DECISION OF THE TRIBUNAL

Summary of the decision

The Tribunal finds that the responsible body:

i) has failed to comply with the duty to make reasonable adjustments in terms of section 21 of the Equality Act 2010; and
ii) is ordered to make a decision on the placing request submitted by the claimant on 12 October 2017 by 15 February 2018.

Introduction

1. Following a shortened case statement period, it was agreed at a telephone conference to discuss case management issues in this case that the sole issue for determination was: "Whether the education authority has failed to comply with their duty to make reasonable adjustments by refusing to consider the claimant's placement request at an earlier stage than the standard procedure".

2. Although Solicitor for Claimant had suggested that the matter could be considered on the papers, Responsible Body Representative objected to that course of action, and consequently we heard evidence at an oral hearing which took place in January 2018.

3. Solicitor for Claimant subsequently amended the case statement to include a claim of indirect discrimination, which he clarified at the outset of the hearing was put forward as an alternative to the reasonable adjustments claim, rather than an additional claim, since it would not affect the ultimate remedy.

4. At the hearing, we heard evidence from Witness 1, educational consultant and the claimant; and for the responsible body from Witness 2, Head of Education, School A and Witness C, principal teacher of language and communication classes at School B. Their evidence in chief was lodged in the form of witness statements/letters/reports, with a number of follow up questions and cross examination. We were referred to documents in a joint file of productions (referred to by page number).

Key findings in Fact

5. The child is currently a primary 7 pupil at School B. He has a diagnosis of autism spectrum disorder (ASD). He is disabled within the meaning of the Equality Act 2010.

6. He is based in the language and communication classroom, but he is increasingly being integrated into his mainstream class.

7. Children with ASD find any change in their circumstances very difficult to manage and without appropriate support will experience heightened levels of anxiety and concomitant problems in self-regulating their behavior and maintaining good mental health. The move from primary to secondary schooling is one of the most significant transitions a child with autism will experience and research indicates a high risk of poor outcomes if the transition is not managed properly.

8. This is because children with autism have processing difficulties and for example have difficulty visualising in the abstract, and therefore have difficulty visualising the transition to secondary and the school environment. It is therefore recommended that so called “transition activities” such as visiting the school, meeting teachers and staff etc should build up incrementally, and therefore a longer transition can be important. This will seek to ensure that children with autism transition successfully and avoids the risk of a child suffering anxiety and stress.

9. The child experiences difficulties in coping with transitions. He copes best when he has sufficient time to process and come to terms with any proposed changes. Transitions which happen too quickly can be problematic.

10. On October 2017, The parents submitted a placing request for a secondary school placement at School A, an independent school. They requested a decision within two months, in order to allow a reasonable transition period, whether the placement request was granted or not.

11. This request was refused by the responsible body by e-mail dated October 2017, which refused to make an exception in this case from the normal timeframe and advised that the decision would be made “on or very shortly before the end of April” (2018).

12. The cut off date for making decisions about placing requests made by pupils with additional support needs for entry to schools at the beginning of the next school year is 30 April. The responsible body’s practice in relation to placing requests for non-catchment schools is that the placing request will be made by no later than 9 March. This is because of the large volume of applications and the need to have the majority of appeals for the new school year heard before the summer holidays.

Relevant law

13. This is a claim under the disability provisions of the Equality Act 2010 (the 2010 Act). In terms of section 85(2), the responsible body must not discriminate against a pupil in the way that it provides education for the pupil; in the way that it affords the pupil access to a benefit, facility or service; by not affording the pupil access to a benefit facility or service; by excluding the pupil from the school; or by subjecting the pupil to any other detriment. The responsible body must not harass a pupil (s85(3)(a)). The duty to make reasonable adjustments applies to the responsible body (s85(6)).

14. A responsible body is therefore under a duty to make reasonable adjustments in terms of section 20, and any failure to comply with that duty will amount to discrimination contrary to section 21.

15. The duty is to take such steps as it is reasonable to have to take to avoid substantial disadvantage to a disabled person caused by a provision, criterion or practice (PCP) applied by or on behalf of a school, or the absence of an auxiliary aid or service. The duty in relation to the provision of auxiliary aids and services generally means anything that constitutes additional support or assistance for a disabled pupil, such as a piece of equipment or support from a member of staff. In this case, the focus is on a practice or PCP.

