



Additional Support Needs

DECISION OF THE TRIBUNAL

Reference

1. This is a placing request reference, made by application dated 17th January 2019. It is made under s. 18(1) and s. 18(3)(da)(ii) of the Education (Additional Support for Learning)(Scotland) Act 2004 ('the 2004 Act'). In making the reference, the appellant asks the tribunal to require the respondent place the child in school A.

Decision

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. The tribunal therefore declines to require the respondent to place the child in school A.

Process

3. A hearing took place over two days on 13th and 14th June 2019. Prior to the hearing, a number of case management conference calls took place. Directions were issued to regulate the hearing and pre-hearing process. Following the hearing, written submissions were directed, with an opportunity for comment on the submissions of the other party, and this led to written submissions from both parties and in addition a reply from the appellant to the respondent's written submission.

4. In considering its decision, the tribunal considered all of the oral evidence as well as the written evidence and the written submissions. A late document was submitted at the request of the tribunal, namely the child's CSP, with a covering letter to the appellant dated 3rd June 2019. It is numbered R219-226. The written submissions for the appellant are numbered A103-112 and for the respondent, R227-240. The conference call note of 1st May 2019 is numbered T24-26. This means that the written evidence we considered (the bundle) consists of: T1-26; A1-112 and R1-240.

Findings in fact

General findings

5. The appellant is the mother of the child, who lives with his family.
6. The child is 10 years old.

7. The child has been diagnosed with a number of conditions, namely: autism spectrum disorder ('ASD'), Attention Deficit Hyperactivity Disorder ('ADHD'), type 1 diabetes, Pica disorder and IgA Nephropathy (a kidney condition).
8. The child currently attends school B, a school under the management of the respondent. He has attended there since Primary 1; he has just completed Primary 5. He is due to begin Primary 6 from August 2019.
9. The child has a Coordinated Support Plan ('CSP') dated 15th April 2019 (R220-226).
10. Due to his diagnoses, the child has delayed learning and requires a high level of support from school staff. He requires to be supported in school by a support worker on a 1:1 basis at all times in class. He has language and communication delay. He can speak with single words and short phrases. He can sometimes offer an observational comment.
11. Again due to his diagnoses, the child is sensitive to certain noises.
12. The child requires support with toileting while in school.
13. Due to difficulties with sleep, the child does not settle until late in the evening and is up very early in the morning, although this has improved recently.
14. The child can sometimes display challenging behaviour at school including biting, kicking, scratching and screaming. Such behaviour can also be displayed at home and during respite sessions. The child can also display repetitive behaviours which appear to be compulsive.
15. On 16th October 2018, the appellant made a placing request for the child to attend school A. The request was not responded to within the statutory deadline and so a refusal of that request was deemed to have occurred on 16th December 2018. School A is a special school and the managers of school A are willing to admit the child (letter of 9th February 2019 at T15).

Findings on the child at school B

16. School B is a mainstream school which has a specialist city-wide provision for pupils with additional support needs ('ASN'). There are 68 pupils within the ASN provision at school B. There are also mainstream classes in the school. The pupils within school B's ASN provision generally have a diagnosis of a neurodevelopmental condition such as Autism, ADHD, Down's Syndrome and Cerebral Palsy and therefore require an adapted learning environment. Many of these pupils have sensory and behavioural needs. Some display challenging behaviour. Many of the pupils at school B with ASN experience language and communication difficulties and some are non-verbal. The children in the child's class are slightly more academically able than him. This is of assistance to the child as he can watch and learn from some of the other class members. Most of the children in his class are more verbal than the child. Some are more socially aware than the child, but some do not engage in social conversation. Some of the child's peers interact with the child and enjoy his company. The child engages with his peers in certain activities, for example pushing them on a trike, collecting coloured balls with them for soft play, engaging in 'high-fives' or handshakes when initiated by his peers. The child is familiar with his peers.

17. The child is currently being educated in one of the seven ASN classes at school B with nine other children. There are five members of staff in this class, one teacher, one early years' practitioner and three pupil support assistants.

18. The child requires (and receives) 1:1 support at all times and for all classroom activities in school B. The child has an individual workstation within the classroom.

19. The staff at school B who are educating and supporting the child have specialist training and education in educating children with needs similar to those of the child. Teachers are educated to degree level. Early years practitioners have a Higher National Certificate (HNC) in Early Education and Childcare or a Scottish/National Vocational Qualification Level 3 in Children's Care and Development, or equivalent. All of the pupil support assistants who work with the child have several years' experience of working with children with ASN and have attended relevant training courses. All staff within the school B ASN provision attend training on: speech and language approaches such as Pixon, Makaton, Intensive Interaction and Picture Exchange Communication System (PECS). Most staff (at least four of the five staff members in the child's class) have CALM (Crisis and Aggression Limitation and Management) training, to assist with challenging behaviour and de-escalation. Some staff (two who are in the child's class) have training in physical intervention using the CALM principles. Staff at school B participate in continuing professional development training, and most staff members have attended such training on: autism spectrum disorder, behavioural difficulties, using visual supports, supporting sensory needs. Accordingly, the staff who are educating and supporting the child at school B are suitably qualified and experienced to do so.

