



DECISION OF THE TRIBUNAL

Reference

1. This is a placing request reference, made by application dated September 2018. 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 to place the child in school B.

Decision

2. The Tribunal overturns the decision of the respondent to refuse the appellant's placing request, in accordance with s.19(4A)(b) of the 2004 Act. The tribunal therefore requires the respondent to place the child in school B as soon as possible and in any event by 25th November 2019.

Process

3. These proceedings have an unusual history. A hearing took place over three days in May 2019. Oral evidence and submissions were heard. A decision was issued on 19th August 2019. In that decision, the tribunal overturned the respondent's refusal of the placing request under s.19(4A)(b) of the 2004 Act. The respondent sought permission to appeal that decision under rule 10 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366: 'the rules'). Before a decision could be issued on that application, the Tribunal instigated a review of the 19th August 2019 decision under rule 11(1) of the rules. On 25th September 2019, the application for permission to appeal was suspended, to allow the review process to be completed. This review was instigated since it had come to the Chamber President's attention that while all three tribunal members agreed with the outcome of the reference reflected in the 19th August 2019 decision, the content of the reasons contained in that decision was not agreed by all three tribunal members.

4. The Chamber President conducted the review process. A hearing took place on 11th October 2019. Following that hearing, and by a decision issued on 14th October 2019, the Chamber President set aside the decision of 19th August 2019 under s.44(1)(b) of the Tribunals (Scotland) Act 2014 and ordered that the matter be re-decided by a tribunal which includes at least one of the original tribunal members.

5. Following that decision, the Chamber President appointed the current tribunal members to re-decide the reference. This second tribunal consists of two of the original tribunal members, namely both ordinary members. The convener on this second tribunal is different

to the convener on the original tribunal.

6. In the decision of 14th October 2019 (the review decision) the Chamber President makes it clear that the second tribunal appointed following the review is to re-decide the reference without the need for a re-hearing (para 26 of the decision). The Chamber President also directed that any member of the second tribunal who was not part of the original tribunal shall listen to the audio recorded evidence and have access to the bundle before deliberating.

7. Following the appointment of the second tribunal, the convener read the bundle and listened to the audio recordings of all of the evidence and submissions. The two ordinary members consulted their copy of the bundle and their notes of the evidence and submissions. The second tribunal members then deliberated and reached the decision set out above and reasoned below.

8. In re-deciding the matter, this tribunal took account only of the material (oral evidence, bundle and submissions) which was available to the original tribunal. We should add that witness C is mentioned as a witness for both parties: this is due to the fact that she was, at the request of the parties, cited as a witness by the Tribunal.

9. The bundle consists of documents numbered: T1-61; A1-98 (including the appellant's representative's outline written submissions at A88-98); and R1-183 (including the child's most recent IEP dated October 2018 at R173-183, submitted on the final day of the hearing). We took full account of the material in the bundle in reaching our decision.

Preliminary matters

10. Two preliminary matters were raised at an earlier point in the reference. The then convener issued a preliminary decision (T59-61), indicating that both should be dealt with after the evidence and submissions in the case.

Preliminary matter 1: future provisions

11. This issue can be dealt with relatively quickly. It is clear that the date at which consideration is given to (a) whether or not a ground(s) of refusal exist and; (b) whether (if at least one does) it is appropriate in all of the circumstances to place the child in the specified school, is the date of the hearing. The question raised by the appellant is whether, as at that date, a stated future intention to deliver a provision can be taken into account. In our view, the answer is no. This issue was raised with reference to the content of page 2 of the respondent's letter of refusal of the placing request (T21-23) and the bullet points at T22. It is clear that the provisions listed there are for the future (the phrase used is 'going forward'). To the extent that any of those provisions were in place (or partially so) by the date of the hearing, evidence about them would be relevant. To the extent that they are not, they remain a statement of future intention and so they cannot, as at the date of the hearing, form part of the relevant provision for a ground of refusal. We do refer to parts of that letter below, but we need say no more about this preliminary matter.

Preliminary matter 2: relevant provisions for schedule 2, para 3(1)(f)(ii) and (iii)

12. This question is more difficult. The child currently benefits from three provisions: (a) three days at school A; (b) one day at two horse care facilities (with lunch at school A); and (c) one day at a placement in school B. The question arises: for the purposes of the second

and third branches in the ground of refusal in schedule 2, para 3(1)(f) of the 2004 act (paras 3(1)(f)(ii) and (iii)), which provisions are relevant and for which purposes? Before we deal with that question, we should say that we are not persuaded by the appellant's representative's argument that since the respondent has arranged a one day per week placement at school B for a 'therapeutic curriculum', this means that the respondent (by definition) cannot meet all of the child's needs. In our view, it is possible for an education authority to exceed the minimum provision required to meet a child's needs. This makes this argument by the appellant's representative untenable.

13. Dealing with para 3(1)(f)(ii), in our view, provisions (a) and (b) qualify as relevant. Provision (c) is not. The reason for the school B provision not being relevant is that the wording of para 3(1)(f)(ii) refers to 'other than in the specified school'. The logic of excluding that provision is clear: the respondent should not have the benefit of consideration of the provision at the specified school since that is the very school in which the appellant is seeking the child to be placed. The purpose of the words 'other than in the specified school' is to force the tribunal to isolate the provision in any school which is not the specified school. This logic applies even where (as here) the respondent has contracted for and is paying for the specified school provision. The measurement point for this sub-paragraph is the provision which is not in the specified school. In considering the ground of refusal below, we have therefore taken this approach.

