Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

Disability Discrimination Claim – Decision Following Review

1. Claim

The claimant made a Claim to the Tribunal alleging that her son, The child born 2008 had been the subject of disability discrimination by the Responsible Body, in terms of the Equality Act 2010 ("the Act"). The Responsible Body opposed the Claim.

2. Decision of the Tribunal

The Responsible Body has unlawfully discriminated against the child contrary to section 85(2) of the Equality Act 2010.

Regulation 4(1) of the Equality Act 2010 (Disability) Regulations 2010 does not apply in this case as the child does not have a tendency towards physical abuse of other persons.

The Responsible Body is ordered in terms of schedule 17, paragraph 9 of the Act to:

(a) Apologise to the child and his parents for the unlawful discrimination in writing, said apology to conform to the terms of the Scottish Public Services Ombudsman's guidance on apologies, all within one calendar month of receipt of this decision.

(b) Ensure that relevant staff at School A undertake appropriate training to improve awareness of the impact of autistic spectrum disorder on a child's behaviour and development and receive crisis and aggression limitation management (CALM) training to enable them to meet their responsibilities under the Act.

(c) Review, develop and revise its policy on exclusion considering Scottish Government Guidance.

(d) Review and routinely monitor exclusion rates of pupils with a disability, under the public-sector equality duty to adopt relevant policies and targets for the reduction of the exclusion gap which exists in Responsible Area for disabled pupils.

3. Preliminary issues

The Reference was case managed prior to the oral hearing by way of case conference calls on 25th July 2017 and 25th August 2017. Case conference call notes are within the case papers.

At the case conference call on 25th August 2017 the parties agreed that the views of the child would be obtained by Independant Advocacy. The Convener issued a note to be provided to the Advocate to assist in obtaining relevant information on the child's view. Note for advocacy is contained within the case papers. As a result, Independant Advocacy provided an advocacy statement on behalf of the child which is contained at T45 within the tribunal papers.

The parties prepared a joint Minute in relation to agreed evidence, the content of which is narrated below in findings in fact.

The Convener determined that the tribunal hearing would be a proof before answer, with legal submissions being required following the hearing of evidence to address the preliminary issue arising in respect of Regulation 4(1) of the Equality Act 2010 (Disability) Regulations 2010. Submissions in relation to regulation 4 were submitted by both parties and considered by the tribunal.

The tribunal hearing took place over 4 days in November 2017 and January 2018. The tribunal members met for a full day to consider evidence and submissions further and reach a decision in February 2018.

In addition to written submissions in relation to regulation 4, the preliminary issue, written submissions were submitted by both parties after the oral hearing.

The claimant's productions are lodged at C7 C125 and C142 to D149.

The responsible body's productions are contained in RB12 to RB183. Productions RB232 to RB405 were allowed late, there being no objection from the claimant. RB406 is an email with attachments including spreadsheets which was allowed late on 24th January, there being no objection from the claimant.

4. **Summary of evidence**.

The child's statement is contained at T45.

In summary, the child's view was that School A had made him feel upset, sad, horrible, because the teachers were horrible, they didn't help him with his work. He felt sad and upset when asked not to go to school because he couldn't go to school to do his work.

The child stated that he loves his new school (School B) and it is good, the teachers are nice and good.

The child was asked what he understood by "kind hands" and he understood that to mean gentle hands or calm hands. If someone was not using kind hands they would be hitting.

Within School B, if The child feels upset or if things are too much for him he goes to the sensory room and he loves it there. He would also wear ear defenders. He worries about what will happen if he goes to a bad high school.

Procedure

The parties agreed that the witness statements provided would be treated as evidence in chief. Accordingly, the claimants statement at C126 to C141 was accepted by the tribunal as the evidence of the claimant in chief.

Statements provided by witnesses for the Responsible Body are as follows:

1. Witness A, Deputy Head Teacher at RB184 to RB207
2. Witness B, Educational Psychologist at RB208 to RB215
3. Witness C, Quality Improvement Officer at RB216 to RB219
4. Witness D, Head of Service for Education at RB220 to RB227

These statements were accepted as evidence in chief. Additional evidence was provided by each witness orally in cross examination and re-examination.

At the commencement of the oral hearing, Solicitor for Claimant, indicated that he reserved his position in respect of calling an expert witness WITNESS E, whose report was lodged with the tribunal without objection on 27th November 2017. She provided evidence to the tribunal on 30th November 2017 by telephone and adopted the terms of her report as her evidence in chief.

Joint statement of the claimant and responsible body is contained at T48.

Both parties lodged substantial lists of authorities including the following:

The Claimant

1. Akerman-Livingstone v. Aster Communities Limited [2015] UKSC 15
2. Anonymised Case report from the ASNTS (DDC 04 01 2013_0)
3. EHRC Technical Guidance for Schools in Scotland
4. EHRC Technical guidance on the Public Sector Equality Duty: Scotland
5. European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009 (SI 2009/1181)
6. Section 3, Human Rights Act 1998

The Responsible Body:

1. The Equality Act 2010, Part 2; Part 11; Schedule 1, Part 1; Part 6; Schedule 13; Schedule 17
2. The Equality Act 2010 (Disability) Regulations 2010, Regulation 4
3. Explanatory Memorandum to The Equality Act 2010 (Disability) Regulations 2010
4. Schools General (Scotland) Regulations1975
5. Education (Scotland) Act 1980, section 28H
6. X v The Governing Body of a School [2015] ELR 133
7. P v Governing Body of a Primary School [2013] ELR 497
8. Governing Body of X V Sendist [2010] ELR 1
9. Essop & Others v Home Office [2017] UKSC 27
10. Trustees of Swansea University Pension and assurance Scheme v Williams [2015] ICR 1 197
11. Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15
11. Blackstone's Guide to the Equality Act 2010, Third Edition, Para 6.40-6.45

The Evidence

Evidence of The Claimant.

In addition to the evidence in Claimant's statement she gave evidence that School A did not provide an environment to help support The child. She had been concerned about whether mainstream education was appropriate and raised that initially in Primary 1 and on 17th November 2016 at a meeting within the school. She looked at alternative provision.

In relation to the evidence provided by Witness D at RB220 she did not consider that The child's additional support needs had been fully taken in to account as part of the process of considering exclusion. His disability had led him to have a heightened state of arousal and the only way that he could communicate his distress was by going in to "fight or flight mode". Earlier intervention could have prevented his behaviour deteriorating and avoided exclusion.

In relation to the second exclusion, the claimant felt it was not reasonable for her to be asked to attend school with The child for him to avoid exclusion. This would mean that The child would be treated differently from other pupils, which The child found distressing. The claimant was not aware of any other parents supporting pupils during the day. She had her own work commitments and could not attend school during the term time with The child.

In relation to RB184 and the statement at paragraph 16 by Witness A, depute head teacher regarding school trips, the claimant advised that the only circumstances in which The child was permitted to attend school trips would be if a family member attended with him. When a trip to the Science Centre was discussed, the claimant was aware that The child was familiar with the Science Centre having visited there before with the family. She requested that a supporter be provided by the school to attend with The child or that he was placed in a small group for the visit. She prepared The child for the visit. The "meltdown" which had occurred at the visit had resulted as result of The child becoming hungry and wanting his packed lunch and being refused the opportunity to do that. In addition, he was not happy to hold the teachers hand as that singled him out as being treated differently from other pupils. The child has an emotional age of between 5 and 6 and his autistic traits are related to his meltdowns. He has behavioural issues related to autistic spectrum disorder and he finds anything unpredictable challenging. He does not always understand what is being asked of him and if things are not working out he cannot always communicate his frustration, which leads to him getting in to a high state of anxiety, lashing out and being aggressive.

In relation to the engagement of the educational psychologist the claimant agreed that she had accepted the educational psychologist would be discharged in 2015 on the basis that she could be phoned if support was needed. She felt under pressure to reach that agreement as she felt she had no right to dissent, given that the school have the lead on deciding such matters and that they know best.

The child had found transition from Primary 3 to 4 particularly challenging. He had moved from one part of the school to another and from downstairs to upstairs. He had a different teacher and was in a new classroom. He took break times in a different playground.

In Primary 4 before the exclusions, The child had left school 3 times within a 4-week period without authority, his facial tics had increased, and his body tics were severe. His anxiety levels were high, and his mental health was deteriorating.

In relation to paragraph 30 of Witness A's statement that she considered The child to be manipulative because he did not want his mother to be told about his behaviour, the claimant considered that to be a neurotypical response as no one wants their Mum to be told when they have misbehaved. She did however, entirely dispute that The child could be manipulative. While he knows at times he is in the wrong, he is not capable of manipulation, due to his disability. The claimant became aware that Witness A's opinion was that The child was manipulative when she read the case papers for this tribunal.

The claimant had requested that she be phoned, emailed or sent a text message if an incident with The child occurred at school as the alternative was that she tended to be spoken to when collecting The child which was done in public, often in the presence of The child, which caused him distress.

The claimant felt that she had worked well with the school in terms of consequences for The child's behaviour being followed up at home. She would restrict his use of the Xbox, iPad or his attendance at clubs. She felt that while all negative behaviour was pointed out to her, there was no positive feedback given by the school. The child's experience of going to school each day was that a negative report would be provided, if anything was said at all. The claimant felt that she had done a lot of research to help the school and had devised a positive behaviour plan and given the school lots of strategies to put in place. She was never criticized for doing so and the school staff never indicated that she was doing anything wrong. Towards the end of The child's time at school she was often upset and distressed because of the circumstances but she denied ever being aggressive or defensive. She was very concerned about her son's deteriorating mental health and the escalation of incidents occurring within school. She often felt that The child was singled out for criticism and she would be told every negative aspect of his day at school which at times she felt was like a "character assassination".

