



Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AC/23/0021

List of witnesses

For the claimant:

The claimant (witness A)

Class teacher (witness B)

Learning disability nurse (witness C)

For the responsible body:

Health and safety officer (witness D)

Head of inclusion (witness E)

Claim

1. The claimant is the father of the young person. Following an incident which took place in January 2023, the young person was not permitted to return to school. He argues that the responsible body is in breach of sections 85(2)(e) and (f) of the Equality Act 2010 (**the 2010 Act**), and that is that the young person has been discriminated against by being excluded from school and/or being subjected to any other detriment. The claimant argues that the treatment is a) unfavourable treatment because of something arising in consequence of disability in terms of section 15 of the 2010 Act; b) failure to make reasonable adjustments in terms of section 20 and 21 of the 2010 Act; and c) indirect discrimination contrary to section 19 of the 2010 Act.

Decision

2. The responsible body has unjustifiably treated the young person unfavourably because of something arising in consequence of his disability; and has failed to make reasonable adjustments contrary to sections 15 and 21 of the 2010 Act.

Process

3. Parties lodged a joint minute of agreed facts. Parties relied on documents lodged at T1-51, C1-360 and R1-285. The incident was captured on CCTV and prior to this hearing, with the agreement of parties, we watched the recording from two angles. An advocacy report was commissioned informing us of the young person's perspective. Evidence at the hearing was in the form of witness statements. The claimant's representative made oral submissions and lodged a written outline thereafter. The representative for the responsible body lodged written submissions supplemented with oral submissions.

Findings in Fact

4. The young person has autism spectrum disorder (**ASD**). He has a learning disability. He has speech and language difficulties, sensory processing difficulties and epilepsy.
5. The young person is a pupil at school A which is managed by the responsible body.
6. A team of between eight and ten learning support workers (**LSWs**) is required to provide appropriate support for the young person's full time school education. He requires two workers with him at all times. Each pair of LSWs is generally replaced twice over the course of each school day. For some activities, such as swimming and other activities outside school, the young person requires three workers to be with him. Each of them requires time to get to know him.
7. Between 2018 and 2021, there were three previous incidents in which the young person bit staff employed by the responsible body, causing injuries. These took place in June 2018 (in school), July 2019 (whilst on a trip to the beach with staff from the Short Breaks respite facility) and in April 2021 (in school).
8. On the previous occasions when the young person injured staff in school the responsible body has required the young person to stop attending school for extended periods in order to make further adjustments. Following the incident in July 2019 the responsible body stopped outings and trips from school and from Short Breaks pending investigation of the incident.
9. A number of protocols and plans have been put in place to support the young person's learning. These include a Person Focused Risk Assessment (**PFRA**) (dated April 2021) and a MAPA dated February 2020 as well as low arousal techniques guidance prepared by the claimant and updated March 2021.
10. It was part of the agreed strategy for the young person prior to the incident in January 2023 for staff not to intervene physically, and to have a duvet / duvet cover available for him, which he uses to calm himself.

11. The MAPA states that 'Where possible, ensure [the young person] always has his duvet near him; take the duvet with you on any outings/car journeys as [the young person] can use this to support him to regulate his mood'.

Incident January 2023

12. In January 2023 the young person attended an art lesson at school. The lesson took place in a room in the school's halls of residence. The young person was accompanied to the lesson by two LSWs.

13. During the lesson, the young person made the LSWs aware that he wanted to return to his base classroom in the main school building. He stood up and said 'bye, bye' which is his way of indicating a wish to leave.

14. The young person was accompanied by the LSWs from the halls of residence towards the main school building. This journey involves crossing the cul-de-sac outside the halls of residence and the access road to the school, adjacent to the stances where buses park at the beginning and end of the day. The young person followed the LSWs and they periodically waited for him. As the two workers went to cross the road, the young person lifted his hand and bit it. He was at that point several yards behind them.

15. The young person ran across the road at the LSWs and knocked first one and then the other to the ground. In the course of the incident the young person bit and scratched at them. One LSW suffered bite injuries to her head, left lower and right upper arm and shoulder. The other LSW suffered bite and scratch injuries to his head, face and lower left arm and muscle strains to his chest and left shoulder.

