

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/23/0150

Witness List:

Witnesses for Appellant:

- Head teacher of school B (witness D)
- Equine Facilitated Practitioner (witness E)
- The Appellant

Witnesses for Respondent:

- Service Manager, Inclusion and Early Years Team (witness A)
- Principal Teacher, school A (witness B)
- Educational Psychologist (witness C)

Reference

1. This is a reference by the appellant challenging the respondent's decision to refuse the appellant's request to place the child in school B.

Decision

2. We overturn the decision of the respondent to refuse the appellant's placing request under s.19(4A)(b) of the Education (Additional Support for Learning)(Scotland) Act 2004 (**2004 Act**). We require the respondent to place the child in school B by the first day of the 2024-2025 academic year at school B, or on such other date as the parties may agree.

Process

3. This reference was managed to a hearing by a number of case management calls. The hearing took place over three days in the Glasgow Tribunal Centre. The hearing was a

hybrid one, with all witnesses except the appellant giving evidence remotely. The representatives, the appellant and her supporter attended in person for the three day hearing.

4. We considered all available oral and written material. The written material (including submissions and some late documents) in the bundle consists of the following page numbering: T1-081; A1-139; and R1-174. There were no objections taken to the admissibility of any of the documents.
5. The respondent's representative objected to the admissibility of some of the oral evidence on the basis that questions were not put to the appropriate witnesses by the appellant (for example on lack of opportunities for the appellant to approve meeting minutes and on alleged understaffing). We agree that this happened on a few occasions, and we have, in fairness to the respondent, left out of account the answers to those questions.
6. We directed the provision of a non-instructed advocacy report, which was provided prior to the hearing (T069-073). The author of the report records the child's preferences, following an observation of the child at school A and interviews with the child's family and members of school A's staff. By the end of the second day of the evidence, we had formed the view that we should obtain a further report on the child's views, this time an instructed advocacy report. We took this view since as the evidence unfolded, it became clear that the child is able to express her views. That instructed advocacy report was lodged prior to the final day of evidence (T078-081). We made every effort to consider the child's perspective from all of the material available (including the non-instructed advocacy report). Since the results of the instructed advocacy report are inconclusive, we were unable to rely upon it in reaching our decision.
7. Following the second day of the hearing, we issued directions requiring the respondent to produce some further documents, partial submissions from both parties and an advocacy report collecting the child's views (T075-077). In compliance with these, the parties prepared draft written submissions for day 3. Following completion of the evidence that day, the parties took time to finalise their written submissions and exchanged them that day. We then heard the parties on any comments about the submissions of the other party and we asked clarification questions too.

Findings in Fact

General findings in fact

8. The child lives with her two mothers (the appellant and her wife). The child has a twin brother who also lives in the family home.
9. The child has a diagnosis of autism spectrum disorder (**ASD**). This diagnosis was made in July 2016. The child also has an intellectual disability.
10. The child's conditions lead to challenges for her in a number of areas. She has sensory sensitivities, in particular with intensities of light and sound. She has difficulties in communicating, learning and problem solving and with everyday social skills, routines and personal care. She is a non-verbal communicator who uses non-verbal gestures and vocalisations to communicate.

11. As a result of her conditions, the child sometimes becomes distressed. One way that she regulates her distress is through movement such as rocking back and forth or bouncing. The child also communicates her emotions through these movements. She also uses extremes of light and darkness to regulate, making use of a dark room in a shed at home and sensory rooms at school.
12. The child prefers solitary activities and play, although she enjoys interactions with adults known to her. She prefers her own routine and she struggles when change occurs or when adults offer her choice or alternatives not within her agenda.
13. The child has a disrupted sleep pattern and is prescribed melatonin to assist with this.
14. The child requires support with most aspects of personal care.
15. The child has hypermobile joints and low muscle tone. As a result, she sometimes uses a wheelchair when she becomes tired and sore. She also has access to a specialist rocking chair (situated in the cloakroom area of school A), which supports her need for movement and correct seating posture while in school. In particular, the child uses this chair first thing in the morning, as part of her transition routine. The child uses the chair for emotional regulation at other times.
16. The child enjoys the outdoors, watching shadows under trees and the movement of light. She enjoys bouncing on a trampoline and being tickled by adults known to her.
17. The child shows a preference for specific adults. She likes adults with a positive and energetic presentation, with whom she can form trusting relationships.
18. The child can follow routines, communicating when she wants to leave for school, putting her bag and jacket in her school tray. At home, she can find what she wants in her environment.
19. By a letter of July 2023, the respondent intimated its refusal of the appellant's placing request, with reasons, to the appellant. The group that considered the appellant's placing request is the respondent's Resource Allocation Group.

