

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AR/24/0112

Witness List:

Witnesses for Appellant:

The appellant

The child

Independent Teacher of the Deaf, Educational Audiologist (witness C)

Principal and CEO, school C (witness D)

Witnesses for Respondent:

Quality Improvement Manager, respondents education authority (witness A)

Principal Teacher Support for Learning and Inclusion, school A (witness B)

Reference

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

Decision

2. We overturn the decision on the placing request and require the respondent to place the child in the school specified in the placing request by the start of the 2024/25 academic year; in terms of section 19(4A)(b) of the Education (Additional Support for Learning)(Scotland) Act 2004 (**2004 Act**).

Process

3. This case has an unusual and lengthy history. The decision by the respondent to refuse the placing request was brought before an Education Appeal Committee (**EAC**) in or

around May 2023. The EAC refused the appeal, by letter dated February 2024. The appellant challenged the decision of the EAC in the Sheriff Court. This process was ongoing when a decision was issued by the Upper Tribunal for Scotland in *JC v South Lanarkshire Council* UT 27, an appeal from a decision in this Tribunal. Section 18 of the 2004 Act makes provision for the different types of references that can be made to this Tribunal. The core of the *JC* decision is that where section 18(3)(da) (placing request references) applies, this Tribunal has jurisdiction under section 18, even where there is no education authority responsible for the education of the child. The decision focusses on the part of section 18(3)(da) in brackets and rules that the condition in section 18(1) (that the education authority must be responsible for the child's education) does not apply where that provision applies. The respondent accepts that, as a result of this decision, this Tribunal has jurisdiction.

4. A case management call took place in May 2024 at which time matters of procedure were discussed and agreed. A hybrid hearing was fixed and dates were agreed for witness statements and a Joint Minute of Agreed Facts. These can all be found in the bundle, which is numbered T001-043; A001-192; R001-085. The Joint Minute includes agreement between the parties that the child's additional support needs are set out in more detail in various reports [T041, para 3]. This means we can presume that there is no dispute on the content of these.
5. Before reaching our decision we considered the oral and written evidence and written submissions, which were lodged for both parties after the hearing.

Findings in Fact

6. At the time of the hearing, the child was 14 years old. She is one of triplets and lives with her parents and two sisters in the family home when not attending boarding school. She is the only deaf person in her family. The appellant is the child's father.
7. The child has bi-lateral sensorineural hearing loss. She was born deaf. She is severely deaf and wears hearing aids. She is a non-signer and prefers to lip read rather than use British Sign Language (**BSL**). She finds it easier to express herself orally rather than in writing. All of the child's language skills are below average when compared to her hearing peers. [Speech and Language Therapy (**SLT**) reports, A002 and A037; Paediatric Audiology, A007; Audiological Assessment Report, A011; Functional Hearing Assessment, A013; Scottish Cochlear Implant Programme, A074]
8. The child's hearing loss has a substantial impact on her communication and language development, her learning skills and her social and emotional development, resulting in delayed executive functioning, social cognition and metacognitive skills (strategies for reading, comprehension, writing and maths). [Witness C, A137]
9. The child has dyslexia and dyscalculia and related language processing difficulties. She has low nonverbal reasoning skills, below average reading skills, low average spelling skills and below average writing skills. Her level of maths is borderline. Her listening skills are below average. Her receptive language skills are moderately delayed. Her understanding of spoken vocabulary is significantly delayed. Her speech intelligibility is a strength. [Psychological Assessment, A087; School C Assessment, A042]

10. The optimum listening conditions for the child are one to one conversation face to face, with no background noise, fully concentrating and attending to the speaker. Close enough to lip read her teacher with breaks from listening. [SLT, A064; Witness C, A117]
11. The child has been provided with independent SLT support for a number of years. Her speech and language needs and audiological needs were both last assessed in 2022. These indicate that the child's understanding and use of language is at a far lower level than her chronological age (between 5:06 years and 8:05 years). [School C Assessment, A042; SLT reports, A002 and A064]
12. The impact of not being able to fully access sound in a hearing environment is that Deaf children have to work very hard to fill in the gaps across the full range of communicative environments. In a classroom setting where there are more pupils and more demands on the child to listen generally, she has to work harder to keep up and to keep track. It is important to use visual information alongside spoken information because spoken information may not always be heard accurately by the child. [SLT, A004]
13. The child has no deaf peer group at present. A deaf peer group would help her to feel she fits in. Being with other deaf people would help her to recognise her own needs and enable her to build her confidence. [Appellant, A128; Witness C, A117; Child's Personal Statement, A059]

