

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/24/0041

Witness List:

Witnesses for Appellant:

Appellant

Witnesses for Respondent:

Headteacher, school B (witness A)

Quality Improvement Officer, education authority (witness B)

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 confirm the decision of the respondent to refuse the placing request, being satisfied that the grounds of refusal specified in paragraph 3(1)(a)(i), and (v) exist, and in all the circumstances it is appropriate to do so; in terms of section 19(4A) of the Education (Additional Support for Learning)(Scotland) Act 2004 (**the 2004 Act**).

Process

3. A case management call took place in May 2024 at which time various processes were discussed and agreed. Directions were then made regarding the provision of witness statements, a joint minute of agreed facts and outline written submissions. An independent advocacy report was instructed and this can be found in the bundle at T030. Parties lodged various documents in support of their position and these are found in the

bundle, which is numbered T001-066; A001-A027 and R001-R083. Final written submissions were lodged after the hearing.

Findings in Fact

4. The child is 9 years old. He lives with his parents and two siblings in the family home. The appellant is the child's mother.
5. The child has Autism Spectrum Condition (**ASC**), intellectual disability and speech apraxia with associated social, emotional and behavioural needs. The child has sensory defensiveness towards people and the environment (avoids touching certain textures, avoids people touching, sensitivity to sounds), repetitive behavior (e.g. verbal stimming), inconsistent alertness and response towards his name, poor self-regulation and emotional regulation, poor task engagement and also poor visual attention; all these limit his learning ability. The child has a delay in language and speech milestones. [Medical Report, A005; Schedule of Growing Skills, A007; Occupational Therapy Report, A009; Speech and Language Therapy Report, A010; NHS Grampian Report, A024]
6. The child has a sensory processing disorder. He struggles greatly with loud noises and can be distressed by certain songs and the sound of a child crying. The child requires physical sensory input throughout the day to help him to regulate and focus and this can include things like swinging, rolling on an exercise ball or balancing exercises. [Universal Support Report, R023; Appellant Statement, A014]
7. The child needs assistance with personal care throughout the day. [Appellant Case Statement, A001, Appellant Statement, A015]
8. The child is non-verbal and requires close adult support to interpret his needs. He can use some simple words and phrases. He uses hand gestures and sometimes pictures to communicate. The child has 10 to 20 words that he uses meaningfully. He can ask for some foods and drinks. The child requires support to develop his independence skills. The child enjoys sensory play and will interact with water, sand and other textures. Sensory play helps regulate his emotional response to unwanted sensory experiences. The child does not have the independence expected for his chronological age.
9. The child gets anxious when expected to join activities that he anticipates will be loud. He often uses his words in addition to the Makaton sign to help him organise his ideas. The child has verbal apraxia (a speech sound disorder) and has worked on intensive support programmes to develop his oro-motor communication through physical and verbal exercises. The child needs access to sensory input throughout the day to help him regulate and focus. The child can hold a pencil and write his name, numbers 1-10 and copy letters of the alphabet with no understanding of the meaning. He can copy uppercase and lowercase but does not understand how to use it. [school C Progress Report, R015]

10. At times, if the child is frustrated he can pull at an adults hands, scratch and very occasionally, kick. The child can become dysregulated and distressed. On occasion the child has needed support from three members of school staff. [school C Progress Report, R015]
11. The child dislikes changes to routine, anything unexpected and loud noises. He does not respond to co-regulation and needs time in a quiet, safe space away from other children to calm down. The child benefits from small groups within an education setting. [Universal Support Report, R024]
12. Prior to April 2023, the child lived with his family abroad. Whilst attending school abroad he attended school C (between 2021 and 2023) where, with support, he made excellent progress, with significant improvements in his behaviour, sensory regulation, attention and receptive and expressive language. The child worked hard to improve his functional verbal communication that he was then able to use in everyday situations. [school C Progress Report, R015].
13. The child is working towards pre-early and early levels of the Curriculum for Excellence. [Appellant Case Statement, A001; Respondent Case Statement, R003]
14. The child needs a school setting that is able to provide a differentiated curriculum that focuses on life skills and a sensory diet, with a staff ratio that will enable him to have targeted support throughout the school day, with the following additional supports:
 - a) A gradual and phased introduction to help build up trust in the new school environment.
 - b) An individualised timetable, which is able to be flexibly adapted.
 - c) A highly structured, predictable routine in school supported by adults the child has developed a trusting relationship with.
 - d) One-to-one support where possible to assist in regulation, focus, and communication.
 - e) A differentiated curriculum that includes life skills.
 - f) Support for sensory needs, including sensory breaks.
 - g) Verbal and visual prompts to aid communication.
 - h) A space that is safe for him and others when he is distressed.
 - i) Support for personal care, as needed.
 - j) Gradual and increased interaction with school peers.

