

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AC/23/0197

Witness List:

Witnesses for Claimant:

Deaf Education Pathway Coordinator, University of Edinburgh (witness A)

Youth Service Coordinator, Deaf Action (witness B)

Teacher of the Deaf (witness C)

Mother of claimant (witness D)

Witnesses for Responsible Body:

Pupil Support Assistant (witness E)

Teacher of the Deaf (witness F)

Principal Teacher Support (witness G)

Educational Audiologist/Team Manager (witness H)

Word meanings: In this decision the following phrases or abbreviations are used

Technical Guidance	Technical Guidance for Schools in Scotland, <i>Equality and Human Rights Commission</i> (2023)
2010 Act	Equality Act 2010 (all section references are to this Act unless specified otherwise)
2004 Act	Education (Additional Support for Learning) (Scotland) Act 2004
Code of Practice	Equality Act 2010 Statutory Code of Practice
UNCRC	United Nations Convention on the Rights of the Child
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
BSL	British Sign Language

BSL Toolkit	British Sign Language (BSL) Toolkit for Practitioners (2022)
SCQF	Scottish Credit and Qualifications Framework
Hz	Hertz (the unit of measurement for frequency)
dB	Decibel (the unit used to measure sound intensity)
ToD	Teacher of the Deaf

Claim

1. The child is the claimant. The claimant relies on two forms of discrimination under the 2010 Act, a failure to make reasonable adjustments and indirect discrimination.

Decision

2. We do not find that indirect discrimination has occurred. We do find that the responsible body has unlawfully discriminated against the claimant in terms of Part 6, section 85(2) (a), (b), (d) and (f) by failing to make reasonable adjustments, in terms of section 85(6), Schedule 13, para (2) and section 20(5) of the 2010 Act. The responsible body is ordered to:
 - a) Make a formal statement that discrimination has occurred during her time in S4.
 - b) Apologise to the claimant in writing, that apology being written in compliance with SPSO's guidance on apology, within 2 weeks of this decision.
 - c) Make provision for the claimant of the following auxiliary aids or services:
 - (i) BSL support in National Qualification classes at interpreter qualified level. To be identified by the claimant in discussion with the school and timetabled into agreed classes.
 - (ii) Weekly timetabled support from a qualified ToD throughout her senior phase of school (S5 and 6). To take place at a time or times agreed by the claimant in discussion with the ToD.
 - (iii) access to the Deaf Base outwith timetabled teaching time and as needed.

Process

3. A case management call took place in February 2024. Following this, witness statements were prepared; a joint minute of agreed facts and outline written submissions were lodged. Final submissions were lodged after evidence was heard. These can all be found in the bundle, along with other written evidence. The bundle is numbered T001-093, C001-122 and RB001-376.
4. A request was made by the responsible body to postpone the hearing on 22 April 2024 following the unexpected absence of the original solicitor. This was refused for the reasons set out in the direction dated 23 April 2024. This can be found at T053. The conclusion was that any possible prejudice caused to the responsible body by proceeding was outweighed by what would be considerable prejudice to the claimant.
5. Following the President's Guidance on *The Child, Young Person and the Hearing*, questions for the claimant were agreed by the tribunal and representatives and asked by one tribunal member who is a specialist in speech and language. These can be found at T056.