20. The child is working at the Early Level of the Curriculum for Excellence. His curriculum is adapted to his needs. The child can read a range of words and recognise words relevant to him. He can identify around thirty high frequency words. The child is able to count sets of items and is working on addition and subtraction up to ten. The child can participate in academic tasks including sequencing, categorising, problem solving, literacy and numeracy. Progress on areas of the child's education is measured (in part) using Action Plans. One such plan was formulated in September 2018, with the target date for achievement being January 2019 (A29-32). The next such plan was formulated in January 2019 for achievement in May 2019 (R133-137). With one exception (toileting R133, where no change is recorded), both plans show improvement across all areas recorded. The child has access to appropriate IT in the class, including an iPad and an interactive white board. Overall, the child is making adequate educational progress at school B.

21. The child benefits from fortnightly speech and language therapy sessions at school B, where the speech and language therapist works directly with him. The child and an observing staff member are shown techniques to be used in the class at school B to enhance the child's communication. These techniques are put into practice in the classroom.

22. The child benefits from advice from the respondent's educational psychology service. The child's educational psychologist (witness B) observes the child in class at school B, attends review meetings and offers feedback and suggestions on the child's educational needs and practices in the class. An example is advice on the appropriateness of language used by the child's class teacher. This advice was communicated and acted upon. Witness B has carried out five classroom observations of the child over the last two academic years: 13th March, 29th June and 1st October 2018; 10th and 20th May 2019.

23. A Diabetes Care Plan dated 19th December 2018 is in place for the child (R71-77). The school takes advice from the school nurse and the diabetes team on management of this condition. Detailed staff training has been undertaken on how to manage the child's diabetes while in school. The school-parent diary is used to communicate any information about food not taken in school, or to inform of any substitute items. The Diabetes Care Plan was updated in January 2019, leading to less telephone calls from staff to the appellant about the child's glucose levels in relation to his diabetes.

24. A number of children at school B, including the child, have the condition Pica. The child, as a result of this condition, has a tendency to eat non-edible items since he enjoys feeling the texture of these items in his mouth. School B staff have taken steps to minimise the risk of the child taking non-edible items (as well as edible items belonging to others) into his mouth. For example: all food items (such as other children's lunches) are locked away during class time; the items on display in the class are limited; there are locks on all class cupboards; and staff are aware of the need to ensure that items are locked away or to ensure that the child is supervised when he has access to items. On occasions where the child manages to put an inappropriate item into his mouth, staff in his class are aware of the need to ask him to remove it, if necessary by the use of an offer of a reward to motivate him. As a result of these steps, the staff at school B are adequately controlling the child's Pica condition.

25. The child requires support with toileting.

26. At school, the child sometimes displays challenging behaviour when distressed. This can consist of biting, kicking, scratching himself and others and screaming. Some other children with ASN at school B exhibit similar behaviour. The incidents of such behaviour are reducing, and have reduced during academic session 2018-19. For example, the child went through a period of regularly biting others. Since February 2019, this has reduced, happening only on a few occasions over that period. Sometimes the triggers for these behaviours are clear, on other occasions the trigger is unclear. School B has developed for the child (and all other children exhibiting such behaviour) a Behaviour Support Plan. The current version for the child is dated 20th January 2019. That plan is split into a Risk Assessment and Behaviour Plan (both of which can be found at R23-29). This documentation includes details on behaviour presenting risks, triggers for those behaviours, crisis management advice as well as proactive and reactive strategies for each behaviour. The severity and likelihood of occurrence of each risk are scored. This documentation is detailed and highly practical. School staff meet regularly to discuss the plan and whether or not it requires to be amended. School B staff deal with difficult behaviours in accordance with the Behaviour Support Plan. In general terms, the approaches involve either a mixture of prevention and de-escalation, as well as teaching children how to self-regulate. CALM physical intervention is sometimes necessary, but the child has not required such intervention. In general, the child's classes at school B are calm with very few disturbances.

27. The child has little sense of danger. He has no awareness, for example, of the potential danger of road traffic. The child has a tendency to climb trees and fences. Previously, the child would regularly try to climb the school fence. However, this behaviour at school has now ceased. In addition, the child previously had a tendency to try to escape from the school. Again, this no longer happens. The school playground is surrounded by a high fence and all gates are locked during the school day. He no longer runs away and he uses the play

equipment in the playground. On one occasion a number of years ago, the child escaped from the playground area into another part of the school grounds. School B staff acted promptly and the child was brought back into an appropriate area of the school. As a result of this incident, changes were made to the area in which the child plays. No further incident of this nature has taken place. The appellant requires to lock windows and doors at home to keep the child safe. The garden at home is fenced in order to keep the child safe.

28. The child sometimes struggles with transitions, for example his arrival at school. Since around the post-Easter term in 2019, the appellant reported that the child was exhibiting distress when being driven by his mother to school in the mornings. This had not previously happened. School staff have observed the child to be upset when collecting him at the school front door. He has also been upset when being taken to board the school bus at the end of the day; sometimes he refuses to board the school bus. School staff have noted that the trigger for such incidents is sometimes the child's wish to engage in compulsive behaviour, for example wishing to touch an item or retrace his steps. The school staff use strategies when faced with such incidents, for example allowing the child to finish his behaviour where there is evidence of compulsion; distracting him; motivating him; making changes to the child's school arrival and home time routines. For example, every morning the child is brought into school five minutes before the other pupils are allowed to enter to avoid him experiencing congestion in the corridor. The child is now being transported both to and from school on the school bus.

29. The child copes well in class with his peers. He interacts with a mainstream pupil who visits his class. He interacts with another child in the playground (pushing the child on a trike). The child is included in school assemblies and school trips and plays alongside other children in the playground. He can access quiet areas, for example the sensory room to listen to music or the swing in the playground, when he is upset. School staff are working with the child to develop in him the ability to ask to go to such places when he wishes to; in the meantime, any such needs are identified by staff members.

