Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

HEC/AR/23/0018

DECISION OF THE TRIBUNAL

Witnesses for Appellant:
Witness A: Head of Education, School C
Witness B: Residential Support Worker, Respite Care
Appellant

Witnesses for Respondent:
Witness C: Head Teacher, School A
Witness D: Continuous Improvement Officer
Witness E: Social Worker

Reference

1. This is a reference by the appellant following a refusal by the respondent to place the child in the school specified in the placing request.

Decision

2. We overturn the decision of the respondent and require the respondent to place the child in the school specified in the placing request within two weeks of the date of this decision or such other date as the parties agree; in terms of section 19(4A)(b)(i) of the Education (Additional Support for Learning) (Scotland) Act 2004 **(the 2004 Act)**.

Process

3. A hearing took place remotely (online) over 3 days. Prior to the hearing directions were issued to regulate the hearing and pre-hearing processes. Witness statements, a joint minute of agreed facts [T043-047] and outline written submissions were prepared. Adjusted and final written submissions were lodged after the oral evidence had been heard. An independent (non-instructed) advocacy report was also lodged [T049-059].

4. Before reaching our decision we considered the oral and written evidence and written submissions found in the bundle numbered T001-113, A001-237 and R001-065.

Findings in Fact

5. The appellant is the mother of the child. The child lives with her mother and brother in the family home.

6. The child has diagnoses of nonverbal autism (**ASD**), with cognitive, social and emotional difficulties; a severe learning disability (intellectual disability), epilepsy, hypermobility and PICA (an eating disorder characterised by a tendency to eat non-food substances and putting inedible items in her mouth) [GIRFme, A008].

7. The child has significant sensory processing issues. She demonstrates sensory seeking behaviours, sensory sensitivities and significant sensory modulation difficulties which make transitions from different environments very challenging. During transitions she will drop to the floor and may refuse to walk. The child had been using a buggy for transitions at school prior to the summer break although the plan is now to reduce this.

8. The child struggles significantly with the regulation of arousal levels. The child communicates non-verbally. She can use vocalisations and clicks. Her main communication form at home is using objects of reference, but she has some understanding of photographs. She can point to show what she wants and she will also take an adult's hand and lead them to what she needs. When the child is overwhelmed, she makes a high-pitched sound. The child has been introduced to PECS at school (communicating using pictures) however she does not consistently access this. Visual prompts can sometimes cause the child distress at home [Appellant, A056].

9. The child's communication, daily living, and interpersonal relationship skills are below the 1st percentile, similar to a child in the infant to toddler stage of development which is in the extremely low range [Vineland Assessment, A034]. She is working at pre-early level of the Education Curriculum [Educational Psychology, A030], somewhere between that of an 18 month to 2 and ½ year old child [Witness C, R032].

10. The child displays significant levels of distressed and dysregulated behaviours in school and at home every day. She has no danger awareness. When she is distressed or frustrated, she may cause harm to herself or others. She will bite or hit herself if she is upset. She is likely to drop down to the ground and may grab, nip or bite at other children and adults. The child relies on the adults around her to keep herself and others safe during these times [GIRFme, A008]. When distressed, the child begins to pace around the room looking for items and might try to get into cupboards or drawers at home or in the classroom. The child will throw things high into the air and try to leave the room. She will bite her hand and cry, and will reach out to nip or bite at adults around her [Reactive Support Plan, A019]. There is a medium risk of destructive behaviour and a high risk of injuring other pupils and staff [Risk Assessment, A021].

11. At home, the child has a Safe Space (which is a robust and padded zipped tent) in her bedroom which is upstairs. She has access to a shower room (it is too small for a bath) which is downstairs. She has access to a garden which is overlooked by neighbours. When the child is highly dysregulated the appellant may have to place her in the garden to keep others safe. During these times the child may remove her clothes. The garden is not a safe place as the child may eat snails and grass [Appellant, A059].

12. The child's distressed behaviours are not a result of her epilepsy. There is not always an obvious trigger [Co-ordinated Support Plan (**CSP**), A015]. Sometimes distressed behaviours can happen when the child is asked to do something, to make transitions between activities/places or if the child is unable to get something she wants or to go to a place she likes [Reactive Support Plan, A019]. Other triggers include attempts to shower her, to attend to her personal care or toileting, travel and transport to school by

bus or car (by bus this can take around an hour) and attempts to give her fluids. The child also struggles with demands, and requires demands to be reduced in any situation. She has a very short attention span for non-preferred tasks [CSP, A015].