[Universal Support Report, R023; Educational Psychologist, R070]

School A

15. The child is currently enrolled in school A, which is a public mainstream primary school with a roll of 210 children. The child is enrolled in a primary 5 class. The school opened

in April 2023 and is designed to modern specification with the needs of children with additional support needs in mind, including ASD.

16. The appellant has not accepted the place at school A, although the child's induction to school A began in June 2024.
17. There are currently no peers at school A with similar levels of need to the child but there are a range of children with additional support needs.
18. The child was observed by the respondent's Educational Psychologist, in May 2024 at his home and in June 2024 at school A. [Observation Reports, R065 to R073]
19. The child attended school A for 1.5 to 3 hours a day from June to July 2024 as part of his induction. He started the new school term in August 2024. An established routine is in place for the child [R082], which includes regular time in an additional classroom adapted for him and time with his class. He has been working individually or with small groups of children, who are accessing the same space but on different tasks. He has access outside to the playground with the supervision of a Pupil Support Assistant (**PSA**).
20. From week commencing 26 August 2024 the child will attend the school every day until lunchtime. This timetable will increase as the child settles into school A.
21. The child has a draft Individualised Education Plan (**IEP**) [R075].
22. The child has an allocated class teacher who is responsible for planning his school day and his learning opportunities. He is supported in classes by PSAs who are drawn from the school's complement of PSAs. Before the start of summer term he had been supported by two different PSAs a day. The child is coping well with the number of different adults supporting him in class. Should this change, his teaching supports will alter.
23. There are 5 additional rooms available for flexible purposes. In addition to this there are two sensory spaces, one on each floor. As the child's timetable increases and develops a number of learning environments will be considered in order to meet his learning and emotional needs.
24. The child has been referred to the NHS for speech and language therapy (**SLT**) and occupational therapy (**OT**) services.
25. Children who require SLT or OT will have this built into their IEP. This is provided through the NHS and allocated to individual children, not to the school. There is no in-house SLT or OT provision at school A.

School B

26. The appellant made a placing request for school B, which was refused by the respondent in February 2024.
27. School B has a specialist citywide education for primary school aged pupils with additional support needs. School B also has 17 mainstream classes. The total number of children within the additional support needs (ASN) provision is 78. The total number of children at school B (including nursery, mainstream and the ASN provision) is 637.
28. The school was purpose built in 2010.

ASN provision at school B

29. The ASN provision caters for children with moderate to complex learning needs or global developmental delay who usually have a neurodevelopmental condition, including ASD. The level of support children now require is significantly greater than it was before the COVID-19 pandemic. The impact of the pandemic on SLT and their limited resources has had a detrimental impact on education services. [Witness A, R056]
30. Each class has an experienced team of school staff, which includes a class teacher, supported by a class team of four, usually PSAs or Early Year Practitioners (**EYP**).
31. Children who require SLT or OT will have this built into their IEP. This is provided through the NHS and allocated to individual children, not to the school. There is no in-house SLT or OT provision at school B.
32. Children within the ASN provision are limited in terms of their independence. All children are supported to come to school. Almost all work individually in class without an awareness of others around them. 75-80% of children are non-verbal; notionally, 10% can have feelings understood orally and 10% with some supports. The child's levels of independence, understanding, cognition, language and vocabulary development and awareness of the world around him are more advanced than those of the children who attend the ASN provision. This means that he would have no equivalent peer group to model from or to scaffold his learning. [Witness A, R057-063]
33. School B is currently at maximum capacity in terms of pupil numbers (120%) and physical space.
34. There are eight ASN classes, which are purpose built around a maximum class size of ten for pupils with moderate learning difficulties. [SNCT Handbook, R014]
35. All but one class has ten children. Room 23 can only accommodate eight children due the limits of physical space. This is not a custom classroom but a converted community space. This is used for younger children (primary 1/2/3) due to its size. Older children require more room as they are bigger.