30. The child benefits from access to a soft play room at school B, where he takes part in physical activities which engage his sensory system and are part of a 'sensory diet'. Access to this facility assists with communication and interaction with staff and peers; the child seeks out staff in this room and interacts with other children there.

31. The child accesses a sensory room at school B. This facility is used by the child for quiet relaxation time and for listening to music, which the child enjoys. It can be used in pre-scheduled times as well as flexibly.

32. The child benefits from being taught age-appropriate life skill tasks at school B. These include: dressing; toileting; health and hygiene (such as washing hands); changing for PE; brushing his teeth; learning about the body; cooking; washing dishes. He also benefits from going on curricular-connected school trips (for example, a trip to a local castle, to assist with a topic at school on castles).

33. The child benefits from being taught age-appropriate social skills at school B including: communication; turn taking and playing alongside peers.

34. The appellant is provided with funding for respite care via Direct Care Payments consisting of 16 hours per week (used primarily for witness D to care for the child) and in addition two overnight stays per month at a specialist respite facility. The overnight respite

visits began recently. In preparation for the overnight stays, the child was attending the specialist respite facility on a Monday afternoon after school until 7.15 in the evening. The appellant is dissatisfied with the time taken to organise the overnight respite provision. She is also dissatisfied with alleged errors by the staff at the respite facility around their management of the child's diabetes.

35. The child has a Child's Plan dated 28th January 2019 (R43-69). This Plan concludes with seven recommendations based on the earlier content of the Plan.

36. Communication between school B staff and the appellant takes place on a regular basis through a number of channels. For instance, specific points which arise during the school day are conveyed to the appellant via the child's 'Homework Diary' (samples from August 2018 to May 2019 can be found at R179-218). Changes to the child's routine or new behaviours are communicated to the appellant. Verbal communication between school staff and the appellant takes place on a daily basis at the school gate when the child is being dropped off for the school day.

General findings on school A

37. School A is an independent school which is a charity which offers education, care and therapy to children and young people with autism and other ASN on a day or residential basis. School A is an Autism Accredited school. As such, it was last peer reviewed in February/March 2017 (Autism Accreditation report at R105-131). School A was last inspected by Education Scotland in February 2016 (report of 9th February 2016 at R87-103).

38. There are approximately thirty pupils in school A with ASN and 20 mainstream pupils.

39. There are likely to be pupils at school A with similar needs to those of the child.

40. There is one pupil at school A currently who has Pica and staff at school A manage this condition in a similar way to the way in which it is managed in school B.

Findings on school A and the child

41. On 16th May 2019, witnesses A and B visited school A, spoke to school staff and observed certain lessons. The purpose of this visit was to consider the suitability of school A from the point of view of meeting the child's needs. Both witnesses viewed a primary school class and a class for children of secondary school age. The child would, if attending school A, be more likely to be joining the former class.

42. In some respects, school A could be an appropriate place in which the child could be educated. An individual approach is taken to the delivery of the education there, based upon the child's needs. There is some focus on life skills as well as on traditional education. Each child at school A has an individual education plan, containing a curricular plan for each term with a list of targets. Additional personal targets are included around social skills. Residential pupils have an entire care plan. A dedicated therapy room is available for speech, art and play therapy. Music is used in much of the school's educational provision. A range of workshops are available for pupils attending school A, including bike maintenance, candle-making, pottery and metalwork. Access to these workshops is controlled according to need, reason for referral and desired outcomes. The child's suitability for any such workshop has

not been assessed. The environment at school A can be calm (its countryside setting is calmer than the city-centre setting at school B).

43. The arrangement for overnight stays for residential pupils at school A involves allocation of pupils to a 'family' with whom the pupil resides in one of the shared houses at school A.

44. There are no fences in the outdoor spaces at school A, so that pupils can, unless closely supervised, access the whole outdoor area, including a road which runs through the campus. The doors to classrooms are not routinely locked. Classroom doors are frequently propped open.

45. The child has not been assessed by the appropriate professionals for the suitability of additional therapies to those currently being provided, such as art therapy, music therapy or equine therapy.

46. The child benefits from a highly adapted curriculum and individualised curricular tasks. Whole class lessons (such as those which were observed as being delivered at school A) would not be suitable for his needs. He also benefits from short structured tasks delivered on an individual basis. The child has an individual workspace within the classroom at school B.

Reasons for the Decision

General remarks on the oral evidence

47. 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. We found the respondent's witnesses to be open and honest. Where concessions were appropriate (such as on positive points about provision at school A or areas of difficulty at school B) we found that the respondent's witnesses were prepared to make these. Further, we benefitted from the provision of detailed witness statements for all of the witnesses. None of the witnesses deviated in any significant way from their witness statements. The witness statements of the respondent's witnesses are particularly detailed and helpful.

48. We found witness D to be someone who cares for the child and knows him well. On the appellant, she clearly cares very deeply for her son, and wants what is best for him. We gained the impression that while the appellant was honest in all of her evidence, her interpretation of the provision at school B was affected by her attraction to the facilities at school A (including the residential facilities). Another influencing factor in the appellant's evidence is that she (in our view understandably) is struggling to cope with looking after the child (and his sister) at home (this is confirmed in the appellant's submissions, at A112, para 9). This led to a tendency to, in our view, be overly critical of the provision at school B. We offer no criticism of the appellant in making these observations; but we do require to reflect our impression of the evidence as far as that is relevant to our assessment of the material available to us. We would also add that while the appellant visited school A on two occasions (and the child attended on one occasion), these were during Open Days and the appellant (unlike witnesses A and B) did not observe any pupils in a classroom setting. This influences the weight we can attach to the appellant's evidence about the likely provision at school A for the child.

