**DECISION OF THE TRIBUNAL**

**FTS/HEC/AC/21/0058**

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| **List of Witnesses:** **For the appellant:**The appellant **For the education authority:** Principal Teacher of Inclusion ‘Witness A’Child’s class teacher ‘Witness B’ |

In this decision the following phrases or abbreviations are used:

The school

The Act – the Equality Act 2010

‘rule’ references The First-tier Tribunal for Scotland Health and Education

Chamber Rules of Procedure 2018

Technical Guidance - Technical Guidance for Schools in Scotland, Equality and

Human Rights Commission

**Claim**

1. The claimant is the child’s mother. The claim was lodged with the Tribunal in May 2021 and alleges that the responsible body should have made reasonable adjustments to the provision of education to the child in April 2021. Specifically, the claimant avers that the responsible body failed to make reasonable adjustments in its provision of a school project on this date. The claimant argues that as a consequence of the failures of the responsible body, the child was unable to participate in this project.
2. The claimant alleges that the responsible body failed to make reasonable adjustments in terms of the Equality Act 2010 **(the 2010 Act)**. The claimant seeks a statement that discrimination has occurred and that an apology be provided by the responsible body, amongst other remedies.

**Decision**

3. We find that the responsible body has not failed to comply with its duty to make reasonable adjustments in terms of section 20 of the 2010 Act and dismiss the claim.

**Process**

1. A number of case management calls (“CMC”) took place in September and November 2021. Over the course of these calls the responsible body was directed to lodge a supplementary case statement with the tribunal and the claimant was afforded a further opportunity to provide an additional written response. The identity and order of witnesses at the hearing was also agreed. The bundle of productions which the tribunal considered is numbered T001-080, C001-005, and RB001-006. The bundle contained all documents lodged by both parties including a late submission lodged by the responsible body to which there was no objection by the claimant. A hearing on evidence took place in February 2022. Parties also lodged written submissions after the conclusion of the oral evidence.

**Views of the Child**

5. At a previous CMC the issue of the child’s views relating to the claim were discussed. Both parties agreed that it would be unnecessary and distressing for the child to give her views on matters either in person or via an independent advocate given the historical nature of the issues being considered by the tribunal, as well as the child’s diagnosis.

**Findings in Fact**

*The Child*

1. The child was born in November 2011 and was diagnosed with Autistic Spectrum Disorder (‘ASD’) in November 2019. The child has also been diagnosed with hyperacusis & misophonia.
2. The child has a number of sensory difficulties. These include finding certain noises distressing and sensitivity to certain smells that can at times cause her to wretch. The child can bite herself or objects when distressed. The child can sometimes become upset when asked in class to do something that she does not like. The child behaviour can deteriorate to the extent that she can become highly distressed and the triggers for this are not always clear.
3. The child can sometimes experience difficulties with peer and teacher interactions and can struggle with certain social interactions. The child can misunderstand other people’s expressions or emotions.
4. The child can be dismissive of and disengage with certain aspects of the curriculum that she does not perceive to be of an educational nature. Staff in the child’s school have developed ways to help the child overcome some of these feelings.
5. The child can often be confident in class and is not afraid to speak or ask questions. The child is very artistic and attended a fashion school prior to the Covid-19 lockdown. The child has strong literacy skills with a reading age of 16 years.
6. The child enjoys being outdoors and talks positively about her time with her family on the farm where she lives. The child enjoys playing outside in the school playground during breaktimes with her classmates and peers.

*Education – the school*

1. The child is a pupil at the school, which is managed by the responsible body. The school is a mainstream primary school. The child started at the school in Primary 3 and initially settled well.
2. The child’s transition to Primary 4 involved a move to a different campus within the school which the child found challenging. At this time staff observed the child displaying increasing levels of anxiety and distress. It was around this time, in November 2019 that the child was diagnosed with ASD.
3. The child’s levels of anxiety and distress increased as the school year progressed over 2019/2020 with the child ultimately refusing to attend school. In the term shortly after the Easter break in 2020, the child was allocated the support of a Family Liaison Officer (‘FLO’), who was a staff member working within the school. The FLO provided support to the child within school and assisted the family to facilitate the child’s attendance at school. At this time, the child returned to school on a part-time basis.
4. The child developed a positive relationship with the FLO and would often spend time in her office in the support base of the school when distressed or agitated. This support base contained a range of educational materials available for pupils who required to take time out of class. Access to the base was arranged for the child on an ad-hoc basis as part of a planned and agreed approach to support the child within the school when she became distressed or agitated or when she did not wish to engage in a particular part of the curriculum.
5. The child was offered the use of noise cancelling headphones however generally declined to use them. The child’s audiologist had discouraged the child from wearing the headphones in school and had recommended that she went to a quiet place as an alternative if needed. The child played outside with her peers without the use of any such headphones.
6. When the child returned to school after Easter 2020, the child had a flexible timetable and at times would start school later than her peers and finish the school day earlier. Over the course of the school year 2020/2021, the length of the child’s school day was increased. When the child returned to school after the Easter break in 2021 she was attending school around 2 or 3 days per week.
7. The child has a Child’s Plan (T46-69) and a Positive Support Plan. The Child’s Plan was reviewed annually by staff. A number of child’s planning meetings have also taken place and referrals have been made to other agencies including Educational Psychology.

