



DECISION OF THE TRIBUNAL

Summary of the decision

1. The Tribunal finds that the responsible body has not failed to comply with the duty to make reasonable adjustments in terms of section 21 of the Equality Act 2010. The claim is therefore dismissed.
2. The claim for indirect discrimination in terms of section 19 of the Equality Act 2010 is not well-founded and is dismissed.
3. The claim of discrimination arising from disability in terms of section 15 of the Equality Act 2010 is not well-founded and is dismissed.

Introduction

1. In November 2018, the claimant, lodged a claim in the Health and Education Chamber, Additional Support Needs Tribunal claiming disability discrimination under the Equality Act 2010 (the 2010 Act) in respect of her son.
2. The disability discrimination claims relate to claims of unfavourable treatment arising from disability, indirect discrimination and failure to make reasonable adjustments. In particular, they relate to the treatment of the child while at School A, and to the failure of the respondent to teach the child literacy based on the principles of “systematic synthetic phonics”.
3. The respondent concedes that the child has a disability in terms of section 6 of the Equality Act 2010 in respect of dyslexia, and additional support needs in terms of section 1 of the Education (Additional Support for Learning) (Scotland) Act 2004.

Procedural history

4. This case has a long procedural history. There was a large number of case management hearings which took place to address a range of case management issues which required to be determined prior to the listing of the final hearing. These took place in May, July, August, October and December 2019, the notes of which are referred to for their terms.
5. The following case management decisions made by the legal member following those hearings are of particular relevance:
 - the claimant's amendment to include an indirect discrimination claim was allowed (because it was a "new label" to facts already included) (and the claimant having withdrawn her claim for harassment);
 - the claimant's request for a documents' order was refused. This was for standardised assessment data which she sought to establish her indirect discrimination claim. This was refused partly because she did not know whether it would support such a conclusion but also because its compilation was deemed to be disproportionate and that any potential disparate impact could be addressed by expert witness evidence;
 - that the incidents at School B which the claimant sought to rely on to establish unfavourable treatment were out of time and were not an aspect of a continuing act given the child's move to School A. It could not be said however, without hearing evidence, that the incidents at School A were necessarily not part of a continuing act; which question was reserved, along with any time bar questions in regard to the other types of claims, until after the hearing of evidence;
 - the respondent's objection to the admissibility of reports by Witness A and Witness B, was repelled, their evidence being heard under reservations as to its admissibility or relevance;
 - witness orders were granted in respect of Witness C and Witness D, employees of the respondent whose evidence the claimant asserted was relevant;
 - the respondent was correspondingly allowed to call additional witnesses given that and the fact that the time bar question had been reserved.

6. The first two days of hearing set down for March 2020 had to be discharged. Initially it had been the intention to hear from the respondent's witnesses first. However given the claimant's witnesses were lined up to attend the hearing on three further dates in March, the legal member decided that the case would commence with the claimant's evidence (which would be standard practice in any event, the burden of proof being on the claimant). All witnesses gave evidence by witness statements and/or reports which were taken as read.
7. There was some confusion over the order of witnesses, but as it transpired we first heard from Witness C, director of education for the respondent, who as the deputy chief executive of the council was standing in for the chief executive of the council, which was on high alert because of the developing situation with the coronavirus pandemic at that time.
8. Thereafter we heard evidence from Witness E, clinical psychologist based in America, Witness A, education consultant, and Witness B, emeritus professor in the department of education and counseling psychology in Canada, all via video conference. The hearing thereafter required to be adjourned because of the Prime Minister's announcement restricting travel and social contact as a result of the Covid-19 pandemic.
9. A further case management preliminary hearing took place in June 2020 to discuss how progress could be made in light of the Presidential Guidance relating to the pandemic which stated that no in-person hearings could take place. Parties agreed that the hearing could proceed remotely by way of video conferencing, and the hearing resumed in August 2020.
10. The Tribunal then heard evidence from the claimant and from Witness D, the child's additional support for learning teacher, who was called by the claimant. The respondent called the following witnesses: Witness F, quality improvement officer who investigated a stage 2 complaint, Witness G, educational psychologist, Witness H, depute head of School B, Witness I, acting head of School A, Witness J, the child's class teacher, and Witness K, the respondent's expert witness.
11. Parties were invited to lodge written submissions by Wednesday 2 September, and to provide a response to the other side's submissions by Wednesday 9 September. These deadlines were extended at the request of the parties.
12. In her written submissions, the claimant dealt with a range of issues which were beyond the scope of the matters which the Tribunal was considering, as is clear by

reference to the list of issues set out in the notes of the case management meetings. Those issues were finally set out in the note following the case management preliminary hearing which took place in December 2019, paragraphs 6 to 17, which for ease of reference are summarised as follows:

- A claim under section 15, that the child was unfavourably treated because of something arising in consequence of his disability, namely the teaching methods at School A (including the conduct of Witness L and Witness D);
- A claim under section 19, that the following four PCPs put children with dyslexia at a particular disadvantage:
 - i. The failure to include a “systematic synthetic phonics” component in their Active Literacy programme;
 - ii. The implementation of the Dyslexia Friendly School model;
 - iii. The practice of using the Staged Intervention procedure;
 - iv. The practice of undertaking an Ecological assessment framework.
- A claim under sections 20 and 21, that the respondent had failed to implement reasonable adjustments, specifically the failure to provide an auxiliary aid or service (that is the failure to include “systematic synthetic phonics” in their literacy programmes), which put the child at a substantial disadvantage.
- Whether any of the above claims are time barred.

13. Further, the claimant sought (particularly in her supplementary submission) to introduce or refer to further evidence which had not been referred to during the course of the hearing and which was not the subject of cross examination. The Tribunal is only able to take into account the evidence heard and the documents referred to. We cannot take into account assertions made or references to evidence to which we were not referred during the hearing.

14. Further, the claimant in her initial written submission set out 40 separate remedies. The Tribunal is however limited to considering those remedies which were set out in the claim form. These were the remedies addressed by the respondent and considered by the Tribunal during the hearing. These remedies were set out in the documents lodged at A4 and for ease of reference are summarised as follows:

- a) a formal statement that discrimination has occurred;
- b) a written apology;
- c) the inclusion by the respondent of “systematic synthetic phonics” in their literacy

- strategy, core and interventions;
- d) an order that the child receive at school continued “systematic synthetic phonics” instruction using programmes produced by Phonics International and Synthetic Phonics Ltd (currently used at home);
 - e) an order that the child has access to decodable reading books;
 - f) an order that the respondent reviews and amends their “Ecological (dyslexia) assessment framework” to “make it scientifically valid” and include “a CTOPP2” assessment;
 - g) an order that the respondent review and amend their Dyslexia Friendly School Model, and train staff on dyslexia and “the Science of Reading, using experts in the field of literacy”;
 - h) an order that the respondent reviews its equality outcomes policy under the PSED to ensure the attainment gap between pupils with and without dyslexia is significantly reduced/eliminated.
15. It should be noted in particular that any remedy must relate to the evidence heard, so that it is not in any event possible to make any decision which relates to the position at School C, since the Tribunal heard no evidence addressing the position there.
16. Further in the respondent’s supplementary submissions, the respondent apparently makes an application for expenses. It is the Tribunal’s view that that application is premature. In any event, the claimant has self-evidently not had an opportunity to respond to that. If the respondent intends to insist on their application for expenses once they have considered this decision, they will require to renew it and the claimant will require to be given an opportunity to respond before the Tribunal can consider it. It should be borne in mind however that the scope of that application is not in any event currently clear. There is a reference to a request to consider expenses “to this limit extent” (sic). It is not clear whether that relates to all four of their expert’s reports and if not, which one(s). In the event that any application is renewed, the respondent should make their position clear and set out the sums sought and why.
17. A member’s meeting took place on 21 September 2020.

Findings in Fact

18. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

19. The child is 12 years old. He has a twin sister, and lives with his mother and father. The child commenced primary 1 at School B in August 2013 and moved to School A in August 2016.

Part of this paragraph has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 101(3)(a)(b)(c) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]

20. The literacy programme which was used at School A and School B was a programme called Active Literacy, which is used widely in schools in Scotland. It has a key focus on the teaching of systematic phonics. While a central feature of Active Literacy is phonemic awareness and phonics instruction, it is not however exclusively focused on phonics. It is a balanced programme which draws on multiple methods but is intended to address the needs of all pupils including those with dyslexia and other difficulties reading. Children who struggled with literacy (for whatever reason) are targeted for extra help. Its effectiveness has been demonstrated through longitudinal evaluation.

21. School B traditionally used Jolly Phonics in early years schooling. This consists of multi-sensory resources that teach children to read and write using synthetic phonics. It is a systematic synthetic phonics programme, which takes a particular approach to the teaching of phonics, where children learn the letters/sounds and blend them to make words (sometimes described as “bottom up”).

22. This can be contrasted with traditional, or analytic, phonics approaches, where children look at the word and break it down to sounds/letters (“top down”). This was the principal approach taken by the Active Literacy programme. When it was introduced, it was augmented by elements of the Jolly Phonics programme, since Active Literacy does not provide resources such as songs/videos. The Active Literacy programme complemented by early years teaching using Jolly Phonics thus contained a systematic synthetic phonics component.

23. Active Literacy is a comprehensive teaching system that allows differentiation based on the learner’s needs. Active Literacy has a library of teacher handbooks

which provides prescriptive ways for teachers to guide their classes but which differentiates the curriculum based on different additional support needs. It is very structured in its teaching of phonics and spelling, and there is a prescribed order for the teaching of sounds. This includes blending and recognising sounds and general phonological awareness. Initially two sounds are taught per week, followed with various activities to reinforce the learning, but differentiated depending on ability. In regard to the teaching of phonics and spelling, the Active Literacy Handbook states that “the programme takes a holistic synthetic and integrated approach to phonics learning”. While Active Literacy has a synthetic phonics component, it is primarily an analytical phonics programme.

24. The child was taught using the Active Literacy Programme which, particularly in primary 1 and 2, was combined with elements of Jolly Phonics.
25. Assessment for Excellence tests were carried out at the start and end of primary 1. These are standardised assessments of literacy and numeracy assessing phonics, reading and numeracy, producing three scores often referred to as PIPs. At the beginning of the year the child scored 44.6 for phonics placing him in the “average” category” (ie between 40 and 60). There is no separate phonics score at the end of primary one, but at the end of the year he was assessed to have made average progress in literacy and above average in maths.
26. These results were discussed by staff at pupil progress meetings, when consideration would be given to the scores, taking account of teacher’s professional assessment based on their judgment and observations as to whether the PIP results reflect the child’s ability. These results did not raise any immediate concerns with the child’s teachers. The PIP results would not ordinarily be shared with parents unless requested because this assessment is not deemed a comprehensive guide to a teacher’s judgment of a child, but a factor to be taken into account.
27. Notwithstanding average PIP scores, at the pupil progress meeting at end of primary 1 in May 2014, the class teacher recorded that the child “continues to cause concern with his reading and writing....his mum is aware of the situation” and “[the child] is inconsistent in his reading and we should continue to monitor this with regard to dyslexia”.
28. In September 2014, at the beginning of primary 2, the child was put on Staged Intervention. This is a centrally produced framework used by the respondent to

provide extra support or extra challenge to those children who are identified as requiring it. Assessments are undertaken by teachers using their professional judgement. At stage 1 this will include extra support and assistance within the classroom, with adjustments and differentiations made as required.

29. In February 2015 in the pupil progress reports, it is recorded that “[the child] often has difficulty retaining common words. The pace of written work in this group is generally slow. However I have noticed a big improvement in the pace and level of [the child’s] writing and spelling”.
30. In June 2015, at the end of primary 2, it is recorded in a support staff evaluation that, “I have carried out regular phonics assessment with [the child] to check his phonemic awareness. He requires support to verbalise initial sounds though he is able to sound out cvc words. His recognition of phonemes (sh,th,ch) is poor and he has been given homework to support this. [The child] would benefit from repetition of these sounds and blending them in words and nonsense words to encourage sight recognition....” and in a teaching staff evaluation, “The Child’s recognition of vowel sounds has improved since March 15. He is having a go at writing independently by sounding out. He still needs encouraged to think about the appropriate letter to match the sound and will benefit greatly from continued additional input on phonics in P3. His reading is improving ”.
31. At that point, the child was placed on stage 2 of Staged Intervention, at which point supports are brought from outwith the classroom. The child was taught for 30 minutes each week by the additional support for learning teacher, Witness D, allowing her to use additional resources with him on a more intensive basis.
32. While on Staged Intervention there is an ongoing monitoring and evaluation process, and “team around the child” (TAC) meetings convened regularly, encouraging close involvement of parents, which were convened regularly in respect of the child, and which the parents attended.
33. In June 2015, the claimant spoke to the educational psychologist regarding concerns about the child’s “phonological awareness, sounding out and transfer of [the child’s] abilities onto paper”. It was agreed that a working memory assessment would be completed by the new educational psychologist (Witness G) since poor working memory is said to undermine acquisition of reading skills and phonological awareness.
34. In September 2015, the claimant contacted the educational psychologist to raise

further concerns. The educational psychologist noted that the “identification of dyslexia is being coordinated by the head teacher”.

