

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/23/0162

Witness List:

Witnesses for Appellant:

Depute Headteacher, specified school (witness E)

Independent Expert in Deaf Education (witness F)

Appellant (with a supporter present during the hearing)

Witnesses for Respondent:

Educational Psychologist (witness A)

Teacher of Deaf Children and Young People (witness B)

Additional Support Needs Manager (witness C)

Headteacher, current school (witness D)

Reference

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

Decision

2. We overturn the decision of the respondent to refuse the placing request, in accordance with section 194(A)(a)/194(A)(b) of the Education (Additional Support for Learning)(Scotland) Act 2004 (**the 2004 Act**) and require the respondent to place the child in the school specified in the placing request no later than end February 2024, or by such other time as the parties may agree.

Process

3. A case management call took place in November 2023. The respondent raised a preliminary point on the competency of the reference in terms of rule 22 of The First-tier

Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (**the rules**). A decision on this was reserved until after the hearing of evidence and this can be found at paragraphs 57 to 62.

4. The case management call addressed a number of other procedural matters. Witness statements were prepared, exchanged and lodged and accepted into the process. A joint minute of agreed facts was prepared (T047-048) and outline written submissions were lodged (T049-T079) with final written submissions lodged after the hearing. An independent advocacy report was prepared and this can be found at T038-046.
5. We had access to and took full account of a folder of evidence ('bundle') comprising pages T001-T079, A001-A083 and R001-095 which contained all documents (including witness statements) lodged by both parties.

Findings in Fact

6. The child is 9 years of age and lives with his mother, the appellant, his father and his sister, in the family home.
7. The child is profoundly deaf with significant permanent deafness in both ears. He has bilateral neuropathy auditory spectrum disorder (**NASD**). Although he wears hearing aids to access sound these provide limited benefits to him. The child does not speak and his ability to understand speech remains uncertain. He is highly reliant on visual clues for communication. As part of a total communication approach he requires British Sign Language (**BSL**) and assistive technology to enable him to communicate effectively. In addition to his deafness, he has autism spectrum disorder (**ASD**) with significant social communication difficulties. He also has a diagnosis of an intellectual disability, although the nature and extent of this is unknown. (Joint Minute, T047; NHS Specialist Children's Services, T023; Appellant Case Statement, A001; Paediatric Audiology Report, A004; Child's Plan/Reviews, A006, A024 and A028; Sensory Profile, A002; Assessment of Wellbeing, R005).
8. The child's diagnosis of NASD was made when he was two-years-old. His deafness was diagnosed late when he was five and a half years old.
9. The child is beginning to learn BSL. BSL is an entirely separate language that is grammatically different to English (BSL Toolkit for Practitioners, Education Scotland, A078 – **BSL Toolkit**).
10. The child uses picture exchange communication system (**PECS**) in school, along with other communication tools. For the child, everything needs to be visual, so PECS works well for him (Sensory Profile, A021).
11. The child has a Child's Plan and there are meetings with the school and other agencies twice a year to discuss this (Child's Plan, A006).
12. The child requires a high level of supervision at home, in school and out in the community. He has no understanding of risk. The child does not understand waiting and becomes very distressed, banging his forehead, crying and attempting to hit others (but stops himself now). He has a very short attention span even for tasks he enjoys (Child's Plan, A007). **[Part of this paragraph has been changed 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)]

13. The child needs a safe, enclosed, consistent and predictable learning environment, speech and language therapy, hearing support, ASD strategies to support learning, visual aids to support routine, a personalised timetable, daily opportunities for outdoor and messy play, access to a sensory room, frequent movement breaks and familiar trusted staff (Child's Plan, A008).
14. The child needs access to fluent BSL users in school and at home. The child needs an education environment where he can access all communication around him. He needs a curriculum delivered in BSL and a deaf peer group. He would benefit from native deaf BSL users as language role models. Those educating him need to have knowledge about how to teach him to read and write in English, a language he has no access to due to his deafness. Because he wears hearing aids, he would benefit from being in a school building that is acoustically dampened (Witness F, A033).
15. When considering how best to support the child it is essential that his needs are considered holistically, rather than separating ASD from his deafness. The people around the child need to have the appropriate expertise to adapt communication, environments, activities and routines to support his engagement and participation in meaningful activities in order to foster his development and emotional wellbeing (NHS Specialist Children's Services, T024).
16. The child has a 'clean foods' diet which includes gluten-free and dairy free foods as well as soya milk, although he eats some of the standard meals prepared for school. The child really likes to be outside and responds well to being in a natural environment (Child's Plan, A006).
17. The child is very orientated to routine and likes to know what is happening next. He does not like to be out of his 'comfort zone'. Transitions can be challenging for the child. (Independent Advocacy Report, T038).

