



## Additional Support Needs

### **DECISION OF THE TRIBUNAL**

#### **1. Reference**

The appellant lodged a reference in accordance with Section 18(3)(e) of the Education (Additional Support for Learning) (Scotland) Act 2004 (“the Act”) in respect of a decision of the respondent to refuse a placing request made by the appellant for her son the child born December 2012 (“the child”) to attend School C. The respondent did not respond to the request timeously which led to a deemed refusal of the placing request. Thereafter in the context of this appeal process, the respondent specified that the refusal was based upon the grounds specified in Schedule 2, paragraph 3(1)(d) and (f) of the Act.

#### **2. Decision of the tribunal**

In terms of the power contained within Section 19(2) of the Act, the tribunal confirms the respondent’s decision.

#### **3. Management of the Reference**

The reference was received on 31 August 2018. A telephone conference call was arranged on 9 November 2018. The respondent’s representative failed to participate in the call. The call was conducted in his absence. No later objection was taken to this and he approved everything that had been discussed and directed. The appellant’s representative understandably wished an opportunity to provide a supplementary case statement having had sight of the respondent’s basis of refusal which had not previously been disclosed given that this refusal of the placing request was a deemed refusal. The appellant’s representative advised that there was no merit in the tribunal seeking to take steps to ascertain the child’s views on the reference. No such steps were accordingly directed. A timetable was fixed for the production of the supplementary case statement, a proposed joint minute, list of witnesses and written witness statements of the parties witnesses which would represent their evidence in chief.

On 21 December 2018 both parties lodged significant further documents which included the joint minute of agreed facts and their witnesses written witness statements. Additional evidence was also lodged by each of the parties. All further additional evidence tendered by both of the parties was admitted.

#### **4. Summary of Evidence and the Hearing**

The tribunal had regard to the bundle of papers (indexed T1-T22, A1-A61 and R1-R306). This was with the exception of the document at A50-51 in which it was agreed between the parties that the tribunal should only take account of the first three paragraphs and not the

remainder of the document which was opinion evidence. The tribunal also had regard to the oral evidence of the witnesses who were:-

Witness D, Educational Psychologist, of the respondent  
Witness E, Visiting Teacher of the Deaf, ASL Service, of the respondent  
Witness F, Head Teacher, School B  
Witness A, Acting Head Teacher, School C  
Witness B, independent Speech and Language Therapist  
The appellant

All the oral witnesses had provided written witness statements which had been lodged in advance and which formed their evidence in chief. The tribunal, adopting its inquisitorial approach, asked such additional questions as was considered necessary of the witnesses before they were cross-examined and thereafter re-examined. Some degree of flexibility was afforded to this order at times to ensure fairness. The evidence of both parties witnesses was concluded on the second day of the hearing. The parties wished an opportunity to prepare written submissions prior to the reserved third day for the hearing. It was agreed that such written submissions would be both exchanged and lodged by 4.00 pm on Friday 18 January 2019. A hearing on submissions took place on the third day of the hearing.

## **5. Findings of Fact**

1. The appellant, mother of the child at the centre of the reference.
2. The respondent is the relevant Education Authority.
3. The child was born on December 2012. He is 6 years of age. He resides with the appellant and his father, Witness C.
4. At newborn screening the child was diagnosed with a moderate to severe sensorineural hearing loss in both ears. He has a history of fluctuating loss of hearing due to glue ear. He has had three grommet operations.
5. At the age of 3 years 10 months, the child was diagnosed with Autistic Spectrum Disorder (ASD) by Deaf Community Adult & Mental Health Services (CAMHS). As part of his ASD, the child also has sensory seeking behaviour.
6. The child has not attracted a formal diagnosis of learning disability. He is recorded upon assessment in 2016 to have developmental regression with delay in speech, language and social communication skills.
7. The child wears bilateral hearing aids. The child has significant learning and sensory needs as a result of his dual diagnosis of autism and deafness, both of which require to be fully considered in terms of his school educational placement. The child requires specific and consistent opportunities to develop language and communication through various means. The child does not use speech and his response to functional listening is inconsistent.
8. The child has additional support needs in terms of Section 1 of the Educational (Additional Support for Learning) (Scotland) Act 2004 ("2004 Act").