14. On para 3(1)(f)(ii) and provision (b) (horse care provision), this is a relevant provision since it is not provision in the specified school. There was some discussion during submissions about the question of whether the provision is 'in a school', but in our view a broad interpretation of that wording should be used. Where provision of type (b) is organised by the school and the child attends during the school day (returning to the school for lunch), in our view this is provision 'in a school'. That phrase cannot logically refer only to the buildings and grounds of the school (here school A) since that would exclude provision made on a school trip or work experience, for example. In our view, 'in a school' refers to what is provided in the school building and grounds as well as while the child is attending another place organised under the instruction of the school.

15. Turning to para 3(1)(f)(iii), and to respective suitability, the respondent is entitled to the benefit of provisions (a) and (b). The appellant can argue that provision (c) should be credited to the specified school. This is for similar reasons to those indicated above, and since there is a link from para 3(1)(f)(iii) back to para 3(1)(f)(ii). On respective cost, since the respondent is meeting the cost of all three provisions, these should be attributed to school A. The entire cost of a full time placement should be attributed to the specified school.

16. Although we have approached the analysis below from this point of view, we considered whether or not our decision would have been different if we had 'credited' the respondent with each element of all three provisions for all of the purposes in para 3(1)(f)(ii) and (iii). We concluded that, given the nature and extent of the lack of provision for the child's needs at school A (para 3(1)(f)(ii)) and the gap in respective suitability between schools A and B (and the lack of impact on reasonableness when taking respective cost into account under para 3(1)(f)(iii)), our conclusion on the reference would have been the same, even on the best possible interpretation of the ground of refusal for the respondent.

Findings in fact

General findings

17. The appellant is the mother of the child, who lives with his family.
18. The child, a boy, was 16 years of age.
19. The child has autism spectrum disorder ('ASD'), learning disabilities and sensory difficulties. The child suffers from gastroesophageal reflux. The child has longstanding food intolerances and sensitivities.
20. The child requires a quiet, calm learning environment.
21. The child functions at the early curriculum level or lower.
22. The child finds loud, unexpected noises distressing. The child is largely non-verbal, although he can vocalise occasional words, and sometimes repeats words. The child cannot independently articulate his needs and his communication needs to be supported through the use of symbols and other methods.
23. The child has poor gross and fine motor skills and requires adult support to self-care. The child does not cope well with change or transitions.
24. The child has a lack of awareness of his own and others' safety. He can wander away.
25. The child avoids milk, soya and wheat in his diet and he cannot have direct contact with dairy or gluten, all due to his food intolerances and sensitivities.
26. The child currently attends school A. He started attending nursery class there in April 2007, primary 1 in August 2009 and has attended there ever since.
27. The child has an Individual Education Plan ('IEP') (most recent one dated October 2018) which contains targets for the child and is reviewed each school term. The staff to pupil ratio in the child's class at school A is: 4 staff members for 8 pupils.
28. On or around 28th June 2018, the appellant made a placing request to the respondent for the child to attend school B, an independent school. That request was refused on or around 28th September 2018.
29. The managers of school B are willing to accept the child as a pupil. They consider the child to be a suitable candidate for admission to school B.

Findings on the child's current schooling

30. School A is a special school for children with complex additional support needs ('ASN'). There are 36 pupils at school A. The age range of pupils is from 5 to 18 years.
31. Witness A is the Head Teacher of school A, and took up that post in September 2016. The experience, qualifications and employment history of witness A are provided in her witness statement at R139-141. Witness A is qualified and experienced in the teaching of children with ASN. She has held leadership roles in schools providing education for children with ASNs. Witness A chairs and minutes annual reviews of the educational provision for the child at Multi Agency and Action Plan Meetings ('MAAPMs').

32. While attending school A, the child is based largely in a classroom setting at school A. He shares his class with 7 other pupils. The range of educational stage of those pupils with whom he shares a class is from primary 6 to secondary 5. The child is the only pupil in his class who has ASD.
33. The child can access a sensory room at school A. He regularly does so (usually with a small group of peers) and he benefits from the quiet and calm in that room.
34. The child has opportunities to spend time outside while at school A. These include carrying out some gardening and collecting materials for recycling from other classes and taking these to the recycle bin.
35. The child has low sensory arousal and this means that he requires school staff to support his engagement in class. In addition, it can be difficult to know whether the child is learning during a particular classroom activity.
36. Work on the child's fine and gross motor skills is supported by school A staff through tasks such as: taking lids off tubs, squeezing pegs, assisting to pull up his coat zip, weaving, packing and unpacking his lunch bag. The child is to move onto developing the skill of fastening the head collar of a horse. He has already learned how to lead a horse, again contributing to his gross motor skills.
37. The child is independent in his personal care while in school A.
38. When the child is in the community, he requires 1:1 support. The child has no road safety awareness. If unsupervised, he may become lost. When out in the community while attending school A, the child wears a high-visibility vest. A risk assessment has been carried out for the child (R102-103).
39. The child is working through the Early Level experiences and outcomes of the Curriculum for Excellence while at school A. This is the initial stage of the National Curriculum that pupils at pre-school and Primary 1 in a mainstream school setting would be typically working on. There are eight areas within the Curriculum for Excellence and the child works on all of these areas.
40. The child benefits from a Total Communication approach in school A. A number of communication methods are used with him, for example symbols, pictures, Makaton, gesture and clear and concise instructions. He follows a symbolic timetable in order that he can better understand what is expected of him during his school day.
41. The child attends school A for three full days per school week. On one of the other two school days he attends two local horse care facilities. The child does not attend one of the local horse care facilities over the period from November to March due to the closure of these facilities for the winter. On the remaining school day (Wednesdays), the child attends school B.
42. When attending one of the horse care facilities, the child engages in general horse care activities. These include grooming, during which the child's numeracy abilities are utilised and built upon.