In relation to the exclusion of 2nd November (detailed in Witness A Statement paragraphs 58 and 59 RB198/199) the claimant felt intervention should have been put in place at an earlier stage to avoid escalation of behaviour. If a teacher had appropriately intervened at an earlier stage, having identified the likelihood of escalation, The child could have been removed to a quiet place and calmed down.

In relation to the exclusion of 18th November (as detailed in paragraphs 60,63 and 64), The child was back in class and settled prior to the exclusion. The claimant had been at school for a pre-planned meeting about another incident and had not been told about the decision to exclude but had been asked to keep The child off the following day. The child did not understand why he had been allowed back into class and then was being excluded, and the claimant had some difficulty in accepting that this was reasonable. Suspension was put in place for 7 days. Although the incident in that occasion had happened in the morning, no phone call was made to the claimant about it and it was only discussed when she attended in the afternoon for another meeting.

In relation to the absence in November 2016 (referred to in paragraph 67), the claimants position was that she was with The child to see the Christmas lights when she received a telephone call to advise that the teacher would be off, and the school couldn't guarantee who The child's teacher would be. She had asked if she was being asked to keep The child off school, and Witness A had said that it was up to her. No alternative proposal was put in place or discussion of any other means by which The child could be in school.

In relation to the suggestion that The child could only attend school with a family member, the claimant recalled that she had been told if she couldn't come in herself or have someone else to sit with him, then The child would require to be excluded. The claimant felt that no other pupil would have been asked to participate in such an arrangement. If she had attended, it would have set The child up for failure. He would have been distressed and struggled to understand why she was there, his state of arousal would have been high throughout the period she was present with him in school. By that stage the claimant was very distressed and felt that she had no option but to tell the school that rather than exclude The child, he would not be returning there.

The claimant advised that she felt The child struggled with aspects of the work that he was provided with at school. For example, he had no imagination and, so he struggled with literacy. He found it frustrating that he was continually given work that he could not understand. The claimant had asked for support for him to access the curricular with similar work, but he had become more disengaged, which led to more challenging behaviour. If issues arose at school, the claimant continued to address these at home by putting in place consequences and sanctions. She wanted The child to succeed in school and wanted him to learn accountability for his behaviour but found that that did not happen at school in the way that it did at home. In relation to sanctions at school MS (the head teacher at time of exclusions) had told the claimant that she could do no more for The child and that everything had been done that could be done. Witness A said that The child couldn't cope with consequences in school and didn't suggest any consequences that could be put in place in school to make him aware of the effects of his behaviour. The result of that was if an incident occurred in school in the morning, there was no consequence for The child until he got home. He wouldn't understand why the consequences taking place at home and would often say "that happened in school".

Since The child has moved to his new school placement he is thriving. He is educated partly in mainstream and partly in the learning communication resource base. He receives rewards for positive behaviour and there are consequences for negative behaviour at school. As a result, he is a completely different child, being happier and more settled. If any incidents occur at the school, the claimant is informed immediately, and The child is sent home that day but the next day is a fresh start.

In re-examination the claimant accepted that when distressed The child can throw things about and lash out and that at times his presentation could be a danger to himself or others. The child is not aware of his own space and often does not know when rough and tumble play should end. He likes to be in control and be first in line. He finds it difficult to appreciate the effect that has on others. The claimant advised that she was always concerned that The child would struggle in mainstream school, but she was assured by school staff that they could work with him to support him in mainstream and that it was best for him. Between Primary 1 and 3, the supports in place appeared to work. Academically, The child was doing well but socially he had difficulties, there would be regular communication between the school and the claimant. Sometimes restorative discussions would take place between The child and school staff. The claimant felt that whilst The child might listen to what is said he would struggle to understand any restorative discussion. Often, he would simply answer by saying what he thought everybody would want him to say. Laterally, he was less willing to engage in restorative discussions. Nothing had changed at home as his environment remained the same, but the claimant felt that the school environment had changed considerably as far as The child was concerned, as he had a new teacher and had moved physical location in school and in the playground and those matters contributed to The child's challenging behaviour as he struggled with all the transitions.

The child was provided with a space of his own, but it was in a noisy corridor and, in any event, if his anxiety was rising he would need someone to help him to access the quiet space. There was not always someone available to do that.

The claimant disputed that she had been content for The child not to take part in work within the classroom or that she had let him feel that he could opt out. Her evidence was that if doing particular work was going to cause The child distress or if he was not coping, then the school should make reasonable adjustments to enable him to engage.

When asked if there were any circumstances in which the claimant considered it would be appropriate to exclude The child, the claimant had agreed that there had to be serious consequences for The child in relation to his behaviour. She could not exclude the possibility of exclusion being acceptable, but she felt that 7 days exclusion was disproportionate. For him to return to school without strategies being put in place to address the issues and then excluded again for a further 7 days had consequences for The child and was not proportionate. She had never been given any explanation for the period of exclusion, except that it was to give time for meeting to take place and strategies to be put in place. She was not aware of any other child in the school being excluded for 7 days. She had heard of another child with additional support needs being excluded for 2 or 3 days the previous year.

In relation to being asked to keep The child off school, which is the claimants position, she did not recall being told prior to the day before the teacher was due to be absent that a difficulty would arise (as suggested by Witness A). She recalled that the head teacher could not guarantee who The child's teacher would be.

The claimant recalled The child returning to school between exclusions on a reduced timetable, advising that had been at her suggestion.

In answer to questions from the tribunal, the claimant advised that the strategies that she had suggested about managing The child's behaviour came from her own research into the matter and suggestions by the Education Psychologist. She and the education psychologist had given the school ideas. The school had said that they could not put in place consequences for The child in relation to his behaviour and that that required to be done at home.

In re-examination, the claimant clarified that in relation to the requirement for The child to use kind hands and feet, she felt that was placing responsibility on The child when his challenging behaviour and struggles were as a result of his disability rather than through choice.

The claimant provided her evidence in a very composed and measured manner, despite being emotional at times. She sought to give credit to School A staff where she felt it was due. She appeared a credible and reliable witness, and where her evidence conflicted with others, we have preferred her position. In particular, the Tribunal accepted the Claimant's description of events in December 2016 when she was told that The child's teacher was to be off school.

WITNESS E

WITNESS E provided evidence all as contained in her report lodged at C142 to C149. She is an expert in exclusion from school and is Depute Director of the Centre for Research in Education, Inclusion and Diversity. Her expertise is evidenced at C142/3.

WITNESS E advised that other countries find it shocking that exclusion is used in Scotland. Internationally, the policy is of **inclusion,** so that even if there are difficulties a way is found to ensure that each child knows they are part of a community and are included by nature. Whilst she considers it excellent to know that Council's across Scotland have reduced exclusions significantly and substantially over a period (including the Responsible Body), she was extremely concerned that despite that, disabled and vulnerable children are still more likely to be excluded and their figures are not decreasing in the same proportion.

In addition, she was concerned that authorities with similar challenges can be more, or less, effective at reducing exclusion. There are different rates and different proportions of disabled and vulnerable children, therefore there is an opportunity to intervene in a way which can be different and not just about the circumstances of the Local Authority or the school.

In relation to the proposition that in some circumstances exclusion is necessary to keep pupils or staff safe, WITNESS E's position was that other countries avoid exclusion altogether, even in difficult circumstances, and the Scottish Government Guidance talks about many different approaches. Restorative approaches and others can be used to resolve issues. Exclusion is not necessarily effective and can be detrimental to the child involved. It can also have an indirect adverse effect on other pupils in the school. In a large US robust study, the findings were that the higher the level of exclusion, the more negative an impact on pupils who were not excluded.

As far as restorative approaches were concerned, there was a frame work of approaches within the school communities with children and adults repairing harm rather than apportioning blame. Another approach is solution focus schools which share common approaches looking to the future, how things could be focused differently and framed positively. WITNESS E had evidence of a large study in Scotland (in which she was involved) which looked at how to deal with indiscipline and serious matters of indiscipline. That research showed that where there was holistic, whole school approach using restorative ways, success rates were very good, and effectiveness was very strong.

When asked if exclusion was ineffective, WITNESS E confirmed that the purposes of it were to resolve difficulties and to make sure that the issues don't occur again. Therefore, there must be a change in behaviour and there is no evidence that this occurs when exclusion is used. The fact that it is more often used for disabled children suggests that it is ineffective.

Whilst WITNESS E recognised that time is needed, for instance, for emotions to cool down, it is not of itself a reason for exclusion. The restorative approach gives another set of tools to do that in another way. Exclusion is not necessary to allow a meeting to take place or put plans in place, and there is no evidence available that exclusion has to happen to precipitate that. If the relationship between school and pupil has broken down, then exclusion will not help. It is extremely rare that a child or family feels things are better after exclusion. Exclusion is used for the more serious issues but is ineffective and potentially makes matters worse for that pupil, and potentially for other pupils within the school.

In re-examination WITNESS E confirmed that she had worked as a teacher, principally as a guidance teacher in mainstream school, but also to support the risk of exclusion in alternative settings. She has worked within secondary and primary schools and focused on avoiding exclusion during the 1980's within the youth strategy. She worked directly with children with disabilities and young children with a range of challenges, as well as being a guidance teacher in mainstream school. She confirmed that she had not met The child but had been asked to give a view in relation to exclusion in general and not specifically in relation to The child.

When asked if it was her position that the restorative approach should have been used here other than exclusion. WITNESS E advised that in general terms (rather than specific to The child) exclusions had the same meaning as it was given when first introduced in 1975. Since that time the understanding of children's circumstances and what education can do for children has changed out of all

recognition. Exclusion is not effective. Research shows that. It is possible for exclusion rates to be nil in the longer term if schools make good use of Scottish Government advice and policy which supports every move away from exclusion. All other European countries emphasise all that is possible which is preventative, value that ethos and want to learn about ways they can work with children and young persons. If there was a particular issue which led to serious concerns or extreme risk (which would be rare) efforts would be made to work with multiple agencies to prevent it reaching that point, involving the child and family and making sure they understood the decision and had a genuine, authentic opportunity to participate in discussions and decisions.