The child and school A

20. School A is a primary school managed by the respondent. The respondent provides primary education there for pupils from primary 1 to primary 7 with a variety of needs, including ASD and complex learning needs. School A shares a building with a mainstream primary school. The child has attended school A since primary 1. She is currently in primary 7 at school A. A co-ordinated support plan (**CSP**), made in July 2023, exists for the child. This is the child's first CSP.
21. All of the children at school A have either a diagnosis of autism or display traits or characteristics of autism. A number of the pupils there have other needs. Some of the children at school A are verbal communicators, but most are non-speaking communicators who communicate with visuals and gestures.

22. All of the children attending school A have their own individual curriculum. The learning level of school A pupils ranges from pre-early years milestones, up to second level in the Curriculum for Excellence.
23. School A is accessed by a separate entrance to the entrance to the mainstream school. The mainstream school pupils are not able to freely access school A. The mainstream school has its own playground that is used by its pupils only.
24. School A is attended by 24 pupils, split into 4 classes, each with 6 pupils. There are 4.4 full time equivalent class teachers there, assisted by 10 full time equivalent support for learning assistants (**SLAs**). The class teachers have a range of training including in the Neuro Sequential Model for Education training, Crisis Prevention Institute training and Makaton. Educational Psychology and Occupational Therapy professionals also carry out ongoing training with all staff members.
25. A corridor area in school A is used by the pupils for activities such as skipping and running. There is also a workstation there, which pupils can use for activities away from the rest of their group.
26. Each of school A's 4 classrooms is set out differently depending on the pupils' needs and preference in each class. The needs and preferences of pupils are considered before the start of each academic session to determine which classroom suits each pupil and how the space should look and feel. Some classrooms are set up with lots of space so that the children can get up and be stimulated. Some classes have cosy spaces. All classrooms are set up with their own breakout area to allow children to regulate and make this part of their routine.
27. School A has a light/dark room which has soft furnishings including crash mats on the floor, bean bags and pillows with lights with multiple settings. The child enjoys using the light/dark room.
28. In August 2023, an SLA who provides support to the child on a 1:1 basis was appointed. The child has developed a very positive relationship with her SLA.
29. Each class has 2.5 SLAs allocated per 6 children in addition to a class teacher. These SLAs will move between classrooms depending on need, but the child's dedicated SLA stays with her. The child can (and does) move around within the rooms in school A, and is followed wherever she goes by her own SLA, who engages in activities with her wherever she is. The child usually stays in a particular room for a short time (around 10 minutes) before moving on.
30. The child often directs her learning experiences when in school: she will indicate if she wants to be in the provision or if she would like to be in the mainstream part of the school or out in the busy playground. She has not shown any visible distress being in the busy playground amongst other children and often sits with her SLA at the main entrance to the school eating her lunch, observing everything that is going on. She learns through a range of sensory experiences and enjoys experiences such as feeling the wind on her face when out in the playground. Her SLA has a work tray and short activities are provided for the child to support her engagement with pre-early level activities.
31. The child has three main methods of self-regulating: rocking in her specialist rocking chair, rocking at other times and bouncing. There is a trampoline in the child's garden

which she uses for this purpose. School A has a small trampoline which is available to the child. Due to the child's height (she is very tall for her age) the trampoline in school A is not suitable for use by her.

