The Additional Support Needs Tribunals for Scotland

Decision

1. The Tribunal finds and declares that the responsible body failed to comply with its duty to make reasonable adjustments and that the claimant has been unlawfully discriminated under section 21 of the Equality Act 2010.

2. All other claims are dismissed.

Reasons for decision

Introduction – issues for determination

1. This is a claim by the claimant on behalf of her daughter ("the child") against School A ("the school"). She claims that the school discriminated against her daughter contrary to the disability discrimination provisions of the Equality Act 2010.

2. During a case management conference call which took place on March 2017, the school's representative stated that he accepted that The Child was disabled for the purposes of the Equality Act, both in respect of asthma and dyslexia. Although there had been no formal diagnosis of dyslexia when The Child was at the school, it was accepted that the school knew or ought to have known that The Child had that disability as defined by the Equality Act. Thus disability status was conceded.

3. At that case conference call, the Tribunal identified the issues for determination as follows:

    a. Whether there was a failure to comply with the duty to make reasonable adjustments in terms of section 21 of the Equality Act 2010 in respect of a failure to take such steps as was reasonable in relation to the child's dyslexia;
    b. Whether the conduct of staff, specifically Teacher A and Teacher B, amounted to harassment in terms of section 26 of the Equality Act 2010 and/or section 13 of the Equality Act 2010;
    c. Whether the failure to allow the child to attend a school ski-ing trip amounted to unfavourable treatment arising from disability contrary to section 15 of the Equality Act 2010.

4. On the morning of the first day of the hearing, the responsible body tendered an apology to the claimant, her husband and her daughter from Head Teacher, School A, which it is helpful to set out here in full:

> "On behalf of School A I would like to apologise to The Claimant, Her husband and their daughter The Child. I am sorry that the Additional Support Needs provision give to The Child whilst she was a pupil at The school did not meet the high standards that we set ourselves. Registered as we are with Crested we should have been more alert to the possibility that The Child had dyslexia. In discharge of the school's duty under the Equality Act 2010 to make reasonable adjustments, we ought, at the start of the school year 2013-2014, to have referred The Child for assessment by an Educational Psychologist. I agree with Witness A that had there been a referral, The Child's dyslexia is likely to have been revealed. With the diagnosis, an Individual Education Plan would have been created for her. Enhanced support would have been considered in light of the diagnosis and communication with The parents would have been improved. I am sorry that this was not done. It meant that The Child missed out on any enhancements that might have been put in place. Unfortunately, it was only towards the end of The Child's time at The school that we moved to put in place an IEP and have her assessed by an independent psychologist. I do not know whether The Child would have benefitted from an earlier diagnosis and IEP but I am sorry that she missed out on the chance of having a provision tailored with the diagnosis in mind. The school's ASN provision has now been entirely reconstituted with a different structure under new leadership. We are now more alive than ever to the need for early assessment of girls who shows signs of dyslexia".

5. Although Counsel for the RB considered that dealt with the first issue for determination, Solicitor for Claimant, with whom we agreed, indicated that he considered that the following issues remained outstanding in respect of the reasonable adjustments claim, as set out in paragraph 5 of his case statement (C2):

> "In particular, the school had a duty to comply with the third requirement (s.20(5)) by taking such steps as it is reasonable to have to take to provide auxiliary aids and services. It would have been reasonable for the school to provide specialist tuition from a teacher qualified in teaching pupils with dyslexia. It would have been reasonable for the school to make use of an individualised educational programme (IEP) to plan, monitor and review the support she required. It would have been reasonable for the school to put in place a specific programme of support for The Child focussing on her phonics. It would have been reasonable for the school to put in place a specific programme of support based on the assessment of her profile of needs, such as the Active Literacy Kit".

6. After the hearing, Solicitor for Claimant withdrew the claims under section 13 and under section 26 in respect of the conduct of Teacher A.

The hearing

7. This hearing took place over four days. The claimant was represented by a solicitor and School A was represented by counsel. We heard evidence over three days, from Wednesday 24 May to Friday 26 May. We heard from The claimant as well as from Witness A, educational consultant, Witness B, head teacher at School B (The Child's current school) and from Witness C, former Principal at Organisation A. We also heard evidence from The Child, and from her fellow pupil, Child B. Their evidence was taken in an informal setting in the presence of the Tribunal only, and reported back to the parties' representatives.

8. For the respondent, we heard evidence from Teacher B, teacher of French at School A, Teacher A, now head of the junior school, and Teacher C, now head of School A.

9. We also had a witness statement from Teacher D, former head of learning support at the school, although we did not hear evidence from her. We also had a copy of her CV, which showed that she obtained a Postgraduate Certificate in Specific Learning Difficulties in August 2001. We understood this to have included modules focusing on dyslexia.

10. The evidence in chief of the witnesses was set out in their witness statements or in their reports, and these were adopted as their evidence, with supplementary questions and cross examination as appropriate during the hearing.

11. We then received very helpful written submissions from Solicitor for Claimant and from Counsel for the RB, which were supplemented by oral submissions at a fourth day of hearing, namely Friday 9 June, after which we had a members' meeting.

12. The Tribunal was also referred to a bundle of documents, over 700 pages of which had been lodged by the claimant's representative and over 450 by the school's representative. However, the Tribunal noted that the documents lodged by the claimant included duplicates and even triplicates in some cases; it included irrelevant documents; and documents were not in chronological (or indeed any logical) order. We noted that the responsible body had also lodged duplicates of documents lodged by the claimant. It would have been helpful not least for the administrative staff, if only one copy of relevant documents had been lodged, and an inventory of documents had been included.

Findings in Fact

13. The Tribunal finds that the following relevant facts are admitted or proved:

14. School A is the responsible body for The School, which is a mainstream independent school for girls.

15. From August 2012 until March 2016, The Child was a pupil at the school. She was admitted to what the school termed upper first (the equivalent of primary 3). She was taught by Teacher A, who had joined the staff at the school that same year.

16. The Child has brittle asthma and dyslexia.

17. During the time she was at the school, The Child had 186 half day absences for the period from 14 September 2012 to 4 March 2016 (C199 – 204), that is she was absent for 97 out of 565 days.

Asthma

18. The Child's asthma was made known to the school on admission. In October 2012, the school received a child asthma plan from The claimant. Regular updates were subsequently provided. On the plan for June 2015 to June 2016, triggers are stated to be "colds, exercise".

19. There were various meetings and exchanges regarding the management of The Child's asthma.

20. In particular, on 13 March 2013, The claimant complained to the school about The Child feeling cold at hockey practice due to inadequate dress, and this had led to her developing a cold. The claimant expected this to trigger an exacerbation of The Child's asthma (C359).

21. In April 2014, a meeting took place between The claimant and Teacher E (then head of the prep (junior) school) to discuss The claimant's complaint about an incident when The Child was sitting in wet shoes (C163) which precipitated an exacerbation of her asthma.

22. On 3 February 2016, The claimant advised Teacher A that The Child had been admitted to hospital the previous evening with a chronic exacerbation of her asthma (C675). She stated that, as well as the cold virus, stress could also be a trigger and that The Child was at that time under a great deal of stress.

