



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/21/0094

List of witnesses

For the appellant:

Headteacher (specified school): **witness C**
Independent Occupational Therapist: **witness D**

For the respondent

Depute Education Psychologist: **witness A**
Depute Headteacher (current school): **witness B**

Reference

1. The appellant made a placing request for a place at an independent special school (**the specified school**), in May 2021. This was refused by the respondent in July 2021 on the grounds specified in Schedule 2, paragraph 3(1)(f) and 3(1)(g) of the Education (Additional Support for Learning) (Scotland) Act 2004 (**the 2004 Act**). The appellant lodged a reference with the Tribunal in September 2021.

Decision

2. The tribunal overturns the decision of the respondent to refuse the placing request and requires the education authority to place the child in the school specified in the placing request as soon as possible and no later than 7 March 2022.

Process

3. A hearing took place over three days using video conference. Prior to the hearing, a number of case management calls took place. Directions were issued to regulate the hearing and pre-hearing processes. Written witness statements were prepared, exchanged, lodged and accepted into the process as evidence in chief. A specialist occupational therapy report was lodged which had been prepared by the skilled witness (D) (R051-077). Advocacy reports were prepared with the views of the young person

(T038 and T093). The young person also prepared a presentation (T040). A joint minute of agreement was lodged (T055) and written submissions were prepared, exchanged and lodged (T061 and T074) after evidence was heard.

4. Before we reached our decision, we considered the written and oral evidence and the written and oral submissions. The written evidence (the bundle) consists of T001-094, A001-106 and R001-180.
5. The young person gave her views at the hearing. These were consistent with the advocacy statements and her presentation.

Findings in Fact

6. By the time of the hearing, the young person was 16 years old. The young person lives with the appellant, her mother, in the family home with her two siblings.

The Young Person's Neurodivergence

(Summary of Pupil Information, A076; CAMHS letter, A079; Depute Educational Psychologist, Summary of Assessments, A081; Appellant witness statement, A085; Child's Plan, R028, Occupational Therapy Report, R051, Joint Minute, T55).

7. The young person has Attention Deficit Hyperactivity Disorder (**ADHD**), Dyslexia, Dyspraxia and traits of Autism Spectrum Disorder (**ASD**) with associated sensory processing difficulties and social, emotional, and behavioural needs. Because of her neurodivergence, the young person needs a close level of adult support for a wide range of activities of daily living and personal care. The young person lacks fine and gross motor skills, which means she struggles to complete basic daily tasks with confidence and without support. She is extremely anxious and struggles to express her emotions due to a limited emotional vocabulary. She can become upset and anxious if her expectations are not met, due to her rigid thought process. She struggles to concentrate and to sleep, which affects her ability to focus unaided throughout the school day. She struggles with crowds and loud noise. Dyslexia affects her working memory, spelling, reading, accuracy and organisation skills. She needs extra time to process information. When she feels overwhelmed in school, she needs a safe space to de-stress and to regulate her emotions.
8. The young person has poor visual perception alongside poor-visual motor skills and planning, which has a significant impact on her daily functioning. She has extremely low self-esteem and poor mental health because of the underlying challenges caused by her neurodivergence. The significant levels of anxiety the young person experienced in the current school heightened her sensory and learning challenges. **[Parts of this paragraph have been removed by the Chamber President for reasons of privacy under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)].**
9. The combined effect of her neurodivergence means that the young person needs a high level of adult support in school, consistency in routine and a calm sensory environment.
10. The young person is under the care of Child and Adolescent Mental Health Services (**CAMHS**) and is being assessed for medication for her ADHD and sleep difficulties.

The current school

(witness B, Depute Head Teacher - R145; witness A, Educational Psychologist - R156; Joint Minute, T55; Admitted and Disputed Facts – R021)

