Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

Claim

1. This Claim, made by application on October 2016 (TC1-8), is made under 7 and 8 of Schedule 17, Part 3 of the Equality Act 2010 ('the 2010 Act').

Decision of the Tribunal

2. The Tribunal finds that the Responsible Body has not discriminated against The Child in the performance of its duties under the 2010 Act. No remedy is therefore ordered.

Preliminary/Procedural Matters

3. A hearing took place over 3 days in 2017. The Claimant seeks certain remedies following from allegations of discrimination made around the provision of education to The Child. The hearing in this case was consolidated with the hearing in a CSP content and implementation reference. A separate decision has been issued in connection with that reference. The issues and evidence were similar for both cases. A number of conference calls between the parties and the Convener took place, and Directions were issued to regulate the procedure (dated January (T30-32); April (T33-35); April (T36); June (T38-39)).

4. Following the hearing, written submissions were directed (see the Direction at T38-39). These submissions were delivered by the deadline set for those (see Claimants' submissions at A274-284; Responsible Body's submissions at R104-119). The Tribunal panel deliberated on July 2017, the first available date due to holiday commitments, reaching a final decision. Thereafter, these reasons were prepared, and this document represents the final decision with reasons.

5. In addition to the witnesses mentioned above, the panel met with The Child on May 2017 and spent around an hour with him at the hearing venue taking his views on a range of issues relevant to this claim. This meeting took place with the consent of the parties, and only the three panel members and The Child were present. The Claimant provided in an e-mail of April 2017 (at the Convener's request) some helpful information in order to assist with making relevant conversation with The Child

during our meeting with him (A260). The meeting was audio recorded and a note summarising the main points was prepared by the panel member who agreed to take a note of what was discussed. That note is at T40-42. Following the meeting with The Child, a summary of the main points discussed was read out to the parties. The note at T40-42 was made available to the parties once prepared (following the hearing date on May, prior to the final hearing date).

6. The panel found The Child to be articulate, intelligent, pleasant, engaging and helpful. He answered all questions put to him. His answers were detailed. The views expressed by him were very helpful to us in reaching a decision on a number of the issues, and we refer to his views at various points below.

7. The Claimant expressed some considerable surprise at the high level of engagement The Child demonstrated during his meeting with the panel. We note that the Advocacy Worker was unable, despite several visits, to obtain any views from The Child (see her report at T37). There is no obvious explanation as to why he felt unable to share his views with the Advocacy Worker. At the end of the final day of the hearing, the Claimant asked about The Child's capacity to state his views. She also refers to capacity in her submissions, seeking the tribunal's views (A282) and referring to The Child's Mandate at A247. We are of the view (as we confirmed orally to the Claimant at the hearing) that there is no doubt in our minds that The Child has the capacity to state his views; he did so very clearly, fully and helpfully during our conversation. There is no doubt whatsoever in our minds that The Child has full capacity to state his views on the issues raised in this claim. In our view, those views, having been expressed so clearly, fully and honestly, deserve to be respected. The Mandate at A247 is, in our view, not relevant to this question since it relates to dealings with the school, not the Tribunal. In any event, the Claimant was very supportive of the idea of The Child speaking to the Tribunal, describing such a meeting as "essential" and providing advice on subject areas The Child might be interested in during any such conversation (A260). At no point prior to the panel's meeting with The Child did the Claimant suggest that she had doubts about his capacity to state his views.

Summary of Evidence and Proceedings

8. The bundle consists of: pages T1-42 (Tribunal papers), pages A1-284 (Claimants' papers) and pages R1-119 (Responsible Body's papers). This numbering is the numbering used in the bundle for the associated CSP reference. This is convenient since the majority of the papers for use in the reference and the claim are identical.

9. There are some papers which are particular to the claim, and which we will number separately here for convenience, namely the claim form and the attendance forms (numbered TC1-14); Case Statement (AC1-9) and the Respondent's letter of 7th December 2016 and its original Case Statement (RC1-5) and the Respondent's Amended Case Statement (RC6-9). All other numbering (including the most recent additions to the bundle, listed below) follow the CSP bundle numbering as set out in the decision on that reference.