35. On 6 October 2015 an online dyslexia screener assessment was undertaken to provide additional supporting information in the assessment of dyslexia. Reference was made to an assessment of “mild dyslexia”, with recommendations for specialist tuition and further investigation.
36. On 8 October 2015 the educational psychologist completed the working memory test battery. Results showed that the child would benefit from accessing working memory supports, and that “any information presented to [the child] should reflect his memory span and that this differs between auditory and visual information.....that [the child] may find it less challenging to retain verbal information and for teachers to note that [the child] is most comfortable working with up to three pieces at any one time. This is in keeping with previous findings that [the child] struggles with tasks that require verbal working memory. These skills are key to the development of reading and spelling – both areas of learning which present a challenge for him. In relation to his visual memory skills [the child] found the subtests more challenging and the assessment suggested that the amount of visual information that [the child] is asked to process and work with should be less than his verbal memory”.
37. These differentiations were made, including the way that information was presented by staff and time given for the child to undertake work. A whole class intervention was also implemented to support working memory skills for all children in the class (Meemo).
38. In October 2015, the educational psychologist discussed with staff the Ecological Assessment Framework for helping structure assessment in regard to dyslexia and the child’s wider literacy needs. This consists of a non-linear bank of assessments allowing school staff to gather more information about the child to identify strengths and areas of difficulty. Class teachers use their professional judgement to decide which assessments are necessary and appropriate and then get input from other staff, such as pupil support assistants. While this is not designed specifically to identify children with dyslexic traits, it includes a section for phonological awareness in the reading category to help decide what assessments are needed to demonstrate skills in relation to phonological awareness, including an assessment pack which includes decoding.

39. A range of contextual information and school assessments were identified with further assessments to be completed by the class teacher. This identified that the child's needs were focused on his literacy skills, and the school then used the literacy assessment framework to support the assessment process further. While no specific phonemic and phonological awareness assessments were carried out at that time, school staff were confident that they were sufficiently well informed about the child's skills in this area from ongoing assessment which had already identified the child's phonological skills and decoding as a difficulty.
40. In October 2015 there was a meeting of school staff to review the assessment information to assess whether the child could be identified as dyslexic.
41. Later in October 2015 a meeting took place with the educational psychologist, the parents and school staff to discuss the outcome of the working memory assessment and the information obtained through the Ecological assessment process. Following this meeting, the child was formally identified as having dyslexia.
42. In November 2015, information from the Ecological assessment progress report was fed into the Staged Intervention action plan. The plan outlines the additional assessments completed and records "difficulties with literacy – blending, cvc and ccvc, reading, spelling, writing, copying and focus" as "initial concerns". In regard specifically to phonological awareness and decoding skills, it states "inconsistency in identifying sounds/name and in blending and segmenting cvc words", with the areas highlighted for focus being decoding, blending and working memory supports, and suggested actions. The "Literacy Assessment and Analysis" states as concerns "breaking words into sounds; not able to recognise consonant digraphs (sh, ch, th, ng)" and under "Phonological awareness" in particular difficulties with "phoneme level" and under reading states "unable to consistency use knowledge of phonics to decode. Did not use any other reading strategies to predict new words".
43. The child's work was further differentiated to meet his needs as reflected in his Staged Intervention paperwork, including differentiation by pace, opportunities for overlearning, consolidation of sounds taught and a multisensory approach.
44. An assessment, funded privately by the parents, was undertaken by Mr W in December 2015, which assessed the child as being dyslexic.
45. The Head Teacher at School B did not believe that there were any significant well-

being concerns.

46. Due to parental concerns particularly about the child's progress in literacy and the child's stated dislike of school, the parents decided to move the child to School A for primary 4 commencing August 2016. This was a gold accredited Dyslexia Friendly School (DFS), in contrast with School B, which was bronze accredited and working towards silver. The DFS model is a programme intended to raise awareness of dyslexia within the pupil group, and to promote early identification of pupils with dyslexia and raise overall awareness for all children to help to overcome any stigma. It looks at ways to minimise barriers to learning and seeks to ensure an inclusive approach to teaching, providing a variety of resources in the classroom available for all children.
47. The child attended School A for the final week of P3 in June 2016. A POLAAR (Primary one literacy assessment and action resource baseline assessment) was carried out by the primary three teacher.
48. In or around September 2016, an occupational health assessment was undertaken which recommended further observation and evaluation from the Educational Psychologist.
49. The child's primary four class teacher (Witness J) received the transitional information from School B highlighting his difficulties with literacy as a result of his dyslexia. Along with the POLAAR result, this gave her an indication of the child's capabilities and she used this information as a starting point. At this time, targets were set as part of the Staged Intervention process in relation to phonics and sight vocabulary.
50. Literacy was taught on a daily basis in a systematic way using the structured approach of Active Literacy which was differentiated for the child. In particular, the class teacher followed the Active Literacy programme, focussing on phonics and common words (high frequency words). She followed the prescribed Active Literacy order of working with the child on blending and the phoneme progression. There was one focussed lesson each week when two new sounds would be introduced, which was followed up by various activities to reinforce learning. The class teacher made differentiations to allow the child to access the curriculum, including a reduction in the amount of work expected, the type of work that he was given or how he showed his learning ie spoken rather than written. She deliberately adjusted her lessons to make them more inclusive for the child, specifically using

learning strategies which did not focus heavily on writing. Adjustments included readingwise flashcards, daily reading practice, one-to-one support from class teachers or classroom assistant, small group work, differentiated spelling, and access to a laptop and reading pen.

51. The class teacher had more interaction with the claimant than any other parent, and she was aware that the claimant was undertaking research into the child's literacy difficulties. The class teacher sought to incorporate her suggestions if they were appropriate, including using resources which she brought into school such as games and flashcards. The staff augmented their usual approach to literacy teaching with the Dianne Craft resource at the request of the claimant. The Dianne Craft resource does not focus on phonics.
52. Although the child was recognised as having "obvious intelligence", the child was not always a motivated learner, requiring a lot of prompting. Teachers observed that often at the outset of tasks he stated that he was unable to do them because he "was dyslexic". It was the teachers' view that he used this reasoning to avoid completing tasks which he came to believe he could not do, or as a reason not to participate in activities. This outlook was viewed as a further barrier to learning which staff worked to minimize. It was often the case that he was very able to complete the task once given prompting and encouragement. Staff were aware that there were examples of tasks which he claimed that he could not do that he had successfully completed.
53. In addition to the differentiated support from the P4 class teacher, the child received support in the classroom from the classroom assistant and additional support for learning teacher Witness D. That additional support consisted primarily of separate small group work (in a class of four children) two to three times per week for up to 60 minutes. The additional support for learning teacher used a programme called Catch Up Literacy on a one-to-one basis. While Catch Up Literacy is recommended for children with dyslexia, and while it contains an element of phonics, it is not a phonics based programme. Other resources utilised by the additional support for learning teacher were Rapid Reading; Big Book/Three read; vocabulary/word aware; spelling/phonics/sight words/dolch words; literacy games and activities; and Nelson Grammar.
54. The child's lack of motivation was on occasion evident in these small group settings when he would on occasion cry when he believed he could not complete a task.

These were often tasks which were similar to tasks which he had on other occasions successfully completed, such that the child's teachers were not of the view that he was not capable of completing them. The additional support for learning teacher incorporated "growth mindset" in her lessons with a view to encouraging the child to be more positive about himself and his capabilities.

55. The class teacher observed that the child "never returned to class showing any signs of upset or distress" and the AHT stated that the child "never stood out as a child who was distressed".
56. An IEP was created for the child in November 2016.
57. Assessments within the school during primary 4 showed that the child's reading and spelling age were seen to be improving. The AHT noted that at the start of primary 4 the child was able to read a minimal of common words 8-10, but by February 2017 at the next planning block he was able to read 119 words and write 70 which was viewed as a significant improvement.
58. At the end of primary 4, the claimant shared further research with the child's class teacher and suggested that the use of phonics would be beneficial, and asked to focus on phonics tuition in future. Phonics had been in any event included in his lessons throughout his time at school, including in primary 4 as evidenced by Staged Intervention plans which included a phonics element, including targets which focused on phonics, dolch words/sight words; literacy; numeracy; health and wellbeing.
59. In June 2017 a phonological awareness assessment was undertaken by Witness D, namely PAST (Phonological awareness skills test) to assess phonemic awareness.
60. In or around August 2017, the claimant raised concerns about the child's welfare. The head teacher therefore asked the educational psychologist to prepare an objective assessment of his wellbeing. In September 2017, the educational psychologist completed a number of questionnaires, namely the Stirling Children's wellbeing scale, Myself as a Learner and the School Connectedness questionnaire.
61. In primary 5, the child was given further specific interventions to support his phonics, namely flashcards, daily reading practice, one-to-one support from the class teacher and/or classroom assistant, small group work, differentiated spelling, access to laptop, Ipad and reading pen as well as the 5 Minute Literacy Box

programme and Toe to Toe.

62. The child continued to be given support from the same additional support for learning teacher (Witness D). This now consisted of 105 minutes each week in a small group of four, when strategies included growth mindset/spelling/sight words/phonics/strategies; handwriting and alphabet awareness/phonological awareness; rapid writing; and mindfulness activities. The child was given two sessions of one-to-one Catch Up Literacy programme.
63. In October 2017 a TAC meeting took place at which the educational psychologist provided feedback on the wellbeing assessments. The educational psychologist concluded that the child had a low self-concept of himself as a learner.
64. It was therefore agreed that additional ways for the child to experience success in his learning would be explored, and that a growth mind-set approach would be used within the classroom. It was also noted that the child showed idiosyncrasies in his communication style and the educational psychologist suggested that these concerns about his social communication skills should be explored further. An observational profile was given to school and parents to complete.
65. In October 2017, an observational profile was completed apparently by Witness D which states that the child does “not respond well to criticism, will often resort to crying if told off or asked to redo work”. The claimant was not at that time given a copy of the observational profile and nor were these teacher concerns communicated to her.
66. The claimant initially agreed to this further assessment but later withdrew her consent. The claimant wished to focus solely on the remediation of the child’s dyslexia. The staff were however concerned that there was potentially another underlying barrier for the child to access learning that would also explain aspects of his presentation within the school that should be explored.
67. In December 2017, the claimant requested that the child stop seeing the additional support for learning teacher (Witness D).
68. In April 2018 the claimant was led to believe by the child’s friends that his primary 5 class teacher (Witness L) was not “nice” to the child and lacked patience with him when he was trying to complete literacy tasks. The claimant confronted Witness L informally, who found her presentation accusatory and upsetting.
69. In May 2018 the child had what is described by the claimant as an “emotional breakdown”, which the claimant recorded and had transcribed.

70. In May 2018, the claimant made a complaint to the AHT relating to a number of allegations of harm perpetrated by teachers at School A. That was dealt with by the AHT as a stage 1 complaint. An investigation was carried out by Witness J (who was no longer the child's class teacher but was responsible for additional support in the school) who interviewed relevant personnel. The complaint was not upheld.
71. The claimant was unhappy with the outcome and the matter was escalated to stage 2, and was referred to a Quality Improvement Officer, Witness F, who conducted a further investigation. She did not uphold the complaint.
72. In particular she concluded: "I found no evidence to corroborate [the child's] statement that Witness D had shouted at him and had an angry demeanour during group sessions. Other children in the group spoke very highly of Witness D and the support she gave them. Witness D and the other children confirmed that on some occasions [the child] had cried. This tended to be when [the child] was asked to stay on task and not interact with the others. Witness D dealt with these situations with sensitivity and encouraged him to go to the toilet to compose himself....I found no evidence to substantiate the four claims made against Witness L. Other staff, including a school assistant, who was regularly in Witness L's class and a sample of children all stated that Witness L rarely/never shouted...They stated she had a very positive relationship with [the child] and was always nice to him. She supported him well in class".
73. The child continued to make progress in P5, with teachers continuing to focus on the child becoming more positive about his learning and minimising any barriers.
74. Around this time the child was removed from school and thereafter home schooled. He did however return for primary 7 on a flexi schooling basis, with the claimant assuming responsibility for his literacy tuition.
75. The child commenced as a pupil at School C in August 2020.