The current school

(Independent Advocacy Report, T038; appellant case statement, A001; Witness A statement, R046; Witness B, R056; Witness D statement, R017; Witness F statement, A033; Educational Psychology report, R009; Deaf Education Service Report, R014; ASN Profile, R063; Child's Plan, A006, Joint Minute, T047)

18. The child is a pupil at the current school, where he has attended since primary 1. He is currently in primary 5. The school is a primary school managed by the respondent. The child has always attended the dedicated autistic unit in the school. The child is the only deaf pupil. The child is provided with ongoing support in school from the Deaf Education Service, educational psychology and speech and language therapy. A co-ordinated support plan is being prepared by the school.
19. The children in the child's class are working at different stages of the Curriculum for Excellence (CfE). The child is currently working at Pre-Early Level across all curricular areas, which means he is learning at nursery level. One other pupil in his class is at Pre-Early Level, using the same strategies for learning as the child. Other pupils in his class are working at Early Level (pre-school – primary 1) or aspects of First Level (for numeracy and Maths).

20. There is a high adult to pupil ratio, with three members of staff to six pupils, which ensures that there are adults available to deliver the curriculum in place for the child, to model positive peer interactions, to encourage communication, and to respond to the child's needs [Witness A, R046].
21. The ASD unit the child currently attends provides a warm, well-structured and well-resourced learning environment for autistic children. It uses visual methods of communicating, including Signalong (a very basic communication system using signs borrowed from BSL), PECS, BSL and assistive technology.
22. The school use a sounding board in conjunction with BSL signs, which they are all learning in order to communicate with the child, although this is not embedded in all classroom activities. A peripatetic Teacher of the Deaf comes into class for one hour, recently increased from once to twice a week and has a session with the child (for 30 minutes each time) and then works with the whole class. This means that everyone in the base is learning some BSL.
23. The child communicates in school using an iPad and sounding board. Visual timetables are used and objects of reference. The child uses single word PECS and is beginning to learn and use single word BSL. He stopped using Signalong in primary 4. The child has an individualised workstation.
24. Apart from a few activities throughout the day when single signs are used to include the child in the communicative environment the language used to communicate is inaccessible to the child due to his profound deafness (Witness F, A039).
25. There are six pupils including the child in his class. He has a good relationship with his class teacher, who knows him well and has taught him for several years. The class is also supported by two advanced pupil support workers. The child is given one-to-one support when his learning task is introduced and initially modelled to him but this is gradually withdrawn in the middle of tasks to help the child to attempt this independently. The child is familiar with all of the staff who work at the school. He has positive relationships with the key adults who have daily contact with him, including his class teacher.
26. The wider classroom environment has a good amount of space with good accessibility, tailored to the needs of children who benefit from opportunities for regular movement. The child has an individual desk area, which is where he completes his individual learning tasks. The desk area is clearly laid out and accessible, with trays that contain the child's specific literacy and numeracy tasks. There are BSL visuals on the wall, which range from signs for colours and emotions, to basic phrases. The child has access to a sensory room as well as another room to help support his emotional regulation. **[Part of this paragraph has been removed 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)]**
27. The child prefers to engage in solitary play when at school although he is demonstrating the ability to engage with peers (Educational Psychology Report, R010).

28. None of the Deaf Education staff employed by the education authority have achieved higher than BSL level 2 (equivalent to National 5 level of BSL). The class teacher and all of the advanced pupil support workers in the school are undertaking an introduction to BSL course and are about halfway through this. The class teacher intends to complete the Level 1 BSL course (Witness D, R022-023). Although staff are not fluent in BSL they introduce signs throughout activities. Teaching staff within the child's class have a heightened deaf awareness (Witness B, R058).
29. Transition planning to secondary school has not yet commenced. This means that no preparation has been made for secondary staff to use or learn BSL (Witness D, R028).
30. The child can become distressed during the school day when he cannot communicate his needs and wants. Staff use social stories to help the child transition to activities outside of the daily routine. When the child is outside, he has one-to-one support.
31. The child is profoundly deaf so would not hear any warning signals such as bells or horns. He has a personalised evacuation plan (**PEP**) that he takes with him whenever he leaves the classroom (PEP, R094).
32. The child has no physical health needs which require attention, but he does have a special diet which is adhered to in school. Food is very important to the child and staff have to put any foods for other pupils away out of his reach or he would eat them.
33. The child is still at the stage of achieving 'milestones' within the pre-early level of the CfE. Since beginning to use BSL and the sounding board, staff have seen progress in all areas. The child is very comfortable with school staff and would seek out any of them if he needed support or comfort. The child is making progress in being able to sit and engage in tasks, but his concentration span is still short. He is able to let staff know when there is something that he does not want to do.