23. On 17 February 2016, The claimant and her husband wrote to the school (C129) with reference to The Child's recent attendance in hospital, which they stated was "resultant from a lung infection, which, in turn, triggered an Asthma attack. Upon her return to school, it was intimated by The claimant, that The Child was to refrain from taking part in physical education, until otherwise advised. This simple request was noted and added into the daily bulletin for the teaching staff. When the time came for The Child's P.E. class, your Teacher F dismissed The Child's explanation as a fabrication, as she had not been given personal notification by ourselves. I am sure Teacher F does not have the relevant qualifications to make an on the spot clinical assessment of The Child's condition. Asthma is a condition that can accelerate from a cough to death in a very short period of time and as this is not the first time this has occurred, we are no longer willing to tolerate it any further without action.

Therefore we trust that you will be able to furnish us, by return, a full written explanation as to why our simple request is regularly ignored in respect of The Child's health".

24. Teacher G provided an explanation by letter dated 19 February 2016 (C141) and The claimant e-mailed a response on 22 February 2016 (C143).

Dyslexia

25. The school is registered with the Council for the Registration of Schools Teaching Dyslexic Pupils (Crested), in the WS category. That category requires that "SpLD pupils are withdrawn from appropriately selected lessons for specialist tuition from a teacher with a nationally recognised qualification in teaching SpLD pupils. There is ongoing communication between mainstream and specialist teachers." (C267).

26. In September 2012, Teacher A identified that The Child required some additional help with maths and particularly English. The Child completed the Vernon spelling assessment, Schonell reading test and Salford reading tests, which children were given every year to monitor their progress, which showed The Child to have a spelling age of 6.8 and a reading age of 5.9, when her chronological age was 7.5.

27. The Junior 2 report for the summer term from School C, which The Child had attended for two years prior to commencement at the school, identified some difficulties with spelling (erratic test scores and spelling patterns), reading and presentation of written work. It also shows that The Child was absent for 39 days between August 2011 and June 2012. Teacher A discussed these issues with Teacher D (then head of learning support) and Teacher E and they agreed that the absences were the most likely explanation for The Child's weaknesses.

28. It was agreed that The Child needed additional support. From the outset, Teacher A differentiated lesson plans so that the materials delivered to her were at a suitable level. This included reading practice and the use of the Nelson differentiated spelling programme, following the "Look Say, Cover, Write and Check" method, with specific focus on letter patterns and spelling rules. Classwork and homework was tailored to her needs. Teacher A provided one to one additional support on occasions, which was possible due to the small class size.

29. Teacher E arranged for Teacher D to go into the class one period a week. The arrangement was that she would do handwriting with the class (C413), while Teacher A gave targeted support and had additional time to work with The Child as part of a small group, using differentiated materials and working towards achieving agreed targets.

30. Teacher A was concerned about a high level of absences and The Child's failure to hand in homework.

31. For the academic year 2013/2014, group educational plans were produced, which showed that the lessons for The Child in a small group were differentiated (C497 – 500).

32. In September 2013, Teacher E asked Teacher D to work in class with Teacher H (The Child's teacher for lower second) for one period a week with a small group, including The Child, whom she wished to provide targeted maths and literacy support (C414 and C422). Both Teacher H and Teacher D supported this group who had differentiated programmes of work and were working towards numeracy and literacy targets set by Teacher H. This allowed either to work individually with The Child. Attempts were made to compensate for periods of absence through greater individual support. The class teacher supplemented the school spelling programme with the Alpha to Omega course which follows the patterns of phonological language acquisition.

33. In the academic year 2014/15, concerns were identified with The Child's maths and language (C423). Group educational plans were produced, which showed that the lessons for The Child working in a small group were differentiated (C501-513). In September 2014, Teacher E asked Classroom assistant (classroom assistant) to provide class room assistance in Teacher I's class for two periods a week (C415). In October 2014, she asked Mrs Baird to provide classroom assistance for a further two periods per week (C416). This support continued into academic year 2015/16.

34. In October 2014, The claimant and her husband raised concerns regarding dyslexia at a parents' evening with Teacher I.

35. On 13 November 2014, a support for learning referral was completed by Teacher D due to concerns about The Child's progress in literacy and maths (C531). This was discussed with Teacher E. As a result, Classroom assistant was asked to provide an additional two periods per week (C417), making a total of 6 additional periods into this class. The classroom assistants were following a differentiated work programme working in small literacy and numeracy groups, including The Child, under the direction of Teacher I. At times, Classroom assistant worked on a one to one basis with The Child, particularly after a period of absence.

36. A differentiated spelling programme continued at this stage with the emphasis being on the development of phonological skills. The specific focus for The Child continued to be letter patterns and spelling rules.

37. On 22 January 2015, The claimant reported to the school that The Child had told her that the words are "jumping around the page" when reading in the car. She asked if there could be formal testing in relation to dyslexia (RB301).

38. In January 2015, Teacher E asked Teacher D to carry out a LASS assessment. This is a test for children of all abilities used to identify areas of strength and weakness compared with national normative data. It is not a diagnostic test for dyslexia. On 25 February 2015, Teacher D wrote to The claimant to advise that she hoped to assess The Child within the next week

and that she would contact her to arrange a suitable time to discuss the results of the assessment.

39. In March 2015, The Child was assessed by Teacher D using the LASS test. This showed that her reading and spelling skills gave cause for concern. In particular, the comments stated “Pupils with such a profile may have insufficient literacy experience resulting in weaker spelling and reading skills. The Child will continue to receive additional support within the classroom. However nightly reading/spelling practise and literacy games at home would be of benefit to her progress”.

40. Teacher D discussed these results with Teacher E and Teacher I; Teacher E said that she would continue to actively monitor the provision of support within the class.

41. Teacher D met with The claimant to explain the results of the assessment and to re-iterate the importance of her family working closely with the school and in particular to reinforce the benefit of the support that was being provided for her from the school.

42. In the academic year 2015/16, The Child was again identified as having maths/language concerns (C424). Group educational plans were produced, which showed that the lessons for The Child in a small group were differentiated (C514-520).

43. In August 2015, Teacher A and Teacher D implemented a maths support group with a small group of pupils in lower third, which included The Child, at the behest of Teacher E, which continued into 2016 (C418 and 419). A record was kept for The Child working as part of a small group for the period from Sept-Dec 2015, which included an individual evaluation (C521-522), and for January to April 2016 (C523 -524).

44. Individual and small group reading continued. “Wordshark”, a multi-sensory programme which supports reading and spelling enabling the design and monitoring of individual programmes for The Child, was also differentiated for The Child, all pupils having been given iPads.

45. On 4 November 2015, The claimant e-mailed Teacher A to thank him for the positive impact he was having on The Child’s commitment and confidence (RB261).

46. In November 2015, English and Maths GL assessments, which are standardised test to monitor and track the attainment and progress of pupils, were introduced for the first time. The Child’s results showed that she had obtained below average in English. In particular they indicated significant difficulties with English skills particularly spelling, and grammar and punctuation, and making complex inferences from text. Meetings were expected to be arranged with parents whose children fell below average. No meeting was arranged with The claimant.

47. On 13 January 2016, Teacher D wrote to The claimant to advise that The Child was to complete a number of language assessments over the next few days (C551) (that is, further LASS tests) and that she should contact her to arrange to meet to discuss the results.

48. Following receipt of the GL assessment results, which were a cause for concern, The claimant requested a meeting with Head Teacher (head teacher of the school who had assumed position in April 2015).

49. On 18 January 2016, The claimant and her husband met Head Teacher, Teacher A and Teacher D to discuss The Child's learning support needs. An agreement was reached that Teacher A and Teacher D would support The Child on a one to one basis and that she would be withdrawn from religious studies and French classes for that (C545).

