness B recognises this risk where she refers, in her statement, to the movement of the child from School B potentially being 'really bad for him…he's really happy and settled, it's a safe place for him.' (T38, third last paragraph).

58. Drawing these points together, it seems to us that, considering the suitability of the provision for the additional support needs of the child in each of the two schools, the provision at School B is more suitable than that which would be provided at School A. This is based on the child's progress at School B as indicating its suitability; on the lack of evidence of an advantage of School A over School B; and on the risk of disruption to the child's education that a move from a happy settled environment to a new environment might cause.

Respective cost

59. Solicitor for Appellant argues that we should, in assessing respective cost, follow a line of case law in the English courts. That case law involves an interpretation of s.9 of the Education Act 1996, which provides:

> "In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure."

60. The cases referred to by Solicitor for Appellant are: *Oxfordshire County Council v GB* [2002] ELR 8; *Slough Borough Council v Special Educational Needs and Disability Tribunal* [2010] EWCA Civ 668 and *EH v Kent County Council* [2011] EWCA Civ 709. Solicitor for Appellant argues that the approach to the interpretation of s.9 of the 1996 Act adopted in the *Slough* case was approved in the *Kent* case, again by the Court of Appeal. In our view, this is the correct interpretation of those cases, and it appears to us that the position approved by Lord Justice Sullivan in the *Kent* case reflects the current position in England.

61. Solicitor for Appellant argues that we should follow this line of cases rather than the line which has emerged from the Court of Session. The two relevant Scottish cases are *SM v City of Edinburgh Council* 2007 Fam LR 2 and *JB v Glasgow City Council* [2013] CSIH 77; 2014 S.C. 209; 2013 S.L.T. 1050, the latter an Inner House decision, the former a decision of Lord Glennie in the Outer House.

62. There are a number of problems with this suggestion. Firstly, Court of Session decisions on appeal from this Tribunal (of which type both of the above cases are examples) are binding on this Tribunal. Solicitor for Appellant argues that the Inner House approval in *JB* of Lord Glennie's views on respective cost expressed in *SM* (see paragraph 18 of the *JB* decision) was given on an *obiter* basis. Even if that is the case, an *obiter* comment from the Inner House which is directly relevant to a question for this Tribunal should be followed, unless there is good reason not to do so. Further, and in any event, the decision of Lord Glennie on its own is binding on us. Once the two are combined, it is perfectly clear that we are bound to adopt the same approach to respective cost as approved in both cases. Secondly, the provision in s.9 of the Education Act 1996 is not a direct equivalent to the provision in the 2004 Act, Schedule 2(3)(f)(iii). In fact, s.9 is almost identical to s.28 of the Education (Scotland) Act 1980, a provision which, for reasons we come to below, is relevant at the next stage (appropriateness in all of the circumstances). It is by no means clear to us that the Court of Session would, therefore, be persuaded that the line of English authority referred to should be followed in order to interpret Schedule 2(3)(f)(iii) of the 2004 Act. In fact, it seems to us that the approach taken in the two Scottish cases above derives from a careful consideration of the wording of the more specific provision in the 2004 Act; the provision in the English 1996 Act is far broader

in its import. Thirdly, Solicitor for Appellant argues that it would be surprising if the same question was considered differently in England than in Scotland. Assuming that both lines of case law do address the same question, we think it is going too far to express surprise at a difference in approach. The Court of Session would be perfectly entitled, in our view, to take a different approach on the same question from the one adopted in the English courts. This would be the case even in the context of UK-wide legislation; in this case, we are comparing two different legislative regimes.