When challenged about the meaning of the exclusion in other countries, WITNESS E advised that exclusion covers a number of things in this country too. It can range from being asked to go home to be being excluded from school permanently. There are good reasons why it should not happen here as elsewhere, for instance, every child is entitled to an education, putting them out of school may put them in to a more vulnerable situation, putting them out of school may place them at additional risk, it is illegal to refuse to educate a child and there is no opportunity to resolve the problem.

WITNESS E confirmed that there is no direct research in relation to children with disabilities but most research includes it, rather than specifically relates to such children. Often children may have a disability and other difficulties and it is common to face complex needs.

There are nationally public available statistics from 2014 and 2015 which are bi-annual and are Scotland-wide which indicate that, as is common with the pattern across the UK, disabled children are more likely to be excluded than other children.

WITNESS E was an impressive witness with excellent, relevant credentials. Her evidence was largely unchallenged, although it was suggested that it could never be the situation that exclusion rates be nil. She refuted that position, illustrating her evidence with international research and findings.

The Evidence of the Responsible Body

Witness A, Head Teacher.

In addition to her written statement, Witness A had prepared a risk assessment in relation to The child because his behaviour was very challenging, and there were concerns about his health and wealth and wellbeing. The purpose of the risk assessment was to ensure that everyone knew how to respond to The child's behaviour. The strategies had been developed from School A Learning and Communication resource. The risk assessment had been shared with the claimant who seems satisfied but did not add any comments or suggestions.

In relation to differentiation in the curriculum for The child in P4, particularly in relation to literacy, support was in place to help guide him and the class teacher was aware that he required to be given the extra support with explanations. He found it

difficult to engage in personal and social education. Staff had a conversation with the claimant to say that if he didn't want to engage perhaps alternatives could be provided. It was still open to the child to join in if he wanted to do so. The child had a 5-star chart for good listening, sitting, completing tasks etc and it would incorporate computer time. If he completed his tasks he got 15 minutes on the computer before playtime. By P3 he seemed very motivated by that.

In Primary 4, The child was using a visual class time table and the teacher would clearly explain the day. She would break it down and specifically outline what would be happening to accommodate The child and let him know what would be happening throughout each block of the day. Witness A could not say whether the star chart had been continued in Primary 4.

Witness A's evidence was that there were no consequences for The child's behaviour which could be put in place in school. When The child had come in to Primary 1, the nursery transition group had suggested a firm approach with clear instructions and boundaries. That had worked up until Primary 3. In Primary 4 the school could no longer put boundaries in place for The child as his behaviour escalated between August and December 2016. He would have a temper tantrum, shout and swear if sanctions were tried. He had his own agenda. He could not be persuaded to come off the computer or be distracted to do so. He would not accept other sanctions such as losing golden time or having restorative conversations or time out. It became difficult to identify the trigger that escalated behaviour and staff would revert to the risk assessment and the restorative approach which was used for lots of children.

The risk assessment would be updated from the experience learned by dealing with The child. In Primary 4 it was updated twice due to the escalation of The child's behaviour. For example, he would leave school by going over the fence. The school backs on to a park and that was obviously a considerable risk to The child. In addition, there were various incidents of physical violence towards staff. The child had been aggressive towards peers from Primary 1 and did not know his own strength. He had no spacial awareness. There was an escalation in violence and he was very aggressive towards staff from Primary 4.

In cross examination Witness A conceded that she could not say whether there was a 5-star chart for The child in Primary 4, but she was confident that the class teacher would have continued with the same targets as Primary 3. She did recall on occasions the class teacher advising that The child had been able to have his computer time.

Witness A could not provide further information to the tribunal about the strategies in Primary 4 for The child meeting his targets. Witness A advised she was not involved in the first exclusion of The child, either in the incident or the school's response. She was aware of the information about that incident from school records. She considered that the exclusion was necessary for good order and discipline and the severity of the incident justified the approach taken.

Witness A advised that she did not know whether The child's anxiety and distress arose from Asperger's or if it was just a behavioural issue. He finds social situations

challenging and that gives rise to him becoming anxious and distressed which leads to tantrums, leaving the classroom, shouting, charging at staff, grabbing, pushing and pulling others and hitting out. He was not always in control of his actions. He was impulsive but at other times Witness A felt that he was aware of what he was doing, that he weighed it up, looked, watched and then acted. She thought he was at times “manipulative”.

In relation to the second exclusion, Witness A had been alerted to that incident by MS. The actions described, Witness A considered to be deliberate. For example, it was a deliberate action of The child to follow the pupil support assistance and hit her on the head. He had paused, looking at MS and had then run off. Witness A did not consider his actions to be automatically impulsive but rather to have been thought about. She was not personally present during this incident.

When asked about The child’s ability to make good decisions in the moment when he was at a high state of anxiety, Witness A’s position was that staff did not know where The child was on the scale of anxiety each day. He could appear calm and settled but could be in a very high state of anxiety. When it was suggested to her that it would be unrealistic to expect him to act as neurotypical child in such situations, Witness A’s position was that it looked to her like The child weighed up situations and did not make an automatic response. She accepted that sometimes there is red mist for other children, but they can be redirected to make good choices.

In relation to The child’s disability, Witness A confirmed that Asperger’s syndrome is a barrier which the school are trying to support. The barrier to learning which was impacting on him was his rigidity of thinking and the impact that had on himself and on his health and safety. She could not say however that his behaviour was entirely due to the ASD and believed that choices were being made by The child about his conduct. He found it hard to engage in restorative conversations.

In relation to the chronology of events, the first exclusion of The child was on 2nd November 2016. Witness A attended a meeting on 10th November 2016 and the decision was made to readmit The child to school on the condition that he used “kind hand and feet”. The second exclusion took place on 18th November 2016. One of the new strategies put in place was that Mum had handed in a “Tucker Turtle story” as a resource and suggested a positive handling plan. She had also asked for the golden book to be put in place. Those 3 new strategies had been suggested by the claimant.

The child returned to school on Tuesday 29th November 2016. A meeting took place on 12th December 2016 where strategies were discussed at that time with the Educational Psychologist. The aim of strategies put in place at that time was to have improved communication and have a star chart to analyse The child’s behaviour, and to use a communication diary as Mum felt that comments were always negative. The teachers were trying to find positives but were being realistic.

Witness A was not aware of the legal requirement for proportionate means to achieve a legitimate aim with reference to exclusions and it was not a concept that she had considered, but she did look at what was needing to be done in terms of intervening.

When asked in what way the exclusions of The child for two seven-day periods had helped to address concerns about health and safety or discipline of the school, Witness A's position was that the decision to exclude had nothing to do with her and she could offer no guidance on why seven days had been selected as a period of exclusion.

When asked the purpose of asking a 9-year-old child with autism to sign an agreement for readmission to school undertaken to use "kind hands and feet" and whether that was an effective way of supporting him, Witness A's position was that the purpose of it was to give explicit instruction to him. He was a literal thinker and there could be no misinterpretation of what was being expected of him. He knew the difference between good and bad behaviour and could say sorry. He could see if he had done something wrong. His mother agreed to the terms of readmission and to The child signing. Witness A could not say whether The child would have been readmitted to school if the document had not been signed.

In relation to the statistics in respect of exclusions, at RB301 Witness A's explanation for the rise in the number of exclusions was that School A have many pupils with challenging behaviour, social and emotional issues. They have many children who are very demanding and were, in the relevant period, being physically aggressive towards other children. The child was the only child with a disability who was excluded although there were half a dozen children on the role with additional support needs and 5 were autistic.

Witness A was asked by the tribunal what was hoped to have been achieved by the seven-day exclusion on 2nd November and what was done differently when The child returned to school. Witness A advised that she did not discuss what was hoped to be achieved as she was not part of those conversations. When The child returned to school he had access to the learning and communication resource and had various charts and lots of things had been done to support him to enable him and others to be safe in school. Everything was looked at intensely with the claimant and the educational psychologist. In addition, an advocacy worker had had a meeting with The child and could not think of anything which she could identify that the school were not doing. None of the strategies changed but there were many meetings, and everything was looked at and analysed.

The tribunal made enquiry as to how The child's curriculum was differentiated for him to enable him to engage. Witness A advised that The child did not want to talk about emotions and sometimes would sit and listen and other times join in. His mother had spoken to CAMHS and there had been 4 options for activities suggested. He did not wish to engage in art or PSE. Accordingly, the curriculum was adapted around him, and he was not forced to do those subjects. He would often choose another activity as an alternative, but at times he would go and distract other pupils.

In relation to Witness A's position that The child's behaviour was not necessarily due to autism, Witness A advised that she sought advice from the psychologist about pathological defiance disorder but did not feel that another label would be helpful for The child.

In situations where The child required to be calmed down, the school had written guidance by way of the risk assessment. At times, the strategies would work and other times they did not. If a crisis arose, The child would generally leave the class and a staff member would follow him and wait until he had exhausted himself. The guidance was to encourage the child to return to the class. There were positive behaviour meetings with staff, and the adults involved with The child would know the procedures. The strategies in place worked until Primary 4 although The child had always been a challenge to the staff. He had not left the building without authority until Primary 4.

Witness A advised that the school had a zero tolerance towards physical aggression. She wants children to recognise their behaviour, talk about it and engage in a restorative approach.

On re-examination, Witness A advised that the claimant was very good at calming The child down. Witness A had witnessed a 15-minute sustained attack by The child on his mother when she was kicked, punched and headbutted and had witnessed the claimant using strategies such as holding him until he calmed down. During the 3 years that Witness A had worked with The child, she had learned a lot from the claimant who had started the autism support group within the school.