Tribunal deliberations and decision

Observations on the witnesses and the evidence

The claimant

76. While it is clear that the claimant wants what is best for the child, she seemed to have lost sight of the focus on him in this case, and to have sought to pursue a wider agenda.
77. As a party litigant, she had clearly undertaken a great deal of research not only into

the issue but into the legal claims being made, and she presented the case in a thorough and comprehensive way, although with a tendency in places to drill down on detail of tangential relevance.

78. While she was able to summarise her case in well-structured written submissions, as discussed elsewhere in this judgment, in those submissions she sought to introduce new evidence and to make assertions which had not been put to the witnesses in cross examination.
79. Further, when it came to the evidence of Witness K in particular, she focussed on discrediting him rather than addressing his opinions on the key points in dispute in this case. This was to presuppose that we would agree with her regarding Witness K credentials or lack of them, assuming that we would not take his views into account. Despite prompting and being given considerable latitude in time and scope, she did not focus her questions on the issues which we actually required to determine. We noted however that in her supplementary submissions in relation to Witness K's evidence she asserts that he made several "false statements" but she did not put these specifics to Witness K during cross examination.
80. Rather unusually, she attached what might be described as a complaint about the "Conduct of The Local Authority" but we have treated this as further submissions on the evidence of Witness D and Witness K, discussed further below.
81. With regard to her evidence, while she gave a detailed account of the background context, as she is not an expert of literacy and was not a first-hand witness to the alleged unfavourable treatment upon which she relied in support of her claims, these factors weighed heavily in regard to the extent to which we took her evidence into account in our deliberations. We noted that, despite her emphasis of the need for, and absence of, what she referred to as objective, scientific data, she did not present any evidence about the child's progress when he was home schooled, beyond her assertions.
82. We bore in mind that she had the highest of expectations for the child, which is understandable, but we came to the view that these were unrealistic and lacking objectivity. As Witness K pointed out, she has been led to believe by those she has instructed that had the "correct" interventions been made, he would have been reading to his chronological age (and beyond) by now. That conclusion was not borne out by the evidence we heard, and indeed Witness E departed from the certainty of his conclusions in cross-examination even when teaching methods were what he would categorise as "gold standard". There were references

throughout to the claimant's belief that with the "correct" interventions the child could be "cured" and "symptom free" but that is not borne out by the evidence even of her own witnesses.

Expert witnesses

Witness A

83. With regard to Witness A, the Responsible Body representative re-made her application to have her evidence ruled inadmissible, relying on the decision of the Supreme Court in *Kennedy v Cordia (Services) LLP* 2016 SC. The representative argued that even if the Tribunal were to find her evidence admissible, that it should be given no weight. To the extent that there is any conflict with the evidence of Witness K, she argued that his evidence should be preferred not least because he has the necessary expertise to give that opinion and is familiar with Active Literacy and Catch Up Literacy.
84. The Representative argued that although it was not suggested that Witness A set out to mislead the Tribunal or was not credible, she submitted that she could not hold herself out as an expert since she was not suitably qualified or suitably objective, and in particular she submitted as follows: "She is a proponent and advocate of a particular form of teaching, of which she is a purveyor of the product. The style of her report is campaigning in nature and critical of teachers, the respondent and the Scottish Government. She acted in the role of advocate for the claimant which is entirely inappropriate for an expert witness. It was clear from her report that she accepted the views and facts as presented by the claimant when forming her views. She is explicit in saying that she took into account anecdotal evidence. She formed views as to the response of the schools to complaints by the claimant (without apparently checking the facts) and reiterated what she had been asked by the claimant to include in her report".
85. Although the Tribunal gave further consideration to the arguments of the Responsible Body representative set out in her written submissions, the Tribunal does not depart from its decision made by the legal member at the case management stage not to rule Witness A evidence inadmissible.
86. The legal member concluded by reference to the decision in *Kennedy v Cordia* and as fully set out in the note following the case management preliminary hearing in

August 2020 that Witness A should be categorised as a skilled witnesses of fact, where the test is whether the proposed skilled evidence will assist the court in its task. We were of the view that given Witness A's expertise as a respected practitioner in this field, with particular knowledge and experience of "systematic synthetic phonics", that her evidence was of some assistance to us in determining the questions before us; and in particular whether or not the respondent's literacy programme does include an approach which is properly speaking "systematic synthetic phonics"; and on the question of the extent to which the respondent's literacy programme might particularly disadvantage children with dyslexia.

87. While we recognised her wide experience and knowledge of mainly the system of education in England as a practitioner, publisher and consultant, we noted that she dismissed all approaches except her own in regard to the essential and exclusive validity of a "systematic synthetic phonics" approach, discounting any value for analytical phonics/any other systematic phonics programmes. Although we accepted her passion was genuine, we found her to be dogmatic in her views, and her first report in particular was highly emotive and lacking balance, which tended to "taint" the views expressed in the second report, which we found to be more relevant.
88. Crucially, she came to these conclusions without having any direct experience of the programmes under scrutiny in this case (apart from Jolly Phonics). As The Responsible Body's Representative pointed out in submissions, "Witness A acknowledged in oral evidence that she was not best placed to comment on the Active Literacy programme. She did not review the workbooks. She agreed that success in literacy for those with dyslexia can be elusive. She did not consider that dyslexia could be cured. In respect of the Catch-Up Literacy she acknowledged in her report that she had no direct experience of it".
89. Ultimately, we gave her evidence little weight particularly because it was apparent that she was not familiar with the literacy programmes under scrutiny. We noted in particular that she said in her report that "Good phonics provision may indeed have occurred in [the child's] schools but there is simply no evidence of it" and "we cannot really know how much phonics was linked to teaching the dolch word lists – but that is the point the parents were simply not informed about the practicalities

of teaching [the child's] foundational literacy". Thus we concluded that she did not have appropriate knowledge of the approaches taken in practice.

90. Witness A is highly critical of the lack of parental involvement/awareness, especially in her first report. It should however be noted that the extent of parental involvement is not a matter which is relevant to the legal tests which we require to apply, but in any event, we did not, as is clear from the findings in fact, agree with that conclusion. Further, in so far as the evidence of Witness A may be of relevance to the other questions to be determined by the Tribunal, namely any unfavourable treatment, we give her evidence no weight, noting that it is lacking balance, that she relies on anecdotal evidence and that she has not met or assessed the child.

91. In summary we give the evidence of Witness A little weight in the context of this case because: she has not seen or assessed the child; she is not knowledgeable about the Scottish Education system; she has no direct experience of Active Literacy programme and many of the other teaching methods under scrutiny in this case; her report appears to be based on limited or incomplete information; her report lacks balance by failing to objectively consider alternative approaches to teaching phonics. For these reasons, to the extent that the evidence of Witness A conflicts with that of the other witnesses who gave evidence, we preferred the evidence of the respondent's witnesses.

Witness E

92. We accepted that Witness E is a recognised expert in the field, and we noted his impressive record as a clinical neuro psychologist/academic clinician and leader of a school of 130 children with dyslexia in Florida. We noted that he was a strong proponent of "systematic synthetic phonics" and its regular application, stressing early intervention and diagnosis.

93. We noted in a case such as this he advocated that "the highest calibre of scientific, evidence based with large gains method (peer-reviewed in scientific publications and commercially available) for improving phonological awareness, decoding and phonics skills is provided daily, with high intensity of instruction (a minimum of one hour per day) and high frequency (Monday to Friday 5 days per week of evidence based instruction, which should include instruction that is engaging/systematic/explicit/intensive/ supportive". He states that "there is

imperative that gold standard programs be considered as a priority instructional programme”, such as those identified in his report (ADD programme and Lips programme).

94. To the extent that he was of the view that phonics teaching needs to be explicit and systematic while favouring the use of synthetic phonics, his overall emphasis was on structured phonics instruction to remediate dyslexia. This accords with the views of the other experts Witness B and indeed Witness K, given that his own initiative taught synthetic phonics for one period a day, five days each week.
95. However, Witness E gave no validity to any other approach, and we would have welcomed his views on alternatives, but when questioned about that, his response was that the evidence was so overwhelming that there was no debate on the matter, so that there was no merit to any other school of thought or approach. We accepted that this may well be the consensus view in North America, but we did not accept that there was no debate on the matter in the UK.
96. Given however that he had seen the documents lodged, it was not clear to us on what basis he was able to conclude that “there was no record of the local authority providing an evidence based instruction programme”. Witness E appears to indicate that the only “evidence based interventions” which are appropriate are those that he is aware of, and in any event these are, as he himself acknowledges the “gold standard”.
97. However we did hear evidence that the Active Literacy methodology was subject to longitudinal evaluation with positive results, which we would categorise as “evidence based” (as referenced both by Witness A and Witness K). We concluded that his partiality for the programmes which he advocates, and his lack of knowledge about the methods used in this case led him to discount them, without analysis, as an “evidence based intervention”.
98. Nor was it clear how he came to conclude that the child had made “minimal or no improvement from the years of educational instruction he has received”. He stated further that “If he continues to receive the same direct instruction, sight word approach of instruction it is highly likely that no progress will continue to be made resulting in negative emotional consequences.”
99. As is clear from the findings in fact we did not agree with that assessment based on the documents which we considered and the evidence which we heard. These

are conclusions which he apparently reaches without having seen or assessed the child and apparently without any analysis of the effectiveness or otherwise of the Active Literacy programmes or other interventions under scrutiny in this case. It appeared that his conclusions were reached on the basis of examining individual examples of the child's work rather than an objective assessment of the interventions made.

100. He appeared to advocate a view that all children with dyslexia, if they are taught in a particular way, will develop the skills to read at their chronological age and school grade level. The respondent's representative submitted that he departed from that position in his oral evidence. She stated that "Witness E relied upon a study he had undertaken in which at age 5 children had been identified as being "at risk" of dyslexia and they received what he called "evidenced based instruction" and more than 91% of them could read to their grade level by age 9. In cross examination the witness acknowledged that this was the research he speaks of in his report, but which is not cited or produced. He acknowledged that the children were not all ultimately diagnosed as having dyslexia because at the age of 5 years they had not yet been taught to read and therefore could not be diagnosed with dyslexia. The impression given by the report of this witness at A78 was that every child with dyslexia given "*evidenced based instruction*" would read to their chronological age. This is misleading. In fact, not all children identified for the study relied upon, read to their chronological age and not all of the children identified in the study ultimately were determined to have dyslexia".

101. Witness E was of the view that on the basis of the documentation he had seen that the child should have been diagnosed with "developmental dyslexia" far sooner than occurred. He relied on research which he states indicates that dyslexia of this severity can be reliably diagnosed before 7 years of age. That conclusion however is to discount the approach taken in the Scottish education context where a *formal* identification of dyslexia is made only when a body of evidence is available about a child's reading abilities (to reduce the incidence of false positives). In any event, in this case, the need to monitor for dyslexia was identified as early as primary 1.

102. Further, Witness E in his evidence made reference to "resisters" and conceded in cross examination that not all those even who had the benefit of his "gold standard" instruction progressed as he would have expected. Any conclusions

which Witness E made about the child's lack of progress could of course be put down to the child being so categorised or to other barriers to learning which have not yet been fully explored. While we noted that Witness E described the social difficulties experienced by the child as being dyslexia related, we took account of the fact that he has never met nor assessed the child.

103. We accepted the Respondent Representatives submission that the evidence of Witness E should be given limited weight, given the concerns set out above. In preferring the evidence of Witness K where there was any conflict in views, we have taken account of the fact that Witness E is US based and that he apparently has no knowledge of Active Literacy or how it is delivered, or the other programmes and methods under scrutiny in this case.

Witness B

104. We accept that Witness B is experienced and knowledgeable about education practices, and while an expert in her field, we noted that her expertise relates specifically to education practices in US and Canada. We noted that she is widely published in her field, and is a highly regarded expert.

105. Witness B also emphasised the importance of structured approaches to instruction on literacy, the importance of early identification of dyslexia and the provision of early intervention. She too favoured synthetic phonics, and indeed cited the Clackmannanshire project as research to support that. She took the view that this was better than the analytical approach, which she favoured over a whole language approach. Again, this appears to accord with views expressed by Witness E and Witness K.

106. We noted that she concluded from the documentation which she considered that despite the child's difficulty with writing and also identifying the sounds of letters, "no specific interventions were proposed". As a matter of fact, we do not accept that conclusion given the evidence which we have heard and the documentation which we have considered. We have set out in some detail in the findings in fact the interventions which took place. It seems that she reaches these conclusions on the basis of her consideration of documentation containing samples of the child's work, and by reference to data showing the child was over 3.3 years behind his chronological age in his decoding and spelling skills. She has not

however met or assessed the child. She does not report having undertaken any analysis of the interventions which were in fact undertaken. She seems to have reached this conclusion because in her view the “correct” interventions were not undertaken.

107. Indeed, as the respondent representative pointed out in her submissions, when she was asked about this in cross examination, she agreed that one could not make a conclusion about whether appropriate interventions had been provided simply based on the scoring as this said nothing about interventions, or indeed what interventions might be needed.