32. There is a cloakroom in school A. This is used for multiple purposes and by pupils who need it as and when required. It is not timetabled for any particular purpose. It is used mainly for reading tasks or more concentrated tasks and if a child needs a space in which to self-regulate. The room is set out with benches around its sides and an emotions rug in the centre, to allow the children to express how they feel. It can be noisy or quiet there, depending on how it is being used. The child uses the cloakroom area to regulate, especially first thing in the morning, as part of her daily transition to school. Her specialist rocking chair is in the cloakroom, and she uses that to sit on while regulating.
33. In around November 2023, the child became distressed while in the cloakroom area of school A. As a result, she removed some of her clothing. School staff helped her to re-dress. This happened during an unplanned observation visit by witness C. School A staff called the appellant to inform her about this incident. During the whole weekend following this incident, the child was very upset and had to be comforted by the appellant and her wife.
34. Specialist services including Speech and Language Therapy (SLT), Occupational Therapy and Educational Psychology are available at school A. School A has access to Music Therapy where the children have individual sessions once per week; Equine Therapy where the children are visited by horses once per week; ArtLink, a charity providing access to arts for those with disabilities; and Sportability, a charity providing sports to children with disabilities. The child's SLA has been provided with guidance by the SLT service on communicating with the child. The child currently chooses not to access Equine Therapy within school A.
35. Difficulties with the child's attendance at and transitioning to school A started in November 2022. The child's attendance at school A began to seriously deteriorate in January 2023 and continued to deteriorate through that school term until late March 2023. The child did not attend school A between the end of April 2023 the end of June 2023. A number of reasons were considered as possible for her non-attendance over this period. During the period when the child did not attend school A, the Team Around the Child (**TAC**) identified opportunities for the child to have supported access to sensory activities. As a result, the child began a programme of visits to school C, a school managed by the respondent for children with complex additional support needs in May 2023. The child made use of sensory facilities there. This continued until the end of June 2023.
36. The plan in place during this period involved two school A staff members collecting the child from home and transporting her to school C to access their facilities initially twice a week, later extending to 3 times per week. The child attended the sessions at school C successfully. The child's experiences at school C included accessing the light room, dark room, soft play area, open area for snack and playground area.
37. The child has transitioned successfully and consistently back to school A since August 2023 with a current attendance rate of nearly 96% by March 2024. The child was initially attending on a part time basis but is now mostly spending the full day at school, returning home on school transport.

38. The child has not exhibited distress at school A recently.
39. In early March 2023, witnesses B and C visited the child at home to observe her and to complete a Talking Mat. A Talking Mat is a picture based communication tool which supports people to share their thoughts and think about a topic in a concrete, structured, way. Working with the child and the appellant, this tool was used by witnesses B and C to listen to the child's views on what she liked and did not like about school. The child seemed to understand the Mat and was decisive about things she liked and things she did not like.

The child and school D

40. The respondent proposes that the child attends school D (a school managed by the respondent) as her secondary school. Transition meetings for the child's move to secondary school began in December 2023, with a meetings between witness B and the appellant and witness B and witness C. Witnesses B and C, the appellant and her wife visited school D together in December 2023. A meeting about the transition process took place in March 2024 (recorded at R123-125).
41. School D is a school for pupils with severe and complex needs. Some pupils there require certain specialist equipment to support their learning. This equipment includes adapted chairs, standing frames, wheelchairs, hoists and feeding tubes. The child associates medical equipment with trauma, and becomes very anxious when attending any medical environment. Due to this anxiety, the child was very distressed on attending a local dental clinic in January 2024 and the visit could not proceed as a result.

Planning documents for the child

42. In addition to her CSP, a number of planning documents exist for the child. These include a Social Communication, Emotional Regulation and Transactional Support (SCERTS) Plan, developed for the child in early 2023 (R028-037). The purpose of the SCERTS Plan is to help the child become a confident social communication and active learner. The child's progress is discussed and developed via regular meetings, the outcomes of which are recorded in Form 6 documents (R046-055, R097-105 and R123-125). Risk assessments for the child also exist (R126-143). Further planning actions are recorded in Form 4 documents (R038-041, R116-119 and R145-151).

Reasons for the Decision

43. The parties agree that the child has additional support needs, as defined in section 1 of the 2004 Act. We agree, as supported by our findings in fact at paragraphs 9-16 above.
44. The appropriate point in time for consideration of the evidence is at the date of the hearing: the law is clear on this. The burden of establishing that the respondent's decision should be confirmed falls on the respondent.
45. A few points are worth noting about the evidence. Firstly, all of the witnesses who gave oral evidence did so in a credible and reliable fashion. Our decision turns on interpretation of the evidence and its application to the relevant statutory tests. Secondly, we have not said anything about the evidence of witnesses D and E in our reasons. This

is since, for reasons explained below, we need only consider the provision being made for the child at school A, and neither of those witnesses have professional experience of this.

The ground of refusal: respective cost and suitability (2004 Act, Schedule 2, paragraph 3(1)(f))

46. The respondent argued that one ground of refusal of the placing request exists. That ground has four component parts. In order to conclude that the ground of refusal exists, we must be satisfied that **all four** parts of the ground of refusal apply.

47. The parties agree that two of the four parts of the ground of refusal apply. These are: (a) that school B is not a public school (2004 Act, Schedule 2, paragraph 3(1)(f)(i)); and (b) that the respondent has offered the child a place in school A (2004 Act, Schedule 2, paragraph 3(1)(f)(iv)). It is clear from the evidence that these two parts of the ground of refusal apply. The remaining two parts (to which we now turn) are in dispute between the parties.