*General communications between claimant and the school*

1. Over the course of the school year in 2019/2020, communication between the family and school became strained. The claimant felt that the child was being failed by the school and felt frustrated by the child’s lack of progress and attendance.

1. At this time, witness A was the lead in the child’s educational planning and was involved both in supporting the child and organising the child’s planning meetings. The claimant was of the view that witness A was responsible for the child’s lack of attendance and progress at school and expressed a degree of animosity towards witness A in the course of her email communications with her. As a consequence of this, witness A removed herself from direct communication with the claimant. It was thereafter agreed that the FLO would be the main communication link between the school and the claimant for any communications that were specific to the child.
2. In December 2020, the responsible body was asked to provide independent mediation in an attempt to resolve the breakdown in relations between the claimant and the school and to develop the child’s plan. This process was not successful. The school thereafter continued to make efforts to engage the claimant in planning for the child from this time onwards however the claimant declined to engage in further discussions on the child’s plan.
3. When the child returned to school following the lockdown period and summer holidays to start the new school year 2020/2021, witness A offered the claimant a meeting in order to update the child’s plan. The claimant refused to attend this meeting because she felt that it would be pointless to do so.

*The Animation Project – Sound Walk*

1. The child’s school was invited to take part in a film project called the “Animation Project” This project was an inter-school project managed by an external independent organisation across four schools in the responsible bodies area. The project involved each school contributing to a feature film. The child’s school was required to film a section involving a listening or sound walk. The whole of the Primary 5 of the school were to be involved in this project including the child’s class.
2. Prior to this listening walk taking place, weekly remote meetings between the organisers and the child’s class were arranged to inform the children about what the project would involve. At this time, the child’s school attendance was variable. The child attended at least one of these meetings with her class.
3. The project for the child’s class involved groups of twelve pupils from the class going out into the playground to listen to sounds of nature including any birdsong, trees or wind. This walk together with the children’s voices would be recorded for the final film.

*Communication between the school and the claimant about the sound walk*

1. The school emailed a newsletter to the claimant in April 2021 which informed all parents and carers about the listening walk. In April 2021 this was followed up by an individual email from the school to the claimant (RB005) providing further details on the timing and location of the walk and offering the child the option of staying in school with the FLO if she did not wish to participate. The claimant did not respond to this email.
2. In April the FLO met with the claimant in the car park when the child was being collected from school. The FLO discussed the walk with the child and claimant. The FLO advised the child that she did not need to make up her mind about taking part in the walk until the day of the walk which was the next day. The FLO also stated to the child and the claimant that if the child did not wish to participate in the walk she could go the support base with the FLO.

*School planning for the sound walk*

1. Witnesses A, B and the FLO had discussions about the child’s participation in the listening walk. It was agreed between staff following these discussions that the walk would be suitable for the child. It was also agreed in the course of these discussions that if the child did not wish to participate in the walk, the child could attend the office of the FLO or the FLO could take part on the walk with the child if the child wanted this.
2. In planning the sound walk for all of the P5 pupils, staff gave consideration to individual children with additional support needs (including the child) and whether or not the walk would be suitable. Staff involved with the child including witnesses A and B did not consider that the child would require any further supports or adjustments to the provision of the walk. It was agreed by staff that as the walk was outdoors, in a familiar environment and with quiet sounds, the child would be able to participate in the walk if she wished to. The child’s class teacher planned to place the child in a group with her friends and believed that the child would enjoy the social side of the walk if she chose to participate.
3. The FLO spoke with the child a few days before the walk and explained what the sound walk involved and discussed the arrangements with the child. The child was not enthusiastic about the walk and expressed a view to the FLO that she did not wish to take part. The child’s class teacher was confident, however, that the child would get involved when she saw her classmates enjoying the activity.
4. In April 2021, after the FLO discussed the walk with the child and claimant, the child became agitated and her behaviour deteriorated with her becoming distressed.
5. The child did not attend school on the day that the sound walk took place.