Findings in Fact

6. At the time of making the claim and the hearing, the claimant was 15 years old.
7. The claimant was born deaf. She has a bilateral, moderate mixed form of deafness (she was born with sensorineural deafness and has developed a permanent conductive loss over the years). The claimant's hearing threshold is at an average of around 64dB. At certain frequencies, it is as low as 70dB. Her hearing loss fluctuates, and can be exacerbated by ear infections, ill health or seasonal allergies [C097, Claimant; C082, Witness D; C056, Witness A].
8. There are four categories of deafness used by the British Society of Audiology, National Deaf Children's Society and the Scottish Government when collecting data as part of the Record of Deaf Children. This is mild (21-40dB), moderate (41-70dB), severe (71-95dB) and profound (>95dB), taken by calculating the average thresholds over the frequencies 250, 500, 1000, 2000, and 4000 Hz by dividing the total by 5 [T047, Joint Minute].
9. The audiograms provided by NHS Audiology [C040-041] provide an accurate measure of the claimant's hearing loss at the dates they were conducted. The latest test results show a right ear average threshold of 61dB (moderate) and a left ear of 57dB (moderate). There is a single point on the left audiogram at 70dB. There are two points on the audiogram at 50dB and one at 45dB. Single points are not used to calculate the category of deafness [RB263, Report of NHS Audiology; T047, Joint minute].
10. The claimant was not born into a deaf family and the language at home is not BSL, although her family are making efforts to learn and use BSL. Spoken English is the language she was exposed to during her formative years [T047, Joint Minute].
11. The claimant's first referral to the responsible body's Deaf Support Service was at the point of transition to nursery education (around November 2011).
12. The claimant uses hearing aids. She was first provided with hearing aids by an NHS paediatric audiologist in November 2011, when she was 3 years old.
13. The claimant previously wore two hearing aids and now wears one or two hearing aid(s) at school in certain subjects such as maths and chemistry. In other contexts, she wears one hearing aid or none. Even when aided, she often misses what is being said, especially in noisy environments like a classroom. She relies heavily on lip-reading. She finds communication by way of BSL easier. BSL is her chosen method of communication [C098, Claimant; C082, Witness D].
14. NHS audiology have recently (January 2024) adjusted the claimant's hearing aid for unilateral (one ear) as opposed to bilateral (both ears) use.
15. The claimant attends Deaf Action (a charity for deaf people) fortnightly and has done so since the age of 10 years, which she enjoys. They provide many services, including counselling, youth services, interpreting and a place for deaf people to come together as a community. This provides the claimant with the only social interaction she has outwith school with a deaf peer group [C043, Witness B; C076, Witness D].

The school

16. The claimant is (and was at all relevant times) a pupil at the school, which is a mainstream school managed by the responsible body.
17. Spoken English is the language used across the school. Pupils do not get to select their language to access the curriculum. The school provides access to the education curriculum for pupils using their first language, which they have determined to be spoken English for the claimant [RB300, Report of Witness H].
18. The school has a specialist provision for deaf pupils, which includes access to ToDs who provide BSL support, and access to the Deaf Base which is located at the school. Access to BSL support is provided where the pupil is unable to access the curriculum by any other means [T052, Joint Minute].
19. Access to the Deaf Base requires an application by the school to the Area Management Group. Pupils with a higher level of need attend the Deaf Base. The claimant does not want to attend the specialist provision at the Deaf Base but wishes access to the room. The room is used for teaching and non-contact time by teachers. Pupils do not currently use this space as a drop-in area [RB325, Witness H].
20. The school classrooms provide natural amplification of speech clarity by +9dB (STI of 0.9, which is considered excellent). Soundfield systems technology is installed in the claimant's classes to increase the quality of the sound, which has the effect of reducing the level of noise and increasing the level of speech. This helps make listening in noise easier as the amplified voice of the teacher is acoustically different to the unamplified voices of the pupils. These measures are less effective in a busy school or classroom environment, and essentially ineffective when the claimant is unable to use her hearing aids [C029, Focused Support; C032, Support Strategies in Class; C034, Report of Witness A; C042, Head of Audiology; C076, Witness D; C094, Claimant; Joint Minute, T047]
21. Many factors may influence a child's ability to hear effectively at all times should they have hearing loss, even when aided appropriately. Background noise, room acoustics, attentiveness, language levels, lighting for lip-reading, tone and pace of speaker and cognitive ability will also be important [C042, NHS Head of Audiology].
22. The claimant has Roger X receivers attached to her hearing aids, which provide a direct input from the Roger pen microphone used by the teacher and can also be used at home.

Language and BSL

23. BSL became a recognised language in Scotland in 2015. There is an obligation on public bodies to promote BSL, in terms of the *British Sign Language (Scotland) Act 2015* and the National BSL Plan. The responsible body in partnership with NHS Fife has prepared a statutory BSL Plan [RB050].
24. All languages are multimodal. For spoken English this involves the use of lip-reading, gesture and the spoken word. Those who are hearing and deaf use a combination of visual and auditory clues to help comprehend communication. Around 80% of communication and comprehension is non-verbal. Deaf and hearing people merge

auditory and visual information into a unified percept, a mechanism called audio visual integration (**AVI**) – this is where visual input can override auditory input. An example of this is lip-reading, which provides multi-channel communication when the claimant can incorporate AVI [RB290 and 296, Report of Witness H].