School B

14. At the time of the hearing the child attended school B, which is an independent mainstream school. She has been a pupil there since September 2017 and a boarder since September 2018. She boards on a 12 day rotation. The school has a roll of 150 pupils with class sizes of less than 15 pupils. The child repeated her Primary 7 year.
15. The child uses her own assistive listening device (**ALD**) in school, a roger radio aid, and subtitles when available. She has a scribe and reader for exam purposes only. She sees an independent SLT bi-weekly and receives daily support from a Learning Support Unit. She receives 10 hours of one-to-one support each week.
16. Optimum listening conditions are rare in school B. The child is easily disturbed by noise around her. She also shows signs of listening fatigue, which causes additional stress for a deaf learner. [SLT, A064; Witness C, A117]
17. The child tries hard and is well behaved in class and keen to please. She is kind and helpful, is motivated by competition and has a great sense of humour and loves animals. [EAC submissions, A068]
18. The child's academic progress has been slow in relation to her chronological age and the gap between the child and her peers has widened significantly. As a result, the child has become increasingly isolated from her peers and aware of her deafness. Academically she has become disillusioned and increasingly disinterested. She has started to resent her deafness and to question her own place in her peer group. [School B, A063]

School A

19. School A is a mainstream school with approximately 820 local pupils. It has a Support for Learning and Inclusion Department. This Department provides support to pupils in a number of ways, including ongoing assessment and identification of learning needs. [Witness B, R083]
20. A new school is currently being built next to the main building. The current school building will continue to be used until August 2025 when the new school and its community buildings are expected to be completed. Acoustics and small teaching areas for small group work are being considered in the plans for this. [Witness C, A112 and 116]
21. Around 49% of pupils who attend the school have some sort of learning difficulty which includes visual impairment, hearing impairment, dyslexia and neurodiversity. Seven children in school A have a hearing impairment, 88 have dyslexia and a number have dyscalculia. The school has created systems to support pupils who need a differentiated curriculum, including removal from mainstream classes to teach in small groups. All staff involved in deaf learning are trained in BSL. Teaching staff are used to adapting the curriculum to meet the needs of learners.
22. The child would be placed in a mainstream class of around 20 pupils. Two of the children in that class have a hearing impairment. The child would be educated in a small group (a maximum of 6 pupils) for Maths, English and Communications for 12 periods a week.
23. School A is developing the skills of 3 Communication Support Workers (**CSW**) to provide support in lessons as required. One of the CSWs has delivered deaf awareness training to the staff working with deaf pupils.
24. School A has not completed a formal assessment of the child's additional support needs. This would commence once the child is enrolled at school A. School A can provide various supports, including the following [Witness B, R084; Witness C, A114]:
- a) An Individualised Education Plan and an individual timetable.
 - b) A referral to SLT, if required (none of the current deaf pupils are working with a SLT).
 - c) Support workers to prompt, read and scribe for pupils.
 - d) Access to the Nurture Room in the mornings and Pupil Support Room (Garden Room) for breaks and additional learning sessions.
25. School A has a large number of pupils with additional support needs, however, those pupils will not provide a deaf peer group for the child. Deaf identity, a deaf peer group and being part of a Deaf community are not directly available within school A. [Witness C, A118]
26. From August 2024, the child would spend one year in the current school buildings and then move to the new building. The child would find it difficult to manage acoustically in practical lessons. She would find it overwhelming to be in the corridors at changeover time and to cope with the noise and bustle of pupils, although she would be able to leave lessons 3-5 minutes early to avoid this. The child could spend time in the Garden Room if she did not feel confident in the general areas of the school, however, there could be a number of pupils present, which could create a higher level of noise. A second quieter space could be found for pupils who need it. [Witness C, A116]