11. The young person is enrolled at the current school, in S4, which is a mainstream school provided by the respondent. A maximum of 456 pupils attend the current school, which is a large and busy mainstream school.
12. The young person is not attending the current school due to the significant anxiety she faces when in unpredictable, loud and busy environments. When the young person is in a busy mainstream classroom, she cannot concentrate on work; this increases her anxiety levels, which affects her concentration.
13. The young person needs support, intervention and assistance when her anxieties and struggles at school are heightened. She needs to feel safe at school. The young person is afraid to ask teachers at the current school for help and she finds it difficult to express her emotions. She masks her difficulties in class (Review of Young Person's Support Needs, R039).
14. The young person has no peer group at the current school or within the current education groups provided by the respondent. This contributes to the young person's low self-esteem and low resilience in social contexts.
15. The young person has been bullied when travelling to the current school and in school. She has been scared, anxious and isolated at times, which has affected her sleeping and her mental health. As a result, the young person now refuses to attend the current school (Independent Advocacy Reports, T038 and T093).
16. The young person has not attended the current school since April 2021, after a period of reducing attendance. Because of this and the impact of her neurodivergence, the young person has fallen behind her peers academically (Attendance Records R025-026). She has a reading age of 11 years, spelling age of 11 years and 1 month and is lower than average in mathematics (Review of Young Person's Support Needs, R039).
17. The young person was given an education assessment in May 2021, at the request of the appellant, which identified a number of barriers to learning. These include the need for the young person to feel safe and secure in an educational environment and during the journey to and from school and to have a key, trusting relationship for adult support in school (Review of Young Person's Support Needs, R039).
18. A specialist occupational therapy assessment was completed in June 2021 (Occupational Therapy Report, R051 – **the Report**). The school and the educational psychology service have liaised with witness D to discuss the recommendations of the Report. Part of this includes school staff receiving training from Motorvate (**MV**). At the date of the hearing, no such training has taken place.

Off-site education service (organisation A)

19. The young person has been attending a number of groups and engaging with services outside of school in recent months. This includes organisation B ; 1:1 tutoring in some

subject areas from a young carer's support group; 1:1 mentorship through organisation C; and attendance at organisation A, which is an off-site service for secondary school pupils from S1-S6, offering support to young people with social, emotional and communication difficulties.

20. This off-site service supports young people into employability and sustainable positive destinations, with 100% positive destinations for its school leaving age cohort in the years ending 2020 and 2021. They offer a period of support (average around 3 months) past a young person's school leaving age.
21. The off-site service has 16.5 staff members, which includes 4 full time teachers, 6 senior social care officers and 2.6 pupil support assistants. All teaching and social care staff are trained in additional support needs. They have not received training from MV.
22. Twenty young people attend, with 6 of these in the young person's S4 group.
23. The young person's off-site curriculum has gradually been increased since it commenced in September 2021, although it remains part time (Timetables, A006 and R180)
24. A proposed full-time timetable was prepared on or around 28 January 2022 (R169), to support the young person to study four National 4 and three National 3 qualifications and a Level 4 Professional Development Award this year. Teaching staff from the current school would provide some of the timetabled sessions, although not all of these would be specialist subject teachers. The timetable includes a day of work experience within a primary school that will shortly end. This means that if the young person remains at school past their school leaving age, they would attend S4, S5 and S6 off-site without returning to the current school.

The specified school

(School Prospectus, A063, statement of witness C, A095)

25. The specified school is an independent special school, providing education for children and young people aged 11 to 18 years who require highly specialised teaching, individualised pastoral care and a range of dedicated services, which include psychological services, specialist consultants for attachment, trauma and resilience, speech and language therapy and occupational therapy.
26. Pupils who attend the specified school face significant emotional challenges, which arise from their additional support needs, including anxiety, fragility, social difficulties and avoidance. Many of the pupils have ASD.
27. Staff are trained in dyadic developmental psychotherapy (**DDP**) and safe crisis management. Psychology staff have expertise in DDP and are on site full time. There are staff who deliver Sleep Scotland programmes. Staff have undertaken intensive Google Classroom training. The school is working towards autism accreditation.
28. A maximum of 30 pupils can attend the school. At the moment, there are 14 pupils, with class sizes of three or four pupils. Individualised teaching is available to pupils who require intensive support. Classes are grouped by age and stage. Class periods last 30 minutes, to support pupils who struggle to retain attention. Some are double periods for

practical classes but these are mapped out for each pupil. Pupils can use fidget tools and walk around the class, which provides movement breaks. The smaller pupil roll provides a quieter learning environment. The environment is calm inside and outside the school.