25. The claimant has a positive deaf identity. She is bilingual, spoken English is her first language, but BSL is her chosen language. She began learning this from the age of 6 years. The claimant's mother has undertaken BSL training to Level 2. The claimant's father and sibling have completed Level 1 and are currently completing Level 2.
26. The claimant has recently completed BSL Levels 1 and 2 and she can use BSL at a level above this. The claimant uses BSL socially with her deaf friends. Given her BSL skills, the claimant would understand an educational interpreter well in school classes [C043, Witness B; C067, Witness A].
27. The responsible body's BSL support is targeted at those pupils who are unable to access the curriculum by any other means and not to those who have spoken language as a first language, who then choose BSL as their preferred language [RB007, Responsible Body Case Statement]
28. The staff employed by the responsible body to provide BSL support (ToD) are not interpreters [T051, Joint Minute]. They are trained to BSL Level 2.
29. The claimant interacts with school staff using spoken English because they do not use BSL. BSL is easier for the claimant to use in a noisy situation, which means it is less likely to cause fatigue. She has the potential to use a wider range of languages in the classroom to access the curriculum [C059, Witness A; RB149, Minute of Family Meeting]

School supports

30. The responsible body categorises the allocation of support for pupils into the following [RB070, Allocation of Support]:
 - a) *Universal*: support all known deaf learners receive - other types of support are in addition to the universal package.
 - b) *Focused*: periods of intensive support where there is a specific need identified relating to a pupil's deafness.
 - c) *Intensive*: for pupils who have the highest level of need - those who have significant language delays that mean there are significant difficulties accessing the curriculum.
31. The claimant is given universal support as she is able to communicate using technological support, has access to classroom acoustics and school staff using deaf friendly teaching methods. She has access to lip-reading, transcripts of lessons and is shortly to be provided with digital school resources which have subtitles; and lesson summaries [RB325, Witness H].
32. The claimant received periods of focused support during the run up to her prelims between October - November 2023 [RB336, Witness H].
33. The claimant requested and was refused the following:
 - a) Consistent, regular access to a ToD
 - b) BSL support; and

c) Access to the Deaf Base at the school

34. The claimant has had contact with a ToD since 2020 on a sporadic basis. A ToD meets with the claimant annually and will also provide input on equipment faults or replacing batteries when needed. During 2023 contact included a ToD providing BSL support in some classes, when they were free to do so [RB309, Record of input from ToD]. This did not involve the usual ToD class preparation for subject specific language.
35. The claimant is academically able, however, she performed less well than expected in her prelim exams. **[This paragraph has been changed by the Chamber President to maintain privacy under rule 101(3)(b) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
36. The claimant does not feel safe in school if her hearing is impaired and/or when working in a practical environment. If her mental health and wellbeing, deaf identity and social integration in school is not addressed she is at risk of feeling isolated, withdrawn, unsupported and not listened to [RB254, Child's Plan].
37. Although still attending at school, the claimant did not attend mainstream classes from September 2023 through to January 2024 as she was unable to effectively participate. Not being able to attend classes and being unable to attend the Deaf Base led to her feeling isolated, which resulted in her becoming anxious, upset and tearful. When not in class the claimant was sent to the library. When feeling overwhelmed, the claimant would go home [C085-86, Witness D].
38. A wellbeing meeting took place in October 2023 when it was agreed that additional supports would be given to encourage the claimant back to full time education. This included counselling from a deaf counsellor, which is now complete and a block of focused support for two periods weekly, by a Pupil Support Assistant or ToD in the library, which completed on 22 November 2023 [RB336, Witness H; RB313-314, Record of Input from ToD].
39. The claimant regularly experiences mental fatigue as a result of her difficulties in hearing in class. She regularly goes to bed at 8.30 pm every night which has an effect on her peer relationships [C038, Report of Witness A; C050, Witness A].
40. The failure to provide BSL support means that the claimant is missing things in class and does not know what she is missing. Where she attends classes using spoken English and BSL she gains a fuller picture and finds it less tiring to follow and understand [C094, Claimant].
41. In October 2023 the claimant's mother made a complaint to the responsible body regarding the claimant's education. The complaint included that the claimant:
- a) does not have allocated support from a ToD (apart from an annual appointment); and
 - b) is not provided with BSL support (except where other pupils are absent).
42. The responsible body rejected the complaint in November 2023. In investigating and determining the complaint the Quality Improvement Officer (**QIO**) did not meet with the claimant, despite her offer to do so [C009-010, Email exchange Witness D and QIO].