13. The child needs adult supervision at all times [GIRFme, A008]. She needs 2 or 3 staff to attend to her personal care in school [Personal Care Plan, R049]. She needs support for all aspects of personal care and toileting [Educational Psychology Assessment, A030]. The child is refusing to allow personal care. This means she is often unable to be changed and cleaned as needed, at home and in school, which can cause the child physical discomfort and pain [Witness B, A048; Appellant, A071]. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

14. The child enjoys being active and exploring open spaces, including garden spaces. She enjoys plants and trees. She loves having a space that she can run around and spin. She enjoys a tight space that she can squeeze into and hide. When she is regulated she loves a bath. She also enjoys swimming. She likes songs and bouncing, ripping paper and rough and tumble play. The child chooses to explore and play mostly by herself, but she will sometimes try to interact with her peers. She finds it hard to share resources and toys and needs lots of support to do this [GIRFme, A008].

15. The child is prescribed a range of medication, which includes medication for anxiety, sleep and seizure management. The child has focal seizures, which can sometimes lead to generalised seizures. The focal seizures take place approximately weekly. She has generalised seizures around once per month, which can sometimes last up to 20 minutes, and the child will need to have rescue medication administered.

16. The child has a very limited diet, she is very sensitive to taste and smells [GIRFme, A008]. The child requires specialist seating to assist her to settle at mealtimes. When the child is unwell she stops eating and drinking and as a result she has had hospital admissions due to her sugar levels dropping dangerously low [Witness A, A063].

17. The child had a gastrostomy tube (known as a **PEG**) inserted in February 2023, which allows medication and fluids to be given. The child refuses to take fluids orally, and her PEG is used to supplement her oral fluid intake. She needs 120ml of fluid, four times daily, via her PEG. Lack of fluids affects the child’s bowels and she needs to take a laxative. Constipation can cause pain and discomfort to the child. During the summer holidays she did not have to take a laxative regularly [Witness A, A064].

Support services

18. A number of education, personal care, risk and health plans are in place to support the child in school. This includes a CSP, which was created in June 2022. A number of agencies are involved with the child, including Educational Psychology, Occupational Therapy, Neurology, Child Psychiatry, Paediatrics, and Epilepsy Nurses.

19. The child is given respite care. During term time she attends one overnight per week, from 16.00 until 09.30 the next morning; 4 hours after school on a Wednesday; and 4 hours on a Sunday. A Summer Care Plan was prepared by the social worker to increase the amount of respite during the summer holidays [R053], however the child could not

cope with many of the transitions and as a result the plan did not meet her needs [Witness E, R060].

20. The child needs at least two adults to go out with her in the community, which is not always available. This means she has very limited opportunities to experience community life.

21. The child has a self-directed support (**SDS**) annual budget of £61,605, facilitated by social work. This is to provide respite support to the child during term time and school holidays and home support. For a short period of time home support was provided to assist getting the child ready for school, however this was withdrawn as the provider could not provide 2 members of staff for early mornings [Witness E, R060]. The SDS budget also covers home support between 9 am and 3 pm during school holidays but this has not been provided as there are no resources available [Witness E, R022].

The current school (School A)

22. The child is enrolled in the current school, where she has attended since August 2022. It is a special school managed by the respondent. It sits in a wider school campus, which includes two other schools. It is directly connected to School B, which is also a special school. Pupils can access indoor and outdoor facilities across the campus. The current school provides education to children with severe and complex additional support needs. There are six classrooms, each with around 7 to 8 pupils. Pupils are taught and supported by experienced teachers and Additional Support Needs Assistants (**ASNAs**).

23. The current school is a very compact school and there is not a lot of breakout space [Witness C, R032]. There are no dedicated breakout spaces attached to the classrooms. There is an outdoor space next to the school and a wider outdoor area which sits across the whole campus. There is a Forest School (a child-centred learning process in the natural environment), however this is not in use due to vandalism.

24. The child has struggled with her emotions in school for significant periods of time. This has impacted on her learning and progress [School Report, A101]. Over 50 incidents were recorded by the school between August 2022 and February 2023 [A131-222]. These occurred when the child was distressed and dysregulated and she hurt herself or (mainly) teaching staff or other children, by biting or throwing objects.

25. Between October and November 2022 the child became increasingly dysregulated and distressed in school and was spending less time in the classroom. From January 2023 the child was unable to spend any time in the classroom and she was educated on her own in the gym hall. On a day to day basis the child has timetabled members of staff who try to follow an education curriculum with her [Witness C, R032].

26. The child is always provided with 1:1 staffing support. There is normally a 2:1 staff ratio in the gym hall, which increases if the child displays heightened distressed behaviour. The school struggle to find safe spaces for the child and they have regularly struggled to keep the child and staff safe [Education Report, A223]. As a result staffing ratios are regularly increased, which happened every day in the lead up to the summer holidays. Two additional ASNAs have been allocated to support the child in school [Witness C].

