Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AC/23/0020

List of witnesses

For the claimant:

Expert witness (witness A)

The claimant

For the responsible body:

Additional Supports Needs Officer (witness B)

Educational psychologist (witness C)

Claim

1. The claimant is the child's mother. The claim was lodged with the Tribunal in February 2023. The claimant argues that the responsible body discriminated against the child under the Equality Act 2010 (**2010 Act**) in connection with (1) his exclusion from school and (2) the operation of its physical intervention policy.

Decision

2. The responsible body has discriminated against the claimant by treating him unfavorably or by putting him at a disadvantage in connection with (1) his exclusion from school, (2) the return of the child to full-time education and (3) the operation of its physical intervention policy. This discrimination represents contraventions of s.85(2)(a) and (e) of the 2010 Act.

3. As a result of these contraventions, we make the following remedies under schedule 17, paragraph 9 of the 2010 Act:

    a. We find that discrimination has occurred, in contravention of s.85(2)(a) and (e) of the 2010 Act, in the three areas outlined in paragraph 2 above.

b. We order that the responsible body makes a written apology to the child for that discrimination within 14 days of the date of receipt of this decision by the responsible body. The letter must be in the form provided in guidance issued by the Scottish Public Services Ombudsman.

c. We order that the decision to exclude the child from school in January 2023 is overturned and that the responsible body writes to the claimant to confirm this within 14 days of the date of receipt of this decision by the responsible body.

d. We order that by the end of April 2024 those staff members in the following categories undertake relevant, externally provided training with a focus on avoiding and reducing the use of exclusion of disabled pupils from school: (a) teaching staff at school A and school B; (b) schools managed by the responsible body that have a record of exclusion of pupils with additional support needs; (c) schools managed by the responsible body that have a high level of pupil exclusions; (d) all head teachers in schools managed by the responsible body; and (e) all of the responsible body's Education Service Managers.

e. We order that by the end of April 2024, the responsible body reviews, develops and revises its policy on physical intervention, in line with the principles of the national guidance on restraint and physical intervention, with any such policy review involving the direct input of disabled pupils who have been affected by restraint or physical intervention in the past.

f. We order that the responsible body makes provision for the full-time education of the child within 28 days of the date of receipt of this decision by the responsible body.

Process

4. The claim was managed to a two-day remote hearing through two case management calls (**CMC**). The final bundle, including late documents allowed to be added, extended to T001 - 029 (tribunal documents), C001 - 128 (claimant's documents) and RB001 - 065 (responsible body's documents, including its e-mail of September 2023 clarifying the agreed remedies).

5. During oral submissions on the final day (to supplement outline submissions), the representatives agreed to reach a consensus on more specifically worded remedies than those agreed in the Joint Minute of Agreed Facts (**joint minute**) (T031-032) as applicable in the event of a finding of discrimination, to include timescales and (where appropriate) affected staff members. In September 2023, the parties provided these clarifications in writing.

Findings in Fact

6. The child is 9 years old, and lives with the claimant.

7. The child has Autism Spectrum Disorder (**ASD**) and Attention Deficit Hyperactivity Disorder (**ADHD**). As a result, the child finds it very challenging to sustain attention,

even for activities he chooses. The child has limited tolerance of interactions with other children or adults unless this happens on his own terms.

8. It is difficult for the child to build relationships with adults. This can only be done successfully in a gradual way through modelling and repetition of experiences in one-to-one or small group environments. Consistency of staffing is important for building successful adult relationships with the child.

9. The child has a very high level of sensory needs, necessitating an individualised sensory school curriculum. He finds it difficult to understand social norms.

10. The child can, when distressed, display physical behaviour towards school staff, sometimes causing unintentional injury to others. The child has been displaying distressed behaviour of this kind since he started primary school.

11. A high level of staffing is required to manage the child's education effectively.

12. Staff at school B are trained in the use of physical intervention and restraint using Crisis, Aggression, Limitation and Management (**CALM**) techniques. This is an accredited training scheme which requires those who are trained to be reaccredited annually following initial CALM training. Staff at school B have been CALM trained and their accreditation is up to date.

13. The Restraint Reduction Network (**RRN**) issues guidance on restraint minimisation, including a definition of this concept. The responsible body's current physical intervention policy does not fully reflect the RRN guidance on restraint minimisation. That guidance represents current industry good practice.