50. Thereafter Teacher D and Teacher A devised an individual education plan (IEP) for The Child (C20) (525-526) as well as a learning journal, setting out the specific areas covered. These included a literacy programme focussing on phonics, spelling and reading skills as well as memory skills and numeracy. Teacher D provided specific support for learning input in language for The Child one period per week. A learning journal recorded the areas covered each week from 21 January to 25 February 2016 (C528).

51. Teacher A continued to be concerned about the failure of The Child to complete her homework and her frequent absences from school.

52. An arrangement was made by the school for The Child to be assessed by an educational psychologist. Although she had initially agreed, The claimant cancelled that assessment.

53. On 23 February 2016 The Child attended an assessment which was conducted by Doctor A, education psychologist, arranged by The claimant and her husband. Doctor A made a formal diagnosis of dyslexia. Her report was not forwarded to the school. That report set out a series of recommendations (C134).

French lessons

54. The Child had French lessons from lower second. Teaching becomes more structured in upper second, and at that stage the French teacher, Teacher B realised that The Child needed some additional support. Teacher B was made aware of pastoral issues in the class, so she asked The Child to sit in front of her desk with one of her peers, which allowed her to provide her with some additional support in the class. By upper second, she provided her with one to one support, and differentiated learning materials during lower third.

55. Teacher B had concerns about The Child failing to complete her homework. She has concerns too that her significant absence record meant that she was finding French difficult. She shared her concerns with Teacher A who, on 30 October 2015, e-mailed The claimant to advise that the French department

had concerns about The Child failing to hand in her homework (RB270). Around that time, The Child got 0/10 in a test. Teacher B had a word with The Child in the class (as she did with others who had not scored well in the test) . She told her that she was capable of a higher score and that she should focus more on her French.

56. On 2 November 2015, Teacher A met The claimant to discuss The Child's French lessons. The claimant believed that The Child was frightened of Teacher B, who she believed was singling her out and had disciplined her which could have resulted in her forfeiting the class prize. Teacher A reported these concerns to Teacher J, head of modern languages. Teacher J visited Teacher B in class, unannounced and without knowledge of the complaint, and observed her teaching The Child. Afterwards he told Teacher B that he did not consider there to be any problem. The claimant did not report her concerns about The Child directly to Teacher B.

57. Teacher B used puppets of Astérix and Obélix in her classroom.

Ski-trips

58. The Child attended ski trips in 2013 and 2014, which were organised by Teacher A, who is a qualified ski leader.

59. On the day of the 2013 ski trip, The claimant advised Teacher A that this was The Child's first time ski-ing and that he should be careful as skiing could induce and asthma attack and The Child could die as a result. Teacher A expressed concern that this information had not previously been given to the school.

60. On 27 February 2013, given these concerns, Teacher A met with The claimant and asked her to inform the school if The Child had any virus or illness that could have a negative impact on her asthma in advance of the trip. The claimant responded by stating that "this is of one of the most dangers forms of asthma which will kill if not treated appropriately and quickly" (RB251).

61. The claimant completed a form giving The Child permission to attend two ski days in winter 2016 (C400). Four days had been identified as potential dates for the trips, and a decision was to be made by Teacher A nearer the time about whether the ski trip would take place on one of these dates, which depended on the weather. Teacher A completed a generic risk assessment for outdoor trips, and a specific risk assessment for ski-trips.

62. At the beginning February 2016, during half term, The Child was in hospital for two days with a lung infection. The claimant asked The Child's doctor not to send a medical report in to the school.

63. On 18 February 2016, Teacher F advised Teacher A that she had been advised by The Child that she was not to do PE that week because she had been in hospital.

64. On 29 February 2016, Teacher A checked the weather forecast for the ski day due to take place the next day, which indicated temperatures of -9 allowing for wind chill factor with rain and intermittent sleet.

65. Teacher A was concerned that The Child did not look well upon return to school after the spell in hospital and he was very concerned that her health would be adversely affected by attending the trip and that her safety was therefore compromised.

66. Teacher A relayed his concerns to Head Teacher. At Head Teacher's request, the school matron attempted to obtain advice from the school medical officer or alternatively practice nurses but they were unavailable. Consequently, matron telephoned Asthma UK helpline (C396 – 397).

67. For these reasons, Teacher A asked The Child whether she was going on the ski trip. She said that she was definitely attending the trip and that her mum had recently purchased new ski gear. He advised that he would need to speak to her mum about it.

68. At 11.46 that day, Teacher A sent an e-mail to The claimant in the following terms: "The Child has told me this morning she is coming on the ski day. I am concerned about her attending the day for the following reasons: The Child was hospitalised very recently due to her severe bout of asthma. The Child has missed quite a lot of school and we have shared concerns over her spelling and English work. As [I] organise the ski day and sign off the Risk Assessment it is [me] who is ultimately responsible for the safety of everyone in the group, and no one else. I am worried that (due to the weather being forecast for -9 and snow) it is going to be a cold, wet, day. I know from your previous emails that this sort of weather exacerbates the asthma. In terms of work, The Child has been out of school on a few of the days that she is meant to be given time out of French and RE to work on her spelling and English. She has catching up to do in this area and in her class work also. For these reasons I am reluctant to take The Child tomorrow. If you are available to discuss this today I would greatly appreciate it. I can be contacted on the school line and I am about after school".

69. The claimant did not contact Teacher A by telephone. She came to the school and went to his classroom with a view to collecting The Child. However, The Child was at an extra maths class from where Teacher A collected her and took her to Head Teacher to be collected by her mother. The Child did not return to the school.

Expert/Opinion evidence

70. We heard expert evidence from Witness A, Witness C and we also heard from the head teacher of The Child's current school, Witness B.

71. Witness A scrutinised extensive documentation covering the issues which had arisen at the school during The Child's attendance there. He stated that it was very clear that the discrepancies between her chronological age and spelling

and reading age have increased over the years. He said that while “absences from school can impact on pupil achievement....given that her general overall ability, as assessed by the educational psychologist is within the average range then this pattern of test discrepancies is significant and is indicative of dyslexia, even taking account of absences”. He concluded that her dyslexia was present from when she was admitted to the school.

72. He was of the view that “it is clear that The Child’s learning difficulties were recognised following her admission....[and] that the school did assess and make provision for The Child’s learning difficulties....”. However he was of the opinion that the significant gap between The Child’s chronological age and spelling and reading ages which increased with age meant that there were shortcomings in the educational provision being made, even taking into account her absences from schools. He was concerned that the documentation available was insufficiently detailed to track what is happening, but had robust IEPs in place then it would have been possible to follow the progress being made from one IEP to another.

73. He concluded, “In my view an IEP should have been put in place when she was admitted to the school in 2012 so that it was clear what learning targets she was expected to achieve, what teaching strategies were to be used to help her achieve these targets and when it was expected the targets would be achieved”.

74. He accepted in cross examination that the school would not necessarily have been able to detect The Child’s dyslexia immediately on admission, but was of the view that by her second year, that is by August 2013, the school should have identified that she had dyslexia or at least dyslexic traits. At that point, she should have been tested for dyslexia, which could have included the commissioning of an educational psychologist at that time. He said that it should be the school that raises the issue of dyslexia not the parents. In his view, an IEP was therefore essential to allow the school to determine progress, to put the appropriate support mechanisms in place, to track progress and adjust supporting if necessary. He said that if properly implemented an IEP should lead to better educational outcomes for a child.