10. We took into account all of the information in the bundle in reaching our decision. This numbering includes some documentation which arrived close to or at the hearing from both parties (and one generated by the Tribunal). We allowed all of that documentation to be lodged since it was all, on the face of it, relevant to the issues we had to decide. This documentation has been numbered in the bundle as follows:

(a) Tribunal directions as follows: January, T30-32; April, T33-35 (renumbered); April, T36; June, T38-39;

(b) Letter from Partners in Advocacy dated March 2017– T37;

(c) Summary of ASNTS panel meeting with The Child on May 2017 – T40-42;

(d) E-mail of April 2017 from the Claimant to the Convener re meeting with The Child – A260;

(e) Series of e-mails between Witness B, Witness E, Witness C, (A) and (E) regarding visual impairment provision for The Child dated August 2016, November 2016 and February 2017 (a number of e-mails on the latter date) – A261-266;

(f) Letter from Claimant to Convener dated 8th May 2017 enclosing items (j)-(m) below - A267;

(g) Statement of Child's Father – A268-269;

(h) RGK Wheelchairs Ltd. Quotation dated April 2017 – A270-271;

(i) Eye prescription for The Child dated April 2016 – A272;

(j) NHS Optical Voucher and Patient's Statement dated April 2017- A273;

(k) Copy of The Child's current CSP dated July 2016 with agreed changes marked in green type and proposed but disputed changes marked in red type – R90-R101; and

(l) E-mail from Witness E to Witness B and RB solicitor dated May 2017 attaching an e-mail from Witness E to the Claimant dated November 2016 - R102-103.

11. Oral evidence was led from the witnesses listed above over three days, followed by written submissions. Written witness statements (precognitions) of the witnesses who gave evidence for the Responsible Body were directed and were provided (R64-89). The oral evidence given by each of those witnesses did not deviate in any material way from the content of their statements. The Claimant was represented for part of these proceedings by (D), solicitor. However, the Claimant decided to dispense with (D) services before the start of the hearing. The Claimant relied on (D) Case Statement (AC1-9). However, following (D) departure as the Claimant's representative, the Claimant indicated that she had a number of changes to make to (D) Case Statement. Those changes are outlined in the Claimant's e-mail of April 2017 (A243-245, the relevant changes for this claim at A243-244). While unusual, we are mindful of our duty as part of the overriding objective in the Tribunal rules, to ensure so far as practicable that parties are on an equal footing procedurally and are able to participate fully in the proceedings (rule 3(2)(c)). We are therefore content to allow the Case Statement at AC1-9 to be treated as amended in line with the Claimant's changes set out at A243-244. We should add that, again in line with our duties under rule 3 of the Tribunal rules, we allowed the Claimant considerable latitude in presenting her case, for example in lodging documents late and in her cross-examination of witnesses as well as in her own oral evidence.

12. In framing our Findings in Fact (below) we drew upon the Responsible Body's proposed findings which were set out in detail, but making some amendments to the content of those findings, as appropriate.

The submissions of the parties

13. The Responsible Body's arguments are set out in full in its written submissions (R104-119).

14. The Claimant used a mixture of arguments made by her former lawyer, (D), and her own arguments in her submissions and sought to persuade us that the Responsible Body's conduct (or lack thereof) in certain areas represented discrimination under the 2010 Act. Although the Claimant set out her main arguments in her written submissions (A274-284), since she was unrepresented we were careful to check all other documents in the bundle where points were made by the Claimant. Where any point which was relevant to any proposed amendment was made anywhere in the bundle, we considered it. We have addressed most of the Claimant's points in our discussion of each of her amendment requests below. However, there are a few general points made in the Claimant's submissions which we will deal with here. Although the Claimant split her written submissions between this claim and the associated CSP reference, many of the points are relevant to both and so we address all relevant points in both decisions.

15. Firstly, at A279-281, the Claimant lists a range of topics upon which she claims the Responsible Body did not produce evidence. However, in our view ample evidence was produced by the Responsible Body to meet each of the main areas identified by the Claimant as areas in which the Responsible Body is alleged to have discriminated against The Child. We do not have general jurisdiction to review all aspects of The Child's education, we may only (in a claim such as this) consider the areas of complaint identified by the Claimant. We note that 445 pages of information was made available here and that the bundle was substantial. We do not feel that there was any information missing which was required in order to enable us to reach a decision in this case.

16. At A282, the Claimant argues that SSNs should not question The Child about equipment and that any issues should be raised with parents immediately. We disagree with both points the Claimant makes. In our view, it is perfectly acceptable for a school to discuss equipment with a child who has the capacity to state views on such issues. There is no doubt at all that The Child has that capacity. On communicating any issues regarding equipment to parents immediately, in our view this is simply not practicable. We have no doubt that there are regular issues around the use of equipment for The Child and for other children. Many such issues will be resolved by staff there and then. Any significant issues requiring parental input would, no doubt, be communicated. The communication of all issues would place an intolerable burden on the school and distract staff away from providing The Child and other children with an education.