The specified school

(Appellant case statement, A001; Assessment Visit, A009; Witness F statement, A033; Witness E statement, A045)

34. On or around 2 June 2023, the appellant made a placing request to the respondent requesting that the child be placed at the specified school. The managers of the specified school are willing to admit child. The respondent refused the placing request. The specified school is a grant-aided school.
35. The specified school provides a visual learning environment, onsite speech and language therapy (specialist in both ASD and deafness), a total communication approach including the use of BSL (with other pupil and staff members native/fluent in BSL) and the use of augmentative and alternative communication technology. The school is acoustically dampened and in a quiet location, allowing for maximum access to sound. The school specialises in providing education to children who are deaf and to those with ASD.
36. The school provides a low arousal environment suited to children with ASD. The space is calm, and the muted colour scheme has been specifically chosen to reduce stress. The rooms have good natural lighting and are also next to an exit door leading to the outdoor playground spaces, and beyond, via gates, to extensive campus gardens.

37. BSL is used extensively throughout the school. The school employ three deaf, fluent BSL users, who work in classrooms. Eight of the fourteen children educated there have hearing loss and a significant number are profoundly deaf. One teacher is a qualified Teacher of Deaf pupils. Classroom teachers are expected to acquire sign language BSL skills if they do not already have them. Nearly all of the children use BSL to varying degrees.
38. The school follows the CfE from Pre-Early Level up to and including National 4. The school provides primary and secondary education.
39. Staff are highly skilled and experienced in working with children with a range of complex additional support needs. They collaborate with specialists who support learning through therapies, the arts and outdoor activity. Staff are trained to ensure the environment is low-arousal, and to place thought and care on reducing distractions and potential sensory issues.
40. Staff are trained in the school's person-centred planning (**PCP**) approach. This is a therapeutic approach in developing individual programmes for pupils. All pupils have a full PCP six to eight weeks after enrolment. This can be reviewed as often as is required and no less than every six months. Staff are also trained in using *Emotion Works* and are currently going through refresher training. *Emotion Works* is aligned to the CfE and GIRFEC. It is used as a teaching tool to develop emotional literacy.
41. Dietary preferences are planned for, and familiarity with a wider range of foods over time is encouraged. Some pupils bring in their own food from home in order to reduce anxiety about menus and expectations. When pupils show interest in trying other foods, they are encouraged and supported in this. Many pupils have specialist cutlery or cups and plates.
42. All of the children who attend the school have additional support needs requiring a highly differentiated curriculum. There are currently thirteen pupils enrolled in the school, aged 8 to 18 years of age. Four of these are of primary school age. There are four classes. These are grouped to ensure the best dynamic for learning. In some classes there may be fewer children. Class sizes are based on individual need.
43. The school provides a small group setting with a high staff ratio: there is a maximum class size of six, each supported by a full-time teacher and two or three Learning and Wellbeing Practitioners. The child would initially need a one-to-one dedicated member of support staff to ensure his support requirements are always fully met during transition.
44. The class the child would attend is supported by a deaf, fluent BSL using classroom assistant. The child would initially work on a one-to-one basis with a deaf fluent BSL user. The class would be made up of a mixture of pupils across different primary and secondary school ages.
45. The school has lots of space including breakout spaces for each classroom, which can be individualised, areas for life skills development, several fenced and secure play areas and extensive grounds, which are used frequently throughout the day. The school uses visual timetables, objects of reference, regular movement routines/sensory breaks and daily opportunities for outdoor learning.

46. The cost for a full-time place at the school for one year is £39,700. It is likely that initially the child will need additional one-to-one support on top of this. The cost for a one-to-one support assistant (who will be fluent in BSL) is £31,163.80 per year. The child is unlikely to need one-to-one support for an extended period.
47. The cost of the specified school providing transport is £15,105 per academic year. The estimated cost for the respondent providing escorted transport to the specified school, is £90 per day. Based on 190 school days, the total estimated cost would be £17,100 per academic year.