The ability of the respondent to make provision for the additional support needs of the child in school A (2004 Act Schedule 2, paragraph 3(1)(f)(ii))

48. The appellant argues that the respondent is not able make provision for the additional support needs of the child in school A. The respondent argues that it is so able. We prefer the appellant's position.

49. We will consider this part of the ground of refusal under a number of subject headings. Before we come to those, we make a few preliminary points about this part of the ground of refusal:

- a. We must consider all of the child's additional support needs.
- b. In doing so, we must bear in mind the definition of 'additional support', which refers to provision which is additional to or otherwise different from the educational provision made generally for children of the same age in schools under the respondent's management (to summarise the key points of the definition in s.1(3) of the 2004 Act).
- c. We must also consider the general statutory duties that apply to the respondent in delivering school education.
- d. In considering whether the respondent is 'able to make provision for the additional support needs of the child', that ability is properly measured by considering the evidence of that ability, bearing in mind, as we do so, that the respondent carries the burden of proof.
- e. In considering whether that ability exists in relation to provision in 'a school...other than the specified school', we must consider the provision in the context of a particular school.

50. Point (e) above requires some further analysis. The parties disagree on a particular point of statutory interpretation. That point arose mainly in the context of branch (iii) of the

ground of refusal, but it applies also here. The child will soon transition to another school to receive secondary school education. By the end of the hearing, she had under three months of primary education left. The child will attend school A for that period, after which she will leave school A. This means that the relevance of provision at school A exists only for a limited period.

51. The respondent wishes the child to transition to school D for her secondary school education from August 2024. The question that arises is the relevance of school D for parts (ii) and (iii) of the ground of refusal. The appellant's representative argued that it is relevant since the word 'school' as it appears in those two provisions can mean more than one school, and includes school D. She relies on the definition of 'school' in s.135 of the Education (Scotland) Act 1980 (**1980 Act**) (imported into the 2004 Act in s.29(2)) which 'includes any such school or all such schools as the context may require'.
52. The respondent's advocate argued that the reference to 'school' in the ground of refusal is singular and that the definition in s.135 of the 1980 Act refers to the statutory context, not the factual context. We are not convinced that there is a material dividing line between the statutory and factual context. However, we agree with the advocate's general position, as it applies in this case.
53. The key words are 'as the context may require'. In order for the ordinary (here, singular) meaning of 'school' to be expanded to include more than one school, the context would have to 'require' an expanded meaning. Although the child's attendance at school A is drawing to a close, she remains at that school. The reference in paragraph (ii) is to the provision to meet the additional support needs for the child. The child has not yet attended school D. We do not require to consider how the child's needs may be met at School D in order to conclude how they are being provided for at school A. This means that the expanded meaning of 'school' does not apply here. For the same reason, it does not apply when considering branch (iii) of the ground of refusal. This follows since the 'school' referred to in paragraph (iii) is explicitly the one identified in paragraph (ii).
54. However, since transition planning is part of the provision made to meet the additional support needs of the child by the respondent while she attends school A, transition planning for any move to school D is relevant to part (ii) of the ground of refusal. The transition process is clearly being led by witness B, headteacher of school A, as set out in her witness statement (paragraphs 38-41, R075-076).
55. In considering branch (ii) of the ground of refusal, we will do so in two general parts: (1) planning to meet the additional support needs of the child and; (2) providing for those needs on a day to day basis.

(a) Planning: general

56. Proper planning to meet the additional support needs of a child is an important part of the respondent's duties in meeting those needs in its day to day delivery of education in a school. If the necessary planning is not in place or is inadequate, those day to day needs are less likely to be met. This duty to plan exists (insofar as relevant to this reference) in four areas: around the co-ordinated support plan (**CSP**), transition planning, seeking and taking account of the child's views about school A provision and in making alternative provision when required. These four planning activities are part of the provision for the child's additional support needs in school A. The child's CSP is based

there (see T021-22, where school A is specified) as is the transition planning for moving from school A to an appropriate secondary provision.

(b) *Planning: CSP*

57. Turning firstly to the child's CSP, the appellant's representative advances two criticisms (written submission, paragraph 45).

58. The first is that there was no evidence to indicate what had happened to the intention to consider whether the child required a CSP in November 2021. The current CSP (the child's first) was made in July 2023. In the record of a meeting in September 2021 (R049-051), the following appears at R050: "All were reminded of upcoming CSP meeting on 10th November to discuss if [the child]....meet[s] the criteria for a CSP".