27. The child finds the classroom environment difficult and overwhelming. She needs an environment where resources are available but safe for her to use. Having too many people around can trigger her distress. A larger, quieter environment helps her to regulate her emotions [School Report, A098]. There is a sensory room and a soft play room at the current school and in School B, which the child can use when she is calm [Educational Psychologist, A237], however, a soft play area can heighten her emotions and may not assist when she is dysregulated [Witness C]. There is also a swimming pool, however the child has not been able to use this.

28. CALM training (a form of safe physical intervention and de-escalation techniques) will reduce risks [General Risk Assessment, A024]. School staff have been trained in CALM but this has now lapsed until the respondent makes a decision on the use of restraint in their schools. The school take a "hands off" approach when the child is in a heightened dysregulated state. This means that they need sufficient physical space to be able to create enough distance between staff and the child. If distraction techniques do not work staff remove themselves from the room [Witness C and Statement, R036].

29. In January 2023 a teacher held the child by the arms to prevent her from injuring herself or biting the member of staff [Dojo Message, A102, Incident Report, R050].

30. When feeling settled the child has engaged in some activities and she has made some new school friends, who look for her at playtime [School Report, A101]. The safest place to enable the child to be around her peers is within the playground. The child's ability to go outside is dependent on her levels of distress. Transitions from outdoors to indoors are difficult for the child.

31. During January and February 2023 the child was increasingly distressed and the school struggled to meet the child's needs. Since that time the child has begun to engage slowly with her environment. However, there continue to be daily incidents of highly distressed and dysregulated behaviour [Witness C].

32. The school is expected to provide the child with 120 mls of fluid, twice a day [Paediatric Fluid Plan, School Regimen, A105]. However, this rarely occurs, as a result of the child's dysregulation and distress, and little or no fluids were administered in the weeks before the summer holidays. The appellant provides the school with two 60 mls syringes of fluid to support her fluid intake but these are rarely used by the school and the syringes sent on the first day of the new term (August 2023) were returned unopened [Witness A, A063]. The school is reluctant to administer fluids when the child is distressed and in any other area other than the personal care room.

33. The school does not maintain a fluid chart nor does it share precise information with the appellant or respite care on the amount of fluids taken by the child each school day.

34. The school plan to slowly transition the child back into a classroom from August 2023. The classroom she will attend is slightly bigger than her classroom in the previous academic year. There will be seven other pupils in the class, with one teacher and three ASNAs. All the pupils in the class are non-verbal and use a combination of communication aids [Witness C, R063].

The specified school (School C)

35. The appellant made a placing request for the child to attend the specified school, an independent special school, on a residential basis, which was refused by the respondent in a letter dated January 2023. The specified school are willing to admit the child for a full-time residential placement beginning in August 2023. The school provides a 24 hour curriculum over 52 weeks and school staff work closely with residential staff.

36. The criteria for admission are ASD and a learning disability and a need for a high staffing ratio. The child has visited the specified school and family visits were made over the summer holidays by school staff, including witness A. Senior members of staff also visited the child at respite care.

37. The school has a maximum of 25 pupils. There are 6 class groups with between 3 and 5 pupils in each. Pupils have access to the classroom and a number of breakaway spaces. The main classrooms are grouped around a central courtyard, which functions as an outdoor area, with a garden and playground. All classrooms have doors which go out into the garden space. All pupils get comfort breaks and there is no limit on accessing the outdoor space. There are a number of specialist rooms, such as the soft play area, a life skills suite, a multi-sensory room, a hall used for music and assemblies and a cafeteria for PE, parties, and other group events [Witness A, A038].

38. The school provides a structured curriculum and opportunities to go into the community to learn life skills. There is a quiet room in every class. If the child was distressed, she would be able to retreat to the quiet room to keep her safe and give her space to regulate. The pupil profile is similar to the child's profile. The school is very familiar with and experienced in managing dysregulated and self-injurious behaviours.

39. The environment is relaxed, calm and very quiet. The surroundings are designed so it is noise-reduced. The garden area is sheltered from external roads. The internal courtyard is quiet, peaceful, and private. There are not too many internal signs or distractions. There are visual cues and Boardmaker symbols (visual signs) around the school to indicate what is in rooms so pupils can look and see these, which increases feelings of safety [Witness A, A039].