16. The duty to make reasonable adjustments is an anticipatory one owed to disabled pupils generally. The reasonable adjustments duty is triggered only where there is a need to avoid 'substantial disadvantage'. 'Substantial' is defined as being anything more than minor or trivial. Whether a disabled pupil is at a substantial disadvantage or not will depend on the individual situation.

17. There is no definition of "reasonable" in the 2010 Act but the Equality and Human Right's Commission (EHRC) Technical Guidance for Schools in Scotland sets out at 6.29 a non-exhaustive list of factors to be taken into account.

18. The Additional Support for Learning (Placing Requests and Deemed Decisions)(Scotland) Regulations 2005 (the 2005 Placing Requests Regulations) state at regulation 3 that: "An education authority shall be deemed to have refused a placing request….(a) in the case of such a placing request received by the education authority on or before 15 March in any year with respect to a child….being placed in the school specified in the placing request at the commencement of the first term of the school year next following the date of making the request, on 30th April of the first mentioned year; or (b) in the case of any other such placing request on the expiry of the period of 2 months immediately following receipt by the authority of the placing request".

19. The Additional Support for Learning (Changes in School Education) (Scotland) Regulations 2005 (the 2005 Transitions Regulations) specify the action that the education authority must take at various transition points in a child or young person's school career. Regulation 3 sets out that the process of transition planning, specifically in relation to seeking and taking account of information and advice, for pupils with additional support needs should take place over a period of at least 12 months, where possible. Regulation 4 indicates that information should be provided to appropriate agencies no later than 6 months before the transition, where possible.

Tribunal deliberations and decision

Observations on the witnesses

20. We heard evidence from Witness A who is an educational consultant/neurodevelopmental specialist. His qualifications and experience are set out on pages C18 to C20. He has particular experience of transitions as a head teacher of an independent residential special school and in his role as a service manager with another authority. We heard that he had been working with The child for around 3 years. We therefore found his evidence in relation to the process of transitions for children with autism, and of The child in particular, to be helpful.

21. The Claimant lodged a lengthy written statement but we found her oral evidence to be particularly helpful in understanding how The child responds to transitions and how it is anticipated that he will respond to the transition to secondary school.

22. We found Witness C to be well informed with a good deal of experience in dealing with transitions from primary to secondary and we found her to be very candid in the way that she gave her evidence, which we found to be credible. She knows The child well having worked with him for a number of years.

23. While we did not doubt Witness B's credentials, and his evidence in relation to understanding the different facets of transition was helpful, his evidence was of less value in this case particularly because he has no direct knowledge of The child.

Reasonable adjustments – the PCP

24. The key question for determination in this case is whether or not the local authority has failed in its duty to make reasonable adjustments by refusing to make the decision regarding a placing request at an earlier date. The local authority has accepted that The child has additional support needs and that he is disabled for the purposes of the 2010 Act and therefore that the duty to make reasonable adjustments in general applies. It is also accepted that the PCP is now articulated as "the practice of determining placing requests for children with ASN in their final year of primary on or around 30 April".

"Substantial Disadvantage"

25. The reasonable adjustment's duty is however only triggered where there is a need to avoid "substantial disadvantage". Whether a disabled pupil is at a substantial disadvantage or not will depend on the individual situation. Notwithstanding the language of comparison with persons who are not disabled in section 20 of the 2010 Act, recent caselaw in the employment context has confirmed that it is not necessary to compare the disabled person with a non-disabled person also disadvantaged (**Griffiths v DWP [2015] EWCA Civ 1265**). Indeed the EHRC's Code of Practice on Services and Public Functions states (at 7.13) that "the disadvantage created by the lack of a reasonable adjustment is measured by comparison with what the position would be if the disabled person in question did not have a disability".

26. Solicitor for Claimant argues that the refusal to issue an earlier decision places The child at a substantial disadvantage and reminded us that the threshold is not a high one given that substantial means "more than minor or trivial". In support of that submission he relied on the evidence of Witness A that autistic pupils generally require additional time for transition; that timing was critical; that pupil related transition activities were required at an early stage to address the child's anxieties and that the process ought to have already begun. He also relied on the evidence of Witness B that the sooner the process began the better. While Witness B had accepted that a decision at the end of April would give sufficient time for transition, that is to be qualified by the fact that Witness B is not in a position to speak about The child. The Claimant's evidence is that The child is aware that different schools are being considered and considers that it is likely that this will result in anxiety as the date approaches. Witness C says she thinks

that The child may have said that he was worried and Witness A's evidence was that uncertainty was a key risk factor for The child and could result in secondary mental health difficulties. Further, although Witness C was not clear on the point, it would appear that the school have not yet decided whether they have mainstream or special provision in contemplation.