36. The mainstream part of the school is at full capacity for primaries 1 to 7. Four areas within the school have already been converted to additional classrooms since the school was built. As there are 20% more pupils and staff than the school was originally designed for this places a significant strain on shared facilities such as the canteen, gym hall and music room.
37. There are designated areas which are for specific purposes, these include library, art, music, therapy, soft play and sensory rooms. None of these rooms could be converted into an ASN classroom. Some of these are too small. There is a meeting room but this is the only breakout space available for meetings with parents and others and it is used very regularly. [School A Plan, R074].
38. If an area was available to convert to a classroom this would require alterations to the fabric of the building, including the provision of an additional height adjustable interactive whiteboard, plumbing and height adjustable sinks, additional network points for ICT, additional computers, specialist furniture, fridges and microwaves, door safety handles and adapted toilet facilities. The conversion of room 23 in 2020 cost £24,262.85 plus £15,000 of educational resources. [Witness A, R054]
39. There is no playground space available to convert to a classroom or to accommodate a Portacabin because the school is running at 20% above capacity, which places more children and staff in the playground than it was designed for. There are a number of children with mobility or vision difficulties who need wide open spaces to travel around the building. Narrow passages between the main building and a Portacabin would present a risk to them. Approximately 30% of the playground is sloped with mature trees. [Witness A, R055]
40. There are no teachers employed elsewhere by the respondent who are suitably experienced and qualified who could be moved to school B. A supply teacher would not be suitable as they are temporary in nature and unlikely to work more than one or two days at a time. [Witness A, R053]
41. ASN teachers have significant levels of expertise. Unlike mainstream primary school teachers, they use pre-early level curriculum and developmental milestones and they have expertise in a large number of areas including visual communication tools and sensory needs. A mainstream teacher cannot move to an ASN setting without significant support, mentoring, training and experience. There are no ASN teachers available within the respondent's area to move to school B immediately. There is a shortage of ASN teachers in Scotland. [Witness A, R052]
42. The cost of providing an additional teacher and four PSAs or EYPs to support an additional class would be in the region of £160,000 to £180,000. [Witness A, R055]

Reasons for the Decision

43. The parties agree 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.
44. The respondent's refusal of the placing request is based on three grounds, which are found in Schedule 2, paragraph 3(1)(i), (ii) and (v) of the 2004 Act. The onus of proof rests with the respondent and the assessment point is at the time of the hearing (*M v Aberdeenshire Council* 2008 SLT (Sh Ct) 126).
45. As we go on to find that two of the three grounds are established, we must consider whether in all the circumstances it is appropriate to confirm the decision of the respondent (section 19(4A)(a)(ii) of the 2004 Act).

General remarks on the evidence

46. We had the benefit of written statements for witnesses A and B and for the appellant. No-one departed from these in any significant way in their oral evidence.
47. Witness A was a thoughtful and impressive witness. He is the current Head Teacher at school B. He has a comprehensive knowledge of the school estate (internal and external) and its ASN provision. He has experience of creating space in the school and he was familiar with all of the spaces he was asked about during his evidence. His knowledge and experience of teaching children with additional support needs was equally comprehensive. He made concessions where necessary and demonstrated a willingness to consider different perspectives, including those of the appellant. Although he has not met the child he has considered the school C report in full and the Educational Psychology reports. He explained that this information allowed him to complete an assessment of the child's suitability for school B. He had no reason to believe that any of this was inaccurate and no contrary independent evidence was led by the appellant in this regard. He wrote his statement in the midst of the Educational Psychology report, which did not alter his view but instead supported his conclusion. Witness A explained that the quality and content of the information provided to him was very good. He added that sometimes he does not get as much information about a child as he received in relation to the child. As someone who has to read a lot of external school reports, he considered the school C report to be written well.
48. Witness B was helpful in explaining the processes used by the respondent following the placing request. She agrees with witness A that school B is not suitable for the child. She provided us with details of the supports to be given to the child in school A and explained her role as Quality Improvement Officer in checking that these work as intended. By the time of the hearing she had met the child on two occasions in August 2024 for short periods of time, and had observed him in school A. She observed a PSA working with him in the additional class created for him. She did not observe him in the playground but she was told this had gone well. The child appeared happy, comfortable and safe in his classroom. Witness B made concessions where these were appropriate. For example, she accepted that the child's Established Routine document [R082] and