17. The Claimant asserts that RB'S witnesses were 'neither credible or reliable' (A282). In our view, all of the Responsible Body's witnesses as well as the Claimant's witness were entirely credible and reliable. They gave their evidence in a straightforward and professional manner. At A282, the Claimant suggests that some of the Responsible Body's witnesses were 'evasive'. We disagree. The Claimant goes onto say that Witness D evidence on the incident on October 2016 is not backed up by the 2nd SSN. There is no evidence about what the 2nd SSN's account of that incident was (we assume that is the point the Claimant is making) but not every witness needs to be brought and in any event we regard Witness D account of that incident to be credible and reliable.

18. The Claimant suggests (A282) that the evidence of the RB'S witnesses 'was not backed up by any documented evidence in the case bundle'. We disagree. We refer at numerous points below to parts of the case bundle to substantiate many of the points made by the witnesses.

19. At A283, the Claimant requests that the Tribunal formally monitors the Responsible Body's decisions and directions. The Tribunal has no power to do so.

Findings in Fact

20. The Child is a fourteen year old boy who resides with his parents, the Claimant and Child's Father and his older sister. The Child was born on July 2002. He has an older brother who does not reside in the family home.

21. The Child is a pupil at School A. The Child completed his third year of secondary school education during academic year 2016-17.

22. The Child has additional support needs ('ASN') as defined in s.1 of the 2004 Act. These needs arise from multiple and complex factors. He has quadriplegic cerebral palsy with total body involvement, his legs being more affected than his arms, resulting in significant physical difficulties and limitations. Specifically, his lower limbs, hand function, eating and drinking are affected. He has a visual impairment secondary to periventicular white matter pathology (PVL) (brain damage since birth) which affects his vision. He is registered blind/partially sighted. He was diagnosed with aspergers syndrome in 2008. He has a chronic bowel condition and bladder control issues and requires toileting support. He suffers from mild asthma.

23. The Child has a CSP prepared by the Responsible Body and reviewed annually. It details The Child's educational objectives, the additional support required to meet those objectives (including equipment to be provided) and the persons providing that support. The CSP was last reviewed in November 2017. The current version of his CSP is one dated July 2016 (T12-23).

24. The Child is an intelligent boy who is doing well academically at school. He is currently studying Maths, English, Spanish, French, Drama and Chemistry. His tracking reports indicate that he is making good or very good progress in all subjects. In addition he has periods of PE and RE each week.

25. The Child has additional sessions on his timetable. He has a session on his standing frame between 8.30 and 8.55 each morning. He has a period of trike each day. He currently has a maths tuition session once a week although this is a short term arrangement. He has physiotherapy once per fortnight at school and leaves school each Monday at 2.05 for a physiotherapy session at home. The Child uses a wheelchair throughout the school day and is transferred to a bambach chair for English and Maths lessons.

26. The Child requires to be supported by a school support assistant ('SSA') at all times during the school day and requires two SSAs for all manual handling including transfers to trike, bambach chair, standing frame and for toileting. At the request of the Claimant, the number of SSAs involved in providing support to The Child was reduced. Currently there are three main SSAs involved over the course of the week, with 2 additional SSAs providing a small amount of cover during staff breaks. All SSAs who are involved with The Child are known to him.

[paragraphs 27-30 of the decision are removed for reasons of confidentiality]

31. The Child is supported in class by an SSA at all times. SSAs scribe for The Child, when required, usually in maths and sometimes in other subjects. At other times The Child is able to carry out his schoolwork on the laptop provided for his use. He sits at the front of the class so that he can see the backboard. He uses an adjustable desk. He sometimes has access to an acrobat camera which can be used to enlarge text. He uses glasses when he has difficulty seeing the board. In the event that the acrobat camera were set up in advance in class, he usually prefers to use that equipment rather than his glasses.

32. In September or October 2016 Witness E brought a Sony camera and IPad to the school and demonstrated same to The Child and his father. The Child tried out the equipment. Following this meeting, Witness E assisted the Claimant with a grant application to obtain the Sony camera and IPad for home use.

33. A teacher from the VI Unit based at School B visits The Child at school at least once a term to assess use of equipment, classroom placement and ensure The Child is fully supported in relation to his vision. A short report is issued after each visit, the latest dated February 2017 (R34).

34. On March 2017, CALL Scotland carried out an assessment at the school to establish if the Responsible Body is providing the most effective technology to support The Child. The Claimant had requested this assessment which was arranged by the Responsible Body. The conclusion reached by CALL Scotland was that The Child is being well supported at school and they did not recommend significant changes (R42-46 for their report). They recommended trialling a smaller keyboard, making the most of adobe acrobat software and exploring dedicated maths and science software to enable The Child to work independently without a scribe. These trials are underway.

35. The Child has considerable difficulty with handwriting and this is unlikely to improve. He has a period of handwriting practice in his timetable although this is currently used for maths tuition.