16. One of the LSWs was carrying the duvet cover in a rucksack. After she was attacked she managed to extract it and threw it over the young person, at which point he immediately calmed down. He went over to railings with the duvet cover over his head. He then fell to the ground, having an epileptic seizure.

Events in the aftermath of the incident

17. After the incident, the claimant came to take the young person home. In the evening of January 2023, the claimant met with witness E and the social worker via teams video call. He was told that the school was unable to make provision for the young person to attend school on the following day (Friday).

18. In January 2023, witness E proposed that the young person be based at a respite facility and that staff provide part-time outreach education for him there, pending further plans being made. The respite facility is operated by the responsible body. The young person is familiar with this and he stays there regularly for respite provision. His parents declined this proposal as they thought that it would affect the success of the respite.

19. The responsible body suggested that as a temporary expedient the young person could access learning in the art space at the school A halls of residence. The claimant did not consider that suitable because it had been the location of the recent incident.
20. The responsible body is prepared to fund an educational placement for the young person at a special educational establishment, but his parents wish him to remain at school A. They were not prepared to consider a temporary placement pending the restoration of facilities for the young person at school A. **[Part of this paragraph has been removed by the Chamber President for reasons of anonymity under rule 101(4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
21. The responsible body has implemented an outreach package for education that is delivered within and from the young person's home. This commenced on or around April 2023. Proposals to extend the outreach provision are currently being discussed.
22. The responsible body is in course of revising the young person's PRFA. The current document is dated March 2023 and extends to 19 pages. This version followed extensive consultation with the claimant and staff.
23. The responsible body has provided staff working with the young person with a bite-proof jacket, trousers and baseball cap. The PFRA states that a duvet rather than a duvet cover is available and is carried loose.
24. The PFRA includes the following instruction relating to how to address risks while occupying rooms within the support for learning department:
 - a. 'staff working in a room with [the young person] are aware of [the young person's] behaviours. If biting his hand or other warning signs known by staff team, give [the young person] his duvet and go out through door. Always be between [the young person] and the door and be close to the door with duvet available at all times'.
 - b. 'staff working directly with [the young person] who have up to the minute awareness of his current behaviour. If deemed not safe, stay in the room. There will be a protocol created by [the young person's] staff team and managers to address this'.
 - c. 'if corridors not deemed safe for others to use, office would contact staff to ensure they remain in classes with the pupils via class phone system. Walkie talkies will be provided for [the young person's] team and designated manager in school'.
25. It includes a statement that 'The young person has access to his duvet in all areas of the building and whilst moving around the building. The duvet is always within [the young person's] line of sight and not in a bag'. The PFRA sets out additional control measures to reduce risk in the school environment.

26. The claimant has provided revised advice on low arousal techniques which have been taken into account by the responsible body. The young person's Personal Emergency Evacuation Plan (**PEEP**) has been revised. Revisions are being made to his Safety and Support Plan, Co-ordinated Support Plan and Child's Plan.
27. Following the incident in January 2023 the team supporting the young person reduced to four members of staff, including one full time teacher (witness B). The responsible body is taking steps to recruit additional members of staff for the team, who will need to be trained.
28. Witness C was invited to produce a further functional behavioural assessment (**FBA**) but advised that he did not consider that one was required. Occupational therapy was invited to provide an updated sensory profile (**SP**) but did not consider that the situation had changed since the previous profile had been prepared.
29. Members of staff both within the support for learning unit and the wider school have expressed concerns about their safety should the young person return to school. There have been numerous meetings during February and March 2023 with individual staff members and whole department meetings to attempt to allay concerns. This has included meetings with union representatives. The parents' wishes that a reduced PFRA would be shared with staff in the support for learning department and that otherwise it should not be shared outwith the relevant school staff have been respected. This means that the risk assessment has not been shared with union representatives who are not employed at the school. The union representatives have advised that without seeing the full PFRA they remain unable to agree its terms. The unions are seeking a guarantee that such an incident will not happen again.
30. The young person remains on the register of school A.