his School Timetable [R083] could be clearer on when the child will be learning with his other peers.

49. The appellant gave us the best impression of the child. She was able to explain the ways in which the child appears to have regressed during his time out of school education. She is concerned that the school C report does not mention the extent to which the child was supported in school. She gave the example of board games and explained that the child was supported here to hold and roll the dice. However, the appellant's understanding of the provision available at school B does not align with what happens in practice. The appellant believes that in-house OT and SLT is important to the child and she appears to continue to believe that this is provided at school B, when this is not the case (as it is provided to individual children via the NHS). She was also keen to explore the possibility of the child transferring to the mainstream classes at school B in a couple of years but this is unlikely to happen in practice. Witness A explained that forty-two children who live in the school B catchment area cannot access school B's mainstream classes and have to travel to other schools. We felt the appellant may have overestimated what can be provided at school B and the sensory environment, which can be loud and noisy.

Independent Advocacy

50. A non-instructed independent advocacy report was prepared following an observation of the child in his home with the appellant [T030].

The legal tests

Schedule 2, Paragraph 3(1)(a)(i) – placing the child in the specified school would make it necessary for the authority to take an additional teacher into employment

51. We are satisfied that this ground is met.

52. There must be a causative link between the placing of the child in school B and the employment of a new teacher and we are in no doubt that the respondent would require to employ an additional teacher if the child was placed in school B. We accept the evidence of witness A in this regard. He had given considerable thought to this. By any calculation there is no scope to add the child to an existing class. The school is currently operating at well above pupil capacity. His evidence was supported by that of witness B.

53. Maximum class sizes are agreed as part of teachers' nationally agreed conditions which form part of their contracts of employment. These are found in the Scottish Negotiating Committee for Teachers (**SNCT**) Handbook. The appellant submits that this is nothing more than an 'advisory policy document relied on by the Council'. The respondent contends that this can be considered to form part of the contractual relationship between the respondent and its teachers.

54. The respondent argues that breaching the maximum class sizes would breach the respondent's legal obligations by breaching the terms and conditions of its employee teachers. They contend that the maximum class sizes are effectively mandatory for the respondent – they form part of a collective agreement and are contractually binding. We were referred to previous decisions by the First Tier Tribunal (Additional Support Needs) in support of this, including FTS/HEC/AR/22/0107 at paragraph 57 and ASN_D_11_05_2021 at paragraph 5.15. The respondent conceded that in another decision the tribunal found that whilst it may have regard to the SNCT, it is not binding either on the respondent or the tribunal (FTS/HEC/AR/22/0115 at paragraph 46).
55. The respondent accepts that there is no legislative basis for maximum class sizes but argues that there is still a requirement on the respondent to employ an additional teacher if the class size in the SNCT is exceeded, otherwise they would be in breach of contract. These maximum class sizes are incorporated into teachers' contracts.
56. The appellant refers us to the case of *Parents of Child J –v- Dumfries and Galloway Council* 2015 WL 6757800, a case which pertains to school capacity. However, this offers us limited assistance as the sheriff was then considering The Education (Lower Primary Class Sizes) (Scotland) Regulations 1999 and their implications in a mainstream placing request. Although the 1999 regulations are referred to in the SNCT they apply to lower primary class sizes (whereas the child is in primary 5) and they do not apply to special schools.
57. We prefer the approach taken by the tribunal in FTS/HEC/AR/22/0115 and we conclude that the SNCT is given more than advisory status by Councils, although this does not mean that it has statutory status. We may take it into account (as we do here) but it cannot be determinative of the statutory test.
58. According to the SNCT [R014], for children with moderate and profound learning difficulties the maximum class size is ten. For profound learning difficulties the teachers are complemented by support staff and councils are recommended to apply an adult/pupil ratio of 1 to 2.5. Parties agree that the children in the ASN provision at school B have additional support needs arising from moderate to profound learning difficulties.
59. The respondent argues that it is for them to determine the maximum number of pupils who may be accommodated in every room or area used for instruction, which can be found in the Schools General (Scotland) Regulations 1975, at regulation 8. To the knowledge of witness A, class sizes have never been exceeded at school B. This is important as it demonstrates a consistent approach to class sizes. In FTS/HEC/AR/22/0115, the opposite was the case and there was a history of exceeding the class maximum 'most years'. Witness A explained the complex profile and needs of children at school B which explains why the class sizes are maintained within the SNCT limit.