75. Witness B explained in evidence the approach which she takes in order to assess whether a child has dyslexia (and therefore whether a reasonable adjustment is required). As part of her monitoring programme, she holds a tracking meeting once per term with each class teacher at which each child’s progress is discussed, including any concerns about spelling etc or anything picked up in CEM testing. Interventions and strategies are discussed and where needs be further assessments undertaken eg eyesight hearing check etc. In Council A, they have adopted a dyslexia pathway, which begins where a class teacher may pick up worrying signs, such as a discrepancy between a child’s developed ability (their ability to learn) and their attainment academically, which may be highlighted through CEM testing. The support for learning teacher would be consulted and may observe the child and seek permission from parents to carry out specific assessments.

76. Witness B said that the assessments which are used at this stage are BPVS (British Picture Vocabulary Scale) and NARA (Neale Analysis of Reading Ability) which measures the accuracy, comprehension and rate of reading in pupils from 6 to 12 years. She said that they would not typically use these assessments for a child in P1, although additional support could be put in place, e.g. with phonics. From P2 onwards, assessments would be used where there was cause for concern. If there were discrepancies, identified as a "spiky" profile (ie areas of strength and difficulties), this would suggest possible dyslexia. They would then refer the child to Council A's specific learning difficulties teachers for a more formal diagnostic assessment, although they would not normally finalise a formal identification of dyslexia until P5 or P6. Instead they would continue to monitor the child and put in place supports with a view to a formal assessment carried out again at the P5/P6 stage. Appropriate support, determined by the support for learning teacher, would be identified, some given on a one to one basis by the support for learning teacher, others by the class teacher. The support would be formalised, tracked and reviewed through the child's plan (form 4).

Relevant law

77. This is a claim under the disability provisions of the Equality Act 2010. 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)).

78. Section 15 of the Equality Act 2010 states that a person will discriminate against a disabled person if that person treats the disabled person unfavourably because of something arising in consequence of their disability, although only where that person does not know, or could not reasonably be expected to know, that the person has a disability. A school will have a defence where it can be shown that the treatment is a proportionate means of achieving a legitimate aim.

79. Section 26 sets out the definition of harassment. A school will be liable where a teacher harasses a pupil, that is where a teacher engages in unwanted conduct related to a relevant protected characteristic (here, disability) which has the purpose or effect of violating the pupil's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

80. Where the harassment is not intentional, but has that effect, the Tribunal will take account of all the circumstances of the case, the perception of the pupil and whether it is reasonable for the conduct to have that effect.

81. The school is 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.

82. 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 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 the absence of a service.

83. A school's 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.

Tribunal's observations on the witnesses

84. The Tribunal had serious reservations about the claimant's evidence. We did not find the claimant to be a wholly credible or reliable witness. We came to this conclusion for a number of reasons. The Tribunal noted that The claimant often failed to answer the question put, but would give a much more general answer which on occasion did not apparently relate to the subject matter of the question. Often, she resorted to semantics to explain why her position was different than what it appeared. For example, despite documentary evidence suggesting that The Child had not done her homework, her evidence was that The Child always did her homework, but that on occasion she did not hand it in.

85. Further, there were a number of aspects of The claimant's evidence which we found to be inconsistent and implausible. For example, she said that she did not know what her husband meant by certain comments, but we did not find it credible that she had not discussed these issues with her husband. Further, we did not accept that she had not been informed of the results of the LASS test in circumstances where Teacher D had e-mailed her to advise that she would be in contact to discuss them. Her position was that Teacher I had made a passing comment that The Child was not dyslexic, and that her spelling and reading would improve over time. In answer to a direct question from the convenor, she said that she was satisfied with that. We did not consider it plausible or indeed credible that she would not have followed that up by asking to discuss the test results in detail.

86. We considered the complaints against the individual teachers to be completely unfounded. We considered that the claimant should have thought long and hard before making such serious allegations against professionals. Had she done so, and done the sensible thing, then the school would not have had to focus on defending these allegations and the apology relating to the reasonable adjustments may have come sooner. Indeed, it did not escape our notice that the claimant did not in the end pursue the harassment claim against Teacher A, but only after putting him through the stress of having to defend such an accusation.

87. With regard to the respondent's witnesses, we found them to be credible and broadly reliable. We were of the view that Teacher B was a committed professional who cared about her pupils and was keen to urge them to do better. She was surprised and understandably very upset by the accusation.

88. With regard to Teacher A, we found him to be an impressive witness. We considered that he presented as an effective teacher, recognising very early on that The Child had literacy difficulties. We got the impression that he was conscientious, and confident in his teaching abilities.

89. With regard to Head Teacher, we considered her to be professional and measured in the way that she gave her evidence. Not least given her statement and her admission that there had been deficiencies in the programme put in place for The Child, we concluded that she was an honest, credible and reliable witness.

90. Consequently where there was a conflict of evidence or a dispute in relation to key facts, we preferred the evidence of the respondent's witnesses.

91. We found the evidence of expert/opinion witnesses to be of assistance to us in reaching the conclusions that we have in this case. In particular, we found Witness A's evidence to be informative and authoritative, as well as non-partisan.

92. The Tribunal members also spoke in an informal, closed setting with the children. We considered that both children were comfortable in that environment. We gave their evidence weight appropriate to evidence heard from eleven year old children in that context, which assisted the Tribunal in coming to the conclusions that it did.

Deliberations and conclusions

93. On the morning of hearing, as discussed above, Counsel for the RB produced a letter of apology in respect of certain adjustments which it is now accepted by the school ought to have been made. It initially appeared that Counsel for the RB had understood that to be a complete answer to the first of the issues for determination by the Tribunal. Solicitor for Claimant did not accept that that in respect of the claim relating to the failure to make reasonable adjustments.

94. However, the apology is significant in its terms, because we must therefore find against the school to that extent at least.

95. Before turning to the question of whether or not the school had further failed in its obligation to make reasonable adjustments, we first considered the other issues which we believed were clear cut, namely the question whether the conduct of staff amounted to harassment, and whether there was a breach by the school of the provisions relating to discrimination arising from disability. We consider each of these issues in turn.

Harassment

96. The claimant initially claimed that the behaviour of both Teacher B in respect of French lessons, and Teacher A in respect of the way that he dealt with the skiing issue and The Child's absence on 23 February, amounted to harassment related to disability in terms of the section 26 of the Equality Act 2010. We did not accept from the evidence which we heard that either teacher subjected The Child to harassment, as defined by the Equality Act 2010. Solicitor for Claimant did not pursue the claim in relation to Teacher A in submissions.

97. With regard to the claim in relation to Teacher B, Solicitor for Claimant accepted that Teacher B did not have knowledge of The Child's dyslexia at the relevant time. He relies on the fact that the school has now admitted that it knew or ought to have known that The Child had a disability. He argues that it is not necessary for Teacher B to have knowledge of the disability for the school to be liable. He argues that motive or intention is not relevant, because the question was whether the conduct has the effect of creating the offensive environment, not whether it has that purpose. He submits that the responsible body is therefore responsible for the actions of Teacher B, and liable for the discrimination.

98. This raises the legal question whether conduct can be related to disability if the alleged perpetrator did not know that the pupil had a disability.

99. As Counsel for the RB argued, the question of intention relates to the conduct, not the knowledge of disability. Relying on *Reynolds v CLFIS (UK) Ltd* [2015] EWCA Civ 439, *Gallop v Newport City Council* [2016] IRLR 395, and *Urso v DWP* [2017] IRLR 304, he argued that there was nothing in statute or caselaw, in the case of direct discrimination or by analogy harassment, for imputing knowledge that an organisation, or others in an organisation, ought to have, to an individual.