29. The specified school offers a broad general education in line with the Curriculum for Excellence (CfE). They offer a broad range of the whole CfE portfolio, starting at National Qualifications up to Advanced Higher; and provide focused work on post school destinations. Their pupil timetables are bespoke. This differentiation is more achievable because of the low pupil numbers in each class.
30. Each pupil has a key teacher, who is the main link between school and home and the rest of the school community. The key teacher will work with CAMHS where they are involved. The young person would receive the close adult support she needs at the specified school (Joint Minute, T055).
31. The specified school has a 'virtual academy', which provides flexible access to learning and can aid transition into school. Celebration of achievement is an essential daily and weekly activity when young people are rewarded in a variety of ways, including the weekly celebration of success. This provides a shared forum for all young people and staff where successes are celebrated (Curriculum Rationale, A053).
32. The specified school provides a senior phase curriculum for pupils, to improve preparation for leaving school/World of Work and positive destinations; and to ensure staff have more motivating and manageable courses to deliver (Curriculum Rationale, A054).
33. Education Scotland completed a post-registration inspection of the specified school in March 2020, at which time, learning, teaching and assessment was assessed as 'weak'. In November 2021, Education Scotland conducted a support visit for an update on the school's Covid-19 recovery and the post-registration areas identified for development.
34. The young person has attended the specified school on a Friday on seven or eight occasions, which she enjoys. She has a peer group. The specified school is developing a new health and wellbeing woodland. The young person has helped put together a plan for this, which she has enjoyed. Her attendance has improved her confidence and her mood.
35. If the young person attends the specified school full time, she would be in a class with a maximum of four pupils, with similar needs and at a similar academic level (one other girl and two boys).

Reasons for the Decision

General remarks on the evidence

36. We benefitted from the provision of various documents and detailed statements for each of the witnesses. None of the witnesses deviated in any significant way from their statements. Witnesses A and B demonstrated a degree of knowledge of the young person but not to the extent we expected following the difficulties she has experienced in school and the information contained in the Report. Although witness C has known

the young person for a shorter time, she impressed us as knowledgeable and familiar with the full extent and impact of the young person's additional support needs. The appellant helpfully provided us with a personal perspective, although it was the young person herself, who provided us with the clearest insight. She spoke with little prompting. We used the headings she had provided in her own presentation as a guide and she elaborated on these. We found her insights valuable.

37. Witness D is a skilled witness, with expertise in occupational therapy. She was an impressive witness. She has a clear and longstanding knowledge of the young person. Her Report is very detailed and we attached some weight to this. She conducted the assessment at her own behest after observing the young person's heightened anxiety during a non-school social activity. The Report provides us with the clearest understanding of the young person's additional support needs. Witness D's observations and assessment are detailed but also accessible. She explains very clearly, how the young person's survival behaviours become internalised and masked and when she is in constant survival mode, learning is blocked. Similarly, this affects her social communication skills leading to difficulties with her mainstream peers who will be more socially mature.
38. Witness A described the Report as a highly specialised assessment but added a note of caution as it had not been "triangulated" with information from the current school. Witness D conceded that she had not consulted with the school at the time she prepared it, as the young person was by then not attending school. She did however consult with witnesses A and B a month or so after. When asked, she stated that these discussions did not alter the content, conclusions or recommendations of the Report.
39. We mention briefly the letter of the independent education consultant at A008, which refers to an assessment undertaken by him in 2018. The appellant advised that this was lodged for context before the Joint Minute was agreed. More up to date information and specialist assessment is available to us in the Report and for that reason; we attach little weight to the letter.

General remarks on the legal tests

40. The parties agree and we accept that the young person has additional support needs for the purposes of section 1 of the 2004 Act (Findings in Fact, paragraphs 6 to 9).
41. The respondent has refused the placing request on the following two grounds, which appear in Schedule 2 of the 2004 Act.

Ground 1

42. This is found in paragraph 3(1)(f), which provides:

If all of the following conditions apply, namely–

- (i) the specified school is not a public school,
- (ii) the authority are able to make provision for the additional support needs of the child in a school (whether or not a school under their management) other than the specified school,
- (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 and in the school referred to in paragraph (ii), to place the child in the specified school, and

- (iv) the authority have offered to place the child in the school referred to in paragraph (ii).

43. All of the conditions must be satisfied for this ground to be met and the burden of proof rests with the respondent.

(i) *The specified school is not a public school*

44. The parties agree and we accept that the specified school is not a public school (Finding in Fact, paragraph 25). This condition is met.

(ii) *the authority are able to make provision for the additional support needs of the child in a school other than the specified school*

45. The respondent argues that they are able to make provision for the additional support needs of the young person in the off-site provision and across other venues, which we see specified in the proposed timetable (R169). The appellant does not accept that this is suitable. We agree.