60. The appellant argues that this ground does not exist if the respondent is able to move a teacher from another school, if necessary on a part-time basis, or to use a supply teacher. Although neither witnesses A or B make decisions about the allocation of teachers they both had knowledge of the availability of teaching staff. We accept their evidence that it is not possible to move a teacher employed elsewhere by the respondent as there are no suitably qualified teachers who can be moved.
61. We accept the evidence of witness A that supply teachers would not be suitable given their temporary and limited availability. This would not work well with the child's need for consistency. Witness A explained that change and transitions can be extremely stressful for children with additional support needs. He explained that it takes time to understand a child's needs as they cannot always tell you. This cannot be effectively achieved with short term supply staff. This is consistent with the evidence of the appellant which is that the child needs consistency of staff.

Schedule 2, Paragraph 3(1)(a)(ii) – placing the child in the specified school would give rise to significant expenditure on extending or otherwise altering the accommodation at or facilities provided in connection with the school

62. We are not satisfied that this ground is met.
63. The respondent submits that school B is at capacity in terms of pupil numbers and physical space. We accept the evidence of witness A in this regard. It is clear that school B is 20% above capacity. This places a considerable strain on existing physical space, particularly those areas which are shared.
64. Four areas of the school have already been converted to additional classrooms since the building was originally designed and built in 2010. Even if space was available, and we accept that there is none, witness A suggested there would be considerable costs to converting space to a classroom. He bases this on the conversion of room 23 in 2020.
65. Witness A explained the challenges and potential costs of a modular classroom (Portacabin). His evidence is that a Portacabin would cost approximately £4,000 per month to lease and there would be an upfront delivery and installation cost of around £70,000. This is based on similar costs for a Portacabin at school C a few years ago. Internal approvals would be needed such as committee approval for the expenditure, as well as planning consents. Another factor is that the respondent does not own the land upon which school B is built. School B was built as part of the respondent's 3Rs Public Private Partnership (**PPP**) project. It is operated and maintained by the 3Rs company, NYOP Education, under a PPP contract. Any alterations or extensions to the building can only be carried out with the agreement of NYOP and all design and construction work can only be carried out by NYOP's contractors on the respondent's behalf.
66. The appellant argues that the respondent did not provide current information, plans, quotes or details of what this could cost now at school B and for that reason the

respondent has failed to discharge the burden of proof. We agree. In the absence of up to date and relevant evidence we cannot be satisfied on the question of 'significant expenditure'.

Schedule 2, Paragraph 3(1)(a)(v) – placing the child in the specified school would be likely to be seriously detrimental to the educational well-being of pupils attending the school

67. We are satisfied that this ground is met.

68. The respondent argues that increasing a class of ten children to a class of eleven equates to an increase in the class size and the workload of the teacher and support staff of almost 10%. Such an increase would be detrimental to the teaching and support provided to all pupils in the class, including the child. Given the complexity of need and the attention required by each of the individual children we accept this argument.