40. Classes are arranged by social dynamic rather than age and staffing is provided on a 2:1 ratio. The child would attend a class with 3 other residential pupils who have a very similar profile. These pupils have access to an individual space, and the same would be available to the child. The pupils all have a severe learning difficulty as well as ASD, personal care needs and a range of physical health concerns, but they are all independently mobile and enjoy physical activity and outdoor learning. Some have Epilepsy and self-injurious behaviours which can be linked to their expression of pain. [Witness A, A039].

41. The school uses sensory play and activities to develop joint shared attention, bringing the pupils together for short periods of time and making sure they are comfortable in the same space together [Witness A, A039].

42. Many pupils take medication. All staff are trained in the management of Epilepsy because it is widespread across the school. Training is provided every year. They have Epilepsy protocols, which depend on the severity of the seizure activity. A number of pupils have rescue medication, as well as routine medication. No pupils currently have

a PEG. Some staff are trained in their use and refresher training will be arranged for those staff, and the wider staff team [Witness A, A040].

43. The school offers Early Level curriculum, which is consistent with the learning currently being provided to the child. The school would complete sensory based work with the child in the initial stages of her attendance and then introduce a wider range of learning activities. The school uses play pedagogy, which means taking a holistic and child-centred approach to education, giving pupils the ability to lead their own play. It includes meaningful links to community learning. For example, rather than teaching a lesson about gardening, doing gardening in a garden setting [Witness A, A40].

44. The school has an in-house Speech and Language Therapist, who is their key point for planning of communication strategies. There is access to Occupational Therapy. They have a music specialist and an art specialist one day a week. They have Forest Schools, and one of the teachers is a qualified Forest Schools Leader, who leads the sessions every Monday, taking cohorts of pupils for a term at a time.

45. The school is located in the middle of a busy urban area, with access to a canal bordering their property. The school has built up good relationships with local supermarkets, and other local areas of interest. This means that there is a wide range of community activity where the school is valued and the needs of pupils better understood [Witness A, A042].

46. The school would develop a functional communication system for the child as soon as possible, using a communication board and PECS, and possibly a talker, like an IPad. All the pupils in the child's proposed class use alternative communication methods.

47. Each of the 6 classes has their own teacher and a team of experienced Learning Support Workers. Pupils are not expected to develop relationships with a wide range of staff. To avoid staff and pupil 'burnout', the school rotate staff within the class team, so they get to know different pupils. Two staff are assigned from within the class team to each pupil each day, and the school vary who these are, while maintaining consistency for the pupil. For example, on each Monday, the same two people are assigned. This gives familiarity and consistency of routine [Witness A, A042].

48. The school is experienced in demand avoidance and has language strategies in place. All staff are trained in de-escalation, CALM, autism practice and play training, sensory based behaviours training, moving and handling, and some are trained in MIDAS (minibus training) and first aid. Other training is available as required. For example, different classes have different medications, so the Epilepsy trainer makes sure that staff are familiar with different types of medication. CALM training is refreshed every year. The school is the first in Scotland to have received Advanced Autism Accreditation in 2020.

49. If a pupil displays self-injurious behaviours, they might be given 'chew buddies' and sensory-based toys to offer alternatives as well as access to safe spaces. Staff would use similar strategies for the child and seek to redirect her and find alternative approaches. They will consider whether she needs a sensory circuit or sensory diet to help her to regulate.

50. The school has four community houses with gardens in the local community for residential pupils. At most, some are 10 minutes away by bus and some are a lot nearer.

These are set up like family homes, and the child would have her own room and bathroom. Fresh staff support pupils. The staffing ratio is the same in waking hours but overnight ratios may be increased depending on health needs. There are around 3 pupils per house, and one has capacity for 4. Residential pupils do not have a lengthy transition to school and the same communication systems are used. Families can visit as often as they wish and pupils can go home as often as they wish [Witness A, A043].

51. There are regular trips at weekends to the local community and further afield, for example, to the beach. Some pupils go on overnight trips. The school has charity partnerships with various local organisations which helps them to extend their range of activities. They use a canoeing company for trips on the canal and also provide access to horse riding.

52. The school places an emphasis on life skills to equip pupils to have as full a quality of life as possible. They provide cookery classes and bakery, and pupils have access to resources in the life skills suite or in classes.

The child's views [Advocacy Report, T050]

53. We instructed that an independent advocacy report be lodged and this was prepared on a 'non-instructed' basis because of the child's communication difficulties. This was completed by same advocate who has supported the child for a number of months. The advocate consulted with the Educational Psychologist, the Manager at the School Hub, and the Head Teacher at the current school, the Key Worker at respite care; and the appellant. The advocate used their responses to build a picture of the child's likes and dislikes, what life is like for the child and what her future wishes might be. As is commonly the case in non-instructed advocacy the report is measured against the wellbeing indicators (commonly abbreviated to SHANARRI) and the United Nations Convention on the Rights of the Child (**UNCRC**).