27. In contrast, Responsible Body Representative submitted that the evidence did not support the submission in the claimant's case statement that a decision by 30 April "placed children with an autistic spectrum disorder at a particular disadvantage". He relied on the evidence of Witness B who confirmed that if a decision was made on 30 April that would be sufficient time. Witness C's evidence is that actual transitions are not implemented until June and that she has experience of very many successful transitions.

28. Responsible Body Representative also argued that the evidence does not support the submission that a delay in the decision would cause The child mental stress, relying in particular on Witness A's cross examination that he did not say that he had observed The child to be stressed; The Claimant said that she thought that The child would like to know but he had not verbalised that and Witness C said that The child was no more stressed than any other P7 child.

29. However, following careful consideration of the evidence, we accepted Solicitor for Claimant's submissions that the evidence in this case supports a conclusion that the practice of making decisions by that date puts children with ASD in general and The child in particular at a substantial disadvantage, that is a disadvantage which is "more than minor or trivial". While the 2005 Placement Request Regulations envisage that a decision need not be made until 30 April, given that many pupils with ASN will also be disabled for the purposes of the Equality Act duty to make reasonable adjustments, clearly there may be circumstances when such practices may result in substantial disadvantage to those pupils.

30. Further and in any event, we noted that, where placing requests are made for children within ASN seeking places in non-catchment schools, parents will be informed by 9 March, and therefore we accepted that the claimant suffered substantial disadvantage in comparison with those pupils, whose placing requests would be determined some 6 weeks before that of the claimant.

Reasonable Steps

31. Where a practice puts a disabled person at a substantial disadvantage, the local authority must take such steps as is reasonable to avoid the disadvantage. The key focus of our enquiry then is on the question whether the step of making an earlier decision on the placing request than is proposed is one which is reasonable.

32. In determining this question, we had in mind the EHRC Technical Guidance, which at paragraph 6.29 sets out some factors which should be taken into account when considering what adjustments it is reasonable for a school to make, including: the extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil; the extent to which support will be

provided to the pupil under the 2004 Act; the resources of the school and the availability of financial or other assistance; the financial and other costs of making the adjustment; the practicability of the adjustment; the effect of the disability on the individual; and the interests of other pupils and prospective pupils.

33. In determining whether the requirement to make an earlier decision was a reasonable adjustment we first considered the relevant legislation relating to transitions and placing requests. Solicitor for Claimant had initially described a tension between these regulations but sought to argue in submissions that the interplay between the regulations was clear, and that was that a decision on the specific school which a child would be attending should be made by the six month mark, if at all possible. Here, he argued that this was not one of those cases where that would not be possible.

34. Solicitor for Claimant submitted, having regard to the 2005 Regulations, that the expectation is that the transition process will take place over at least 12 months where possible. The Code of Practice on Supporting Children's Learning makes it clear that the regulations require the gathering of information during that period which does not require knowledge of a particular secondary placement. Paragraph 5 makes it clear that the process should be completed no later than 12 months before the child is due to start secondary school. The second stage is that no later than 6 months before the child is due to start secondary school, the education authority should provide that information to those agencies so that those agencies have adequate time to prepare. Solicitor for Claimant submitted that the regulations therefore envisage there being clarity about secondary provision at that point. While the regulations envisage that may not be possible in some situations, Solicitor for Claimant submitted that this was not one of the circumstances. The regulations state that the decision should be made by 30 April, but it would be open to them to make a decision at an earlier stage. Indeed, as a matter of policy and practice, the local authority had brought the date forward for non-catchment mainstream schools to 9 March.

35. Solicitor for Claimant argues that in order to comply with the transition planning process, the regulations and the code of practice, knowledge of the destination is required 6 months prior to the planned transition, which for entry in August would mean that a decision should be made by mid-February.

36. He submitted that there is no tension between these separate provisions, because all the regulations do is to set a latest date. That latest date is not sufficient for those with ASD in general, and for The child in particular. Here it is necessary and reasonable for the authority to make the decision at an earlier date.