9. The child has an outgoing and curious personality. He enjoys interacting and meeting people and forming strong bonds. He enjoys new experiences and meeting new people. He is physically robust and has a good balance and likes to be active.
10. The child commenced his nursery education within the respondent's education authority when he and his family moved to the authority in or about March 2018. He completed his nursery education at School A where his additional support needs had begun to be addressed by the respondent. He commenced his primary education at School B at the beginning of the new school term in August 2018. The respondent quickly responded to the child's impending commencement at School B and carried out adaptations and made provision for his education and additional support needs. It took the child a number of months to settle within School B. He is now settled and looks forward to coming to school, and is happy in the school environment.
11. The child's learning at School B currently takes place within the chestnut class which is a combined primary 1 and primary 2 class of eight children in total. In the class there is a staff team of four; the class teacher, part-time nursery nurse (4 days a week) and two pupil support assistants. All of the children at School B face difficulties with communication and emotional regulation. The school works closely with Speech and Language Therapy (SLT) and Occupational Therapy (OT) Teams who support teaching and support staff. Specialist support is provided by the Deaf Support Team who are part of the Additional Support for Learning Service. Staff at School B have become very competent at reinserting the child's hearing aids and tubing. The Educational Psychology Service monitors all pupils' progress. The head teacher at School B has significant knowledge and experience of the additional support for learning system with the respondent. She also has significant work experience with both hearing impaired children and autistic children.
12. The child has an Individualised Education Plan (IEP). He does not have a Co-ordinated Support Plan (CSP). The IEP targets for the child are founded upon the Social Communication, Emotional Regulation, Transitional Support (SCERTS) system. The child was working at pre-early level on the national curriculum. The most recent planning meeting for the child for the purposes of education took place at School B on 22 November 2018. At this review it was noted the child has had a very positive start to his primary education at School B. This review was following 3 months of the child's commencement at School B. By this time the school and other professionals working in the school had built up a clear picture as to the child's needs. Regular meetings take place to review the child's progress and to adapt his support according to his changing needs.
13. The educational provision being made and offered to the child at School B is a total communication environment which he requires. The communication mediums include SignALong, Picture Exchange Communication System (PECS), Sign Supported English (SSE) and BSL (British Sign Language).
14. The child has shown that he has the capacity to use PECS well if it is available to him and there is a responsive communicative partner. The child's family report

that he is at PECS stage 3 and evidence of this has been seen within his current school environment. There are six stages of PECS with further additional communication skills to work on when this stage has been reached. The child currently operates at the lowest SCERTS level, namely at the Social Partner Stage. The child has required significant support and overlearning to use the BSL signs which he has acquired the knowledge and use of. This has involved numerous hours of reinforcement in relation to each sign. His understanding of such signs to date is for practical command and request type scenarios e.g. more, toilet. He has not demonstrated an ability to be able to communicate using such a language medium. He has learnt only one phrase consisting of three words (more biscuits please), but his use of this has been limited to some six occasions. He is not consistent in the use of the limited signs which he does know. The key is for the child to learn signs which match his current ability and understanding, both receptively and expressively.

15. At School B, the child initially had access to Deaf Support Team input for 2 hours once a week. From mid-November 2018 the child has received a Monday afternoon session of sign support and a sign support session every second Wednesday morning. Both of these sessions are with a signing nursery nurse from the Deaf Support Team with a Level 3 BSL qualification. Close monitoring of the child's need for input from the signing nursery nurse takes place within his current school placement at School B. The current proposal upon review formulated by the Deaf Support Team is that the child be provided with at least one and hopefully two morning sessions of sign support each week. It is believed that he is more receptive to such work in the mornings when he is less tired. The child is currently able to sustain attention for such 1:1 learning for approximately 20 minutes.
16. The child is at the pre-verbal stage of communication. He is at an early stage of his learning. He has been recorded as making progress at School B, but this is slow. He does not currently have the cognitive learning capacity to learn BSL as a language i.e. he could not at this stage of his development understand the syntax and grammar of formal BSL. He remains at a stage where he can learn with significant support and overlearning a limited number of BSL signs only. The child needs to be explicitly taught all communication and language intensively rather than being able to absorb it.
17. The Deaf Support Team have provided significant support and guidance to staff and management at School B. The BSL nursery nurse has been working 1:1 with the child in the classroom context and also on class outings providing modelling and coaching for staff. She carries out weekly reviews with senior staff to tailor the child's learning. Key BSL signs have been identified and developed with staff. This has included instruction on the use of the child's Phonak Sky Q SP hearing aid and Rodger Digital Touch Screen FM system. Staff use a touchscreen microphone which is paired with the child's hearing aids to ensure that instructions are sent directly to him providing him with the best possible signal. The Deaf Support Team has also provided support and guidance on acoustic adaptations which to date have included:-
  - Provision of acoustic linoleum flooring within the classroom.