100. Although these are decisions in the employment context, and they are decisions of the EAT sitting in England and the Court of Appeal of England and Wales, they are decisions interpreting the provisions of a GB Act of Parliament in respect of which this tribunal has jurisdiction to adjudicate claims. While not binding on us, we considered them to be highly persuasive.

101. Clearly, an employer, here a school, may be liable and responsible for the acts of discrimination of their staff, whether done with or without their knowledge or approval. However the actions must be capable of being categorised as discrimination contrary to the provisions of the Equality Act. We concluded that even if we could have said that the conduct of Teacher B could properly be categorised as harassment for the purposes of the Equality Act, it could not be "related to disability" if the perpetrator did not know that the victim was disabled. It could not be unlawful harassment or discrimination for the purposes of the Equality Act.

102. In any event, even if we could have been persuaded that the school could be liable for the actions of Teacher B despite not knowing that The Child had

dyslexia, we concluded that the conduct described could not on any assessment be categorised as unlawful harassment of the sort envisaged by the Equality Act.

103. We heard that The Child did not like Teacher B. She mentioned concerns about her, for example she told her it would not take her five minutes to revise for a test and she told her in front of the whole class that she had got a low mark in her test. When asked how that made her feel, she said that she felt embarrassed; she said that she was mean to her; she said that she "used to bully me".

104. We did not consider that a child's categorisation of a teacher's behaviour as "bullying" was in any way relevant to the question whether there had been harassment reaching the threshold set down by the Equality Act.

105. We accepted that Teacher B was simply doing her job of teaching in the class room. Her evidence was that she was concerned that the absences were having a particular impact when The Child was only taught French two hours each week, and that she was concerned about her not doing her homework. We noted that Teacher B said in evidence that it would take more than five minutes to learn vocabulary for the tests. With regard to the particular test results, Teacher B said that she had spoken to The Child personally about this. However, it is inevitable that in a very small class others would hear. In response to a question, Teacher B said she had performed better in previous tests and so was aware that she could do better. She said that The Child was upset because she was keen to do well.

106. We considered that it was not inappropriate for Teacher B to use puppets as teaching aids (although we did have some misgivings about the analogy of what happened when pupils failed their tests). Although it may well have been that some pupils did not find the use of puppets funny, we did note in particular that when we questioned The Child, she made no reference to the puppets. We considered that had she been frightened by their use or by Teacher B in general, this would be a dominant thought which would have remained with her and which she would have been quick to mention to us.

107. Thus, we did not consider that the conduct described did have the effect of creating a hostile or intimidating environment of the type envisaged by the provisions of the Equality Act. In any event, even if it did, we did not consider that it was reasonable to have concluded that the behaviour had that effect, which we would categorise as an appropriate teaching environment.

108. We had no hesitation in concluding that the conduct of Teacher B did not fall within the definition of harassment set down by the Equality Act, and no hesitation in dismissing this claim.

Discrimination arising from disability

109. The claimant claims that the failure to allow The Child to attend the ski-ing trip in March 2016 amounts to unfavourable treatment arising from disability contrary to section 15 of the Equality Act 2010.

110. We accepted Teacher A's evidence that on the morning of 29 February, he had asked The Child if she was attending the ski trip, and that he had responded by saying that he would have to speak to her mother about it. This accords with the e-mail which Teacher A sent setting out his concerns and advising that he was reluctant to take The Child ski-ing the next day. His e-mail concluded, "If you are available to discuss this today I would greatly appreciate it. I can be contacted on the school line and I am about after school".

111. Solicitor for Claimant submitted that the decision not to permit her to attend had effectively been made, given that was the outcome that Teacher A intended, that he had hoped that The claimant would contact him to withdraw The Child from the trip, and his actions in sending the e-mail had exactly the effect of preventing her attendance at the ski trip. Counsel for the RB submitted that, for the purposes of the legal test, there was no decision and therefore no "treatment".

112. We have found, as a finding in fact, that Teacher A had not refused to allow The Child to attend the ski trip. We concluded, at the very least, that The claimant should have taken up the offer to discuss the issue and that she over-reacted by coming in to the school with a view to removing The Child from the school. Had she come in to discuss the issue, consideration could have been given to alternatives, or she may have come to understand the staff's concerns better.

113. However, if we were to have accepted that Teacher A had refused to allow The Child on the trip, we would have accepted that this was unfavourable treatment arising in consequence of her disability. We did not accept Counsel for the RB's submission that the treatment was not unfavourable, and we did not consider that the case of *Trustees of Swansea University Pension Scheme v Williams* [2015]ICR 1197 supported his submission. That decision essentially confirms that unfavourable treatment equates to disadvantage or detriment, although treatment is not unfavourable simply because it could have been more favourable. We accepted Solicitor for Claimant's submission that Counsel for the RB's rationale for arguing that the treatment was not unfavourable, was in fact to argue that it was objectively justified, as a proportionate means of achieving a legitimate aim.

114. It was however generally agreed it is an objective test, and we took the view that withdrawal from the ski trip would quite clearly and objectively have been unfavourable treatment, because The Child would not have been able to do something which others could. This was clear from the fact that she was so upset that she might not be able to go. We were clear that had The Child not been permitted to attend the ski trip, that would have been unfavourable treatment.

115. We were clear too that the treatment would have been in consequence of The Child's disability. We noted that Teacher A gave two reasons, one which related to her asthma, and another which, arguably, related to her dyslexia. We accepted Solicitor for Claimant's submission that it would not be a legitimate aim to use a pupil's falling behind in school work to exclude them from a school trip. However, we took the view that the proper reading of the situation was that Teacher A was presenting it as an opportunity for The Child to catch up in response to concerns about The Child's progress, and that had it not been for the concerns about the asthma, he would not have refused to let her go for this reason alone.

116. In any event, we would have concluded, had we found that there had been "treatment" at all, that it would have been objectively justified. Solicitor for Claimant argued that while the desire to safeguard a pupil's health and safety could be a legitimate aim, here there was no evidence to support that legitimate aim, beyond "bald assertions of risk unsupported by evidence".

117. He said this was because no risk assessment which was specific either to the activity or to The Child herself had been produced. The risk assessment which was produced was deficient and did not support a withdrawal from the ski-trip, so risks had not been quantified and no consideration had been given to what measures might be taken to mitigate the risks, and there were no discussions with pupil, parent or medical advisers. There was a failure to comply with the requirements of the technical guidance to clearly specify the risks.

118. We did not accept Solicitor for Claimant's submission in this regard. While we accepted that it was for the school to justify the treatment, we concluded that there was evidence to support their decision. We accepted Teacher A's evidence that a general risk assessment had been undertaken in respect of outdoor trips, that a general risk assessment had been undertaken for ski trips in particular. We accepted that he had used these templates to produce a specific risk assessment for the ski trip which was due to take place on 1 March, because he said that he had to have this signed off by Teacher G, head of pastoral care. It became apparent that the particular risk assessment that was lodged was not in fact a copy of the risk assessment which he was referring to in oral evidence, but we accepted his evidence that one had been undertaken.

119. We agreed with Teacher A that this should be a "dynamic" document in any event, and that he was giving consideration to the general and specific risks in the run up to the day planned for the ski-trip. That was clear from the fact that four dates were proposed for ski-trips but that consideration was always given for example to the weather and the decision could change at the very last minute. Clearly the circumstances of the risk to a particular child could also change over time. The risk assessment was constantly being updated based on the information which was coming to him. It had to be responsive to both the group and the individuals in the group. We considered that to be best practice.