Reasons for the Decision

31. This is a claim under the 2010 Act. In terms of section 85(2)(e) a responsible body must not discriminate against a pupil by excluding them from the school; or by subjecting them to any other detriment, in terms of section 85(2)(f).
32. The claimant's principal case is that the responsible body has discriminated against the young person by excluding him in terms of section 85(2)(e). If we do not find that he was excluded, it is argued in the alternative that he has been discriminated against by being subject to "any other detriment".

Disability status

33. We proceeded on the basis that the responsible body has conceded that the young person is disabled in terms of section 6 of the 2010 Act, without distinction between his

autism generally and his tendency to physical abuse. This is as stated in the joint minute and as set out in the responsible body's written submissions at paragraph 2.7.

34. We did not therefore consider it necessary to engage with the question whether the Equality Act 2010 (Disability) Regulations 2010 apply such as to exclude from the definition of disability a tendency to physical abuse.

35. This was notwithstanding the reference by the representative for the responsible body in paragraph 2.7 to the expectation that the case may be argued elsewhere. We understood from her oral submissions that the responsible body reserves the right to advance that argument should this decision be appealed.

Has the young person been excluded in terms of section 85(2)(e)?

36. The claimant's representative argues that the young person has been excluded from school. The responsible body maintains that the young person is not excluded from school. This is disputed by the claimant because the young person has not received education within school A since January 2023.

37. The term exclusion is not defined in the Equality Act 2010, nor in any other education related regulations. We were referred to a decision of the sheriff in *Proudfoot v Glasgow City Council* 2003 SLT 23, where the claimant's representative asserted that exclusion should have its ordinary meaning that is 'to debar from'.

38. The claimant's representative submits that it is not at all clear what the responsible body believes the difference is between the decision as they have described it, and exclusion from school. Their decision, he submitted, had both the purpose and the effect of preventing the young person from attending school A. Another decision of this tribunal was referenced, namely ASN_D_22_01_2021, and paragraph 36 was relied on, that on any reasonable interpretation this amounts to an exclusion.

39. The claimant's representative submits that the responsible body has not advanced any authority for the proposition that there is some alternative means under which pupils may be prevented from attending their school. He relied on the provisions of their exclusions policy and in particular paragraph 3.3, which states that 'Any exclusion from school, that does not conform with the terms of the 1975 Regulations has no statutory authority and will render the authority open to legal challenge'.

40. He also referred to the Scottish Government's Guidance on Preventing and Managing Exclusions, which states under the heading 'Sending home without excluding' that

'All exclusions from school must be formally recorded. Children and young people must not be sent home on an 'informal exclusion' or sent home to 'cool-off'. Following an incident where the decision is made that the child or young person cannot remain in school, for one of the reasons specified in regulation 4 of the Schools General

(Scotland) Regulations 1975 as amended, this must be recorded as an exclusion. This will ensure transparency, allow for appropriate monitoring and enable support to be put in place through the education authority's staged intervention system'.

41. The claimant's representative does not accept that to afford a disabled child due process should be equated as doing them a disservice and pointed out that the responsible body does not use such language in its strategy where it references positive outcomes.
42. The position of the responsible body is that 'it has not excluded [the young person] from school A. It is affording [the young person] such education and benefits, facilities and services as a pupil at school A as it can, consistent with the legitimate aim of safety to all those involved (including [the young person] himself)'.
43. The representative for the responsible body argued that the young person has not been excluded from school in terms of the Government guidance. She submits that no decision has been made that the young person cannot remain in school for one of the reasons specified in regulation 4 of the Schools General (Scotland) Regulations 1975 as amended. The responsible body could not exclude him because they had no basis to do so under the regulations. She referred us to the specifics of that regulation, which states as follows:

'In discharging their functions under the Education (Scotland) Act 1980, an education authority shall not exclude a pupil from a school under their management to which he has been admitted, except where—

- (a) they are of the opinion that the parent of the pupil refuses or fails to comply, or to allow the pupil to comply, with the rules, regulations, or disciplinary requirements of the school; or
- (b) they consider that in all the circumstances to allow the pupil to continue his attendance at the school would be likely to be seriously detrimental to order and discipline in the school or the educational well-being of the pupils there'.