27. National 3 are the first formal assessments in the school. Later, the child would be offered more vocational learning pathways, including work experience. [Witness C, A115]
28. Some areas in school A have been acoustically treated to address noise levels. All academic classrooms are carpeted and noise levels are not overly high. In practical class subjects the rooms are large with hard floors and a high proportion of hard surfaces with up to 14 pupils in the room. The reverberation levels in these rooms would not be compliant with acoustic recommendations for deaf children. There is a PA system in the main hall, which is not used during assembly. There are no pupils using ALD systems, no teachers using ALD transmitters and no soundfield systems to amplify the teacher's voice. The corridors have hard floors and solid plastered ceilings. At lesson changeover the corridors are filled with groups of up to 30 pupils, creating substantial noise and bustle. [Witness C, A112]
29. The Teacher of the Deaf (**ToD**) service currently employs 3 Visiting ToDs, providing 2.18 full time equivalent. The service presently provides support to 68 pupils in the respondent area. Of these, 23 pupils have regular interaction with one of the visiting ToDs. How often a child sees the visiting ToD can vary session to session depending on their current needs. [R007; Witness A, R080]
30. Visiting ToDs support subject teachers but are not subject teachers themselves. A ToD visits the school once a week to work with deaf pupils. It is not clear how much ToD support the child would receive as this has not been assessed. [Witness C, A114]

Visits to schools A and B

31. On 20 March 2023, a ToD employed by the respondent, visited school B, discussed the child's needs with staff there and observed the child in class. [R072]
32. On 21 March 2023, an Educational Psychologist employed by the respondent, visited school B, discussed the child's needs with staff there and observed the child in class. [R070]
33. On 23 March 2023, the appellant visited school A with the child. The child met some members of staff and was shown around the school, including the Support for Learning Department.
34. The purpose of these visits was to inform the respondent and to allow them to determine the placing request. The appellant complied in full with all requests for assessment or information made by the respondent. [Joint Minute, T042]

School C

35. School C is a boarding and day school in England which makes provision wholly or mainly for children and young people with additional support needs. It is a school for deaf children and young people, with pupils from across the UK. It uses the auditory/oral approach to deaf education. It has a focus on supporting pupils to use spoken and written English to access the curriculum. [Witness D, A166]
36. The school currently has 176 pupils between the ages of 4 and 19 years.

37. The child had a 3 day assessment visit to the school between 9 and 11 January 2023. School C completed a Prospective Pupil Assessment for the child. The results of this assessment were reviewed by a large panel of specialists in deaf education. From this, it is clear that the child needs spoken language to be delivered at a slower pace, with full access to lip patterns at all times. Her lessons should be taught in an acoustically treated environment, within a small group by subject specialist ToDs who are able to adapt their language and understand the impact the child's deafness has on her ability, with regular listening breaks to combat the effects of listening fatigue. [Prospective Pupil Assessment, A042; Witness D, A168-177]
38. The child would be provided with the following in school C:
- a) Acoustically treated classrooms and the digital group hearing aid system to support access to spoken language used within the classroom environment.
 - b) Lessons delivered by subject specialist ToDs who are trained in the development of language and are able to modify and adapt the curriculum to meet the child's needs.
 - c) Support from a specialist Teaching Assistant (qualified in working with hearing impairment) to help with the child's learning after school during homework time.
 - d) Direct input from a SLT specialising in deafness in order to further develop the child's listening, vocabulary, receptive and expressive language skills.
 - e) On-going management of the child's personal amplification by an on-site Educational Audiologist.
 - f) Access to a large deaf peer group in order to support the child's self-esteem, confidence and deaf identity.
 - g) Regular support from Specialist Teachers for intervention support.
39. All subject teachers are dual qualified as ToD or in training to be a ToD. Some members of boarding staff are deaf. There is a specialist teacher for dyslexia in the school. Specialist SLTs are available on site and provide both individual and group sessions for pupils. There is an on-site Educational Audiologist and Teaching Assistants. There are full time Wellbeing Coordinators. [Witness D, A163]
40. From September 2024, the child would be placed in a Year 9 class of 5 pupils set out in the classroom within a horseshoe shape around the teacher and a group hearing system for the teacher and students that broadcasts directly to the pupils' personal amplification devices. She would be taught by ToDs or training ToDs. She would have the support of a learning assistant (daily – compulsory one hour post school), a form teacher and a head of year. She would also have a key worker who would develop welfare plans with the child. [Witness D, A190]
41. For the majority of her subjects the child would be in a group of deaf pupils with similar learning levels. She would have one to one or group sessions with specialist teachers for specific learning difficulties, according to need. She would have group and individual SLT (specialising in deafness) sessions. The appropriate acoustic environment and use of the group hearing aid system would enable access to speech. The delivery of lessons in small groups by a ToD would mean that the child should be able to function effectively in school C. [Witness C, A115; Witness D, A163]
42. In practical subjects, there are hard floors and additional appliance noises, which make the learning acoustics more challenging, however, noise levels are manageable for the

small number of pupils in the room and staff have an awareness of how to make adjustments to improve access to speech. In assemblies there is a soundfield system and there are television screens around the hall showing the face of the person speaking so that the audience can lip read the talker. In the corridors, the floors are carpeted and ceilings have acoustic tiling. At lesson changeover there are groups of up to 8 pupils moving towards lessons. [Witness C, A111 and 115]