36. The Responsible Body has recently revised the Personal Emergency Evacuation Plan (PEEP – at R35-38) for The Child and staff training takes place regularly, particularly in relation to use of the EVAC chair.

37. An Occupational Therapist (OT) visits The Child at school once a term to monitor use of equipment, handwriting progress, height and position of bambach chair and desks. During these visits, The Child is observed by the OT in class. The OT also assesses the toilet facilities and use of same, although not necessarily each term. A detailed report is issued following these visits, the last dated March 2017 (R31-33).

38. The Physiotherapist attends the school once a fortnight to give physiotherapy to The Child.

39. The OT and Physiotherapist provide training to staff, when required.

40. When school trips for The Child's year group or class are arranged the Responsible Body makes provision for The Child to attend, should he wish to. This includes the provision of two SSAs to support him during the trip. A trip was

scheduled in June 2017 and The Child was invited to attend. Prior to the trip, the Claimant indicated that The Child would not attend. The Child did not wish to attend the trip due to the travel distance involved and since he would have to wake up early in the morning to attend. An alternative trip has was arranged to the cinema for those who do not go[on the trip] , including The Child.

41. The Responsible Body has not facilitated trips by The Child to local shops during lunchtimes due to concern over the hazards identified in relation to such trips. Pupils who leave school at lunchtime are not supervised

42. The Child is encouraged to drink during the school day. He does not present as dehydrated during the school day.

43. CSP meetings are attended by Parents, Head teacher, member of staff from VI unit, OT, Physiotherapist, speech and language therapist, dietician, Inclusion Manager. Regular ASP meetings also take place. The Child is invited to join these meetings and comment.

Reasons for Decision

44. It is not disputed that The Child has a disability as defined under s.6 of the 2010 Act.

45. The Claimant seeks a number of remedies for disability discrimination under the 2010 Act. Disability discrimination is defined in s.25(2) as discrimination of one of four kinds:

(1) Discrimination arising from disability (s.15);

(2) Direct discrimination (s.13);

(3) Indirect discrimination (s.19);

(4) Failure to comply with the duty to make reasonable adjustments (ss.20-21).

46. Although it is not clear from the Claimant's submissions at A274-284 (when taken together with (D) Case Statement (at AC1-9)) which of these forms of discrimination are being relied upon, and which issues are relevant to each, we have decided that it is fair to the Claimant to assume that all forms of disability discrimination as defined in s.25(2) are being argued. We note here that the Claimant was not represented for the whole of the case, including the hearing and written submissions stages, and that the 2010 Act is a complex piece of legislation. We are mindful of our duties under rule 3 of the 2011 Rules, and under rule 3(2)(c) in particular.

47. On the subject matter of the alleged discrimination, the relevant provisions in this case are s.85(2) and (6), dealing with the duties of schools towards their pupils. The Claimant suggests that the Responsible Body breached s.85(2)(a) (discrimination in the way education is provided to The Child); s.85(2)(b) (discrimination in the way access to a benefit, facility or service is afforded to The Child) and s.85(2)(f) (discrimination by subjecting The Child to any other detriment) (see (D) Case Statement at AC2). However, there is no detail on how these provisions have been breached. Again, in fairness to the Claimant, we assume that (D) would (had she remained involved in the claim) have argued that in respect of each of the four

elements outlined in her Case Statement at AC2 (namely the incident of October, access to toilets, continuity of care, and breach of the CSP) the Responsible Body failed in its duty not to discriminate against The Child. We note that each of the four matters to be considered fall under both s.85(2)(a) and (b), the terms of both of these provisions being very broad.

48. We will deal with each of the four forms of discrimination (above) in turn. Before we do so we should note the position on the burden of proof under the 2010 Act. Under s.136 of the 2010 Act the Claimant has to make out a case of discrimination which appears sound on the face of it and if this is done, the burden of proof switches to the Responsible Body. Paragraph 443 of the Explanatory Notes to the 2010 Act explains this:

> "This section provides that, in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the Claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the Responsible Body to show that he or she did not breach the provisions of the Act. The exception to this rule is if the proceedings relate to a criminal offence under this Act."

49. There are two exceptions to this which are relevant to this Claim: the burden of establishing a proportionate means of achieving a legitimate aim under ss.13(2), 15(1)(b) and 19(2)(d) and the burden of establishing that reasonable adjustments have been made (s.20(3) and (5)). Although the burden in our view reverses in considering these concepts, as we explain below, neither is triggered in this case.

50. For completeness, we should add that (D) in her submission did not make reference to s.85(4) (victimisation) or s.85(3) (harassment). We have considered the related provisions (sections 26 and 27 of the 2010 Act) and it is clear to us that, on the facts in this case, neither provision is activated.