When attending horse care facility 2, the child attends for one hour, half of which consists of general horse care and observation, the other half consisting of horse riding.

43. The child's attendance at horse care facility 1, horse care facility 2 and school B have been organised by the respondent, with the cost of horse care facility 1 being met by charity and the cost of horse care facility 2 being met by the respondent. The child previously attended riding with Riding for the Disabled for one hour per week. However, since the child had had access to this facility for over two years, and in order to allow other pupils to have an opportunity to benefit from this activity, the child's access to this activity was stopped. Witness A worked to put in place horse care facility 1 and horse care facility 2.

44. The child tends to remove himself from situations where he is unhappy. He previously was very reluctant to enter the home economics class in school A due to the sound of a blender in that classroom. However, staff at school A have worked with the child over a period of months to build the child's confidence in relation to this classroom and he is now able to enter it.

45. Communication between school A and the child's parents takes place regularly, in the form of e-mails, meetings and the use of the home-school diary, which is completed daily by school staff and also by the child's parents. The quality of the entries in the home-school diary can sometimes be affected by pressure of class time. The diary allows staff to communicate what the child has been doing in the class, and parents can communicate relevant information from home, or respond to school comments.

46. The child's classroom learning is augmented by the application of the principles learned in the playground and local environment. Examples of this include: recognising numbers, looking at car number plates, street signs and numbers in shops.

47. The child's numerical ability is limited by his ASN. He can identify numbers, but he would not be able to show what they represent. He uses pegs corresponding to a particular number (which also assists with his fine and gross motor skills) and an adding machine (used under the supervision of a staff member). He also uses blocks, cubes or objects for addition tasks. Learning these tasks is designed to improve the child's independence.

48. School A would usually organise work placements in the final year of the school education of a child. Work placements for children with ASN are difficult to source.

49. Some of the child's education at school A is based around health and wellbeing, for example parts of the body. This work was undertaken following concerns raised by the appellant that the child is unable to identify parts of his body, for example for the purpose of identifying an area which is sore.

50. An outdoor leaning instructor has recently been arranged by the respondent for school A. That instructor only attends school A on a Wednesday (when the child is at school B). School A's plan is that school staff will pass on any learning from the instructor to the child on days when he attends school A.

51. Recently, the child has started to develop positive interactions with two class peers both in the classroom and in the playground.

52. The child can recognise words and pictures and match them. He can also arrange words in the correct order to form a sentence when shown a picture. It is not clear whether the child can perform these tasks only by rote learning or as a result of comprehension of the task.

53. The child was previously taught French as part of the Curriculum for Excellence. This was stopped following the appellant's intervention and advice sought from school A's educational psychologist.

Findings on school B and the child

54. School B is an independent school which is a charity. It offers education, care and therapy services for children and young people with autism and other additional support needs on a day or residential basis. Its ethos is inspired by the principles advanced by Rudolph Steiner. Currently, 29 pupils attend school B. Fifteen of those pupils have been placed there by the respondent. The school employs 8 teachers and 12 pupil support assistants (PSAs). The PSAs are assisted by temporary voluntary staff.

55. School B offers day placements and residential placements. Its residential pupils are based in ten houses. The educational and therapeutic provision is based in a number of premises and the total provision, including young adult services, is sited on two campuses of school B which are a few miles apart.

56. School B holds an Autism Accreditation from the National Autistic Society ('NAS'). This accreditation means that school B has a specialised knowledge and understanding of autism spectrum disorders. This understanding consistently informs the organisation, resources and management of the school as well as the individual assessment and planning for all pupils with autism. The accreditation status requires that school B is reviewed by an independent NAS panel every four years, with an interim review every two years. During four-yearly reviews, the panel members observe the school for around one week. A report on School B's most recent accreditation visit and renewal, which took place in 2017, is at A47-60.

57. The ethos of school B consists of three strands: (1) considering who the child is – their age and developmental stage; (2) finding the child's point of interest/engagement; and (3) using (1) and (2) to provide an active, meaningful and developmentally progressive education.

58. The curriculum taught at school B follows the Curriculum for Excellence, but delivered in accordance with the ethos of the school. That ethos includes a particular emphasis on vocational life skills. These vocational life skills are delivered, in part, through access to practical activity workshops and classes in areas such as: metalwork, woodwork, candle dipping, pottery, baking, riding (and horse care), farming, shopping and sensory garden work.

59. The child has attended school B for one day per week from March 2017 to date. He receives a 'therapeutic curriculum' while there, which can include both therapies and therapeutic activities, to support his needs and which are not available in school A.

60. The respondent commissioned the provision of the child's curriculum at school B ('the placement') in the form of an Individual Placement Agreement dated 13th March 2017 (R8-18). The purpose of the placement is specified as to give the child a therapeutic curriculum to include preparation for independence through development of skills for life and work (R12).

61. While on the placement at school B, the child benefits from exposure to a range of activities including: daily walks with a key worker around the estate; access to workshops; gross motor skills work such as climbing stairs to reach the toilet; setting dining tables for the cottage; reading and pronouncing table place-names; feeding the donkey; visits to the sensory garden; increased stamina due to walking; picking flowers and putting them in vases; independent dressing skills such as hanging up a coat, pulling up his trousers, washing his hands and tidying toys; working with compost and a wheelbarrow; eating lunch alongside peers; washing and drying dishes; brushing his teeth; encouragement to use a trampoline; gardening (including planting seeds); candle dipping (see the appellant's statement R77-78; Annual Personal Plan, R104; Options Appraisal, R82-92).

