

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/24/0012

Witness List:

Witnesses for Appellant:

Head of Education at school B (witness C)

Occupational Therapist (witness D)

The Appellant

Witnesses for Respondent:

Depute Headteacher at school A (witness A)

Principal Educational Psychologist/Inclusion Manager (witness B)

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 confirm the decision of the respondent to refuse the appellant's placing request under s.19(4A)(a) of the Education (Additional Support for Learning)(Scotland) Act 2004 (**2004 Act**). We therefore do not require the respondent to place the child in school B.

Process

3. This reference was managed to a hearing by a number of case management calls. The hearing took place over three days, the first two in hybrid mode, the third day remotely online.
4. We considered all oral and written material. The written material in the bundle consists of the following page numbering: T001-059; A001-150; and R001-234 (including all written submissions).
5. We considered the child's views, as recorded by an advocate (T047-054). We also considered the child's views expressed directly to us on the first day of the hearing. In summary, the child's views are as follows:
 - a. He likes his support staff at school A.
 - b. He likes the staff at school B more than the staff at school A.
 - c. He misses attending school B.
 - d. He prefers to play at school B in comparison with school A since there is a park and trampoline at school B.
 - e. His least favourite thing at school A is the noise, which makes him feel annoyed. It is hard for him to do work there as a result. It is quieter at school B. He feels that school A is 'super noisy'.
 - f. When he feels annoyed at school A and needs to calm down, his teachers usually take him somewhere quiet, like the library.
 - g. He has lots of friends at school A, 'around 10'. He likes to play in the playground with them. He sees them sometimes when he is at home.
 - h. He has 2 or 3 friends at school B.
 - i. He would like to attend school B since it is quiet there, allowing him to listen and learn better.
6. The parties delivered written submissions between days 2 and 3 of the hearing. These were supplemented orally on day 3.

Findings in Fact

General findings in fact

7. The child lives with his mother, the appellant, his father and his sister.
8. The appellant made a placing request for school B dated November 2023. In January 2024, the respondent wrote to the appellant refusing her request.
9. The child has a diagnosis of autism spectrum disorder (**ASD**) with a Pathological Demand Avoidance (**PDA**) profile.

10. As a result of his condition, the child finds unexpected events difficult to manage. He can also find waiting challenging. The child struggles with demands made by others and is sensitive about making mistakes. These trigger distress for the child. Excessive background noise can be a significant distress trigger for the child. Loud noises (such as the noise of a hand dryer or a fire alarm) are not distress triggers.
11. Child planning meetings have taken place since the child was in nursery education, in November 2021, May and September 2022 and in May and November 2023.

The child and school A

12. School A is a primary school managed by the respondent. The school roll is currently 220. There are 9 classes in school A in addition to a nursery. During primary 2, the child was in a class of 24 pupils.
13. The child attended the nursery provision at school A from August 2021 and transitioned to school A in August 2022, where he has remained a pupil since.
14. School A is around 10-15 minutes' walk (or approximately 3 minutes' drive) from the child's family home.
15. School A introduced supports shortly after the child's transition there. These were: developing and using an individual visual timetable (from August 2022) and drawing up and implementing a Social Communication, Emotional Regulation and Transactional Support (**SCERTS**) plan (from September 2022, updated in March 2024).
16. The child benefits from an individualised curriculum and teaching by staff with specialist training. All school A staff who work with the child have undertaken training on ASD and sensory and communication supports.
17. The child initially settled in well at school A. However, between October 2022 and June 2023 there were 20 recorded incidents in which the child became distressed. The child's distress in class became more significant from January or February 2023. Four of these incidents occurred in term 2 of the school year, 16 occurred in term 3. Sometimes, the child's reaction to distress led to him physically harm a member of staff or (on one occasion) a pupil. This was unintentional, and directly caused by his state of distress.
[Part of this paragraph has been removed by the Chamber President to protect the welfare of the child under rule 55(3)(a) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]
18. By the end of the child's primary 1 year at school A, the child was spending a significant proportion of his time out of class but within the school, with 1:1 pupil support.