(1) Discrimination arising from disability (s.15)

51. It is convenient to begin with this form of discrimination. There is a two stage process to the application of s.15(1):

> Stage 1: Did the Responsible Body treat The Child unfavourably because of something arising in consequence of his/her disability? (s.15(1)(b));
>
> If 'Yes' then:
>
> Stage 2: Can the Responsible Body show that the treatment is a proportionate means of achieving a legitimate aim? (s.15(1)(b)).

52. If the answer to Stage 2 is 'No', discrimination under s.15 has taken place. If the answer to Stage 2 is 'Yes' then it has not. The situation under s.15(2) does not apply in this case.

53. As the Claimant indicates in her submissions (prepared by (D)) at AC2, the motive for the treatment is irrelevant. There are four matters in respect of which the Claimant asserts that there has been a breach of s.15. Each will now be considered.

[paragraphs 54-60 of the decision are removed for reasons of confidentiality]

(b) Access to toilet facilities

61. The evidence is clear around the fact that a toileting plan is in place for The Child (R7-8). Witness C indicated in her evidence (see her statement at R78) that a new toileting procedure was introduced in August 2016. This procedure led to the insertion of scheduled toilet visits to a dedicated facility in the school, known as a bio-bidet toilet, into The Child's timetable (R47). These toilet breaks were adjusted following Christmas 2016 (see Witness C's e-mail of December 2016 on this at R53-53). Witness C further explained in her evidence that the plan involves taking The Child to the toilet on each of these toilet breaks, and that on each occasion, The Child is accompanied by two School Support Assistants (R7; R78). Witness D (as an SSA who is sometimes involved in The Child's care) assists, as part of her role, in taking him to the toilet. In the context of the incident on October 2016, she describes how she deals with The Child during a visit to the toilet (R87-88). Witness F, The Child's OT also explains her involvement in overseeing The Child's toileting needs (see her statement at R65 and 66-67).

62. The Child himself in his meeting with the panel indicated that he is happy with the toileting arrangement at the school and that it is 'working very well' (T42). He indicated that an unscheduled toilet trip does not normally happen and that the existing scheduled visits meet his day to day needs (again, T42). The Claimant expressed concern that the toilet which The Child uses would, depending on the lesson he is in, be some distance away from The Child's location, causing disruption to his schooling due to the length of time it would take him to travel from his class to the toilet. However, there is no evidence to suggest that this has been a problem, and The Child himself indicated to the panel that he could, if such a situation arose, use one of the nearby disabled toilets. In all of the circumstances, there is no evidence to suggest that the toileting plan is not being implemented. The Claimant suggests in her submissions that the lack of a changing places toilet facility means that the school is not equipped to deal with The Child's needs. We do not accept this – all of the evidence suggests that the facilities, plans and practices currently in place are adequate for The Child's toileting needs.

63. There is no evidence at all to suggest that The Child is being treated unfavourably in relation to access or use of toilet facilities in the school. In these circumstances, the Claimant has not managed to make out a sound case on the face of it; she has not made out sufficient facts which in the absence of an alternative explanation point to a breach of s.15 having occurred. Even if she had done so, meaning that the burden had shifted to the Responsible Body, we take the view that the evidence presented by the Responsible Body as to the adequacy of the toileting plan would have been ample to discharge that burden.

(c) Continuity of care

64. The Claimant argues that The Child is being discriminated against by being denied continuity of care. She points to two areas in which this is apparent: the lack of named staff (especially SSAs) to care for The Child and that the number of staff members with responsibility to look after The Child should be reduced to two members of staff. We will deal with each point in turn.

65. On the first issue (named SSAs), the Claimant argued that where SSAs dealing with The Child were not named, this could lead to some SSAs who were not familiar with him providing support for him and that this would be detrimental to him, since it would hamper predictability and comfort. There is no evidence of any difficulties over

continuity of care for The Child. Witness C in her evidence explains the reasons for the pool of five SSAs, with three of them offering the main support (see her statement at R79). She indicates that she is unaware of The Child being unhappy with those who provide support. In his discussion with the panel, The Child confirmed that he gets on 'very well' with all support staff and he indicated that he was not concerned when support staff members rotate. It is clear to us, then, that there is no continuity issue in this area. In our view, there is no case for the school to have restricted the identity of those who care for The Child to only certain named individuals. Naming individuals for any purpose would not be sensible and may well be to The Child's detriment, since it would mean that if a named individual is not available (for example due to illness) no one else would be able to stand in, leaving The Child with less than his usual level of care. While we accept that continuity of care is important, complete continuity cannot be guaranteed.