Witness A gave the impression to the tribunal that she placed responsibility for The child's "bad behaviour" on his mother, and on The child. She thought The child acted deliberately as he did, and that he was manipulative. It appeared to the tribunal that she did not really accept that The child's disability caused him to become anxious, agitated and distressed, and to react in the way he did. She did not appear to take responsibility for managing The child in school, and deflected discipline to the claimant. She had no concept of the requirement for proportionality in relation to her actions concerning The child and appeared to lack true understanding of the causes of The child's behaviour. There appeared little knowledge in the team of safe restraint and conflict management skills, which may have allowed The child and others to be kept safe without the need for exclusion. The school staff tended to react to situations, rather than use skills available to anticipate difficulties and plan his education around managing his reactions.

Witness C, Quality Improvement Officer

Witness C became involved with the child when she received an email from the Head of Inclusion on 13th December 2016.

In addition to her written statement, Witness C provided oral evidence that she had observed The child in class at School A on 9th December 2016. She had not been specifically in school to observe him but was in his class for about 20 minutes. She witnessed the teacher using lots of appropriate strategies. In a spelling activity The child was struggling to keep up and process the activity, and the teacher responded to that directing him giving him extra time. He became more agitated when he was not keeping up with the class and had more urgent interactions with the teacher, and when the strategies were used he managed. Later that day she had observed The child after he had left the class and gone to Witness A's office. He had then left her

office and staff required to find him to put him in a safe place. He ended up going into the learning and communication resource. He was very upset and was physically and verbally abusive at that stage. His Gran came to collect him from school. There were people with specialised knowledge trying to deescalate that situation and they were not able to do so.

Witness C did not provide evidence, and was not asked, about her current involvement in monitoring exclusion rates in School A. It would have been helpful to the tribunal to have explored these issues with her. This evidence came to light when Witness D gave evidence.

Witness C's involvement was in relation to The child's education provision. She had first received information about him after the date of the incident described above. The tribunal understands that until that date she would have had no background information about his support needs, and accordingly little weight can be attached to her views of the appropriateness of interventions by staff during a 20-minute incidental observation.

Witness B

Witness B is an Educational Psychologist. In addition to her written statement, she advised the tribunal that The child had settled very well in the learning communication resource at School B School, his new placement. He is building up time in the mainstream class. He is happy at School B. He has a classroom assistant with him in class at all times. He has reward time at 2pm each day. He has had some blips, but these have been rare. He had a difficult day in September and there had been a meeting at that time, where any issues were talked about and the strategies put in place to build up positive responses and positive relationships. He is open to Educational Psychology services and accordingly Witness B is involved in the review meetings.

When asked by the tribunal whether different strategies were being used now at School B as had been used at School A, Witness B's position was that the difference for The child now is that he is in a smaller class in a supported unit. The nature of approaching the curriculum is different in a learning and communication resource from mainstream school. A different approach is taken to the curriculum.

In cross examination Witness B confirmed that in September 2015 it had been agreed that at the start of Primary 3 there was no need for further psychological intervention, but that The child could be re-referred if required. At that meeting the strategies in place were discussed and The child appeared to be responding well to those. It was deemed appropriate to make the case inactive, but it was made clear that if there were future concerns a re-referral could be made to Psychological Services. The school did contact Witness B when The child was in Primary 4 around August and again Witness A had a discussion near the October break. She had been advised to refer The child back to the joint support team. Beyond that, when The child was not open to the service, Witness B would not have been further involved in discussions.

Witness B provided her evidence in a professional and credible manner.

Witness D, Head of Service for Education

Witness D provided oral evidence in addition to the statement accepted as evidence in chief. In examination in chief, Witness D was asked about his understanding of Responsible Body's approach to exclusion in ASN cases. He advised that an extra step was taken, and he would ask, having taken account of additional support needs, is the exclusion reasonable and proportionate in the circumstances and if so what is hoped to be achieved by doing it?

Witness D advised that in relation to the time periods for exclusions, head teachers have responsibility for excluding and that can normally be up to 10 days at their discretion. It is not the position that a 10-day exclusion is twice as serious as a 5-day exclusion. It has to be rational. An exclusion is not punitive. It is to allow the school and others to look at situations, calm down, reflect and find appropriate ways forward and to ensure the health and safety of the child and others is not compromised.

The head teacher can request a serious incident review meeting if the head teacher is looking for guidance or advice regarding exclusion. As head of service Witness D decides if it is appropriate to have a serious incident review. He can refer the case to the joint support team or can say that there should be a temporary exclusion, depending on which approach is most appropriate, or alternatively he can convene a meeting which he would chair.

The purpose of a referral to a joint support team is that it is a multi-agency meeting with professionals looking at the barriers to learning and coming up with supports. A serious incident review request may be made if a head teacher feels they have explored all avenues and think a serious incident review would be helpful to move the issue forward. These are supportive meeting and in 11 years only 3 or 4 children have been removed from registration. Witness D has never known a child with additional support needs to be removed entirely. The starting point of the meeting is to be supportive and not punitive. The expectation is that the child will return to school.

Scottish Government guidance states that an assurance of cooperation is appropriate. A memo of understanding can be drafted up between parties setting out the conditions of return. If dealing with a younger child or a child with additional support needs, then the parent can be asked to sign. If they refuse to do that, the head teacher can contact Witness D to see what happens next, for instance if the parent is not supporting the rules and expectations of the school. The memorandum would be drafted by the head teacher if it is a temporary exclusion but if the memorandum is following a serious incident review, then Witness D would generate the criteria for the return following those discussions. If a child is not signing the document, staff need to know that the child understands what is expected of him or her and the child needs to know that the parents agree so that there is a shared understanding of everyone's responsibilities towards making the return to school successful.

Witness D was not a party to any assurances of cooperation in respect of The child.

Witness D advised that the education directorate have the information regarding exclusions collated from their information system and they report to elected members and send summaries to head teachers and quality improvement officers. They are looking for differential changes and outliers so that they can find out what the story is about the figures every 6 months. If there are factors varying up or down, the quality and improvement officer teams are asked to investigate to see why figures are higher or lower. Quality assurance and improvement is a cycle of reflection. The last update of management circular 8 (at C44) was in 2015 and a review is being undertaken.

Witness D advised that Responsible Body have reduced exclusions by 74% in the last 10 years. His department works with staff to support them and try to identify what is causing a child to behave in the manner complained of, to address those issues and provide support. Exclusions in relation to pupils with additional support for learning have always been lower in Responsible Body than in other areas and also lower for those assessed with disability.

Witness D's position was that he considered The child not to be badly behaved, but that his behaviour was putting himself and others at risk, so the response of exclusion was proportionate and reasonable in the circumstances.

He first became involved in October 2016 when he received an email communication from the school regarding concerns about The child. Shortly thereafter The child was excluded for the first time on 2nd November. A serious incident referral was then made by the then head teacher. She spoke to Witness D about her concerns for herself and for The child. Witness D was aware that lots of supports had been put in place for The child and that he had a recorded disability. The head teacher considered that what was in place was appropriate and wanted to know if Witness D concurred. They talked through it and he was satisfied that the exclusion was appropriate in the circumstances due to the risks involved. At that time, the head teacher had indicated she would submit a serious incident review report and Witness D had indicated that he would hold a meeting to review the situation. He had formed the view that he held on the basis that the head teacher felt that no matter what she tried she could not mitigate or anticipate risks. The strategies were not working, and she was concerned about The child, the staff and other children. She did not discuss the time period for exclusion with Witness D as that matter was entirely at her discretion.

Witness D's view was that 5 days would be necessary for a meeting to take place and 2 days to put in place whatever strategies were agreed, and accordingly 7 days exclusion was appropriate.

The record of the meeting which took place on 10th November 2016 is contained at T14.

By the time of the second exclusion on 18th November 2016, the head teacher had spoken to Witness D about the incidents leading to exclusion. He felt there was no purpose in having a further serious incident review meeting. He had put in to process

his position that the joint support team should be involved, and a coordinated support plan was under consideration, plus a reduced timetable was in place. The serious incident meeting had been a restorative meeting held on 10th November and put in place multi agency approaches. When the other incident happened a week later, it would have been unnecessarily stressful for The child, and would not have progressed matters, to hold another serious incident meeting. He had agreed retrospectively that the decision to exclude The child was appropriate.

Regarding the suggestion on 13th December 2016 that The child could attend school if his mother went with him, Witness D felt that there was no alternative to exclusion otherwise. He had been told that The child did well when a relative was with him. He knew that The child's pathway was being looked at and reviewed, and he felt that it would be a proportionate and reasonable adjustment to meet his need and to meet the needs of the safety of others, that The child could attend school if a family member came with him. He felt that if the risk was mitigated then there might be no need for exclusion. The child's mother had decided to remove The child from school until an alternative pathway was found. At this stage, the quality improvement and education officers were looking at matters, the joint support team were involved, CAMHS, Place to Be and Educational psychology were involved. An alternative pathway was being considered and the last thing that Witness D felt appropriate for The child was to be excluded late in December. Arrangements were made to support him at home and to get work to him as there were only a couple of weeks left of that term and there was going to be an outcome of the review early in the New Year.

RB316 and RB317 were spoken to by Witness D as providing statistical information per 1000 pupils, with the proviso that additional support needs (ASN) are different from assessed or declared disabilities. He accepted that exclusions for pupils with ASN were higher this year than previously, but the numbers were small overall relative to the number of children, rather than the number of incidents.

In relation to the statistics in RB233 the purpose of the analysis prepared and produced by the planning, performance and resource team, was to illustrate the data fields and incidents per 1000 pupils. It illustrates that the trend is that children with disabilities are more likely to be excluded and that is linked to aspects of violence and assault which aligns with Witness D's experience over the years.