19. During the initial part of the child's primary 1 year in school A, his class was taught by two teachers in a job share arrangement. The child found the differing approaches of the two teachers challenging. One of the child's two teachers unexpectedly left at Easter 2023, leading to the introduction of a third teacher, a change which the child found challenging. Some of the child's peers also struggled with this change, leading to further challenge for the child.
20. As a result of these incidents, staff at school A (in consultation with the child's parents) took a number of steps (with the month of introduction in brackets):
- a. A behaviour protocol was established (November 2022).
 - b. A sensory checklist and profile were developed (December 2022) and updated in May 2023.
 - c. Regular sensory breaks were introduced into the child's timetable (January 2023).
 - d. Support from a pupil support assistant (PSA) was made available on a 1:1 basis at all times when needed (January 2023).
 - e. Spending time out of the class, working alone or in a group, in the afternoons (from February 2023).
 - f. Movement breaks when needed (February 2023).
 - g. Daily e-mail to share information to/from home (February 2023).
 - h. Individual timetable (February 2023).
 - i. Afternoon snack break (March 2023).
 - j. Individual assessment to ensure challenge in learning (April 2023).
 - k. Weekly sessions with Outreach teacher (August 2023, later increasing to two sessions per week).
 - l. Creation of an Individual Education Plan (**IEP**) (February 2024) (A038-A040).
 - m. One to one work with an autism support co-ordinator from a local charity for one hour per fortnight in school (February-May 2024).
21. The child's attendance at school A in his primary 2 year (academic year 2023-24) until May 2024 was around 85%. For around 11% of that school year, the child attended school B.
22. Staff at school A employed a number of strategies when the child was in primary 1 and becoming heightened, in order to avoid the onset of distress, or to de-escalate distress, which have continued in primary 2. For example, the PSA sometimes suggests a movement break, allowing the child to leave class for a short period (around 5 minutes), and then return and continue his work. Providing a task for the child, as a distraction, is a further strategy, as is the use of humour, re-direction, moving to a quieter area and giving the child increased choice and control in planned activities. More recently, school staff have been giving the child a clear role and elements of responsibility. All of these strategies have worked well to reduce or avoid distress.
23. Following the child's difficult year in primary 1, school A carefully considered the child's class composition for primary 2. For example, he was placed in a class with a single full-

time teacher. The child's class peers were carefully selected as children whose behaviour is more predictable, are positive social role models, and with whom the child has positive relationships. Another child with ASD was included in the child's class.

24. The child found the transition from primary 1 to primary 2 at school A difficult. The child settled in gradually during the period up to Christmas 2023. The period between January and Easter 2024 was relatively settled for the child. The child experienced a more unsettled period at school A for a few weeks in May 2024.
25. In January 2024, a referral was made by school A for the child to receive support from the local occupational therapy service. There is, to date, no information about when the child may be seen or what the outcome might be.
26. The proportion of time the child spent in the classroom at school A while in primary 2 has increased compared to primary 1. During primary year 1 and at the start of primary year 2, the child spent very little time in his class. This has improved during primary 2 so that, by May 2024, he was almost always in class during teaching time (except during planned breaks). While the child is out of class, he is almost always accompanied, usually by his PSA. During such breaks, the child usually works on tasks in his IEP. Sometimes the PSA involves the child in a game or in taking turns in an activity with another pupil on a break out of class. These activities are planned in advance by the child's teacher. The child has a very good relationship with his PSA.
27. The child struggles to attend physical education classes at school A (although he sometimes does). This is something school A staff are working on as an area for improvement.
28. The child is highly sociable at school A, especially in the playground. He likes playing games with his peers. He is rarely on his own or unhappy in the playground. The child works well in a group play setting. His play is creative and cooperative. Some of the child's peers are his friends and know him very well. On occasions, when the child gets frustrated in the playground, his friends step away from him, but also offer him support.
29. The child's literacy skills (measured by the York Assessment of Reading Comprehension (**YARC**) undertaken in March 2024) showed him to be in the 98th centile for reading accuracy and rate with an age equivalent of 10 years and 11 months and in the 88th centile for reading comprehension. The child's reading accuracy increased by one year and 9 months over the previous assessment in May 2023. The child has a peer group in class working at a similar literacy level. The child's literacy skills have improved since starting school A.
30. The child's numeracy skills in a number screening test on 6 March 2024 was equivalent to 8.1 years compared to his chronological age of 6.4 years. These figures were 7.1 and 5.6 years respectively in April 2023. The child enjoys working with big numbers and has an excellent memory for times tables and number sequences. School A staff intend to

work with the child to develop his abstract approach to calculations. The child's numeracy skills have improved while attending school A.