46. The appellant referred us to the case of *M v. Aberdeenshire Council 2008 SLT* (Sh Ct) 126, and the approach taken by the sheriff on the proper time for assessing these same conditions, with which we agree.

[45] I consider that the proper time for assessing whether the conditions contained in para 3(1)(f) are met or not met is, for the purposes of an appeal to the sheriff, the date on which the hearing proceeds.

[47] Standing the concession by the defenders' counsel, a concession which was in my opinion rightly given, that the onus was on the defenders to satisfy the court as to the four conditions contained in para 3(1)(f), the very latest time at which the defenders' assessment of R's needs should have been made was before the commencement of the hearing of the appeal and in time for proper consideration and examination of what they considered to be R's needs at the hearing of the appeal.

Proposed timetable (off-site provision)

47. At the date of the hearing, the education plan relied upon by the respondent is contained in the proposed timetable (R169). The respondent had previously offered to place the young person at the Hub in the current school. However, given the young person's strong views, they looked at an alternative plan and this is the off-site provision at organisation A; and work experience at a local primary school. Witness B confirmed that they were no longer pursuing a plan to return the young person to the main school building, although she would remain enrolled at the current school.

48. We are not satisfied that the proposed off-site provision will meet the young person's additional support needs. The Report provides us with a clear understanding of her needs. She has definite difficulty with her motor skills, which affects her movement; her visual perception is below average; she has significant challenges in processing auditory

information; she can be frequently fearful of sounds and distracted by general environmental noise in school, which will increase her anxiety levels; and she has an increased likelihood of trips/falls/walking into objects. All of these and other factors explained in the Report will have a significant impact on her ability to achieve her full cognitive and educational potential. The Report provides school recommendations to address these, which include all staff being trained in sensory issues and the 'why' of behaviours (including masking and compliance), all strategies adhered to consistently and a sensory diet (R070).

49. Despite these recommendations, the proposed provision is scattered across five separate venues and it lacks consistency. While a member of organisation A staff would escort the young person to each venue, it would not always be the same person. We are not persuaded by witness B's suggestion that the scattered approach would "build the young person's lifestyle". To the contrary, we think this illustrates a lack of understanding of her sensory profile and needs.
50. Neither the young person nor the appellant were consulted in the preparation of the timetable. It did not adequately reflect an understanding of the young person's additional support needs, despite the fact that the Report had been available to witness B since August 2021 (when she joined the current school). We had the impression that it was prepared in a rush. The young person felt that it had been "thrown" at her (T093).
51. It does not include any social or emotional support, which witness A said the young person needs in order to successfully return and sustain her education. Witness A has a concern that she would not engage with the service if she does not receive the correct emotional support. When asked if there was a plan to monitor her wellbeing, witness B conceded that there were elements in place, but not fully. We could not identify anything in the timetable, which addresses this.
52. During questioning, witness B explained that live input from a teacher experienced in a specialist subject would be restricted to art and cooking, and only on a Thursday. These would be staff of the current school. During the remainder of the week, a member of non-specialist subject staff would provide input. On the remaining subjects, organisation A staff who have experience in teaching would deliver some of these. Non-teaching staff would deliver the remainder. For example, a social care officer would teach the young person in her personal development award. Witness B did not know the subject experience of organisation A staff.
53. Witness B advised that the proposed timetable was drawn up after consultation principally with organisation A. She had selected the subjects. The young person was not involved in this. She was unclear where the admin class had come from and thought a member of staff had suggested this. When asked why attendance at the Leisure Pool was included twice for 90 minutes each time, she conceded that the young person had not been consulted, although the young person is a keen swimmer. Although this twice-weekly activity is described as 'physical activity to support recommendations in [the] Report', it is clear that the sensory environment was not taken into account. When we invited witness D's views on this, she described the venue as "sensory hell". It is a public pool, which is loud, echoing, and noisy and crowded; which would not be conducive to the young person's sensory needs.