44. In oral submissions, the representative for the responsible body submitted that the young person cannot be excluded because neither (a) nor (b) above applies. The representative for the responsible body asserted that the last thing a child in these circumstances needs is to be told that they are excluded. She submitted that there is no need to make them go through the exclusion processes and it would be counterproductive for us to order that.
45. We took account of the fact that witness E, in paragraph 110 of her written statement, states how the responsible body deals with disabled pupils:

'there are occasions where children and young people with severe and complex needs have caused injury to staff members but due to the nature of their understanding and their needs, they were not excluded. Sometimes they may have had to attend alternative provision or had support at home or a different setting whilst

their staffing team was being rebuilt or their accommodation in school was being deep-cleaned or repaired. ASD as we all know, is a spectrum of strengths and needs and not a “catch all” therefore the child or young person’s cognitive understanding of their actions and the reasoning behind why the individual did what they did is considered carefully when exclusion is being contemplated as an option’.

46. Witness E thus distinguishes between those pupils who are deemed responsible for their own behaviour and those who are not. All of the witnesses were clear that no blame has or should be attached to the young person in this case.

47. We were aware that the Scottish Government guidance (A187) states that:

‘Schools and education authorities should ensure that they comply with the provisions of the Equality Act 2010 in relation to discriminatory behaviour in the context of exclusion from school. The Disability Discrimination Act 1995 Code of Practice [now repealed] indicates that responsible bodies must not discriminate against a learner with a disability by excluding him or her for a reason related to the learner’s disability’.

48. The claimant’s representative suggested that it may be that a ‘short exclusion for planning and reflection’ is possible (arguing that in this case the length of time was disproportionate, as discussed below).

49. It seems to us however that either this is an exclusion to which the relevant regulations apply or it is not. We consider that the matter of the length of time that any exclusion persists is a question about the proportionality of the decision.

50. Clearly (a) above does not apply because that relates to the behaviour of parents. The responsible body asserts that since (b) above does not apply either this case cannot be categorised as an exclusion.

51. The difficulty with that position is that it is apparent that even if the circumstances do not fit precisely into that category, the Government guidance indicates that the legislation applies to exclusion generally. The young person in this case is not permitted to attend school. On the ordinary meaning of the word, that means they are excluded. The guidance is not confined to exclusion on disciplinary grounds, and therefore it must apply to any decisions which relate to the behaviour of the pupil, whether the pupil can be said to have cognitive understanding of their actions or not.

52. Following careful reflection, we have come to the view that the circumstances of this case, where the young person is not permitted to attend the school, must be categorised as an exclusion to which the Government guidance ought to have been applied.

53. In any event, while we have come to the view that the young person has been excluded in terms of section 85(2)(e), and while the responsible body does not accept that the young person is excluded, it is accepted that the young person has been subjected to a detriment by being out of school in terms of section 85(2)(f).

54. Consequently, whether the circumstances are treated as an exclusion or not, we must consider whether the young person has been subjected to discrimination contrary to the 2010 Act, by being subjected to any other detriment in terms of section 85(2)(f).

Discrimination arising from disability

55. The claimant submitted that there has been a breach of section 15 of the 2010 Act, that is there has been discrimination arising from disability.

56. Section 15 means that a school discriminates against a disabled pupil where they treat the disabled pupil unfavourably; that unfavourable treatment is because of something arising in consequence of the pupil's disability; and the school cannot show that the treatment is a proportionate means of achieving a legitimate aim, sometimes referred to as 'objective justification'.

57. The responsible body concedes the first two elements of the test: it is accepted that the young person was treated unfavourably and that the unfavourable treatment was because of something arising in consequence of his disability. The focus then is on whether the responsible body has identified a legitimate aim and whether its actions are appropriate and necessary for the achievement of that aim.

Legitimate aim

58. The responsible body set out its legitimate aim in written submissions 'to restore [the young person] to full time education within school A in a manner that is consistent with the needs, well-being and interests, including safety of all concerned, including [the young person] himself, staff and other pupils' (by reference to section 1(5)(a) of the 1980 Act and the 2010 Act section 15(1)).