- Provision of lightweight curtains at all windows.
  - Provision of acoustic room dividers to improve the working spaces within the classroom.
  - Provision of acoustic foam to class display boards, under tables and to cushion heavy toys and objects.
  - The class is continuing to have lunch within their classroom rather than open area where the other classes meet as a reasonable adjustment to best suit the child's acoustic needs.
  - An acoustic pod has been provided as a means by which the child can work in a protected environment in the classroom.
  - Woolly Cloud sound absorbers were purchased and were due to be installed. This was not possible due to concerns regarding the classroom ceiling structure. As an alternative, wall materials to reduce reverberations in the classroom will be installed in the short-term.
18. Being part of a peer group who also have hearing loss is of assistance and benefit to the child. Within his current school placement at School B, there are two other hearing aid users. Being part of a peer group who are of a similar age and developmental stage is of significant assistance and benefit to the child. The child is currently unable to recognise and identify with other hearing aid users.
  19. The acoustic environment within which the child is educated is crucial. Low levels of background noise and good sound insulation maximise learning opportunities. Adaptations to the acoustic environment at School B have taken place. Other adaptations are planned.
  20. The child seeks to remove his hearing aids on occasions which can be detrimental to his learning, communication and social opportunities. This has previously been noted to take place within the assembly hall at School B. The acoustics within that area are poor. The child's resistance to increased levels of noise may be an explanation for this. The child is noted however to also remove his hearing aids within other environments, including home, the classroom and outdoors where noise levels are less and the acoustics are much better.
  21. On around 27 June 2018 the appellant wrote to the respondent requesting that the child be placed at School C ("the specified school"). The managers of the specified school are willing to accept the child as a pupil. School C is a Grant Aided Special School (GASS) providing an individualised focused education to differently abled children and young people aged 5-18 whose main barriers to learning are communication difficulties arising from various additional support needs such as autism and deafness.
  22. School C offers a total communication environment. Many staff at School C are qualified BSL users (including one native deaf BSL user) - including senior management, teaching staff, support staff and speech and language therapist

23. It is a matter of agreement amongst all professionals who have had the opportunity of observing and working with the child that it remains unclear as to his cognitive ability to learn new skills. Whilst he has evidenced the ability to learn some single BSL signs, he has not evidenced any capacity to learn BSL syntax and grammar in order to use BSL as a language.
24. The acoustic properties of School Care purpose designed to maximise deaf peoples' access to speech. The staff at the specified school are experienced in the education of children with dual diagnoses of hearing loss and autism. The specified school has other children who use sign language.
25. The child's ability to learn BSL signing will continue to be reviewed actively within School B by the respondent. In the event that he is deemed to be capable of learning more BSL then additional provision will be provided. Such additional provision could even include the making available of a full-time BSL 1:1 personal support assistant in the classroom. The respondent is significantly committed to meeting the child's needs as assessed on an ongoing basis.
26. School C has a total current pupil roll of ten. There are no other pupils of a similar chronological age to the child. He would have no immediate peer group. The ten attending pupils at School C comprise three secondary age children and seven children who are a mix of 10 and 11 years of age. Those seven children are at the early level of the national curriculum. Three of those children have a similar profile to the child's in that they have a dual diagnosis of deafness and autism. They each use BSL but are at different levels from one another.
27. School C recognises the importance of pupils being part of a peer group. This is currently a recognised problem at School C which they are seeking to tackle. It is planned to have meetings with local primary schools to work in partnership where pupils from School C and other primary schools who may benefit from some of the provision provided at School C to mix. This proposal is at a very early stage and there is currently no indication as to whether such working partnership will come to fruition. School C currently has two other applications for admission from younger children of a similar age of the child. Such applications are at a very early stage. The profiles of those children are unknown.
28. None of the staff at School Care qualified or have significant knowledge of SignALong which is part of the Sign Supported English (SSE) communication model principally used by the child and from which he is currently benefiting. A limited number of staff are trained and utilise PECS which the child uses.
29. Children in Scotland have the right to be taught by qualified teachers registered by the General Teaching Council for Scotland (GTCS) for 25 hours per week. The provision proposed for the child at School C would fall far short of this entitlement. Based upon School C's assessment of the child a suggested timetable has been produced which offers the child a total of around 4 hours a week only of teaching by a GTCS registered teacher. Significant reliance is placed upon early years practitioners. Literacy and numeracy are taught by such early years practitioners.

30. The suggested timetable prepared for the child by School C incorporates a single 45 minute session of speech and language therapy a week and a single 45 minute of 1:1 BSL teaching each week.
31. The appellant and the child's father have enrolled in a family BSL 3 hour course run by Deaf Action so that they, the child's older sibling (aged 8) and the appellant's own mother can continue to learn BSL.
32. The additional cost to the respondent of the child's continued placement at School B is nil. The additional cost for transport is £4,066 per annum (calculated at £53.50 per single journey, times two journeys per day, times 190 school days, divided by 5 children).
33. The cost of a place at School C to the respondent is £32,303 per annum. The cost of transport to School C would be £25,650 per annum (calculated at £67.50 per single journey, times two journeys per day, time 190 school days). The total cost of such a placement to the respondent would be £57,953.
34. The difference in cost to the respondent of placing the child at School C compared with maintaining him at School B is £53,887 per annum.