66. On the second issue (number of staff), the staffing complement is explained by Witness C in her evidence. There is no suggestion of any difficulties around the number of staff involved in The Child's care, and The Child himself expresses that he is content with the staffing arrangements. There is no evidence to support the need for a limitation of the number of staff to a number less than the current pool of five. The Claimant in her submissions (A277) refers to the high number of staff who are involved in The Child's care, but again there is no evidence (including from anything The Child said to the panel) to suggest that he is overwhelmed or unhappy with receiving support from a number of individuals.

67. Given the lack of any evidence of continuity issues in either area, the failure of the Responsible Body to take either measure does not represent unfavourable treatment under s.15. In these circumstances, the Claimant has not managed to make out a sound case on the face of it ; she has not made out sufficient facts which in the absence of an alternative explanation point to a breach of s.15 having occurred. Even if she had done so, meaning that the burden had shifted to the Responsible Body, we take the view that the evidence presented by the Responsible Body as to the adequacy of staffing continuity would have been ample to discharge that burden.

68. Since the Claimant does not succeed at Stage 1 above, we need not consider Stage 2.

69. In conclusion, there Responsible Body has not discriminated against The Child under s.15 in the area of continuity of care.

(d) Failure to implement CSP

70. We accept that, in principle, the failure by a Responsible Body to implement a CSP could amount to disability discrimination under s.15. Although there is separate legislation dealing with CSPs and their content, monitoring and implementation, the concept of unfavourable treatment in s.15 is not limited in any way. If a CSP is in place and certain additional support should be provided in respect of a pupil, a failure to provide that support might constitute unfavourable treatment; much will depend on the circumstances.

71. In connection with the CSP reference with which this claim is associated a number of implementation failures were alleged. We dealt with each in that decision, but for the sake of completeness, we will detail our conclusions here also.

72. Some of these arguments are too vague to be sustained. In particular, the reference to failure to approach The Child's disabilities in a holistic manner (A220, para 12). We agree with the Responsible Body's point that there is no specification to this claim. We cannot therefore sustain an argument that this represents non-implementation of the CSP.

73. On PEEP planning, again this lacks specification (A221, para 13). This paragraph simply states that the planning is not implemented, there is no detail on how this is the case. In any event, it is clear to us that the PEEP planning is in place. Looking to the current content in the CSP (R94), there was no evidence from anyone to suggest that the support specified there (mainly around the plans and how they will be implemented and around training) is not in place. We cannot therefore sustain the view that this part of the CSP is not being implemented.

74. On VI support, the Claimant argues that there is no implementation (A221, para 14). However, only one example is provided, which is around the non-availability of certain equipment. The Claimant in her changes to (D) Case Statement removes that reference (A244) replacing it with a reference to the Sony camera, IPad and clamp. This is dealt with in our decision on the CSP reference. There is simply a general assertion about non-implementation of the VI parts of the CSP. This is simply not supported by the evidence. We note above the agreed changes to this section of the CSP (R95, green text) and we have dealt with the proposed amendments (red text, R95) in our CSP decision. Looking to the black text at R95 (the CSP content in this area prior to amendment), it is clear from the evidence of Witness E and from the CALL Scotland Assessment Report (R42-46) that the terms of the CSP are being implemented.

75. The Claimant argues that occupational therapy is 'lacking' and that healthcare implications are not taken into account throughout the day, having a negative impact on The Child's ability to access the curriculum (A221, para 15). The Claimant in her changes to the Case Statement adds that monitoring whole time, class time and content of the curriculum is essential.

76. In our view, it is clear that The Child is receiving adequate OT support and that the CSP content in this area is being implemented. That content is outlined in detail at R96, the black text being relevant (green text representing agreed changes since this Claim was made). As the Responsible Body has noted, there is little specification about which parts of the CSP content are not being implemented. Nevertheless, having examined that content and taking account of the evidence of Witness F, we can see no implementation issues. Witness F outlines in detail in her statement (R64-69) the support being provided. That evidence covers the areas of support identified in the CSP. On the Claimant's additions, there is no evidence to support the need for whole time monitoring and it is clear that Witness F's input includes aspects of The Child's curriculum. We cannot therefore sustain the view that this part of the CSP is not being implemented.

77. Finally on implementation, the Claimant alleges that there is a failure to encourage fluid intake. Further, it is argued that there is no monitoring of fluid intake or communication of such monitoring to The Child's parents (see the Claimant's submissions at A282). The relevant part of the CSP is at R98 under 'Community dietician'. SSAs are required to encourage fluid intake throughout the day. Again, the evidence suggests that this support is being provided. Witness D indicates that The Child is always encouraged to drink fluids (see her statement at R89). There is no evidence to contradict this. The Child himself was clearly aware of the need for hydration when he was asked about this by the panel (T41). He indicated that he is

allowed to take the soft drink Irn Bru in a cup attached to his wheelchair into class. This is further evidence of provision being made for regular fluid intake. We cannot therefore sustain the view that this part of the CSP is not being implemented. There is an obligation in the CSP to report that back to parents on fluid intake (via the diary). There is no evidence to suggest that this system is not being followed.