14. The child is on the roll at school A. He currently attends an educational provision managed by the responsible body, school B, on a part-time basis. School B is a resource used by the responsible body for primary school pupils who would normally attend a mainstream school when the pupil's access to school is threatened or is very likely to be.

15. In October 2019, during primary 1, the child moved to school A from a larger primary school. During primary 2 (academic year 2020-21) the child's day was split between mornings at school A and afternoons at school B. During primary 3 (academic year 2021-22) the child attended school A full time.

16. In primary 4, the child returned to school A after the summer holidays but as the incidents of distressed behaviour increased it was decided that after the 2022 October break, the child would attend school B. He started attending school B but only on a part time basis on the suggestion of the claimant, with a view to this being increased gradually. The child continued to attend school B until the exclusion in January 2023.

17. Witness B has been involved with the child's education since the child attended afternoons at school B in primary 2 and was then the child's teacher in primary 3 at school A. When witness B changed job and was no longer available at the beginning of primary 4, the child's distressed behaviours increased. Witness B has a close, trusting relationship with the child. The responsible body's reliance on witness B as a support for the child is very strong.

18. The child was excluded from school in January 2023. The exclusion period was due to last until early February 2023. The responsible body's reasons for the exclusion are explained in its (wrongly dated) letter of 25 January 2023, provided to the claimant on 27 January 2023 (RB034-035).

19. During the child's distressed behaviour that led to the exclusion in January 2023, school B staff employed the use of physical restraint on the child. While being restrained, the child's continuing distressed behaviour caused injury to a member of staff. The physical restraint that day was carried out by two CALM trained members of staff.

20. In early February 2023, the claimant and the responsible body agreed that the child would not return to school for a period of two weeks following the end of the period of exclusion. The reason for this two-week agreed break from school was to allow the newly prescribed ADHD medication to take effect.

21. The child did not attend school following his exclusion until late February 2023, after which his attendance at school B built up gradually. Since March 2023, the child has attended school B on a part-time basis, including during the 2023-24 academic year. Since the exclusion in January 2023, the child has only attended education at school B when witness B and a familiar pupil support assistant is available.

22. A significantly higher proportion of pupils at schools managed by the responsible body with ASD and ADHD are excluded compared to pupils who do not have either of these conditions.

23. The child displayed distressed behaviour at school on a regular basis between March 2022 and January 2023. A total of 21 such incidents are mentioned in the child's school records over that period.

24. Four of these 21 recorded incidents featured multiple events within a short period of time, involving physical behaviour. These incidents took place in November and December 2022 and January 2023 (the day the child was excluded).

25. During the 2022-23 academic year, up until the end of December 2022, the responsible body recorded the use of physical intervention in 33 incidents for all pupils in its area. The child was involved in 14 of those incidents, 8 in November 2022 and 6 in December 2022.

26. There is a Child's Plan to oversee the child's education. The last meeting to discuss this plan took place in September 2022. It had been reviewed prior to this following a meeting in June 2022. The plan was due to be reviewed again in November 2022. That review did not take place and no review has taken place since September 2022. The responsible body has not consulted its educational psychology service in connection with steps to return the child to full time education since the exclusion in January 2023.

Reasons for the Decision

27. The parties agree that the child has a disability under s.6 of the 2010 Act. We agree. This is clear from the findings in paragraphs 7-10 above.

A. Physical intervention

28. What is clear from the evidence is that no criticism can be made about the way in which the child was physically restrained in January 2023. Witness A, an independent expert on the matter, was confident of this in his oral and written evidence. The claimant's arguments about restraint focus not on its use on the day in question, but on the responsible body's restraint policy and how it was applied to the child in the period prior to January 2023. We are not satisfied therefore that the actions taken in January 2023 amounted to discrimination arising from disability under s.15 of the 2010 Act. This is since we take the view that the responsible body was pursuing a legitimate aim (preventing further distress to the child) and did so in a proportionate way. In considering the question of proportionality we have applied the tests from the Supreme Court case of *Akerman-Livingstone v Aster Communities Ltd* [2015] AC 1399, Lady Hale at paragraph 28.

(a) Physical intervention with the child and discrimination arising from disability (s.15 of the 2010 Act)

29. In considering whether an action or omission may constitute discrimination arising from disability, we must answer three questions. We will now turn to each.