37. Responsible Body Representative submitted that Solicitor for Claimant's submission was clearly wrong, and submitted that there was nothing in the Code of Practice which would create a presumption that the local authority should make an early decision in relation to disabled children. In particular, the regulations themselves are silent on the date on which the placing request requires to be made for disabled children (see Code of Practice, Chapter 6, paragraph 7). While Witness A said that a decision should be made as early as possible, he was not able to cite any regulations to support that and accepted that "early" is not defined anywhere.

38. In this case the school is fulfilling its duties, Witness C having confirmed in evidence that the transition planning process has been underway since primary 2, when the "My World" profile was created. The Regulations envisage transition planning for children before any particular decision is made about the specific school. Responsible Body Representative submitted that Solicitor for Claimant's proposition that a decision should be made by the 6 month mark was wrong; and that local authorities need the time afforded by the law to continue the transition planning process.

39. He relied on the evidence of Witness B that a decision made on 30 April that would be sufficient time, and Witness C's evidence of successful transitions implemented in June, and the example she gave where she thought that implementing an early decision was not helpful, because she preferred to focus on teaching and learning at that stage.

40. Responsible Body Representative submitted that the Code of Practice is of limited value in interpreting the law where the law is clear as it is here since the regulations are silent on the timing in the case of a placement request. Further, he submitted that the code is poorly drafted, especially at Chapter 6 para 1, in respect of the reference to "early or timely planning being required" because timely could be either earlier or later. Responsible Body Representative took issue with Solicitor for Claimant's submission that April 30 was the latest date, which he said was not supported by the Scottish Government's explanatory notes, where latest date is not used. He submitted that it was the optimum time for a decision. In this case that would give The child time in class to achieve his upward trajectory to mainstream. He submitted that the code was wrong and unhelpfully raised parental expectations.

41. We did not accept Responsible Body Representative's submissions that we should not take the code of practice into account. It is after all statutory guidance (as the third revised edition make clear, and we considered that it contained a helpful guidance on the relevant law.

42. In particular, we noted that the code provides guidance on school transitions and on the implementation of the 2005 Transition Regulations, which states in Chapter 5 that education authorities should have appropriate arrangements in place to ensure smooth transitions, which may involve other agencies for children with ASN. Chapter 5, paragraph 5, states that: "There will be some circumstances where transition planning is taking place alongside a parental placing request for a particular school and this can, potentially, lead to difficulties in meeting the timescales for transition planning and/or resolving any placing request difficulties. The timescales for transition planning set out in the Act refer **to the latest times** by which a particular stage of the transition planning process should have been completed. For example, for a child with additional support needs transferring from primary to secondary school, to whom the transition arrangements apply, then no later than 12 months before the child is due to start secondary school the education authority must seek and take account of information and advice from appropriate agencies or others. However, in many cases it will be better to start this process earlier than 12 months before the expected transfer date to allow all those involved sufficient time for planning and this should help to avoid difficulties over timing with transition arrangements……"

43. At paragraph 7, it is stated that “It is anticipated that the transitional duties will certainly apply to all those children and young people with ASN where one or more of the following circumstances apply. They:
    a. Have a co-ordinated support plan
    b. Are in a specialist placement such as a specialist unit or day or residential special school
    c. Have additional support needs arising from a disability within the meaning of the Disability Discrimination Act 1995 (sic)
    d. Are otherwise at risk of not making a successful transition”.

44. With regard to the transition between primary and secondary for children with additional support needs, it is stated at paragraph 15 that: “The duty to seek and take account of relevant information and advice from appropriate agencies or other persons should be completed **no later than 12 months** before the change of school is anticipated…….The duty to provide information should be completed no later than 6 months before the anticipated change of school…….if the education authority cannot meet these timescales because they were not made aware of the proposed change in school education in time then they should take steps to fulfill the requirements as soon as possible”.

45. And at paragraph 19, the Code of Practice sets out some good practice principles in relation to transitions, which include:

    a. transition planning should be embedded within the education authority‘s policies and procedures for additional support needs and the more universal policies and procedures for children and young people
    b. other agencies, such as health and social work services, Skills Development Scotland (Careers), further education colleges and institutions of higher education should also be involved in transition planning where required
    c. the child's or young person's views should be sought and taken into account when discussing changes in school education
    d. parents should be part of the planning process, and their views should be sought, and taken account of, and they should receive support, as required, during the transition process
    e. early consultation should take place with the school or post-school provision, which the child or young person will be attending
    f. schools should plan to ensure that the necessary support is in place for children and young people who have additional support needs to help them through the transition phase to their new school or provision
    g. professionals from all agencies working with the child, young person and family should plan in good time for transition to future services
    h. transition should be co-ordinated by a relevant person known to the child or young person and their family
    i. where a child or young person has a co-ordinated support plan then any anticipated change in the statutory co-ordinator should be discussed with the child or young person, and parents, as far in advance of the change as possible.