## **6. Reasons for the Decision**

- 6.1 The tribunal considered all of the evidence and was satisfied that there was sufficient evidence available for the tribunal to reach a fair and fully informed decision on the reference.
- 6.2 The tribunal has carefully considered all of the available evidence which includes all paper documentary productions and the oral evidence of the witnesses. The tribunal has also had regard to the written and oral submissions made by the parties representatives.
- 6.3 This placing request reference is an appeal in terms of Section 18(3)(e) of the Education (Additional Support for Learning) (Scotland) Act 2004.
- 6.4 In terms of Section 19(5)(a) of the Act the tribunal may confirm the decision of the respondent if one or more of the grounds of refusal specified in paragraph 3(1) or (3) of Schedule 2 of the Act exists *and* in all the circumstances it is appropriate to do so. This requires the tribunal to apply a two stage test if a ground in paragraph 3(1) is found to be established. The tribunal firstly requires to establish whether the respondent has established any of said grounds of refusal.
- 6.5 The placing request was made in writing dated 27 June 2018 (R126). The respondent acknowledged the request and indicated that a decision would be given by 28 August 2018 as they were obliged to do. They failed to do so. The respondent was under an obligation within 2 months to determine the placing request as required by the Additional Support for Learning (Placing Requests and Deemed Decisions) (Scotland) Regulations 2005. The respondent failed to adhere to this timescale and accordingly the Placing Request refusal was a deemed refusal.

- 6.6 The respondent did ultimately carry out a full and careful consideration of the placing request at a Case Management Review Group (CMRG) on 15 October 2018. Enquiries were made in advance of this meeting about the child's needs and how these were being met at School B to inform those who were to make a recommendation on the placing request. Following the meeting an email was sent to the appellant advising that the respondent had refused the placing request. The recommendation and advice of the CMRG was accepted by the respondent's parenting pupil support manager who is the relevant decision maker of the respondent. The reasons provided also indicated the legal basis upon which the placing request was refused. The respondent relies upon two separate grounds to refuse the placing request.
- 6.7 Firstly, the respondent relies upon the terms of paragraph 3(1)(d) of Schedule 2 of the Act. This statutory exception would apply if the child does not have additional support needs requiring the educational special facilities normally provided at School C.
- 6.8 Secondly, the respondent seeks to rely upon the terms of paragraph 3(1)(f) of Schedule 2 of the Act. If this statutory exception were not to apply then the respondent is bound to comply with the appellant's placing request and place the child at School C.
- 6.9 The burden of proof in establishing any of the exceptions contained within paragraph 3(1) of Schedule 2 rests with the respondent.
- 6.10 The tribunal relies upon the detailed Findings of Fact which are earlier set out in this Decision. The tribunal's decision is based upon these findings.
- 6.11 The tribunal found all of the witnesses who gave evidence to be credible and reliable sources of evidence. The tribunal found that everyone had the same common aim to seek to identify and prioritise the child's needs in terms of his educational learning.
- 6.12 The tribunal attached significant weight to the opinion evidence of the respondent's witnesses who in the conclusion of the tribunal have a good knowledge of the child given their working relationships with him and their relevant experience. Their opinions were evidence based and relate to their own and their colleagues experiences of working directly with the child and observing him in his current educational setting since August 2018.
- 6.13 Prior to the appellant making the relevant placing request which forms the substance of the appeal before the tribunal and prior to the CMRG of the respondent considering and reaching a decision on the placing request, the respondent's parent and pupil support manager, the respondent's representative, wrote to the appellant by way of email dated 25 May 2018 (found at page A1 of the bundle) and *inter alia* stated "You may make your own enquiries to School C- if the managers at the school offer you a place, you may then make a placing request to the respondent for School C, but any such placing request *would be* refused because the respondent believes your son's needs can be met at School B or School D." (emphasis added by the tribunal).



- 6.14 The phraseology of the respondent's representative's email is rather unfortunate. It certainly, on the face of it, indicates that the respondent's determination of any future placing request made by the appellant for the child to be placed at School C would definitely be unsuccessful. The tribunal had careful regard to the evidence of the respondent's witnesses, including Witness F who was a member of the CMRG who discussed the child's case. The tribunal was wholly satisfied that there had been no prejudging in practice by those professionals involved in the relevant decision-making and that the decision-making was not accordingly flawed nor void. They knew not of the respondent's representative's offending email at the time of them discussing the child and his educational needs and how they can best be met. The recommendation and advice was firmly based on plentiful sound evidence. In the course of his oral submissions the tribunal noted the apology given by the respondent's representative to the appellant and her family for his choice of words. It was clear that he recognised that the terms of his email had been inappropriate.
- 6.15 The tribunal had little difficulty in concluding that the respondent's reliance upon paragraph 3(1)(d) of Schedule 2 of the Act is unfounded and has no merit. The child has additional support needs requiring the type of educational special facilities normally provided in School C. This is self-evident from the facts found by the tribunal. The child has a dual diagnosis of hearing loss and autism. School C as a matter of fact do provide special educational facilities for pupils with such a profile. The respondent's representative submitted that this ground is met on the basis that the child's needs can be met elsewhere, namely at School B. He also submitted that ground 3(1)(d) is superfluous and should be repealed by legislation because this ground would always be established from establishing the ground contained in paragraph 3(1)(f). This is a rather bold and unfounded submission in the view of the tribunal. There may be cases where paragraph 3(1)(d) is relied upon in isolation. The reality is that the child has a profile which is in keeping with the profile of those who can have their education needs met at School C. The fact that the child's needs can be met elsewhere does not by implication mean that School C does not provide the type of educational provision which is provided at School C which is the specified school.
- 6.16 The more controversial aspect of this appeal is whether or not the respondent has established all four of the components of paragraph 3(1)(f) of Schedule 2 of the Act are met.
- 6.17 There are four conditions contained within paragraph 3(1)(f) of Schedule 2 of the Act. All of these require to be established. It was a matter of agreement between the parties that paragraphs (i) and (iv) were not at issue. The substance of these are (paraphrasing used):-
- (i) The specified school, is not a public school.
  - (iv) The Authority have offered to place the child in a school or maintain the child's school place; either being under their management, which meets the needs of the child.
- 6.18 School C is not a public school. The respondent has offered to place the child within School B where he currently attends.