49. These general observations of the oral evidence affect our assessment of the evidence and its application to the relevant legal tests.

General remarks on the legal tests

50. On the general approach, as pointed out by the appellant (and as set out in the case of *M v Aberdeenshire Council* 2008 SLT (Sh Ct) 126 (Sheriff Court)), the appropriate assessment point is at the time of the hearing. We also accept that the onus of establishing the ground of refusal lies with the respondent. We further accept that (again arising from the *M* case), consideration should be given to the assessment of the child's needs which happened closest to the hearing. In our view, we have evidence of such an assessment in the respondent's witnesses' oral and written evidence.

The ground of refusal: 2004 Act, schedule 2, paragraph 3(1)(f)

51. This is the only ground of refusal relied upon by the respondent in this reference. This ground comprises 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 will deal with each in turn. We should add that there was no dispute between the parties on the question of whether the child has ASN, as defined in s.1 of the 2004 Act. Given the findings at paragraphs 7 and 9-14 above, it is clear to us that this is the case. The only further comment we would make is that it seems to us that the child's diabetes qualifies on its own as an ASN under s.1 of the 2004 Act, since meeting the child's needs in this area represents "provision (whether or not educational provision) which is additional to, or otherwise different from, the educational provision made generally for children.." (s.1(3)) and that such a need means that the child "would be likely to be unable without the provision of additional support to benefit from school education" (s.1(1)). The need for a Diabetes Care Plan (R71-77) and the content of it is evidence of the need for support to be provided to enable the child to keep well during the school day.

52. One particular legal interpretation matter on this ground of refusal arises. The appellant raises certain concerns about the respite provision of the respondent (see paragraph 34 above). We are referred by the appellant to the case of *Edinburgh City Council v MDN* 2011 SC 513 (First Division, Inner House), and in particular to paragraph [19] of the judgment, where the court refers to a 'holistic' view of needs, encompassing educational and social work support. We note that the court in that paragraph is simply summarising the approach of the tribunal in that case; the court does not endorse it. Indeed, on considering the summary of one of the relevant limbs of the ground of refusal at paragraph [26] of the judgment, there is no mention of a 'holistic' approach; the task is defined there more narrowly. In taking the approach set out at paragraph [26], what matters is '[the respective suitability] of the provision for the additional support needs of the child in the two schools under consideration'. Although this part of the judgment is about paragraph 3(1)(f)(iii) of Schedule 2 to the 2004 Act, it is clear that this approach must also apply to paragraph 3(1)(f)(ii), since similar wording is adopted ('provision of the [ASN] of the child in a school'). In our view, since the respite provision is not provision in a school, it is not relevant to our consideration of the ground of refusal in this case. It would certainly be relevant to a consideration of a reference relating to the content of a CSP. What we have to concentrate on here is the provision not by the respondent in all of its roles but by the respondent as it is responsible for provision 'in a school' or 'in the two schools'. The respite provision is not provided in a school at all. We return to respite when considering the 'appropriateness in all

of the circumstances' test in s.194A(a)(ii) of the 2004 Act below, (although the outcome of our consideration there is the same as here).

(a) School A is not a public school: paragraph 3(1)(f)(i)

53. 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. This part of the ground of refusal is met.

(b) Provision for the child's needs at school B: paragraph 3(1)(f)(ii)

54. This paragraph requires that the respondent is able to make provision for the child's ASN 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, and that this part of the ground of refusal is met.

55. The application of this paragraph is disputed. The appellant's arguments are set out in pages 3-5 of the appellant's initial written submissions (A105-107) as well as in the relevant parts of the appellant's supplementary submission (A112-13). The respondent's arguments on this part of the ground of refusal are made in its written submissions pages 5-9 (R231-235).

56. 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.

57. We have carefully noted the appellant's concerns over incidents and difficulties at school B. We accept that there have been issues in areas such as toileting, challenging behaviour, an attempt to escape and Pica, but in our view difficulties in these areas, while distressing, are inevitable with a child with needs such as the child in this case. In our view what is important is that systems and practices are in place to reduce the risk of issues developing, and to deal with them when they occur.

58. Reference is made by the appellant to a sentence in the report of the Occupational Therapist at A80, 2nd paragraph, final sentence. The comment notes that the learning environment is very challenging for the child and that he is distracted and not always available for learning tasks. However, this is not a comment which is useful to demonstrate any deficiency in provision by school B staff, nor does it appear to be designed as such. Further, it is a single sentence from a detailed report which is not critical of the provision for the child at school B; rather it is an update on the OT provision and plans for the child. Many of the concerns recorded in the latter part of the report are summaries of the appellant's comments in the meeting. No opinion on these is offered by the Occupational Therapist. Further, the Occupational Therapist was not called as a witness, so her views were not open to scrutiny, unlike those of the witnesses for the respondent. We therefore find the sentence relied upon to be of no real evidential value.

59. We will break down our consideration of this part of the ground of refusal into specific areas. We return to these areas when examining the comparison exercise for paragraph 3(1)(f)(ii) on 'respective suitability' of the two schools. In examining each area, we make

reference back to the relevant paragraphs in the 'findings in fact' part of our decision, above. The findings in these paragraphs underpin our conclusions in the relevant areas.