Witness D's position was that The child was involved in restorative practices around emotional literacy, confidence, engagement, relationships. His entire class did "Place to Be" which involved issues around behaviour, inclusion, acceptance - a parallel approach to support The child without stigmatising him. The approach taken with The child was proportionate to achieve a legitimate aim. When asked by the tribunal what that aim was, Witness D's position was that the legitimate aim was to come up with an alternative pathway for The child. The evidence he had of The child and the knowledge that he had was that partners, school and parents had used alternatives including the use of extensive restorative practices and he was very proud of the programme of inclusion and GIRFEC and continued to strive to further improve. All teaching staff were trained in restorative practices and used that training in relation to The child and other pupils. The young people were not in silos, they were aware of the effect of their behaviour on others. Place to Be worked with the class, amongst

others, due to additional needs impact on others. The exclusion was proportionate to achieve the legitimate aim to come up with an alternative pathway.

When a serious incident meeting was held the idea was not to exclude The child but to look at barriers to his learning, to reduce his timetable and look at an alternative pathway.

With reference to the city inclusion group meeting at T14, the route to that is through the joint support team and they have all the information about children and young person's necessary to go to city inclusion.

In relation to C44, management circular 8 and temporary exclusions, the decisions made were specific to The child rather than in accordance with policy or guidance. What Witness D was trying to achieve was to mitigate the risks by giving time to staff to try and adhere to policy and guidance and use better support. The education improvements service would get information to allow reflection on the data ingathered in relation to exclusion on a termly basis. Trends can be identified and picked up on as the exclusion rates are increasing.

Witness D challenged WITNESS E's position that exclusion rates could be at nil in any country and felt that there must be a mechanism to remove a child from school if it is necessary. Exclusions should however be a last resort. Exclusion has worked for The child as he is now happy, as an alternative pathway has been found for him. At times the child was not at school it was possible to risk assess, modify, support and consider an alternative pathway.

In answer to questions from the tribunal, particularly regarding productions RB233, Witness D accepted that the statistics produced indicated that the number of pupils per 1000 being excluded has doubled. He indicated that that was due to the changes in the way that additional support needs were recorded or focused in the year applicable. He advised that he would produce further statistics in relation to that matter in evidence.

The tribunal sought clarification as to what was different for The child in school after the meeting referred to in production RB324, and the answer was not clear. Witness D indicated that following the incident on 2nd November the consequence was that there was a referral to himself. There required to be a referral to the Inclusion group before there could be a different pathway considered for The child. He chaired a meeting on 11th November and said that a multi-agency meeting should take place from there. He asked the education psychologist and the Inclusion group to consider matters. The new pathways were not considered for The child until the review by the joint support team. He had a feeling that alternative pathways may be necessary but did not have the knowledge to approve that. There was a very strong view at the meeting on 11th November that probably the best outcome was for an alternative pathway, but no one had corporate authority to change it. There was a strong view to look at it and that would be done by the Inclusion group and joint support team. Extensive supports were put in place. The school had explored all options available in mainstream and both school and the claimant considered that the child's needs were not being met. A way could not be found to resolve that.

In cross examination by Solicitor for Claimant, Witness D confirmed that although the school may have been discussing alternative pathways from October, he first thought about it from his meeting on 11th November. At that meeting he had a lot of paperwork. He had met with staff before the meeting and with the parent and child. He had to decide. One decision is permanent removal, and another is to look at alternative pathways to support, looking at special school rather than mainstream. He felt others should be involved. He was not specifically saying special school, just pathways.

In relation to evidence in chief that exclusion was not about punishment but was about support, Witness D was referred to C49 paragraph 2.5 which refers to exclusion being proportionate to the level of misbehaviour. Witness D's position was that the period of exclusion is to enable him to take matters forward sensibly and defuse the situation. In the case of multi-agency involvement, there had to be time for meetings to enable measures to be in place to support the child on return to school. It is not about punishment. He did not agree with the guidance in that regard. The head teacher would consider the incident, relevant factors and go back to GIRFEC. Exclusion was not punitive.

Witness D was asked if he had noticed that School A had exclusion rates which were higher than the rates at other schools. He advised that the quality improvement officer had been working with the school, (which had not been mentioned in her evidence) and they were aware that the rates were higher than previously. The head teacher was engaging with Witness D and the quality improvement officer, due to her concerns. Witness C had reasonably regular visits to the school and discussions with staff in relation to the higher rates of exclusion. He went on to describe the restorative approaches used in the school since 2011 with a rolling programme of inclusive nurturing approaches and an overt policy of nurture inclusion and relationships. The head teacher had talked to him about the incidents and the children being excluded. She had explained actively covering all strategies and was worried that she was doing something wrong. School A in previous years hadn't had a raised level of exclusions and she accepted that there were concerns about the higher rates. On reviewing individual cases there was nothing immediately springing to mind identifying the causes. Witness C was the link to the school to see if the school was accessing appropriate supports. There were a small number of children with a high level of exclusions, which indicated that something was clearly not working.

In relation to the productions at RB301 and RB304, the figures suggested that these issues were more than short term. Witness D's position was that several children resulted in significant increase number of exclusions. This highlights the issue and authority looked to resolve it.

In relation to the statistics provided at RB233 (compiled by the planning and resources team at Responsible Body for lodging with the tribunal, at the request of Education Services, to assist Witness D in articulating the data fields), Witness D advised that the reason that figures are higher for disabled children being excluded from school than non-disabled children, was that when autistic children are excluded it tends to be due to one or more circumstance. He accepted that the figures indicated that autistic children were excluded at the rate of over twice as often as

non-disabled pupils according to the statistics. He explained that in exclusions of children with ASN, there is a generally higher proportion of violence and other behaviours than in other children. Each incident is recorded rather than the number of incidents being relative to one child. It was suggested to Witness D that a green light was given to exclude these children if their behaviour was challenging. He disputed that, advising that exclusion is not an effective way of dealing with behaviour at all. The exclusion is due to placing the child or others at risk and to allow time to look at strategies. The needs of the child would always be taken in to account.

Witness D was challenged about whether all teaching staff at School A were versed in restorative practice given the evidence of Witness A. Witness D's position was that evidence had been given by WITNESS E regarding reflective practices which reflected the key strategies in the school and in The child's plans. There had been discussion about reflective plans and emotional literacy and Place to Be. Restorative practices are imbedded throughout school plans. He could not explain why restorative practices were not discussed in his written evidence or in the case statement at RB11.

Witness D confirmed that he was aware of a higher rate of exclusions for pupils with additional support needs. He was aware of that on a national basis and relative to Responsible Body. He has a long working knowledge of the figures and statistics and was aware of disparity in the figures prior to these proceedings.

Witness D accepted that children with autistic spectrum disorder have greater number of exclusions per 1000 pupils, but this was not due to policy or practice and it was not an injustice built in, nor was it disproportionate. He disputed that the policy results in bias. He stated in absolute terms that the higher number of exclusions is because of circumstances of violence recorded but does result in a disproportionate number of exclusions for children with additional support for learning. The causes were complex, and the council would be working with families to find alternative pathways. Overwhelmingly, the exclusions were temporary (about 90%) and within Responsible Body exclusions can be between 1 and 10 days of duration.

In relation to the length of exclusion, such decisions were made by the head teacher and not, as suggest by the Claimant, by Witness D.

Witness D reiterated that the reason for exclusion was that it was proportionate means to achieve a legitimate aim. When asked again what the legitimate aim was he replied that in discussions with (head teacher) around the times of the incidents, the description of the child was highly distressed, vulnerable, lashing out, with high tariff aggression, hurting others. Staff could not find ways of mitigating this. Strategies were in place and not working, he was hurting himself or others and they could not just put him back in that environment. The proper thing to do to achieve the proportionate aim was to exclude as they were not supporting The child, so they needed to look at something else. This was a multiple agency approach, and the rational was the safety of The child and the staff and others. It seemed reasonable

to exclude him. The legitimate aim was safety and allowing space for discussion and allowing an alternative pathway to be identified.

When it was put to Witness D that the educational psychologist had confirmed that The child's current school incidents are dealt with other than by exclusion, Witness D advised that at School A, The child's safety and that of others had been seriously compromised, that it was likely to take many agencies to resolve that and he supported the decision to exclude.

In relation to the second exclusion when The child had been reintroduced to class and then excluded, Witness D advised that the pattern was another outburst and it was reasonable to assume that that would occur again in a short space of time. The strategy had become ineffective and there was assaults and physical attacks which were very serious. These were becoming stronger and more frequent and placing The child and others in danger and there was a very strong likelihood it would continue.

On 2nd November, all these issues had been discussed and The child went back to school with a reduced timetable, structured assessment and adaptations had been made. From the 2nd November, Witness D had started the ball rolling to look at alternative planning. The meeting was on the 11th November. On 18th November another issue arose, and The child could not go back into mainstream. Despite the additional measures put in place on 2nd November there was still aggression. There was no point in putting him back in an environment where he was failing. It was proportionate.

Responsible Body do not keep systematic records of comparison between rates of exclusion with children with disabilities or children without. Additional support for learning exclusions are tracked in the standards report. The council are improving outcomes for children as opposed to producing lots of reports. These matters are routinely monitored.

It was suggested to Witness D that in RB10 it was not clear where his statistics had come from, although that his position was that such statistics were routinely monitored. They had not been at hand when the case statement was prepared or in answer to a freedom of information request made by Solicitor for Claimant. Witness D's position was that he had no idea whether his statistics produced at RB316 had been produced for these proceedings but the PRR team provide information and generate data if there is a specific request (as described above). Witness D was asked if there are documents or data reported to him on a routine basis highlighting and routinely monitoring the rate of exclusions for disabled pupils or pupils with ASD in comparison with non-disabled pupils. He answered "yes, we analyse it and it has led to a reduction". He was asked why that information had not been produced in answer to the specific request made on behalf of the claimant in these proceedings. He advised that the Council get lots of requests and it is not their function to produce data which may not be held in the required format. He would not re-direct staff from other duties to produce that information. He confirmed that ASL exclusions are tracked. He knows what he is doing, and the Council's policies are exemplary. He is more concerned in improving chances for children than providing reports. He did not

think there was anything odd about this information not being available to be lodged when it was clearly an issue raised in these proceedings.