    Question 1: Did the responsible body's restraint policy, or how it was applied to the child, represent 'unfavorable' treatment?

30. The answer is: yes. The correct definition of 'unfavourable treatment' in this context is the 'placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person…': Lord Carnwath in *Trustees of Swansea University Pension Scheme v Williams* [2019] 1 WLR 93 (Supreme Court), at paragraph 24.

31. There are two reasons for reaching this conclusion:

    a. The responsible body's physical intervention policy (which includes physical intervention and restraint, both defined at paragraph 1.2 of the policy at C032) is outdated in that it does not reflect the Restraint Reduction Network Standard of 2019 and 2021, meaning that there is insufficient emphasis in the wording of that policy on the principle of restraint reduction. This was the unchallenged evidence of witness A, and we accept that evidence due to his qualifications and experience on the matter.

    b. The responsible body failed to react appropriately to an increase in the number of restraints of the child between November and December 2022 (see the findings at paragraph 24 above). No child's planning meeting was held when it was due in November 2022 (as indicated in the Child's Plan at C119). No steps were taken to consider what the cause of this increase was or how to reduce it over subsequent months. While there were incident reports made in relation to each incident (witness A lists them in his report at C044), the responsible body did not take steps to consider the pattern more broadly and how incidents requiring restraint could be reduced.

32. It is impossible to assess reliably whether or not issue a. identified above would have led to the distressed behaviour from the child in January 2023 being avoided or handled differently. However, such an assessment is not necessary. A physical intervention policy

that is not up to date with current industry standards offers a disadvantage to school pupils who are, as a result of their disability, more likely to experience physical intervention. The hurdle created is the reduction of the chance to benefit from a current industry acceptable policy which focusses, in particular, on restraint reduction.

33. On issue b., the child suffered a clear disadvantage in the absence of steps taken to tackle what was obviously a spike in the use of physical restraint in November - December 2022. The failure to have a Child's Plan review, as was intended following the review in September 2022, offers a disadvantage in itself, even in the absence of the spike in the number of physical interventions. The disadvantage of not having a review of the child's plan is amplified given the obvious increase in physical interventions.

34. Even had a review of the Child's Plan not been due in November 2022, there is an expectation that the responsible body should have taken steps to review the spike in the number of physical interventions. Not only did that review not take place by the date of the child's exclusion following another physical intervention in January 2023, there is no evidence to indicate that any review of this pattern has happened since. A failure to examine a pattern of instances means that lessons cannot be learned. This increases the risk of the continued use of physical intervention. This represents a clear hurdle and disadvantage to the child since the likelihood of reducing physical intervention to manage distressed behaviour is reduced.

35. In these two key ways, the acts/omissions of the responsible body constitute unfavourable treatment of the child.

36. Witness A offers some additional criticisms of the responsible body in connection with their policy (as summarised in the claimant's written submissions at paragraph 37, C118-120), but we do not regard them as sufficiently relevant to the incident that led to the claim.

Question 2: Was the treatment because of something 'in consequence of' the claimant's disability?

37. The answer is: yes. This is not in dispute: the parties agree in the joint minute at paragraph 10 (T030) that the use of restraint and physical intervention was related to the child's disability. Given the child's conditions and the evidence of how they affect his interactions with others (see the findings in fact at paragraphs 7-11 above), we have no difficulty in reaching our conclusion on this point.

Question 3: Has the responsible body shown that the treatment was a proportionate means of achieving a legitimate aim?

38. The answer is: no. The responsible body does not offer an argument that the unfavourable treatment identified in a. and b. (paragraph 31 above) can be excused as an attempt to achieve a legitimate aim. It is difficult to see how such an argument could be constructed. We need not, therefore, consider proportionality at all. Acting to keep a restraint policy in line with industry standards and reacting to a sudden increase in the need for physical intervention with a child would be legitimate aims. The responsible body did neither.

39. This leads us to the clear conclusion that, in the respects identified in a. and b. in paragraph 31 above (falling within the category in s.85(2)(a) of the 2010 Act, the way in which the responsible body provides education for the child), the responsible body discriminated against the child under s.15 of the 2010 Act.

(b) Physical intervention policy and indirect discrimination (s.19 of the 2010 Act)

40. The claimant argues that the responsible body's implementation of its physical intervention policy constitutes indirect discrimination in relation to the child.