46. Given that background, it was clear to us that there are two phases in the transition process, that is the move to secondary level education, and the move to a particular

school. Clearly the process in respect of transitioning in general has begun well before the 12 month point (indeed Witness C's spontaneous evidence about that was that transition planning began as far back as primary 2). We came to understand that the transition process was an umbrella term including both transition planning and the execution of the transition, in the sense of transitional arrangements in respect of a specific school. Witness B had indicated that even that should be understood as being two-faceted, in regard to the preparations which were made by professionals and parents for the child's transition, and then the preparations which required to be made with the child themselves.

47. It was clear to us that there was some tension with the legislation in relation to transition planning and the time frame for making placing requests. We did not however view that as an irreconcilable tension. Certainly we did not consider that the dates set out in the 2005 Placing Requests Regulations were necessarily the appropriate or optimum dates in all cases, and we did not accept Responsible Body Representative's submission in that regard.

48. Having considered the competing arguments carefully, we were of the view that it is clear from interplay between the two sets of regulations and the Code of Practice on Supporting Children's Learning that the date of 30 April is the very last date when a decision should be made (failing which of course it will be a deemed refusal). While that may well be the optimum date in some cases, and even in the majority of cases, and even for some disabled pupils, we did not accept that to be necessarily so in this case. Indeed, the evidence we heard indicates that in the case of pupils with ASD it is unlikely to be the optimum date. Rather as the code of practice clearly indicates, in our view, for children with ASN, an early decision may well be appropriate and necessary and therefore may well be a reasonable adjustment for a disabled child.

49. Solicitor for Claimant submitted that in this case such an adjustment would be effective in overcoming the substantial disadvantage which would be encountered by The child, relying on the evidence of Witness A and of The Claimant regarding The child's reaction to previous transitions, and in particular that those transitions which were taken more quickly were where the problems arose; but it was different when he had more time to prepare. Concerns were expressed that transitions may result in secondary mental health issues if not successful, and that the length of transition is key. Indeed, Witness A's evidence was that he felt that a deadline of even March to make decisions was too late.

50. When making this assessment we had in mind then the effect of the disability on the individual, as well as the likelihood of the adjustment overcoming any disadvantage. In that regard, we were interested to hear about the possible disadvantages for the child of advanced knowledge of the identity of the secondary school.

51. Responsible Body Representative set out his argument in an e-mail to the Tribunal dated 22 November why an earlier decision would not be a reasonable adjustment in this case. He submitted that The child may be advantaged rather than disadvantaged by a later decision. In particular, The child has been increasingly spending time in the mainstream classes, and indeed Witness C stated that now "on a good week spends over 90% of his time in his mainstream class". This "upward trajectory" is "consistent

with the school's planning for transition to secondary school. Such planning is characteristic of the education authority's special classes for autistic children with particular regard to increasing mainstream integration as the emotional maturity of the children develops with age and with the incremental specialist support provided in the special class".

52. Responsible Body Representative argued specifically that "To make a decision on secondary school earlier than the statutory deadline would be prejudicial to The child's best interests as it would not afford time to fairly and justly assess his potential for the fullest reasonable range of options for transition to secondary school. Therefore to make such a decision would be contrary to the legal duty of the education authority to provide an adequate and efficient education in terms of the 2004 Act and to provide education directed to the development of the personality, talents and mental and physical abilities of the child or young person to their fullest potential inters of the 2000 Standards in Scotland's Schools Act."

53. As we understood the argument, the decision regarding whether the child should attend mainstream school or special provision should not be made until closer to the time, and indeed in this case it appeared from the evidence which we heard that a decision had not yet been made in relation to The child in this regard. This does appear to contradict the principles set out in the Code of Practice regarding transitions, but Witness C made no mention of this specific consideration for The child.

54. We further noted three reasons in particular were also alluded to in this case which might support an argument than an early decision was not in The child's best interests.