59. Witness A was unable to explain what had happened at that meeting or why the CSP was not made until July 2023. There was no evidence to suggest that the respondent had sought or taken account of advice and information from others on the possible creation of a CSP. There is no mention of a possible CSP in the record of the next child's meeting made available to us, namely in May 2022 (R052-055). We have to assume (in the absence of any evidence to the contrary) that the intention to explore the making of a CSP did not take place in 2021, or for the rest of that academic year. One was produced in July 2023, some 21 months after it was intended to be discussed. No explanation for what is the passage of a significant period of time has been offered by the respondent. This is despite a statutory obligation to prepare a plan if the relevant tests are met (2004 Act, s.2 and 9(1)) and an associated (but wide) obligation to keep the additional support needs of the child under consideration (2004 Act, s. 4). The apparent lack of consideration of whether a CSP was needed over a long period of time, when that consideration had been due to happen, represents a significant flaw in the respondent's planning to meet the additional support needs of the child in school A.

60. The second CSP-related criticism advanced by the appellant's representative is that once the child returned to school A in August 2023, no early CSP review was undertaken. Witness A explained that as the child's school had not changed and the level of co-ordinated support had not changed, the CSP would not have been reviewed. The appellant's representative argues that a change in circumstances had taken place between the making of the CSP in July 2023 and the start of the new academic year in August 2023, namely the child had started attending school A again following a significant period having not done so. The appellant's representative points to educational objective 6 in the CSP (T027) which states that the child will 'learn in an educational setting'.

61. In fairness to the respondent, an early review (that is one within the usual 12 month period of a CSP) is only required where the education authority consider it expedient to do so due to a significant change in the child's circumstances (2004 Act, s.10(3)(b), 3(a) being inapplicable here). We agree with the appellant's representative that a review of the CSP ought to have taken place as soon as possible following the child's return to school A in August 2023. The CSP was written at a time when the child had, a few months earlier, stopped attending school A. The CSP has not been reviewed since then, nor is there any evidence to suggest that a review had been considered. The CSP is out of date and has been since August 2023. That is clear not only from the inapplicability of educational objective 6, but also from the Profile information (paragraph 3, T023).

Further, witness A conceded in her evidence that a review would take place on a change of circumstances. A significant change of circumstances took place when the child started attending school A again in August 2023. Given the lack of clarity around the reasons for the child choosing not to attend school A between April 2023 and the end of that academic year, the requirement for a review of the planning to meet her needs in order to reduce their risk of a recurrence seems to us to be more important than ever following her return to school A in August 2023.

62. We have a further concern (although one related to the appellant's representative's criticisms). Witness B explains in her statement (R070 at paragraph 17) that the child's CSP was 'established to support [the child's] return to education after an extended period of absence from [school A]'. This offers a misunderstanding of the nature of a CSP. It should not be established for any particular purpose: if the tests for a CSP in s.2 of the 2004 Act are met, it must be made (2004 Act, s.9(1)).
63. These three concerns, viewed individually, and certainly when taken together, represent a flawed approach to planning to meet the child's additional support needs.

(c) Planning: transition

64. We turn now to transition planning (that is for the child's transition from primary to secondary education). Witness B explained in her statement how the transition process is being handled (paragraphs 38-41, R075-076). The respondent's intention is that the child should attend school D from August 2024. Witness B explains (paragraph 40 of her statement) that any transition would be tailored to meet the needs of the child. The appellant's representative argued that school D is an inappropriate provision for the child (written submissions, paragraph 59) and that this is evidence of a lack of understanding of the child's needs. We do not agree that this is a reasonable conclusion from the available evidence.
65. However, there is a significant problem with the respondent's transition planning. The evidence of the appellant is clear: the child reacts negatively to the sight of medical equipment. Skilled opinion exists that indicates that the child links the sight of such equipment with trauma. The appellant cites the opinion of a psychologist treating the child at the Child and Adolescent Mental Health Service (**CAMHS**) (appellant's witness statement, paragraph 44, A018). The account there is that the psychologist advised that there should be an awareness of this when considering secondary school. This part of the appellant's evidence is unchallenged, and we accept it given her (uncontested) good credibility. There is some support for a very traumatic reaction to medical environments from the child's dentist (A114-115). The consequences of this reaction are significant: the child refuses to access rooms that have medical beds or equipment in them. As the appellant's representative points out, the evidence indicates that there are children who attend school D with complex medical needs who require the presence and use of specialist medical equipment, including children who require to be lifted and hoisted. Some of the children at school D have severe medical and health needs. There are adapted chairs for seating, standing frames and hoists for wheelchair users.
66. We approached this evidence with some care. A school in which there is some medical equipment is not the same as a hospital or other medical environment. It is possible that the child's traumatic reaction is confined only to medical settings, not to the sight of medical equipment.