62. School B prepares an Annual Personal Plan for the child setting out the planned delivery for the coming year. The most recent such plan is at R104. School B also produces a 6 monthly update on the child's progress, consisting of an Outcomes Plan and Summary of the Education and Personal Plan. The latest such update took place in June 2018 (R105-106).

63. School B has stables and horses which are used in the delivery of its education programme. The stables were unavailable for use due to flooding from January 2016 until mid-2017. The child, if placed in School B on a full time basis, would be likely to benefit from working in these stables.

64. When the child began attending school B, he showed a reluctance to entering the educational building which is part of school B's campus. This was resolved within a matter of weeks. The child accesses that building regularly for a music lesson.

65. If the child were to attend school B on a full time basis, he would attend for 40 weeks on a non-residential basis over three school terms. He would be assessed during the first six week period. The school would consider the child's most up to date academic reports and put together a timetable to meet the child's needs. School B would assess how the child reacts in group settings, large and small, and how he responds to people.

66. If attending school B on a full-time basis, the child would be likely to spend around half of his school week in the classroom and the other half in outdoor activities. The provision is costed to give the child 1:1 support, but it is possible that this may be reduced following further assessment and review. The child would use his class as a base, meeting his peers there in the morning, and later for a snack and after lunch. At other times, the class members follow their individual timetables, which involves splitting up for certain workshops or activities, based in the class or elsewhere on the campus.

67. If attending school B on a full-time basis, the child would be likely to be based in a class of six other pupils who are aged from 15 years to almost 18 years. The others in this class currently comprise: two males with significant autism and who are pre-verbal; and four girls who are very verbal, but with different presentations, one of whom is capable of sitting National 5 examinations and so is high-functioning. The staffing in that class would consist of a class teacher and four Pupil Support Assistants (PSAs). The PSAs would move between

classes according to need. A small number of voluntary staff assist the PSAs.

68. Some pupils at school B require 1:1 support for the full school day, others only for certain tasks such as a trip outside the school grounds.

69. If the child attends school B, he will undertake a period of assessment likely to take around six-weeks. The purpose of this assessment would be to try to get the child's programme at school B as right as possible, then adjust it as things work or don't work.

70. If attending school B on a full-time basis, the child's curriculum would be likely to include: numeracy, communication and life skills across a broad curriculum. That curriculum would be bespoke for the child. It would include, for example, social studies, science, expressive arts and technology. It would cover the elements required in the child's IEP. The curriculum would be designed around learning which is most likely to be useful for the child in adult life.

71. If attending school B on a full-time basis, numeracy would be taught to the child by taking part in specific group communication activities, for example understanding signage and recognising packages in shops. Measurement would be taught to the child through practical activities such as measuring for baking; water (full, half-full); building projects (for example measuring a piece of wood which has to fit into a gap).

72. If attending school B on a full-time basis, literacy would be taught by encouraging the child to look at books, even if consisting only of pictures, building up vocabulary (perhaps with the use of communication symbols and photos). The child would be exposed to a range of books in order to develop understanding of verbs and emotions. The aim would be for the child to understand and use meaningful words that he might encounter.

73. If attending school B on a full-time basis, the child would be taught a social science curriculum covering for example, people and place: where physically am I in world?; orientation - left and right, forward and backward, above and under; who are these people?; what are the places on the school estate called?; what shops can we access in the local community?; what can we buy?; who are the others around us in the school, for example the gardener?

74. If attending school B on a full-time basis, the child would be taught sciences, for example the natural world; what can we touch and see?; planting seeds; what do we need to make them grow?; where do carrots come from, are they healthy?

75. If attending school B on a full-time basis, the child's progress against his IEP targets would be measured in accordance with both the Curriculum for Excellence as well as more specific benchmark standards.

76. School B operates a data gathering and processing system in relation to its pupils. It conducts a twice-yearly gathering of curriculum data for each pupil. It breaks down the curriculum for excellence levels into three sub-levels, to track progress. A database is used for inputting twice per year. Any changes are immediately visible across subject areas.

77. School B retains a database of challenging behaviour for every child in which all behavioural incidents are recorded, whether minor or not. The information from this database is gathered daily and inputted monthly into the school's system. This allows staff to see any behavioural patterns, physical, verbal or non-engagement, for which interventions can be targeted.

78. School B operates several pupil award schemes, including SQA National 1-5, Duke of Edinburgh and Jass Awards. Jass awards are similar to Duke of Edinburgh awards but at a more junior level. These awards recognise curricular and non-curricular learning.

79. School B operates a regular system of school update training in which staff members undertake training four times per year.

80. School B operates a Young Adult Programme for those requiring post-school education, aged 18-25. Some placements in this scheme are residential, some are day-placements. Currently there are 45 pupils in that programme. These pupils have a wide range of abilities, from pupils with complex and multiple needs up to more able pupils who might be attending Further Education at a college. Obtaining work placements is a key focus of that Programme.

Findings on costs

81. The approximate cost of a 40 week provision for the child's additional support needs at school B would be: £45800 fees and £14,000 transport costs, assuming a need for 1:1 support for the child for the whole year at school B. The total cost of this provision would therefore be: £59800 per year.

82. The approximate cost of provision for the child's additional support needs at school A is: £31803 (the 'unit cost', discussed later); £1080 (for horse related activities) based on a 40 week year; £12000 for the current one day per week placement at school B. The total cost of this provision is therefore: £44883 per year.