41. Reliance is placed on the following factual concession in the joint minute (T031, paragraph 14):

> The [responsible body's] practice and policies on restraint/physical intervention result – in practice – in a significantly higher proportion of disabled pupils and pupils with autism spectrum disorder and ADHD being subject to restraint/physical intervention.

42. The 'provision, criterion or practice' (**PCP**) for the purposes of s.19 of the 2010 Act is the application by the responsible body of its policy on physical intervention (C030-040). In order for that PCP to be discriminatory, the four requirements of s.19(2) must be met. We deal with each briefly:

    a. The responsible body's physical intervention policy (**PIP**) applies to all pupils at schools managed by the responsible body, whether the pupil has a disability or not. This is clear from the wording of the policy (C030). The requirement in s.19(2)(a) is therefore met.

    b. The PIP puts pupils with a disability at a particular disadvantage when compared with persons who do not have a disability. This is inherent in the agreed fact that identifies that a significantly higher proportion pupils with a disability are subject to restraint or physical intervention than pupils who are not disabled. We need not dwell on the question of whether or not physical intervention of a pupil represents a disadvantage when compared with a lack of physical intervention. As a specialist tribunal, we know that physical intervention is a negative experience for a pupil; it interferes with the physical integrity and freedom that a pupil is usually entitled to expect. This is why many education authority policies in this area reflect, as a core principle, the notion of physical intervention as a last resort. This principle is emphasised by the report by the Children and Young People's Commissioner Scotland *No Safe Place: Restraint and Seclusion in Scotland's Schools*, December 2018 (pages 32, 36 and recommendation 13). When a policy is implemented such that a group of pupils are more likely to experience physical intervention than another, the former group is at a particular disadvantage compared with the latter. The requirement in s.19(2)(b) is therefore met.

    c. Implementation of the PIP has put the child at a disadvantage, not least since physical intervention of the child has been used on numerous occasions. Indeed, as noted at the finding in paragraph 25 above, a very high proportion of the physical interventions recorded by the responsible body during the 2022-23 academic year until December 2022 involved the child. The requirement in s.19(2)(c) is therefore met.

d. As the claimant points out, the responsible body does not advance an argument that it can show the PCP to be a proportionate means of achieving a legitimate aim. The burden of establishing this lies with the responsible body. The requirement in s.19(2)(d) is therefore met.

43. Since all four parts of s.19(2) are satisfied, indirect discrimination under s.19(1) has occurred.

(c) Remedies for physical intervention discrimination

44. The remedies in paragraphs 3(a) and (b) above arise, in part, from our analysis of the responsible body's acts/omissions in relation to physical intervention. These remedies were agreed between the parties as appropriate in the event of a finding of discrimination relating to physical intervention.

45. The remedy in paragraph 3(e) was also agreed on this basis – we refer to our findings at paragraph 13 above on the need to update the responsible body's physical intervention policy to reflect the RRN guidance, as outlined by witness A.

46. While we are not bound by proposed remedies agreed between the parties, we take the view that these are remedies that, in the words of schedule 17, paragraph 9(3)(a) of the 2010 Act may obviate/reduce the adverse effect of the responsible body's discrimination of the child and the claimant.

47. The parties agreed a further remedy relating to staff training in physical intervention in the joint minute at paragraph 16(e). Given our finding in paragraphs 12 and 19 above, we are not persuaded that such training is needed, and so we decline to make that remedy.

B. Exclusion

(a) Exclusion of the child and discrimination arising from disability (s.15 of the 2010 Act)

48. In considering whether an action or omission may constitute discrimination arising from disability, we must answer three questions.

49. Before we do so, three preliminary points arise.

50. The first is the question of whether or not the exclusion of the child was lawful. A pupil may only lawfully be excluded from a school in Scotland as a result of their conduct in one particular set of circumstances. That is: where the education authority considers that in all of the circumstances, to allow the pupil to continue their 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: Schools General (Scotland) Regulations 1975, SI 1975/1135, regulation 4(b). The wording of this rule has not changed since its inception, and so it has lasted for 48 years. It is therefore well-established and ought to be familiar to school staff throughout Scotland.