120. In particular, we did not accept Solicitor for Claimant's submission that simply because there was no piece of paper lodged which could be proved to be the specific risk assessment to which Teacher A was referring, that meant that the school had failed to show the rational connection between the measure (of not allowing her to go on the trip) and the aim (protecting her health and safety). Taking that argument to its logical conclusion, that could result in a teacher who knew of risks or dangers to a particular child but who could not produce a piece of paper to support their decision having to conclude that they would require to take the child with them because they would otherwise be unable to justify their decision.

121. In support of his submission, Solicitor for Claimant relied on the decision of Preston County Court of 2002 under similar provisions of the DDA, *White v Clitheroe Royal Grammar School*, highlighting the factual similarities. However, we were of the view that the similarities were superficial, and that case could be easily distinguished from this. This was not least because in that case the decision to exclude the child from a ski-ing trip was found to be a "knee jerk" reaction, there was no risk assessment undertaken at all, there was no attempt to consult with the child or parents, there was a failure to obtain a report from the child's medical advisers despite numerous offers, and the decision in that case was said to be "finely balanced".

122. We considered that Teacher A took his obligations for the safety of his pupils very seriously indeed. His decision was not "knee-jerk". We considered that the fact that the parents had previously stressed (on more than one occasion) that The Child's asthma could result in death made him understandably particularly concerned for The Child's safety. The Child had been in hospital relatively recently. He said that he did not think she looked well that day. She had recently asked to be excused from PE classes. In addition, he was concerned that the weather forecast might mean that The Child would get cold and wet, and he knew that The Child's asthma could be triggered by the cold virus, but also by sitting around in damp clothes or shoes. However, other indications at that time were that both stress and exercise were also triggers.

123. We noted too that The claimant had said in her evidence that, after the lung infection, in a letter dated 17 February 2016, that her husband did not trust the PE staff and it was for that reason that they did not want The Child doing PE at that time. We considered it disingenuous of her to have claimed that her husband did not trust the PE staff, but to have been quite happy for other members of staff to take The Child ski-ing despite their legitimate concerns. Further, no medical report had been produced because for some reason The claimant had said that one should not be sent in by The Child's doctor (although she did not explain why). In the absence of any medical report, the school sought further advice from their medical advisers and when that was not possible from the Asthma Helpline.

124. We accept that the attempt to discuss the situation with The claimant was last minute, which might not give The claimant time to arrange herself to attend the trip, which Teacher A says he thought was a possible way of addressing the problem. However, Teacher A was attempting to consult with The claimant

when a number of factors came together that very day to point to increased risks, not least the information that he had just obtained about the weather.

125. For these reasons, we considered that even if Teacher A had concluded that The Child was not to attend the ski trip, that was a decision which would have been objectively justifiable.

126. However, we find that Teacher A had not as a matter of fact refused to allow The Child to attend, and therefore we concluded that there was no unfavourable treatment. Again, we had no hesitation in dismissing that claim.

Failure to make reasonable adjustments

127. The claimant argues that there was a failure on the part of the school to comply with the duty to make reasonable adjustments in contravention of section 21 of the Equality Act in respect of the failure to take such steps as was reasonable in relation to The Child's dyslexia.

128. The respondent has conceded that it would have been a reasonable adjustment to have drawn up an individual educational plan at the beginning of the academic year 2013/2014. In so doing, they conceded that The Child had suffered a substantial disadvantage.

129. Witness A indicated in cross examination that he would not have expected the school to have drawn up an IEP earlier, although he considered that the signs that The Child may be dyslexic should have been apparent to the school. It was generally agreed therefore that the period under scrutiny in respect of any failures was from August 2013, until February 2016. We accepted Counsel for the RB's submission that that was the beginning of February, when the IEP was put in place, and there was a referral to the Educational Psychologist.

130. However, the claimant did not consider that the school had sufficiently discharged their duty by that adjustment alone. We therefore went on to consider whether or not there were other reasonable adjustments which we considered that the school should have implemented.

131. We considered in particular whether the additional adjustments contended for by the claimant would have been reasonable. Those were that:

    a. the school should have provided specialist tuition from a teacher qualified in teaching pupils with dyslexia;
    b. the school to put in place a specific programme of support for the child focussing on her phonics;
    c. the school to put in place a specific programme of support based on the assessment of her profile of needs, such as the Active Literacy Kit".

132. 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 resources of the school and the availability of financial or other assistance (noting at paragraph 6.35 that it is recognised that it is more likely to be reasonable for a school with substantial financial resources to make an adjustment than it is for an independent school with fewer resources); the financial and other costs of making the adjustment (noting at paragraph 6.38 that includes the cost of staff and other resources); the practicability of the adjustment; and the effect of the disability on the individual.

133. In considering whether the school had properly complied with their duty to make reasonable adjustments, we did consider that it was not irrelevant that The Child had significant absences. We noted that there was a high number of days of absence over the period when The Child was at the school.

134. We appreciated that some of these absences related to The Child's asthma and therefore were unavoidable. We noted that a number of absences related to The Child competing in riding competitions. However, we noted that a number of absences/lateness were for reasons which could apparently have been avoided. In particular, we noted from the e-mails lodged by The claimant which had been sent to the school to explain absences/lateness that some of the absences were because The Child was out late the night before (C429, C432, C446, C458, 462, 478) or related to The claimant's own work commitments (C437, 439, 467, 437, 479, 483, 492) including attending her work Christmas party (C494) or in anticipation of long days ahead (C438, 463), and to attend a holiday.

135. We noted that Witness A agreed that absences were likely to have an impact on a child's learning, although he said that the indications of dyslexia were there, even taking account of the absences. We therefore gave careful consideration to the steps which the school had taken from the beginning of the school year 2013/14, and to what adjustments ought to have been in place.

136. We were aware that the school's position (from the apology) was that The Child ought to have been referred to an educational psychologist at the start of school year 2013-14; that would probably have revealed at that time that The Child had dyslexia; that in turn would have precipitated the creation of an IEP; and that enhanced support would have been put in place. Counsel for the RB sought to convince us that what the school had otherwise put in place was what they would have put in place anyway, even if there had been a diagnosis of dyslexia.

137. Witness A said that it was not clear to him from the paperwork which he considered what exactly was being done, and he was not given the opportunity to speak to the staff at the school to find out what exactly they had done. We consider that it would have been to the school's benefit to have co-operated with Witness A. However, having now read the statements of the school's witnesses he said that this did not affect his conclusion.

138. Although he did not have the detail, he acknowledged that the school had put in place additional support and had used various resources available which

would assist children who are dyslexic or have dyslexic traits, such as Alpha to Omega and Wordshark. He was of the view that "it is clear that The Child's learning difficulties were recognised following her admission to The school School. It is also clear that the school did assess and make provision for The Child's learning difficulties during her period at the school. School reports refer to The Child receiving differentiated work and the fact that she was also in small classes (8-10 pupils) which would have helped. Insofar as one can tell from some of the IEPs there were some appropriate targets set". It became apparent in cross-examination that he was referring to the group educational plans, rather than an IEP.

139. We therefore do acknowledge from Witness A's evidence, and from the extensive papers we have considered and the evidence which we heard that by and large the school had identified and were seeking to address additional support needs of The Child from the outset of her time at the school.

140. Witness A indicated that an IEP was essential, and it was essential in particular because it allowed the school to track the pupil's progress and it was only by tracking and monitoring that a school could tell whether a child was progressing and in particular whether the particular resources in place were working or not. If they were not working for the particular child, then they would require to be adjusted.