67. However, the evidence indicates that those planning the child's transition to school D have not (and, it would appear, don't intend to) fully investigate this prior to her proposed attendance at school D. The child has not yet visited school D. This is a concern expressly raised by the appellant in her witness statement in relation to school D (A018, paragraph 44 and A019 paragraph 46). The Tribunal sent this statement to the respondent as part of an updated bundle in March 2024. Witness A in her oral evidence suggested that they would see if issues 'crop up' there when the child attends (we took this to mean during the transition process or afterwards). There has, according to the evidence, been no contact between the respondent or school A staff and CAMHS to explore the nature of the evidence of possible trauma, despite evidence that this traumatic reaction exists in relation to medical equipment. It may be that the child's reaction to such equipment in a school environment will be different to that in a medical environment. It may be similar. No one can, at the moment, tell. But there is a risk that the child may react negatively to the sight of medical equipment in school D. A comprehensive transition plan would take account of this, and make provision for it. Such consideration could even lead to an alternative secondary school provision for the child. The point is that we cannot conclude on this issue in the absence of it being treated seriously as part of transition planning. This means that a medical issue (trauma) which may have a significant impact on the child's ability to learn (such that she may refuse to attend school D or certain classes within it) has not been explored or planned for despite the advanced stage of the transition process.
68. The only mention in the transition planning documents of any steps to be taken around this concern is in the transition discussion at a meeting in March 2024, where the appellant raised this issue, and where under 'Decisions' the following is recorded: 'Permission for team to contact CAMHS regarding current assessment ([witness C] will contact)' (R125). This note is vague and does not indicate that any steps will be taken to investigate the matter in relation to the suitability of school D or arrangements made there. Witness A stated that witness C told her about this and that CAHMS may be able to work with the child on this and that a very skilled occupational health team would be looking to support the child. However, this appears to be speculative in the context of a lack of understanding of how significant this issue could be for the child.
69. The failure to properly investigate and plan for the possible trauma of the child as it may affect her attendance and/or learning at school D represents a serious flaw in the respondent's approach to planning for the child's additional support needs.

(d) Planning: delay in making an alternative provision

70. The appellant's representative points to the e-mail of the Principal Educational Psychologist of June 2023 (A040) where he states that there is little formal information about the child from May 2022 until the time of the e-mail (written submission, paragraph 42). She builds on that argument by referring to an apparent gap in planning between November 2022 (when the child's difficulties at school began) and May - June 2023 (when the sessions at school C took place) (written submission, paragraph 44). The appellant's representative argues that the offer of visits to school C was (by inference) in response to the appellant's placing request, received in May 2023. The appellant's representative suggests that there is some support for that motivation from witness A's evidence. Whatever the motivation was, there was clearly a delay in tackling the issues of non-attendance and transitioning to school noted by witness A as having started in

November 2022 (R079, paragraph 12, the attendance record at R120, and the findings in fact at paragraph 35) and the start of sessions at school C in May 2023. The situation had deteriorated by then such that the child was not attending school at all. However, the gap in taking significant steps to tackle the difficulties over that six month period offers further (albeit limited) evidence of a lack of planning in meeting the child's needs.

(e) *Planning: child's views*

71. At paragraphs 14-18 of her written submission, the appellant's representative develops an argument around the respondent's failure to seek and record the child's views in planning documents. She points to a number of documents, namely the child's CSP as well as a total of seven other planning documents in the bundle dated between October 2020 and August 2023; the child's views are recorded in none of these documents. The child's views were recorded in one document, dated May 2022 (R052-055 at 054). We should add that the child's views were, in addition, not recorded in the Form 4 Child/Young Person Action Plan dated November 2023. A number of the documents in which the child's views were not recorded were put to witness B in her evidence. She indicated that she did not know why the child's views had not been taken for these documents. She accepted that all behaviour is communication.
72. We note that in witness C's written evidence, she refers to a visit to the appellant's home in March 2023 during which the child used a Talking Mat to express what she liked and did not like at school. Witness C records that the child seemed to understand the mat and that she was decisive about what she liked and did not like (R059, paragraph 12). This demonstrates that the child is able to use a Talking Mat to express her views.
73. The appellant's representative points to the statutory obligation on the respondent to seek and take account of the views of a child when considering whether a child requires a CSP and in preparing such a plan (2004 Act, s.12(1)(a) and (c) and 12(2)(b)(i)). This was not done. That obligation also applies to determining what provision to be made for the additional support needs of a child (2004 Act, s.12(1)(d) and s.12(2)(b)(i)). This was not done. Not only is this the position on considering the documents, there is no evidence from anyone to suggest that, in making planning decisions for meeting the needs of the child, her views were sought. Indeed, witness B was unable to explain why the child's views were not taken for planning purposes. As the appellant's representative also explains, the obligation in s.2(2) of the Standards in Scotland's Schools etc. Act 2000 carries a similar obligation, but in a wider context since it does not apply only to children and young persons with additional support needs.
74. It is clear that the child's views are able to be taken (there is no suggestion that she does not have the capacity to express them, triggering the exception in s.12(2)(b)(i) of the 2004 Act). This is clear from witness C's visit to the child's home in March 2023 (findings in fact at paragraph 39), as well as from the fact that the child's views were taken and recorded in the Form 6 record from May 2022 (R052-055 at R054).
75. It is, of course, not possible to say what difference seeking and taking account of the child's views would have made on provision for her additional support needs. It may have made no difference at all. Or, it may have made a significant difference. We will never know. However, these duties are designed to ensure that decisions about the provision for additional support needs of (in this case) the child in school A are influenced by any views expressed by the child.