78. In these circumstances, the Claimant has not managed to make out a sound case on the face of it case; she has not made out sufficient facts which in the absence of an alternative explanation point to a breach of s.15 having occurred. Even if she had done so, meaning that the burden had shifted to the Responsible Body, we take the view that the evidence presented by the Responsible Body as to the implementation of the CSP in the areas identified is ample to discharge that burden.

79. Since the Claimant does not succeed at Stage 1 above, we need not consider Stage 2.

80. In conclusion, there Responsible Body has not discriminated against The Child under s.15 in the area of implementation of The Child's CSP.

(2) Direct discrimination (s.13)

81. The test here involves taking a fictional non-disabled pupil and comparing, on a medical model, the treatment of The Child with that pupil (*Lewisham London Borough Council v Malcolm* [2008] UKHL 43). If The Child was treated less favourably than that non-disabled pupil (known as the 'comparator'), on any of the four issues (a)-(d) above, then direct discrimination occurred.

82. It is clear the test in s.13 does not require that exactly the same provision is made for disabled and non-disabled pupils in order for discrimination not to have occurred. Different provision for pupils with a disability, when compared with non-disabled pupils, is expected and required. In our view, The Child was not treated less favourably than the comparator on any of the four issues identified above. The Child has access to a full educational experience and does not miss out on any subjects or activities. His toileting is well provided for. The support specified as required in his CSP is provided. His care in the class, including the continuity of it, poses no problem. His intellectual and physical needs are fully met, as they should be for any non-disabled pupil. He is a thriving and happy child in school.

83. In these circumstances, and referring to our discussion of each of the four elements (a)-(d) above, no direct discrimination has occurred. There has therefore been no breach of the duty under s.13 of the 2010 Act.

(3) Indirect discrimination (s.19)

84. This form of discrimination is described usefully at paragraph 78 of the Explanatory Notes to the 2010 Act:

> "Indirect discrimination occurs when a policy which applies in the same way for everybody has an effect which particularly disadvantages people with a protected characteristic. Where a particular group is disadvantaged in this way, a person in that group is indirectly discriminated against if he or she is put at that disadvantage, unless the person applying the policy can justify it."

85. To trigger this section, there would have to be a 'provision, criterion or practice' which the Responsible Body applies to all pupils including The Child, but which disadvantages The Child. Considering each of the four issues at (a)-(d) above, the facts around none of these could reasonably be characterised a 'provision, criterion or practice' which applies to all pupils. Indeed, all are related to provision which is made for The Child alone, to meet his particular needs. Section 19 therefore does not apply in this case, and so The Child has not been the subject of indirect discrimination.

(4) Failure to comply with the duty to make reasonable adjustments (ss20-21)

86. (D) spends some time in her Case Statement arguing that the Responsible Body has failed in this duty (AC3-7). She refers to s. 20(3) and (5). We will deal with each in turn. Before we do so, we should say that, in our view, in establishing whether or not reasonable adjustments have been made under the 2010 Act, the burden of establishing this falls squarely on the Responsible Body; it seems to us that given the nature and wording of the requirement to make reasonable adjustments, the terms of s.136 do not apply.

87. Section 20(3) in the context of this case requires that where a provision, criterion or practice put in place by the Responsible Body puts The Child at a substantial disadvantage in comparison with non-disabled pupils, reasonable steps must be taken to avoid the disadvantage (those steps being known as 'reasonable adjustments').

88. (D) refers to two matters which represent a 'provision, criterion or practice' for these purposes: toileting and non-implementation of the CSP (AC3). However, even taking each of the four areas identified above in (a)-(d), it seems to us that while each might be characterised as or at least involve a 'provision, criterion or practice', The Child has not been put to any disadvantage in comparison with a non-disabled pupil in respect of any of them. As we note above, The Child has access to a full educational experience and does not miss out on any subjects or activities. His toileting is well provided for. The support specified as required in his CSP is provided. His care in the class, including the continuity of it, poses no problem. His intellectual and physical needs are fully met, as they should be for any non-disabled pupil. He is a thriving and happy child in school. This is the situation we would expect a non-disabled child to be in.