55. At RB132, an e-mail from Mr M to Responsible Body Representative notes a conversation which he had with a Mr D who is the manager of care at School A. There Mr D is noted as having said that the general policy for transition for a start in August would be to start transition in June. They are keen to avoid perseverative questioning from their future pupils eg asking over and over when they will be going etc. It states that Mr D also indicated that they have started pupils a little after the summer holiday to avoid this and that School A were flexible in their approach for each child but that their usual procedure is to begin the transition a couple of weeks before the start date.

56. Witness B was asked about this in evidence, and he was understandably cautious about commenting in detail about the points made in the e-mail. In any event, assuming this is an accurate transposition of the conversation (and Witness B initially stated that he took no issue with what was said there) this relates to the general policy and the usual practice, which might of course require to be adjusted for certain individuals, where that was reasonable. In cross-examination he accepted that often there will be no opportunity to have a lengthy transition because often crisis situations will be involved. On the issue of perseverative questioning in particular, we accepted the evidence that we heard that this was not in any event a trait which was particular to The child.

57. Witness C said in her statement that "The transitions never begin before June; this is to maintain focus on the current placement, and to avoid prolonged anxiety or stress. Learning and teaching continues as normal until the final three weeks preceding the

summer-time break". She also stated that "All the transitions are very individual to match the needs of the pupil". Her evidence was that she had overseen very many successful transitions and they were invariably successful in this time frame. While Witness C gave one example where she found that early intervention from staff at the new school was not necessarily helpful, we did not understand her to give any evidence which otherwise indicated that early knowledge may in fact have an adverse impact on an individual disabled child, (and we did not understand her to say that of The child) but rather that it was her preference to focus on teaching and learning without being distracted about decisions regarding schools. This was particularly because pupils in P7 at School B tend to be transitioning to a large variety of different secondary schools. Witness C accepted in response to questions from A panel member that The child would require "enhanced transition" and that he does struggle to cope with change and in processing new environments.

58. Witness B referred in his statement to two facets to the transition procedure, that is arrangements for the pupil and arrangements for the parents, associated professionals and organisations to ensure sharing of relevant information and practice. He says "both procedures are flexible to ensure pupil centred support and planning. Both procedures should happen as early as possible with consideration given to the possible response of the pupil (ie some may see this as a positive step and knowing details will give them the security and impetus to put maximum effort in to the transition process, others may give up trying because they know they are moving on)".

59. Witness B confirmed that there would be time to carry out transition if a decision was made on 30 April, however he qualified that by adding that there were two aspects to the transition in relation to the child and in relation to the professionals, which we understood to include the parents.

60. We heard a good deal of evidence (discussed above) regarding The child's current circumstances and we found it difficult to align what we heard about The child with the proposition that it was in his best interests for the decision to be delayed. We came to the view that The child's best interests, considered in the round, would point to the value of an earlier decision. This was not least because we recognised that his parents were understandably anxious about the move. We considered that it was important for parents in these circumstances, as well as professionals, to be involved in the transition planning with the knowledge of the specific school, and that any anxiety on the part of the parents was likely to impact too on the child, as Witness A confirmed.

61. While a child's best interests are always a primary consideration in decisions such as this, there are of course other considerations which must be taken into account, not least the impact on other children. Responsible Body Representative explained that it is important for the local authority to ensure appropriate and adequate provision for all children with additional support needs, while at the same time meeting their obligations in relation to "Best Value". He advised that "the education authority created two new classes within one of its special schools for the start of this current school year. This was to address a pending gap in the special school estate which the education authority identified in the process of assessing together all of the children identified as needing special school or special class provisions for the start of the current school year – these children having been identified as at the statutory deadline of 30 April for

making decisions on placing requests. This process of decision-making is vital to the ability of the education authority to plan strategically its special school and special class estate and this process is essential therefore to the education authority meeting its duty to seek to secure best value by carrying out its work efficiently and effectively under the terms of the 2003 Local Government in Scotland Act".

62. In oral submissions, Responsible Body Representative also submitted that there were financial implications of the decision because it was very important to look at as many children as possible to fill the gaps and ad hoc decisions involve financial costs and create precedents for parents expecting decisions to be made outwith the normal cycle was not efficient and therefore not in line with the council's duties in relation to best value, relevant also to questions of practicability and the interests of other pupils.

63. In coming to our decision, we took into account the impact that making a decision in relation to The child ahead of others would have on the local authority planning cycle and their other various statutory duties. While we accepted the local authority requires to ensure sufficient provision to ensure a sufficient special school estate, and to match children to places efficiently, we did not consider that a decision in this case would impact disproportionately on that requirement, and indeed if anything advance knowledge of where The child will be placed may well be beneficial. We did not consider that the local authority's requirements in this regard outweighed the disadvantage that could be suffered by the child. Nor therefore did we accept Responsible Body Representative's submission that the requirement to make an earlier decision would have any significant financial implications.