General classroom environment at school B (paragraphs 16-19)

60. It is clear to us that the child is being educated in an appropriate environment in school B. He is being taught in an ASN class, alongside children with similar educational needs. The other children in the ASN class are overall more able than the child, but this is an advantage. The staff involved in the classroom teaching are suitably qualified. The child is overall settled and happy in school B. There are no issues with regular non-attendance, suggesting that despite transition problems, the child wishes to attend school.

Academic progress at school B (paragraph 20)

61. In our view, there is ample evidence to indicate that the child is making adequate academic progress at school B, given his age and needs. It is clear that a number of age and needs appropriate milestones are being set and that he is meeting all of these. The appellant expressed concerns that the child was not progressing academically, and that a better focal point for his education would be on building his life skills. However, the skilled evidence available suggests that academic progress is being made at school B, with various educational targets being set and largely achieved. In addition, appropriate life skills are being imparted at school B.

Specialist input at school B (paragraphs 21-22)

62. The child and the regular teaching and support staff are assisted by the input of speech and language and educational psychology expertise. The advice being offered is put into practice by staff, enhancing the child's ability to learn and cope in the classroom and general school setting. The appellant questions (A105) why earlier educational psychology and CAMHs input did not happen. However, our role is to consider the current provision, not to review allegations of delay in referrals which have by now been made. The appellant also notes (A105-106) that the system for communicating between witness B and the school staff (verbal) is not effective. We did not get a sense of this from witness B who indicated that communications from the appellant were acted upon. On the point that communication between witness B and the appellant is not effective, this is not a matter which, at least on the face of it, is relevant to the statutory tests we must apply. The appellant also suggests that ABC charts are not being used for the child, but as the respondent points out, witnesses A and B were of the view that such charts are not needed for the child.

Diabetes management at school B (paragraph 23)

63. The Diabetes Care Plan in place for the child appears to us to be appropriate and is followed. That plan has been adapted in order to avoid excessive calls home to the appellant. There is no evidence to suggest that the plan is not working or that there have been any notable issues with the management of this condition at school B. The appellant notes in her initial written submission, page 4 (A106) that there were repeated calls to her on the same diabetes-related matters. However, the evidence suggests that these calls have reduced more recently.

Pica management at school B (paragraphs 24 and 25)

64. School B staff have taken steps to reduce the risk of the child taking inappropriate items into his mouth. In our view, the complete exclusion of any instance of the child putting something inappropriate in his mouth is unrealistic, especially given the evidence that the child can spontaneously and very quickly reach for an object. In relation to the incidents during toilet visits (paragraph 24 above), we accept that this must have been distressing for the appellant to learn about. However, it seems to us that these were isolated incidents and that the staff are alert to the possibility of this happening again. The steps taken by school B to reduce the risk of the child taking inappropriate items into his mouth seem to us to be measured and as robust as can be reasonably expected.

Toileting at school B (paragraph 25)

65. Appropriate progress is being made in this area overall. It is obvious that the staff at school B are treating this important aspect of the child's life skills development seriously. Independence in this area is being encouraged. Although the incidents of Pica during toilet visits are unfortunate and to be avoided, as noted above staff at school B are aware of the risks. Recent issues with toileting are being addressed in an appropriate manner by school B staff.

Challenging behaviour at school B (paragraph 26)

66. In our view, given the child's ASN, it would be unreasonable to expect the complete absence of such incidents; what is important is that they are kept to a minimum by the educational environment in place and that they are handled appropriately when they arise. The instances of such behaviour are decreasing and, in our view, appropriate planning and monitoring of such instances is in place. Strategies are in place for avoiding triggers and for dealing with such behaviour where it occurs. It is also important to note that there was no evidence to suggest that the appellant had been called in by the school to take the child home as a result of challenging behaviour (as is not uncommon). Nor has the child been excluded for such behaviour (again, not uncommon). This is an indication of the ability of school B staff to avoid such behaviour and to deal with it when it does occur. The child's challenging behaviour occurs both at home and in the community. Witness D indicated that despite knowing the child well and being his regular carer, she struggles sometimes to deal with the child's behaviour. The appellant has sometimes had to come to her assistance during support periods when she has struggled to manage the child's behaviour. This all indicates that the environment in school B is not the cause of the child's behaviour. In addition, the fact that school B staff can manage the child's behaviour when it does occur reflects favourably on the school's practice of meeting the child's needs in this area. The appellant refers at page 3 of her initial written submission (A105) to 'repetitive OCD behaviours' (referring to Obsessive Compulsive Disorder) and to the child's anxiety. As the respondent points out in its written submission, page 5 (R231), the child does not have a formal diagnosis of anxiety. We did not hear any evidence of a formal diagnosis of OCD. Whether the behaviours referred to by the appellant are part of the child's autism or represent symptoms of other conditions is an unresolved matter. Should there be a diagnosis of any additional conditions, that will be a matter for future discussion. We may base our decision only on the evidence available to us.

Environmental safety at school B (paragraph 27)

67. The child's tendency to wish to climb and escape has been noted by school B staff and is treated very seriously. A reduction in instances of such behaviour as well as clear risk

reduction measures are both evident at school B. The sole incident of escape from the appropriate part of the playground happened in a previous academic year has not happened again. In our view, the evidence suggests that the play area the child uses is safe.

Transitions at school B (paragraph 28)

68. Transitions are clearly an issue for the child. Again, however, school B staff are acutely aware of this and strategies for dealing with particular transitions are in place. It is not reasonable to expect every transition to be smooth and uneventful; what is important in our view is that appropriate risk reduction action is taken and that any problematic transition events are handled appropriately. On both fronts, we feel that school B staff are succeeding.