59. The claimant's representative argued that this cannot be a legitimate aim because by excluding the young person this cannot be with the intention of giving him access to school. If the legitimate aim is that they are excluding him to allow them to rebuild and train the support team and to agree the necessary protocols with staff, that presupposes that it is necessary or even beneficial that the young person must be out of school. He asserts that if the aim is about keeping people safe, then that is not supported by the evidence.

60. We consider that these arguments properly address the proportionality question. We accept that the responsible body's stated aim, of restoring the young person to education consistent with the needs and safety of others, including staff, pupils and the young person himself, is a legitimate one.

61. The focus then is on objective justification. Is the way in which the responsible body seeks to achieve that aim appropriate and necessary in all the circumstances?

Proportionality

62. The claimant's representative submitted that the measure or treatment deployed to meet the aim could not be proportionate if it was not lawful. His position is that the young person has been excluded but without reference to the statutory process which must mean that he has been unlawfully excluded.
63. We agree that the aim, which is to exclude the young person until certain conditions are satisfied, cannot be proportionate if exclusion is unlawful. We have concluded that the young person has been excluded and the relevant procedures have not been followed. The claimant has thereby been denied relevant safeguards and appropriate channels to challenge the decision.
64. Should it subsequently be found that the exclusion was not unlawful, we decided that it was appropriate to consider in any event whether the decision not to permit the young person to be educated in school premises is a proportionate one.
65. Parties accepted the test set out in the case of *Akerman-Livingstone v Aster Communities Limited* [2015] UKSC 15 applies. That test requires consideration to be given to the following elements: (1) is the objective sufficiently important to justify limiting a fundamental right; (2) is the measure (here treatment) rationally connected to the objective; (3) are the means chosen no more than necessary to achieve the objective; and (4) is there an overall balance between the ends and the means.
66. We first consider the factual background in this case, and then how this proportionality test applies to those facts.

Availability of sufficient staff

67. The responsible body's position is that the young person is not in school currently to allow them to rebuild and train a full support team and to agree with the staff the necessary protocols for staff for working with the young person on his return. They argue that the young person cannot attend school because the team who worked with him has disintegrated and the staff and community have been badly affected, requiring careful work to put the situation back together, on an incremental basis. Recruitment of additional staff has been difficult due to safety concerns and there are outstanding steps which the responsible body requires to take to reduce those concerns. Extension of outreach hours is currently proposed, both for the young person's benefit and in order to reintroduce him gradually.
68. The claimant's representative submitted the evidence of witness B did not support this assertion that it is necessary or even beneficial to have the young person out of school in order to build the team. The evidence was that outreach is working well. There is a team which would allow him to be taught part time in school. Witness B's evidence was

that there is no reason why the team working with him could not continue to work with him on school premises.

69. The claimant's representative relied on the evidence of witness B and to some extent witness E that having the young person in school would help build the team because staff and pupils would benefit from seeing the young person in the building. He argued that it cannot therefore be said that the support they need to build the team is rationally connected with aim of getting him back into school (other than sufficient to allow full-time attendance). During oral submissions, the claimant's representative withdrew his application for the young person to return full-time and now seeks return on a part-time basis.
70. Given that there is a sufficient staff team to provide outreach education on a part-time basis, we accept there is a sufficient staff team to provide part-time education in school.

Length of time

71. The claimant's representative argued that an aspect of the proportionality question is the length of time which the young person has been out of school. Following previous incidents, the young person was able return to the school within a few weeks. On this occasion the responsible body has not justified the length of time during which exclusion has persisted. He argues that even if there is a case for 'a short exclusion for planning and reflection', the length of time has rendered the exclusion disproportionate. The evidence is that the changes in policy/practice following the incident in January, namely the use of duvet, the need to have eyes on the young person at all times, and PPE were all in place or arranged very quickly after it.
72. The representative for the responsible body argued that provision of education for pupils with the level of disability that the young person has can be problematic and take time. She argued that in these sort of circumstances (relying on *A v Essex County Council* 2011 1 AC 280) the delay in putting the correct measures in place does not amount to a denial of the right to education.
73. We noted that, while there may have been a question about whether or not the alternative proposals for the young person's education were appropriate, these were offered very quickly after the incident, and the responsible body was aware that these alternatives were not considered suitable by the claimant. We noted that the outreach arrangement did not commence until the end of April. It is not clear to us why it should have taken so long to put that in place.
74. We did note that it took some time for the risk assessment to be finalised. It appears that this was put in place in March 2023 and that the delay was due to consultations with the claimant. However, we understand that the risk assessment, which addresses the position both outwith and within the school, was available by mid to end April.