54. Witness B said that the young person's views were considered when developing the proposed timetable but this is not evident. The independent advocacy reports and the young person's presentation were available to witness B. These clearly set out her views, which include a view that Navigate is "good" but not a solution. The young person wants a full time education. She wants to obtain qualifications. She describes the current school as a "boomerang" (T094) that she cannot get away from. She has lost trust in staff and is highly anxious about coming into contact with them or peers from the current school. Both of which are a possibility at organisation A. She describes the impact the current school has had on her mental health. There can be no doubt that planning for her future education would require careful thought and considered input from the young person and her mother. The proposed timetable does not meet these standards. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)].**
55. The impact of the young person's masking ought to have been well known to witness B. In the most recent advocacy report (T093) she reveals that she feels she has to say things are "good", when in fact she does not want something. She wants to avoid arguments and confrontation. For example, the young person would have liked to discuss the photography project and biology on the timetable, as she does not want to pursue these. Photography accounts for three periods and biology, one. She is anxious at the thought of the different locations. She does not feel ready for work experience, which accounts for a full day. She explains the impact of having different teachers in one subject, which is "harder" (T093). Her art theory is online, despite difficult online experiences during pandemic lockdowns. When asked about this, witness B advised that the current school is a Microsoft school with all learners having an iPad. We consider such a standardised approach to fail to take account of individual needs.
56. There are other flaws in the timetable. The young person is able to concentrate in classes lasting 30 minutes but all classes last longer. One lesson lasts for 2 hours 30 minutes, and cooking, art, photography and admin for 1 hour 40 minutes. Although witness B advised that the young person would not be expected to concentrate for the whole of the lesson and there would be various breaks, none are timetabled to help the young person to know and to ensure that she does not feel different by having to ask for one. Lunch is only timetabled for a Monday and work experience is not confirmed for the future. The young person was told this could only be for four weeks and she had completed two of these before the hearing.
57. In conclusion, the proposed timetable fails to adequately address and make provision for the young person's additional support needs. It does not factor in the practicalities of delivering a plan scattered across different provisions and venues. Although it is set out as a full time timetable, witness B explained that it would need to be "built up". She was not clear how and when this would be in place. The young person would be taught on a 1:1 basis, which means that she would lack a peer group. She would be isolated. This is not what you would expect to see as an education provision for someone of this age, which should be built around specialist subject teachers in the context of a peer group. These are fundamental, whether in a mainstream or specialist school setting. There is some, but the bulk of it is tutoring or supervision from an adult.
58. It is not clear to us why there has been a delay in providing MV training to staff. The absence of this could explain why the timetable fails to meet the young person's needs.

Witness B was not clear who would provide the training and when, or why there has been such a delay. She conceded that she had been remiss in progressing this. She did not know how quickly this could be delivered, although all staff had a copy of the Report.

59. In conclusion, this condition is not met.

(iii) *respective suitability and cost*

60. This condition is disputed by the parties. The respondent submits that it is not reasonable to place the young person in the specified school. The appellant submits that the specified school is more suitable and the suitability justifies any cost of placing her there. We agree.

Suitability

61. Our reasoning for condition (ii) above, also applies here.

62. The specified school is willing to admit the young person and witness C is confident that they can meet her additional support needs. No contrary evidence was led to suggest that the specified school would be unsuitable and it was accepted by the respondent that it may be equipped to meet the young person's additional support needs. Witness A stated that "it is likely that [the specified school] can meet [the young person's] needs (R167) although this is caveated with her concern about a peer group and post school transitions. When questioned, witness A was not aware of the current peer group. Witness C explained that the specified school has had post school transition successes, with all learners moving on to positive destinations in 2020 and 2021. No contrary evidence was produced on this or how the young person would transition from the off-site provision. Witness C had had discussions with the respondent's inclusion manager and senior education psychologist on transitions, resulting in some amendments to wording in the planning programme and records. Witness C understood that the respondent was happy with progress and she had not received any communication to suggest otherwise.

63. By the time of the hearing, the young person had attended the specified school on seven or eight occasions, on a Friday. She has benefitted from this. We see this in her responses. She describes feeling "at home" and "safe". Witness A conceded that if the young person feels this way, this would allow or at least assist her to reach her potential. The appellant explained that when the young person returned from the current school, she would have "meltdowns". In contrast, when she returns from the specified school, she is very excited and wants to talk about her day.

Draft Timetable (specified school)

64. A typical S4 draft timetable was lodged (A106) for the specified school to illustrate how they could meet the young person's needs. This was not a proposed timetable. Witness C explained that the young person's timetable would be tailored to meet her needs, taking account of her rigid thought processes and need for clear explanations. Subject specialist teachers deliver all subjects. The majority of subjects in the timetable are taught across 30 minute periods, with six taught over a 60 minute period. Health and wellbeing is included in the timetable, which is supported by the psychology team, who undertake targeted work with the pupils.