54. Non-instructed advocacy is familiar to this jurisdiction and it often provides valuable insights, as here. The appellant invites us to consider the evidence against the backdrop of this report and what it tells us about the child. The respondent submits that we cannot attach any value to the report as the independent advocate was not called as a witness. We reject this view. It would be unusual for an independent advocate to appear as a witness when their role is to advocate for the child. The report is not determinative but it does provide us with an independent perspective on the child. In this regard, we find it informative and helpful.

55. From the report we are able to identify a number of concerns and triggers (see paragraph 12 above) which increase the child's distress. We can see that she loves being outdoors. She enjoys being active and swimming. She needs stability, consistent relationships and environment which is tailored to her needs. Although the child has very short moments of calm, when she is settled she will explore her environment, make sounds of pleasure, give cuddles and kisses and laugh.

Reasons for the Decision

General remarks on the oral evidence

56. We benefitted from the provision of detailed witness statements for all of the witnesses.

57. There were some areas where the evidence of the respondent's witnesses conflicted, such as the provision of the ASNAs to the child. Witness C stated that two ASNAs were provided to specifically support the child and witness D described them as supply staff providing cover for staff absence. If witness C is correct, this is an extra cost to the respondent to meet the additional support needs of the child. If witness D is correct, then this is sessional cover, which the child happens to have benefitted from for a number of months. We say more on this in our cost analysis at paragraph 99.

58. We found the evidence of witness C to be honest and relatively measured, although sometimes hesitant or uncertain and this led us to conclude that she did not have the fullest knowledge of the child. For example, she initially said that the child's fluid intake at school amounted to around 120 mls most days and then when asked by the respondent, said she "wouldn't be confident in saying most days – I would say some days". Her oral evidence about the sustainability of the child's place at the current school was more cautious than in her written evidence and we were not sure how convinced she now was. In her statement she states that she is "100 % confident" that the school can meet the child's needs [R039, para 26] but in her oral evidence she said this is a "hard one to say", it was very hard to measure and she could not say whether it was now more or less sustainable, although she did not say it was not sustainable. She conceded that ideally she would like bigger classrooms with smaller numbers to see if they could make any "further headway" with the child.

59. Witness D did not have significant direct knowledge of the child. Witnesses C and D had a tendency to speak very broadly about the behaviours of children with complex additional support needs and we often had to ask them to be specific about the child. Witness E did not demonstrate significant direct knowledge of the child. Her evidence was vague at times although she did offer a number of concessions. She did not appear to know the full extent of the child's difficulties. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

60. In contrast, the written and oral evidence of witnesses A and B was consistent. Witness B knows the child well, she is her key worker, and she has regular weekly contact. We were impressed with her knowledge and her measured approach. Witness A described the services at the specified school in detail, which assisted us in making our comparison of the two schools. Witness A and her staff have met the child and the appellant. They have undertaken detailed assessments to understand the child's additional support needs. Witness A used this knowledge to develop a school plan for the child.

61. Finally, we found the evidence of the appellant very compelling. She was measured and honest. She accepts that the current school are doing all that they can, she acknowledges the hard work of the teachers. She offered concessions where these were appropriate. She remains resolute that the current school is not suitable for her child and that the specified school can offer her a better quality of life and education.

The law

62. There is no dispute that the respondent is responsible for the child's education.

63. Both parties referred us to the case of *M v Aberdeenshire Council* 2008 SLT (Sh Ct) 126 (Sheriff Court), which reminds us that the proper time for assessing whether the conditions contained in the grounds of refusal are met or not is at the time of the hearing. We also accept that (again arising from the *M* case), consideration should be given to the assessment of the child's needs which happened closest to the hearing. We have evidence of such assessments in the oral and written evidence.

64. We accept the submission of the appellant that it is appropriate for us to consider the child's additional support needs in their entirety, following the Inner House case of *City of Edinburgh v MDN* [2011] CSIH 13. In refusing this appeal the court found no error in law in the tribunal's approach to determining that 'these needs required to be stated in a more general, all-encompassing and indeed "holistic" way' [para 32].

65. We accept the submission of the respondent that when calculating respective costs we must view that according to what is reasonable from the perspective of the respondent and that the costs to be compared are the costs (in each of the two schools) of providing the additional support necessary for the child; not the overall costs (*S v Edinburgh City Council (SM, Appellant)* 2007 Fam LR 2.).

66. Parties accepted that the onus of establishing the ground of refusal lies with the respondent (*M v Aberdeenshire Council*).