Reasons for the Decision

General remarks on the oral evidence and submissions

83. 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 evidence of witness C and the appellant to be particularly persuasive. We should add that in setting out these reasons we do not assess every argument and fact which was before us, nor are we required to do so; we have chosen only those arguments and facts which significantly influence the legal tests we must consider.

84. In the case of witness C, we were struck by the fact that she was unwilling to provide concrete conclusions in relation to likely outcomes in relation to the child. This enhanced her reliability, since her evidence was measured: she did not yield to the temptation to guess or to draw conclusions which were not based on her own direct knowledge or experience.

85. In relation to the appellant, we found her evidence to be compelling. She was measured and fair. Even when she was asked to list positive aspects of school A, she did so willingly and listed a number of them. She struck us as a completely genuine, fair and reasonable witness who was not unduly affected by emotional considerations.

86. While witness A is clearly a dedicated professional and we found her overall evidence to be reliable, she was a little evasive at times. On occasions, she strayed from the question in her answer, or gave an answer which was vague, in an apparent attempt not to concede

ground on certain points. We detected a defensiveness in some of her responses. This is perhaps understandable, but it does mean that we placed less weight on her conclusions than those of the other witnesses.

87. Witness B was a fair and straightforward witness, whose evidence was given in a reliable fashion.

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

89. Further, we benefitted from the provision of detailed witness statements for all of the witnesses. These statements set out the qualifications and experience of the witnesses. Clearly, witnesses A, B and C are highly qualified in their area with witness A having had the most contact with the child, witness C the least. The appellant (for obvious reasons) knows the child best of all of those who gave evidence. None of the witnesses deviated in any significant way from their witness statements. We also benefitted from oral submissions from both parties as well as an outline written submission from the appellant's representative.

General remarks on the legal tests

90. As pointed out by both parties, 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 (and each of its component parts) lies with the respondent.

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

91. This is the only ground of refusal relied upon by the respondent in this reference. This ground comprises a number of constituent parts, or branches, 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 19-24 above, it is clear to us that this is the case.

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

92. The presence of this branch of the ground of refusal is not disputed. This paragraph requires that the specified school (school B) 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 A: paragraph 3(1)(f)(ii)

93. This branch requires that the respondent is able to make provision for the child's ASN in a school other than the specified school. It is clear that in referring to meeting the child's ASN, this is a reference to doing so in full in relation to all of those needs. In this case, that other school is school A. We are not satisfied that school A can make such provision, and that this part of the ground of refusal is not met. We discuss above (paras 12-15) how we are taking into account only the provision at school A (including the horse care activities on Tuesdays) and not the provision for the child at school B. However, as indicated at para 16, had we considered the whole of the provision for the child, including at school B, the outcome on this branch of the ground would have been the same.

94. 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)(iii) on 'respective suitability' of the two schools. The relevant findings in fact above underpin our conclusions in the relevant areas.

General educational environment at school A

95. While we believe witness A to be a committed Head Teacher, we have serious concerns about the capacity of the school to meet the needs of the child. It is clear from the evidence that the child's main barriers to learning are directly related to his autism. Witness A indicated that the autism awareness when she arrived at school A in September 2016 was an area of concern. It is clear that some steps have been taken to improve this but we did not detect that there had been a major change in this area. The only autism training witness A had introduced in the two and a half years since her arrival was a single day of in-service training for all staff. There was no evidence available on the content or impact of that training. There was no evidence led about the autism skills, qualifications or experience of the staff who have regular contact with the child.

96. We accept that there are some instances of staff using certain techniques which would be suitable for the child's needs such as the use of symbols, some functional task work and a visual timetable. However, what was lacking for us was the impression of an organised, training based approach to the use of techniques for children with autism. That impression was not alleviated by witness A's lack of recall during her evidence of the number of pupils in her school who have autism. These concerns are further compounded by the fact that the child is the only pupil in his class with autism.

General classroom environment at school A

97. In our view, the general classroom provision at school A is not conducive to meeting the needs of the child in full. It is clear that the child is operating at an early level. He is largely non-verbal and the appellant described him as operating at the level of a two or three year old. An environment in which his education is delivered mainly in a classroom setting is, in our view, not one in which he is likely to learn the life skills he will need as he transitions into adult life. He is the only child in his class with autism. He is in a class with pupils of a very wide age range. He has been receiving his education in three classrooms at school A since he was three years old. It is clear from the evidence that the child loves outdoor activities and that he benefits from this educationally. An education in a largely classroom setting is therefore unlikely to meet his ASN.

98. We note here that for the purposes of this factor, the child's attendance at the horse care facilities for horse care sessions does improve the 'classroom' environment since, as noted above, these sessions are to be regarded as being provided in the school. However, there is no information available on how progress during these sessions is monitored. In any event, any likely benefit acquired by the child during these weekly sessions would be unlikely to counteract the general classroom environment deficits in the provision for the three regular days at school A.

Curriculum at school A

99. In our view, the child's curriculum at school A is not suitable for the child's ASN. It is rooted in a traditional mainly classroom based timetable. There are some opportunities for

outdoor sessions, but in our view these are insufficient. The evidence about recycling and garden work was encouraging, but much of the child's timetable involves traditional class-based education. The exception to this is the provision of horse care placements each Tuesday in horse care facility 1 and horse care facility 2. While these are likely to be beneficial for the child, there is little information on how progress during these sessions are monitored. In any event, any likely benefit acquired by the child during these weekly sessions would be unlikely to counteract the curriculum deficits in provision for the three regular days at school A.