141. In answer to a question of Witness A whether he would expect the attainment gap to narrow if the appropriate provision was put in place, he said not always, but if the correct measures were in place, then even if the gap did not narrow, at least these would prevent the gap widening. We noted Witness B's evidence was that spelling difficulties might be intractable.

142. In this case, the indications were that the gap was widening during her time at the school. The failure to have an IEP meant that the details of the additional support were not recorded, and The Child's progress was not monitored, the additional support which was afforded was not properly assessed, and there was no opportunity to consider alternative support mechanisms which may have been more suited to The Child. To that extent at least, that is to the extent that there was a failure to track progress and to create the conditions to adjust and tailor provision, it is clear that The Child was substantially disadvantaged, which the school rightly now accept.

143. We did not accept however that beyond that we could say what impact the IEP might have had, as we did not have sufficient evidence to allow even a specialist tribunal to determine that. We did not accept that the evidence which showed progress could necessarily be attributed exclusively to the diagnosis of dyslexia, as very many other factors could have contributed to the improvement. However, we did not consider that to be relevant to our determination.

144. We did however give careful consideration to whether or not the programme of support which the school had put in place was otherwise sufficient, absent the

diagnosis of dyslexia, acknowledging that the school accepted that an IEP should have been put in place.

145. If there had been a diagnosis of dyslexia, the question is what would they have done differently? What is clear is that with an IEP The Child's progress would have been monitored closely, and if the view was taken that the particular approach was not working, then alternative support methods could have been considered. Otherwise however we find that the school was doing what other schools would do where additional support needs had been diagnosed, short of a formal diagnosis of dyslexia. The approach that was in fact being taken was largely consistent with the standard practice to dealing with literacy concerns at this stage, as we heard from Witness B. From the evidence that we heard, we considered that the approach taken to addressing The Child's additional support needs (absent a diagnosis of dyslexia) conformed with the standard practice, that is that a support for learning teacher will work collaboratively with the class room teacher. Although we could not assess the quality of the support being given, the same would be true of support given by other schools.

146. In our assessment of the extent to which the adjustments made for The Child could be said to have been reasonable (in the absence of the IEP), we had in mind the recommendations made by Doctor A, the educational psychologist who made a formal diagnosis of dyslexia, and who made certain recommendations regarding the approach to teaching The Child (C134). Apart from her first recommendation (that teachers should be made aware of her dyslexia) Head Teacher agreed, in response to a question, that the school had in fact been taking her recommended approach, namely:
    - Literacy teaching should be structured, multisensory and targeted specifically to The Child's needs
    - Phonological skills to be developed....
    - Individual and small group teaching to help develop core literacy skills
    - Reading every day to help build up her confidence
    - Listening to recorded books while following the text as this will help with fluency and accuracy
    - Paired and shared reading activities to extending comprehension skills and in making reading enjoyable and fun
    - Using the look, cover, spell, check method of learning spelling words
    - Encouraging use of keyboarding skills to benefit from technology available....
    - Working with a peer for topics/investigations/projects and peer tutoring and cooperative learning situations
    - A structured teaching approach which includes scaffolding and reciprocal teaching strategies to help develop success and self-confidence in learning and independent learning skills.

147. Given these findings, we were of the view that the school did implement a programme of support consistent with the additional support needs which the school had identified, and the school had in place a specific programme of

support for the child, which included attention to phonics and was based on the assessment of her profile of needs.

148. As was recognised, the school failed however to put in place an IEP in August 2013, and had they done so, that may well have resulted in an alternative programme of support being implemented based on the progress reports which that would have highlighted. We find that the school has failed to that extent, but we do not consider that there were further reasonable adjustments which we could say were not in place which resulted in substantial disadvantage to The Child.

149. We also considered whether the school should have provided specialist tuition from a teacher qualified in teaching pupils with dyslexia. We accepted that Teacher D had a qualification in Specific Learning Difficulties, and understood that she had completed modules specifically focusing on dyslexia. To that extent, The Child did have specialist tuition from such a teacher during her time at the school. We noted that once the IEP was created in January 2016, that The Child got lessons from Teacher D in a one to one setting as recorded in the learning journal. We noted from the children's plan created for The Child at her current school that as well as input from the classroom teacher, there was input from a support for learning assistant and a support for learning teacher. To the extent that what is suggested is that there should have been further provision by a specialist dyslexia teacher beyond what The Child would have got had an IEP been created at the relevant time, we did not consider that to be a reasonable adjustment, taking account of all relevant factors, including those discussed in paragraph 132.

Remedies

150. The claimant sought the following remedies:
    i. Order the responsible body to issue a written apology to The Child and to her parents, the terms of which should be in compliance with the SPSO's guidance on apology;
    ii. Order the responsible body to undertake staff training on the Equality Act and inclusion in schools, delivered by an external third party expert in such matters; and
    iii. Order the responsible body to review and revise school policies on additional support for learning, school trips and its accessibility strategy, with assistance and input by an external third party expert in such matters.

151. Schedule 17, paragraph 9 sets out the powers of the Tribunal, namely
    (1) This paragraph applies if the Tribunal finds the contravention has occurred;
    (2) The Tribunal may make such order as it thinks fit;
    (3) The power under sub-paragraph (2) –
        a. may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates;

b. does not include power to order the payment of compensation.

152. During the course of the hearing, the Convenor raised the question whether, in light of the wording of Schedule 17 setting out the limits of the Tribunal's powers, the Tribunal had the power to make the orders which the claimant sought. This is particularly given the reference to orders which may reduce the adverse effect on the child to which the claim relates. In this case, the child is no longer at the school and therefore the claimant will not benefit from any orders, and they will not prevent further unlawful discrimination in relation to the particular child concerned. Solicitor for Claimant and Counsel for the RB addressed these issues in their submissions.

153. Solicitor for Claimant submitted that this provision does not restrict the Tribunal to making orders only with a view to reducing adverse effects on the particular child. He relied on the Technical Guidance, para 8.27, which states that the tribunal may make any order that it thinks appropriate in that individual case, often with the intention of trying to remedy the damage done to the disabled person and to reduce any future disadvantages. He submitted that "often" does not mean "always", and that the plain reading of the Act is that the powers may be exercised in this way "in particular", but there is nothing which constrains the Tribunal to so doing and nothing else. He referred to the decision of the Tribunal, available on its website, DDC 03 02 2016, where the Tribunal made extensive orders relating to training and policy revision, despite refusing to order the child's readmission, to support his submission that this is not the practice of the Tribunal (although he conceded that it was only one of ten decisions published on the website that did so). He said that when the jurisdiction was transferred from the sheriff court, there was a significant amendment to the powers of this Tribunal, following a deliberate policy decision to change the scope of the orders which could be granted by the Tribunal.

154. In support of his argument he referred to the decision of the Upper Tribunal in England and Wales *ML v Tonbridge Grammar School*, [2012] UKUT 283 (AAC), a decision on a procedural point. In that case, Upper Tribunal Judge Rowland also expressed reservations at paragraph 21 as to whether orders, beyond a declaration or an order requiring a formal written apology, could be made against a school if the claimant's child had left the school because the claimant would not then have sufficient interest to enforce the order.