Witness D advised that the information reported to Education Services to enable them to routinely monitor the rate of exclusions of pupils with ASN or disability was provided (he assumed) termly to MM, Executive Director of Education Services. Witness D undertook to produce such information and to access the statistics relevant to the current period as those produced at C19 related to 2009 – 2012.

Subsequently, the Responsible Body lodged at RB455 an email from MM with attached spreadsheet statistics in answer to this undertaking. Said statistics do not reflect the matters discussed in evidence.

In the documents at C22 and C66 (Accessibility Strategies) there was no mention of exclusions from school, which was accepted by Witness D.

At C82, the Equality Outcomes 2017 – 2021, there was no mention of exclusions relating to outcomes. Witness D made no comment.

At RB257, there was no EQIA done. Witness D's position was that there was no impact on protected characteristics and therefore it was not required.

At RB264 Standards and Qualities, there was no EQIA. Witness D assumed because there was no impact on protected characteristics.

Relative to The child, Witness D accepted that The child did not require to be excluded so that he could change school. He advised that The child needed exclusion to have a look at his pathway and in the interim period to minimise risk to himself and others. He went on to say that violence was exempt from the protected characteristic and exclusion would only be used if there was no opportunity to use another strategy.

In re-examination Witness D reiterated that restorative practices are imbedded in the culture of Responsible Body and with disability awareness and inclusive practices they are held up nationally as being exemplary**.**

Witness D was evasive in his answer to questions. Although the Representative of the Responsible Body has conceded in submission that he may have appeared defensive, the tribunal's conclusion was the Witness D was arrogant in his manner, dismissive of the tribunal and unable to give coherent answers to the direct questions asked of him by Solicitor for Claimant, particularly regarding the issue of statistics. He left the hearing at the close of his evidence without being invited to do so, and his demeanour throughout cross examination was belligerent. His evidence in chief regarding the data produced suggested one method of calculation, and in cross examination he suggested it be interpreted differently. Whilst he repeatedly asserted that decisions to exclude The child were proportionate to achieve a legitimate aim and that Responsible Body's policies were exemplary, he could not satisfy the tribunal about the necessity for exclusion, or what it achieved. He, retrospectively, considered the Council's actions to be exemplary because another pathway had been successfully found for The child, failing to acknowledge that the

Claimant had first sought consideration of the alternative pathway at a meeting on 17th November 2016, and exclusion was not required to achieve that.

Determination of Preliminary Issue – Regulation 4

Having heard the evidence from all witnesses and considered the relevant authorities referred to by agents, the tribunal concluded unanimously that The child did not have a tendency towards physical abuse of others.

In so concluding, the tribunal had particular regard to X v Governing Body of a School (2015) ELR 133 ("X"), and the guidance given in that case in reaching a decision based on the evidence. In particular, the tribunal considered each of the factors outlined in paragraphs 115-120 as follows:

1. The issue is one of fact and the tribunal must consider all of the circumstances of each individual case. Each paragraph of RB184 and the exclusion letters at T12 and T13, and all productions referred to were fully considered. The tribunal considered all oral and written evidence regarding The child's conduct. The details of the conduct complained of were not disputed, and are contained in the statement of Witness A, at RB184 and within T12 and T13 (exclusion letters). These circumstances related to the entire period of The child's schooling.
2. Parliament chose not to use the phrase "physical violence", and it is inferred that there must always be an element of violent conduct. On its own that may be insufficient to meet the definition. The greater the level of violence, the more readily it will fall within the meaning of "physical abuse". The evidence specifically relating to The child's conduct is provided by Witness A within her statement at RB184.The description of incidents is detailed and relates to the period from 2013 until the date of the tribunal. On many occasions, The child did not react violently. For example, at paragraph 29 – the child was in a distressed situation and he did not physically abuse others. At paragraph 32 the evidence indicates The child was aggressive and verbally abusive at times. Further examples are at paragraph 36 – The child was aggressive but not physically abusive; at paragraph 54 – The child threw a chair. He was not physically abusive; at paragraph 57 – The child exhibited distressed behaviour and was anxious to push his way out. Paragraph 51 described conduct typical of young boys engaged in dispute. Witness A felt it appropriate to leave the parents and children to sort this out. Paragraph 55 described an incident where the tribunal could not conclude from the evidence that there was intention to physically harm anyone as the child had grabbed a learning board being held by a teacher and pupil. Paragraphs 59 and 63 describe the incidents leading to exclusion. Paragraph 68 described instigation of incidents by another child and an intervention by the Headteacher during which the child reacted by pushing her, pulling her hair and hitting her with a plastic cone. Paragraph 74 describes a similar incident. We compared the behaviours described in X to those in the present case. Taken in its entirety, the tribunal was not satisfied that the level of violence described was sufficiently great or sustained to easily fall within the meaning of tendency to physical abuse.

3. There is no requirement for any knowledge on the part of the perpetrator that what they are doing is wrong as the regulation is concerned with the manifestation of the behaviour. If the conduct was akin to a spasmodic reflex it would not meet the terms of the definition. The tribunal concluded from the evidence that on many occasions The child's response was spasmodic and was not always violent. It was often an automatic response to unwanted intervention. For example, paragraphs 12, 16, 19, 20 and 21 of RB184 describe conduct typical of a child with ASD. Paragraphs 23 and 24 describe the typical reactions of a young child in the absence of ability to regulate or articulate his emotions, for example paragraph 34 – he would run away and charge at staff who tried to intervene, and at paragraph 35 he kicked and punched his mother when distressed. These incidents appeared to be instant responses and reflexes on the part of The child.

4. The existence of some sort of misuse of power or coercion may lead to the conclusion that a much lower degree of violence than would otherwise fall within the terms of the regulation would suffice. Conversely, a finding of physical abuse in the absence of such factors would require careful justification. The child had no power over others at school. Adults directed his daily school routines. Paragraph 6 of RB184 makes it clear that he showed concerns for others and could work in a small group. It was acknowledged in the risk assessment at T16 that The child needed support to understand the consequences of his actions. The tribunal concluded that there was no evidence on which we could rely to conclude that there was an element of coercion or misuse of power in The child's actions. On the contrary, the evidence suggested that he reacted to situations and his behaviour often escalated beyond his control.

5. The stage of a child's development is a factor to be considered in deciding whether that child has a condition within the remit of the regulation. The child is a young child. The child rarely was in control of his emotions, due to his disability and stage of development. This was reflected, as noted, in the risk assessment at T16/17. It was accepted in evidence by Witness A that CAMHS had provided evidence, as noted at RB130. that The child is still at an early stage of development.

6. It is not necessary for a tendency to physical abuse to be manifested frequently or regularly, it may present at triggered events, but that does not mean it is not present at other times. The tribunal was not satisfied on the evidence, for the reasons outlined above, that a tendency to physical abuse was present in The child. The tribunal considered all of the information regarding the Risk Assessment prepared in September 2016 (which did not note a tendency to physical abuse but described distressed behaviour) and all incidents involving The child, all as described in detail in unchallenged evidence provided by Witness A. The child's reaction was not always to use physical violence, although he was violent on occasions. The violence was at a low level, and was not, in the opinion of the tribunal, sufficiently great or sustained to meet the definition, such as in X. Due to

ASD his distress tended to build up and the interventions made did not de-escalate the situation. However, the manifestation of his distress did not lead us to conclude that he had a tendency to physical abuse.

7. Further, there was no evidence of any serious incidents at The child's new school, where he appeared to have settled well, and there had been no conduct leading to formal exclusion.

8. The tribunal took account of all information provided in evidence, and having considered the evidence found the following evidence particularly relevant to determination of the issues in Reg 4 (with reference to R184):

Paragraphs (P) 12, 16, 18 19, 20 and 21 of RB184 describe conduct typical of a child with ASD. These incidents do not indicate a tendency to physically abuse others.
P 23 and 24 describe the typical reactions of a young child in the absence of ability to regulate or articulate his emotions.
P26- there is acknowledgement that aggressive behaviour is not always initiated by The child.
P29 – the child was in a distressed situation and he did not physically abuse others
P32 – indicates The child was aggressive and verbally abusive at times directed at children who were involved in disputes with him
P35 - this was a violent incident in response to challenge
P36 – The child was aggressive but not physically abusive
P42 – The child was play fighting and would not stop, which is not untypical for children with ASD, and for children of his stage of development
P52 – The child was physically aggressive and assaulted Witness A when she attempted to intervene
P54 – The child threw a chair. He was not physically abusive
P55 – conduct described does not amount to physical abuse
P57 – The child exhibited distressed behaviour and was anxious to push his way out past Witness A. He threw a ball and water bottle. The level of violence was not great
P59 – The child was violent on this occasion, and kicked, punched and slapped a member of staff. This incident led to exclusion.
P63 – The child kicked staff and threw a ball at the pupil support assistant. He was further excluded.

The tribunal acknowledges that even if the tendency is displayed in response to trigger events that does not mean that the tendency does not exist. However, the tribunal concluded on the whole evidence that although there had been incidents of violence, the evidence did not suggest a tendency to physical abuse taking account of the factors to be considered. Accordingly, on the evidence, and applying the guidance in X v Governing Body of a School (above) we concluded that the evidence did not satisfy us that The child had a tendency to physically abuse others.

Findings in fact – Agreed Facts

1. The pupil was born on 2008. He is currently 9 years old. The child has Asperger's Syndrome, which was diagnosed in April 2014. The child does present as a child with a cluster of behaviours linked to the diagnosis of Asperger's. Asperger's is a lifelong, pervasive social and communication difficulty which can have an impact on behaviour. He displays rigidity of thinking. He finds transitions difficult and does not like change. He can become anxious about certain activities and become quickly overwhelmed. He struggles to describe or make sense of his feelings which can be distressing for him. He finds it challenging to recognise the consequences of his actions and those of others. The child is a disabled person in terms of Section 6 of the Equality Act 2010.