108. Nor did we agree that the evidence supported her conclusion that “There was no assessment of his reading, spelling, mathematics and writing skills”. This is clear from our findings in fact which sets out the significant number and scope of assessments which took place. Again given her statement that “proper assessments were not done” in fact her view is that those assessments which were done were not “proper”. We noted that she took the view that the “Ecological assessment” approach was too subjective and did not result in objective data which in her view was more accurate. In highlighting the need for specific “systematic” assessments she apparently entirely discounts the assessments of the professionals involved.

109. In particular, while she concludes “there were no systematic assessments of his phonological awareness skills”, we have not found that there was no assessment of his phonological awareness skills and we have found as a matter of fact that this was being assessed by teachers throughout, which identified at an early stage that the child had difficulty with blending and decoding and that he should be monitored for dyslexia from primary one, and which subsequently included objective assessments (eg PAST). Again she had a particular view of what “systematic” assessments might look like.

110. Witness B also was of the view that there “appears to have been no attempt to address [the] concerns” of the claimant. We agreed with the respondent representative, as addressed elsewhere in this judgment, that this is not a matter which is relevant to the legal issues for determination in this case, and in any event we did not as a matter of fact agree with that conclusion.

111. While Witness B provided a supplementary report in which she considers the suitability of the Meemo intervention, she does not comment on the detail of

the other interventions made in this case, specifically Active Literacy, Jolly Phonics or Catch Up Literacy, and nor did she do so in oral evidence.

112. For these reasons, where this is a conflict with the evidence of Witness K we have preferred his evidence, in summary because Witness B is not familiar with the Scottish Education System; she has not considered in her report in any detail if at all the Active Literacy programme or indeed the other literacy programmes under scrutiny in this case; she has not met or assessed the child; and she has apparently ignored or discounted the interventions which did take place in this case without any considered analysis of them as well as the value of the assessments which were in fact undertaken.

Witness K

113. We accepted that Witness K is an expert in his field, and that he is knowledgeable about literacy both in an academic sense and in practice. His evidence was extremely measured and balanced and he was considered in his responses to the questions put both in writing and in the hearing itself. Witness K has particular knowledge of the situation in Scotland and is very frequently asked to give expert evidence in the courts in Scotland, but has an international reputation.

114. Witness K produced three reports for this hearing, which we found to be detailed and balanced. While the first two reports were more general in nature, we found his third report, where he directly addresses the issues which are at the centre of this case, to be of particular assistance.

115. We noted that he did not favour an early diagnosis of dyslexia but preferred a gradual approach. He acknowledged readily the importance of some types of phonics but not exclusively “systematic synthetic phonics”. Indeed, we noted that he is in fact a particular proponent of synthetic phonics, but it was systematic phonics instruction which he viewed as critical for all children learning to read, including children with dyslexia. He accepted that appropriate instruction in analytic phonics was as valuable so long as it was systematic. His view was that phonics needs to be well defined, structured, daily and explicitly taught, which accords with the views of other experts in this case.

116. Concerns were expressed by the claimant and her experts about the level of information was shared with the parents. As noted above, this is not relevant for the legal tests which we were to determine, but we note here that we accepted Witness K's views that the school shared an appropriate level of information with the parents.
117. We found his evidence to be convincing because he has an in-depth knowledge of the Scottish context, as well as the programmes under consideration, but especially with a different local authorities system; he is knowledgeable about the assessment system and the interventions, including for example Ecological assessment and Staged Intervention, and was the best placed to give a view on the approach taken by the school and the respondent.
118. In summary, wherever there was a conflict in the evidence of the experts, we preferred the evidence of Witness K because he is an expert on the Scottish education system and was the only expert from whom we heard who had a working knowledge and understanding of the Active Literacy programme and other programmes being considered.
119. For the avoidance of doubt, we considered the "conduct complaint" and Witness K's personal response, and reject the claimant's application to have his evidence disregarded. In particular, we do not accept that his involvement with the Currie report meant that he was "incapable of providing an objective unbiased opinion" on the conduct of the respondent.

Comments on the expert witnesses

120. An important consideration in preferring the evidence of Witness K is that the expertise of Witness E and Witness B needs to be understood in the North American context. We gained the impression from their reports and evidence, and the way the case was presented, that the approach favoured by North American experts is informed chiefly by the "medical model" of disability. This influenced the claimant's views and for example her preference for the medical model led her to believe that had the child been taught correctly "his brain would have made neural connections and changed from a dyslexic to a non-dyslexic processing profile". This was authoritatively refuted by Witness K.

121. We noted that the respondent's approach is informed by the "social model" which is favoured in the Scottish system. We have therefore borne in mind in our deliberations the different cultural context here.
122. We were alert too to the fact that the experts who the claimant selected to give evidence were particular proponents of a particular form of teaching literacy, and that meant that we were deprived, to some extent, of further expert opinion which might have assisted us further in weighing up the pros and cons of the different approaches.

Other witnesses

123. We found Witness C to be a credible witness who gave measured responses to questions, some of which were well outwith his present remit. However given his past experience in ASN/HMIE/ Ed Psychology he gave a valuable context to the respondents policy and procedure. He was convincing on quality control of education services, the devolved nature of schools and responsibility of headteachers, training of staff and use of assessment data, as well as confirming the importance of the professional judgement of teachers in assessments.
124. We found Witness H to be an experienced and knowledgeable practitioner who also stressed in evidence the importance of teacher assessment from day-to-day observation in addition to assessment data. She was clear on supports used for the child (from primary 1 to 3) and the intervention system; and she gave helpful background on Active Literacy in practice.
125. Witness I presented as a committed and knowledgeable AHT who was informed on the subject matters raised, including literacy instruction as well as models, approaches and strategies deployed, having benefitted from teaching in different authorities and schools. It was clear too that she knew the child well and she was informative on detail of school procedures and resources.
126. Witness J was professional and knowledgeable about the child having been his class teacher in primary four and additional support teacher in primary five. She was knowledgeable too about the interventions made, with a clear practical intuitive understanding of learning strategies available. We found Witness J to be a caring, experienced and capable teacher who understood how to get the best out of the child. We noted that she was accommodating with the claimant.

127. We have considered the additional submissions of the claimant which would appear to be a complaint about the conduct of the council in regard to Witness D. The fact is that Witness D did give evidence. A witness order was issued. A statement was submitted which had been taken by the respondent's staff, but the claimant was given the opportunity to lead evidence from her so she was treated as "her" witness. We do not consider that she was disadvantaged as a result of any actions on the part of the respondent.
128. We noted Witness D had first supported the child briefly at School B but mostly at School A and we concluded from the evidence we heard that her training in ASN and specifically dyslexia before teaching the child was limited. We noted however that her experience and training improved, and we considered that her answers on dyslexia, reading, and assessment while not academic were sound. We accepted that she was a conscientious teacher who had the child's best interests in mind while following guidance from class teacher and HT/DHT. We did note that she could not recall completing the observational profile but did not appear to dispute what had been stated there.
129. We did get the impression that she had limited scope to initiate alternative approaches. For example, we understood that the weekly sessions were not what the experts recommended. Further, we noted her decision to use Catch Up Literacy with the child. She selected this programme because this was the one she had been trained in. While we accepted that this was not deemed unsuitable for children with dyslexia, we noted that it was not a phonics based programme, although her evidence was that she did phonics based work with the small group. She was of the view, and this was supported by the other teachers, that the child was capable of doing the tasks which she set him, and that the crying episodes related to his own lack of confidence which she addressed through interventions such as growth mindset.
130. We found Witness K to be a credible witness who was a fairly experienced QIO and experienced HT. She gave the impression of being well trained and knowledgeable, and we found her investigation to have been comprehensive and conclusions supported by the evidence gathered. We accepted her evidence, specifically in relation to the conduct of Witness L and Witness D.
131. Witness G assisted by explaining the role of the educational psychologist and assessment procedure, interventions and training. She confirmed that the

respondent adheres to a Social model of disability when dealing with dyslexia. We noted that it is class teachers who are primarily expected to identify dyslexia, although the training input appeared to be reactive rather than proactive.

Overview of teacher's evidence

132. We therefore accepted the respondent's witnesses' evidence as credible and reliable. We came to the view in the round that the teachers involved with the child knew him well and were committed to trying to do what was best for him. It was clear to us that the school was taking his learning seriously and the interventions made were appropriate and relevant. They were accommodating and informative with the parents, and the system ensured appropriate and sufficient parent intervention. We noted that an extensive range of assessments were undertaken, and we accepted that subjective assessment was an important element of that (although the significance of the PIPs scores appeared to be down played). While we noted that these interventions and assessments were not of the type which the claimant believed were required, it was not clear to us from the evidence what difference it would have made had the teachers had the objective, scientific data which the claimant calls for. Ultimately, we placed significant weight on the evidence of the teachers because it was clear that they knew the child well.

Time bar

133. The time bar pleas were reserved until after the hearing of evidence. In her written submission, the respondent representative advanced a time bar plea in regard to the section 15 claim in respect of the use of Catch Up Literacy and the conduct of Witness D or Witness L. She submitted that there was no explanation given by the claimant that would make it just and equitable to extend the period of time provided for in the rules. The respondent representative did not maintain her position (if indeed that was her position at one point) that any other aspects of the claimant's claim were out of time.

134. Rule 61(4) of the First-tier Tribunal for Scotland Health and Education Chamber (Procedure) Regulations 2018 states that "the First-tier Tribunal shall not consider a claim unless the claim has been received by the First-tier Tribunal before the end

of the period of six months beginning when the act complained of was done. Conduct extending over a period is to be treated as done at the end of that period”.

135. Rule 61(5) states that, “The First-tier Tribunal may consider any claim which is out of time under paragraph 4 if, in all the circumstances of the case, it considers that it was just and equitable to do so”.

136. Given that the child ceased to be taught by Witness D from December 2017, and the claimant became aware of particular concerns about Witness L in April 2018, and the claim having been lodged on 13 November 2018, it would appear that this aspect of the claim is on the face of it out of time. We therefore gave consideration to whether or not it would be just and equitable to allow the claim to be determined, albeit that it was out of time.

137. The claimant argued that it would be just and equitable to extend time primarily because School A staff did not alert her to concerns regarding the relationship between the child and Witness D, specifically Witness I advised he was “settling in fine”, and because she was not initially provided with the observational profile, or other material which she obtained through a Subject Access Request (SAR).

138. The claimant had lodged further particulars about the reasons why she had not submitted her claim earlier set out at T76-79. In evidence the claimant confirmed that she was not aware of the problem until she saw the observational profile in April 2018 following a SAR. In regard to that SAR, she received hundreds of documents on a usb stick which took her some time to consider and only then was provided with a copy of the observational profile which she came to understand was written by Witness D.

139. It was in April that she heard from the child’s friends about concerns about the way that he was treated by Witness L, and it was not until May that the child had what she called an “emotional breakdown”, and that he was taken out of school. These events prompted her to make a claim in the Tribunal in November, which, she argued, is less than six months after she found out about the specifics of what she alleges is unfavourable treatment.

140. Bearing in mind the overriding objective, we take account in this case of the fact that any delay, from the last act of alleged discrimination, was short; that the claimant had a valid explanation for her delay; that the claimant is a party litigant; that the respondent has suffered no prejudice as a result of the short delay; and

indeed the respondent was clearly able to respond cogently as is evidenced by subsequent proceedings.

141. In these circumstances, we concluded that it was just and equitable to extend the time to allow these claims to be considered.

Discrimination arising from disability

142. By reason of section 85 of the Equality Act 2010, under the chapter headed “Schools”, the responsible body (in Scotland in this context, the local authority) must not discriminate against a pupil, and that encompasses the provision at section 15 regarding discrimination arising from disability.

143. With regard to the claim under section 15, the claimant requires to show that the child has been treated unfavourably because of something arising in consequence of his disability. In this case, this relates to teaching methods at School A, referencing the conduct of Witness L and Witness D. The claimant argues that the child was unable to complete literacy tasks due to his disability, and that he was treated unfavourably as a result, such as by being shouted at and told to speed up, manifested in the fact that he would get upset in class. Further it is understood by the Tribunal (and the respondent) that the claimant asserts that the use of Catch Up Literacy programme as an additional support for a child with a disability such as the child and also the failure to include “systematic synthetic phonics” in their methods of teaching literacy are examples of unfavourable treatment.

144. The first question of course is whether the child could be said to be treated unfavourably, before we would come to consider whether that was “because of something arising in consequence of his disability”. Only once unfavourable treatment is identified, do we require to consider whether any unfavourable treatment was not because of the disability itself, but because of something connected with it, such as the fact that the child was unable to do his work or he was slower at doing his work.

