

# DECISION OF THE TRIBUNAL

# FTS/HEC/AR/22/0072

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| List of witnesses For the appellant: The appellant For the respondent:  Witness A, depute headteacher of School A  Witness B, headteacher of School B |

**Reference**

1. This is a reference by the appellant following a refusal by the respondent to place the child at the Language and Communication Support Centre (**LCSC**) of school B.

# Decision

1. We confirm the decision of the respondent to refuse the placing request, in accordance with section 19(4A)(a) of the Education (Additional Support for Learning)(Scotland) Act 2004 (**the 2004 Act**). We therefore do not require the respondent to place the child in school B’s LCSC.

# Process

1. The reference was received in May 2022. There were three case management calls, in the first two of which the appellant self-represented. By the time of the third case management call in October 2022, the appellant had arranged representation by a solicitor. A two-day remote oral hearing was fixed. In advance of the oral hearing, parties lodged written statements from each of their witnesses and a joint minute of agreed facts. The views of the child were obtained by Agency C and lodged in the form of an advocacy report. All these materials were included in the 159-page electronic bundle of written evidence numbered T001-045, A001-052 and R001-059:
	* witness A, depute headteacher of School A, written statement [R049-059].
	* witness B, headteacher of School B, written statement [R041-048].
	* the appellant, written statement [A042-052].
	* joint minute of agreed facts [T043-045].
	* advocacy report on the views of the child [T038-040].
2. The oral hearing was completed on the first day, in November 2022. Parties declined oral submissions and instead exchanged written submissions which were then lodged. Before reaching our decision, we considered the oral and written evidence and written submissions.

# Findings in Fact

*General findings*

1. The appellant is a parent of the child. The child, who is eight years old, lives with the appellant along with the child’s siblings.
2. The child has been diagnosed with autism spectrum disorder and is prescribed 6mg of Melatonin per day.
3. The child has a serious medical condition, which has required hospital based medical treatment between 2017 and 2021. This has impacted on school attendance. Whilst in hospital the child developed a stress-induced condition. **This paragraph has been edited by the Chamber President for privacy and anonymity reasons 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)**.
4. The child requires, amongst other things, the following:
	* support with language and communication.
	* support to express feelings, thoughts, and opinions.
	* support and encouragement to complete activities in the classroom.
	* movement breaks throughout the day to assist with keeping focused.
	* more thinking time to process information.
	* staff awareness of the child’s reluctance to ask for help when unsure or stuck with an activity in the classroom.
5. The child has a Getting it Right for Me Plan (**GIRFME plan**) to support the child’s learning in school.
6. The child attended a primary school’s LCSC from primary 1 to primary 3 (**school A**).
7. In April 2022, the respondent accepted the appellant’s request for the child to be placed in the mainstream part of primary school B (**school B**) from primary 4. The child is enrolled at school B but has not yet attended for primary 4 education.
8. In April 2022, a further request by the appellant to place the child at the LCSC of school B (**school B’s LCSC**) was refused by the respondent.
9. The child has two siblings, who both attend school B’s LCSC. Separate taxis convey each of these siblings from the appellant’s home to school B’s LCSC each school morning. **This paragraph has been edited by the Chamber President for privacy and anonymity reasons 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)**.
10. Whilst in primary 1 to 3, a taxi conveyed the child, along with the child’s sibling, from the appellant’s home to school A each school morning. **This paragraph has been edited by the Chamber President for privacy and anonymity reasons 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)**.
11. There is currently no requirement for the local authority to provide a taxi for the child to attend school B.
12. The appellant cannot drive.

*Findings on school A and the child*

1. School A is a mainstream primary school with a LCSC which takes children from primary 1 to primary 3. It provides an intensive support programme to specific children over a period of three school years. The aim is that at the end of primary 3 the children would be ready for either an enhanced transition to their local mainstream primary school or to a LCSC that takes children up to primary 7. **This paragraph and the subsequent two paragraphs have been edited by the Chamber President for privacy and anonymity reasons 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)**.
2. Despite the child’s absences from school A for medical reasons , the child thrived during this period. The child was ready to move to a mainstream primary school from primary 4.
3. The child’s sibling was not ready to move to a mainstream primary school from primary 4. The child’s sibling was enrolled in school B’s LCSC from primary 4 and continues to attend there.