64. In oral submissions, Responsible Body Representative also expressed concern about the hypothetical nature of some of the questions put to the witnesses. In particular, he was concerned that the claimant's submissions proceeded on the basis that the placing request itself would be refused. He was concerned that would create a precedent for the future where parents could have decisions made in their favour by saying that they would appeal and he submitted that this was contrary to natural justice. Responsible Body Representative therefore proposed that if the Tribunal were to refuse this application, in order to avoid the difficulty which would be caused by allowing time for an appeal, then preparations for the appeal could take place concurrently while the council was considering its substantive decision. For example, parties could agree a shortened case statement period. Solicitor for Claimant submitted in response that this would cause some difficulty, not least in him preparing for an appeal when he did not know the grounds for refusal.

65. While Solicitor for Claimant did point out that in the event that the placing request was refused, there may well be an appeal, which would take time for this Tribunal to determine, we are not making a decision on the basis that the claimant might not know the outcome until after a decision is made on appeal. We take into consideration whether it was reasonable to have a longer lead in time for the transitional activities to take place with the designated school, rather than factoring in time for an appeal. Further, we did not accept that it was appropriate or even desirable (even if it were possible under the rules) for parties to prepare for an appeal before any decision had been made.

66. Further, we understood Responsible Body Representative had concerns regarding creating a precedent. We did not accept his submissions in that regard. The duty to make reasonable adjustments requires a focus on the individual, and each case will require to be considered on its own merits.

67. With regard to the practicability of making the adjustment, we also had in mind the fact that the 2005 Placing Requests Regulations envisaged that a local authority would made a decision in respect of a placing request made throughout the course of the school year within a two month period, and indeed that a request made as late as 15 March relating to entry at the beginning of the next school year would require to be made within six weeks.

68. We noted too that the council, for what we understood to be perfectly understandable logistical reasons around the need to have appeals heard in good time before the end of the summer term, had brought forward the last date for decisions relating to placing requests for non-catchment schools for pupils who did not have ASN until March 9. As Solicitor for Claimant pointed out in submissions, that meant that The child was in fact in a less advantageous position than other pupils in that category.

69. Further, Responsible Body Representative was able to confirm, in the event that this Tribunal came to the view that an earlier date was a reasonable adjustment, that a decision could be made in around a week.

70. In all these circumstances, we consider that the evidence in this case does not support the submission that an adjustment to the time frame for determining the placing request would not be reasonable.

71. Having found that the child is put at a substantial disadvantage because of the practice of the local authority to make decisions no later than 30 April, and that it was a reasonable step to make a decision at an earlier date, we find that the responsible body has failed in its duty to make reasonable adjustments contrary to section 21 of the 2010 Act.

Indirect discrimination

72. Solicitor for Claimant had made an amendment to his claim shortly before the hearing to add a claim for indirect discrimination. However, Solicitor for Claimant confirmed that this was an alternative rather than additional claim. In the circumstances, there was no requirement for us to consider this claim.

Conclusion

73. While Solicitor for Claimant stated that he was looking for the authority to make a decision forthwith, and Responsible Body Representative had confirmed at the outset of this hearing that a decision could be made within a week of the Tribunal decision, Solicitor for Claimant proposed that a longer period of around 2 weeks could be agreed. Following some discussion, Responsible Body Representative accepted that a decision could be made within two weeks of the Tribunal's decision.

74. Thus the Tribunal, having found that the responsible body has failed to comply with the duty to make reasonable adjustments in terms of section 21 of the Equality Act 2010; orders the responsible body to make a decision on the placing request submitted by the claimant on 12 October 2017 by 15 February 2018.

75. While we have said that each case should be dealt with on its own merits, and to that extent this decision should not be seen as creating a precedent, the Tribunal recommends that the local authority look again at its policy in relation to placing requests for children with ASD and reconsiders whether an earlier cut off date would be possible. Further, the particular feature of ASD which is relevant here, that of difficulties in coping with change and transitions, is common to many children with learning disabilities and consideration could also be made to change in policy more generally, in the way that the local authority has been able to change its policy in respect of placing requests for children without ASN in non-catchment schools.