**Reasons for the Decision**

*General remarks on the evidence*

1. The claimant appeared to be a caring parent, focussed on supporting her child to reach her potential at school in what appeared to be difficult circumstances for the claimant and her family. Over the course of her evidence the claimant made ongoing reference to her concerns around the overall educational provision for the child and was critical in particular of witness A. The claimant’s evidence focussed largely on what she perceived to be general failings on the part of the responsible body in supporting the child at school. The claimant’s evidence did not provide clear answers to the specific points put to her, in particular around what further adjustments could have been made by the responsible body. The claimant was not familiar around the actual planning and arrangements that had been put in place by the school to support the child to participate in the walk. This meant we could place less weight on her evidence when determining the issue on whether or not there had been a failure to make reasonable adjustments on the part of the responsible body in the provision of the sound walk. It was evident that the claimant was a parent who was keen to ensure that her daughter participated and enjoyed school life along with her peers. We did not doubt the claimant’s commitment to this.
2. The witnesses for the responsible body gave their evidence in an objective and balanced manner. They were both qualified and experienced in their respective fields. Witness A had known the child since she had started at the school in Primary 3. Since this time she had been involved in the development and review of the Child’s Plans as well as agreeing to engage in the proposed mediation process in December 2020. Witness B had worked with the child since she started her Primary 5 class and had also been involved with the planning of support and approaches to help the child at school. Both witnesses were familiar with the child’s diagnosis and how this affected her at school. Both witnesses were also directly involved in the planning and arrangements for the child to participate in the sound walk. This evidence was corroborative. For these reasons we felt that we could place significant weight to the evidence of witnesses A and B.
3. Parties agreed that the child is a disabled person in terms of section 6 of the 2010 Act and that she has additional support needs. We are satisfied on the evidence that the child has a disability within the meaning of the 2010 Act.

*General remarks on the legal test (2010 Act)*

36. Section 85(2) provides that the responsible body of a school must not discriminate against a pupil in the way it provides education for the pupil or by subjecting the pupil to any other detriment. The claimant relies on section 20 of the Act averring that the responsible body failed to make reasonable adjustments as a consequence of which the child was unable to participate on the walk in April 2021.

*(1) Failure to make reasonable adjustments (section 20)*

1. This duty can take three forms. The one relied on by the claimant is the first requirement. Section 20(3) provides:

The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person 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 avoid the disadvantage.

1. The terms ‘provisions’, ‘criterion’ and ‘practice’ **(PCP)** are not defined in the 2010 Act but should be construed broadly. We were satisfied that the term “provision” includes the way that education is offered or provided and also includes one -off decisions or projects. In this particular case, the “provision” referred to in terms of the Act was the provision of education via the Animation Project which included the sound walk of 27 April 2021 (see para 6.20 of the technical guidance below)
2. Section 212 of the 2010 Act defines ‘substantial’ as ‘more than minor or trivial’, which suggests the disadvantage should be of some substance, although there is a relatively low threshold when determining this. There is no sliding scale to be applied here. Whether a disabled pupil is at a substantial disadvantage or not will depend on the circumstances of the case.

1. The Equality and Human Rights Commission, Technical Guidance for Schools in Scotland (**Technical Guidance**) states:

The duty is ‘to take such steps as it is reasonable to have to take to avoid the substantial disadvantage’ to a disabled person caused by a provision, criterion or practice applied by or on behalf of a School, or by the absence of an auxiliary aid or service (p63, para 6.4) .

The duty to make reasonable adjustments requires a school to take positive steps to ensure that disabled pupils can fully participate in the education provided by the school (p82.para 6.12).

A school’s duty to make reasonable adjustments is an anticipatory one owed to disabled pupils generally, and there for schools need to think in advance about what disabled pupils might require and what adjustments might be needed for them (p82 para 6.12) .

1. The Technical Guidance provides a list of factors that are likely to be taken into account when considering what adjustments it is reasonable for a school to have to make (p85-86). These include:

* 1. The extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil
	2. The effect of the disability on the individual
	3. The need to maintain academic, musical, sporting and other standards
	4. The interests of other pupils and prospective pupil

*Burden of proof*

1. It was agreed over the course of the CMC process that the burden initially lay with the claimant to establish on the face of it that there was case. Thereafter, if this was done, the burden rested with the responsible body to show that it did not breach the provisions of the Act. In this case, this required the responsible body to show that there was no failure on their part to make reasonable adjustments in terms of section 20 of the Act.