*Findings on school B and the child*

1. School B is a mainstream primary school with a LCSC which takes children up to primary 7.
2. Following assessment and transition meetings, the child was allocated a place in a mainstream primary 4 class at school B. That class has a total of 21 children with a teacher and a full time Additional Support Needs Assistant (**ASNA**).
3. The placement of the child in this primary 4 class would meet both the requirements listed at paragraph 8 above and all the requirements of the child’s GIRFME plan.
4. School B has the expertise, necessary equipment, teaching aids and learning spaces to meet the educational requirements of the child in a mainstream setting.
5. School B would provide an appropriate educational environment for the child.

*Findings on school B’s LCSC and the child*

1. School B’s LCSC is attached to school B. It is currently at capacity with 10 classes, each with 6 pupils.
2. With smaller class sizes and higher adult to pupil ratios, school B’s LCSC is suitable for children who have greater Additional Support Needs (**ASN**) than those of the child.
3. School B’s LCSC would not provide an appropriate educational environment for the child.

# Reasons for the Decision

1. Parties are agreed on the applicable law.
2. The child has ASN in terms of section 1 of the 2004 Act.
3. The respondent’s refusal of the placement request is based only on schedule 2, paragraphs 3(1)(a)(vii), 3(1)(b) and 3(1)(g) of the 2004 Act.
4. The onus of proof lies with the respondent.
5. The assessment point is at the time of the hearing.
6. Even if a ground of refusal exists then we still must consider whether in all the circumstances it is appropriate to confirm the decision (section 19(4A)(a)(ii) of the 2004 Act).

*The grounds of refusal Paragraph 3(1)(b)*

1. We are satisfied that the education normally provided at school B’s LCSC is not suited to the ability and aptitude of the child. Accordingly, this ground of refusal is met.
2. Witness A had the most direct knowledge of the child in a school setting. Witness A had known the child throughout primary 1 to primary 3. In addition, witness A had held meetings with the child’s class teachers and with an educational psychologist who had assessed the child. Consequently, we accepted the evidence of witness A over that of the appellant on matters of the child’s ability, aptitude, and educational need.
3. Whilst the appellant believed the child required the level of support associated with school B’s LCSC, witness A was clear that the child had progressed well with the intensive support provided at school A. By the time of assessment in April 2021, all educational professionals, including witness A, reached the view that the child was ready for mainstream education from primary 4. On each occasion the child had returned from being off school as a result of medical procedures , staff had anticipated problems, but these had not materialised. Other than requiring a social story to assist the child and the child’s peers with understanding the child’s [medical condition, the child had re-integrated into school remarkably well. The child continued to perform at a higher level whilst requiring less support compared to fellow LCSC class pupils. Following the medical absences, the child had a good ability to catch up. The child’s year group was split into two classes according to ability. The child was in the higher ability class. The child no longer requires individual speech and language therapy. The child’s needs are in direct contrast to the primary 4 children in school B’s LCSC, who all continue to need individual speech and language support. The child’s literacy and numeracy levels in primary 3 were at the same level as a number of the children who attended school A’s mainstream. **This paragraph and the subsequent two paragraphs have been edited by the Chamber President for privacy and anonymity reasons 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)**.
4. Witness A was challenged on the basis of the appellant’s view that the child was anxious and had few friends. This was in direct contrast to school A’s experience of the child. Witness A’s direct experience of the child was that of a very sociable child with many friends and who preferred, and coped with, playing football in the larger and noisier playground. The child did show some anxiety in class, but this was successfully managed with support. There was no sign of anxiety outside of class and the child would choose to play in the larger mainstream playground rather than in a quieter outside area.
5. There had been little opportunity to carry out a planned transition for the child until near the end of the summer term. This was because of the uncertainty over where the child would be going to school as well as the child having been absent from school for much of the Spring term due to heart surgery. There was disagreement about the number of completed transition visits. The appellant believed it was a single visit while Witness A believed it was three visits. In our view, nothing in this case turns on the number of transition visits. Importantly, the child had integrated well on a transition day which occurred on sports day at school B. The child was accompanied by a staff member thechild knew well from school A. There had been no perceived problems that day. The visit reinforced the professional view of the appropriateness of a mainstream placement for the child. Given the child’s ability to integrate in a mainstream setting, school B’s LCSC is not suited to the child’s ability and aptitude.
6. The appellant believed the child displayed distress at the prospect of and refused to return to school B following the only transition visit. Whatever the nature or cause of the child’s emotions as interpreted by the appellant, that does not overcome the substantial body of evidence which points in the direction of the child enjoying and integrating into a mainstream environment. The child’s positive transition visit to school B is consistent with what was anticipated at the time the assessment was made for mainstream education in primary 4.
7. Witness B, an impressive witness with 13 years’ experience as a headteacher, independently confirmed that school B’s LCSC would not be suited to the ability and aptitude of the child. Whilst witness B had no direct experience of the child, witness B had read all the relevant documentation in relation to the child and had a wealth of experience in dealing with children with ASN. Witness B had spoken to staff who had direct knowledge of the child. School B’s LCSC would not provide an appropriate peer group for the child as those currently there in primary 4 had greater ASN and required greater support than the child. Having an appropriate peer group was important for the child’s continuing education. It would allow the child to progress far better than were the child to be placed in school B’s LCSC. All the support requirements referred to in the child’s GIRFME plan, such as movement breaks, would be provided for the child in a mainstream class in school B. The child would be in a smaller mainstream class of 21 pupils with a full time ASNA, in addition to the teacher, to assist with some of the pupils in that class. The staff were experienced in educating children with ASN, like the child. There were already several children with equivalent or more ASN than the child in the primary 4 mainstream class in school B. Should the child require support in relation to mental health issues then this could be provided for in school B by a number of means including NHS referral. Whether the child was in school B or in school B’s LCSC did not affect access to external support agencies when required.
8. The appellant challenged witnesses on the basis that the most recent medical procedures had changed the child such that the prior assessment of mainstream education was no longer relevant. This was rebutted by both witnesses for the respondent, by witness A directly and witness B by inference. It was clear that the professionals, including the educational psychologist, had reviewed matters after the child’s return from the medical procedures. Their view on the mainstream placement remained the same because the child had once again integrated well back into school on return from medical absence. Had they determined otherwise, then they would have changed their assessment. It was clear that both witnesses A and B had the child’s best interests as their primary consideration. They had adopted a flexible approach with the intention to assess further the child on attendance at primary 4. They also acknowledged that there would be a need to work with the appellant to agree a carefully considered transition to get the child back into school, given the time that the child has now spent away from formal education. The appellant submitted that this requirement for further assessment demonstrated the initial assessment must be incomplete. We disagree. The flexibility and further assessment suggested by witness B is eloquent of a holistic approach to a child with ASN and to this child in particular.
9. We appreciate the child may well present differently to the appellant in the home environment. In addition, the appellant has personal experience of both schools’ LCSCs. The appellant knows the child well and we understood the desire to fight for what the appellant believes is best for the child. However, looking at the totality of the evidence, and for the reasons above, there is no doubt that the child is most appropriately educated in the mainstream at school B rather than in school B’s LCSC.