69. The respondent submits that overcrowding is seriously detrimental to the educational wellbeing of pupils attending the school. As we have noted, placing the child at school B would require an additional classroom and the employment of an additional teacher. We accept the evidence of witness A that there is no room for another classroom. If it was possible to extend a classroom, which it is not, there are no other areas for displacement of pupils within the school, if work on extending classrooms was to take place. This would cause significant disruption and be seriously detrimental to the educational wellbeing of pupils attending the school.

70. Witness A explained that it would not be appropriate to educate the child on his own, which reflects the position of the appellant. Other children would have to be moved out of an ASN class either to create space for the child or to provide him with a peer group in an alternative setting. Witness A explained that displacement of pupils to other areas would cause some of the pupils to become very anxious and distressed. This could cause additional distress and breaks in their education. Many of the pupils within the ASN classes have sensory issues so any additional noise etc. of reconfiguring classrooms would cause distress.

71. Witness A explained that increasing the school roll would add further pressure on communal areas. The use of a Portacabin would also be seriously detrimental to the educational wellbeing of the pupils who currently attend the school, with their outdoor space and playground area being reduced. We accept that the addition of a Portacabin could reduce the outdoor space available. There would also be a risk that those pupils with mobility issues could not move around as freely as they currently can.

Appropriateness in all the circumstances

72. Having decided that two of the statutory grounds of refusal exist we must now consider whether in all the circumstances it is appropriate to confirm the respondent's decision.

73. The respondent submits that the child has only recently started at school A and there is no evidence to suggest that school A is not appropriate. The respondent will assess, monitor and review the child's additional support needs with input from Educational Psychology, Autism Outreach and the NHS.
74. Witness B explained that a draft IEP has been prepared. This will be reviewed and adapted on an ongoing basis throughout the academic year to respond to the child's needs and progress. Regular multi-agency meetings will take place to keep the child's support under review.
75. The respondent argues that although Dr L [A006] recommends that the child attends a 'special educational needs centre' as soon as possible, Dr L was not called as a witness to elaborate on what she understands this to be. Nor do we know if she has an understanding of the Scottish education system. We accept this argument. We were not able to examine Dr L's understanding here. We attach no weight to the appellant's suggestion that Dr L would know about the Scottish education system because she had attended a Scottish University. Higher education is quite distinct from school education. We know nothing of Dr L's knowledge and understanding of Scottish school education.
76. Based on the report from the school C and the Educational Psychology reports, witness A suggests some aspects of the child's ability and aptitude may be greater than the children in attendance at the ASN provision. The appellant submits that the child required more significant support in all areas of his learning at the school C, which she contends is not reflected in their school report. However, no professional or independent evidence was led by the appellant to demonstrate this.
77. Witness A relied on the content of this school report to help inform his assessment on the suitability of the child attending school B. We are satisfied that he was entitled to do so. It is the last school report for the child. The respondent and Educational Psychologist had a meeting with school C, which confirmed the information provided. It covers the child's progress over a number of learning areas that are consistent with Scottish school education.
78. The respondent argues that educational professionals are required to continually assess and plan for the child in a school environment. This ongoing assessment can be carried out within school A. Witness A agrees that this can be conducted in a mainstream setting. Although it is very early days, there is some evidence from the observations by Educational Psychology that the child is happy at school A and has begun to form relationships with staff. There have been no episodes of dysregulation. The view from the Educational Psychologist is that 'ongoing opportunity for exposure to a language rich environment, that enables [the child] to hear the language used by both adults and other children, will be important for his continued development in this area.' Witness A suggests that such opportunities will be more available at school A.

79. The respondent argues that the provision of mainstream found in section 15 of the Standards in Scotland's Schools etc. Act 2000 is relevant. We reject this argument. The 2004 Act makes specific provision for this as a ground of refusal. Given the explicit provision we can assume that Parliament did not intend this 'second stage' consideration to include fresh arguments based on other statutory grounds. To do so would defeat the interests of justice, which includes fair notice. Had the respondent intended to rely on this ground they could have done so in their reasons for refusal of the placing request. They did not do so and for that reason we do not accept this has relevance now.
80. Witness A explained that if the child was placed at school B this would require an additional teacher to be employed but also additional support staff. The respondent submits that this would amount to a significant financial cost. The respondent accepts that we are not entitled to consider staffing costs of PSAs and EYPs when considering whether any of the grounds of refusal exist - paragraph 3(1)(a)(i) concerns employment of a teacher (not support staff) and paragraph 3(1)(a)(ii) concerns significant expenditure in terms of the fabric of the building etc. However, the respondent argues that the cost of support staff is a relevant factor in considering whether the decision to refuse a place is appropriate in all the circumstances. For the same reasons we set out in paragraph 66 we cannot be sure what those actual costs would be, however, we accept that they are likely to be consequential.