76. This failure to seek and take account of the child's views across a period of over 3 years (October 2020 and November 2023, with one exception, namely in May 2022) represents a significant breach of important statutory duties and is further evidence of the inability of the respondent to plan to meet the additional support needs of the child at school A.

(f) *Day to day needs*

77. The respondent's representative argues that there are a number of respects in which the provision at school A meets the additional support needs of the child (paragraphs [34]-[41] of her written submission). She refers to the facilities at school A, the staffing, the support for the child (including the 1:1 support, which is to continue into secondary school), highly individualised and adapted curriculum with appropriate targets, a communication assessment, and a CSP. The respondent's representative also points to the fact that the child's attendance level is now very high, and has been for a number of months, in contrast to the child not having attended at all for a period and that this is due to the supports put in place for the child as explained by witness C. The respondent's representative refers to the excellent relationship between the child and her SLA, and about the attempts to communicate with the child. She points to the impression of the occupational therapist about how the child is doing in the school environment. The respondent's representative also relies on evidence of progress and engagement by the child at school A. The environment is also relied upon, for example access to outdoor space and the use of equipment such as the specialist rocking chair and the availability of the dark room. The lack of distress on the part of the child for some time is also relied upon. Strategies and supports in place for the child were also cited.

78. We agree that the respondent has made efforts with a view to meeting the child's additional support needs. We also agree that the child is, in some respects, well supported at school A both environmentally and by the staff there. There is some independent support for that in the advocate's non-instructed advocacy report (T069-073). However, we need to consider whether all of the child's day to day needs can be met at school A. We are not persuaded from the evidence that the respondent is able to meet all of those day to day needs.

79. The appellant's representative points to the lack of evidence of support for the child from the respondent's Additional Support Needs Outreach Team when she was not attending school (written submission, paragraph 42). No explanation was provided for this apparent lack of support at a time when the child's needs were at their highest. It could be said that this is a historical concern given that the child has now (and for some time) re-engaged at school A. However, there is a lack of any consensus around the reasons for the child's non-attendance at school. This means that the child may stop attending school at any time. The lack of any evidence of support for the child from an Outreach Team in the relatively recent past is a factor in considering whether the child's needs could be met at school A.

80. The appellant's representative argues (written submission, paragraph 54) that there is an issue with the cloakroom being used as a space for the child to regulate when distressed. The issue is that it is used for multiple purposes and can be busy. Witness B accepted that if it were busy in the cloakroom, the child would not be able to regulate there. The child's specialist rocking chair, which she uses to regulate, is there. The appellant's representative also points out that the child would have to pass through the

cloakroom to get outdoors, another space where she regulates. We accept that this arrangement is one which is unsatisfactory to meet the needs of the child, namely the need to regulate when she is distressed. The fact that the child has not recently been distressed in school A does not detract from this issue: meeting a child's needs requires facilities to be in place to meet them when they arise. There is no dispute about the child's need to have access to a space within which to regulate.