*Paragraph 3(1)(a)(vii)*

1. As is evident from this decision, we have found it is appropriate for the child to be educated in a mainstream environment. Accordingly, this ground of refusal becomes irrelevant.
2. However, had we been required to determine this issue, we would have accepted the evidence of witness B on this matter as narrated below. There was no opposing professional evidence led. For these reasons, we would have held that this ground of refusal is met. Placing the child in school B’s LCSC would, though neither of the tests set out in paragraphs 3(1)(a)(i) or (ii) of Schedule 2 of the 2004 Act is satisfied, have the consequence that the capacity of school B’s LCSC would be exceeded in terms of pupil numbers.
3. Witness B gave evidence that school B’s LCSC was at its maximum capacity of 60 pupils. The appellant challenged this on the basis that the limit had been exceeded in the past. Witness B explained that in the past a different staff grouping, and different child requirements had allowed some classes to go over the limit of 6 children. However, the current situation is that teaching staff insist on adhering to this limit as it is provided for by the Scottish Negotiating Committee for Teachers handbook. In addition, the current needs of the children in the primary 4 year group at school B’s LCSC are such that exceeding the limit would be detrimental to their education. An increase in size of school B’s LCSC would have a detrimental impact on the whole of school B. This is as a result of impacting on the whole school physically and reducing the opportunities for integration. There were also physical constraints because of the current school building not being ideally suited to its purpose. A new school building in the future may well address the issue but at present it is a limiting factor. The appellant relied on the authority of *Parents of Child J v Dumfries and Galloway Council* 2015 SLT (Sh Ct) 253. We accept the principles stated in paragraph 23 of that decision, namely that primary legislation takes precedence over subordinate regulations and an appeal is not precluded solely because of those regulations. The evidence of witness B was not to rely solely on the regulations but also on other detrimental factors as narrated above. We accepted the evidence of witness B on these matters.