UNCRC Article 3

81. The respondent submits that it is not in the child's best interests to be placed at school B. We are referred to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (**the 2024 Act**) and Article 3 of the Convention, which provides that the best interests of the child shall be a primary consideration in decisions by public authorities.
82. The respondent argues that when making decisions on placing requests it is appropriate for the respondent to take into account not just what is in the best interests of the child to whom the placing request relates, but also what is in the best interests of other children should the child be placed in the specified school. The respondent argues that overcrowding is detrimental to the educational wellbeing of pupils already in attendance as well as the child.
83. We are satisfied that it is not in the child's best interests to be placed in school B. Although he would have the benefit of a smaller class size his peers would not be able to provide him with modelling or scaffolding opportunities. He has been seen to smile and react positively to his peers at school A, which suggests that this is important to him. He would not have the quiet environment the appellant seeks. Classrooms can be noisy and the overall school roll is much higher than school A, which means the child will be with more children in communal areas like the playground, with the resultant noise levels.

84. The appellant argues that there would be a negative impact on the child's self-esteem to be the only child within the school to have such a high level of need, although no independent evidence was led on this point. Although the child is not yet integrated into his class at school A steps are in place to do this. School A does not intend to teach the child in isolation to his peers.

85. As we have reached this decision we do not need to consider the argument advanced by the respondent on the application of Article 3 in placing requests (regarding other children). A decision on this would not affect the outcome since the respondent would be successful overall even if it lost on the point.

UNCRC Article 12

86. Article 12 of the UNCRC provides that the child should be given the opportunity to express his views on this matter and that his views should be given due weight in accordance with his age and maturity. We found the independent advocacy report of value here, although we acknowledge it was limited to an observation in the child's home. The report was prepared on a non-instructed basis, relying on observations of the child and discussions with the appellant and set within the wellbeing indicators. The report helpfully sets out a range of questions for decision makers to consider. The respondent explored each of the questions raised by the independent advocate with both of its witnesses.

UNCRC - Intimation

87. Where a UNCRC 'compatibility question' arises in any proceedings before a court or tribunal, intimation of that is to be given to the Lord Advocate, the Commissioner for Children and Young People in Scotland and the Scottish Commission for Human Rights. Any or all of these bodies may give notice and then take part in the proceedings so far as they relate to a compatibility question (section 34 of the 2024 Act). A 'compatibility question' is defined in section 31(1).

88. At present there are no Tribunal regulations regarding this process. However there is for the Sheriff Court, found in regulation 4 of the Act of Sederunt (Proceedings for Determination of Compatibility Questions Rules) 2024. This specifies that it is not competent for a party to raise a compatibility question after the proof has commenced, unless [the sheriff] on cause shown, otherwise determines. There is a form to complete and a process to follow. While these Regulations do not apply to this Tribunal they do evidence a clear Parliamentary intention that this is done formally and not left to written submissions.

89. On that basis and as the parties did not introduce this until written submissions, we formed the view that the duty to intimate does not arise. This is consistent with our overriding objective to avoid delay.

Additional Comments

The comments in this section do not form part of the reasons for the decision in this case. These are optional comments which are designed purely for the assistance of the parties.

90. There are a number of ways school A could improve their communication with the appellant so that she is clear when the child will have contact with his primary 5 peers during each school day and who will be supporting the child in school. The appellant has struggled to obtain information promptly at times. As witness B acknowledged communication can be clearer here.

91. It would not be difficult to update the child's timetable, his IEP and his established routine with this information.

[Parts of the following paragraphs have been altered by the Chamber President to maintain 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): 7, 9, 10, 12, 47, 49, 76 and 77]