DECISION OF THE TRIBUNAL

1. Claim

The claim alleges the Responsible Body discriminated against the child by refusing to admit her into the year J1 (equivalent to primary one) of an independent School contrary to section 85(1) of the Equality Act 2010 (hereinafter referred to as "the act").

2. Preliminary Issues

A preliminary hearing was held in November to determine (first) whether the actions of the Responsible Body in refusing to allow the child to be admitted to J1 at School A fell to be considered in terms of s85 (1) of the Equality Act and, (second) if that was the case whether the arrangements for admission amounted to a "permitted form of selection" in terms of Schedule 11, para 8(3) (b) of the act. A joint minute of the agreed questions of law was lodged (T37-38) as well as a joint agreed statement of facts. The preliminary hearing proceeded on the basis of those agreed facts with submissions being made by both parties. The Tribunal issued a decision following the preliminary hearing that (first) the Claim is concerned with the arrangements for admission of the child to School and consequently requires to be considered in terms of s 85(1) (a-c) of the Equality Act 2010 and, (second) the criteria for a permitted form of selection in terms of paragraph 8(3) (b) of Schedule 11 of the Equality Act has not been met.

Parties and the Tribunal were in agreement that given the nature of the claim, whether as a matter of fact and law there has been discrimination, there would be no merit in seeking the views of the child.

In January a request was received from the Claimant's Solicitor to postpone the hearing. Having taken received representations opposing this from the Responsible Body's Solicitor the request was refused. A direction was issued confirming the request was refused and the reasons.

At the outset of the hearing Solicitor for Claimant confirmed parties' views of the matters under consideration. He advised that parties were agreed given the decision at the preliminary hearing that the child had suffered unfavourable treatment due to a disability. The questions for the Tribunal were whether the treatment could be justified, in pursuance of a legitimate aim and, if so, was the means of achieving that legitimate aim proportionate. In considering these matters the duty to make reasonable adjustments required to be considered and parties were in agreement that the burden was on the Responsible Body.

3. The Decision

The Responsible Body has unlawfully discriminated against the child contrary to section 85(1) of the Equality Act 2010. The Responsible Body is ordered in terms of schedule 17 paragraph 9 of the Equality Act to :-

a) Apologise to the child and her parents for the unlawful discrimination in writing, said apology to conform to the terms of the Scottish Public Services Ombudsman's (SPSO) guidance on apologies within one calendar month of receipt of this decision.
b) Ensure all staff and managers at School A with responsibility for admission undergo training on disability awareness and inclusion prior to the next school year starting in August 2016.
c) Amend its admission policy and accessibility strategy, having regard to the terms of an equality impact assessment to be carried out by an independent third party. The terms of said revised policies must comply with the Supporting Children's Learning Code of Practice and the Scottish Government guidance document "Planning improvements for disabled pupils' access to education: Guidance for education authorities, independent and grant-aided schools." The revised policy and strategy should be in place by the end of the school year (June 2016).

4. Reasons for Decision

Agreed Facts

A statement of agreed facts was submitted by parties and is contained in the bundle at T49-64; accordingly it is unnecessary to repeat those agreed facts in this decision. We set out some of the agreed facts below as are necessary to fully understand this decision:-

1. The child is five years old and is a disabled person within the meaning of s6 of the Equality Act 2010
2. The Responsible Body trades as School A. There are three parts to School A ("the College"), a Nursery ("the Nursery"), a Junior School ("the Junior School") and a Senior School.
3. The child attended the Nursery initially in April 2013 but had difficulty settling and her entry was deferred. She began attending again in January 2014.
4. Until the summer of 2015 the College was run in partnership with the local authority. The arrangement required all eligible applicants to be admitted to the Nursery.
5. Parents who wish their children to join the Junior School require to apply.
6. In January 2015 the child's parents applied for the child to be admitted to the Junior School.
7. The College's Admissions Policy provides that when prospective pupils of the Junior School attend the Nursery School, "entry to J1 is based on on-going monitoring in Nursery and Junior School." Pupils other than the child have failed this assessment.
8. The child did not satisfy the Responsible Body from her performance in Nursery that the required standard for admission to the Junior School had been met. The Responsible Body gave the child a further opportunity to satisfy them that she had reached the required level by attending an assessment day. An assessment day was carried out during January 2015.
9. A number of adjustments were made to the "assessment day" to ensure the child was given a fair opportunity to satisfy the Responsible Body that she had reached the requisite level to be offered a place.
10. The child did not engage with the activities asked of her during the assessment process in full. The assessment report notes that "despite adjustments the child has

not engaged in any required task for our assessment purposes, and does not therefore qualify for entry to J1 of School A".