43. Pupils follow the full National Curriculum. It is expected that all pupils would be aiming for some GCSEs although Functional Skills at Entry level is also available. Work experience is organised in Year 11. [Witness C, A113; Witness D, A163]

44. The child has a clear preference for the specified school as a deaf learner. A place was offered to the child in January 2023 and this remains available.

Allocation of funding (respondent)

45. The respondent delegates funding for children and young people with additional support needs to each school to use to meet their needs. Any additionality over and above this is considered on a child by child basis once the child is in attendance at a respondent school.

Costs

46. The annual boarding fee at school C is £85,689 per year. In addition to this, the child will require scribe support, at an additional cost of £14,750, resulting in a total of £100,439 per year. School C runs a 4 term year and unless there are wholly exceptional circumstances, this fee will apply until the end of Year 11. [Witness D, A191-192]

47. The respondent would be expected to pay costs for the child to come home on visits and for her parents to visit the child in school, including travel and accommodation costs. [EAC, A081]

48. The following are some of the costs which could arise at school A [Witness A, R081]:

- a) A Roger mic costs £702. If receivers for hearing aids are needed, these cost around £642 each.
- b) The cost to employ an additional ToD is £53,947 per year.
- c) The cost to employ an Additional Needs Assistant (**ANA**) or Education Worker for the Deaf, is £23,345 per year.
- d) The cost to employ 0.5 FTE of a Teaching Assistant is £11,673 per year.

49. The respondent has not completed a formal needs and cost assessment for the child's attendance at school A.

Reasons for the Decision

General remarks on the oral evidence

50. We heard evidence from two skilled witnesses, witnesses C and D. Witness D is the Principal and Chief Executive Officer at school C. He has been a qualified ToD since 2009. He was appointed as SENDCO in 2011 (Special Educational Needs and Disability

Coordination Officer). He was an impressive witness, who was able to provide detailed evidence on their assessment of the child's needs and how the school would tailor their support. The respondent asked very limited questions of witness D and nothing of any challenge.

51. The evidence of witness B was based on the overall potential provision in school A, but not rooted in any assessment of the child's needs. Witness B had reviewed some of the reports available but not all of the information provided. She insisted that the child's needs would be assessed once she attends school A. We attach less weight to her evidence. It did not take us far enough, it lacked specification. Likewise, the evidence of witness A. It is a matter of agreement that everything witness A asked for was provided. Witness A conceded that for a child already based in one of their local authority schools this would include historical information. Witness A did not explain why historical information was not requested for the child, which would have given a fuller picture of her additional support needs.
52. The second skilled witness is an independent witness for the appellant. Witness C, is a ToD and an Educational Audiologist. Her report [A109] was prepared in October 2023 following a visit to the three schools. She used the National Deaf Children Society Parents Checklist to inform her observations. She is familiar with school C as she studied audiology there. Her findings were updated in her written statement [A135] dated June 2024. We found her written evidence informative and impressive. Relatively little oral evidence was provided, with no questions from the respondent.
53. The appellant presented his evidence in a measured and balanced manner.

The evidence of the child

54. The child prepared a personal written statement [A059] and she attended the hearing to give her evidence. She did this with the support of both of her parents. The child was provided with the agreed list of questions before the hearing and she had made notes in relation to each question which helped her to share her views. It was clear that the child needed to use a lot of concentration and energy to answer each question verbally. As well as hearing the child's perspective we were able to observe how she communicates. This gives us a sense of the daily challenges she faces.
55. The child has a clear preference for school C. She explained the difficulties she has with background noise and where there are a lot of people talking. This is an issue for her at school B. She finds it difficult to make or keep friends as her peers get impatient with her attempts at communication. She explained some of the things which help her – smaller groups, less noise, outdoor space, not too hectic, having fun.
56. The child is concerned that she would probably spend most of her time in the learning support environment at school A. This is similar to school B, where her "treatment" stands out from others. The child is struggling to fit in and to be supported in this way.
57. The child said that she might get "a bit home sick" if she attends school C, but she is used to boarding and has family close by. She thought school A was "not the right school for me". She said there were a lot of kids and it was "so loud".