- 6.19 School C have made a clear offer to accommodate the child for his education. The letter confirming this issued by the School C Trust which is dated 25 June 2018 is found at page T13 of the bundle. This offer remains open.
- 6.20 The contentious components of paragraph 3(1)(f) are subsections (ii) and (iii) which are in the following terms:-
- (ii) the authority are able to make provision for the additional support needs of the child in a school (whether or not a school under their management) other than the specified school,
  - (iii) it is not reasonable, having regard both to the respective suitability and to the respective cost (including necessary incidental expenses) of the provision for the additional support needs of the child in the specified school and in the school referred to in paragraph (ii), to place the child in a specified school.
- 6.21 The tribunal initially focused on identifying whether or not the respondent is currently making adequate provision for the additional supports needs of the child in School B. The tribunal concluded with little difficulty that this is in fact the case.
- 6.22 The tribunal was highly impressed by the extent of the commitment and the efforts made by School B and their professional partners, including the Deaf Support Team and Additional Support for Learning Team at large as to how they have prepared and delivered the child's education to date. The child was not on the respondent's radar at all until early 2018 and it was somewhat later identified that he would be placed at School B after conclusion of his nursery education. Strenuous efforts were made in the short timescale allowed, including work undertaken over the school summer holidays of 2018, to prepare for the child's commencement at School B. Adaptations were immediately considered and deployed.
- 6.23 It is clear that on a constant ongoing basis the child's needs have been reviewed since August 2018 and the specific provision made for his education and in particular provision for his communication has been considered and adapted.
- 6.24 The tribunal is satisfied that staff at School B do have a good understanding of children with a dual diagnosis of both autism and deafness. The fact that their pupil population does not consist wholly or mainly of children with such a profile does not mean that they are inadequately trained or lack the requisite knowledge required to meet the child's needs. The tribunal did not consider that the lack of past experience of working with children with a dual diagnosis of both autism and deafness is of itself a material issue. The tribunal was satisfied that the staff at School B and those other members of the respondent who make provision for the child within School B have the required knowledge to meet the needs which arise from both components of his diagnosis. This includes the combine effect of both conditions of autism and deafness together.
- 6.25 The tribunal is wholly satisfied that Witness F the head teacher at School B has a wealth of relevant experience and knowledge which is of benefit to delivering the child's education. The tribunal is also satisfied that all relevant staff working with the child are acutely aware of his needs and how to deal with those needs. The

school has adopted a flexible approach, working closely with specialist services, including Speech and Language Therapy and the Deaf Support Team, to proactively identify and meet the child's needs. All relevant staff have been trained specifically to meet the child's individual needs. To an extent a tailored package of support has been created and is maintained and is reviewed.