The child's views (Independent Advocacy Report, T038)

48. The child's views were gathered by an independent advocate using non-instructed advocacy, a process which is familiar to this jurisdiction. This involves speaking to the people who know the child best (his family and school staff) and conducting an observation of the child at home and in his school setting. The information gathered through conversation and observation is used to build a picture of who the child is, what he likes and dislikes at school, what works for him and what can be difficult in the school environment. Non-instructed advocacy was used as the child can only understand single word BSL so a BSL interpreter would not be able to assist with communication.
49. From the advocacy report we learned that the child is a happy boy – he is very nice and kind to others. He uses cards, photos and online apps to communicate with his family. If he wants something, he will take you by the hand and lead you to it. The child can only really communicate about practical things – he cannot let you know how he is feeling. The child loves to be outside in all weathers. He enjoys baking and cooking. He really enjoys his food. The child is on a diet of 'clean foods' as he seems to be more regulated on this. The child likes everything to be clean and tidy. The child does not have friends. He and his little sister get on very well together most of the time.
50. The child enjoys sensory play, *Swing and Slide*, cooking, messy play and art at the current school. He appears happy at school. He enjoys PE and will sometimes join with others in warm-up games. The child is valued by staff and is part of the school community. The child enjoys physical activities especially in the sensory base. He likes to run around and explore spaces. He enjoys outings and is happy to be out of school as long as he has been well prepared for this.

Reasons for the Decision

General remarks on the evidence

51. We benefitted from the provision of detailed witness statements for all of the witnesses. None of the witnesses deviated in any significant way from their statements.
52. Where their evidence contradicts, we prefer the evidence for the appellant, which includes the evidence of witness F. Her evidence is, that out of all the provision for deaf pupils in Scotland, the specified school is uniquely suited to meet the child's additional support needs. We attach significant weight to her evidence, which is very compelling. She is an independent skilled witness. She has considerable expertise and experience in the field of deaf education. Her current and past work experience as a Teacher of the Deaf is in a local authority context as a local authority employee. She is therefore very

well versed and experienced in state schooling. Her evidence was given in an open and straightforward manner, including readily accepting drawbacks with her preferred education provision, for example, she agreed that the range of ages within the child's proposed class was "not ideal".

53. Witness B also has considerable experience in deaf education in a local authority context. He challenged a number of the statements made by witness F in his statement. However, when questioned on the detail of these there were a number of areas he agreed with, as well as those he did not. This meant we had to approach his evidence with some caution. Witness B argues that to learn BSL you need good eye contact which, he suggests, the child does not have. The appellant contends that the child does have good eye contact. She advises that he watches their mouths and hands at home and can follow instructions. We prefer the evidence of the appellant here. Her evidence overall is very compelling, which she presented in a measured and balanced manner.

The law

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

55. The respondent's refusal of the placing request is based solely on schedule 2, paragraph 3(1)(f). The burden of proof sits with the respondent and the assessment point is at the time of the hearing (*M v Aberdeenshire Council* 2008 SLT (Sh Ct) 126).

56. If we find that the ground of refusal exists we must consider whether in all the circumstances it is appropriate to confirm the decision (section 19(4A)(a)(ii) of the 2004 Act). However, as we find that the ground of refusal does not exist here, we do not have to go on to consider the appropriateness test.

Preliminary matter

57. The respondent's and appellant's preliminary submissions (Case Management Call, T032) are relevant here, as well as their final submissions. In short, the respondent submits that the appellant's placing request reference must be regarded as a request only in respect of the primary school stage of that school as the child is currently in primary 5. If the appellant seeks a place beyond primary school then the reference is incompetent. The respondent relies on the reference to 'school' in the singular as it appears in the ground of refusal, for this proposition. The respondent submits that the appellant is not prejudiced by this approach because she has the right to make a placing request when the child is in primary 7, for transition to a secondary school.

58. The respondent submits that it is not competent for the appellant to seek a placing request at an independent 'all through' school for the purposes of primary and secondary education, and that we should only decide upon the specific stage of the child, or the next imminent stage if the child is in the final year of nursery or primary school.

59. The appellant argues that the respondent has not provided a legal basis for this proposition. The 2004 Act does not make the distinction that the respondent makes. Paragraph 2(2)(a) of Schedule 2 of the 2004 Act allows the appellant to make a placing request for a place at a special school which is not a public school, without requiring the specification of primary or secondary education.