67. Parties are agreed that the child has additional support needs in terms of section 1 of the 2004 Act. Having considered the evidence we are satisfied that this is the case.

68. The respondent's refusal of the placing request is based solely on schedule 2, paragraph 3(1)(f) of the 2004 Act. If we find that the ground of refusal exists we must then go on to consider whether in all the circumstances it is appropriate to confirm the respondent's decision (section 19(4)(a)(ii) of the 2004 Act).

The ground of refusal

69. There are four parts to this ground of refusal, numbered in paragraphs (i) to (iv). The respondent must satisfy us that each of the parts apply to the facts of the case at the date of the hearing.

Paragraph 3(1)(f)(i) The specified school is not a public school

70. It is accepted that the specified school is not a public school. This part of the test is met.

Paragraph 3(1)(f)(ii) The authority are able to make provision for the additional support needs of the child in a school (School A) other than the specified school (School C)

71. The appellant does not accept that the current school can meet the child's needs and we agree. This part of the test is not met.

72. Apart from the very recent return to school following the summer break, the child has been receiving schooling in the gym hall since January 2023. This is an isolated learning environment with limited peer contact. As a result she has had few opportunities for shared learning and developing peer relationships. Although there are other pupils similar to the child, she is the only one being educated in this way and no other pupil

displays the same heightened levels of distress and dysregulation. Witness E describes the child as having probably the highest level of complex additional support needs in the authority.

73. There is a great deal of concern around the child's refusal to take fluids. The PEG was intended to improve this and a dietician prepared a fluid plan for the school. However, staff have frequently been unable to administer fluids due to the child's levels of distress. This raises health concerns. For example, the child may regularly be dehydrated, which could give rise to distress and dysregulation. We are concerned at the absence of a precise record of fluids and limited communication from the school regarding fluid intake with the appellant and respite care, when the child is transitioning there.

74. Space is important to the child, which all witnesses acknowledged. She needs a large classroom space where she can be safely supported to regulate. She needs access to a break out space near to her classroom to give her space to become calm while still having the experience of sharing a classroom with her peers. She needs a low arousal environment with limited sensory overload from furnishings and people. These environmental factors are critical to the delivery of her education. The current school cannot provide this given its physical limits and the number of pupils in each class.

75. The alternative to the gym hall is the new classroom, which is slightly larger than her first classroom and which has 7 other pupils. This is a return to the type of environment that the child could not previously cope with. There is a lack of detail to the new term plan. It does not explain how the child will cope with the other pupils when it is known that too many people may act as a trigger. It does not factor in the higher staffing ratio the child will need for her personal care and toileting, many times during each day, and when she becomes dysregulated due to other factors. Witness C advises that the child can be dysregulated 5 or 6 times in a day. If the plan fails, the child will return to the gym hall.

76. Witness C was far more cautious in her oral evidence about the sustainability of the current school placement. Despite their hard work, they have struggled to find a safe space that the child can access when she becomes dysregulated. The new plan does not address this. It will place her in a smaller room than the gym hall with more pupils and possibly a lower staff to child ratio at times, given pupil numbers. This lack of space restricts the child and limits her opportunities for positive school experiences.

77. Witnesses C and D explained that a lot of extra facilities are available at School B, however, the child struggles with transitions. Irrespective of distance, any change from one environment to another amounts to a transition for the child, which witness B and the appellant reinforced in their oral evidence. The child also has to traverse an area with other distractions to get to School B resources, which can heighten her dysregulation.

78. Witness C conceded that on or around February 2023 the school were finding it increasingly difficult to support the child and to keep her and staff safe. Although incidents have reduced since the Easter break, they continue to arise on a daily basis. Witness C cannot identify patterns or triggers and things can change many times in one day. She cannot be confident that the new plan will work, but she is willing to try it in the hope that it produces a more settled school environment for the child.

79. It is clear that the home environment is no less difficult. The child's distressed behaviours are exhibited here as at school. Some home incidents can last up to 2 hours. The child often attends school in a hooded blanket as the appellant cannot dress her due to the child's distress. Attempting to put her school clothes on often acts as a trigger. The appellant describes the child's world as "getting smaller". **[Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

80. The appellant has significant concerns around the child's personal care and toileting and the school's ability to manage this, which has an impact on the child's health and dignity. Sometimes the triggers for her distress are unclear, however, a clear trigger is personal care and toileting. All behaviour is communication and we are concerned that the child is frequently communicating distress. This could arise from being uncomfortable or in pain. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

    Witness E advised that while they used to be able to give the child a bath regularly at respite care the child will no longer tolerate this. Witness E and the appellant shared that the child has recently taken to holding her legs firmly closed which makes it more difficult to change and clean her. This adds to our concerns for the child's wellbeing. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

81. Despite the best efforts of the school, the child's additional support needs are not being met. The child has made little progress in a full school year. We accept the appellant's submission that this has a negative impact on the child's wellbeing. The respondent suggested that we could not reach that conclusion from the absence of shading in some of the wellbeing indicators on the GIRFme plan. We do not draw that conclusion from this plan alone but from the entirety of the evidence before us. There are 8 wellbeing indicators. We can identify at least 5 where the child's wellbeing is currently compromised: Safe, Healthy, Achieving, Nurtured and Respected.