51. We need not answer the legality question. The written reasons for the exclusion do not address this test, nor do they make reference to factors that could be said to apply it. The claimant conceded that it is possible that the test could be said to have been met in connection with this particular exclusion. However, we simply do not have enough information on the likely general impact of the child returning to school in January 2023 on the running of the school to enable us to reach a decision on whether or not the exclusion was legally justified. Our task is not to decide on legality generally; instead we need to consider whether discrimination under the 2010 Act took place in connection with the exclusion.

52. The second preliminary point is whether or not the child remains excluded. The child did not receive any education from the date of the exclusion until February/March 2023, when he returned to school B on a part-time basis. This continued until the end of the 2022-23 academic year. The child has remained in part-time education only during the early part of academic year 2023-24. All children of school age are entitled to full-time education unless they are excluded from school (for example, see the Education (Scotland) Act 1980, s.1; Standards in Scotland's Schools etc Act 2000 (**2000 Act**), ss.1-2; 2004 Act s. 4). On one view, unless an arrangement is made between an education authority and a parent, a child is either excluded from school or is in full-time education. The child is not in full-time education and the argument advanced by the claimant is that he must therefore remain excluded. We need not decide this point as we only have jurisdiction to consider whether or not the responsible body has breached its 2010 Act obligations. We need not attach a label to the lack of full-time education following the 5-day exclusion in January 2023.

53. The third point is a straightforward one: does the exclusion of a child from a school involve treating the child unfavourably? The answer is very clearly: yes. Excluding a child is a very serious step for any education authority to take. That is why there is tight legal protection around the reasons for it, as well as an automatic statutory appeal against exclusion. To exclude a child means depriving the child of access to education for a period of time, which is clearly unfavorable. Also, as a specialist tribunal, we are aware of the stigma that can attach to an exclusion, especially one which is related to a pupil's conduct. We are in no doubt, then, that the exclusion of a pupil is an example of unfavourable treatment under s.15 of the 2010 Act.

54. We now turn to consider the three questions relevant to the application of s.15 of the 2010 Act.

Question 1: Did the responsible body's exclusion policy, or how it was applied to the child, represent 'unfavorable' treatment?

55. As noted above, the child's exclusion from school was, in itself, unfavourable treatment. An exclusion can be unfavourable not just in principle, but also in the manner in which it is applied.

56. The responsible body's exclusion policy (C006-028) is extensive, detailed and practical. It is possible for a policy of this kind to be deficient in its content such that its application to the child would automatically represent unfavourable treatment. The claimant argued that some of the wording of the policy could be updated.

57. However, in its essentials, the policy is sound. There are guiding principles to be applied on exclusions (C006). The legal test for exclusion is clearly and accurately stated (C012, repeated at C015). Key considerations for the decision to exclude are provided in checklists (appendices 1a and 1b at C020-022, discussed at paragraph 4.2 at C015). The appeal procedure relating to an exclusion is clearly set out (C019) and there are mandatory template letters at Appendices 3 and 4, which reference the legal tests (C025-026). These are some of the features of what is a clear and rigorous policy. The policy is not perfectly framed and could, in places, be clarified, but that is no doubt the case with any policy document. The application of that policy to the child does not, in general terms, amount to unfavourable treatment. We therefore decline to make the requested remedy requiring its review, development and revisal.

58. However, the policy was not, in several key respects, properly applied in relation to the exclusion in January 2023, as follows:

    a. Witness B, who made the decision to exclude the child, was not authorised under the policy to do so as he was not a Head Teacher or Deputy Head Teacher of the school (or of any school). Reference is made to the table at paragraph 4.5 of the policy (C015). While there is no accompanying text with that table, it is clear from the heading 'Authority to exclude' that only those specified may take the decision to exclude a child. Witness B explained that the Area Additional Support Needs Manager was consulted prior to the decision to exclude being taken, but that is not relevant since the policy provides that the decision itself must be taken only by a Head Teacher or Deputy Head Teacher, even for a much longer exclusion than the one in question.

    b. Witness B did not take account of the key considerations listed in Appendices 1a and 1b prior to taking the decision. He accepted that he did not look at those appendices before taking the decision to exclude. It is not possible to say whether the decision to exclude would have been taken had he done so, but not doing so is in clear breach of the terms of the policy. The appendices are referred to at paragraph 4.2 of the policy (C015), and while there is no text there to explain their importance, their title, containing the words 'Key considerations' discloses how important they are. We note that a total of 26 key considerations (most of them framed as questions) apply to the child. It is extremely unlikely that all (or even a high proportion) of these considerations were addressed prior to taking the decision to exclude the child without referring to the checklist at the time. Even if they were, the policy clearly envisages that the list is used as a 'checklist' with columns for 'Consideration given' and 'Comments'. That checklist was not completed for the child's exclusion.