Reasons for the Decision

General remarks on the evidence – skilled witnesses

43. We heard the evidence of two skilled witnesses. Witness H, the Educational Audiologist, speaks to matters of fact and opinion, which is permissible. Witness A, the independent report provider for the claimant, provides opinion evidence. There are four considerations which govern the admissibility of skilled evidence (1) whether the skilled evidence assists us; (2) whether the witness has the necessary knowledge and experience; (3) whether the witness is impartial in their presentation and assessment of the evidence; and (4) whether there is a reliable body of knowledge or experience to underpin the expert's evidence (*Kennedy (Appellant) v Cordia (Services) LLP* [2016] UKSC 6).
44. Both skilled witnesses are able to assist us to different degrees and both have the necessary knowledge and skills to do so. There are no material discrepancies in their conclusion regarding the claimant's level of deafness. Where they differ is on their impartiality and the reliability of their body of knowledge and experience to underpin their evidence regarding the impact of the claimant's deafness. We prefer the evidence of witness A to that of witness H here for the following reasons.
45. Witness A provides an impartial and balanced understanding of the impact of the claimant's deafness; whereas witness H insists upon the science of deafness and the use of technological aids without factoring in the claimant's lived experience. In short, the voice of the claimant is considered by witness A and wholly discounted by witness H. Witness H insists that the claimant is simply wrong when she reports her own experiences. He characterises much of this as 'hearsay' and has formed conclusions without discussion with the claimant or from assessing her.
46. Witness A accepts the limits of her assessment. She has 25 years of experience as a ToD and she is a senior university lecturer in deaf education. She does not need to be an audiologist to have completed her assessment. She offers concessions where these are appropriate. She considers the science of deafness and the concerns of the claimant. Few concessions are made by witness H. There are many examples of this.
47. Witness H criticises witness A (and the NHS Audiologist) for using the NHS Audiologist's terminology 'moderate-severe' to describe the claimant's level of deafness (which he describes as 'wooly') despite approving its use in the Deaf Service's Focused Support Document [C029]. He refuses to accept it as a common sense descriptive term or to accept that the claimant's threshold levels (at 57dB and 61dB) are closer to the severe end of the moderate range (70dB) than the mild end of the moderate range (41dB), which we accept.
48. Witness H criticises witness A's report for not being carried out in the school and for using a lower level of speech, when the assessment of witness A is intended to evaluate the claimant's language and communication skills, rather than the acoustics at the school. Witness A acknowledges that she does not know the claimant well. She accepts that she cannot comment on the learning environment in the school. She was nevertheless pleased to hear about the acoustic developments. Her report gives examples of a range of conditions and signal to noise ratios. Witness H relies on a 'test battery' approach for assessment. This consists of two elements – overall academic performance, and whether teachers have reported concerns about progress. This does

not include any objective measurement of the claimant's ability to hear in class and the factors which may affect this or her lived experience.

49. Finally, the claimant submits that witness H goes so far as to imply that witness A's report is biased and influenced by the fact that it was instructed for the purposes of a tribunal [RB344]. We agree that this is a very serious allegation to make and one for which no evidence was offered.

General remarks on the legal tests

50. The parties accept, and we agree, that the claimant is a disabled person as a result of her deafness, in terms of section 6.
51. The effect of section 136 is that the burden of proving the case starts with the claimant and, if this is done, the burden shifts to the responsible body.