11. The Responsible Body decided that the child did not demonstrate the necessary skills to pass the entrance assessment process as set out in the Admissions Policy.
12. The child was not admitted to the Junior School.
13. Following the decision to refuse the child entry to the Junior School, she transferred to The L Nursery, which is an independent mainstream pre-school provision.
14. From August 2015 the child has been a pupil at School B, a mainstream independent school in D.

Very few of the facts in this matter were in dispute and we found the further facts established to enable us to reach our conclusions:-

1. No formal support plan was in place for the child at the Nursery.
2. The nursery took numerous measures to support the child. These are described in the witness statements from Witness C (R274) and Witness D (R231). In taking the described measures they implemented suggestions from the child's parents, as well as professionals in speech and language therapy and occupational therapy.
3. Following the assessment of all potential entrants into J1 there is an assessment meeting at which it is determined which children will be admitted to J1.
4. Only the children who have performed best during the assessment process are admitted.
5. Outcome letters are issued to the successful applicants for places in J1 in early February of each academic year.
6. In deciding whether to send children to the school parents primarily look at exam results and HMIE inspections.
7. In late January or early February 2015 the school prepared a document (R111 – the child's needs document) estimating the level of support the child would require if admitted to J1 and adjustments to the premises that they believed would be required. This document significantly overestimates the child's needs.
8. The support the child has received in nursery or school since leaving School A is significantly less than was estimated by the Responsible Body as necessary. In particular the support provided at her current school as specified at C82 does not include many of the measures suggested in the child's needs document.
9. The Responsible Body's accessibility strategy was prepared in 2007. As of the dates of the hearing the strategy had not been reviewed since then
10. A request for the child to be re-assessed was refused by the Responsible Body in May 2016.
11. The child has made significant progress in her learning since leaving the nursery, both at The L Nursery and School B.
12. The child is well placed in her current school.

In reaching our decision we took into account the evidence of the six witnesses and the documents in the bundle. Both parties were represented with submissions substantially submitted in writing but supplemented orally. Consequently those submissions are not set out in full below but referred to where appropriate. The witnesses the Tribunal heard from were as undernoted and as the majority of them produced written statements which have

been included in the bundle their evidence is not set out at any length below although parts are referred to where appropriate :-

Witness A, a Senior Education Psychologist with Council A Council. A report from Witness A is in the bundle at T26. Witness A also commented on various other documents including witness statements detailing supports and adjustments made for the child while attending the nursery.

Witness C, Head of Nursery whose statements are at R188, R241 and R274 in the bundle.

Witness D, Master of Education in Special Needs and Inclusive Education whose statements are at R197 and R231,

Witness E, Head of Junior Department and Primary Teacher in the College's junior school whose statements are at R205 and R237.

Witness B, Principal of the College whose statement is at R214.

The Claimant and the father of the child, lodged a joint written statement (along with his wife the child's mother) at C71 and The Claimant also gave evidence in person.

There was broad agreement between parties as to the relevant law. It was agreed that the Responsible Body had treated the child unfavourably because of something arising in consequence of her disability contrary to section 15(1)(a) of the act, the unfavourable treatment being the child not being allowed to join J1 at the school. Of course if the school could show that the treatment was a proportionate means of achieving a legitimate aim in terms of section 15(1) (b) of the act then the child will not have been discriminated against.

Accordingly we require to determine whether the treatment could be justified. We were referred by Solicitor for Claimant to the Supreme Court decision in Akerman-Liivingstone v Aster Communities Ltd [2015] UKSC15 as authority that a four-stage structured approach should be taken and Solicitor for Responsible Body agreed with this approach. The four stages to be considered are:-

A. Is the objective sufficiently important to justify limiting a fundamental right?
B. Is the measure rationally connected to the objective?
C. Are the means chosen no more than is necessary to accomplish the objective?
D. Is the disadvantage caused to the claimant not disproportionate to the aims pursued?