100. The curriculum designed for the child for the three regular days at school A seems, in our view, to be influenced mainly by policy considerations. Witness A appears to be of the view that she is constrained by certain policy considerations in this area. In her written statement at R147 she says:

“My view is that [school A] has a responsibility to provide to pupils with ASN the opportunities their counter-parts get in a mainstream setting.”

This suggests to us that witness A's approach to designing the child's curriculum is not needs based but is based on what is offered in a mainstream environment. This is of some concern to us.

101. Further evidence of this approach can be found in witness A's dealings on the subject of French language. She believed that school A had to offer a modern language to the child, and that it was his right to receive it. The appellant objected to this on the basis that the child would not be able to understand French and indeed that it could confuse him. After seeking advice, witness A accepted that the child does not require French language tuition as part of his curriculum. In our view this is an example of a wider issue at school A: the lack of a sufficiently individualised curriculum for the child which is tailored to his needs.

102. This approach is further evidenced by the decision (for policy reasons around a rationing of access) to stop the child's access to horse riding visits which, importantly for a child who is hard to engage, we understand to be his main interest and a significant motivator to learn. We accept that witness A went to some lengths to secure some replacement activities, but the point we are making is a more general one, about a policy driven approach (as opposed to needs driven one) to provision access.

103. We also note that changes to the child's curriculum to make it more needs based appear to have been driven not by the school or educational psychology staff but by pressure from the appellant. This applies, in particular, to the one day placement at school B which, it would appear, would not have happened without parental pressure.

104. Also of concern is an apparently relaxed approach to addressing various matters relating to the needs of the child and his future. This includes making promised/assessed improvements to the child's provision at school A. In the respondent's letter of 11th September 2018 in which the placing request was refused (A21-23), two major future proposed developments (in the fifth and eighth bullet points relating to a cognitive skills consultation and a sensory assessment and sensory diet) had, by the time of the hearing, not got underway. Indeed, the sensory diet was recommended in October 2014, over four years earlier, by Company A (A7-12 at A12). No explanation was provided as to why this recommendation was outstanding by the date of the hearing. We can only assume that it was not regarded as sufficiently important to action. This relaxed approach to proper consideration of the child's educational needs is further demonstrated by the fact that the

respondent's decision to refuse the placing request was intimated on 11th September 2018, one week before the draft options appraisal document at R82-92 (a process referred to in that letter in terms which suggest that it had already been completed) was available to the author of the letter (see witness B's statement at R161- 162, spoken to in her oral evidence). This suggests that the respondent did not fully complete or consider the options appraisal process prior to making a decision on the placing request. On the basis of the evidence available (and in the absence of the author of the letter as a witness) it would be unfair to draw the conclusion that the respondent had closed its mind to the outcome of the placing request without properly investigating it. However, this discrepancy does indicate a rather relaxed approach to consideration of school B in relation to the child's needs.

105. Further, we were concerned by the approach taken by witness A and witness B to the distinction between an 'educational' and 'therapeutic' provision for the child. In particular, witness B appeared to suggest that the latter is not provided by the education authority. In our view, this distinction represents a worrying misunderstanding of the nature of provision for ASN. In the 2004 Act, 'additional support' is defined as including provision 'whether or not educational provision' (s.1(3)). Further, a child has ASN where 'for whatever reason' that child is unable, without additional support, to benefit from school education (s.1(1)). The term 'school education' for these purposes is defined as including 'in particular such education directed to the development of the personality, talents and mental and physical abilities of the child...to their fullest potential' (s.1(2)). This means that where a particular therapy(ies) are required for a child to enable that child to benefit from school education (as defined), then it must be provided, whether it is ordinarily available in the school in which the child is being educated or not. The separation of the child's educational and therapeutic curricula in the way suggested by witnesses A and B is legally wrong. Indeed, there should not be reference to two types of curricula at all. There is one educational curriculum, and for the child that has various elements some of which could be described as therapeutic. We can only assume that this interpretation of the 2004 Act has informed how the child's curriculum has been designed and delivered.

Educational progress at school A

106. The evidence suggests that the child is making some progress academically (see his latest school report at A25-27), but that evidence is in our view, only applicable in the context of a traditional mainly classroom based environment, where the focus is on the teaching of abstract concepts often with little relevance to useful real life skills (for example using an adding machine). Indeed, witness A indicated more than once in her evidence that it can be difficult to know whether the child is learning or not in a particular activity. In our view, this indicates that gathering evidence of progress for the child is difficult. Any academic progress can only be viewed, therefore, in the context of the traditional class-based curriculum and where (within such a curriculum) progress is difficult to measure.

The child's perception of school A

107. We accept that securing the view of the child on the abstract comparison of provision at schools A and B has not been possible (see the Advocacy Report at T50-52). However, the appellant contrasted the muted reaction of the child when mention was made of going to school (a reference to school A) when compared with his enthusiasm for school B. This is not a major factor, but it is a relevant one. This does not apply to the Tuesday visits to horse care facility 1 and horse care facility 2 (about which the child is enthusiastic), but logically the child's perception of school A provision will be more heavily influenced by the three regular days there.

Conclusion on respondent's ability to make provision

108. Taking all of this together, in our view the respondent is currently unable to make provision in full and for all of the child's additional support needs in school A.

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

General comments on the test

109. 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 (fully and all of them) at school A and school B 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 B. 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 B. 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.

110. 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."

111. On cost, it is clear that we should consider the additional cost in meeting the ASN for the child at school A 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).

112. We will now consider each in turn. As indicated at para 16, had we considered the whole of the provision for the child, including at school B, the outcome on this branch of the ground would have been the same.

Respective suitability – general comments

113. 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”.

114. This exercise involves a direct comparison of the respective qualities as they relate to the child, and on the evidence available.