2. Between August 2013 and February 2017, The child was a pupil at School A. School A is managed by Responsible Body, who are the responsible body in terms of Section 85(9)(c) of the 2010 Act.

3. From Primary 1-3 The child achieved most of his targets, successfully accessing the curriculum. The school staff were aware that social and emotional communication skills were a potential barrier to learning for The child. Appropriate supports were in place.The child was well supported. An Additional Support Plan was in place and targets updated and reviewed each term.

4. The child was referred to Responsible Area Psychological Services in October 2012. The Educational Psychologist regularly attended meetings regarding The child until September 2015. At a Review Meeting on September 2015, the responsible body, following discussion with the claimant took the view that the educational psychologist did not have a specific, direct role in regard to The child. The child was well settled and there were support strategies in place. His educational psychology file was closed in October 2015. The School staff could ask the EP for advice at any time or re-refer to GPS. At a meeting with the claimant on 17th August 2016 the responsible body took the view there was no specific, direct role for an educational psychologist. Witness B was contacted for advice on 25 August 2016 and again in October 2016. A request for direct support from GPS was made in October 2016.

5. A risk assessment for The child was created for the first time in September 2016. In the school's risk assessment for The child, dated 10 September 2016, and reviewed 27 October 2017, the responsible body had identified the following specific preventative strategies for The child:

   "The child to identify an agreed safe place which he can access."

"Time by himself with no educational, social or behavioural demands placed upon him."

That same document identified, inter alia, the following procedures to be followed during an incident:

"The child to be directed to a quiet area."

The types of concerning behaviour identified in the Risk assessment included "a high level of distressed behaviour including hitting, punching, kicking, throwing objects."

6. While The child attended School A Primary, the school staff agreed a safe place with The child in line with the risk assessment. He was also allowed to have time by himself with no demands. The child had access to three quiet spaces: a quiet space in the classroom; a quiet space outside the classroom; and access to the DHT's room. The management team purchased two free standing boards to create a space in the open area close to the classroom so that it was on the same level and accessed easily if required- it reduced sensory overload, gave The child his own space with a view out of the window and his preferred tasks were there if he wanted to access these e.g. Mindfulness, maths worksheet.

7. While The child attended School A Primary, he was reminded that he could go to his quiet area during an incident. This included going to the DHT's room. Sometimes The child would choose to go into her room to sit there. He was encouraged to make a good choice and go to a quiet area e.g. when he was distressed. He was also reminded that he could go to time out area-sit and have quiet time. In addition, at lunchtime he was offered the choice to go to ICT club which he liked. He was offered the football club at the interval. At lunchtime he was allowed to walk with a member of the senior management team to lunchroom to reduce any incidents in lines which might further distress him.

8. In October 2016, the DHT sought advice from Witness B as The child's behaviour was giving cause for concern. Witness B asked the DHT to ask the claimant if there had been any trauma in the family - anything that might have had an effect on The child. The DHT e-mailed the claimant to confirm that she had spoken to the educational psychologist, that she wanted to speak to the claimant and confirmed that she had suggested a referral to Learning Community Joint Support Team (JST). The DHT spoke to the claimant the following day. The claimant said there was nothing that she could think of.

9. The DHT completed a referral to the JST on 14th October 2016 and intended to lodge it that day to ensure that it was discussed at the next JST on 25th October. She asked the claimant by telephone to provide a comment so that she could record this on the paperwork. The claimant said she would like to meet to look at the referral to the JST. The DHT explained the contents of the paperwork and said she could read out what she had written. The claimant said she knew what a referral to the JST was as she worked in education, but she said she couldn't accept this without seeing it and discussing it first. The following week was the October holiday. School returned on 24th October. The earliest date that parties could meet was 25th October. This was the date of the JST. Following the meeting with the claimant, the referral was made for the next JST (on 22nd November).

10. On 31 October the claimant and the HT met to discuss supports for The child.

11. On 2 November 2016, The child was excluded from school for a period of 7 days. The reasons given for his exclusion were "Physical assault with no weapon" and "Other". A copy of the exclusion letter is enclosed with the papers and includes a more detailed narrative of events.

12. On or around 10 November 2016, the claimant received a letter indicating that The child may be permanently excluded following discussions after the exclusion. On 10 November 2016, a readmission meeting took place, at which Witness D (Head of Quality Improvement) and CAMHS were in attendance. Minutes of that meeting are enclosed with the papers. The child's readmission to school was agreed, subject to the claimant signing the assurance of co-operation.

13. On 18 November 2016, The child was again excluded from school for a period of 7 days. The reasons given for his exclusion were "Physical assault with no weapon". A copy of the exclusion letter is enclosed with the papers and includes a more detailed narrative of events. Witness D's advice was that a child's additional support needs must be taken into account. Although staff had managed to calm The child down and get him back into class, he was excluded from school later that day for a further 7 days. The conditions for readmission for this exclusion were "The child must use kind hands and feet".

14. The child's case was discussed at the JST meeting on the morning of 22 November 2016. It was attended by various professionals including the Head Teacher of another school (Chair), the DHT at School A, an Occupational Therapist, an educational psychologist and a nurse. It was also attended by the claimant. The meeting decided that The child

should continue at School A. The child's case was subsequently discussed at the Psychological Service LIG (Local Improvement Group) Review and Allocation meeting on the afternoon of 22nd November 2016. That meeting decided that The child should be re-referred to Psychological Service, due to the apparent escalation of The child's distress and the school's request for support and advice on how they might help alleviate or reduce this distress. It was agreed that, as Witness B had previous involvement with The child's case, it would be re-allocated to her.

15. On 12th December 2016 a Consultation Meeting was held in school. In attendance were the claimant, the Depute Head Teacher of School A Primary and the educational psychologist. They discussed the current strategies in place to support The child and how those could be adapted to provide a higher level of support and aid communication with the claimant. It was arranged that the educational psychologist would observe The child in class in January 2017. However, this did not go ahead as by January The child was no longer attending School A.

16. On 13 December 2016, the claimant received a phone call from the school intimating that there had been another incident at the school. She was told that unless she agreed to come to the school and sit with The child, he would be excluded. This was offered as a temporary alternative to exclusion. On 14 December the claimant confirmed that The child would not be coming back to school before Christmas. This removed the necessity to exclude as the risk to children and staff was removed. The Head Teacher of School A School told the claimant that Head of Inclusion would be chairing an emergency meeting regarding The child's future at School A School. The claimant took the decision to keep The child at home until matters were resolved, intimating this decision by e-mail to Head of Inclusion.

17. By e-mail dated 21 December 2016, Head of Inclusion intimated the Council's intention to "provide an alternative educational pathway next year". The focus of the collaborative discussion with the educational psychologist changed to being one of collaboratively assessing the appropriateness of an alternative educational pathway.

18. A meeting was held on 11 January 2017. On 17 January 2017, a further meeting was held to discuss options for The child's ongoing education. These included School C, a special unit at School D and School B LCR (Language and Communication Resource).

19. A further JST took place on 24 January 2017, followed by a CIG meeting on 26 January 2017. The child's placement at School B was

agreed. He commenced a transition to School B with an initial attendance at the school for one hour on Thursday 16 February 2017, working towards full-time education. Two hours per week of interrupted learning support was provided (a teacher at School A LCR, who knew The child) between 23 January and 17 February 2017.

Additional Findings in Fact

1. The child's transition to School B has been successful. He is happy there and has not been excluded.

2. The child was not happy at School A School and felt sad and upset there.

3. Staff educating The child within School A were not trained in crisis and aggression limitation management.

4. Staff felt unable to effectively intervene when The child became agitated and had a "meltdown". They considered that there were no further strategies available to them to manage The child's behaviour, resulting in exclusion.

5. The Head teacher did not seek urgent direct input from the educational Psychologist previously allocated to The child, despite reporting that the child had indicated his wish to kill himself. She sent an email to the Education Psychologist on 25th August 2016 but was not available when she responded that day. The detail of the conversation which took place the following day was not noted by the educational psychologist. The next contact by the Head Teacher was October 2016. No direct referral was made in the interim despite the child's escalating behaviour.

6. School staff had involved their trade union due to their concerns about their safety as they were unable to manage The child's behaviour

7. The child's mother was contacted in December 2016 by Witness A to advise that the child's class teacher would be absent for 2 days. It was suggested by Witness A that the child would struggle with a new routine and she suggested he be kept off school for that period. The Claimant felt under pressure to agree.

8. The policy on exclusion at RB 327 states that the grounds of exclusion are the same for all children. Additional considerations **may** apply where the child or young person has additional support

needs. These are not further specified, nor is there are requirement to take any identified additional steps in such cases.

9. In respect of the withdrawal of direct education psychology support in 2015, and the failure to request same in September 2016, the responsible body failed in its duty to make a reasonable adjustment

10. The Responsible Body's policies and practices on exclusion led to a higher proportion of disabled pupils, and those with autistic spectrum disorder (ASD), being excluded. There is no specific monitoring of the exclusion rates of such pupils.

Decision and Reasons

The tribunal accepted the submissions made on behalf of the Claimant and found as follows:

A. **In respect of the s20 duty to make reasonable adjustments -** the tribunal has taken account of the EHRC Technical guidance s6.11-6.13 and 6.25, and the case law referred to by both parties in submissions.