81. The appellant's representative points to witness C's misunderstanding of the child's rocking motion and what that signifies: the argument is that she got the rocking motion direction for the child showing distress and happiness around the wrong way (written submission, paragraph 50). This may, of course, be a simple error, but given the importance of non-verbal communication to the child, it does lend some weight to an impression that those involved in providing for the child's additional support needs at school A do not fully know what those needs are.
82. The appellant's representative refers to the incident in the cloakroom in November 2023 (see findings at paragraph 33 above). This incident happened during an unplanned visit by witness C to observe the child. The appellant's representative makes two points about this incident.
83. The first is that the visit was unplanned, and that this caused the child to become distressed. On the evidence available, we are unable to conclude what the reason was for the child's actions. However, we accept the appellant's representative's concern about the lack of advance planning for the visit. It is agreed that the child interacts with known adults (see the Joint Minute, T061, paragraph 6). Witness C is not such an adult, given that she had, by November 2023, met the child on three occasions, all in the previous academic year (see witness C's statement, paragraphs 10, 12 and 21, R058-059 and R061). In our view, there was a risk that unexpectedly introducing an unknown adult to observe the child could cause the child to become distressed. That is possibly not what happened, but there was at least a risk of this. Witness C explained that she always checks with the staff involved with children if it is suitable to carry out an unplanned observation. However, it was clear from the evidence that there had been no prior communication with the child about the observation. It is agreed that the child prefers her own agenda and routine and that she struggles when change occurs or where adults offer choice which is not within her agenda (Joint Minute, T061, paragraph 7, finding in fact at paragraphs 10 and 12). In our view, the decision to carry out an unplanned observation of the child created a risk that the child may become distressed, given her additional support needs. The decision to take that risk is an indicator of a lack of understanding of the needs of the child.
84. The appellant's representative's second concern about that incident was the interpretation of the child's actions. Witness B (who attended for at least part of the incident) interpreted the child's actions as evidence of distress. The appellant explained that when she took a call from the school that day about the incident, she was told that the child was showing high levels of distress in the cloakroom area. Witness C's evidence was that she thought the child was relaxed during the incident and that sometimes she undresses when relaxed. The appellant explained that the child was dysregulated for the whole weekend following this incident, and that she had not before or since taken off her clothes at school.

85. Witnesses B and C have very different interpretations of the child's actions that day. Indeed, their interpretations are at both ends of the spectrum – that the actions showed extreme distress or a relaxed state. This indicates a lack of understanding among the professionals of how the child presents when distressed. Witness C's oral evidence on this point is of considerable concern given that she indicated that she was aware of the child's dysregulation that weekend. In her oral evidence to us, she suggested that the child was relaxed in the face of witness B's evidence to the contrary and the explanation from the appellant about the child's reaction that weekend. This is concerning given the key role of witness C in planning and advising on the child's needs. If (as it seems to us) key professionals providing for the needs of the child are unable to form a consensus on an important form of non-verbal communication by the child, this suggests a lack of cohesive understanding of how the child communicates. Further, there was no evidence to suggest that this lack of consensus was a matter that was being addressed by the respondent.
86. Further concern exists around the lack of a suitable trampoline for the child at school A (see the findings in fact at paragraphs 16 and 31). This is concerning given that this is one of a few ways in which the child regulates, and is relevant to meeting her additional support needs.
87. To conclude on the child's day to day needs, each of the concerns raised above may not be significant in themselves, but taken together they represent evidence of a fundamental lack of attention to important aspects of the additional support needs of the child.

Conclusion on branch (ii) of the ground of refusal

88. When we take the planning flaws (around the CSP, transition planning, seeking and taking account of the child's views about school A provision and delay in making an alternative provision) along with the issues with the day to day provision for her needs (lack of outreach support, error around rocking motions, unplanned observation visit, significant difference on interpretation of non-verbal behaviour and lack of suitable bounce regulation equipment), we conclude that the respondent is unable to make provision for all of the additional support needs at school A. Problems in these nine areas combine to bring us to this conclusion.

Reasonableness of placing the child in school B having regard to respective suitability and respective cost of schools A and B (2004 Act, Schedule 2 paragraph 3(1)(f)(iii))

89. This is the part of the ground of refusal that involves a comparison between schools A and B on suitability to meet the child's additional support needs, and on the cost of doing so, against an overall reasonableness test.
90. Given our conclusion on part (ii) of the ground of refusal, we need not carry out this comparison. We therefore decline to do so.

Conclusion on the ground of refusal

91. Since not all of paragraphs (i)-(iv) of the ground of refusal in Schedule 2, paragraph 3(1)(f) apply, that ground of refusal does not exist.

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

92. As we conclude that a ground of refusal does not exist, we need not consider whether it is appropriate in all the circumstances to confirm the respondent's refusal of the placing request. We therefore decline to do so.
93. Finally, we have ordered that the child is placed in school B by the start of the next academic year. The appellant indicated that this is the time by which the child ought be placed there, in the event of this being the outcome of the reference. We take the view that this is appropriate, given how close we are to the end of the current academic year.