82. When considering how the child can benefit from her school education we should take a holistic approach (*MDN* case). This means that it would be artificial to separate her care needs from her educational needs. This is particularly important when we go on to consider the residential nature of the specified school.

83. The appellant's home and garden do not provide a safe physical environment, which adds to the 24 hour picture of the child's life. The Safe Space is upstairs in the house. The shower is downstairs. When the child is in a dysregulated state the appellant cannot safely relocate her. Critically, the appellant is left to attend to her child's personal care on her own, despite the fact that it takes 2 or sometimes 3 staff to achieve (or attempt) this in school. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 55(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

84. Despite the child's challenges with transitions she has a number to make during the school week, which include from home to school, from one school to another when using School B facilities, from school to respite care when respite is in place and from respite care to home or school (after an overnight respite); and from school to home when no respite is in place. She also has transitions from home to respite care and respite care to home when respite is given at weekends and during school breaks. It is critical that transitions are reduced to as few as possible. This cannot be achieved in the current school.

Paragraph 3(1)(f)(iii) It is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in the specified school (school C) and in the school referred to in paragraph (ii) (school B), to place the child in the specified school

Suitability

85. Our findings in relation to the second part of the legal test also apply here and we find that this part of the test is not met.

86. Both schools provide skilled and experienced teachers and support staff, however the specified school offers a consistent team of staff at a higher staff to pupil ratio. They are trained in CALM and this training is up to date. We acknowledge that physical intervention may sometimes prove necessary to keep a child or others safe and it is a concern that the current school do not have a clear system and current training in place for this. This could lead to the use of restraint without staff realising, such as the incident in January 2023 (see paragraph 29 above). Although witness C does not think CALM is helpful when a child is highly dysregulated, we prefer the evidence of witness A that it can be valuable, particularly the de-escalation component. We place some weight on the training and experience of staff at the specified school given the extent and frequency of the child's distressed and dysregulated behaviours.

87. The appellant argues that the residential component at the specified school is critical and we agree. The child's home life is in crisis and has been for some time. It is highly unlikely that this can be sustained. No package of suitable home support or foster care has been provided. The evidence of witness E that she plans to keep checking with providers, despite their inability to provide support to date, is not reassuring. There is no concrete plan, which is a consistent theme. None of the existing plans for the child have been adjusted or updated to reflect her current circumstances. Although witness C said that plans will be updated over time we are left with the impression that the current school are 'fire-fighting'.

88. We agree that there are advantages to a residential school. Education and care will work in harmony. Given the concerns there are regarding the child's health, this is critical. The child will be supported in her personal care to be changed and dressed before she attends school. The same communication systems can be used across both, which is not happening between the current school and home. They (residential) have fresh staff who are able to be energetic and to meet challenging needs. The child is less likely to arrive in school in a heightened dysregulated state, as she frequently is now. She will not have to spend a lengthy time on the bus, compared to up to an hour for the current school, and she will be transported in a consistent way.

89. The specified school offers a quiet environment, more physical space and fewer transitions, which is a better match for the child. There is a breakout room and direct outdoor access. The child's class has access to four separate rooms. The child would be placed in a classroom with fewer pupils (less than half compared to the current school), all with a similar profile to her own. She would have a greater opportunity to develop consistent peer and staff relationships. She would have more regular access to the community and greater opportunities for outdoor learning. Both schools recognise the value of community access, however this has not been achieved at the current school. The appellant places some value on this as she is unable to do this safely with the child. The higher ratios and team approach to staffing at the specified school provide greater opportunities for this to take place.

90. The respondent argues that the respite support provided to the child and appellant is sufficient and in any event is unrelated to the grounds of refusal. We do not accept that it is sufficient when there is a wealth of contrary evidence. On relevance, care needs are often provided by a different department in an authority, like social work, as here. While the respite is not provided in the school or by the school, it is connected to the child's school education during term time. At least one period begins after school (Wednesday) and one of the overnight periods may begin after a school day (this is flexible) and end at the beginning of a school day. This means that the child is sometimes directly transitioning from and to school from respite. Importantly, the respite is provided to the child and funded from her SDS budget. It is part of a package to meet her additional support needs [Witness E, R060 and Witness B, A046]. Even if we were not satisfied on this holistic view, the respite has relevance to the question of residential schooling.