31. Witness B has observed the child in school A on three occasions, in October 2023, December 2023 and February 2024. Each observation lasted around 1 hour to 90 minutes.
32. The class teacher and PSA in the child's class know and understand the child well, and work effectively with him. The child works well with peers in his class. The child reacts positively when he is given responsibility in class.
33. The child becomes distressed every day at home after school and on some days in the morning. This also happens for the first part of school holidays. A trigger for this distress is when the child is expected by others to do something (a 'demand'). **[Part of this paragraph has been removed by the Chamber President to protect the welfare of the child under rule 55(3)(a) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

The child and school B

34. School B is located in a peaceful, rural environment. The school provides small group specialist day and residential care and education, including therapeutic support, for pupils aged 5 to 18 years. Pupils who attend school B have high levels of anxiety which impedes their emotional development and learning. Many school B pupils have ASD.
35. School B consists of a primary school and a senior (secondary) school. These schools share the same site, but are located in different buildings. The primary school provision at school B has a maximum limit of 6 pupils. Four primary school pupils are currently enrolled there. In academic year 2024-25, 8 pupils will be starting in the senior school, aged 13 to 17 years and 5 pupils (the child would be the 6th) are due to start in the primary school. One of these 5 pupils will be 6 years old, the others will be 9, 10 and 11 years. Of those 5 pupils, 3 are girls and 2 are boys. The child has met all of these 5 pupils during his visits to school B.
36. The primary school provision for 2024-25 will be split into two classes. It is intended that the child would be in a class with one other child, aged 6 years.
37. School B has a health and wellbeing facility, a vocational classroom (for woodwork), a hall for physical education classes, a multi-purpose court (for tennis and football, for example) a poly tunnel area, a sports field and a computer games room. School B has on site speech and language therapy (**SLT**) and occupational therapy (**OT**) and is in the process of organising on-site counselling.
38. School B holds an Autism Accreditation, awarded by the National Autistic Society (**NAS**). This accreditation demonstrates that school B has specialist knowledge and

understanding of autism. This informs the resources and management of the school as well as pupil assessment and support plans and all aspects of practice. School B is the only NAS accredited school within the respondent's area. All school B staff have experience in working with pupils who are neurodiverse. They are also trained and experienced in PDA. School B's NAS accreditation was renewed in November 2023.

39. The NAS reported very positively on the school's delivery of education to its pupils (A041-A057). The NAS has commended school B on person-centred delivery and on having a structured and predictable environment which minimises pupil anxiety.
40. School B has a strong focus on the health and wellbeing of its pupils and on building resilience. Flexible and creative learning opportunities exist at school B within carefully planned personalised learning pathways rooted in the Curriculum for Excellence framework. School B's sensory curriculum supports the needs of pupils with significant and complex needs. Every input for pupils at school B is bespoke.
41. The underpinning philosophy at school B is Dyadic Developmental Psychotherapy with a nurturing ethos and the development of strong relationships to gain pupil trust. The environment at school B has been constructed around sensory sensitivities of pupils, including the provision of as many sensory breaks as a child needs.
42. School B operates a bespoke communications package, which involves using ongoing dialogue methods about a child and their progress that work for each individual family.
43. Teaching provision at the primary school at school B is delivered by 2 full time teachers supported by 2 full-time support for learning assistants. Specialist tutors are employed for certain subjects, when needed.
44. All teaching staff at school B are fully qualified and registered with the General Teaching Council for Scotland. All staff also have expertise in working with neurodiverse children. A full range of qualification levels are offered, up to and including Advanced Highers across most subject areas. School B arranges work experience and has links with colleges and universities.
45. School B operates an Initial Education, Health and Wellbeing Evaluation Protocol which forms the basis of the transition of a child there. This involves a holistic process of building a profile of the child's achievements, skills, interests, previous learning experiences and future aspirations. The protocol is informed by the assessment principles of the 2004 Act Code of Practice.
46. School B has a psychological intervention service which assists staff with pupil assessments and who work with staff to decrease anxiety through needs based methods and strategies.