- 6.26 The staff at School B are aware as to the wishes of the child's parents to include the use of BSL as part of his communication. These wishes are respected in the delivery of the child's education by the respondent.
- 6.27 Much time was spent in the tribunal in identifying from witnesses whether BSL comes in two forms - firstly as a language in its own right with syntax and grammar and secondly as a diluted version utilising BSL signs only. Different witnesses gave different answers. This is not an uncommon approach amongst professionals and practitioners within various disciplines.
- 6.28 The tribunal is mindful and aware that British Sign Language in the formal sense was recognised as an official language by the Scottish Government in 2011. The British Sign Language (Scotland) Act 2015 seeks to promote the use of BSL and requires the preparation of BSL plans by Scottish Ministers and "listed authorities", including the respondent. The respondent's BSL Plan 2018-2024 (R112) incorporates the long-term goal for all Scottish Public services set out in the BSL National Plan which is to the effect that children and young people who use BSL will get the support they need at all stages of their learning, so that they can reach their full potential; parents who use BSL will have the same opportunities as other parents to be fully involved in their child's education; and more pupils will be able to learn BSL at school.
- 6.29 Ultimately the opinion of the witnesses as to whether there are two forms of BSL or what this comprises does not matter for the purposes of this decision. What is undoubtedly the case is that the child does not have the cognitive learning capacity at this stage to learn BSL syntax and grammar. Witness E was very clear that this is the case and her opinion is based upon a detailed understanding of the child's progress and learning to date within School B. Her opinion was soundly evidence based. The child remains signing at a single sign level.
- 6.30 The difference in interpretation of what BSL incorporates by the various witnesses whom the tribunal heard from led in the tribunal's view to differing opinions being offered as to the benefit of the child being placed within a "BSL environment" which were expressed firstly by Witness E and thereafter by Witness B. Witness E was very clear that it would be adverse to the child's interests to be immersed in a BSL environment as he would be unable to benefit from this. This could ultimately lead to his regression as he would stop having opportunities of using the other communication which he uses and under the umbrella of sign supported English, including SignALong and the use of BSL signs. The tribunal is satisfied that when Witness B was asked about the benefits of the child being taught in a BSL environment and her response being that it absolutely would be beneficial to him she was talking about BSL in its widest sense, including BSL signs. Additionally, she qualified her evidence by indicating that frankly no one knows at this stage whether or not the child has the capacity to learn anything beyond single signs. Witness B stated such exposure would be beneficial if and only if the child has the

capacity to develop BSL as a language and it is in the tribunal's conclusion given the Findings established that he does not currently have such capacity.

- 6.31 The other difference in opinion expressed between Witnesses B and E related to the fact that Witness Bs indicated that the child would benefit from being able to absorb knowledge about BSL signing from the environment of a BSL community. The tribunal concluded otherwise and did not attach significant weight to the view of Witness B in this respect. The tribunal decided it was unlikely to be of any benefit for the child due to his cognitive ability at this stage and the nature of his dual diagnosis. Witness B's knowledge of the child is understandably restricted. She had an initial meeting at home with the child with his parents present. She subsequently carried out a further period of assessment with a colleague. Thereafter a colleague of hers has worked with the child twice. Her knowledge of the child is therefore somewhat restricted. She has had no opportunity of observing the child in his learning environment. She has had no opportunity to discuss the child with the teaching staff or other professionals involved with the child. It is recognised that she had access to various reports prepared by professionals but this is not the best source of evidence.
- 6.32 The tribunal concluded ultimately that it would be purely speculative to conclude that the child will either be able to learn BSL as a language or benefit from being within a BSL environment. There is insufficient evidence to support the conclusion that the child would benefit from this. The tribunal was satisfied by the evidence of the Respondent that should the child demonstrate an increased ability to learn BSL as a language then they would put in place the support to allow him to do so. The submission made on behalf of the appellant that since the child was non-verbal then it makes no sense for him to be educated in an environment where spoken English is used does not provide any greater support to the proposal that the child be placed at School C. He does have some workable hearing. An environment where the spoken word is also used is what the child is accustomed to. There is no justification for changing the dynamics of such an environment.
- 6.33 It is clear from all the evidence that whilst the child is learning at a single sign level that he requires significant overlearning in terms of repeated hours to learn single signs. This taken together with other sources of evidence leads the tribunal to the conclusion that there is very little prospect at this stage of the child's learning to be in a position to absorb the benefit which could be gleaned from being a peer group with those who use BSL. He has developmental regression. At the age of 2, the child's parents arranged for private speech and language therapy and for the input of a specialist service (Auditory Verbal) to concentrate on the spoken word. A year's worth of direct support led to no progress being made with the ultimate advice being provided to the child's parents that he requires a total communication approach. This is what he is being delivered with at School B. It is recognised that the child will use a combination of two signs and has one string of three signs which he has used on limited occasions (more biscuits please). The third sign "please" adds nothing to a communication exchange. Additionally many of the signs understood by the child whilst functional in nature are used as basic command or informative signs.
- 6.34 It was suggested on behalf of the appellant that the child is likely to become confused as a consequence of using SignALong signs in tandem with BSL signs.

The tribunal concluded otherwise on the basis of the evidence. SignALong signs are based on BSL signs. In the main there is little difference between them. The child is at a very early stage of learning signs and is at single sign learning. He is able to use such signs when working 1:1 with a communication partner. He is most unlikely to pick up any marginal differences in the manner in which signs are commonly and practically used in these two systems. There will be no impact upon his understanding or future learning.