We considered each of these in turn. Notwithstanding our finding of discrimination we consider it appropriate to record our findings on all aspects of the four stage test.

A. Is the objective sufficiently important to justify limiting a fundamental right?

Two possible legitimate aims were suggested by the Responsible Body. Firstly there was the aim of maintaining academic standards in the school, the school being a selective school that requires all applicants to have reached a particular academic level. The second

legitimate aim suggested was for the health and safety and well-being of the child and others.

In relation to both these aims we are of the view that they are sufficiently important to justify limiting the fundamental right not to be discriminated against. In relation to the former we heard evidence of the importance of maintaining high academic standards within the school in attracting parents to send their children to the school and consequently funding the school. Witness B indicated that the key things parents look to in considering the school are exam results and HMIE inspections. The law entitles independent schools, prima facie at least, to be selective in their intake and given the potential consequences for the school in not maintaining academic standards we had no difficulty in reaching this conclusion.

Similarly we have no difficulty in concluding that health & safety and well-being of pupils is sufficiently important, indeed we could not think of anything more important than the health and safety of pupils within a school.

Support for our conclusion is found in the Technical Guidance for Schools in Scotland produced by the Equality and Human Rights Commission (hereinafter referred to as "the technical guidance") indicates at paragraph 5.34 that both these aims may be legitimate.

B. <u>Is the measure rationally connected to the objective?</u>

In relation to the objective of maintaining academic standards Solicitor for Claimant's submissions were very broadly that there was no evidence to connect the child's refusal of admission with maintaining academic standards. Solicitor for Responsible Body on the other hand submitted that the admissions process was linked to this objective. The academic standards are set out in T17. He argued the standards are used to ensure only the best applicants are offered a place and that the assessment criteria are the best way to assess skills and aptitudes for the school. He stated "The Responsible Body insists on this standard to maintain a high level of educational achievement. The Responsible Body made as many adjustments as they could to ensure the child was given a fair opportunity to demonstrate her skills… She failed to meet the requisite standard. The child had not reached the standard that would allow her admission into J1 in comparison to others. Para 5.34 of the Guidance notes that maintaining academic standards could be a legitimate aim. The legitimate aim was the maintenance of academic standards. Each of the criteria relied upon seeks to achieve that. The decision not to offer a place because the child had not reached that standard was a proportionate means of achieving that legitimate aim. There was no lesser way in which this aim could have been achieved. Simply to have offered the child a place in Junior School (in preference to other candidates who had performed better than the child) despite the child's performance in the entrance assessment process (not least given her performance was considerably less than the other candidates) would have frustrated the objective. There was no middle ground.

In our considered view the measure was rationally connected to the objective. The technical guidance accepts that maintaining academic standards can be a legitimate aim. The Responsible Body's witnesses were clear that only the best pupils would be admitted to J1 and a method is required to ascertain who the best pupils are. It seemed to us that when considering pre-school children the factors listed in the assessment document at T17 were an appropriate method to work out who the best potential pupils are and therefor if a child

failed that assessment process, as the child did by some way according to Witness B, then the child could not be expected to be admitted to J1. Accordingly we find that the measure of refusing entry to the child is rationally connected to the objective of maintaining academic standards.

In relation to the aim of protecting the health & safety and well-being of pupils Solicitor for Claimant submitted that there was no evidence to connect the measure of refusing the child admission to the health and safety and wellbeing of pupils. In particular Solicitor for Claimant argued:-

"The measure – refusing [the child] admission to Junior School – is not rationally connected to these aims. They cannot be, because there is no evidence to connect them. The Principal conceded that none of these concerns were based upon a risk assessment. These risks had therefore not been quantified, and no consideration had been given to what measures might be required in order to mitigate or obviate the risks identified. At nursery, where these issues are said to have been causing such concern, no risk assessment had been carried out and the school were content to have [the child] return for a further year. The Principal conceded that the provision of support staff would likely be one of the control measures in any such risk assessment, but that has not been taken into account, despite The Claimant's comments on this specific issue (R121).
The technical guidance at (5.34) identifies that it can be relevant to consider "ensuring the health and safety of pupils and staff, provided that risks are clearly specified;" – that has not taken place here.