    c. The letter sent to the claimant informing her of the decision to exclude the child was not framed using the mandatory (see paragraph 4.9 of the policy) template in Appendix 3 (C025). There is no evidence to suggest that a letter was sent to the child at all, as is required using the template in Appendix 4. It is obvious that if that template had been used for the letter to the claimant, with its explicit reference to the legal bases for exclusion, the reasons given would have been different to those set out in the letter sent to the claimant. This was not a matter that was specifically discussed during oral evidence, but it is evident from the bundle that the template letter in Appendix 3 was not used.

59. The purpose of a school exclusion policy is to protect against unlawful or unfair exclusions, and to ensure that an excluded child has the best chance to return to school as quickly and safely as possible for the child, other pupils and school staff. These aims are clear from the responsible body's exclusion policy. When that policy is not followed, (at least in a material sense as is the case with each of the above flaws) these aims are likely to be undermined. Indeed, it is possible that had the policy been followed properly, the child may not have been excluded at all. In these circumstances, the failures to follow the responsible body's exclusion policy represent unfavourable treatment, even viewed individually.

60. Turning from the exclusion itself, to the period since its expiry, the child has been treated unfavourably.

61. No child planning meeting has been held since the exclusion (in fact not for nearly a year since September 2022). Indeed, there is very little evidence of any steps having been taken by the responsible body to help the child to return to full-time education. There were only two material actions referred to in the evidence: (1) an offer made to the claimant of an assessment placement of the child in an out of area residential school; and (2) an intention to obtain a specialist assessment of how the child presents and his needs.

62. On action (1), the claimant made it clear that she refuses to consider an out of area specialist placement for the child. The responsible body accepts that she is entitled to do so. The claimant is entitled to expect that adequate full-time education is provided to the child in the local area.

63. On action (2), we are perplexed by this. Considering the evidence as a whole, and in particular the evidence of witness C (including her witness statement), the responsible body appears to have a very clear picture of the child's needs. It is difficult to see how a specialist assessment is likely to add to their knowledge. Further, this remains an intended step, and such an assessment has not yet been commissioned.

64. Around 7 months have passed since the exclusion. There is no evidence of any planning to return the child to full-time education. The claimant's wish for the child to return to full-time education is clear from her claim form, lodged in February 2023. The responsible body argues that 'local resources have been exhausted and the risk to staff members is too high to establish a safe environment except for when [witness B] can be present.' (written submissions, paragraph 23, RB071 and witness B's witness statement at paragraph 36, RB023). We see no evidence to underpin this conclusion, especially in the absence of any recent formal multi-disciplinary discussion. In any event, as noted earlier, the responsible body is under a statutory obligation to provide the child with full-time education and may not, especially over a prolonged period, simply announce that it cannot meet this obligation for a particular child. The absence of activity over the last 7 months means that the claim that nothing more can be done is unreliable. Witness B acknowledged that the child was becoming increasingly reliant on his presence and that this was impacting on his other duties. There is no evidence to suggest that the responsible body is taking steps to address the reliance by the child on a particular member of staff. Further, witness C conceded that the educational psychology service may be able to assist with the child's education. That service has not been consulted by the responsible body since the child's exclusion. These are steps that would appear reasonable in the circumstances of this case.

65. Similarly, there is no evidence to suggest that the responsible body has taken its duty to provide the child with a mainstream education seriously. This duty is found in s.15 of the 2000 Act. There are certain circumstances in which that requirement does not apply, outlined in s.15(3), but there is no evidence available to indicate that any of those three circumstances apply here, or that this duty has been given any consideration. The education the child has received since his return to school on a part-time basis in February/March 2023 (and for a period in late 2022), in school B, has not been provided in a mainstream environment.

66. The failure to take action to return a child to full-time mainstream education following an exclusion is clearly unfavourable. In addition, for every day of full-time education the child misses, his capacity to develop the personality, talents and mental and physical abilities to his fullest potential (to use the wording of s.2(1) of the 2000 Act) is at risk. The result is to create hurdles to the child's educational progress.