63. This leads us to the conclusion that we should follow the approach in the Scottish case law, as outlined by the Respondent in its submission on costs (R286-292), namely that it is the additional cost to the Respondent which must be considered. The evidence of Witness F on this point is clear. The Respondent produced the figures in the e-mail of 2nd December 2015 (at T39) in response to the Convener's direction to produce certain information (T42). This would involve, in this case, taking the figure for the provision of education for the child at School B as nil. The evidence of Witness F was that if the child is placed in School A, there will be no reduction in costs to the Respondent, since the teaching and other resource provision at School B will remain as it is currently. In other words, the cost to the Respondent of education at School B will remain the same, whether the child remains there or is placed at School A. This is due to the school funding distribution arrangements operated by the Respondent. In considering Lord Glennie's discussion of the issue in *SM*, he refers to the correct exercise being to identify "…the costs which will actually be incurred if one or other option is chosen" (para [23]) of his judgement).

64. However, we are conscious of the fact that, given the English case law cited, there is some uncertainty as to how the 2004 Act test might develop in future. It is possible that the Court of Session, in a future appeal, might revisit its analysis of the respective cost question, and this could lead to the English approach being followed, which may lead to a move away from a nil cost based approach in cases such as this one. Given this uncertainty, we feel that it is fair to the Appellant to examine the respective cost question by considering the actual cost of provision (per pupil) for the child at School B as against the projected cost of the child's attendance at School A. On this basis, we will take each in turn. The current per pupil cost of provision at School B is: £23,887 (T39). The per pupil cost of provision for the child at School A, if being placed there, would be: £40,278 in fees for a 40 week term. The differential is: £16,391 per year. There would be no transportation costs for the Respondent in the event of the child being placed in School A since the Appellant confirmed that the family would make its own transport arrangements. In our view, this is a significant cost differential on an annual basis.

Conclusion – reasonableness arising from cost and suitability comparisons

65. Considering respective cost and suitability factors in the round, we take the view that it is not reasonable for the Respondent to place the child in School A. We have explained above how, considered properly, School B is a more suitable school for the provision of the child's additional support needs. He is presently being educated there. It would not, in our view, be reasonable to place the child in School A where that placement to a less suitable school would come at significant cost to the Respondent. If we were to follow the approach to respective cost which, technically, we are bound to, the cost differential would widen to £40,278, and our conclusion on reasonableness would be the same (since the cost to the Respondent would be even higher). We should add here that, given our assessment of suitability, even if the cost differential between the two schools were marginal, we would have reached the same decision. When the cost differential is added in, we have no hesitation in reaching our conclusion on reasonableness under Schedule 2(3)(f)(iii) of the 2004 Act.

Paragraph 3(1)(f)(iv)

66. The condition in this paragraph is met – the Respondent offered to place the child in School B and he has been attending there since August 2012. The Appellant does not argue that this condition is not met.

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

67. Having concluded that a ground of refusal exists, for the reasons set out above, we require to consider whether, nonetheless, it is appropriate in all of the circumstances to confirm the decision to refuse the Appellant's placing request, or whether we should overturn the decision and place the child in School A. The burden of proof remains on the Respondent, as it does throughout the process.

68. In considering this part of the test, we must take account of all of the circumstances, including those which are relevant to the consideration of the ground of refusal, as well as any other circumstances.

69. One of the circumstances Solicitor for Appellant urged us to consider is the duty placed upon the Respondent under s.28(1) of the Education (Scotland) Act 1980, which provides:

> "In the exercise and performance of their powers and duties under this Act, the Secretary of State and education authorities shall have regard to the general principle that, so far as is compatible with the provision of suitable instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents."

70. We are satisfied that this provision applies here. The test of appropriateness in all of the circumstances is a very wide one. It seems to us that those circumstances must include the question of compliance with any statutory duty upon the Respondent which might be relevant to any question of the provision of education or the cost of so providing. It seems to us that the fact that any particular statutory duty appears in an Act other than the 2004 Act is irrelevant to this question. If Parliament had intended to restrict the test, it could have done so. To put it another way, the wording employed cannot be taken to mean that breach of a relevant statutory duty from outwith the 2004 Act is to be ignored.