The technical guidance at (6.48) also states that "Suitable and sufficient risk assessments should be used to help the school to determine where risks are likely to arise and what action can be taken to minimise those risks. Risk assessments should be specific to the individual pupil and the activities in question. Proportionate risk management relevant to the disability should be an ongoing process throughout a disabled pupil's time at the school." – none of this has taken place, and the school are simply not in a position to demonstrate any objective connection between health and safety / wellbeing & welfare and the school's treatment of [the child]".

Solicitor for Responsible Body argued that even if the child had passed the entrance assessment it would still not have been possible to have offered the child a place in J1 as significant adjustments would be required. These adjustments being specified in the document beginning at R111 which we shall hereinafter refer to as the child's needs document. These changes it was suggested would fundamentally change the Junior School environment and impact on the child and other pupils. The cost would be extremely high and that combined with the impact of the adjustments on others was such that the adjustments were not reasonable.

We had significant difficulties with the child's needs document. It had been prepared at short notice for the purposes of an admissions meeting and while it may have some merit for planning purposes as a first attempt at considering what might be necessary to meet the child's needs should she be admitted to J1, it was some way short of a properly formed risk and needs based document of a standard suitable to meet this part of the test. Solicitor for Claimant went as far as suggesting that it had been put together in order to maximise the extent to which the adjustments might seem unreasonable. While we would not go that far

and are prepared to accept it was prepared with honorable intentions, its credibility as a plan to meet the child's needs in J1 was seriously undermined by the lack of risk assessment, recording of the child's progress and incidents of hitting other children or running away, input from Speech and Language Therapy or an Education Psychologist. Its lack of credibility as a sensible record of needs was further illustrated firstly by Witness A evidence that had the child attended a local authority school the level of support suggested would not be needed and secondly the evidence (The Claimant and C82) that since leaving the school the child had first attended a private Nursery and from primary 1 another private school and flourished without the need for anything approaching the level of support suggested. In relation to the matters specified in the document that were more clearly related to health and safety, rather than the child's needs, such as the requirement to lock her classroom or enclose the playground we would have expected a proper risk assessment illustrating the specific danger and options for removing or at least reducing the risk. Witness A for example was clear that in a Council A school classroom doors would not be locked but the handles would be at a higher level. While all the Responsible Body's witnesses maintained that the changes were absolutely necessary there was at least a concession by Witness B that it was a list of needs "at that time" rather than now.

Consequently on this point we had no difficulty in accepting Solicitor for Claimant's submissions in full. No risk assessments had been undertaken as suggested within the technical guidance and in our view the measure of not admitting the child was a very long way from being rationally connected to the objective of protecting the health & safety and well-being of pupils including the child.

C. <u>Are the means chosen no more than is necessary to accomplish this objective?</u>

The Solicitor for the claimants put this stage as follows "Could alternative measures have met the legitimate aim, without such a discriminatory effect? If proportionate alternative steps could have been taken, the unfavourable treatment cannot be justified. If reasonable adjustments could have been made instead, it will not be possible to show justification.
The provision, criterion or practice that the child experienced was the assessment process. The first stage of that process involved an ongoing assessment of children in the nursery setting, where the standard had not been demonstrated there was a second stage which normally took the form of an assessment day. Thereafter there would be an assessment meeting where entrants to the junior school were agreed. Who is offered a place is determined according to the assessment and how many places are available, with offers being issued to the parents of the children early in February of each year.

Given the first stage involved an ongoing assessment undertaken in the nursery the adjustments the school made to assist the child in the classroom were relevant to this stage. There is absolutely no doubt that the responsible body took numerous measures to assist the child and monitored and adjusted strategies throughout her time at the nursery. The measures were described in detail by Witness C and Witness D in their statements and oral evidence. The adjustments took account of the advice of the parents, of an occupational therapist, of Speech and Language Therapy Services and involved different strategies being used to engage the child. Notwithstanding those strategies the evidence was clear that at the first stage the child had not met the standard required by the school. None of the witnesses could point to any adjustment that could have made a difference. Witness A who, while a witness for the Claimant, was not connected with the Claimant or the Responsible

Body carefully reviewed the strategies and adjustments employed and indicated that the strategies in general felt appropriate but she couldn't comment on whether there was consistency or rigour in implementing the strategies. She like the other witnesses could not think of anything else that could have been done. Similarly we have already indicated in our preliminary determination that the School made reasonable adjustments to the second stage of the admissions process with no alternative adjustments being suggested to us.