155. Solicitor for Claimant argued that, in Scotland, the claimant would have "sufficient interest" to enforce the order because she could ask the President to ensure that orders of the Tribunal had been complied with. If not satisfied they were, the President has powers to require a responsible body to explain their position, and if the President is still not satisfied then she can make a referral to Scottish Ministers under section 70 of the Education (Scotland) Act 1980. Here, the claimant therefore does have "sufficient interest" to enforce the decision, because the matter would be in the public interest and a complaint would be made by the President.

156. However, if the Tribunal are not with him on that, he argues, esto, that, referring to paragraph 27 of the *ML* decision, that an obligation to take appropriate action may also be imposed by a declaration, or even a mere finding, made in the proceedings. Thus he said a declaration having essentially the same effect as an order could be made.

157. Counsel for the RB argued that the jurisdiction conferred by the primary legislation cannot be expanded by provisions in the rules or by the practice of the Tribunal. The words of the statute are the starting place and here they cannot be given a broad literal meaning, as clearly the Tribunal cannot order anything it decides. The orders that it can make have to be closely connected with the discharge or explication of its jurisdiction, which is to deal with individual applications. He submitted that the powers are to make declaratory orders, or remedial orders to put things right for the claimant. Otherwise an application to this Tribunal becomes a public enquiry into the school as a whole that is not what is intended.

158. In this case, since the child has left the school, there are no remedial orders to make. He argued that if the Tribunal makes the orders asked for in (b) and (c) it would exceed its jurisdiction. However, in any event, it would be inappropriate to make the orders sought, given that the child has left the school, the school has a new head teacher who oversaw the IEP being put in place and the school has overhauled its policies in many respects. It also had a good, recent report from HMIE and the Care Commission (November 2015). It has also had a stern and expensive reminder about equality law as a result of these proceedings. Making orders would put the school to further expense without any demonstrable gains for the pupils or society more generally.

159. We had some misgivings about Solicitor for Claimant's submission, but we have concluded that we do not require to take a definitive view on the exact limits of our powers in this case. This is because we are not minded in any event to grant the orders which Solicitor for Claimant seeks, even if we have the power to do so.

160. This is primarily because we are aware that, as a result of the claimant's complaints to Education Scotland, covering the same ground, a special inspection of the school was undertaken by HM Inspectors. This included consideration of a substantial amount of evidence and a visit to the school on 14 September 2014, with a subsequent report provided to Scottish ministers. That special inspection was instructed to examine the school's current policies and practices, and included the school's policies and practices around the provision of additional support for learning and the quality of that learning support, the quality of the school's individual learning plans for young people and the tracking of the learners' progress and the school's policies and practices on medicine handling (C217-226).

161. It concluded that, based on all the available sources of evidence relevant to the child's time at the school, while the school's support for learning required improvement and that weaknesses in provision may have led to individual needs not being identified or appropriately supported, the school had

recognised the need to improve and had taken significant steps to improve practice. The Scottish Ministers were therefore not satisfied that the school was objectionable on any of the grounds set out in s.99(1A) of the 1980 Act.

162. Unlike the inspectors, we have not had the opportunity to examine in detail the quality of the current procedures, and in particular the current practices in the school, and in the particular circumstances of this case, we have decided not to make the orders sought.

163. We were conscious too, that the orders sought were very wide-ranging, going well beyond the focus of concern of this particular case. We thought that the "acid test" was what might be expected for a child who went to the school now. In so far as we had evidence to answer that question, we were of the view that the IEP that was produced for The Child in January 2016 was appropriate and reasonable with reasonably specific targets, and it compared positively with the one in place for The Child at her new school (C193).

164. Having said that, we accept that the concerns which Solicitor for Claimant has raised about have school's revised policies which were lodged have some validity. He gave the example of the school trips policy which makes no mention of inclusion of disabled pupils and the checklist at appendix 4 likewise says nothing on the subject of making checks on accessibility or suitability for disabled pupils, or reasonable adjustments (RB 429). He also set out a number of valid concerns about the school's current accessibility strategy (C231-246). He submitted that the need for staff training was evidenced by an apparent lack of understanding of the interplay between the various plans and policies and the fact that there was little understanding of how the accessibility strategy or support for learning policy impacted on classroom practice.

165. We had no difficulty with Solicitor for Claimant's alternative submission (and nor did Counsel for the RB) that the Tribunal had the power to make a declaration, or even a finding, which would create an obligation to take appropriate action, and that we could thus make a finding that a policy was unlawful which would imply an obligation to amend a policy.

166. Notwithstanding, we make no specific findings of unlawfulness beyond the declaration that the school was in breach of its reasonable adjustment duty in the particular circumstances of this case. However, we would expect the school to revise their policies to address the deficiencies which have been identified, and in particular to review and update their accessibility strategy and to ensure teachers are aware of the implications of that strategy for their classroom practice.

167. With regard to the particular issues which this case raises, we would expect that in future teachers would be supported to develop their knowledge of recognising and teaching in relation to dyslexia, and that there should be a system in place for ensuring an appropriate "dyslexia pathway" for pupils. That would include reviewing or assessing current practice against the staged intervention approach recommended in the Supporting Children's Learning Code of Practice (revised edition), specifically Chapter 3.

168. We clearly do have a power to require an apology. Counsel for the RB argued that the apology which had been given was appropriate and sufficient; that it conforms to SPSO guidance; that the school cannot go further than the facts which they admit. He said that it was the spirit of the apology which was most important.

169. Solicitor for Claimant submitted that the apology did not go far enough; this was because it seeks to minimise the impact on The Child of the school's failures; nor does not conform to the guidance on apology issued by the SPSO.

170. We gave careful consideration to the terms of the apology and whether it went far enough. We have found above, that the school has failed in its duty to make a reasonable adjustment for The Child, specifically in relation to the failure to create an IEP in August 2013. We have accepted that the additional support that was put in place was a standard response to the identification of literacy concerns, absent a diagnosis of dyslexia.

171. The school now accepts that at the start of the school year 2013-14, The Child ought to have referred for assessment by an educational psychologist, which would probably have revealed The Child's dyslexia, which would have resulted in the creation of an IEP, in turn resulting in enhanced support and improved communication with the parents.

172. We considered whether the apology was deficient in that it stated that they "do not know whether The Child would have benefitted from an earlier diagnosis and IEP". We heard concerns about early "labelling", and while Witness A did support early identification, he said that there was no "cure" for dyslexia, so to that extent it is true to say that the benefit to The Child could not be known. However, we heard that The Child would have benefitted at least to the extent that an IEP requires monitoring of progress. Witness A said in evidence that there is an expectation that if the correct support is in place there would be an improvement or at least no deterioration, and if there was no improvement, that alternative support measures would have been considered. However, the school recognise that in their apology, which states that they are sorry that "that she missed out on the chance of having a provision tailored with the diagnosis in mind".

173. With regard to meeting the SPSO guidelines, we were aware that one rationale for an apology is to repair a damaged relationship. In this case, the school had embarked on a course of action to rectify previous failings but the claimant did not see that to fruition. In this case, The Child having moved schools, no practical benefit is served to her by the apology, as there is no continuing relationship. Rather in this case the apology serves as a vindication of the claimant, and to that extent it serves its purpose.

174. The Tribunal concludes therefore that this apology does sufficiently cover the issues where we consider that the school has failed. We were of the view that, in general terms, the apology meets the requirements of the SPSO guidance,

particularly because it confirms that the school's ASN provision has now been entirely reconstituted with a different structure under new leadership. It states, "we are now more alive than ever to the need for early assessment of girls who show signs of dyslexia". This case has been a valuable lesson to the school, and we have no doubt that future pupils will have benefited from the actions which have resulted.