*Paragraph 3(1)(g)*

1. The three circumstances identified in section 15(3) of the Standards in Scotland’s School etc. Act 2000 come with the presumption that they arise only exceptionally. We are satisfied that none of the three circumstances arise in this case and so this ground of refusal is met.
2. For the reasons stated in this decision, we have already reached the conclusion that the child is most appropriately educated in the mainstream. It follows that mainstream education is suited to the ability and aptitude of the child and this first circumstance does not arise.
3. Witness B was the only professional to give evidence on the remaining two circumstances. For the reasons already stated, we accept that the ASN of the child can be catered for within mainstream education in the class of 21 pupils in primary 4 at school B without disrupting the efficiency of the education provision of any other child at the school. It would be an odd result in the circumstances of this case to hold otherwise. The child has been assessed to be appropriately placed in mainstream education at school

B. That school has considered the child’s GIRFME plan and ensured that the child has been allocated the relevant small sized class with full time ASNA cover. Accordingly, the second circumstance does not arise.

1. In relation to public expenditure, witness B confirmed that there was no additional cost for the child’s placement at school B. The ASNA was already in place and required for that class in any event. It was not a cost associated with the child. In these circumstances, this third and final circumstance does not arise.
2. For the sake of completeness, we deal with the respondent’s submission that the evidential burden falls on the appellant to establish whether any of the three circumstances apply in this case. We disagree with that submission. The onus remains on the respondent. The information in relation to the exceptions is within the knowledge of the respondent. It would be difficult and unreasonable, for example, for the appellant to try and produce evidence on the additional costs from public expenditure for the child’s school placement. It would not be appropriate to place the burden on the appellant in these circumstances. The onus is on the respondent to establish a ground of refusal. In discharging that burden in relation to the presumption of mainstream education, the respondent is required to prove that none of the three statutory exceptions exist.

*Conclusion on the grounds of refusal*

1. The respondent has satisfied us that each ground of refusal is met on the facts of this case.

*Appropriateness in all of the circumstances – section 19(4A)(a)(ii) of the 2004 Act*

1. Having concluded that each of the grounds of refusal exist, we require to consider whether, nonetheless, it is appropriate in all the circumstances to confirm the decision to refuse the placing request, or whether we should overturn the decision and require the respondent to place the child in school B’s LCSC.
2. We have considered the evidence as a whole, including all the circumstances discussed above. We are satisfied that the refusal of the placing test should be confirmed. The respondent has behaved reasonably in assessing the child’s educational needs and determining that those needs would be most appropriately met at school B. No contrary professional evidence has been led. It seems clear to us that it is in the child’s best interests to attend school B as soon as possible. The child’s educational needs would be met at school B. The child would be able to develop appropriate relationships with peers at school B.
3. School B’s LCSC would not be as appropriate an educational setting for the child. School B’s LCSC would not provide the child with an appropriate peer group. In contrast to school B, it is likely that the child’s education progress would be hampered as the child would be educated with those with significantly higher ASN, as compared to the child.
4. The appellant has submitted that the current lack of taxi provision for the child at school B is not being relied upon by the appellant as the sole argument for a specialist school but is, however, important to understand the context of the child’s difficulties in the round. The child’s views placed sharing a taxi with his siblings in getting to school as the first positive factor. The lived experience of the previous three school years for the child includes that shared taxi ride. It may well be that the absence of a taxi provision is an important factor in this case. However, we are clear that the child’s best interests involve the child attending mainstream education without further delay. It would be disappointing were considerations of a taxi ride to be an impediment to the child’s best interests in this case. This is particularly so when it is apparent that when the child reaches school, the child thrives in that environment, and is educated separately to the child’s siblings. **This paragraph and the subsequent two paragraphs have been edited by the Chamber President for privacy and anonymity reasons 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)**.
5. In relation to the views of the child, there were far more positive factors than negative factors. It was difficult to take much more from this information beyond that discussed above.
6. Having considered all the evidence in the context of the much wider test of appropriateness, we have decided that it would, on balance, not be appropriate to place the child in a school where the education provision and level of support is not as suited to the child as it would be in school B.