65. The young person would be involved in developing her own timetable. It would be tailored to accommodate her learning and concentration abilities. Regular movement or stretch breaks would be included, none of which is unusual in the specified school. The young person would not stand out as different. Witness C is confident that she would progress to a full time timetable “very quickly”.
66. The young person would have a key teacher, who would track the young person’s emotional wellbeing. She may have a soft start to the day when she could have a catch up with her key teacher in a quiet space. The key teacher would have ‘check in’ time with the young person every day and regular catch up sessions with the family.
67. Witness C had read the Report. She appeared well informed by this. She referred to sections of the Report in her evidence. For example, the Report highlights the need for less clutter in classrooms and not too many bright lights, which the specified school has as a matter of design. She explained that there is adequate signage, no bells and a quiet environment. The corridors are not busy. The current total school roll sits at 14. She explained that this is what the young person needs – a quiet environment with small class sizes, which is consistent with the Report.
68. Witness C described how the young person has progressed during her weekly time in the specified school. She explained that she is not displaying any signs of anxiety, her confidence and mood has improved and she recently “skipped into school and class”. She has friends at the school. The low number of girls in the school does not seem to faze her. She is comfortable speaking to other children and young people. When asked how witness C could be sure that the young person is not masking, she explained that staff provide clear explanations, check understanding and then observe and check that the young person has understood. Witness C is aware that the young person does not want to be seen as different from anyone else. She thinks that is why she is so comfortable at the specified school. She gave a recent example when the young person volunteered to thank a piper who had played in the school gardens. She smiled and gave the gift, thanking the piper, which demonstrates confidence and comfort in her surroundings.
69. Witness C demonstrated a good understanding of the young person and her additional support needs. She explained that all of the young people who have left the school have gone on to positive destinations, despite the impact of the pandemic. She gave positive examples when they had to “think out of the box” and highlighted positive case studies to illustrate this.

Education Scotland Post-inspection Report: 10 March 2020 (R094)

70. Witness C explained that the format for a post-registration inspection is different from other inspections. This took place 9 months after the school had opened, in accordance with Education Scotland guidance. As the school had only opened in May 2019, pupils were only there for 6 weeks before the summer holidays. For that reason, witness C said the school really only started in August 2019, which she described as little time to establish a new school. She also advised that the former school had closed suddenly and “traumatically”, which had caused a lot of trauma to the pupils. All the pupils at the time of the inspection were the same ones from the previous school.

Education Scotland Support Visit: November 2021

71. Due to the pandemic, Education Scotland did not complete a follow up inspection but a support visit took place in November 2021 with one of the lead Inspectors of the post-registration inspection and a colleague. They met with the Board of Governors, all teachers and the support for learning team, the pupils, some parents and families and two of the current local authorities who purchase pupil places. One of these was the respondent, who purchases the current majority of pupil places. With one pupil recently placed, this takes the respondent's current total of pupils placed to seven.
72. Witness C explained that she received verbal feedback following this visit and she has seen the draft report. She described both as very positive. Although staff need to continue to develop creative approaches to use the information they have to inform tracking and monitoring, comments in the draft report are otherwise positive. They highlight the work done during the first national lockdown to ensure that pupils received teaching in an environment where they felt safe, and not online. They are confident that the school is fulfilling all their responsibilities in keeping children safe, particularly online. They comment on the well-planned and relevant professional learning to meet the needs of pupils. There are no comments on transitions. In the verbal feedback, they were complimentary on the school's transitions. Witness C advised that the first leaver in 2020 progressed to college as did four leavers in 2021. The specified school is to provide details of their progress following the post-registration inspection, within a year of the support visit report.
73. We can see that the specified school is on a journey of improvement. They may not yet have reached the pinnacle of this but there was no evidence to suggest that their education provision is otherwise of concern to the respondent. The respondent has continued to place pupils at the school following the post-registration inspection. Witness A conceded that if there had been any concerns for the "9 or 10 [respondent] pupils" placed at the school since it opened in 2019, they would have been withdrawn. We have no reason to doubt the evidence of witness A on this – given the circumstances leading to the closure of the former school. The two areas identified by witness A - a suitable peer group and post-school transitions - appear now to be addressed. The young person would be in a class of four pupils, two girls and two boys (so she would not be the only girl) and the evidence points to a record of positive post school destinations for all leavers since 2020.