Reasonable Adjustments

52. Section 85(6) of the 2010 Act places a duty on the responsible body to make reasonable adjustments. In terms of Schedule 13, para 2 of the 2010 Act, the responsible body must comply with the first and third requirements. In relation to the provision of education (or access to a benefit, facility or service), the reference to a disabled person in section 20 (5) is a reference to disabled pupils generally. The reference to disabled pupils generally is a reference to pupils who share the same disability – in this case deaf pupils (section 6(3)).
53. The claimant relies on the third requirement. This is the duty on the responsible body to consider whether disabled pupils generally would, but for the provision of an auxiliary aid (or service), be put at a substantial disadvantage in relation to the provision of education in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid (or service).
54. The responsible body submits that no evidence has been led on the disadvantage to deaf pupils generally and for that reason the claimant has failed to discharge the burden of proof. We do not agree. The evidence of the claimant is that deaf pupils generally, and the claimant in particular, are placed at a substantial disadvantage by the failure to make the reasonable adjustments. There is sufficient evidence for us to be satisfied on this point for the reasons we set out.
55. The duty to make reasonable adjustments requires a school to take positive steps to ensure that disabled pupils can fully participate in the education provided by the school. The duty is an anticipatory one owed to disabled pupils generally (Technical Guidance, paras 6.11 and 6.13). The duty is a continuing and evolving obligation (*Blackstone's Guide to the Equality Act 2010*, 4th ed (2021), para 3.65).
56. There is no definition of 'reasonable' in the 2010 Act, but the Technical Guidance sets out a non-exhaustive list of factors to be taken into account when considering what adjustments are reasonable for a school to have to make (para 6.29). The responsible body refers us to a number of these, which includes the extent to which support will be provided to the pupil under the 2004 Act; the resources of the school and the availability of financial or other assistance; the financial and other costs of making the adjustment; and the interests of other pupils.

57. The claimant submits that she is placed at a substantial disadvantage by the failure to provide the auxiliary aids and services (both individually and collectively). The case studies on reasonable adjustments at para 6.67 of the Technical Guidance approach this by asking three questions, which we set out below.

(1) Is the claimant at a substantial disadvantage?

58. We find that the claimant is at a substantial disadvantage.

59. Substantial means more than ‘minor or trivial’ (section 212). Whether a disabled pupil is at a substantial disadvantage or not will depend on the individual facts and circumstances. The Supreme Court has made it clear that the Code of Practice provides helpful advice as to the relatively low threshold of disadvantage which is sufficient under the relevant provisions of the Act (*Trustees of Swansea University Pension and Assurance Scheme and another v Williams* [2019] 1 WLR 93, para 27).

60. ‘Disadvantage’ is not defined by the 2010 Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that ‘detriment’, a similar concept, is something that a reasonable person would complain about—so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the pupil does not have to experience actual loss. It is enough that the pupil can reasonably say that they would have preferred to be treated differently (Code of Practice, chapter 7; Technical Guidance, para 5.21).

61. A material factor in this case is the failure by the responsible body to fully consider the views and lived experiences of the claimant. The claimant captures this in the question she raises in her National 5 English Assessment, ‘*Why is it always a hearing person who decides what is right for a Deaf person?*’ [C109]. We found her a compelling witness, she was measured and balanced and her evidence was supported by that of witnesses A and D.

62. The claimant has additional support needs as well as a disability. School education includes ‘such education directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential’ (section 1(2), 2004 Act. This follows the provisions at Article 24(1)(b) of the UNCPRD, which also adds ‘creativity’; and Article 29(1)(a) of the UNCRC. The responsible body bases its entire argument on the academic successes of the claimant, arguing that this would not be possible if she was experiencing difficulties with hearing [RB332, Witness H; RB360, Witness G] but this fails to recognise and acknowledge the detrimental impact on her mental and physical health.

BSL support

63. The failure to provide BSL support places the claimant at a substantial disadvantage.

64. The claimant is denied an opportunity for full multi-modal learning. The claimant submits that the provision of BSL support to her prior to her prelims demonstrates an implicit acceptance of its utility. The responsible body denies this. They submit it was provided to alleviate any anxiety the claimant was feeling and not because it would benefit her. This is not in line with the evidence of witnesses C, E and F who delivered BSL support

during this period and stated this was to assist with her prelims because she had been struggling in some subjects.