60. This question arose in a recent Additional Support Needs Tribunal case and we agree with their approach (*HEC-AR-22-0113*) where it is stated at paragraph 37:

We have no power other than, in the event of overturning the respondent's decision, to direct the placement of the child at the school specified in the request. The tribunal has no general power to decide the legal effects of a placing request being granted, whether by the effect of a successful reference to this tribunal or otherwise. There is no right of appeal to this tribunal regarding decisions made as to the duration of a placement or to bring a placement to an end, or not to continue a placement begun at one stage of education to another, so that a child might progress from the nursery component of a school to the primary component (or the primary to the secondary). In directing the child's placement at the specified school, we have no power to direct the duration of that placement or to decide that it must (or need not) be maintained through to the child's primary stage of education. It is not for us to decide or advise as to what legal consequences there might be for the child's primary education of our direction to place her at the specified school as a child of nursery age.

61. Our powers to decide a placing request reference appear at section 19(4A)(a) of (b) of the 2004 Act. These explicitly permit us to 'confirm' or 'overturn' the decision of the education authority; nothing more. We have no statutory power to direct the duration of a placing request or to specify which part of the child's education it should apply to – primary or secondary. If such a power was available, then Parliament would have specified this. In the absence of such specification we must conclude that no such power exists.

62. For these reasons, having decided to overturn the education authority's decision to refuse the placing request, we do nothing more than specify that the child must be placed in the school specified in the request. This does not prevent the parent from making a placing request in the future nor does it prevent the respondent from raising a request under rule 12 that the implementation of the decision be monitored.

The ground of refusal

63. There are four constituent parts to schedule 2, paragraph 3(1)(f), numbered in paragraphs (i) to (iv). The respondent must satisfy us that each of the four paragraphs is applicable to the facts of this case, at the date of the hearing.

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

64. There is no dispute that the specified school is not a public school. This means that this part of the ground of refusal is met.

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

65. This paragraph requires that the respondent is able to make provision for the child's additional support needs in a school other than the specified school. In this case, this is the current school. This part of the ground of refusal is disputed.

66. The appellant does not dispute that the current school is well placed to meet the needs of pupils with ASD. However, the child's deafness, language deprivation and ASD creates interrelated barriers for the child's learning and his wellbeing. More than one witness urged a holistic understanding of the child's needs (witnesses, A, D, E and F). The appellant does not dispute that the child is settled and happy at the current school

– a point on which all witnesses agreed. It is clear to us that school staff are working hard to try to meet his needs, using the resources available to them.

67. The appellant submits that this part of the ground of refusal cannot be satisfied by a meeting of only some of the child's needs in the current school. The duty on the respondent is to make provision for the child's additional support needs (section 4, 2004 Act), in such a way as to enable the child to access school education directed to the development of his personality, talents and mental and physical abilities to their fullest potential (section 1(2), 2004 Act). That legal test is not satisfied by 'half-measures'.
68. The appellant argues that the current school is not able to meet the child's needs in relation to communication and the acquisition of BSL, whereas the specified school is able to provide the support he needs with BSL communication and daily speech and language support to increase his access across the curriculum [Journey Record, A015]. The specified school is also able to meet the child's additional support needs arising from his ASD [Witness E, A046].
69. We find that the current school can meet some but not all of the child's additional support needs. Critically, they cannot meet the needs which arise from his deafness. We learn from the evidence of witness F that the child's late diagnosis results in him suffering language deprivation exacerbated by the people around him thinking that he could hear. Profoundly deaf children need those educating them to have knowledge about how to teach them to read and write English, a language that they have no access to due to their deafness. Staff around them must understand the importance of providing the child with full access to the educational environment by always having BSL users present to communicate with the child and to deliver the CfE fully in BSL (Witness F, A034).
70. The child has reached the age of 9 without having learned a language (Witness F, A039). The current school have made commendable efforts to introduce BSL to the child. It continues to largely rely on English phrasing and grammar (which the child has no access to), rather than BSL, although single word BSL is used. We agree with witness F that the child is 'communicatively isolated'. This point was picked up by witness B who does not agree. We think this arises from a misunderstanding of witness F's evidence. Witness F does not suggest that the child is physically isolated, rather he is isolated in his communication environment. He cannot access the mixed range of communication used in the class and in the school. He has no first language. This amounts to language deprivation.
71. Witness F gave us an example of how BSL language differs in structure and grammar from English, using the sentence, "The elephant walked across the bridge." If this was BSL signed, the word "bridge" would be used first, as the person needs to know there is a bridge to walk across before they say that the elephant walked across it.
72. We agree with witness F that the staff at the current school should be commended for their efforts to learn BSL to communicate with the child. However, as she points out, learning a new language takes a long time. Even if staff continue with their BSL studies over the next 18 months, they will not have acquired the skills to provide the child with the sign language BSL role models from whom he can learn a language before he moves to secondary school. The Teacher of the Deaf who provides the child with support does this using the range of communication tools available, including BSL, but this only takes place twice a week, with only 30 mins given to the child on a one-to-one basis. Witness