91. The respondent also argues that the support provision for the child over the school holidays was adequate to meet the child's needs and in any event is unrelated to the ground of refusal. We do not accept that this was adequate but we accept that this is not directly related to the grounds of refusal. However, it is part of an informative picture which highlights the significant challenges at home. This again has relevance to the question of residential schooling.

92. Article 29 of the UNCRC (right to an education which develops personality, respect for others' rights and the environment) 'is concerned with a vision of education that looks not only beyond the school gate but also beyond the content of a child's textbook' (Tobin, J in The United Nations Convention on the Rights of the Child, A Commentary, page 1123, para 3).

93. The statutory Code of Practice (page 17, para 4) states:

> The benefit from school education which children and young people will gain will vary according to their individual needs and circumstances. However, all children and young people benefit from school education when they can access a curriculum which supports their learning and personal development; where teaching and support from others meets their wellbeing needs; where they can learn with, and from, their peers and when their learning is supported by the parents in the home and their wider community.

94. When we compare the two schools and the potential for the child to develop to her fullest potential we are markedly in favour of the specified school. The child's learning and development are not progressing in the current school, the appellant cannot support her

in the home or in her wider community. By placing her in the specified school there is an opportunity to significantly improve the quality of the child's education, her relationships at home and her learning in her wider community.

Cost

95. The residential enhanced rate for the specified school is £6912 per week, over a 52-week period. This includes the residential and school fees and transport to school by mini bus for residential pupils. The total annual cost for the child to attend the specified school on a residential basis is £359,424.

96. The costs to be compared are the costs (in each of the two schools) of providing the additional support necessary for the child; not the overall costs (the *S* case). The question is: what is the difference in cost to the respondent of providing for the child's additional support needs in one school rather than the other? The respondent argues that there is nil cost to retaining the child in the current school and the only cost they incur is an annual cost of £15,600 for transport to the school.

97. The appellant argues that we should have regard to the SDS budget when assessing cost. The respondent argues that this may still be needed even if the child is placed in the specified school. We think this is unlikely given the 24 hour, 52 weeks nature of the school placement and the purpose of the SDS. This means we accept this is a saving.

98. The appellant argues that we should include the cost of the 2 ASNAs. Despite the evidence of Witness D, it is clear that Witness C believes the 2 ASNAs to be specifically for the child and they have been allocated in that manner. Witness D stated that a decision was made to "instantly deploy some additional teaching resources and ASNAs" at the meeting on in February 2023. His recollection was that some additional teachers were put in from a supply list and as ASNAs became available the teachers were phased out and the ASNAs increased. He said that they could look at more if needed and fund these. This suggests a tailored resource for the child. Witness C said that they were provided so that the school would have the necessary flexibility for the child. She confirmed that they will remain in place. They are not being used by the school to support staff absence. We are persuaded that this is an extra cost to the respondent of providing for the child's additional support needs.

99. When we add the SDS saving (£61,605), the cost of the transport (£15,600) and the cost of the ASNAs (£40,000) this amounts to an annual figure of £117,205, which can be discounted from the annual cost to the respondent of the child attending the special school. This means that the cost to the respondent is £242,219, which is still appreciably greater than any savings. With or without the cost savings we are satisfied that suitability far outweighs the cost to the respondent.

100. Suitability does not automatically outweigh cost, particularly where there are comparably even levels of suitability between the two schools but this is not the case here. We do not think that the current school has been meeting the child's additional support needs or that they are equipped to do so in the future, despite their best efforts over the course of a full school year. We are concerned that the child's wellbeing is significantly compromised. She is a highly vulnerable young child who cannot really communicate in any other way than through her behaviour. We conclude that the child

is telling us she is very frequently not feeling well or happy and that she is very often upset and distressed.

101. There is an appreciably better prospect that her additional support needs will be met at the specified school for the reasons we set out at parts two (ii) and three (iii) of the test.

Paragraph 3(1)(f)(iv) The authority have offered to place the child in the school referred to in paragraph (ii) (the current school – School A)

102. The authority have offered to place the child in the current school. The parties accept that this condition is met and we agree. This part of the test is met.

103. Having decided that the ground of refusal does not exist we are not required to consider whether in all the circumstances it is appropriate to confirm the decision. Had it been necessary for us to do so we would have not considered it appropriate to confirm the decision (for the reasons specified above) and we would have placed the child in the specified school.