Suitability – School A

115. It is clear from the evidence that school A is not a suitable school for the provision of the child’s ASN given our conclusion (above) on the second branch of the ground of refusal. We outline our analysis of the provision there at paragraphs 93-108 above. We simply adopt that analysis for present purposes.

Suitability – School B

116. In order for there to be a fair and clear comparison between the provision in schools A and B, we will adopt the same headings as we used in considering (in relation to school A) the second branch of the ground of refusal. The exception is the matter of transition to school B; this is relevant only to school B provision and so it is dealt with here only.

General educational environment at school B

117. We were impressed with the evidence of the educational environment at school B. It is clearly informed by the ethos of the school, making it ‘more flexible’ than that available in school A (to use a phrase used by witness B). In our view, the use of the Curriculum for Excellence not as the sole driver of curriculum design and delivery, but as a reference point, is much more likely to lead to the needs of the child being met fully.

118. The NAS accreditation of school B indicates its specialism in an area which is relevant (indeed lies at the heart of) the child’s education. His educational development is clearly heavily influenced by his autism; a school which specialises in this area (and which is independently accredited as such) is much more likely to meet the needs of a child. This stands in contrast to the lack of evidence of a strong autism focus in school A (discussed above, paras 95-96).

119. School B has extensive grounds. The child already benefits from these when he visits once per week on his placement. The evidence suggests that the child benefits from outdoor activities as part of his education. There was no evidence to suggest that the playground area at school A was extensive.

120. The availability of stables for general horse care activities and horse riding is a major advantage for the child. The appellant spoke of horses being a major motivational force for the child – anything to do with horses keeps him happy and motivated. It is clear from the appellant’s evidence that the child very much enjoys his current horse care activities each Tuesday.

121. The availability of the Young Adult Programme from which the child may benefit is a further indication of the suitability of school B over school A. We deal with the question of transitions below, but the fact that the child can stay within the same campus/provision in order to transition into the young adult service means that the transition may be smoother and easier than if he were to transition from school A to the adult service. Indeed, we heard evidence that it is possible for him to have some access to the adult workshops even before he is of age to go there. If the child is to benefit from the adult programme (and that is not a certainty, but witness B suggested that it is very likely to be the provision that meets his

needs) in our view the sooner he attends the facility in which he will make this transition, the better. We accept that this is not a strong factor, but it does carry some weight.

General classroom environment at school B

122. We were also impressed by the fact that the child's peers at school B would be age appropriate for him. Although age is only one aspect of an appropriate peer group as level of learning and temperament are also important, being educated with children of a similar age is an advantage. Children of a similar age are more likely to have shared interests or be at more similar stages of physical development, especially during the teenage years.

123. In addition, the class the child would be likely to join at school B would consist of other children with autism; this contrasts with the child being the only pupil in the class with autism in school A. This makes it more likely that the child will benefit from a shared understanding of his outlook among his peers as well as make it more likely that classroom resources and techniques can be shared among the pupil cohort. It is more likely to create a community dynamic in the classroom.

124. The evidence from witness C was to the effect that the classroom would be used as a base in which the child would gather with his classmates at least three times a day, and in which he might spend some of his time. Again, this better suits the child's preference for activity based and outdoor work.

125. The respondent (and in particular witness A) referred to the child's difficulties in going into the class in the education building at school B. However, those concerns appear to be historical, since witness C indicated that they had been resolved within weeks of the start of the school B placement. Given that this appears not to be a current (or even recent) concern, we leave it out of account in assessing the suitability of school B.

Curriculum at school B

126. It is clear from the evidence that the child will benefit from a curriculum which will meet all of his educational needs, sensory, learning, therapeutic and otherwise. In our view, the curriculum the child would be likely to receive at school B is clearly, from this point of view, more apt than that currently available at school A.

127. The curriculum will be autism friendly, given the nature of the institution. Witness C's description of the subjects covered and the way in which the learning is delivered would, in our view, be suitable for the child. The managers at school B, a specialist accredited autism school, clearly believe that the child is a suitable candidate for admission and that he will benefit from the curriculum there (letter of 12th July 2018 at T20).

128. The emphasis on outdoor learning and on skills development (including access to practical workshop activities) as major focal points of the curriculum will, in our view, suit the child given his interests, stage and difficulties.

Educational progress at school B

129. This has been measured by the reports referred to at para 62 above. When on his one day per week placement to school B over the last more than two years, it is clear that he is making progress. The appellant is clear that he enjoys the time there and she outlines the benefits of his various activities as they affect aspects of his educational needs such as: touch, sound, life skills, gross and fine motor skills, independence, communication skills (see R77-78).

130. The latest feedback on the child's time at school B (R106) indicates that he is happy

there and is making progress in various areas such as: noise tolerance; relaxation; puzzles; table-setting; outdoor activity; gardening; doing dishes; communication skills; group work; candle dipping. Of course, this feedback is based on only one day a week across two years. However, it is a reasonable assumption that progress in these areas (and others) will be likely on a full time placement in school B.

131. Aside from the historical access to the classroom issue (dealt with above) no major concerns have been raised by the respondent about how the placement at school B has been progressing. There was no indication in the evidence that the respondent had raised areas of major concern with school B about the placement or that they had pursued any requests for alteration of the placement content. The importance of this lies in the fact that the respondent commissions this placement as part of their provision for the child.

The child's perception of school B

132. The appellant indicated in very clear and credible terms the enjoyment the child experiences when attending school B, and his eagerness to go there. This is relevant to our consideration of suitability since a provision which is enjoyed by a child is, logically, more likely to be beneficial.