Need for further assessments

75. The responsible body states that there is a good explanation for the delay and that is the need for a further FBA and SP. This is to support their attempts to build staff confidence. Their position is that for these assessments to be undertaken, they need the claimant's co-operation to authorise further assessment and release further information.
76. The claimant's representative submitted that the evidence does not support the need for these assessments to be undertaken in order to achieve the goal of keeping people safe. Witness D accepted that the current arrangements for outreach satisfy health and safety requirements and that a risk assessment has been completed.
77. However, we understood that the responsible body is of the view that such further assessments are required. It would appear however that witness C's expert clinical opinion that such further assessments are not required and that they are not going to add to their knowledge has not been taken into account.
78. The difficulty for the responsible body is that it would appear that no formal request has been made to witness C. As we understood it, a verbal request was made to him at a meeting, and he gave a verbal response. Further, although an occupational therapist had discussed the matter of the SP with the claimant, it appears that there has been no formal communication of their position.
79. Given that this is, according to the responsible body, a crucial matter, and one which explains the delay in progressing matters, we considered it to be particularly significant that no formal request has been made for these assessments and no formal response has been received. If it is correct to say that no further assessments are required, which is what we understood from the evidence, then that position at least should be communicated to staff.
80. We do not accept that this matter objectively or rationally explains or accounts for the reason why the young person has not been permitted to return to the school.

The position of the trade unions

81. We agree with the claimant's representative when he suggested that, having heard the evidence in this case, the primary block is the trade union and the stance it is taking. This, we conclude, is at the crux of what is preventing the young person returning to school.
82. The responsible body's position is that they are trying to 'fend off' a trades dispute which is what the union is threatening should the young person return to school.
83. The claimant's representative submitted that it cannot be correct that a trade union ostensibly representing the interests of teachers who do not work with the young person

can effectively exercise a veto over his attendance at school. The union know the control measures that have been put in place. They are not suggesting alternative or additional measures. They are demanding information they are not entitled to and guarantees that cannot be given. They are acting unreasonably. It cannot therefore be a proportionate act to acquiesce to that unreasonable position.

84. The representative for the responsible body confirmed that there is a threat of industrial action if the young person returns to the school. Their position is that they need further time to work with staff and unions to allay fears. The responsible body argues, relying on *P v NASUWT* 2003 2 AC 663, that in cases where school education is restricted by action from trade unions there is limited recourse. We understood this to refer to the limited control which the responsible body has in preventing a trade dispute should the necessary legal criteria for strike action be fulfilled.

85. We also heard reference to section 44 of the Employment Rights Act 1996 and witness E understood from the advice that she received that she could not force staff to work with the young person. While we accept that she may well have been given that advice, it seems to us that the conditions which are required to fulfil that provision will almost certainly not be met in this case. We do not accept that this could be a reason which could justify not permitting the young person to return to school, not least when there is a team of staff currently working with the young person.

86. We accept that this is a very difficult matter for the responsible body. We accept that any threat of a 'trade dispute' which might result in industrial action is a legitimate concern for the responsible body. It is apparent however that an impasse has been reached with no indication of how or when it will be resolved.

87. We were made aware that one specific issue relied on is that the claimant would not permit information in the PFRA to be shared with trade union representatives who do not work directly with the young person, or at least directly with the school. We do not accept that information about the situation could not be shared by members of staff (some of whom we understood work in the support for learning unit) with their union representatives, both lay representatives at school and with full-time officials. We understood that the claimant was not permitting the sharing of information and that was being respected. However, we do not accept that the unions are necessarily demanding information they are not entitled to on behalf of their members.

88. However, we do not consider that to be the ultimate stumbling block. We understood from witnesses D and E that the trade unions are looking for a 'cast iron guarantee' that a similar incident could not happen again.