47. All school B pupils have a key teacher, responsible for pastoral care, tracking pupils' emotional and learning progress. Each pupil has a 'My Profile' document setting out their learning journey, tracking progress and targets. That document includes a 'My Wellbeing' plan and an IEP. School B has prepared a 'Meeting Learners Needs' report for the child (A024-A037), designed to identify learning barriers and any resources the child needs.
48. School B encourages older and younger pupils to mix together, for example during lunchtimes. The school also organises show and tell events in which pupils of different ages take part. The younger pupils can benefit from these contacts. They often look up to their older peers, including those in the senior school.
49. School B follows the national practice model for GIRFEC.
50. School B is quiet: it is in a rural setting and its corridors are not busy. Class sizes are small. Steps have been taken to minimise noise in school B, such as carpeting, additional soft furnishings, specialised wall mounts that absorb noise, no grass cutting, leaf blowing or repairs that may be noisy during the school day.
51. The child's and parents' views are integral when considering whether a child is suitable for admission to school B. Discussions with professionals such as educational psychologists would be part of this process. School B staff sometimes visit the child in their current school (but this did not happen for the child). Assessments are undertaken for speech and language and occupational therapy as well as literacy and numeracy evaluations.
52. The child visited school B for the first time in October 2023, with his mother and younger sister. The child seemed comfortable during the visit. The first of regular (weekly) visits took place in October 2023.
53. Following the offer of a place at school B in November 2023, the child attended there one morning per school week until May 2024. Until April 2024, these visits lasted for around 1 hour. In April 2024, the child attended school B from 9.00 am until lunchtime. In May 2024, the visit was from 9.00am until just after lunch (since the appellant was running late). The child showed no concern about his mother running late.
54. The purpose of these visits was to allow the child to sample attendance at school B. These visits went well, with the child showing no signs of distress at any time.
55. If the child were placed at school B, the cost to the respondent in tuition fees would be £61,566.40 per year and at least £32,000 per year for transport to and from school by taxi.

Reasons for the Decision

56. 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 9-10 above.
57. 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.
58. 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 (although see below on witness D). Our decision turns on interpretation of the evidence and its application to the relevant statutory tests. Secondly, we were heavily influenced by the evidence of witnesses A and B, who are well-qualified, experienced education professionals with detailed, direct knowledge of the child. Thirdly, we approached the evidence of witnesses C and D with some caution. While their evidence was delivered in a professional, reliable and measured manner, they know the child less well than witnesses A and B, and have less direct experience of the child in an educational setting.
59. On witness D's evidence, while she is clearly a very experienced and knowledgeable professional, there are a number of important limitations to her report (A024-A141), witness statement (A086-A104) and subsequent oral evidence, which affect the weight we can place on these sources:
- a. Witness D's evidence is based on a formal clinical assessment carried out in March 2024. This assessment took 2 hours (paragraph 008, A089). This means that witness D has had only 2 hours of direct contact with the child.
 - b. Witness D has not observed the child in either school environment. This means that her evidence inevitably lacks important context.
 - c. The full documented history available to witness D was from the appellant and her husband (paragraph 007, A088). This means that witness D did not have any information or perspectives from the respondent. We are not suggesting that she should have sought such information, but it does limit the impact of her report.
 - d. Witness D's report was prepared very recently (May 2024). This is not, of course, in itself a limitation; on the contrary, it means it is current. However, the respondent has not had time to fully consider, let alone implement, witness D's recommendations. This makes the relevance of the report less compelling than a report carrying recommendations which had not, over a period of time, been implemented.

- e. Finally, witness D was very clear about the fact that she does not comment on the schools (paragraph 006, A088). While this is quite proper, it results in a contextual limitation of her evidence, since our task is to consider the needs of the child (for present purposes) as they are being (or may be) provided for in one of two schools.

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

60. This 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.

61. 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))

62. The first point to make is that the appellant does not complain about the efforts made by school A in its provision for the child; rather she argues that the provision there is not suited to his needs.

63. There is clear evidence that the child's needs are being met in school A and that he is progressing well there. There is also clear evidence that he enjoys his schooling there.

64. We accept that primary 1 year at school A was challenging for the child. However, the evidence shows that school A has reviewed the causal factors and made a wide range of adjustments and interventions to ensure that the latter part of the child's primary 1 education and the whole of his primary 2 education has been a much more positive experience (list at paragraph 20 above).

65. The appellant argues that the learning environment at school A is not suitable for the child due to the class size and noise being too much for him, leading to 'outbursts' at school and home. She argues that this environment leads to him not being able to learn effectively such that his needs are not able to be met at school A (final submissions, paragraphs 13 and 14).