However in submissions Solicitor for Claimant referred to three further adjustments that he considered would have been reasonable. The first was that the child could have been assessed towards the end of the school year with a place reserved for the child and others placed on the waiting list. The second concerned the school's out of date accessibility strategy. Essentially Solicitor for Claimant argued that the strategy being 6 years out of date that "there ought to have been two full cycles of accessibility improvements since then…The accessibility strategy is the principal statutory mechanism (for independent sector) to identify and implement improvements to help pupils access the curriculum. All of this is indicative that this has been a low priority for the school, and gives the lie to the claim that the school takes its equality duties seriously. It also seriously undermines the basis on which the school attempt to justify their decision. Claims that they are not in a position (financially or practically) to implement reasonable adjustments have to been seen in the context of the anticipatory nature of those duties, and that the school have failed in their legal planning duties for inclusion and accessibility for the previous six years on the trot".

Thirdly there was what he described as adequate education planning for the child.

We will deal with each of these in turn. Firstly there was that the child could have been assessed towards the end of the school year. The context to this suggestion was that it was generally accepted that the in-class assessment process was more conducive to demonstrating that the child met the required standard. It was repeatedly suggested by witnesses for the Responsible Body that they were looking at readiness for J1. By allowing the child longer to reach the required standard there was a greater likelihood that the strategies put in place to enable the child to progress within J1 would be successful. Indeed some of the matters looked at in the assessment around making choices, working well with others and listening and following instructions can be related to maturity. It is within the Tribunal's specialist knowledge that children with social communication disorders can take longer to master these maturity related skills. Indeed the evidence from The Claimant and The L Nursery (C86) was that she had progressed enormously in these areas in a very short time after leaving School A. Accordingly there is a reasonable possibility that had this adjustment been made and the child re-assessed in June she could have met the required standard. Indeed one of us put to Witness B that the sections of the assessment documented on T19 and T20 are the areas a person with the child's type of disability would have problems with. He was asked, when discussing the child's readiness for J1, did you consider whether her ability in these areas is delayed and that she may become more able to follow instructions and learn to modify her behavior over time. Witness B responded that he didn't think they did and that perhaps that is something that they should have considered. We agree with Witness B that it should have been considered. This adjustment was suggested by The Claimant and rejected by the Responsible Body by letter dated 5 May 2016. The cost of such an adjustment would have been minimal and the only obvious downside that might make it unreasonable was that given offers go out for places in February a place may need to have been reserved for the child with another child being placed on the waiting list.

We do not consider the possible negative effect of this adjustment on another family is sufficient to render the adjustment unreasonable. In coming to this view we had regard to the terms of paragraph 6.52 of the technical guidance which provides "ordinarily, the interests of other pupils regarding the reasonable adjustments required by a disabled pupil will be irrelevant. However, there are limited circumstances in which the provision of a particular reasonable adjustment for a disabled pupil will disadvantage other pupils. This is relevant only where the adjustment results in significant disadvantage to other pupils." While we accept this adjustment would likely cause a disadvantage to at least one other potential pupil, as indicated above, we did not consider it significant and accordingly we consider the school should have made this adjustment which we regard as a reasonable one. Accordingly we do not consider the means chosen, not to admit the child following an assessment in February 2016, were no more than was necessary to accomplish this objective.

Similarly we find that having an up to date Accessibility Strategy was a reasonable adjustment that should have been made. The strategy was many years out of date, having been prepared in 2007; it still referred to the Disability Discrimination Act 2005. Given the strategy is legally required to be reviewed every 3 years (Education (Disability Strategies) (Scotland) Regulations 2002) by the Responsible Body and given the purposes of an Accessibility Strategy include increasing disabled pupils' participation in the curriculum and improving communication with disabled pupils, there is a strong possibility that had the strategy been through the two revisals required it would have increased the chances of the child being admitted to J1.