- 6.35 Whilst it is recognised that the child can make progress and has made good progress at School B, the progress is very slow. This is not a negative conclusion as his progress is steady. He has progressed generally to a PECS level 3 but still requires direct input from a communication partner.
- 6.36 The tribunal is satisfied that the physical environment at School B does not interfere or hinder the child's learning. A number of adaptations have been made at School B. Further adaptations are anticipated. It is perhaps unfortunate that the Woolly Cloud sound absorbers cannot currently be installed. It does not appear likely that they will be. However, even in their absence, the classroom environment itself is one within which the child's acoustic needs can be met. Whilst he has been seen removing his hearing aids in the less acoustically friendly environment of the assembly hall which is a standard reaction for hearing aid users in acoustically less favourable environments there is no clear indication that this is the significant aggravating factor and, indeed, the child removes his hearing aids in very quiet environments i.e. home and also in acoustically desirable environments i.e. outside. The school are proficient in reinserting the earphones and tubing. The school has made reasonable adjustments to accommodate the child throughout the course of each day at School B recognising his individual needs. His learning environment is a good environment for him.
- 6.37 The tribunal concludes clearly that the child does not yet have the capacity to form a deaf identity. He does not have the capacity to identify other hearing aid users. There is no detriment to him by being the only hearing aid user in his current composite primary class of eight pupils in total. He benefits from being part of this peer group.
- 6.38 As a matter of fact, the tribunal is clear that School B does meet his needs. The provision at School B is not nearly or barely adequate in the tribunal's view, but much more than this. Reference is made to the entirety of the tribunal's findings in fact. Within School B, the child is receiving his full entitlement of 25 hours teaching time by GTCS (General Teaching Council for Scotland) staff. This would not be the case at School C. The tribunal would have reservations about granting a placing request requiring the respondent to place the child at School C even in the event that the tribunal had found that School B were not meeting his needs.
- 6.39 The tribunal is also concerned by the proposed timetable offered by School C for the child. It is recognised that this would require to be reviewed in the event of the placing request being successful. However, it is noted that it comprises little more direct speech and language therapy work a week and, indeed, little more if any of 1:1 BSL teaching each week.

- 6.40 The 1:1 BSL teaching each week at School C would be a 45 minute block. The tribunal is not satisfied that the child would have the ability to benefit from such a long period 1:1 teaching. Shorter sessions are more beneficial for him as he cannot concentrate for as long as 45 minutes. The current 1:1 sessions which he has provided by the respondent are up to 30 minutes, but in practice last for some 20 minutes due to the restricted attention span of the child. This is an appropriate period of time to be provided with such teaching. It is likely that the child will be provided with two blocks of such 1:1 teaching each week for up to 30 minutes which is better than that being offered by School C.
- 6.41 Reliance was placed on behalf of the appellant regarding the pressures and demand upon specialist staff across the Authority. Reference was made to the fact that Witness E had a period of absence in late 2018 for medical reasons and her post was not covered. The tribunal heard however that BSL nursery nurses do cover for one another. The tribunal heard from Witness E that it was unlikely that there would be a gap in provision for the child. On the third day of the hearing, the tribunal heard from parties in agreed terms that the BSL nursery nurse who provides input on a 1:1 basis to the child was absent throughout the week 14-18 January 2018. The tribunal also heard that Witness E had worked in collaboration with the child's class teacher to provide specific BSL support in that week. This evidences the commitment which the respondent have to the provision for the child and reinforce the tribunal's view that the child is unlikely to be deprived of the opportunity of learning BSL as timetabled by the respondent. The tribunal was also provided with up to date accurate information that throughout that week in January the child had again only tolerated learning in that context and maintained attention for some 20 minutes, albeit that the session provided could have been for longer.
- 6.42 The tribunal is concerned as is School C and the child's parents about the lack of a peer group for the child at School C. School C are seeking to address the difficulty which exists given that their total pupil roll is 10 and that their youngest child is currently 10 years of age. Steps have been taken to seek to link with and work in partnership with local state run primary schools but any such working partnerships are at a very early stage and there is no agreement yet in place. Additionally whilst there are two other applications currently being processed to School C for children of a similar age to the child these are at a very early stage and it cannot be said that there is any likelihood that those other children will be placed at School C. The tribunal does not require to hear expert opinion evidence to conclude that it is of benefit to the child to be part of a school peer group with those who are at a similar age and stage of development as he is. It is submitted on behalf of the appellant that the "educational provision" could not include reference to a peer group as this was not being specifically provided for by the respondent. The tribunal concludes otherwise. The existence of the peer group is a material factor of relevance and forms part and parcel of the overall provision available and operated by the respondent.
- 6.43 The tribunal noted from the appellant that she is less concerned about the peer group issue though it is clear that she has been significantly concerned to date. She articulated this on the basis of the proposed working partnerships with local schools and the possible admissions of the two other children. It cannot however be said that these are likely events currently. She additionally referred to the child being engaged with other children, including his brother, neighbours' friends in the

community and the children at the Yard where the child attends. The tribunal concluded however that these social relationships are no substitute for a good peer group at school. The child benefits from an existing peer group at School B which he has established over a number of months. The tribunal concludes that it would be unfair and adverse to his interests to remove him from this environment which he is clearly benefiting from. The child is enjoying his current school educational placement at School B and looks forward to attending school there. Although no attempt was made to garner the child's views as this would not have been possible, the tribunal was satisfied that the child is happy and contented at School B. There is no evidence of distress.