Transition to school B

133. This is a factor which applies only to school B, of course. The appellant's representative argued that this factor only arises at the appropriateness in all of the circumstances stage, but we disagree. The suitability of the provision for the child's additional support needs is a broad concept and includes the suitability of any likely transition process, since that is part of the provision for a child's needs. Further, if the appellant's representative's interpretation were correct, in cases (such as this one) where the appropriateness in all of the circumstances stage is not reached, transition as a factor would, where this ground of refusal is chosen, require to be ignored. Given the impact a poor or inappropriate transition process can have on a child, we do not think this would be a viable interpretation.

134. Much was made by the respondent's witnesses of predictions of transition problems should the child be placed in school B. The argument made was that a transition now to school B would mean two transitions, one now and one from the non-adult service to the adult service (whether or not in school B) once that time came. Witness B estimated that the transition process to school B might take the child a year to 18 months to complete.

135. We have some difficulty in accepting that opinion. The child appears to handle transitions he currently undertakes very well. His education is currently based in four different locations: schools A and B, horse care facility 1 and horse care facility 2. There is no suggestion that this causes the child any difficulties. Indeed, on a Tuesday alone, the child is in three different places: horse care facility 1 in the morning, school A for lunch and horse care facility 2 in the afternoon. There are no reports of any difficulties with any of these arrangements, either now or when they started. Further, the child transitions to school B already and has done for two years. There is no evidence of any major issues with that.

136. We accept, of course, that any major transition for the child will have to be handled carefully. Witness C was clear that this would be done if the child is placed in school B. A transition meeting will take place and a plan would be devised. She accepted that transitions vary for each child and would not be drawn on whether a transition to school B for the child would be difficult or how long it would take, but told us that in her several decades of experience at school B it had never taken as long as the respondent's witnesses were

predicting; this only added to our impression of a child-centred, bespoke (and therefore more reliable) approach to transitions at school B.

137. Further, the appellant gave evidence to the effect that no transition to school B would be needed at all – he could start there on a full time basis immediately. She explained that as long as the child trusts the person he is with, he would happily engage in any activity suggested by that person. We took from this that the question is not about the change being undertaken, but about trust in the person working with the child to make that change. While this was in stark contrast to the very bleak picture painted by the respondent, we take the view that the appellant's outlook is more likely to be correct. This is not only because she knows him better than anyone; she spoke of the child's eagerness to go to school B, how he was very happy when dropped off there and picked up and how even the journey there was a pleasure for him. More of something he clearly enjoys (handled sensitively) is in our view unlikely to be a negative experience. Our conclusion about this was strengthened by the appellant's clearly genuine statement that she would not be asking for a full-time placement at school B if she thought it would cause the child distress.

138. On this issue then, we take the view that there is no clear evidence that the likely transition of the child to school B, were he placed there on a full time basis, would be a negative one such that it would impact on school B's suitability.

Conclusion on respective suitability

139. It is plain to us that the likely provision in school B is more suitable for meeting the child's needs than the current provision in school A. On each of the above shared factors, school B's likely provision would make it more suitable as a place to meet the additional support needs of the child than that at school A. The transition factor (which affects school B only) does not reflect unfavourably on the suitability of school B.

Respective cost

140. Considering the facts found at paragraphs 81-82 above, on the face of it, it would appear that the cost of provision for the child's additional support needs in school B is £14917 more than the equivalent (current) costs in school A. However, both parties agreed that the 'unit cost' sum of £31803 for school A provision should (in accordance with case law on the matter) be ignored for the purposes of this calculation. We agree that this is the correct course.

141. This means that the relevant cost differential is that provision in school B would cost £46720 (£59800-£13080) more per year than current provision in school A.

Conclusion – reasonableness arising from cost and suitability comparisons

142. Considering respective cost and suitability factors in the round, we take the view that the respondent has not established that it is not reasonable to place the child in school B. If we did not place the child in school B, his needs would continue to not be fully met, in the face of an available provision in which his needs would be likely to be fully met, or at least more fully met, than at present. Given the clear distance between the suitability of the two provisions, the additional cost to the respondent of the child being placed in school B is not an unreasonable one.

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

143. The condition in this paragraph is met – the respondent has offered to place the child in school A (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).

144. Having concluded that a ground of refusal does not exist (the only relevant one being the one in the 2004 Act schedule 2, para 3(1)(f)), we do not need to consider whether it is appropriate in all of the circumstances to confirm the decision to refuse the appellant's placing request. We therefore decline to do so.

Timing of requirement to place

145. We are required to state the date by which the child is to be placed in school B. Since a full time placement is being sought, the date we have stipulated refers to the date by which that is to take place (2004 Act, s.19(4A)(b)(i)). The legislation does not permit any reference to a transition period; we may only state a deadline for implementing our decision. While this is unfortunate in cases where transition planning is necessary, we have no discretion on this point.

146. This was discussed during submissions. The appellant's representative suggested that we might give an indication as to transition period in our decision. In our view not only would that be outwith our authority, there was no clear evidence about how long the transition might take.

147. We would make two points, however. Firstly, there has, for a number of reasons, been some delay in the resolution of this reference. We are very clear that the child should attend school B on a full time basis and that this should happen urgently. This has influenced the setting of a short time limit for implementing our decision. Secondly, we would refer to the appellant's evidence on this point: she was confident (for the very clear reasons stated) that due to trust and the child's clear enjoyment of time spent in school B that no transition would be necessary. We found that evidence persuasive. We hope that the appellant's view in this matter is considered in framing any transition planning (should a transition period be deemed necessary).