89. Even if The Child had been at a disadvantage on any of the four areas in comparison with a non-disabled pupil, there is no evidence to suggest that that disadvantage is substantial ('more than minor or trivial' – s.212(1) of the 2010 Act). It is true that special arrangements are made for looking after The Child in class and supporting him on trips to the toilet, and that toilet trips take time. However, there is no evidence that any of the arrangements made for The Child cause him to be disadvantaged in any significant way. We refer above to our comments on each of the four areas under s.15.

90. Even if The Child could be said to have been put to substantial disadvantage in this context, it is clear to us that the Responsible Body has made reasonable adjustments to avoid that disadvantage. It is worth noting that the duty is not to avoid any such disadvantage altogether, in the sense of removing it; the duty is to take such steps as it is reasonable to have to take to avoid it. (D) in her Case Statement (at AC5-6) refers to the factors to consider in determining whether adjustments are

reasonable (referring to the *Technical Guide for Schools in Scotland*, 2015, EHRC, referred to here as 'the Technical Guide'). We need not address each factor in turn; suffice it to say that in referring back to our discussion of the four issues analysed in the context of s.15 (above), it is clear that the steps taken by the Responsible Body in these areas have been and continue to be effective in meeting The Child's educational and other needs while in school.

91. One point which is discussed in a little more detail by (D) is under the heading 'Health and Safety Requirements' in her Case Statement at AC5-6. She refers to the Technical Guide and the *White* case. On considering the section on 'Health and Safety Requirements' (paras 6.47-6.50 of the Technical Guide), it is clear to us that what is required is that relevant risk assessments should take place. There is no requirement for documentation in respect of any such risk assessment to exist. Having said this, in our view, the CSP qualifies as a fairly comprehensive risk assessment document in that it identifies issues and needs and how these will be met. The Personal Emergency Evacuation Plan for The Child ('PEEP', at R35-38) is clearly a risk assessment document. Further, the evidence suggests that risks facing The Child have been assessed and are being monitored regularly with input from the OT service, physiotherapy and, of course, the team of SSAs and teachers who look after The Child. The Claimant has not identified any areas in which there exists an un-assessed risk to The Child's health or safety.

92. Turning to s.20(5), this is similarly worded to s.20(3) but in relation to the provision of an auxiliary aid. In her Case Statement at AC3-4, (D) identifies four such aids which should be provided under the duty to make reasonable adjustments. The first is appropriate toileting for The Child, more specifically the installation of a toilet in the Chemistry, Drama and Languages areas of the school. As we note above, The Child is not put to a substantial disadvantage in respect of his toileting and so there is no requirement to make any adjustments such as those suggested by (D).

[paragraph 93 of the decision are removed for reasons of confidentiality]

94. Thirdly, (D) refers to the need for an adjustment by providing a limited number of fully qualified and trained aides to care for The Child. The Responsible Body already provides qualified and trained staff to meet The Child's needs; what seems to be being sought here is a specification of a particular number of individuals. Again, The Child is not at a substantial disadvantage in this area, since he is well catered for in relation to the number, qualifications and training of staff. We refer to our discussion of this under s.15, above. In any event, limiting the number of staff to care for The Child would not be a reasonable step to have to take to avoid any such disadvantage. We refer again to our discussion of the need not to limit the number of staff for The Child (above, under s.15).

95. Finally (under s.20(5)), (D) specifies implementation of the CSP as a reasonable adjustment to take to provide an auxiliary aid. It is not clear to us whether implementation of a CSP would qualify as an 'auxiliary aid', taking into account the guidance in the Technical Guide at para 6.21. However, giving the Claimant the benefit of the doubt on that matter, we are satisfied that the CSP is being fully implemented (see our discussion above under s.15) and that The Child is under no substantial disadvantage in relation to the areas covered in the CSP.

96. In conclusion, the duties under s.20(3) and (5) to make reasonable adjustments in the relevant areas in relation to provision for The Child do not arise and so there has been no failure by the Responsible Body under s.21.

Public sector equality duty – s.149 of the 2010 Act

97. (D) suggests that this duty may be being breached by the Responsible Body in connection with The Child's care. However, it is clear to us that we have no jurisdiction over claims of a breach of s.149. This Tribunal's jurisdiction under the 2010 Act springs from Schedule 17, Part 3, para 8, which refers to Chapter 1 of Part 6 of the Act (see also Schedule 17, Part 1, para 1 where this Tribunal is nominated as "the Scottish Tribunal"). That Chapter (Chapter 1 of Part 6) consists of sections 84-89 of the Act and so we may only consider claims which relate to allegations of breaches of one or more of the statutory duties outlined there. The duty in s.149 is, of course, not one of those. We therefore have no jurisdiction in this area.

Remedies

98. Since we have found that the Responsible Body has not discriminated against The Child under the relevant 2010 Act provisions, we decline to order any remedy under Schedule 17, Part 3, para 9 of the Act.