65. The responsible body relies on the evidence of witness H which is that the use of BSL in classes will have no useful effect and may in fact be detrimental to her learning experience [RB360, witness H]. We are not persuaded that this is the case. We accept the evidence of the claimant and witnesses A and D here. The claimant is a deaf pupil who has learned BSL to the same or higher level as the ToD. She finds BSL helpful, it is her chosen first language. It fills in the gaps in her learning. It reduces the levels of fatigue she otherwise experiences.
66. The claimant submits that the responsible body's position is drawn from mathematical calculations drawn from the abstract rather than based on an assessment of the claimant's actual classroom experience. Witness H was not always able to explain the mathematics he had used to arrive at conclusions. He states in his statement that 'It is important to note that the decibel scale is logarithmic and a 3[dB] difference sounds twice as loud or in this case twice as quiet.' [RB343]. However, having confirmed that 63dB would sound twice as loud at 60dB, he was unable to explain what 66dB would sound like compared to 60dB. He was asked specifically whether an increase of 3dB represented a doubling of sound pressure, and an increase of 10dB would be required for the sound to seem twice as loud. His response was that he was not sure and would have to check that.
67. The claimant feels isolated in her learning. She does not feel heard or listened to. For example, the claimant struggles when the school corridor noise is heightened. Witness G accepts that this can arise, whereas witness H insists that the corridor is only used for pupils attending the toilet and therefore the claimant cannot be experiencing these difficulties. We find this unlikely in a busy mainstream school. We prefer the evidence of witness G and the claimant on this. Witness G was a Guidance Teacher in the school until April 2024. She would have been present in the school on a daily basis.

Teacher of the Deaf (ToD)

68. The failure to provide consistent ToD support places the claimant at a substantial disadvantage. There is some overlap here with BSL as it is the ToDs who provide BSL support and our reasons in relation to the failure to provide BSL support apply here.
69. Witness A suggests that the claimant would benefit from a small weekly ToD time for reassurance and checking she is on the right track with homework or preparation for tests [C072]. The responsible body submits that this role is effectively carried out by the Guidance Teacher. While the claimant appreciates the support of her Guidance Teacher, witness G recognises there were limits to her ability to engage with and support the claimant in relation to her deaf identity and other matters requiring specialist input. The Guidance Teacher can provide what is provided to other non-deaf pupils but not the type of support the claimant needs, which is more than a Guidance Teacher can provide.

Deaf Base

70. The failure to provide access to the Deaf Base places the claimant at a substantial disadvantage.

71. Witness A suggests the claimant would benefit from this. She and witness B refer to the claimant's deaf identity and the importance of being able to interact with other deaf learners and peers. Witness A suggests that having a deaf role model member of staff would probably help a lot as would interactions with other deaf pupils who use speech and/or BSL. She suggests this is not a difficult adjustment to make and it need not interfere with the education of other pupils. While witness A had not visited the school we considered this a reasonable conclusion to reach. She had sufficient evidence and information before her to be able to do so.
72. The responsible body refers to their policy for access to the Deaf Base. This includes reference to the *Standards in Scottish Schools Act 2000* in relation to mainstream education. However, the claimant is not seeking a *placement* in the Deaf Base and for that reason we attach no weight to this argument. It is clear that the claimant is looking for far less. She would like to access the Deaf Base outwith teaching and tutor time. Witness H suggests there is no contact time available outwith this time. However, we heard that teachers commonly take their lunch there. This means that there are periods of non-teaching time. We see no reason to prevent the claimant from accessing the Deaf Base, which may improve her sense of deaf identity.
73. The responsible body argues that there are other more suitable quiet areas, including the library, for the claimant to access. We heard no evidence of any other quiet areas and we are not persuaded that the library is a quiet area. Both the claimant and witness G described it as noisy and, at times, disruptive.
74. There is evidence to suggest that the claimant may be *masking* in school. This happens when a person works extra hard to fit in, hiding their true self in order to present a different self, which can have an impact on the person's mental health. The claimant appears to consider the Deaf Base a safe space, a place where she can be herself. Access could provide her with an opportunity to decompress and relax in an environment designed for pupils with the same disability as her.