145. The respondent representative argues that there is no evidence of unfavourable treatment either through the teaching methods at School A or the use of Catch Up Literacy, or the conduct of Witness L or Witness D, or further the failure to include synthetic phonics in teaching methods. She relied on the evidence of Witness J and Witness I regarding how the child was taught, the differentiation of the

curriculum and the recognition of the nature of his literacy difficulties, as well as the evidence of Witness K which she submits was clear in confirming that the interventions and the supports offered to the child were entirely appropriate. She argues that none of the interventions could be regarded as in any way as amounting to unfavourable treatment.

146. Her primary submission in regard to the claim relating to the conduct of Witness L and Witness D is that the claim is time barred, which we have rejected as discussed above. The respondent representative went on to argue in any event, relying on the evidence of Witness F, that there was no basis for the complaint made about Witness L and Witness D, it being refuted by other pupils interviewed. She relies too on the evidence of Witness D herself, whom she submits, “came across as a kind individual who knew [the child] well and was concerned for his wellbeing. She explained why she thought [the child] was unhappy at times in her sessions. She was clear that the work he received was differentiated for him and he was capable of doing it. Rather what the evidence suggests is that there may have been other barriers to [the child’s] learning involving his social communication skills which would have been relevant to explore but as yet have not been which may have impacted on his presentation in class and with his peers. Various professionals from occupational therapy, educational psychology and teaching staff considered that further assessment was appropriate”.

147. The claimant argued that the conduct of Witness L, in particular her “negative communication style/demeanour” amounted to unfavourable treatment arising from disability. She relied on what the child’s friends had said to her, namely that Witness L was not very nice to him and was too hard on him; her discussion with Witness L; the child’s statement; what he said to her during his “emotional breakdown”; and on the fact that the child was observed to be distressed at school. She submits that Witness F had no formal training in conducting investigations; refused to investigate if there were other parental complaints against Witness L; did not accept that as the QIO for the school that there was a conflict of interest where she carried out the stage 2 investigation. She also failed to accept what she or the children had said and had no insight into what behaviour a teacher may use to pressurise a disabled child into completing literary tasks which they found difficult. She submitted that the Tribunal should prefer the evidence of the children and find that Witness L treated the child unfavourably,

by her negative demeanour, and that he could not complete the work she expected of him because of his disability.

148. The Tribunal considered whether it could be said that the child had been treated unfavourably by the specific interaction with Witness L. However, we heard limited evidence about that, that being the claimant's evidence, which related to what she had been told by the child's friends, and we also took account of what the child had said in his advocacy statement. The claimant asked us to prefer the evidence of the children but of course we did not hear evidence from them (nor would we expect to). Rather, we heard evidence that the complaint was thoroughly investigated by both the AHT and Witness F, and that the complaint was not upheld. This was based on interviews with the pupils involved, which were lodged as productions R626-629, which do not support the claimant's contention.

149. The claimant also argued that the conduct of Witness D amounted to unfavourable treatment. Her submissions can be summarised as follows:

- Witness D confirmed that she did not receive any specialist training before working on ASN; and that she was not trained in "the importance of phonological processing skills in relation to dyslexia or that explicit synthetic phonics instruction can prevent literacy failure/dyslexia"; she was not familiar with the "reading rope" ie decoding versus comprehension skills, the Searchlight model of reading instruction or decodable books; she kept no objective assessment data; she was not aware of data on the child relating to his decoding age or working memory; and she confirmed that she has not been able to get a child with dyslexia to read above their chronological age.
- While Witness D concluded a phonics based intervention was required, she chose Catch Up Literacy because she had been trained in it, and it covered all areas: phonics, reading, writing, comprehension and spelling. None of the programmes used was explicit in systematic synthetic phonics teaching.
- While Witness D maintained that the child was given work within his capability, she did not know the scientific definition of dyslexia; how poor his phonological skills and working memory were; and that using whole language and multi-cueing teaching methods were inappropriate for a child with dyslexia.

- Witness D made the child complete literacy interventions that were outwith his capabilities. The claimant relied on Witness E's evidence that making a dyslexic child attempt to complete tasks that are outwith a child's language skill level, "leads to greater frustration, greater emotional toil, and trauma and creates more negative expectations".
- While Witness D denied shouting at the child, she confirmed she spoke firmly to him to keep him on task and agreed that could possibly be intimidating. She gave a variety of reasons why he would cry including he did not want to do the work, or not getting his own way, because he had a fixed mindset. She used growth mindset techniques with him but did not consider that giving him work that was beyond his capabilities would be causing his low self-esteem.
- Neither Witness B nor Witness E saw any indications of autism, but were of the view that tackling his spelling and writing problems would improve his self-esteem.
- Despite Witness F knowing of his poor working memory and decoding age, she too considered he had been given work according to his ability but did concede that being constantly asked to keep on task may be upsetting.

150. We considered these submissions and the evidence to support the claimant's claim relating to the treatment of the child by Witness D. We noted that this complaint was investigated and found not to be substantiated. Further we noted that the child would on occasion resort to crying (apparently only in Witness D's class), and we accepted the evidence of the respondent's witnesses that this was his way of seeking attention and making teachers aware that he was at least uncomfortable with tasks he was asked to do. We noted too that the evidence of Witness D, Witness J and Witness I was that he was not being asked to do tasks of which he was not capable. Witness I said in evidence that these were tasks which were similar to completed tasks of which there was evidence on the walls of the classroom. Neither Witness J nor Witness I saw the child being distressed, but in any event the fact that the child was said by children to be distressed at school, or indeed that he would cry in lessons, does not thereby indicate that he was treated unfavourably. There is no inevitable causal link between a child being distressed and suffering unfavourable treatment related to

his disability. We did not accept the evidence of Witness A (who has not met the child) that the fact that he was getting emotionally upset during a reading activity meant that he was being asked to do work that he was not capable of doing.

151. We noted that staff had concerns about his negativity and low self-esteem. They considered that it may be that there had been so much focus on his dyslexia that he came to believe that he could not do tasks and that staff took steps to address this and attempt to instil a more positive outlook.

152. Further we took account of evidence that staff, including the educational psychologist, were keen to undertake assessments relating to the child's social communication style, which staff believed may have been a further barrier to learning. Although Witness B and Witness E were of the view that the traits observed are not indicative of autism, they of course based this only on the papers they had read and they had not assessed or even seen the child. This is in contrast to the opinions of professionals who had spent a considerable amount of time in the child's company.

153. We concluded that Witness F's investigation was thorough, and we took account of the transcripts of the interviews upon which her conclusion were based. We did not accept therefore that there was any evidence to support the submission that the child was treated "unfavourably" in the way that he was dealt with by Witness D either.

154. With regard to any argument that there were other forms of unfavourable treatment, The respondent representative argues that the provision of Catch Up Literacy does not amount to unfavourable treatment. Witness D said the child made progress using it. Witness K states that Catch-up Literacy has an evidence base and is widely used for dyslexia. It is recommended by The Dyslexia-SpLD Trust.

155. With regard to the use of synthetic phonics in teaching methods, the respondent representative argued that the use of synthetic phonics is not essential, which by reference to the evidence of Witness K, "is just one of many factors which are crucial to the learning and teaching process in reading and in dyslexia". [R633]. She continued, "It is clear from the evidence that phonics teaching was an integral part of the teaching of [the child] and had been identified as a particular target for his learning, but that [the child] was also exposed to other aspects of learning and teaching in the context of the literacy curriculum. It was not necessary for each support to amount to teaching on systematic phonics". Again relying on the

evidence of Witness K, she argues that there is no basis upon which the Tribunal could conclude that the child has been unfavourably treated because he does not read to his chronological age.

156. Even in the event any treatment was deemed to amount to unfavourable treatment, the respondent representative argued that the use of it was proportionate to achieve a legitimate aim. The legitimate aim was to provide support for the child in his literacy with the benefit of one-to-one support and a small group setting. This was a legitimate aim and the use of Catch Up was proportionate. Even if the claimant has a different view as to its effectiveness, or the panel considered that it did not provide instruction in systematic phonics, there is no doubt that Witness D considered it an appropriate intervention and that is supported by Witness K.

157. With regard to the claim that the child was treated “unfavourably” by the use of Catch Up literacy, the Tribunal considered whether this was damaging as asserted by the claimant and by Witness A. Witness D saw the child once a week for additional support (that being the nature of the role of ASN teachers who are peripatetic) and she worked with him in the small group and did one-to-one sessions with him using a literacy support package with which she was familiar. We noted that the question whether the instruction was “damaging” was specifically addressed in particular by Witness K in his third report. While Catch Up Literacy is not a systematic synthetic programme, both he and indeed Witness A acknowledged that it does contain elements of phonics teaching. As Witness K put it, it was just one of several strategies used in providing extra support for the child (which did otherwise include phonics instruction). Witness K also stated that it is one of the literacy interventions which actually has an evidence base and is widely used for dyslexia.

158. In evidence, Witness I accepted that since the child had a particular difficulty with his decoding skills that was best addressed by a synthetic phonics programme. However, while we accepted that Catch Up Literacy is suitable for children with dyslexia, and although Catch Up Literacy has a phonics aspect to it, we noted that Catch Up Literacy is not a phonics based programme. While we concluded that it would have been better if this additional support had been a phonics based programme (although not necessarily synthetic phonics), we could not say based on the evidence we heard that this was unfavourable treatment. The

child was getting additional supports through these extra sessions. Again although it may have been better if additional supports could have been daily rather than weekly, we could not say that the additional support given by Witness D amounted to unfavourable treatment.

159. Although the claimant did not specifically address in her written submissions the argument that the child was treated unfavourably in terms of this section because he was not taught using a specific systematic synthetic phonics programme or because he was taught using the Active Literacy programme, we observed that the evidence of Witness K did not in any event support such an argument. We noted that Witness K was of the view that a child should receive systematic phonics instruction on a daily basis, and this accords with the views of other experts. The view of all the experts was that a child was best served by explicit, structured, systematic, daily teaching in phonics.

160. We accepted the evidence of Witness J in particular that although a new sound was taught each week, that was not the only phonics teaching which the child received, because the lessons throughout the week would serve to reinforce the learning related to that sound. We accepted that some aspects of the programme involve whole word teaching (which we understood was an aspect of synthetic and analytic phonics for “tricky” or sight words). We accept that the Active Literacy programme was a systematic literacy programme a central feature of which was the teaching of phonics. We have concluded that the child did receive systematic phonics instruction.

161. The claimant’s experts said this should be synthetic phonics, but Witness K’s view is that it could be either analytic or synthetic phonics, so long as it met the other criteria. In regard to the instruction of the child, Witness K concluded R656 that “the records I have examined ...indicate...that the child was receiving considerable additional help and that a key focus of that help was on systematic phonics teaching”. In his third report he considered research which might indicate that synthetic phonics approaches were better than any other method, and his own conclusion that there was some overall advantage in synthetic phonics, such an approach might then be the “gold standard” to use the language of Witness E.

162. However we were alert to the conclusions of the Supreme Court in the *Williams v Trustees of Swansea University* [2019] IRLR 306 that treatment is not thereby “unfavourable” in the meaning of section 14, just because treatment could be more

favourable, Lord Carnwarth endorsing the conclusion of Bean LJ at the Court of Appeal that, “The *Shamoon* case is not authority for saying that a disabled person has been subjected to unfavourable treatment....simply because he thinks he should have been treated better”.

163. Ultimately, we came to the view that while the approach taken by the school could have been improved, in particular consideration might have been given to additional supports with a specific phonics focus which might mean daily rather than weekly additional interventions by teachers, we did not conclude that the approach taken by the school could be said to amount to “unfavourable” treatment.

164. We therefore accepted the respondent’s submission that there is no evidence of unfavourable treatment. Given that conclusion there is no requirement for us to consider the other branches of the legal test.

Indirect discrimination

165. The obligation on a responsible body not to discriminate against a pupil under section 85 includes the requirement not to subject a pupil to indirect discrimination. The relevant provision is set out section 19 as follows: “(1) 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 (2) 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 would be a proportionate means of achieving a legitimate aim”.

166. At the case management stage the Tribunal identified four PCPs, namely the failure to include a systematic synthetic phonics component in the literacy programme; the use of the Dyslexia Friendly School model by the schools; the Staged Intervention process; and the Ecological assessment process, and set out the questions for determination by the Tribunal as follows:

- Whether the PCP was applied to all pupils;

- If so, whether that PCP puts or would put pupils who share the child's disability at a particular disadvantage;
- If so, whether the PCP puts or would put the child at that disadvantage;
- If so, whether the respondent can show that the PCP is justified as a proportionate means of achieving a legitimate aim.