- 6.44 The respondent in the reasons for refusal of the placing request relied significantly apparently upon the transportation issue for the child and in particular on the basis that the length of journey time would be significantly more. The facts on this are that as the school day finishes at 3.00 pm the child can be as late at 3.25 pm by the time that he is actually transported away from the school due to the number of taxi services which are used. Throughout this first 25 minutes, he is however in a classroom setting and not undertaking a journey as such. It does mean that from finishing school to returning home can be a 45 minute period. This, of course, is of a broadly similar amount of time to the total journey time which would be involved if the child was to travel from home to School C and vice versa. Although not forming part of the tribunal's reasons for refusing a placing request, it is worthy to pass some comment about this issue which was clearly in dispute between the parties. There have been issues throughout the transport period for the child journeying back and forth from School B. Improvements have however been noted and the former difficulties with him biting and pinching appear to have lessened and have possibly ceased. He is one of a number of other children being transported and again throughout the journey period is part of a peer group which is probably beneficial to him. Whilst the appellant indicated that the child in his home life often undertakes very lengthy journeys (both to the Highlands and to Germany) these are not routine day to day experiences for him. It is better for the child to have shorter journeys because he clearly can find frequent short journeys distressing. The 45 minute daily journey both to and from School C would be a significant increase for him and he would be travelling alone which he may well find more difficult. It would be yet another new routine or the child to have to become accustomed to.
- 6.45 The tribunal's reasons which are fully set out for finding that the respondent reached the correct decision in refusing the placing request, do not mirror the respondent's reasons as detailed within the decision email issued to the appellant. That however is irrelevant. A full review has now been undertaken by the tribunal who have had the benefit of the fullest of information and opinions in relation to the child.
- 6.46 On the basis of the tribunal's findings and for the reasons which are set out, the tribunal finds that the respondent is well able to make provision for the additional support needs of the child at School B. The only upside of a placement at School C would be the physical environment there which is superior but the environment at School B is fit for purpose and is adequate in meeting the child's own additional support needs. There are as earlier set out a number of issues at School C which in the view of the tribunal would be less favorable to the child and be less suited to his needs. These factors significantly outweigh this limited potential benefit. It is

accordingly not reasonable having regard to the respective suitability and respective costs of the provision for the additional support needs of the child in the two schools that the child be placed in the specified school. It would be unreasonable to incur £53,887 per annum of public money in such circumstances.

- 6.47 The tribunal finds that all four conditions of paragraphs 3(1)(f) are met. Accordingly the tribunal proceeded to consider the second stage of the relevant test and thereafter having reviewed the totality of their findings of fact and their aforementioned reasons, came to the conclusion that it is in all of the circumstances of the child's case it is appropriate to confirm the decision of the respondent. The issues surrounding the child's peer group at School B and the issue of his transportation back and forth from the two relevant provisions comparatively are factors relevant for this second stage consideration in the event that they are not relevant to the first stage of the tribunal's decision-making. For the avoidance of doubt those two factors if not relevant for the first stage of the tribunal's decision-making would not negate from the tribunal's other strong reasons for finding that all of the relevant conditions of paragraph 3(1)(f) are fulfilled. There are no reasons in existence not to confirm the decision the respondent having found that all relevant provisions of paragraph 3(1)(f) are fulfilled.
- 6.48 The tribunal is satisfied that the Education Authorities deemed decision and their own Decision complies with and takes account of:-
1. Supporting Children's Learning: Statutory Guidance on the Education (Additional Support for Learning) (Scotland) Act 2004 (as amended), Code of Practice (Third Edition) 2017.
  2. All duties falling upon the respondent including those duty specified within section 4 (1) (a) of the Education (Additional Support for Learning) (Scotland) Act 2004, as amended to make adequate and efficient provision for the child's additional support needs.
  3. The United Nations Convention on the Rights of the Child (UNCRC).
- 6.49 The tribunal is satisfied that there has always been and continues to be a very positive and warm relationship between the child's parents and School B and the wider set of professionals who provide support to the child in that educational placement. This is not a case where in the context of a placing request being made, a child's parent or parents have become entirely dissatisfied with the educational provision currently being provided.
- 6.50 The tribunal was of the view that the appellant and the child's father have been well motivated by seeking to have the child placed in a school which they genuinely have felt would best meet his needs and provide him with the best opportunities. They will both, no doubt, be bitterly disappointed by the decision of the tribunal, but can take considerable comfort in the knowledge that a wholly impartial independent decision-making body has carefully analysed and reviewed all of the relevant circumstances and concluded that not only has the relevant law being properly applied, but that it will best serve the child's interests to remain at School B, at least for the foreseeable future.



- 6.51 In the event of a material change of circumstances and in particular if at a point in the future it is evidenced that the child can benefit from the alternate educational provision available at School C then there would be merit in a further placing request being made.