While clearly the Responsible Body should have had an up to date strategy we did have some concerns that simply having an up to date strategy would not necessarily benefit the child as we do not know what a twice revised strategy would contain. When asked about this Solicitor for Claimant responded that it was "irrelevant." Accordingly we looked to the technical guidance and in particular paragraphs 6.29 and 6.41. Paragraph 6.29 lists various factors that are likely to be taken into account and our concern fell under the first of these namely, "the extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil." Paragraph 6.41 provides further guidance when it envisages that where even an adjustment involving little benefit to a pupil could be a reasonable adjustment if this is the only possibility of avoiding the disadvantage and there is a prospect of it having some effect. So the technical guidance envisages that it is not necessary to be certain the adjustment would make a difference. In the case of an Accessibility Strategy given among its purposes is increasing the extent disabled pupils can participate in the curriculum and improving communication with disabled pupils, there is a high possibility that a strategy that had been through two further cycles of revisal would have benefitted the child in relation to her performance in nursery and consequently her assessment.

As an aside we wish to be clear that we are not suggesting that it would always be the case that a failure to have an up to date accessibility strategy would be a failure to make a reasonable adjustment. In our view it is relevant that the strategy was not slightly out of date but it should have been reviewed twice by the time of the discrimination.

In relation to the third suggested adjustment Solicitor for Claimant argued that deficiencies in this area were identified in a Care Inspectorate Investigation, the outcome letter being at C47. While some elements of the Care Inspectorate's decisions were disputed by the

Responsible Body much was not. In particular it was not disputed that there was no formal support plan and ineffective recording systems made it difficult to establish clearly how the knowledge of staff was used in meeting the child's needs. The Responsible Body's position was that, while it was generally accepted that record keeping was poor, everything was done to meet the child's needs that could have been done and having a properly considered plan and recorded assessment records would have made no difference as "nothing else could have been done" and they were having regular and ongoing discussions and making adjustments to strategies to meet the child's needs on an ongoing basis. Witness C initially took the position that the benefit of proper recording is that it was very difficult to prove actions if they were not written down but did ultimately accept that there is a risk of information being lost if not recorded and that proper planning would have been beneficial for the child.

While it is clear to us that record keeping within the nursery was almost absent we were not convinced this adjustment could have made a difference to the child and accepted the evidence of Witness C, Witness D and Witness E that while clearly chaotic there was constant ongoing discussion, adaptation of strategies and adjustments to try and best meet the child's needs. The responsible body seemed to take on board everything suggested by other professionals or the parents. Indeed as recently as February 2015 The child's mother was saying thank you to the responsible body for all the work. We are also influenced by Witness A who gave evidence that the strategies in general feel appropriate. Whilst we consider that the creation of a proper support plan would have been preferable as a way of recording, sharing, updating and tracking the implementation of appropriate support strategies for the child, we accept that the child was supported in the nursery.

In connection with the aim of protecting health & safety and well-being our findings above are relevant on this point. There was very little credible evidence that the child's admission to junior school was likely to be significantly prejudicial to the health, safety or welfare of the child or anyone else. While it was agreed (at T49) that the child "did on occasion "hit out" at fellow pupils and there was evidence of grabbing and pushing other pupils, that the child had run away from staff on occasion and that she could be extremely disruptive in class we are not satisfied that not admitting the child to the school is "no more than is necessary to accomplish this objective." We agree with Solicitor for Claimant' submissions that the child's needs document seriously overstates the child's needs and what would be required to protect the health & safety and well-being of the child and others would be closer to the more modest extra resources the child currently receives in school support. Consequently we consider not admitting the child to the school to be more than is necessary to accomplish the health & safety and well-being objective.

D. <u>Is the disadvantage caused to the claimant not disproportionate to the aims pursued?</u>

We have accepted that the objective of maintaining academic standards is sufficiently important that it could justify the restriction of a fundamental right. However the important factor in this claim here is that there were reasonable adjustments that should have been made that possibly could have enabled the child to be assessed as ready for J1 and therefore she would not have suffered the disadvantage. Paragraph 5.38 of the code supports our view providing that it will be difficult to show that treatment is proportionate if the Responsible Body has not complied with its duty to make reasonable adjustments.

Summary of Legal Determination

In summary we have found that the responsible body is unable to justify the discriminatory treatment of the child because while it was in pursuit of a legitimate aim there were reasonable adjustments that should have been made that could have prevented the disadvantage suffered by the child.

Remedies

Given our foregoing findings we have no difficulty in making a declaration that the Responsible Body has unlawfully discriminated against the child or in requiring the Responsible Body to apologise to the child and her parents in writing, said apology conforming to the terms of the SPSO's guidance on apologies. We consider one calendar month to be sufficient time to enable the Responsible Body to prepare a suitably worded apology.