66. Taking the evidence as a whole, we do not agree. The child's numeracy and literacy skills are significantly beyond his age and have been improving during his time at school A (findings in facts at paragraphs 29 and 30, above).

67. He is socialising well there, both in class and the playground, as indicated by witnesses A and B. Witness B refers to this in her reports of observations (paragraphs 10, 14 and 16, R189-191), which paint a picture of a happy child, engaging well and positively with staff and peers.
68. In considering the evidence of witness B, we note that the staff at school A have a very detailed knowledge and understanding of the child, and this has been the subject of advice from witness B. This is clear from the interactions observed by witness B such as an awareness of when he is becoming heightened (paragraph 14, R189), skilled language being used by the PSA (paragraph 10, R186-187) and understanding the child's level of tolerance and reacting to that (paragraph 16, R191-192).
69. There was also evidence from witness B (in the paragraphs referred to above) of advice being given and taken on board following her observations, and of a willingness to adapt strategies and practice. This (alongside the significant adjustments and interventions mentioned above) is further evidence of a positive professional learning environment in which the prospects of school A continuing to meet the child's needs is demonstrated.
70. Further to the limitations on witness D's evidence mentioned above (paragraph 59), her conclusions were based on information which was not (when viewing the evidence as a whole) correct. For example, witness D bases her report on the assumption that '[the child's behaviour in school] has to be accommodated for by providing significant time outwith the classroom with staff support provided specifically for him' (A134, 2nd paragraph). This information came from the appellant, but is not an accurate reflection of the situation at that time (findings in fact at paragraph 26). While we accept that the period of time the child spends in the classroom varies (so that in February 2024, the child was out of class on a regular basis: Class Log, R062-R064), witness A was clear that by May 2024, the child was spending almost all time in class (save for planned breaks). In any event, even considering the log for February 2024, what presents there is a flexible, highly supportive environment where significant efforts are made to ensure that the child's needs are met however they present that day. Therefore, even if a significant period of the child's day is spent outside the classroom, this is not an indication of an inability to effectively educate the child – rather it is an indication of a determination to meet the child's needs flexibly.
71. In addition, when the child spends time out of the class, the evidence demonstrates that he continues to learn (findings in fact at paragraph 26).
72. Witness D's assessment led to a number of recommendations (A138-A139). One of her main conclusions is the likely effect of noise on the child's ability to learn and the consequent need to learn in an environment that does not trigger a fight/flight response (recommendation 1). However, witness A was clear in her evidence that the impact of noise, while a factor, is not as important as the impact of demand. Witness A sees the child in school regularly, and therefore is reliably able to comment on factors that affect how the child learns. Witness D has never seen the child in a classroom. Further, we

note from both witnesses A and B that the child is doing well in class (and in school A generally).

73. The comments of witness B during her three observations on three different days over a period of at least 3 hours does not suggest that the child finds learning in the classroom in school A difficult. Indeed, in those observations, he presents as sociable and participative, despite the constant background noise of a mainstream class.

74. In addition, there is ample evidence of a willingness by school A staff to adapt the learning environment for the child, both from what has happened already and from, for example, the referral made to the occupational therapy service. The question is not whether school A meets the child's needs perfectly; it is rather whether respondent is able to meet his needs in school A. As a specialist tribunal, we know that the needs of children with additional support needs change all the time. It seems to us that school A staff have a good grasp of this, and have made (and are willing to continue to make), adjustments to ensure that this happens.

75. Taking all of this together, we are in no doubt that the respondent is able to (and is) meeting the additional support needs of the child in school A.

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))

76. This part of the ground of refusal 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.

Respective suitability

77. We have concluded that the additional support needs of the child are being provided for in school A. For this part of the test, we need to compare the suitability of school A with the suitability of school B to meet those needs.

78. On school A, given our conclusions above, the provision there is clearly suitable for meeting the needs of the child: we have concluded that they are, in fact, being met there.

79. Turning to school B, there is always an element of speculation about the suitability of a school when the child in question has not attended as a pupil on a full-time (or significant part-time) basis. Despite this, we conclude that the provision available there for the additional support needs of the child means that this provision would be suitable, since those needs could be met there.

80. However, on one major factor, the suitability of school A exceeds that of school B: the existence of an appropriate peer group. As a specialist tribunal, we are aware of the importance of an appropriate peer group for childrens' social and educational

development. Children enjoy the company of their peers, and learn how to interact with others from their peers. Given the child's age, play with peers is important. Witness B refers to this when she says:

At the age [of child B] play and exploration are strong features of learning and so a range of peers is important for him particularly at this stage. (paragraph 25, R196).