Social and life skills development at school B (paragraphs 32-33)

69. There is clear evidence that these are being promoted and at an age appropriate level. The appellant argues that the child is vulnerable and has no interaction with mainstream children and no allocated buddy (initial written submission, page 4, A106). However, as noted above in paragraph 29, the evidence suggests that the child does interact with other children.

Equipment and non-classroom facilities at school B (paragraphs 20, 30 and 31)

70. Access to classroom IT, the sensory room, outdoor access and the soft play room further evidence the wide range of supports in place at school B for the child. These all combine with the classroom and external specialist support in a comprehensive package of measures to provide the child with a strong learning and support environment.

Reasonableness of placing the child in school A: respective suitability and cost - paragraph 3(1)(f)(iii)

General comments on the test

71. 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. It is clear that we must have regard to both cost and suitability, and in considering both, to reach a decision on the reasonableness of placing the child in school A. In other words, this ground 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 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.

72. Further, 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 defenders’ 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.”

73. On cost, it is clear that we should consider the additional cost in meeting the ASN for the child at school B compared with the cost (the fees and, if applicable, transport cost) in relation to the prospective school (*S v Edinburgh City Council (SM, Appellant)* 2007 Fam LR 2 at paragraphs 23 and 28, as approved by the Inner House in *B v Glasgow City Council* 2014 SC 209; 2013 SLT 1050 at para 19).

74. There are two ways to view the respective cost question.

75. The first is to approach it from the point of view that only the additional cost of placing the child in school A not currently being incurred should be taken into account. Using this model, the cost at school B would be nil (since these costs are already being incurred by the respondent) and the cost at school A is the fee which would be paid by the respondent to school A should the child attend there.

76. The second approach is to compare the cost at school B for provision of the child’s ASN with the fees for school A. The issue with that approach is that it might be difficult to isolate and calculate with any accuracy the cost of provision for an individual child in an environment where the cost is global for the school, or class. It is much easier to identify a cost for provision per child in an independent school where fees are paid per child. However, the fact that a cost calculation might be difficult does not mean that it should not be done. The wording of the provision suggests that such a comparison should be made. Further, Lord Glennie’s comments in *S* (as endorsed by the Inner House in *B*) suggest that such an approach is necessary. In addition, this approach is supported by case law in England, albeit not on directly equivalent legislation (*Slough Borough Council v Special Educational Needs and Disability Tribunal* [2010] EWCA Civ 668; [2010] E.L.R. 687 and *EH v Kent County Council* [2011] EWCA Civ 709; [2011] E.L.R. 433, both under s.9 of the Education Act 1996, the Scottish equivalent legislation being s.28(1) of the Education (Scotland) Act 1980).

77. In this case, the respondent (who bears the burden of proof) did not offer any evidence on the cost of provision for the child at school B. The consequence of this is that we should ignore any evidence of the cost of provision for the child at school A in considering the reasonableness question. This therefore means we should assume that on the cost question, the position is neutral. The reason for taking this approach is that it is clear that the respective cost argument is one which can only benefit the respondent. Were the child placed in school A, the respondent would have to meet the cost (2004 Act, schedule 2, para 2(2), final part). As Lord Glennie put it at para 23 of the *S* case:

“The question is: how much more will we [education authority] have to spend to give the child that extra benefit rather than [continue to] place her in our own school?”

78. Only the respondent may benefit from such an argument. In the absence of reliable evidence from which we can make a comparison (we deal with the appellant's cost estimations below), the appellant must be given the benefit of this absence, which leads to our cost-neutral decision. This means that, practically speaking, the reasonableness question requires to be decided only on respective suitability.

79. We should add that we have taken account of the fact that the appellant provides some costs which, it is claimed, would be saved by the respondent should he attend school A (see the appellant's statement, para 23 at A95), and that these costs should be offset against the costs incurred at school A. However, it is not clear whether these estimates are reliable as far as cost savings for the respondent are concerned, and in any event, even if we accept that the respondent as an education authority would save all of the costs listed by the appellant, it is clear that these would fall short of even the minimum estimate of costs for school A provided by witness C (R145-146). Regarding the costs question as a neutral factor therefore benefits the appellant.

Respective suitability – general comments

80. 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".

81. 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 basic educational needs, but we are in no doubt that school B is more suitable than school A.

82. Evidence which is of particular value in considering this question is that of witnesses A and B. This is for a number of reasons. Firstly, they know the child. Secondly, they have experience of observing the child in school B. Thirdly, they have made enquiries of the provision at school A (including class observations), and specifically from the perspective of the child in this case. This last point is important, since some time was spent in the evidence and submissions on general material around the suitability of school A. In particular, reference was made to the last school inspection report as well as an Autism Accreditation review. We did not place any particular weight on these documents. They are several years old and are general in nature. They do not inform us of the likely provision at school A for the child. By contrast, the evidence of witnesses A and B does just that. It is much more recent than the reports relied upon. For these reasons, we placed particular weight on the evidence of witnesses A and B in relation to school A. In doing so, we fully accept that the appellant knows the child better than anyone we heard from, and we closely considered her views on the respective suitability question. However, of most value to us in the task we have to perform is credible and reliable evidence of the provision available at the two schools from professionals who have direct experience of both. That is what we have in the evidence of witnesses A and B.