89. It is self-evident that such a guarantee cannot be given, as witness D recognised. It cannot be reasonable, therefore, that a decision should be delayed pending agreement from the unions. We noted from witness D that a discussion about the reality that no guarantee could or would be given had not yet taken place with union representatives.

90. We agree therefore with the claimant's representative that to delay a decision pending a resolution with the unions, when they are seeking a resolution which would be impossible to achieve, is not an appropriate or reasonable rationale to justify further delay.

The young person's safety

91. The responsible body argues that it would be detrimental for the young person to be reintroduced into an atmosphere where there is fear and hostility from some staff. They are concerned, because he is intuitive, he will sense the change of atmosphere. Their position is that having overcome fear and hostility before, they are working to ensure a positive reintroduction again.

92. All witnesses agreed that the young person is intuitive and would be aware of changes. We consider that there is validity to the concerns expressed about the young person coming into the school building when staff are concerned about their safety and could be hostile.

93. However, we are of the view that this is a matter that could and should be managed by school management. We do not accept that steps could not be taken to address this matter. A very detailed risk assessment, addressing how the young person should be supported in school, has been compiled. This gives very specific instructions to staff on how situations can be managed safely, including updated information on low arousal techniques. These complement and update detailed protocols previously used in the school, referenced by witness B.

94. Therefore, we do not consider that this matter would serve to make proportionate that which is otherwise disproportionate.

Conclusions on the proportionality question

95. Given our conclusions on the evidence, and applying the relevant tests from *Akerman*, we conclude that the objective pursued here - of restoring education only when the staff team are in place and the confidence of the wider staff cohort both within and outwith the support for learning department is secured - does not justify the limiting of the young person's right to attend school. We conclude that the evidence does not support, and therefore is not rationally connected to, the objective. We conclude that the objective of returning the young person to the school, while seeking to ensure the safety and confidence of the staff, can be achieved by alternative means. Thus, we conclude that the responsible body has not struck the right balance between the means deployed and the aim which they are seeking to achieve. In short, we conclude that the stated aim could be achieved by less discriminatory means than excluding the young person from the school for this length of time.

96. We conclude therefore that the responsible body has not justified the unfavourable treatment which the young person continues to experience, and that there has been a breach of section 15 of the 2010 Act.

Failure to make reasonable adjustments

97. The claimant's representative argues that there has been a failure to make reasonable adjustments contrary to section 20 and 21 of the 2010 Act.

98. It is accepted by the responsible body that they owe a reasonable adjustments duty to the young person in terms of section 85(6), section 20 and schedule 13 to the 2010 Act. It is accepted that the first requirement in section 20(3) applies. This means that the responsible body is required to take such steps as are reasonable for them to have to take to avoid the young person being placed at a substantial disadvantage by any provision, criterion or practice (**PCP**) in their provision of education to him. Section 21 states that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments, and that the responsible body discriminates against the young person if it fails to comply with that duty.

99. There is no doubt that the responsible body has made extensive adjustments to address any disadvantage that the young person might suffer in accessing education, with extensive input from his parents.

100. However, the claimant's representative identified two PCPs which he asserts were applied which placed the young person at a substantial disadvantage. He argued that a practice had arisen of placing the duvet in a zipped bag, which deviated from the written protocols. He also argued that a practice had arisen about how the young person was accompanied when walking outdoors, which was that both members of staff would walk in front of the young person, rather than beside him or one beside and one in front.

101. Based on the evidence, we accept that a practice had arisen of placing the duvet in a zipped bag. We understand this practice to have arisen because the young person had been settled in school for a long period of time. Nevertheless, we accepted that this practice placed the young person at a substantial disadvantage in comparison with persons who are not disabled.

102. Although there were misgivings expressed by the responsible body's witnesses about the efficacy of the duvet being more accessible, we agree with the claimant's representative that on balance, having the duvet more accessible is likely to have a beneficial impact. We accept that this is a reasonable step to take to avoid any disadvantage. Indeed, this is a step which the responsible body has reintroduced. That is a reasonable adjustment and since there was a failure to make that reasonable adjustment there has been a breach of section 21 of the 2010 Act.

103. However, the evidence did not support the conclusion that a practice had arisen in regard to walking protocols. There was no evidence to support the argument that this was anything other than a one off oversight or omission.