67. To summarise, the responsible body has treated the child unfavourably in relation to his exclusion as follows:

    a. By not following key elements of the responsible body's exclusion policy; and

    b. By failing to take appropriate steps to assist the child to return to full-time mainstream education since his exclusion in January 2023.

Question 2: Was the treatment because of something 'in consequence of' the claimant's disability?

68. The answer is: yes. This is not in dispute: the parties agree in the joint minute at paragraph 8 (T030) that the incidents referred to in the exclusion letter were related to the child's disability and that these incidents led to the exclusion decision. Given the child's conditions and the evidence of how they affect his interactions with others (see the findings in fact at paragraphs 7-10 above), we have no difficulty in reaching our conclusion on this point.

Question 3: Has the responsible body shown that the treatment was a proportionate means of achieving a legitimate aim?

69. The answer is: no. Failure to follow an exclusion policy and to take appropriate steps to return the child to full-time mainstream education does not, of course, constitute a legitimate aim.

70. The responsible body argues that the aim of the exclusion was to 'allow preparation of robust and supportive measures to held (sic) [the child] attend an education provision safely and to make the environment safe for staff who work with [the child]' (submissions, paragraph 19, RB070). This is a legitimate aim, but there is no sign of the responsible body taking any meaningful steps to meet it. No evidence of meeting it (proportionate or otherwise) has been identified by the responsible body some 7 months later.

(b) Exclusion policy and indirect discrimination (s.19 of the 2010 Act)

71. The PCP for the purpose of s.19 of the 2010 Act is the application by the responsible body of its policy on exclusions (C006-028). In order for that PCP to be discriminatory, the four requirements of s.19(2) must be met. We deal with each briefly:

    a. The exclusion policy applies to all pupils at schools managed by the responsible body, whether the pupil has a disability or not. This is clear from the wording of the policy (C006). The requirement in s.19(2)(a) is therefore met.

    b. The policy puts pupils with a disability at a particular disadvantage when compared with persons who do not have a disability. This is inherent in the agreed fact which identifies that those pupils with a disability make up a much higher proportion of the number of pupils excluded than is the case for pupils who are not disabled. Given what we say above, it is clear that the exclusion of a child represents an inherent disadvantage. When a policy is implemented such that a group of pupils are more likely to experience exclusion than another, the former group is at a particular disadvantage compared with the latter. The requirement in s.19(2)(b) is therefore met.

    c. Implementation of the exclusion policy has put the child at a disadvantage since he was excluded in a purported exercise of the policy. In any event, even had the policy not been used in relation to the child, the disadvantage to him would still exist since he would be more likely to experience exclusion on account of his disability. The requirement in s.19(2)(c) is therefore met.

    d. We have considered (and rejected) the responsible body's argument of a proportionate means to achieve a legitimate aim (paragraph 70 above). We repeat that rejection here. The burden of establishing this lies with the responsible body. The requirement in s.19(2)(d) is therefore met.

72. Since all four parts of s.19(2) are satisfied, indirect discrimination under s.19(1) has occurred.

(c) Remedies for exclusion discrimination

73. The remedies in paragraphs 3(a) and (b) arise, in part, from our analysis of the responsible body's acts/omissions around exclusion. These remedies were agreed between the parties as appropriate in the event of a finding of discrimination relating to exclusion.

74. The remedy in paragraph 3(c) was also agreed on this basis. Given our findings on the flaws in the exclusion process, it would be inappropriate for the exclusion decision to stand.

75. The remedy in paragraph 3(d) above is necessary in order to reduce the risk of pupils (including the child) being excluded, or at least excluded in a manner contrary to the responsible body's policy.

76. Finally, the remedy in paragraph 3(f) above is directly related to the responsible body's continuing discriminatory omission in failing to take adequate steps to enable the child to return to full-time education. We note that there is no mention in the agreed remedy

terms to the need for that full-time education to be delivered in a mainstream environment. We think this is sensible in the circumstances.

77. While we are not bound by proposed remedies agreed between the parties, we take the view that these are remedies that, in the words of schedule 17, paragraph 9(3)(a) of the 2010 Act may obviate/reduce the adverse effect of the responsible body's discrimination on the child and the claimant.