C advised that if a full time BSL support was considered necessary it would be provided, but no plans are in place for this.

73. Although the respondent is not obliged to begin transition planning in primary 5 we are concerned that no preparations are in place for staff in a secondary provision to learn BSL in preparation for the child moving there (Witness F, A036). This could compound the level of communicative isolation the child is currently experiencing. The respondent submits that the child would be prejudiced by being assessed too soon. We do not agree. It is clear that the child needs access to a full language, and, as a result of his deafness, this language needs to be BSL. Far from prejudicing the child, early preparations are critical, particularly when considering the impact of his late diagnosis.
74. The respondent does not appear to us to have the fullest understanding of the impact on the child of language deprivation, including that of communicative isolation. This leads us to conclude that if the child was to complete his primary education in the current school his access to BSL will continue to be limited to his wants and needs and the opportunity to develop a full language will be denied to him, which runs contrary to his rights under two International Conventions, which we refer to at paragraphs 82 to 84. We are able to see the limited scope of the single sign vocabulary in the Milestones Literacy record [R069-070]. As witness F reflects, a full language would provide him with an opportunity to form full relationships and to develop cognitively [A038].
75. Having decided that one of the four paragraphs is not satisfied it is not necessary for us to consider paragraph (iii), however we do so for completeness and to assist the parties.

Paragraph 3(1)(f)(iii) It is not reasonable, having regard both to the respective suitability and to the respective cost of the provision for the additional support needs of the child in the specified school and the school identified as suitable by the respondent (the current school) to place the child in the specified school

76. The reasons we set out in paragraphs 65 to 75 also apply here.

Suitability

77. Witness A expresses concern about a lack of specialist subject teachers at the specified school and a “ceiling being placed upon pupils’ learning” as a result. She accepts that the child has an intellectual disability, but suggests there should be no limits placed on what he is able to achieve, which could happen if he were placed in the specified school. We see no evidence to suggest this. First, none of the witnesses could explain how the diagnosis of intellectual disability affects the child’s learning. There was evidence to tell us how the child is managing at school, but there was little detail on his educational progress. Second, the specified school teach to National 4 level. It is not currently possible to predict whether the child will in future be able to reach National 4 level.
78. Both witnesses A and F agree that it is very difficult to predict what the child can achieve. This arises from language deprivation. Access to a full language of BSL and the potential to develop a language with access to people who use that language may improve his prospects. The fact that the current school provide the child with access to a range of communication tools does not add up to a language. There is evidence that the child wants to communicate more. The appellant explained that she tries to teach the child to say “mama”, which he tries to mouth but cannot imitate with sound.

79. The BSL Toolkit [A076] advice is that:

- (a) Deaf children need to meet other fluent signing children and staff in order to develop their self-expression and confidence in language [A079].
- (b) Children aged 0-5 would ideally need around 10-15 hours per week to become bilingual ... This would be complemented by a sign bilingual environment at school with teachers who are qualified to SCQF 6 or above in BSL [A079].
- (c) BSL SCQF 6 (or BSL Level 3) is a minimum qualification level for staff working with deaf children. Local authorities should ensure that staff are trained on an ongoing basis and aim for SCQF 10 [A080].
- (d) There is a need for staff teaching BSL to be native users of the language or to be at a minimum of SCQF Level 6. It is recommended that other staff working in schools with groups of Deaf BSL signing children be able to sign at SCQF Level 4 and above where there are BSL users in the school community. Teachers of Deaf children require to be fluent in BSL [A082].

80. The appellant argues that none of the above is available at the current school but is provided by the specified school. In addition to this, the specified school provides onsite speech and language therapy, it is acoustically dampened and in a quiet location, allowing for maximum access to sound for the child.