167. The Tribunal considered each of the PCPs in turn.

Active Literacy

168. With regard to the claim by the claimant that the literacy teaching method failed to include a "systematic synthetic phonics" component, the claimant submits that the evidence supports her contention that the child did not receive explicit "systematic synthetic phonics" instruction. She accepts that "the literacy teaching provided to the child did include some systematic synthetic phonics, but it was mainly analytic phonics embedded within whole language teaching that included the use of multi-cueing strategies".

169. The respondent representatives primary submission is that it was only if the Tribunal were to find that the respondent's literacy strategy did not include a "systematic synthetic phonics" component that the Tribunal would then require to consider the further questions to identify whether there was indirect discrimination.

170. Given that it is essentially conceded by the claimant, and in light of the evidence which we heard, we have concluded that the child was taught using methods which included at least a minor "systematic synthetic phonics" component. In particular, the child was taught using aspects of the Jolly Phonics method, specifically in primary 1, and there was no dispute among the witnesses who knew this method that this was a systematic synthetic phonics programme. This method was used in conjunction with the Active Literacy programme. We heard however that while phonics is a central component of that programme, it was traditional or analytic phonics approach that was primarily taken. It was with this aspect which the claimant took issue. We therefore did not agree with the respondent representative, in light of the evidence which we heard, that the fact that there was accepted to be a limited "systematic synthetic phonics" component in the teaching method used, that that was the whole answer to this aspect of the claim. The claimant's complaint was that the Active Literacy programme does not meet the criteria of a "systematic

synthetic phonics” programme as defined by the core criteria listed at A304, and it was that question which we considered. This was a matter which was in any event addressed by the respondent representative in evidence and in submissions.

171. The claimant argues that the Active Literacy programme is a PCP applied to all pupils which puts children with poor phonological skill/dyslexia at a disadvantage because the programme does not improve their poor phonemic awareness skills, and so puts the child at a disadvantage compared with his non-disabled peers. Her submissions were based on the evidence of Witness E, Witness B and Witness A. The claimant relies on the evidence of Witness E and Witness A in particular that the decoding process method used in Active Literacy, namely the top down analytic breakdown of a word, is at a higher skill level and not suitable for a child with poor phonemic awareness skills.

172. The Respondent representative in her submissions invited the Tribunal to accept the evidence of Witness K and the teaching staff that Active Literacy is a well acclaimed and highly successful programme for all children including those with dyslexia and other difficulties in reading, with its effectiveness being demonstrated by longitudinal evaluations. Witness K states specifically that a central feature of Active Literacy is “phonemic awareness and phonics instruction”. It is a balanced programme which draws on multiple methods of teaching. It is not fundamentally synthetic in nature but is a systematic phonics programme. She relies on the report of Witness K to support her submission that there is no evidence to conclude that children with dyslexia are put at a particular disadvantage, namely “a good teaching programme for children with dyslexia or any struggling readers will involve the systematic teaching of phonics as an essential part of the strategy. That in fact applies universally to all children. It is a simple fact which is acknowledged fairly universally by all who work in this field - if we get it right for dyslexia, we get it right for all.” Further and in any event, she relies on the evidence of the teachers that the programme was not used to the exclusion of other resources in the teaching of literacy in school, and specifically it was used with Jolly Phonics which, it is not disputed, is a synthetic phonics programme.

173. We considered whether the Active Literacy programme operates to disadvantage children with dyslexia. We heard evidence that the Active Literacy model was used both at School B and at School A. All children were taught according to this model, its primary approach confirmed by Witness K (and

Witness I) to be analytic phonics, but supplemented to an extent, in the early years especially, with Jolly Phonics. The model did allow differentiation based on individual needs as assessed by the teaching staff, and in particular could be supplemented by tailored interventions for pupils who were seen to have literacy difficulties.

174. We have discussed above our position regarding the claimant's witnesses' evidence that the claimant's experts had little or no knowledge of the Scottish education system, and had no knowledge and no direct experience of the Active Literacy programme. Neither Witness E nor Witness B considered the specifics of the programme.

175. Witness A did consider the Active Literacy programme in the abstract as set out in her second report, but she confirmed she had no personal knowledge of teaching the programme. She evaluated it solely on a selection of manuals and DVDs as well as the documents lodged, because she did not have access to the whole programme.

176. Witness A's evidence was that "systematic synthetic phonics" was a particular method of teaching phonics which was most powerful. She concluded that the Active Literacy programme was "not underpinned by the full 'systematic synthetic phonics' teaching principles". She gave examples of "poor phonics provision". She concludes that where children are given passages to read that contain words where the letter/s-sounds correspondence are new and have not been mastered leads to multi-cueing word guess, which she says is "potentially very damaging for children...who have dyslexia".

177. Witness A in her second report also referenced longitudinal research about the Active Literacy programme (which as she points out was originally called "Think About It"). She notes that the conclusion of the research was that "the intervention (of phonemic awareness and phonics instruction, the development of semantic and syntactical cueing systems, and the development of metacognitive strategies) was evidence based and did appear to work. The intervention was multi-faceted, but the relative efficacy of these different resource components is unknown". Her position was that the Active Literacy programme was based on the multi-cueing/searchlights reading strategies model and not the simple view of reading. The programme "did not incorporate the findings of the Rose Review 2006.....[which] concluded that the searchlights reading strategies model was

ineffective and needed to be replaced by the early teaching of systematic synthetic phonics to ensure every child was given the optimum opportunity to learn how to read (decode) and spell (encode)”.

178. Witness K challenged the accuracy of Witness A’s understanding of the Rose Review. We noted too his views on the elevation of the concept of “systematic synthetic phonics” to a “unique and unjustified position”, and the fact that the Rose Reports of 2006 and 2009 reference synthetic phonics in particular only rarely and that Witness K referenced the fact that it was acknowledged in the report that its recommendation to opt for synthetic phonics was made “notwithstanding the uncertainties of research”. Significantly, he also stated that the two standard text books on dyslexia do not reference “systematic synthetic phonics” at all.

179. We noted too that the Rose report did not say in terms that “systematic synthetic phonics” methods should be introduced into all schools in England. In particular the extract from the report lodged at page A208 stated “Having considered a wide range of evidence, the review has concluded that the case for *systematic phonic work* is overwhelming and *much strengthened by a synthetic approach*, the key features of which are to teach beginner readers....” [our emphasis].

180. As we understood it the emphasis in the 2006 and 2009 reports was on systematic phonics but with less stress on the need for the approach to synthetic phonics. We understood from that and the other expert evidence that what is recommended is an emphasis on structured and consistent phonics instruction, with the experts placing more or less emphasis on the need for such instruction to involve synthetic phonics.

181. The witnesses whom the claimant relied on were not knowledgeable about the Scottish system. The only expert witness we heard from, whose evidence we accepted in preference to theirs, was Witness K. He set out the historical perspective to explain why there was not the same imperative in Scotland to make the fundamental change which had resulted from the Rose Report in England, specifically that phonics had been and continued to be taught in Scottish schools, and teachers required to have a specific teaching qualification.

182. Witness K explained that he was very familiar with the Active Literacy programme because when it was being developed in North Lanarkshire, he was developing his own programme for West Dunbartonshire. While his programme

had a focus on synthetic phonics, he saw “the value of breadth and perspective” so that he was anxious that his own programme did not become “so focused on phonics that it was the only significant weapon in our armoury”. He states that “a central feature of Active Literacy, its ‘Strand 1’ is ‘phonemic awareness and phonics instruction’. However it is a balanced programme which draws on multiple methods and is very far from being an almost exclusive focus on phonics.....it is an asset and not a deficit of the programme that...it is not underpinned by the full systematic synthetic phonics teaching principles. The fact that the local authority adopted this programme to support its work in literacy in my view in itself indicates that it is an authority which was proactive among the authorities in Scotland in its efforts to address the needs of all of its children including those with dyslexia”.

183. We therefore conclude, relying the evidence of Witness K, that there is no evidence that the programme particularly disadvantages children with dyslexia. It might be that outcomes might be improved, or at least slightly improved, taking a synthetic approach to the teaching of phonics, but that is very far removed from saying that a literacy system which has phonics (but not synthetic phonics) as a central feature operates to particularly disadvantage those with dyslexia.

Dyslexia Friendly Schools Model

184. With regard to Dyslexia Friendly Schools Model, the Respondent representative summarises how the model was implemented, and relied on the evidence of Witness I that it was intended to benefit all children and that teaching practices are embedded in the classroom so that children with dyslexia are not made to stand out. She submits that there is no evidence to support the claim that it puts a child with dyslexia at a particular disadvantage.

185. The claimant had particular concerns about training which staff had received from Mr M and specifically references to the model being based on a “paradigm shift from dyslexia as a uniform disability to dyslexia as a learning preference”. She relied on the evidence of Witness I that Mr M’s training is not related to phonics. The evidence showed that the model was self-evaluated and there was no evidence that it had been subject to internal or external review for its impact on the literacy attainment for pupils with dyslexia.

186. She argued that “this PCP uses a definition of dyslexia that has no scientific basis ie dyslexia is a learning preference. The PCP puts pupils who have dyslexia at a disadvantage compared to their peers because DFS strategies appear to have replaced the explicit teaching they require to be able to learn how to read and write”. She relies on the evidence of Witness B who had conducted a literature search and found no studies confirming the validity of the DFS model for helping students with dyslexia, especially for addressing their basic phonological and decoding problems.
187. We did not, as a matter of fact, conclude from the evidence that the DFS strategies have replaced the explicit teaching pupils require to be able to learn to read and write. As we understood it, it encompassed monitoring and Staged Intervention and did not replace the literacy strategy but rather supplemented it. We noted that Witness B was of the view that the DFS model was good, but did not go far enough.
188. We heard that it was self-evaluated, and there was no evidence that it had been reviewed. While we accepted that there was no empirical evidence of this model actually helping pupils with dyslexia, it would be surprising if it did not assist children with dyslexia in some way or other, even to the extent that other children were more aware of the condition or that physical supports at least were more readily available.
189. However importantly there no evidence that it operated to particularly disadvantage children with dyslexia. Indeed, we accepted the Respondent representative’s submission that the model did not disregard the importance of features such as phonological skills and phonics and was intended to benefit all children, but particularly children with dyslexia by encouraging inclusive practices so that children with dyslexia did not stand out. We concluded, relying on Witness J’s evidence that this was a supplementary initiative about the inclusion of children with dyslexia and understanding and awareness by all pupils. Witness J also said that it was about having resources available for all children to use including noise defenders, privacy boards and coloured overlays.
190. We did however have certain reservations about staff training. We got the impression from Witness G in particular that training on dyslexia for teachers was reactive rather than proactive. Given her evidence that it is primarily for teachers to identify dyslexia, we were of the view that more structured, more

extensive training, including possible appropriate interventions, may have been valuable.

191. We did not agree that the reference to dyslexia as a “learning preference” was in any way significant. We heard from Witness I that she agreed that dyslexia was a “learning difference” which was to accept that children with dyslexia process information in a different way and that she therefore advocated a multi-sensory approach based on learning styles. This is in line with the social model described by Witness G which forms the basis of the DFS model. As discussed above, we got the impression that the claimant’s experts (and the claimant herself, given her scientific background) were more inclined to the medical model, but we accept that it was entirely appropriate for the respondent to base their literacy strategy on the social model which is more in line with the Scottish cultural context.

192. To the extent that the claimant asserts that the DFS model does not specifically identify those with dyslexia, or suggest specific interventions, we agreed with the claimant. We understood however that the DFS model would not of itself address any specific literacy difficulties, but that is just one pillar of the respondent’s approach to literacy instruction, given that it supplements the Active Literacy programme. We accepted that the DFS strategies raise the profile of dyslexia and seek to create a literacy-rich environment. We were of the view that this could not be said to disadvantage children with dyslexia, and there was otherwise nothing we heard which would support that assertion.

193. We conclude that we heard no evidence to support the contention that this model particularly disadvantaged children with dyslexia.

Ecological Assessment Framework

194. With regard to the Ecological Assessment Framework, the Respondent representative relied on the evidence that this is not designed specifically for those with dyslexia. It is used to help staff identify any number of difficulties. It is a matter of teaching staff’s professional judgement as to what they use from within that assessment framework. She points to Witness G’s explanation that there is a reading section within the assessment framework and within that a section on phonological awareness. There are assessments within that section which could be conducted with those with dyslexia and other literacy difficulties. It is therefore

not correct to say that the Ecological Assessment Framework could not be used to assess phonological awareness. She relies on the evidence of Witness K that “the local authorities framework is a well-developed one which more than meets the needs of this case and of others with dyslexia or with literacy difficulties irrespective of their cause”. She submits that there is no basis for a conclusion that a child with dyslexia is put at a particular disadvantage by the Ecological Assessment Framework.