Suitability – school B

83. It is clear from the evidence that the provision for the ASNs of the child at school B is highly suitable. We outline our analysis of the provision there at paragraphs 54 to 70. As we have stated earlier, provision there (as at any school) is not perfect in every respect, but it is overall very good, and it is clear that the child is progressing academically and that his needs are being met.

Suitability - school A

84. As a result of the visit by witnesses A and B to school A, they noted certain aspects of the provision there which gave rise to their concern around its appropriateness to meet the child's educational and other needs.

85. Although no firm indication of the class the child would enter was provided by school A, it was stated by school A staff that he would be likely to join the primary class visited by witnesses A and B. We therefore base our assessment of suitability of school A on the provision observed to be being provided in that class. We realise fully that if the child were to attend school A certain adaptations might be made, but we can only base our decision on the evidence of recent provision in the class the child would be most likely to be placed within. That is, in our view, the only reliable source of evidence for the purpose of a comparison of this kind.

86. The concerns noted in relation to provision to pupils in that class included: lack of visual indication of timing of the teaching session; lack of ICT facilities in the classroom currently available at school B, such as an iPad and an interactive whiteboard (although there is a computer room and laptops and iPads can be flexibly used in classrooms); lack of use of technology to motivate learning; lack of autism friendly adaptation to the classrooms; over-emphasis on verbal communication by staff (not enough support by using visual prompts, signing or actions); lack of an individual workstation; disengagement of some pupils with the lessons, sometimes due to lack of suitability of content; lack of visual timetable or structure for the class to support now and next awareness; over-complex instructions for some pupils causing a pupil not to participate; no soft play room; no sensory room; no use of recorded music for calming; possibility of very challenging behaviour from other pupils which can cause distress; lack of suitability of the classroom for a child with Pica (significant number of resources available to access); lack of differentiation in lessons where some children in the class had ASN and some did not; lack of staff interaction; mismatch between the lesson content and abilities of some children with more complex needs; lack of clear structure to the day; no clearly defined areas of the class for different activities; and lack of visual supports to aid learning.

87. These concerns are significant, and led witness A to conclude that if placed in the primary class at school A, they would have a negative impact on the child's concentration, engagement, progress, understanding of the class content, behaviour and motivation to learn. Taken together, impacts in these areas would, in our view, seriously undermine the child's ability to progress academically and to enjoy being at school.

88. We should add that even if the child were likely to join the secondary class at school A (and the appellant indicated that she would be content for him to join either class), witnesses A and B identified some concerns. These concerns were not as strong as those which arose in relation to the primary class, but concerns existed around the need for adaptation of the physical layout as well as the lessons delivered. Lesson adaptations would be required around the use of verbal language; level of signing; individualised visual supports;

personalised communication; appropriate use of symbols; removal of communication aids and lack of specific individual timetables.

89. A further concern which exists (and which applies whichever class the child were to join) is around the child's safety at school A. The child has no sense of danger and the lack of locked (or even closed) doors in classrooms as well as the open, non-fenced nature of the outdoor space there would pose safety risks if the child attended as a pupil. No doubt a risk assessment would take place if the child were to attend, but we would be concerned about the child running off if the levels of supervision were not as robust as they ought to be. This is something which is tightly controlled at school B. The child's lack of awareness of road traffic dangers would pose a risk in him accessing a campus though which a road runs (albeit that the evidence suggests that the road is not used often). This is all the more concerning given the child's liking for outdoor play. In addition (and still on safety), we note that there are currently no school A pupils who have diabetes. While the evidence suggests that training would require to take place for staff to manage the child's diabetes, we have no evidence around when that training would take place or how robust arrangements would be at school A for management of the child's condition. This contrasts with a very clear and efficient system for managing this condition at school B.

90. We note from the evidence that the child struggles sometimes with transitions. This applies to some transitions which take place regularly and therefore with which the child will be, to an extent at least, familiar (for example, his arrival at school each morning). The transition to school A would, in our view, be a very difficult one for the child. He would be attending a new school, with different facilities, staff, pupils and education. Further, if attending on a residential basis (as is sought by the appellant), he would have to transition to a new home life, at least during the school term and on weeknights. It is, of course, to an extent difficult to predict with any accuracy how the child will handle such transitions. However, it seems to us that there is a high degree of risk that distress and discomfort would be caused to the child by such major changes in his life, especially given the evidence of current difficulties the child has with much less significant transitions. That risk might be worth taking if the educational experience of the child would be likely to improve were he placed in school A. On the evidence, as indicated below, we do not find that likely. This is another factor which influences us on the reasonableness question.

Conclusion on respective suitability

91. It is plain to us that the provision in school B is more suitable for meeting the child's needs than the likely provision in school A. There are a number of concerns about the fit of school A to the child's needs. These concerns have been expressed by experienced professionals providing reliable, credible and comprehensive written and oral evidence following on from observations of teaching practices and facilities at both schools.

Respective cost

92. We refer to our discussion of the test above. Although estimates of the fees which might apply at school A were provided, and there seemed to be uncertainty about the basis on which the child might attend school A, we need not address these questions since we are regarding the respective cost question as neutral.

Conclusion – reasonableness arising from cost and suitability comparisons

93. Considering respective cost and suitability factors in the round, we take the view that it is not reasonable to place the child in school A. If we were to overturn the decision to refuse the placing request and require the respondent to place the child in school A, this would involve taking him from his current school environment, where there is clear evidence of reasonable progress, and placing him in an environment where there are doubts around suitability of the provision there for his educational needs. This is assuming that there would be no cost implication to the respondent in placing the child in school A.