The legal tests

58. The parties agree that the child has additional support needs, in terms of section 1 of the 2004 Act. Having considered the evidence, we are satisfied that this is the case.
59. The respondent's refusal of the placing request is based on two grounds, which are found in Schedule 2, paragraph 3(1)(f) and paragraph 3 (1)(g). The onus of proof rests with the respondent and the assessment point is at the time of the hearing (*M v Aberdeenshire Council* 2008 SLT (Sh Ct) 126).
60. As we find neither ground established, we do not have to consider whether in all the circumstances it is appropriate to confirm the decision of the respondent (section 19(4A)(a)(ii) of the 2004 Act).

Ground 1: Respective cost and suitability (Schedule 2, paragraphs 3(1)(f))

61. There are four constituent parts to this ground, numbered in paragraphs (i) to (iv). The respondent must satisfy us that each of the parts is applicable to the facts of this case at the date of the hearing.
62. It is accepted that the specified school is not a public school and that the authority have offered to place the child in the proposed school. This means that parts (i) and (iv) are 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. (School A)

63. This part is disputed. In order to satisfy this part the respondent must demonstrate that they are able to make provision for the child's additional support needs in school A. We are not satisfied that they have done so and for that reason part (ii) is not met.
64. The respondent refers us to their duty to make adequate and efficient provision of school education (Education (Scotland) Act, section 1(1)). They refer us to the case of *Walker v Strathclyde Regional Council* (No. 1) (1986 SC 1) which notes that adequate and efficient is a general duty that could be qualified by a number of factors including resources, practicability and cost. The respondent submits that this phrase could be interpreted as being an education that is satisfactory or acceptable in quality and achieving maximum productivity with minimum wasted expense. They submit there is no suggestion that the education provided must be the best available or that it must provide exactly what the parent wants or what the child prefers. The fact that the child has attended a boarding school does not impose any obligation on the respondent to provide a similar provision if they can demonstrate the child's needs can be met in school A. However, the respondent has failed to demonstrate that school A can meet the needs of the child.
65. The appellant submits that the *M* case is on all fours (very similar in facts and law) with the present case and we agree. The *M* case is an appeal against the decision of a local authority's EAC refusing a placing request in respect of a disabled child (R). R had a number of additional support needs, which included being profoundly deaf (and the need for a quieter environment with reduced background noise). The local authority considered that R's needs could be met in another school although conceded that no formal professional assessment of R's needs had been undertaken. The ground relied

upon by the local authority in *M* is relied upon in the present case and, as with the *M* case, no formal professional assessment has been completed by the respondent.

66. The failure to complete a formal assessment is significant. We cannot see how the respondent can plan to make provision for the child's additional support needs in school A when they do not have the fullest understanding of these needs. This does not mean that the respondent is entirely unaware. However, given the statutory obligation on them to meet the fees and other necessary costs at school C unless all of the conditions in paragraph 3(1)(f) apply, we would have expected to see a formal assessment of the child's additional support needs in order to assess the ability of school A to meet those needs.
67. The respondent submits that witnesses A and B were clear that they had sufficient information to be satisfied what the child's needs are and how they would be met at the proposed school. The respondent conceded that further holistic assessment would take place once the child was enrolled. They submit that every decision made about the child's access to learning is on a needs-led basis, with assessment happening on an ongoing basis. We found this approach lacking in detail and definition. It was vague and generalised.
68. The respondent's witnesses did not have the fullest or most up to date picture of the child. The visits to school B by their ToD and Educational Psychologist took place around a year and a half ago (January and February 2023) and these were for observation rather than assessment purposes. Witness A acknowledged that she would have had access to "much more [and up to date] information" if the child was in one of their local authority schools, yet she did not ask for any further information. When asked if anything requested was not provided she said she did not know, although it is a matter of agreement that all information requested was provided.
69. As their own decision making protocol provides [R059], when a placing request has been received a report should be completed which provides various details, including:
 4. a detailed breakdown of costs for the SBC provision - this should include the following pro rata; staffing (teacher, ANA, other professionals), running costs, transport, resources. [R061]
70. Despite this, witness A insists the assessment of costs cannot be completed until the child is enrolled at school A. Decisions on allocation of supports are then taken either by the school, using their 'devolved resources', or by an education authority panel, using an 'exceptional additional resource' process. There was no evidence on how long these two processes could take, or, if the need for additional staff was identified, how long it would take to recruit such a person. Witness B said she could prepare a wellbeing profile with the child and her parents within a very short space of time but additional support will depend on what and who is needed.
71. Witness A stated that the decision to refuse the placing request was taken on the basis of the respondent's "knowledge of mainstream schools" and of the provision generally available in school A. This is not sufficient to meet the statutory test.
72. We accept the appellant's submission that the respondent will not be able to determine whether or not they can or will meet a particular need until they have determined what