The tribunal found the following established in evidence:

a. In respect of the withdrawal of direct education psychology support in 2015, and the failure to request same in September 2016, the responsible body failed in its duty to make a reasonable adjustment. By August 2016 it was clear from the undisputed evidence regarding The child's behaviour that additional support was required. The head teacher had identified the need for advice from the Education Psychologist but did not request direct input, despite the gravity of The child's expressed suicidal feelings (RB213 para 19). Such expert advice and input is likely to have been of benefit in preparing the Risk Assessment and clarifying for staff the strategies which may support The child and anticipate difficulties for him. There was clear evidence that The child benefitted from such support in P1-3, and he has benefitted from the re-introduction of the service in School B Primary, albeit this is a different educational setting. It was essential that staff within School A could recognise the signs of The child's growing anxiety and react to that appropriately to be pro-active in de-escalating the situation. They did not appear equipped to do so. Indeed, the evidence suggested that they felt there was nothing more they could do, and they were overwhelmed. It seemed that even when Witness C noted The child's behaviour on 9th December, no one seems to have intervened or de-escalated the situation. The staff required to look for

new strategies. They had a duty to take positive steps to do so. They had a duty to anticipate what may be required to enable The child to engage in education equally with his peers. Expert advice, if accessed, may have given them other strategies to adopt to be pro-active or to react appropriately, rather than exclusion, and may have supported The child in addressing his reactions to stressful situations. The opportunity however was not taken until November 2016. The absence of this reasonable adjustment is highly likely to have adversely impacted upon The child and led to his exclusions from school.

b. Whilst it would normally not be required to involve an educational psychologist (EP) in completing a Risk Assessment, by September the head teacher had asked for advice by telephone. Nothing prevented re-referral on an urgent basis and EP advice could have had a beneficial impact on the risk assessment prepared. The points made by the Claimant at C157 in submissions are accepted by the tribunal as being well founded.

c. The tribunal accepts that psychology input could be available indirectly by telephone (and was accessed by telephone twice between August and December) but it is clear from the fact that no notes were made of these calls that they are of an informal nature. This is not a substitute for direct involvement, allowing proper assessment and participation in multi-agency meetings regarding the child. This could have been easily achieved. It was a resource open to the school and was practicable. It is a service with which The child was familiar and the involvement of such an expert is unlikely to have had a detrimental impact upon him.

Accordingly, the tribunal finds that the Responsible Body failed to make reasonable adjustments in relation to their failure to provide direct education psychology input to The child, having withdrawn same in October 2015.

B. Discrimination Arising from a Disability

The tribunal considered the authorities provided by both parties and was mindful that the failure to comply with the reasonable adjustment duty in s20 is relevant to the question of discrimination arising from disability.

S15(1) of the 2010 Act provides that “A person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B’s disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim”.

S85(2)(e) of the Act provides that the Responsible Body of a school managed by a local authority must not discriminate against a pupil by excluding the pupil from school. S85(6) specifies that the duty to make reasonable adjustments applies to the responsible body of such a school.

Scottish Government Guidance, produced by the Responsible Body at RB357 highlights the impact that exclusion can have on, amongst others, those with an assessed disability. It stresses that understanding the evidence of the impact of exclusion supports informed decision making.

The tribunal considered the 2 exclusions, the request for The child to sign an readmission requirement that he use "kind hands and feet" and the request for the Claimant to accompany The child to school.

The tribunal notes that The child felt he had been unfairly treated. The Responsible Body did not dispute that the exclusions amounted to unfavourable treatment, however argued primarily that the child was excluded from protection by Regulation 4 (as addressed previously) and secondly, that exclusion was proportionate to achieve a legitimate aim.

The tribunal must consider this aspect of the claim in 2 stages:

Firstly – Did the Responsible Body treat the child unfavourably because of something arising in consequence of his disability?

Secondly – If the answer to the first question is yes, can the Responsible Body show that the treatment is a proportionate means of achieving a legitimate aim?

On the evidence provided, the tribunal concluded that the treatment of The child was unfavourable as the exclusions arose in direct consequence of behaviour arising from his disability.

It is of significance that the Witness B identified The child's main barriers to learning at the meeting at School A School on 17th January, as detailed in RB130, as inter alia:

"He is at an early stage of development"

"He can follow rules in some contexts….has rigidity of thinking and cannot adapt to situations which can cause frustration and lead to challenges"

This advice and guidance about how best to meet The child's needs ought to have been accessed prior to January 2017 and may have improved outcomes for The child at School A School.

If reasonable adjustments had been made, as suggested in submissions by the Claimant, the question of exclusion may not have arisen.

The tribunal concluded that the exclusions of 2nd and 18th November 2016, and the request made for a family member to accompany The child to school to avoid exclusion in December 2016 amounted to unfavourable treatment. That unfavourable treatment arose as a direct consequence of The child's

disability, as it arose from the incidents clearly described in evidence and referred to in the exclusion letters produced.

The burden of proof therefor falls on the Responsible Body to prove that the exclusion was a proportionate means of achieving a legitimate aim.

The tribunal took account of the Technical Guidance referred to in submissions. The objective was not clear, and therefore we could not be satisfied that the action taken was proportionate to achieve that objective.

For the tribunal to be satisfied in relation to proportionality, we require to accept the evidence provided by Witness A and Witness D.

Witness A knew nothing of the concept of proportionality and did not make the decisions to exclude. She could advise of her understanding of the circumstances leading to exclusion but not the rationale behind it. Her evidence in this regard is accordingly of little assistance.

We cannot accept the evidence of Witness D as we did not find him to be a reliable, credible or accurate witness. As we have noted above, his evidence was not clear. He gave different explanations of what he considered to be the legitimate aim –in chief his position was that exclusion was necessary to consider another pathway, but in cross examination it was for safety, space to discuss matters, to enable an alternative plan. He could not satisfactorily explain the conflict between his position regarding it being non-punative and the punative measures referred to in Management circular 8. He did not adequately explain how the 7 days exclusions were arrived at (other than it took time to set up meetings), but the proportionality of excluding a child of The child's age and level of understanding for that period was not explained, nor was it clear what was hoped to be achieved. His evidence was given in the generality, was unsatisfactory and did not provide the tribunal with confidence that he had truly considered matters and made an informed decision in respect of The child.

Additionally, the evidence of WITNESS E was clear and not rebutted by the Responsible Body. She was clear that exclusion was not a proportionate remedy to accomplish a legitimate objective.

It appeared to the tribunal that there was no requirement for The child to be excluded from school to allow meetings to progress. The safety of staff was an issue which required to be addressed by training and advice regarding handling and our comments in that regard are noted above). Excluding The child would not provide that. Indeed, The child was returned to class and was settled before being excluded on the second occasion. An alternative pathway could have been considered while The child continued to receive education.

In asking the claimant to attend school with The child as a condition of attending, we heard no evidence that the school took account of the effect of

this upon The child or his likely reaction. The school has the responsibility for The child during school hours and should not deflect that to others.

The condition of readmission referred to placed responsibility on The child for behaviour arising from his disability, but also gave the tribunal insight into the lack of understanding of The child's condition. While he may have understood the terms being used, the tribunal concluded that The child's disability causes him to have "meltdowns" and to react in ways which may be unacceptable to others. He is not able to control his emotions at this stage, and accordingly could not be held responsible for breaching this undertaking. It was not a realistic aim. It ignored the advice described in T14 at the serious incident review that the Assurance of Cooperation should make use of visuals to provide a social story. This incident provided another example of the emphasis which was placed on the claimant and The child to come up with solutions for the consequences of The child's disability, with no extra support being provided to enable them to achieve that aim.

For the reasons outlined above, the tribunal could not be satisfied that the unfavourable treatment was justified.

Indirect Discrimination in terms of s19 of the Act

The tribunal found that the Responsible Body's policies and practices on exclusion led to a higher proportion of disabled pupils, and those with autistic spectrum disorder (ASD), being excluded. The fact of higher exclusion rates is as shown in production RB316.

The tribunal found no evidence of consideration of the issue of exclusion of such pupils in the Equality Objectives or Accessibility Strategy produced. There is no specific monitoring of the exclusion rates of such pupils. Therefore, there is no effective means of identifying and thereby reducing the gap.

If the council do not monitor how their policies impact on this group of children, they cannot discover the detrimental impact of the policy on the group and take appropriate action to remedy the detriment to achieve the desired result. The child was disadvantaged as a result, in comparison to a pupil who is not disabled. This amounts to unlawful discrimination.

As noted in the EHRC technical Guidance produced, it is difficult for an exclusion to be justified in circumstances in which a school has not complied with its duty to make reasonable adjustments for the pupil. Such are the circumstances in this case.

The tribunal was disappointed that the statistical information upon which Witness D said in evidence we could rely, which would show monitoring of exclusion rates of disabled pupils or pupils with ASD on a termly basis, was not provided. Instead, routine monitoring of exclusion in primary, secondary

and ASL schools was provided at RB455, which does not show the information requested.

The tribunal accepted the Claimant's submission at paragraph 100 that Witness D appeared to have approached the issue of exclusion in the wrong manner. He had considered whether the action was proportionate before considering what was hoped to be achieved. He ought to have identified the aim and thereafter the manner in which it was to be achieved.

It is clear from the evidence of WITNESS E that rates of exclusion can be reduced effectively. If rates of disabled pupils are not routinely monitored it is unlikely that targeted action will be taken to effect change.

The policy on exclusion at RB 327 makes it clear that the grounds of exclusion are the same for all children. Additional considerations **may** apply where the child or young person has additional support needs. These are not further specified, nor is there are requirement to take any identified additional steps in such cases. No specific evidence about such considerations, or the effect on The child, was provided to the tribunal. Given that the exclusion rates for disabled pupils are disproportionately high, it suggests that such considerations are not being taken into account. The policy does not appear to achieve a "level playing field". Many disabled or ASD pupils will exhibit behaviour which is as a result of their condition. Reasonable adjustment is required to meet the needs of that pupil. If no such adjustment is reasonably made, the application of the policy to that pupil in the same manner as application to a non-disabled pupil, without differentiation, is discriminatory. The disabled pupil may, through no fault of their own, be unable to overcome the barrier to enabling them to continue at school – they may be unable to control their behaviour or reaction. It is noted that Risk Assessment plays a vital part in identifying and preventing potential violence. It is therefore essential, in our view, that risk assessments are meaningful and carried out with the input of relevant professionals.

Accordingly, the tribunal finds the claims established.

We also wish to record our appreciation to agents and Counsel involved for their careful submissions and efforts made to restrict the matters at issue.