The Offer and Assessment

74. The respondent questions the motive of witness C in allowing the young person to visit the school before the placing request is decided. We make no criticism of this. Witness C explained the purpose of the visits, which was to allow the school and the young person to get to know one another better and to progress her education quicker, if the placing request is granted. We accept that there is a balance to be struck but this does not appear to be an unusual approach. Witness C described another current respondent pupil, where a number of visits took place before the placing request was decided, which resulted in the pupil achieving a full time timetable quicker (which they had not had before). Witness C spoke about the value and importance of this inward transition process.

School Fees

75. The respondent suggests that the school has a financial interest in the outcome of the tribunal and infers that the school may not be able to survive if the total number of respondent pupils currently placed were to be withdrawn. Witness C replied that her interest was in the education of the young person and while she would be distressed for the pupils, if the respondent chose to do this, the school is part of a wider group, who do not intend to close the school. We had some disquiet with this line of questioning, given the undertone and considering the former school history.
76. Any independent school will have fees but that does not lead us to the conclusion that their interests will principally be financial. All Scottish schools must deliver a robust and measurable education model with positive outcomes, which are monitored in various ways, including Education Scotland Inspections, as we see here. The purchasing authority will also monitor outcomes. The evidence before us suggests that the school has a focused pupil centred approach, which leads us to reject this argument.
77. The respondent criticises the offer of a place before a full assessment is completed and suggests the fact that the assessment is being conducted now demonstrates the young person's interests may not always have been put before the school's. The respondent submits that this goes some way to suggest that witness C is not entirely credible, which we do not accept. We found witness C to be measured and balanced in her evidence. Where concessions were appropriate, she made them. When questioned by the respondent she did not present as defensive.

Cost

78. The respondent invites us to accept the cost of its proposed education provision in its case statement (R142). This was prepared when the Hub at the current school was to deliver the young person's education. The respondent argues that the appellant has not challenged these costs. However, the costs were not a matter of agreement between the parties (Joint Minute, T055) and the appellant argues that as no witness made reference to cost and no additional witness was sought for this purpose, the appellant had no opportunity to examine this further. The appellant asked witness B about the proposed education provision and how that would be supplemented by the current school in terms of teacher provision and transport for the young person but witness B did not speak to cost and this was not included in her witness statement. The appellant argues that the costing provided by the respondent is out of date, and we accept this. A number of important factors are missing, which include the five new locations for education, the transport costs and the cost of providing subject specialist teachers to the off-site provision.
79. The burden of proof here rests with the respondent and we are not satisfied that this has been discharged. The respondent was given permission to lodge the proposed timetable late (on 31 January 2022). This significantly adjusted their plan for the young person's education. There was sufficient time for the respondent to adjust their costs but no adjustment was made and no further evidence was led, which leaves us with the costs at R142. As a result, we do not have reliable information on the cost of provision for the off-site provision, and for that reason, we must regard the respective cost question neutrally. In other words, we must consider the overall question of reasonableness on the basis that there is no cost difference. This effectively means that the reasonableness

question rests on our suitability assessment. However, had we accepted the cost submitted by the respondent, we would have been satisfied that this was justified by the suitability of the specified school, for the reasons we set out in the section titled *Suitability*.

80. In conclusion, this condition is not met.

(iv) *the authority have offered to place the child in the current school*

81. The respondent considers this to be a matter of agreement; however, the appellant disputes this condition. The appellant submits that the plan to deliver the young person's education through the off-site provision does not amount to an offer to place her in the current school.

82. The appellant raises an interesting argument here. There is no doubt that the education plan is no longer to be delivered within the physical boundaries of the current school. However, the young person remains enrolled there and it is clear that the current school remains responsible for her timetable and for the delivery of subject specialist teaching, whether through monitoring or teacher provision. For that reason, although tenuous in practice, we consider that this continuing connection means that the authority is offering a place, which flows from the current school.

83. In conclusion, this condition is met.

84. Having considered the four conditions and as two of these are not met, this ground is not established.

Ground 2

85. The second ground of refusal relied upon by the respondent is found in paragraph 3(1)(g), which provides:

If, where the specified school is a special school, placing the child in the school would breach the requirement in section 15(1) of the 2000 Act.