those needs are. This is a matter of common sense. It is simply not possible to determine this unless and until you have assessed the specific needs of the child. That determination should have been made by the time the panel had to decide the placing request. In the absence of such an assessment the procedures giving rise to each of those decisions might be seen as flawed. The very latest time at which the respondent's assessment of the child's needs should have been made was before the commencement of this hearing and in time for proper consideration and examination of what they considered to be the child's needs at the hearing (*M case*, paras 46- 47).

73. The respondent invites us to confirm their decision to refuse the placing request not because they have demonstrated that they are able to meet the child's additional support needs at school A but because they will assess child's needs once placed there and decide then how best to meet them. If we were to accept this, we would be deciding that the child's additional support needs can be met at school A without knowing what those needs are or what specific and tailored supports would be provided.

74. The statutory wording in this test is not speculative. It is written in the present tense ('are able') and we must be satisfied on the evidence available to us at the time of the hearing. Having failed to demonstrate this, the respondent has failed to discharge the burden of proof here.

Paragraph 3(1)(f)(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 the specified school.

75. Given that all of the four parts must be met, part (iii) only comes into play if the part (ii) condition is met. If, as we have found, part (ii) is not met then the issue of respective suitability and cost simply does not arise. In other words, the ability of school C to meet the child's additional support needs only needs to be considered if school A can meet the child's needs (*M case*, para17). Even if we had found that part (ii) was met, we would not have been satisfied on part (iii) for the following reasons, which we set out for the assistance of the parties.

76. The proposed provision in school C is set out in detail in their assessment. Witness D confirmed that this remains available for the child. School C provides smaller class sizes. The class layout, acoustic environment and technology will maximise the child's access to teacher and peers' voices, while minimising background noise. All staff are subject specialist teachers as well as ToD or training to be a ToD. Witness D insisted that this level and type of ToD input is essential for the child's progress. Pupils have daily on-site access to an educational audiologist, meaning that any issues with hearing aids etc. can be remedied quickly. The child would have access to specialist teaching for her dyslexia and dyscalculia. She would receive a direct package of annual support from a SLT from the dedicated provision at the school. There is no waiting list for this, in contrast to the "usual waiting lists" witness B referred to when asked about such provision in school A.

77. The appellant clearly places some value on the provision of SLT, having funded this independently for some years. He describes this as really important for the child to help her to develop academically, and to develop friendships and communication skills.

78. The child would also have access to a supportive environment where she could develop her deaf identity amongst deaf peers. This is particularly important to the child. The respondent accepts that school C is a suitable provision with a larger deaf peer group but argues that the lack of a larger deaf peer group should not be enough to negate the other educational benefits at school A. They submit that while the child is familiar with boarding, the distance of the specified school from her home and local community is significant. Where the tribunal is satisfied that both schools can provide an adequate and efficient education to meet the child's needs, weight should be given to the provision closer to the child's home.
79. For the reasons we set out at paragraphs 63-74 we are not satisfied that school A can meet the child's needs. We are satisfied that school C can meet the child's needs. We are alert to the distance of school C from the child's home, however, we consider the benefits to the child of a deaf specialist education to overcome this. The child is familiar with boarding, she has been doing so for almost 6 years. She has family members who live in close proximity to school C (within 15 minutes) and the child's mother is considering locating herself in her English office more often, to be closer (within 45-60 minutes). The child and her parents have clearly discussed this at some length. We are confident that there will be good family support available within a short distance to the school.