71. Turning to consider this provision, it is clear that the duty is not absolute. The education authority must 'have regard to' the general principle. This is different from the notion that that principle must, in all cases, be followed (this view is supported by reference to Court of Session authority, for example *Keeney v Strathclyde Regional Council* 1986 SLT 490 (Outer House); *Harvey v Strathclyde Regional Council* 1989 SLT 25 (Inner House, 1st Div.)). Further, the wishes of the child's parents are clear – they wish him to be educated at School A. There is no doubt about this. Solicitor for Appellant refers to the meaning of 'unreasonable public expenditure' in the English case of *Haining v Warrington Borough Council* [2014] EWCA 398. We agree that the approach to that test expressed in that case is the correct one – we should consider the costs to any public authority as a result of the discharge of the local authority's education functions.

72. In our view, in refusing the placing request, the Respondent has discharged its duty under s.28(1) of the 1980 Act. An important part of s.28(1) is the caveat: 'so far

as is compatible with the provision of suitable instruction and training and the avoidance of unreasonable public expenditure'. The Respondent has considered the views of the parents in deciding whether or not to grant the placing request. The Respondent's position is that the expenditure of the sums involved in placing the child in School A would be unreasonable given the evidence of the child's progress at School B and the uncertain evidence of likely gains for the child at School A. It is clear, then, that all of the component parts of s.28(1) have been considered in the context of the general principle of complying with parental choice. We should add that it is not for us to consider whether the wishes of the parents should be given effect to under s.28(1), we need only consider whether the Respondent has *had regard to* the general principle mentioned in s28(1) in the context of considering the placing request. In our view, it has done so, and so we cannot, in considering appropriateness, draw any negative inference from the terms of s.28(1).

73. Turning away from s.28(1) of the 1980 Act, and considering all of the other circumstances, we refer to those aspects of the evidence we have considered, above. In addition, Solicitor for Appellant, in her written submission, identifies a number of considerations which are relevant at this stage (pages 23-26 of her main submission, T68-71). However, the main points mentioned here have been considered above, and in considering the appropriateness question, we have revisited these points. In considering the evidence as a whole, we are of the clear view that the refusal of the placing request should be confirmed. the child is performing well at a school which, as we indicate above, is meeting his educational needs. We have considered some of the criticisms offered by the Appellant, above. However, we do not think it is appropriate, in all of the circumstances, that the child should be taken from his current relatively successful educational environment and placed in an unfamiliar setting, on the basis of a speculative (at best) chance of improvement in his educational provision.

74. For these reasons, we are satisfied that it is appropriate, in all of the circumstances, to confirm the Respondent's refusal of the Appellant's placing request.

Further comments

75. We have three such comments to make. None is essential for our decision, but we feel it would be useful to offer our brief observations.

76. We take the view that communication between the child's parents and the school is not as good as it could be. Both the school and the child's parents should work harder to establish a clear communication channel. Part of this involves communication by the school of techniques used for and work completed by the child in the classroom setting, so that these techniques and work can be reinforced at home. The home-school diary should be used as much as possible, and information on new vocabulary learned by the child should be communicated home.

77. There was some evidence led around whether or not a Coordinated Support Plan under the 2004 Act had been considered by the Respondent. The position on this was unclear. However, it seems to us that, given the support currently in place for the child, this is a matter which should be considered by the Respondent as soon as possible. We would hope that it is a matter which can be resolved without a further Reference to the Tribunal.

78. We are concerned about what we view as a lack of rigorous and regular educational psychology input for the child. We are surprised to note from the evidence that the educational psychologist for the school was not involved to any extent in the preparation of the most recent version of the planning documentation for the child. Our impression from the evidence was that Witness E only became involved (and in May 2015) in the observation of the child in the class for the purposes of being able to give evidence to this Tribunal. In our view, the child deserves more educational psychology input than has been provided, both in a planning and in a more direct sense. We hope the Respondent reviews this in early course. If the decision is taken to prepare a CSP for the child, this would be an opportunity to consider the extent of adequate educational psychology input for the future. However, in our view, this is a matter which requires attention even in the absence of a CSP.