195. The claimant argued that “the Ecological Assessment Framework puts children at a disadvantage because the framework does not specifically collect information on the deficits of the phonological components of language. There are no objective assessments that are linked to specific interventions specifically differentiating between decoding and language comprehension issues related to poor literary skills”. The claimant was of the view that there were insufficient assessments and the wrong type of data was being collected. She argued that this put the child “at a substantial disadvantage because the ecological assessment and (working memory assessment) did not determine he had deficits in his phonological skills and that he required the intervention of explicit synthetic phonics instruction”.

196. We heard evidence that the Ecological Assessment Framework applied to all pupils. We did not however accept that there was any evidence to support the contention that it operated to particularly disadvantage pupils with dyslexia. It should be clear from our findings in fact that we do not accept the claimant’s submission that the Ecological Assessment Framework did not determine that the child had deficits in his phonological skills. We were of the view that the respondent’s assessment methods were fit for purpose, and there was a place for both the subjective assessments, taking account of teacher’s professional judgement, as well as the objective assessments, including the PIP scores.

197. We have concluded that the teachers in the early years identified that the child had issues with phonological awareness through the assessment process, showing up the need for intervention, and recommended and implemented certain individualized additional supports and specifically certain phonics instruction.

198. The question might then be whether the correct interventions (which might be equated to reasonable adjustments) were made in relation to the issues identified. However, for the reasons discussed elsewhere in this judgment, we have not concluded that having identified deficiencies in his phonological awareness that

the child or any other children “required the intervention of explicit synthetic phonics instruction”.

199. We conclude that there is no evidence to support the claim that the Ecological Assessment Framework particularly disadvantages pupils with dyslexia.

Staged Intervention Process

200. With regard to the Staged Intervention Process, the Respondent representative argued that this is an assessment and planning framework used to identify extra support required based on teachers’ judgement. Again, she submits that there is no evidence that the Staged Intervention Process puts children with dyslexia at a particular disadvantage. In any event, the paperwork generated within the Staged Intervention Process for the child clearly identifies the need to work with the child on phonics.

201. The claimant made detailed submissions under this heading, entitled “staged intervention process and procedures” which she analysed as three separate PCPs. The first was headed “teacher monitoring and use of standard assessment data” in regard to which she argued that “the collection of standardised data” was a PCP applied to all children, but that “the failure to follow up on low phonics and decoding scores put children with poor phonological awareness skills/dyslexia at a disadvantage compared to their peers”. Under the heading, “staged intervention resources and documentation”, she argued that “the documenting and resourcing of additional support puts children with dyslexia at a disadvantage”, because information was not easily accessible to ASN staff and time spent providing interventions to the child was based on teacher’s time allocation rather than the frequency of intervention required. Further, under wellbeing monitoring, she argued that the child was put at a substantial disadvantage because staff did “not understand that a child will ‘mask’ how distressed they actually are in school, they failed to act on parental concerns and applied growth mindset techniques that were totally inappropriate for a child that was dealing with being functionally illiterate in a school environment”.

202. At the case management stage this PCP was identified as the Staged Intervention Process, and was not sub-divided in the way which the claimant now suggests that the matter should be approached. In any event, the claimant’s

argument presupposes that we would reach a number of conclusions which we have not in fact reached. For example, she presupposes that there was a failure to follow up on low phonics and decoding scores, whereas we have found that teachers did take steps to address the concerns they had about the child's literacy skills.

203. It presupposes that we would conclude that there was an inappropriate monitoring of the situation; that any distress which we understood the child to have suffered was directly and causally linked solely to his dyslexia and to the teaching methods; it presupposes that we would conclude that the respondent failed to act on parental concerns; it presupposes that we would conclude that the growth mindset techniques were inappropriate for a child with dyslexia. It presupposes that we would be of the view that the child was "functionally illiterate". As is clear from the findings in fact, we did not agree with these propositions based on the evidence which we heard.

204. We noted the claimant's concerns that information was not easily accessible to ASN staff and time spent providing interventions to the child was based on teacher's time allocation rather than the frequency of intervention required. We do accept that not all of the teachers involved with the child had all of the objective data collated in regard to his particular difficulties, and one aspect of the whole process which we thought could have been improved was to ensure that when data was collected it was passed to the relevant teaching staff, including the additional support for learning teachers. Further we did note that the specific additional support interventions were weekly, rather than daily, but we also heard evidence that class teachers and classroom assistants were working with the child throughout the course of each week to reinforce learning on particular sounds.

205. That however does not lead us to the conclusion that the Staged Intervention Process particularly disadvantaged children with dyslexia.

206. We heard evidence that the Staged Intervention Process is applied to all pupils, and those who are deemed to require further support are placed on so-called "staged intervention" and that the level or "stage" of intervention made depends on the level of internal or external support being provided. We heard that the child was placed on Staged Intervention in response to staff concerns about his progress.

207. However, we heard no evidence that the Staged Intervention approaches could be said to particularly disadvantage pupils with dyslexia. While the claimant

contends for a very specific form of monitoring, and a very specific form of instruction to address concerns, given that we conclude that children with dyslexia are not particularly disadvantaged by the provision of literacy instruction which is not a “systematic synthetic phonics” programme, we find that it cannot be said that the child was disadvantaged by the Staged Intervention Process. It was the identification of concerns about his literacy skills which had the consequence of him being placed on Staged Intervention, resulting in closer monitoring and identified targets to address his literacy difficulties, which did principally address the concern about phonics in particular, and which resulted in additional supports. The fact that these were not what the claimant believed to be the correct interventions/supports does not thereby lead us to conclude that this approach particularly disadvantaged children with dyslexia.

208. We therefore conclude that none of the PCPs relied on particularly disadvantage children with dyslexia. We accepted Witness K’s conclusion that what is good for children in general is good for children with dyslexia. In particular, we conclude that the Active Literacy programme, with the combination of Jolly Phonics, is suitable for children with dyslexia. That programme, delivered alongside the Dyslexia Friendly Schools strategies, the Ecological Assessment Framework, and the Staged Intervention Process, allows for the identification of children with dyslexia and for appropriate additional supports for them.

Reasonable adjustments

209. The claimant also argues that there has been a failure to make reasonable adjustments. The reasonable adjustments duty applies to the respondent by reason of the provisions of section 85(6) of the 2010 Act.

210. A responsible body is therefore under a duty to make reasonable adjustments in terms of section 20, and any failure to comply with that duty will amount to discrimination contrary to section 21. Schedule 13 of the 2010 Act applies to cases involving schools, and states at paragraph 2 that the responsible body must comply with the first and third requirements.

211. The first requirement is set out in section 20(3) and relates to PCPs which put disabled people at a substantial disadvantage. We understood that the claimant in this case, in regard to the reasonable adjustments duty, does not rely on this

requirement (notwithstanding her reliance on the PCP in relation to indirect discrimination).

212. Rather, she relied on the third requirement which is set out at section 20(5) as follows: “the third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter 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”. The duty includes the provision of auxiliary services (section 20(11)) which means anything that constitutes additional support or assistance for a disabled pupil, such as a piece of equipment or support from a member of staff (see EHRC Technical Guidance for Schools).
213. Schedule 13 para 2(4)(b) states that in relation to both the first and third requirements, the relevant matters are the “provision of education or access to a benefit, facility or service”.
214. Schedule 13 para 2(3)(b) states that in relation to both the first and third requirements, the reference to “a disabled person” is a reference to “disabled pupils generally”. This reference to “disabled pupils generally” confirms that the reasonable adjustments duty is an “anticipatory duty”, for cases in the education context.
215. The claimant highlighted that this was an anticipatory duty without making submissions about the significance of that. The respondent representative submitted that that the duty is to take such steps as is reasonable to avoid the disadvantage, for disabled pupils generally (by reference to schedule 13, paragraph (3)). She acknowledges that the nature of the duties is anticipatory and is thus to be assessed by reference to a class of disabled person rather than an individual claimant. By reference to the dicta of Lord Bracadale in *DM v Fife Council* [2016] CSIH 55, she submits that it is not a question of carrying out a close examination of the position of the child.
216. We accepted the Respondent representative’s submission that the duty is triggered by reference to a class of person rather than the individual claimant, in this case “pupils with dyslexia” which would require the respondent to anticipate the needs of pupils with dyslexia. We are however of the view that the circumstances of the individual do come into play when assessing the reasonableness question, as discussed later (although this distinction is not significant in this case).

217. The third requirement (reading section 20(5) with schedule 13) should therefore be read for the purposes of this case, as follows:

“The third requirement is a requirement where [pupils with dyslexia] would but for the provision of [an auxiliary service] be put at a substantial disadvantage in relation to [the provision of education or access to a benefit facility or service] in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide [the auxiliary service]”.

218. We therefore require to consider the following questions:

- i. What is the auxiliary aid or service?
- ii. Does the failure to provide the auxiliary aid or service put pupils with dyslexia at a substantial disadvantage in comparison with persons who are not disabled?
- iii. Are the adjustments contended for reasonable steps to have to take to avoid the disadvantage?

i) What is the auxiliary aid or service?

219. We understood the claimant to argue the respondent should introduce as a reasonable adjustment a literacy programme based on systematic synthetic phonics, including the use of decodable books. This she says is an “auxiliary service” which the respondent had failed to provide. She argues that this puts the child at a substantial disadvantage compared with pupils who are not disabled, and the respondent has failed to take such steps as would have been reasonable to take to provide the auxiliary service.

220. In her written submissions, the claimant submits that the respondent should introduce the “most up to date scientific evidence based research on the most appropriate diagnostic and teaching methods required to be able to predict, prevent and remediate literacy failure due to poor phonological skills/dyslexia”. She submits the correct interventions are required so that any attainment gap would be closed. The claimant summarised the evidence of her experts, and contrasted their position with that of Witness K, to support her argument that the respondent had failed in their anticipatory duty to make reasonable adjustments. She submitted that the respondent had failed to use standardised assessment data

on children to identify children at risk of literacy failure; they had failed to give them explicit “systematic synthetic phonics” instruction which is “evidence based to improve the phonemic awareness skills for children with dyslexia. The mixed method of teaching phonics embedded in whole language has been shown by research to be ineffective and has a negative impact on children developing decoding skills”. She submitted that the child had thereby suffered disadvantage as a result of these failures.

221. In the written submissions, the claimant contended for a much broader range of reasonable adjustments, as listed in the list of remedies which she seeks, compared with those which she had set out in her claim form.

222. The Respondent representative submitted that, relying on Guidance by the Equalities and Human Rights Commission on Reasonable Adjustments for Disabled Pupils that where (as in this case) a child with a disability has additional support needs, the child may be in receipt of all of the appropriate additional supports and there is no additional requirement to make reasonable adjustments. In this case the child received throughout his time at school considerable additional support, those being according to Witness K “good examples” for supporting children with dyslexia. Referring to her previous submissions on the Active Literacy programme, the Respondent representative submits that children with dyslexia are not put at a substantial disadvantage by the Active Literacy programme, and therefore no adjustment for the inclusion of systematic synthetic phonics is required.

223. We understood however that she accepted that the “auxiliary service” in this case was a literacy programme which was based on “systematic synthetic phonics”. The claimant’s position, as we understood it, was that it should include all of the features set out at A304. It was this adjustment which we considered when assessing whether or not the respondent had failed in its anticipatory duty to make reasonable adjustments.

ii) Does the failure to provide the auxiliary service put pupils with dyslexia at a substantial disadvantage in comparison with persons who are not disabled?

224. The reasonable adjustment duty is only triggered where there is a failure to provide an auxiliary service (in this case the failure to provide a literacy programme based on systematic synthetic phonics) which puts disabled pupils generally (here

pupils with dyslexia) at a “substantial disadvantage in comparison with persons who are not disabled”.

225. The requirement will thus only arise where any disadvantage suffered by the claimant is ‘substantial’. This means ‘more than minor or trivial’ (s212(1)) (i.e. “of substance”/“material” rather than “large”). It is important to note that this is a relatively low threshold.

226. The duty to make reasonable adjustments arises where pupils with dyslexia are placed at a “more than minor or trivial” disadvantage ‘in comparison with persons who are not disabled’. Although this indicates a comparison with the general population, that is not how the relevant provisions have been interpreted. Although a comparative exercise is required, unlike direct or indirect discrimination, a like for like comparison is not appropriate (*Archibald v Fife Council* [2004] IRLR 651 HL) and therefore there is no requirement to identify a comparator or comparator group in similar circumstances as under section 23 (*Griffiths v DWP* [2015] EWCA Civ 1265). As it is put in the EHRC Services Code, para 7.13, the disadvantage created by the lack of a reasonable adjustment is measured by comparison with what the position would be if the disabled person in question did not have a disability. This approach was also approved in the education context by the Inner House in the *DM v Fife Council*.

227. Applying the identified failure to provide the auxiliary service in focus here, could it be said that pupils with dyslexia are put at a disadvantage which was more than minor or trivial?