81. Witness B refers to the child's engagement in the playground leading to him knowing which grouping he is part of, giving him a sense of belonging (paragraph 20, R193).
82. Witness B also comments on the benefits of the child having a range of peers, some of whom are neurodiverse, but many others who are neurotypical. She refers to the development of 'strong social skills' as being very important for post-school outcomes (paragraph 25, R196).
83. Socialisation in school is clearly important to the child: witness A describes him as 'absolutely a social creature' who wants to be 'one of the gang' within his peer group (paragraph 33, R171).
84. Witness A gave evidence that some of the child's peers at school A are at an equivalent age level for numeracy but working at a more advanced level in their calculation strategies, providing a level of challenge for the child (paragraph 26, R168). There is also a peer group working at a similarly high level to him in terms of his literacy (paragraph 27, R169).
85. This all demonstrates the presence of an appropriate social and academic peer group for the child at school A.
86. At school B, the child would, in his first year there, be in a class with only one other child. There is no evidence of the literacy or numeracy level of that child, but even if they are similar, the peer relationship forming opportunities will necessarily be significantly more limited than in a class of 23 others at school A.
87. Witness C explained that there are opportunities for pupils to get together during the school day, but even taking account of all pupils in school A (primary plus secondary), this gives the child an opportunity to interact with a maximum 13 pupils, most if not all of whom are neurodiverse, compared with 219 at school A. There will only be one child in the whole of school B who is the same age as the child – the nearest after that is 3 years older. These environments could hardly be further apart in terms of the range of peer interaction opportunities.
88. There are other differences between the provisions in school A and B, but we do not see these as offering any material suitability advantage one way or the other. In other areas, there are no material differences in provision. For example:

- a. **Noise related sensory problems:** the environment in school B will, inevitably, be quieter than in school A. However, as noted above, the child manages (with time out of class) in the (relatively) noisy environment of school A. We refer to witness A's conclusion (born of extensive knowledge of the child in a school environment) that the child's demand avoidance issue presents more of a barrier than noise. This is corroborated by the evidence of the child's enjoyment of a noisy playground (with 200 children playing together) and by witness B's observations of the child's positive engagement in a busy (noisy) primary school class.
- b. **Academic advancement:** there is evidence that the child is progressing in literacy and numeracy at school A. There is nothing to suggest that school B cannot continue to enable the child to progress.
- c. **NAS accreditation:** this factor favours school B, but there is ample evidence that the staff at school A are aware of how to reduce distress and to adjust the curriculum and environment to take account of the child's autism. Further, the concept of additional support needs is not a diagnostic one, it is about the extent to which the child is unable to benefit from school education without the provision of additional support (2004 Act, s.1(1)), and so it is about impact. This is demonstrated by the words 'for whatever reason' in s.1(1), meaning that the source of the need is irrelevant. This arms-length approach to diagnosis is further demonstrated by the definition of 'additional support' which refers to the relevant provision being different from that made generally for children of the same age (2004 Act, s.1(3)). Here, the focus is on difference from the regular provision. This all means that the emphasis that we can properly place on a diagnosis (and any associated accreditation) in itself is limited.
- d. **Direct occupational therapy input:** this is available at school B, while for school A, an NHS referral is underway, with no indication of how long the assessment will take. We accept that this offers a theoretical advantage to school B over school A, but the advantage is speculative. It is not clear what (if anything) the occupational therapist at school B will recommend for the child or what impact such input will have. In any event, school A now have witness D's report. She makes a number of recommendations which school A staff could implement.
- e. **Masking:** the appellant believes that the child is masking at school, leading 'outbursts' of distressed behaviour at home (finding in fact at paragraph 33). Witness A concluded that there was no sign that the child is masking in school and witness B explained that while this is common with children who have autism, she could not conclude that the problems at home are caused by what happens at school. Witness D suggests that the child is experiencing a 'high level of survival mode each day when attending school and this bursts out when he gets home..' (A135). However, two key points lead us to conclude that we cannot rely on this as a factor which favours school A over school B or vice versa.

The first is that we struggle to see how witness D can form a reliable conclusion on masking given the information available to her. She has not seen the child in school at all, nor did she have an account from anyone who has, so we do not think she can reliably assess what happens at school A. We refer to the other limitations on D's evidence above.