86. The 2000 Act is the Standards in Scotland's Schools etc. Act 2000. Section 15 provides:

(1) Where an education authority, in carrying out their duty to provide school education to a child of school age, provide that education in a school, they shall unless one of the circumstances mentioned in subsection (3) below arises in relation to the child provide it in a school other than a special school.

87. The three specified circumstances are:

(3) ...that to provide education for the child in a school other than a special school -
(a) would not be suited to the ability or aptitude of the child;
(b) would be incompatible with the provision of efficient education for the children with whom the child would be educated; or
(c) would result in unreasonable public expenditure being incurred which would not ordinarily be incurred,
and it shall be presumed that those circumstances arise only exceptionally.

88. The burden of proof again rests with the respondent.

89. Section 29(1) of the 2004 Act defines a special school as:

- (a) a school, or
- (b) any class or other unit forming part of a public school which is not itself a special school, the sole or main purpose of which is to provide education specially suited to the additional support needs of children or young persons selected for attendance at the school, class or (as the case may be) unit by reason of those needs.

90. The appellant argues that as organisation A is a service for children with additional support needs, it is not a mainstream provision. The respondent argues that the Scottish Government guidance allows mainstream education to be provided through placements outwith the school building itself (R171-179) and the off-site provision is consistent with this guidance.

91. Witness B describes this as a provision for secondary pupils who find challenges at school, including emotional and social challenges. Pupils who attend always remain in touch with the school. Although we are able to make findings (paragraphs 19 to 24), which include the fact that teaching and social care staff are trained in additional support needs, we were not presented with sufficient evidence to reach a conclusion on whether this provision amounts to a special school. The appellant did not indicate that this was to be argued or it could have been examined during the hearing. On the face of it, its pupil cohort may lead to this conclusion; however, we do not know if organisation A is part of a public school or an independent provision - although we suspect the former. In special schools, which are public schools, we would expect these to be open for the expected number of days each year, with minimum learning hours and limited class sizes dependent on teachers' contracts of employment. None of that information was available to us. For these reasons, we reject the appellant's argument.

(a) ability or aptitude

92. For the reasons we set out under the section titled, *Suitability*, we are satisfied that the off-site provision is not suited to the ability or aptitude of the young person. No evidence was led by the respondent to indicate that the young person would learn with a peer group. She would be receiving, in the main, 1:1 education, which would be highly detrimental to the young person's wellbeing, ability, and aptitude. This is not how the young person wants to be educated.

93. We were referred by the appellant to the case of *City of Edinburgh v MDN* [2011] CSIH 13, and invited to follow the reasoning of the Inner House regarding the tribunal's approach to a child's additional support needs, which the court agreed with, and with which we concur.

[19]...these needs required to be stated in a more general, all-encompassing and indeed 'holistic' way rather than by endeavouring to separate out 'educational support' on the one hand and 'social work support' on the other.

94. Given the significant concerns around her mental health and taking a holistic approach, it is clear that the young person's wellbeing is as important as her attainment and progress within education. She has been unable to attend the current school since April 2021 due to significant levels of anxiety. She has felt trapped. Witness D explained that her anxiety is so significant that she is no longer able to mask the impact attendance at the current school has had on her. For the reasons we specify at Ground 1, it is clear that her neurodivergent needs cannot be met in the proposed timetable. The young person is entitled to a progressive education suited to her ability and aptitude. Placing her in mainstream education would not be suited to her ability or aptitude. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 55(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)].**

(b) would be incompatible with the provision of efficient education for the children with whom the child would be educated

95. There is no evidence to suggest that the young person's education provision would have a negative impact on any other young person. This circumstance does not apply.

(c) would result in unreasonable public expenditure being incurred

96. The respondent invites us to accept the cost of its proposed education provision in its case statement (R142). For the reasons we set out at the section titled, *Cost*, we are not able to make any findings here. There is therefore insufficient evidence to suggest that placing the young person in the specified school would result in unreasonable expenditure being incurred.

97. The respondent argues that as none of the statutory circumstances applies, the respondent is required to provide the young person's education in a school, which is not a special school. We do not agree, for the reasons specified in our analysis of this ground. The respondent has not discharged the burden of proof. This ground is not established.

98. In conclusion, we are satisfied that the decision of the respondent should be overturned. We specify an early date to place the young person, which takes account of her age, and the amount of schooling already lost to her.