*Anticipatory duty*

1. The claimant argues that the responsible body failed to anticipate the need for any reasonable adjustments as well as failing to make any reasonable adjustments. There was compelling evidence that the responsible body had in fact taken steps to fulfil its obligation in this regard. In particular, planning discussions had taken place between witnesses A and B on the needs of all children with additional support needs and in particular the child. The staff involved in this process were familiar with the child’s needs and there was evidence that staff had considered these needs in the planning process for the walk. The walk itself did not involve anything that was considered to be a particular challenge or barrier for the child. On the contrary, the walk was planned in an area where the child was comfortable and familiar and would often be observed by staff happily playing with her friends during break times. The walk did not involve any loud noises. It was clear that the child’s individual needs were considered as part of this planning process. In doing so the tribunal was satisfied that the responsible body had fulfilled its anticipatory duty to make reasonable adjustments. We say more on reasonable adjustments below.

 *Reasonable Adjustments*

1. The claimant suggested that the responsible body had failed to make reasonable adjustments and as a consequence the child was unable to participate in the walk. The claimant felt that the child could have been more prepared. The claimant did not elaborate on what this meant or suggest how the child might have been more prepared. The tribunal concluded from the available evidence that the responsible had taken a number of steps to prepare the child for the walk. These included the child taking part in the remote sessions with her class when she was at school and several discussions with both her class teacher and the FLO, with whom the child enjoyed a trusting and positive relationship.
2. The tribunal was clear from the outset that the onus rested with the responsible body and not the claimant, to establish whether or not there had been a failure to make reasonable adjustments. It was clear from the evidence as it was presented to the tribunal that the responsible body had decided, following discussions, that as the walk was in the playground area with a group of the child’s classmates there were no barriers preventing the child accessing this activity. We agree with this conclusion. The child regularly enjoyed playing in this playground and the walk involved listening to quiet sounds expected outdoors where the child was happy. There was no evidence presented to the tribunal by either party that any further adjustments were required beyond those that had been considered and implemented by the responsible body around the involvement of the FLO to support the child. The responsible body were aware that the child might choose not to take part in the walk and adjustments and plans were made to accommodate this eventuality.
3. We were satisfied on all of the available evidence that the responsible body had taken every step that was open to it at the time to include the child in the planning for the walk and to make any reasonable adjustments to enable the child to participate.
4. The claimant contends that as a consequence of the responsible body’s failure to make reasonable adjustments, the child was unable to take part on the walk in April. We were unable to conclude this from the available evidence for the reasons given. In addition, we took into account that the child herself had stated on more than one occasion that she did not wish to take part in the walk after the details were explained to her by the FLO. It was clear that the child had fixed ideas about what constituted learning and it is likely that the child’s fixed beliefs about learning impacted on her decision that she did not want to take part in the walk. The child had expressed a similar view around other parts of the curriculum and at times would not participate in particular tasks if she felt they did not constitute what the she considered to be learning. Sometimes she would get involved when she saw other children enjoying the activity. On other occasions, it was an agreed approach that the child could attend the support base with the FLO and take part in an alternative task.
5. The child did not attend school on the day of the walk. Both witnesses A and B stated in their evidence that had the child been in attendance at school on the day of the walk, it was possible that staff, in particular the FLO, may have persuaded the child take part in the walk with her peers. The child’s class teacher stated that she would have placed the child in a group with her friends and that she believed the child would have enjoyed the social side of the walk.
6. There appeared to the tribunal to be a fundamental misunderstanding on the part of the claimant around what the walk in April 2021 involved for the child. The claimant was under the impression that the walk would involve sounds and would be difficult for the child; however the walk did not involve any noises beyond general outdoor sounds. It was also clear from the claimant’s evidence that she had been left with the impression that the only support that would be available to the child would be for her to attend the FLO’s offices and complete an alternative task. This was clearly not the case.

*Conclusion on reasonable adjustments*

1. We were satisfied that there was no failure on the part of the responsible body to make reasonable adjustments in its provision of education to the child specifically in the manner which it planned for and provided the walk in April 2021. We were satisfied that the responsible body had fulfilled its obligations in terms of section 20 of the Act for the reasons stated.
2. The claim on reasonable adjustments is dismissed.