Secondly, witness A (who has personal experience of masking in relation to her daughter, as well as extensive experience of the child in school A), concludes that the child seems happy, his body language is positive, he enjoys socialising with his peers, and he is not reluctant to tell staff when he is annoyed or upset (paragraph 37, R173). This evidence (and evidence of the child's presentation as a whole) does not match with three of the four indicators of masking summarised by witness D (A136) quoted by NAS. Only the first indicator could be said to apply, and there is no evidence to definitively attach this to what happens at school. We prefer witness A's assessment of the situation to that of witness D. The appellant, while experiencing what happens at home, does not see how the child behaves in school. Further, there is no evidence from which we can infer that masking (if it is a factor) would not occur at school B if the child attended there.

- f. **Visits to school B:** the evidence suggests that these went well, with no evidence of dysregulation. However, we cannot read anything material into this. The visits were for an hour weekly until the last few visits, when the child attended for the whole morning. This does not mean that this evidence is of no value, but it is not representative of attending a school 5 days a week on a full-time basis. The child's attendance was for only a very small fraction of each school week the majority of the time. This makes this evidence of limited value in comparing suitability with school A, where the child has attended on a full-time basis (except for the weeks when he attended school B) for two academic years.
- g. **Reward system in school B:** the parties explored this subject in evidence and submissions. However, we do not have sufficient evidence to allow us to reach a reliable conclusion in favour of or against the use of this particular reward system. For this reason, we agree with the appellant that no negative inference can be drawn about the reward system at school B.

89. We accept that school B has an impressive educational offering, but we need to consider the suitability of that offering against the needs of the child. There is a substantial difference between the schools on the crucial availability of a wider peer group.

90. We conclude that the provision in school A is more suitable to meet the additional support needs of the child than that available at school B, on account of the different peer group environments in the two schools.

Respective cost

91. The cost of provision (including transport) at school B is stated above (findings in fact at paragraph 55 above). The respondent argues that the correct approach is to regard the cost of provision at school A as nil, on the basis that there would be no cost saving to the respondent if the child attended school B. However, the cost of provision is not the same as cost saving in its absence.
92. The respondent refers to the Inner House case of *JB v Glasgow City Council* [2013] CSIH 2014 SC, a case in which the judgment of Lord Glennie in an earlier case (*SM, Appellant* 2007 Fam LR 2) was approved. We agree that this is the appropriate authority and that it is binding on us. However, that authority supports the appellant's position: that a calculation of actual cost is necessary before the respective cost part of the ground of refusal may be relied upon. The court there refers to a '...comparison of what it will cost the education authority to make provision for the additional support needs of the child in.. [school A].. with the costs to the education authority of making.. [such provision].. in ..[school B]'.
93. This means a comparison of actual costs. The cost of provision for the child in school A is not insignificant, given the need for 1:1 support and other inputs.
94. However, it is clear that in this case the cost of provision at school A is much less than that at school B. The cost at school B would be at least £93566.40 per year (including fees and non-escorted transport). It is inconceivable that the cost of provision at school A (including 1:1 PSA support, not used exclusively for the child, limited outreach input and educational psychology input) would approach that figure. Given that the burden of proof rests on the respondent, and the inevitability in this case that a respective cost exercise would benefit the respondent and not the appellant, it is appropriate to ignore the respective cost factor and base the reasonableness test purely on respective suitability. The appellant's representative did not argue, when this was put to him, that the cost of provision for the child's additional support needs at school A would be likely to exceed those at school B, although he did not make any concession on the cost point.

Conclusion on the ground of refusal

95. We conclude that it is not reasonable, having regard to the respective suitability and the (neutral) respective cost of the provision for the additional support needs of the child at schools A and B, to place the child in school B. To do so would be to place the child in a less suitable school for these purposes than the one in which a place is available for the child. This would not be reasonable.
96. Since all of paragraphs (i)-(iv) of the ground of refusal in Schedule 2, paragraph 3(1)(f) apply, that ground of refusal exists.