Deaf identity and linguistic rights

75. The claimant refers to the BSL Toolkit and their advice that:
- a) Deaf children need to meet other fluent signing children and staff in order to develop their self-expression and confidence in language. This is why deaf schools and resource base schools are so important for Deaf children's sense of identity as confident communicators. Deaf children can learn from each other in these environments and watch adults signing to each other, thus expanding their knowledge base [RB106].
 - b) Having access to British Sign Language and learning English allows a Deaf child to become bi-lingual [RB106].
76. The claimant identifies as a deaf person. As a BSL user, she belongs to a linguistic and cultural minority, protected by Article 30 of the UNCRC. As such she has the right, in community with other members, to enjoy that culture and use her own language. The UNCRC has recently been incorporated into Scots law. Once the provisions commence it will be unlawful for a public authority (which includes education authorities) to act or fail to act in a way which is incompatible with the UNCRC requirements. For the purpose of

this hearing, at this moment in time, we must have regard to the claimant's UNCRC rights and we accept that Article 30 applies.

77. The claimant argues that Article 24 of the UNCRPD 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 and/or Braille ...' We accept that Article 24 applies here.

(2) Could the disadvantage be avoided?

78. The disadvantage could be avoided if the claimant is provided with the auxiliary aids and services.

79. The Technical Guidance states, 'The crux of the reasonable adjustments duty is not whether something is an auxiliary aid or whether it is an adjustment to a practice, but whether it is something that is reasonable for the school to have to do. It is not possible for a school to justify a failure to make a reasonable adjustment; the question is only whether or not the adjustment is reasonable.' (para 6.25). Assistance from a sign language interpreter is listed as the sort of thing schools may have to provide a disabled pupil with (para 6.58).

(3) Is it reasonable for the responsible body to take these steps?

80. The proposed adjustments are reasonable. They would be effective in assisting the claimant. They are straightforward and practical. They are provided for other deaf pupils at the same school.

81. The responsible body submits that there is no spare capacity to assign the claimant with regular ToD input and BSL support without the potential need to recruit additional staff. The responsible body denies their decision to refuse these adjustments is due to funding restraints, and no evidence was led on any financial costs, although they comment on the lack of BSL interpreters across Scotland. The responsible body invites us to infer that there would be a significant financial cost. However, we cannot speculate on any likely financial costs in the absence of evidence. There was no attempt by the responsible body to specify, quantify or contextualise any such costs.

82. The responsible body argues that the claimant is more proficient in spoken English than in BSL. The claimant argues that the issue is not one of proficiency and we agree. The question is whether the claimant is able to access spoken English in the context of a busy classroom, even with technology and aids in place. We accept the evidence of the claimant and witnesses A and D that the claimant is missing things in class and that she does not know what she is missing.

Indirect Discrimination

83. We find the claim for indirect discrimination misconceived. For that reason we do not order the last two of the remedies sought by the claimant.

84. Section 19(1) provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant

protected characteristic of B's. For the purposes of subsection (1), a provision, criterion or practice (**PCP**) is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

85. There is no need to establish that the PCP disadvantages every member of the group sharing that particular protected characteristic (*Essop & Others v. Home Office* [2017] UKSC 27) and the burden of proof is on the respondent (para 47).
86. The responsible body submits that the indirect discrimination claim is misconceived on the basis that neither of the criteria considered are applied to those who do not share the claimant's disability, which is a key requirement of an indirect discrimination claim. The claimant submits that the criteria considered places deaf pupils at a particular disadvantage compared to non-deaf pupils. However, this is not the correct approach.
87. For the purposes of section 19(1) and (2) we must compare the claimant's protected characteristic with persons who do not share that protected characteristic. In the case of disability, the reference to persons who share the same characteristic is a reference to persons who have the same disability (section 6(3)(b)). For the purposes of any comparison 'there must be no material difference between the circumstances relating to each case' (section 23(1)). 'This means, at least, that the pool from which any comparators are to be drawn must comprise only those to whom the PCP was, is, or would be applied, because only they will comprise the relevant control group (*Monaghan on Equality Law* 2 ed. para 6.324, quoting from *Price v Civil Service Commission* [1978] ICR 27).
88. This means we must compare the claimant, *disabled as a result of deafness*, with pupils who are *deaf but not disabled*, for the purposes of section 19(1)(a) and (b).
89. There are two policies which the claimant relies on – the policy for access to BSL support and the policy for access to the Deaf Base. These policies apply equally to all deaf pupils, whether disabled or not. They are used to determine their level of need and their access to the supports. For that reason, they do not put, or would not put, pupils disabled as a result of deafness at a particular disadvantage when compared with deaf but not disabled pupils. Having decided this, we do not need to consider the provisions at section 19(c) and (d).