81. Witness B accepts that these BSL Toolkit components are not present in the current school but he does not accept that the provision the child is receiving does not comply with the BSL Toolkit. We do not agree. On any reading of the BSL Toolkit it is clear that the current school is not providing a learning environment for the child which is sufficiently consistent with their advice. This may arise from the fact that the child is the only deaf pupil in the school. The BSL Toolkit states that the mental health of children who use BSL to communicate can be affected particularly if they are the only deaf pupils in the school and are unable to communicate with practitioners and to form friendships with their peers [A083]. Although some of the staff in the current school are aware of BSL and deaf culture they are not trained to the level the BSL Toolkit advises [A082].

82. The appellant argues that as a BSL user, the child belongs to a linguistic and cultural minority, protected by Article 30 of the United Nations Convention on the Rights of the Child (**UNCRC**). As such he has the right, in community with other members, to enjoy that culture and use his own language. The appellant refers also to Article 24 of the United Nations Convention on the Rights of Persons with Disabilities (**UNCRPD**), which confers a duty on States Parties to facilitate the learning of sign language and the promotion of the linguistic identity of the deaf community. Specifically, Article 24(4) requires 'appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language ...'

83. The UNCRC has very recently been incorporated into Scots law, which includes Article 30. Once implemented it will strengthen the rights of children in Scotland and place statutory duties on public authorities. We accept here that the child belongs to a linguistic and cultural minority and that the protections of Article 30 apply. For the reasons we set out in reference to the statutory paragraphs (ii) and (iii) of the ground of refusal we conclude that the child has been denied the right, in community with other members of his group, to enjoy his own culture and to use his own language.

84. Unlike the UNCRC, the UNCRPD is not incorporated but the UK is signatory to that Convention and for that reason we have regard to it. It is also referred to (along with the UNCRC) in this jurisdiction's President's Guidance to Tribunal Members No 01/2021: *The Child, Young Person and the Tribunal* (paragraphs 7 to 9), which is expected to be read in a way which is compatible with the terms of the UNCRPD. Although the respondent has taken steps to train teachers and staff in the current school in the use of BSL, no appropriate measures have been taken to employ teachers, including teachers with disabilities, who are suitably qualified in BSL.
85. The specified school is able to provide the child with BSL communication and daily speech and language support to increase his access across the CfE [Journey Record, A015]. They are also able to meet his additional support needs arising from his ASD [Witness E, A046]. Witness F is very clear on where the balance of suitability lies between the two schools. She comments that a major specialism of the specified school "... has become educating young autistic people who are also deaf .." [A037].
86. We conclude that the specified school can provide a learning environment where the child, in community with other members of his peer group, can enjoy his own culture and to develop and use his own language (BSL). He will be supported to do so by the employment of teachers and staff who are qualified, and in some instances, native, in BSL. This is not provided in the current school.
87. On the test of reasonableness, when we compare the two schools, we find that the specified school is more suited to the needs of the child.

Cost

88. Our findings on cost can be found at paragraphs 46 to 47. The respondent reminds us that the cost to be considered is the cost to the respondent rather than the public purse (*SM, Appellant* 2007 Fam L.R. 2; and *JB (Parent of child CB) v Glasgow City Council* [2013] CSIH 77, which follows the approach taken by Lord Glennie in the *SM* case). In *SM*, Lord Glennie makes it clear that in considering 'respective cost' the question is viewed according to what is reasonable from the respondent's perspective. The question is, what is the difference in cost to the education authority of providing for the child's additional support needs in one school rather than the other? When calculating the cost to the respondent of the child remaining in a state school it is wrong to simply divide the running costs by the number of pupils or places, the only relevant costs are the additional costs which are incurred.
89. The respondent submits that the cost to them of providing for the child's additional support needs in the current school is 'nil'. The appellant argues that this is not a credible position nor one which is supported in law. The case of *SM* is not authority for the proposition that the question of cost in the current school should be ignored altogether. The court in *SM* drew heavily from the case of *Oxfordshire County Council v. GB* [2001] EWCA Civ 1358. That case, while not overturned, has been expanded and clarified since. The appellant contends that 'nil cost' is not consistent with the statutory test, which requires the respondent to satisfy us on the cost of provision of additional support for the child at the current school (as well as any incidental costs).