Ground of refusal 2: breach of the mainstream requirement (2004 Act, Schedule 2, paragraph 3(1)(g))

97. This ground of refusal refers to the requirement in s.15(1) of the Standards in Scotland's Schools etc. Act 2000 (**2000 Act**) to provide education in a school other than a special school unless at least one of three circumstances (in s.15(3)) arise. The requirement in s.15 of the 2000 Act is commonly known as the 'mainstream presumption'.
98. The respondent argues that the requirement in s.15(1) applies and none of the circumstances in s.15(3) apply. The appellant argues that s.15(1) does not apply at all. The appellant advances two arguments in support of her position (supplementary submission, A149-A150).
99. The first is that the respondent is not providing education in a mainstream school, since the child spends a proportion of his time in a 'special school', namely when he spends time out of class, usually with his PSA. The definition of 'special school' is found in s.29 of the 2004 Act and includes a class or unit which is part of a public school, as long as the definition is otherwise met. We agree with the appellant that the child is being educated, for part of the school week, in a class or unit within school A that meets the definition of a special school. This means that placing the child in school B would not breach the requirement in s.15(1) since that requirement is already being breached: the necessary causal link does not exist. This is sufficient for our conclusion on this ground of refusal, but we will explain briefly the other argument made by the appellant.
100. The appellant argues that the respondent is not (for the purposes of s.15(1)) 'providing education in a school', since, if the child were placed in school B, the respondent would not be providing education there, it would be entering into arrangements for the provision of school education in a school which is not managed by them. The appellant referred to that wording as used in s.15(2) of the 2000 Act (in relation to children who are under school age). The absence of that wording from s.15(1) meant, it was argued, that such a circumstance was excluded. We do not accept the appellant's argument here, given the reference to the provision of school education in s.1 of the 2000 Act, and the importation of the very wide definition of 'school education' from s.1(5) of the Education (Scotland) Act 1980 (**1980 Act**) into the 2000 Act (s.58(2) of the 2000 Act). However, it may be possible to argue that this ground of refusal is only intended to apply where the specified school is a public school (one under the management of the education authority – 1980 Act, s.135) due to the reference to 'public school' in part of the definition of 'special school' in s.29 of the 2004 Act (specifically part (b) of that definition). Against that is the wide definition of 'school' in part (a) of the s.29 definition (again in s.135 of the 1980 Act) which goes far beyond that of a public school. There may be other arguments in favour of the interpretation argued by the appellant. In the end, we need not determine this question since s.15(1) does not apply for the reason outlined above. However, this is a point that may require to be decided in another case, and for this reason, our thoughts on it may be of assistance.

101. In conclusion, this ground of refusal does not exist.

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

102. Since we conclude that a ground of refusal exists, we need to consider whether it is appropriate in all the circumstances to confirm the respondent's refusal of the placing request. If we do consider it to be appropriate, the decision to refuse the appellant's placing request must be confirmed; if we do not, the refusal decision must be overturned.

103. We have taken account of the child's views as outlined above. We should add here that the child's views are expressed in other places in the bundle, but we relied on the views he expressed to us directly and to the advocacy worker as these are the most recently expressed views and were provided in the context of these proceedings. While the child refers to school A as being 'super noisy', the evidence from witnesses A and B is that he does well there and copes most of the time in a busy (noisy) primary school class and all of the time in a very busy (noisy) playground. In other areas, the child's views overall did indicate a preference for school B over school A, and he said positive things about both. We accept that he has said negative things about school A (summarised in the appellant's submissions paragraphs 42-45), but we have to consider the evidence as a whole, and this indicates that the child is doing well and is happy at school A.

104. We have to consider the stability of provision for the child's education. He has settled well into school A and has attended there for two years (his primary 2 year being much more settled than in primary 1). He has very positive relationships with both staff and children at school A. If we overturned the respondent's decision and ordered that the child is placed in school B, we would be uprooting the child just after he has had his first reasonably settled year at school.

105. We have also considered the fact that the child has attended school B for a period each week over an extended period (as pointed out by the appellant – submissions paragraph 42), but as we note above, this contact has been minimal when compared with the time spent at school A, and is not representative of full-time schooling. The child is well aware of the choice that we have to make – he asked us directly which school we had decided on. It seems to us that he has not invested in school B to the extent that our decision will have a seriously detrimental effect on him.

106. All of the circumstances includes consideration of the evidence we have assessed above in relation to respective suitability of schools A and B. It is not appropriate to place the child in a school that is less suitable for meeting his additional support needs than one he is already attending.

107. Taking all of this together, we find that it is appropriate, in all of the circumstances, to confirm the decision to refuse the appellant's placing request.