104. The claimant's representative also submitted that when a school has not complied with its duty to make relevant reasonable adjustments, it will be difficult for it to show that the treatment was proportionate. This is a reference to the proportionality question under section 15. Clearly our decision about this matter reinforces our conclusion about the proportionality question above.

Indirect discrimination

105. The claimant's representative initially argued that the responsible body's actions amount to indirect discrimination. His argument related, in particular, to the practice of the responsible body's policy of exclusion.

106. Witness E's evidence was referenced that, on occasions, children and young people with severe and complex needs who have injured staff were not excluded due to the nature of their understanding and their needs. He described these as 'off-grid' exclusions specifically for disabled / ASD pupils. He argued that the statistics which the responsible body relied on about the number of disabled pupils who are excluded must, on that basis, be underreported. He argued that disabled pupils are at a particular disadvantage because a two-tier system is at play whereby they are informally excluded, and no justification argument is advanced.

107. Following discussion during oral submissions, this argument was not insisted upon. This was because the argument that a two-tier system operates, with that type of informal exclusion only applying to disabled pupils, would not support an argument that the policy is neutral and applying equally to all pupils, as is required to establish indirect discrimination.

Direct discrimination

108. Given the claimant's representative's position that a two-tier system operates, where disabled pupils are treated differently from other pupils when it comes to exclusions during oral submissions, he advanced an alternative argument that this amounts to direct discrimination in terms of section 13 of the 2010 Act.

109. Direct discrimination occurs when a pupil is treated less favourably than a comparator in the same or similar circumstances and the treatment is because of their protected characteristic.

110. The claimant's representative argued that this practice is less favourable treatment because of the protected characteristic of disability. The comparator is a pupil who is excluded for behaviour which is not related to disability, who has deliberately injured a

member of staff whereas here the young person is not at fault for reasons related to his disability. He submitted that the disabled pupil is treated less favourably because they are not formally excluded. This means that the exclusion procedure does not apply to them, and therefore they are not entitled to due process with a right of appeal. For section 13, no justification defence is available, and he argued that the responsible body should be taken to have admitted that there is differential treatment and therefore direct discrimination.

111. The representative for the responsible body argued that while the young person may well have been treated less favourably, it cannot be said that the reason for the treatment was disability.

112. We accept the submission of the representative for the responsible body. As witness D explained, the reason such pupils were not excluded is 'due to the nature of their understanding and their needs' and because they 'had to attend alternative provision or had support at home or in a different setting to allow the staff team to rebuild or their accommodation to be deep-cleaned or repaired'. They were not excluded because they were disabled.

113. While this may well be unfavourable treatment, it was not because they were disabled but because of 'something arising in consequence of their disability'. No further submissions were made by the claimant's representative addressing this.

114. We have discussed at length whether the responsible body's treatment of the young person in this case amounts to unfavourable treatment arising because of something in consequence of their disability. We have concluded above that the responsible body is in breach of the provisions of section 15 of the 2010 Act in regard to their treatment of the young person in the very specific circumstances of this case. We do not however accept that this amounts to direct discrimination.

Remedy

115. We conclude that discrimination has occurred.

116. We order the responsible body to make a written apology to the young person and separately to his parents (in terms of SPSP guidance on apology) within one month of the date of this decision. That apology should refer to the length of time that it has taken to readmit the young person.

117. The claimant seeks an order that the exclusion be overturned. Given that the young person was not excluded we do not accept that it is appropriate to "overturn" something that did not happen. We have concluded above that what happened to the young person ought to have been categorised as an exclusion. That would have afforded the claimant due process and also the responsible body time to make arrangements to ensure the conditions were right to readmit the young person. We direct that the apology above

should acknowledge that the young person was effectively excluded and that the correct procedures were not followed.

118. Given our conclusion above on exclusion, we order that the responsible body reviews, develops and revises its policies on exclusion from school, in line with the principles of the guidance on exclusion and taking account of input from relevant stakeholders. That review should be completed within six months of the date of this decision. Thereafter training on the implementation of the new policy should take place within a further six months.

119. We order the responsible body to readmit the young person to part-time education at school A within one month of the date of this decision, or such other period as the parties may agree.