90. The appellant submits that this approach is supported by case law in England, in *Slough Borough Council v SENDIST* [2010] EWCA Civ 668 at paragraph 13, where Sedley LJ states:

Every element of a maintained school carries a cost in public funds. The recurrent exercise for Tribunals is to calculate what it is, because it is ordinarily only with such a calculation that the protection of public money to which the condition in s.9 is directed becomes possible. If it were not so, a like-for-like comparison between public and private provision could never be made.'

91. And in the case of *EH v. Kent County Council* [2011] EWCA Civ 709 at paragraph 32 where Sullivan LJ states:

[the] question whether placing a child at a particular school would cause "unreasonable public expenditure" should be approached by the FtT in a common sense manner. Fancy accountancy footwork which produces an unrealistic result – whether an excessive figure based on global costs including fixed costs, or a "cost free" placement – is unlikely to be persuasive before the FtT.'

92. While the respondent reminds us that these cases are not binding on us, we find them informative. Although not on directly equivalent legislation, both are Court of Appeal cases which consider a comparative exercise on cost and how this is to be calculated. The First-tier Tribunal to which the cases refer is the English equivalent of this jurisdiction. In the second case the First-tier Tribunal had included costings for a Teacher for the Deaf in the school chosen by the education authority.

93. We must also consider the child in question only and an assessment must be made on the basis of the available information (*City of Edinburgh Council v MDN* 2011 SC 513; 2011 SLT 659). Finally, the test in the wording of the ground of refusal requires a comparison of cost, not a comparison of cost savings.

94. We are not persuaded that the cost of the child remaining in the current school is nil. It may well be difficult to isolate and calculate with any accuracy the cost of provision for a child in an environment where the cost is global for the school, or class. It is much easier to identify the cost for provision in an independent or grant-aided school, where fees are paid per child. However, the fact that a cost calculation might be difficult does not mean that it should not be done (see the tribunal case of, *ASN D 14 06 2019*).

95. Several specific supports are in place (or proposed) for the child at the current school, including a new support assistant to work specifically with him on a Friday. The respondent (who bears the burden of proof) did not offer any evidence on the cost of these supports or the provision for the child at the current school. As a result, we must ignore the evidence on the cost of provision for the specified school when considering the reasonableness question. This means that we regard the respective cost question neutrally. In other words, we consider the overall question of reasonableness on the basis that there is no cost difference. Since the respective cost point will only ever favour the respondent (see *SM*), this is the only sensible approach to take. If the child is to be placed in the specified school, the respondent will have to meet the cost (2004 Act, schedule 2, para 2(2)). As Lord Glennie puts it at paragraph 23 of the *SM* case:

The question is: how much more will we [education authority] have to spend to give the child that extra benefit rather than [continue to] place her in our own school?

96. In the absence of reliable evidence from which we can make a comparison, the appellant must be given the benefit of this absence, which leads to our cost-neutral decision. This means that the reasonableness question requires to be decided only on respective suitability.

97. We add that even if we had accepted the respondent's nil cost argument we would have nevertheless favoured the specified school. It is not always the case that suitability surpasses cost. However, in this case, suitability significantly overshadows cost. The appellant argues (and we agree) that the impact of the child continuing at his current school would be "disastrous". We do not adopt that word lightly. Given its ordinary meaning, it would be 'extremely bad or unsuccessful' for the child. As witness F puts it:

If [the child] was to finish his primary education in [the current school], [the child's] language deprivation will continue to not be addressed and the opportunity to develop a full language with which he can form full relationships and develop cognitively will be denied to him. [A038-039]

98. Witness F was referred to the paediatric audiologist's report on the child (A004-005) and explained that, in spite of the child having some access to sound through his hearing aids since 2020, it is extremely unlikely that he will ever develop spoken language – either receptively or expressively. This is because the hearing pathway in his brain was not stimulated at a young enough age, likely resulting in the brain not developing the ability to process speech sounds. It is therefore critical that the child be given the greatest opportunity to develop a full visual language (BSL) with which he can do more than express his wants and needs. This must be done without delay. The child has already suffered great loss as a result of the delay in diagnosing his hearing loss.

Paragraph 3(1)(f)(iv) The authority have offered to place the child in the school identified by them as suitable for the child (the current school)

99. There is no dispute that the respondent has offered to place the child in the current school. This means that this part of the ground of refusal is met.

Conclusion on the ground of refusal

100. The appellant has satisfied us that all four constituent parts to the ground of refusal are not met on the facts of this case.