The claimant also sought a requirement to admit the child J2 at School A. This request gave us some difficulty. On one hand the matter arose because of the initial refusal and the act envisages that we should when considering remedies think about obviating or reducing the adverse effect. On the other hand representatives accepted that we are entitled to look at all the circumstances including the best interests of the child. We were not at all satisfied that the child attending the school would be in her best interests. All the evidence presented was that the child is flourishing in her current school when she clearly had not done so at School A. Indeed The Claimant indicated she is performing "exceptionally". Notwithstanding this claim was raised in June 2015 by the time of the hearing in February 2016 the Responsible Body had still not reviewed its accessibility strategy. Despite claims that it was "under review" it was blatantly clear that it is not, Witness D, the member of staff responsible for overseeing the provision for pupils with additional support for learning needs, did not know anything about the review and the only part of the process that we heard evidence of was that Witness B had looked it over and determined that it should be reviewed along with the school's other policy documentation. We were astonished that Witness B thought it could be reviewed by the end of February given the process had not started and stakeholder consultation is required, therefore we doubted this. It did not appear to us that the Responsible Body takes its equality duties as seriously as it should. The Claimant had been incredibly critical of teaching staff within the school, to use an employment law expression it appeared to us that he had lost all trust and confidence in the school. Indeed in response to questioning he accepted Witness E (Head of the Junior Department) being the J2 teacher was of concern to him. The Claimant confirmed that if the remedy was granted the child would return to the school and the parents would try to get their two elder children back into School A. When asked what the plan for the child would be were she not admitted to School A he indicated his family would stay in D for the foreseeable future albeit with an ultimate intention to return to Scotland. Accordingly the child would remain in her current school where she is performing exceptionally given her difficulties. If we granted the order she would return to School A, an environment that did not appear to us to be as suitable for the child.

We considered whether notwithstanding our concerns we should accede to the claimant's wishes but decided that we should not make an order granting authority for something to be

done which based on the evidence before us would not be in the child's best interests. It was clear from the evidence presented that the child is well placed within her current school and as stated above we have concerns regarding how seriously the Responsible Body takes its responsibilities to disabled pupils.

It was suggested by The Claimant that as an alternative we could order the child's admission to J3 in due course to give the school time to make adjustments. We are uncomfortable with making an order which would not be implemented for so long and a delayed entry does not address our concerns about a placement being in the child's best interests.

Given we are not ordering the Responsible Body to admit the child to J2 we do not grant the fourth remedy sought of requiring the Responsible Body to make reasonable adjustments for the child.

Finally remedies were sought that, given our decision not to order the child's admission to J1, would be of no benefit to the child, namely around training for staff and requiring amendment to the Responsible Body's admissions regulations and accessibility strategy (they are articulated in full in the decision section above). The terms of Schedule 17, Part 3, paragraph 9 of the act detail our power to make such order as we think fit before proceeding to state that we may, in particular, exercise the power with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates. We considered the terms of the paragraph to be wide enough to allow us to order remedies that would not directly benefit the child and this view of the paragraph's terms is supported by paragraph 8.27 of the technical guidance which provides "The tribunal may make any order that it thinks appropriate in that individual case, <u>often</u> (our emphasis) with the intention of trying to remedy the damage done to the disabled person and to reduce any future disadvantage." Often clearly doesn't mean always and accordingly given we think the remedies are appropriate and related to the Responsible Body's failings we have granted these remedies. It is also important to note that The Claimant expressed a hope that others would benefit from what his family have gone through.

In terms of the training we consider a reasonable period should be allowed and accordingly have required it to be done by the end of the school year. Notwithstanding the failure to revise the accessibility strategy is a long standing and on-going one, in relation to the revisals to the documentation we consider it more important to have the documentation completed properly to a standard that will last the period of the accessibility strategy than to rush out a sub-standard document to comply with our order and belatedly comply with a legal obligation. Time is also required for an equality impact assessment prepared by the third party. Realistically we consider a few months is necessary for the process (including consultation on the accessibility strategy) to be done properly and accordingly we have specified the end of the school year for completion so that all new entrants and prospective entrants from the next school year will have the benefit of the revised documentation.

We did not consider any other remedy would be appropriate.