228. The Respondent Representative’s position was that the respondent had done all that it needed to do considering the additional support given, and by reference to her previous submissions on the Active Literacy programme, submits that pupils with dyslexia are not put at a substantial disadvantage by the Active Literacy programme, and therefore no adjustment for the inclusion of systematic synthetic phonics is required. The Respondent Representative’s position was thus that there was no evidence of substantial disadvantage.

229. However, when we considered that question we found that we did not agree, and that conclusion was based on the evidence of the respondent’s expert, as well as that of the claimant’s experts.

230. Clearly, the claimant’s experts were, to varying degrees, of the view that children with dyslexia who were not taught literacy based on “systematic synthetic

phonics” instruction were being disadvantaged. We noted that Witness K’s position is that the important thing is to have systematic phonics instruction (not necessarily synthetic phonics). However, we noted too that he stated that, “I write as one who is not only a strong supporter of synthetic phonics but who introduced the synthetic methods to every primary school throughout an entire education authority supported by a comprehensive training, monitoring and support programme”.

231. We noted that when comparing his project with the research he was of the view that synthetic phonics, and indeed phonics generally, should not be taught to the exclusion of other aspects of literacy instruction. In his report he referenced Scottish research which concluded that “synthetic phonics accelerated reading, writing and phonemic awareness better than any other method”. However, he criticised the methodology because the researchers did not compare analytic and synthetic phonics on the same footing. He said that he subsequently undertook research himself which sought to overcome that concern. He concluded from the results after one year that synthetic phonics indicated better results and in the follow up three years later, “despite the effects being much less marked by then, we still discerned some overall advantage for synthetic phonics”.

232. We also understood from Witness I’s evidence that she agreed there was a particular value for synthetic phonics for children with decoding difficulties, and we noted that it was decided in the schools concerned that there was a value in the Active Literacy programme being enhanced by Jolly Phonics, which is a systematic synthetic phonics programme.

233. Bearing in mind the low threshold, pupils with dyslexia are deprived of the opportunity to be taught to read using a comprehensive systematic synthetic phonics programme. By reference to the evidence of the experts in this case, specifically to “gold standard” teaching, but also to Witness K’s own research which identified that there was some overall advantage for synthetic phonics, we were prepared to accept that this disadvantage was more than minor or trivial and therefore the reasonable adjustments duty could be said to be triggered.

234. In assessing what adjustments were reasonable, we focused on the reasonable adjustments contended for by the claimant. As discussed elsewhere, our focus here was on the remedies which the claimant set out in her claim form. The

claimant has, in her written submissions, expanded those remedies to include forty separate actions. We were not however able to consider those remedies or the additional reasonable adjustments contended for there. This was not least because these were not the outcomes which the respondent had understood was sought, and therefore the respondent has prepared their response to the claim on the basis of the remedies (and reasonable adjustments) set out in the claim form. Further, these were not the outcomes which the Tribunal had in mind when hearing evidence relating to this claim. In particular, some of the remedies which the claimant seeks in her written submissions relate to adjustments at School C. We heard no evidence about the teaching methods or circumstances at School C to allow us to make any assessment on whether such adjustments were reasonable. Our focus is on the evidence which we heard which related to the child's years at primary school.

235. In the claim form, under remedies, the claimant seeks the following adjustments:

- "c) Authority to include SSP programmes as part of their literacy strategy, core and interventions;
- d) Child to receive continued SSP instruction using programmes produced by Phonics International and Synthetic Phonics Ltd (currently used at home)
- e) Child to have access to decodable reading books at school designed on the SSP principles (phonic books)".

236. The Respondent Representative made submissions regarding remedy, and in particular, by reference to the powers of the Tribunal in respect of a contravention, submitted with regard to the remedies sought set out in the case statement (and summarised at paragraph 14), that in the event that the Tribunal find in favour of the claimant to any extent, any remedy should be restricted to that sought in a and b (that is a declarator and an apology). Beyond that she submitted as follows: "The remedy sought at c would go beyond what might be expected to alleviate any adverse effect on [the child]. It is perhaps symptomatic of the issue in this case that in effect the Tribunal are being asked to make judgements which are concerned with education policy where there may be genuine and legitimate discourse as to the best interventions. The remedy at d is even more problematic as it invites the Tribunal to order the respondents to

purchase the programme being sold by Witness A". The Respondent Representative also submitted that "The remedies at f and g [to review the Ecological Assessment Framework and the DFS model] are so lacking in any kind of detail as to be meaningless. How would such an order be complied with in a way in which compliance could be measured? How is the DFS model to be modified and to what? Who is to be the judge of what is scientifically valid? The remedy at h [relating to the public sector equality duty] has already been dismissed as not being within the power of the Tribunal".

237. The reasonable adjustment which we considered throughout the hearing was whether the respondent should introduce or should have introduced for the child a foundational literacy programme based on "systematic synthetic phonics", which would include access to decodable books. Our focus was on the individual child, and not on whether the respondent should change its literacy programme generally. However, bearing in mind The Respondent Representatives submissions, and the anticipatory nature of the duty, if the focus is indeed on pupils with dyslexia generally, we also had in mind whether such an adjustment should have been anticipated by the respondent as one that was reasonable for all pupils with dyslexia.

iii) Are the adjustments contended for reasonable steps to have to take to avoid the disadvantage?

238. The duty arises only in respect of those steps that it is reasonable for the responsible body to take to avoid the disadvantage experienced by pupils with dyslexia. While we accept that, as an anticipatory duty, the respondent should have considered any reasonable adjustments required for pupils with dyslexia generally, we were of the view that when it comes to what is reasonable we should also focus on the individual circumstances of the child. We noted in particular that the EHRC's Technical Guidance for Schools clearly focusses on the circumstances of the individual when considering what is reasonable. In particular at paragraph 6.40 it is stated that "Schools need to think carefully about what adjustments can be made to avoid the disadvantage experienced by the individual disabled pupil. In line with additional support for learning, the needs of the individual pupil are central. Even pupils with the same disability might need different adjustments to overcome the disadvantage. It is important not to make assumptions about a disabled pupil's

needs, because this may lead a school to provide a completely ineffective adjustment”.

239. However, we were of the view that the facts of this case point to those being one and the same thing. We did not consider that there were any specifics about the individual case to suggest that what was reasonable for pupils with dyslexia would not be reasonable and appropriate for the child.

240. By analogy with decisions in other contexts, we understood that the test of reasonableness in this context is an objective one (*RBS v Allen* 2009 EWCA Civ 1213). Further, while we accepted that if there is no prospect of a disabled person benefiting from a proposed adjustment, it is unlikely to be reasonable (*Romec Ltd v Rudham* EAT/0069/07), nor does there have to be a good prospect of an adjustment removing a disadvantage for that adjustment to be reasonable (*Noor v Foreign and Commonwealth Office* [2011] ICR 695 EAT).

241. The EHRC Technical Guidance sets out at para 6.29 a non-exhaustive list of factors which should be taken into account when considering what adjustments it is reasonable for a school to make, and we considered those which were relevant in this case, namely: the extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil; 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; the practicability of the adjustment; the effect of the disability on the individual; and the interests of other pupils and prospective pupils.

242. We considered these factors and the respondent’s reasons in our deliberations as follows:

The extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered

243. We have concluded that there was “more than minor or trivial” disadvantage experienced by pupils with dyslexia who are not taught using a bespoke systematic synthetic phonics programme. It should be said however that we did find this to be a border line question, and it was only because it is a threshold question, and the threshold is low, we concluded that there was such disadvantage.

244. However, we came to the conclusion, based on the evidence of Witness K in particular, that the evidence that a synthetic based programme was better than other systematic phonics programmes was marginal. We relied on his evidence that the most important element of a literacy programme is that it should be based on systematic phonics, whether analytic or synthetic, and it was the systematic nature of the programme which made for the most effective programme. Further we heard evidence, including evidence from Witness E, that even with the “gold standard” programmes based on synthetic phonics, not all pupils with dyslexia will improve (we understood these pupils were called “resisters”). Further we accepted the evidence of Witness K that even the best of literacy programmes, and even those based on synthetic phonics, would not necessarily lead to improvements for all pupils or result in them reading to their chronological age, as the claimant asserted. We accepted that this was an unrealistic expectation on the part of the claimant.

245. We have concluded that the Active Literacy programme, with the elements of Jolly Phonics, is suitable and appropriate for children with dyslexia because it is a systematic literacy instruction programme, a central core of which is phonics. We could not say that a programme based fully on “systematic synthetic phonics” principles would necessarily have overcome any substantial disadvantage encountered by pupils generally or the child in particular.

The extent to which support will be provided to the pupil under the Education (Additional Support for Learning) (Scotland) Act 2004, as amended

246. The Respondent Representative argued that the child in this case was already in receipt of all of the appropriate additional supports and there is no additional requirement to make reasonable adjustments. She argued that the child received throughout his time at school considerable additional support, those being according to Witness K “good examples” for supporting children with dyslexia.

247. We agreed, as set out in our findings in fact and discussed elsewhere in this decision, that the child in this case had considerable additional support and interventions through the assessment and interventions procedures adopted by the respondent.

The effect of the disability on the individual

248. We accepted that the child's disability, to some extent at least, resulted in him being unhappy and frustrated and that it impacted on his enjoyment of reading and learning generally. However, we also heard evidence that the professionals involved in his day-to-day teaching were of the view that he may have other barriers to his learning. As a Tribunal we found it surprising that the claimant asserted the essential requirement for further objective assessments to be undertaken in regard to the child's dyslexia, but that she was not prepared to co-operate with the professionals in regard to assessment for other potential barriers to learning, even to rule them out.

249. As discussed elsewhere, we could not say that the child's distress was necessarily linked to the teaching methods; the evidence did not support that as the only conclusion. We heard about concerns from the professionals that the child had a negative self-image, was essentially being defined by his dyslexia, and the focus on it was as likely to contribute to that distress as the teaching methods themselves. We did not agree that the interventions to address that were not appropriate.

The practicability of the adjustment

250. The claimant's position is that the respondent's literacy programme should be replaced in its entirety with specific literacy programmes with a focus on systematic synthetic phonics.

251. We considered that this was not a proportionate response to any marginal disadvantage which may have been experienced by the child or pupils with dyslexia more generally as a result of the programme not being underpinned by the full systematic synthetic phonics teaching principles.

252. This adjustment contended for would have the result of the respondent being required to replace, for these primary schools at least, the literacy programme followed by all pupils and for the respondent to be required to make further directions regarding the type of literacy programme followed, which we understand is currently devolved to head teachers.

The resources of the school and the availability of financial or other assistance; and the financial and other costs of making the adjustment

253. We did not hear specific evidence about this, but as discussed above, any adjustment which encompassed replacing the respondent's current literacy programme with an alternative one would inevitably involve extensive resources, including in particular purchasing of materials and training of teachers.
254. We heard evidence from Witness I that when the Active Literacy programme was introduced, this meant that teachers who attended training would require to have their classes covered by other teachers which put a strain on resources for a time.
255. We heard from Witness C that the reading strategy is devolved to Head Teachers, although as we understood any budget for staff training would depend on local authority priorities and the school plan.
256. We concluded there would be a significant cost to the implementation of a literacy programme based on systematic synthetic phonics.

The interests of other pupils and prospective pupils

257. If the focus is on all pupils, and indeed on all struggling readers, then by reference to the evidence of Witness K, it is clear that a literacy programme which focussed only synthetic phonics would be to disadvantage other pupils, not only those with dyslexia, but also pupils who had difficulties with literacy for other reasons. We noted in particular that he said that the fact that Active Literacy did not focus only on systematic synthetic phonics was a strength of the programme rather than a weakness, stating that "the fact that [the respondent] adopted this programme to support its work in literacy in my view in itself indicates that it is an authority which was proactive among the authorities in Scotland in its efforts to address the needs of all of its children including those with dyslexia".
258. We conclude therefore that to introduce a literacy programme which focussed only on systematic synthetic phonics could be to the detriment of other pupils, including those with dyslexia and other reading difficulties.

Conclusion on reasonableness

259. When we weigh up all of these factors, we came to the clear view that the introduction of a literacy programme of the type contended for by the claimant

would not have amounted to a reasonable adjustment, viewed from an objective perspective in the round.

260. It follows therefore that we do not accept that the adjustments contended for are reasonable adjustments, and therefore we conclude that there has been no failure on the part of the respondent to implement reasonable adjustments.

Conclusion

261. Thus the Tribunal finds that the respondent has not failed to comply with the duty to make reasonable adjustments in terms of section 21 of the Equality Act 2010; that there is no unfavourable treatment such that the claim under section 15 is not well founded; and any PCPs contended for do not operate to particularly disadvantage pupils with dyslexia. The claims under the Equality Act not being well-founded are dismissed.