Costs

80. When calculating respective costs we must view that according to what is reasonable from the perspective of the respondent and the costs to be compared are the costs (in each of the two schools) of providing the additional support necessary for the child; not the overall costs (*S v Edinburgh City Council (SM, Appellant)* 2007 Fam LR 2.). The question is: what is the difference in cost to the respondent of providing for the child's additional support needs in one school rather than the other? This is not to be calculated by dividing the running costs of the local authority school by the number of pupils or places there but this does not mean that the question of costs should be ignored by the respondent altogether.
81. The court in *SM* drew 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 argues that the respondent's 'zero cost' position is not supported in law. It 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 (as well as any incidental costs).
82. The appellant also refers us to *Slough Borough Council v. SENDIST* [2010] EWCA Civ 668, paragraph 13 where it 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.'
83. The current annual cost to send a young person to school C is agreed. It amounts to £100,439 per year.

84. The respondent argues that there is no additional cost to them to educate the child in school A. The respondent delegates funding to secondary schools to use to support children with additional support needs as they decide best. They submit that as school A is already established in providing additional supports outwith the larger mainstream provision there is no identifiable cost to them to place the child here. The appellant argues that this is not a credible position. Without specifying the supports to be provided to the child it is impossible to know the costs. We agree, the issue of cost can only be determined by evidence and the onus here lies with the respondent.
85. The respondent accepts that there are costs associated with the provision of the day to day equipment used by the child, in particular the roger pen and potentially receivers for her hearing aids. These would cost around £2,000 per year. This cost would exist at whichever school the child attends. If, at any point, it was assessed that the child would require additional support, there is a process for schools to make an application to a central budget to provide for this. "Taken at its most extreme", if the child was assessed as needing a full time ANA, this would cost £23,345 per year. The respondent submits that the cost referred to by witness A of £6,116 per year for a secondary pupil is not an actual cost when a new pupil joins one of their schools. Instead, it is an abstract cost, taking account of the teaching staff and facilities used.
86. Witnesses A and B made it clear that any provision would depend on a process of ongoing assessment that would not begin until the child is enrolled at school A. For that reason we cannot put the maximum additional costs in context. We cannot speculate. The respondent has failed to discharge the burden of proof here.

Ground 2: Mainstream (Schedule 2, paragraph 3(1)(g))

87. This ground of refusal applies 'if, where the specified school is a special school, placing the child in the school would breach the requirement in section 15(1) of the Standards in Scotland's Schools etc. Act 2000 (**2000 Act**). The appellant argues that section 15(1) would not be breached by placing the child in school C, for four reasons.
88. First, the requirement in section 15(1) is not breached where the school the child is placed in is not one of the respondent's own schools. We agree. For a child who is under school age, the requirement that education be provided in mainstream schools applies both to education provided by the local authority and education provided by non-local authority providers (section 15(2)). This distinction in provision does not appear in section 15(1) for a child of school age, which is the case here.
89. Second, school C is not, in legislative terms, a 'special school'. We agree it is 'a school in England, Wales or Northern Ireland the managers of which are willing to admit the child and which is a school making provision wholly or mainly for children (or as the case may be young persons) having additional support needs' (2004 Act, Schedule 2, paragraph (2)(b)). The appellant refers us to *Aberdeen City Council v. LS* [2021] UT 1, paragraph 18, where Lady Poole reminds us that the definition of special school in England (Education Act 1996, section 337) is significantly different from the definition in Scotland (2004 Act, section 29(1)).
90. Third, the education authority's proposed provision for the child at school A itself meets the legal definition of a special school in section 29(1). We agree. Special schools are defined as schools whose sole or main purpose is to provide education especially suited to the additional support needs of children selected for attendance at the school, class

or unit by reason of those needs. Witness B gave evidence that the child would be taken out of mainstream classes to be educated in a small group setting for 12 periods out of 27. This small group would comprise children with various additional support needs and is supported by the Support for Learning and Inclusion Department. If classroom noise becomes too challenging, which seems likely, the child's time out of the mainstream classroom would increase.

91. Fourth, the appellant argues that in any event, the exception in section 15(3)(a) applies because providing education for the child in school A would not be suited to her 'ability or aptitude'. We agree, for the reasons we set out at paragraphs 63-74.
92. The respondent offers little argument in support of this ground or refusal, submitting simply that a number of factors can impact this, however if it can be demonstrated that the respondent can provide for a child's needs in a mainstream setting, we should give weight to this presumption. We are not persuaded that this is the case here.