Respondent has offered to place the child in school B - paragraph 3(1)(f)(iv)

94. The condition in this paragraph is met – the respondent has offered to place the child in school B (where he is currently being educated) by allowing him to continue to be educated there. This is not in dispute.

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

95. Having concluded that a ground of refusal exists (the one in the 2004 Act schedule 2, para 3(1)(f)), 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.

96. In considering this question, 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 that are not so relevant. In this case, all of the relevant circumstances have been discussed above, along with our views on each. In considering the evidence as a whole, we are of the clear view that the refusal of the placing request should be confirmed. It seems to us that the respondent has behaved reasonably in deciding that adequate provision could be made for the child at school B. It is clear that reasonable educational progress is being made and that the child is reasonably happy at school B.

97. The appellant in her evidence (both written and oral) raised a number of concerns around the provision at school B, and made a number of positive points about school A, which she visited with the child. The points of concern around school B include: diabetes management; management of the child's Pica; distress at school indicating that he is unhappy; lack of training of staff to deal with the child's challenging behaviour; communication between the appellant and staff; soft play room availability; size of the school and its impact on the child; incontinence management; safety and management of the child's lack of fear of danger and desire to escape from the school; level of life skills education. This is contrasted by the appellant with school A where she refers to a happier, quieter environment which would be caring and nurturing and reduce stress for the child and where he would learn more relevant life skills.

98. We have considered these points above in our respective suitability examination, and we refer to that part of our decision. We consider them (along with all of the other evidence) here in the context of the much wider test of appropriateness. However, in our view, it would, on balance, not be appropriate to place the child in a school where the educational provision is not as suited to him as it is at the school he currently attends. The uncertainty of the transition to school A is also a concern to us, as noted above, as is the physical safety of the child if placed in school A.

99. The appellant refers to s.28(1) of the Education (Scotland) Act 1980 and the case of *Haining v Warrington Borough Council* [2014] EWCA Civ 398 in the submission on the appropriateness test. The respondent refers, in addition, to s.4(2)(b) of the 2004 Act, which is framed around unreasonable public expenditure. The duty in s.28(1) requires education authorities to have regard to the general principle that (subject to certain caveats), pupils are to be educated in accordance with the wishes of their parents. In our view, the respondent has had regard to this general principle. It is clear that the appellant wishes her child to be educated at school A, and this was the basis on which the placing request was investigated, albeit following the deemed refusal (see witness C's statement at R140-141). The appellant's views were considered as part of that process and during the course of this reference. Indeed, the whole focus of this reference and the respondent's response to it has been to have regard to the general principle of parental wishes. That is the focus of the relevant provisions (2004 Act, schedule 2, para 2(1), placing a duty on the respondent to place the child in accordance with the wishes of the parent unless one of the grounds of refusal exists). What s.28(1) does not do is require the respondent to accede to the wishes of the parent, or even to consider those wishes at a certain level; it need only have regard to the general principle. It is only where the evidence suggests that no (or only scant) regard is had to the wishes of a parent in this area that there can be an argument that the s.28(1) duty may have been breached. Since no such argument can be mounted in this case, we need not consider the caveats to the duty. Even if the duty had been breached, that is only one factor in the appropriateness question. Given that this tribunal requires in all cases to pay close attention to parental wishes on the education of their children, it would be a very unusual case in which a breach of s.28(1) by an education authority would mean that it would be appropriate to place a child in a requested school. The appropriateness test is a wide one.

100. The appellant points to written evidence from Doctor A (letter of 9th May 2019 at A82-83) and Doctor B (letter of 2nd April 2019 at A88-89), Consultant Paediatricians in support of her argument that school A would be an appropriate place for the child to be educated. Although Doctor A appears to offer her support for a placement at school A, it is unclear whether or not this was a considered view or based mainly on information passed to her by the appellant. Most of the letter appears to consist of a summary of what the appellant stated to her. There is no evidence to suggest that Doctor A was aware of the professional assessments of witnesses A, B and C on the attendance of the child at school A. Doctor A is not an education professional. We are surprised, then, given all of this that Doctor A felt able to state such a view. She was not in attendance in the hearing as a witness, so her view (unlike that of witnesses A, B and C) could not be tested. For all of these reasons, we feel that we can place no weight on Doctor A's view. In relation to Doctor B's letter, he does not offer a general view in relation to school A (he says that placement there 'may be...reasonable'), and again he would appear to be basing his views purely on information from the appellant (as suggested by his mention of psychology and psychiatry). Similar comments to those above on the weight of Doctor A's evidence apply to Doctor B's views. Again, we can place no weight on these views.

101. Finally, we indicated earlier that we would return here to the respite issue. In our view, this is of limited relevance to the appropriateness question. The appropriateness question is around whether the child should be placed in school A. We appreciate that if he were, the need for the current respite arrangement would most likely disappear. However, the residential component of school A is untested for the child. It would, in these circumstances, be very difficult to say that the issues experienced at the respite provision would be resolved

if the child attended a residential placement at school A. The residential element of a school A placement would be much more intensive and of a different kind to the respite provision currently. We therefore do not see respite issues as a factor to which we can give any weight in considering the appropriateness question. We deal above with the respite issue as it affects respective suitability.

Additional comments

102. The comments in this section do not form part of the reasons for the decision in this case. These are optional comments which are designed purely for the assistance of the parties.

103. It seems to us that the appellant is struggling to care for her son at home and that this is an issue which could be tackled by improvement of the respite arrangements in place for her and the child. We hope that this is something the local authority can consider further and as soon as possible.