Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

Word meanings: In this decision the following phrases or abbreviations are used

No Safe Place	No Safe Place: Restraint and Seclusion in Scotland's Schools, *Report of the Children and Young People's Commissioner Scotland (2018)*
Holding Safely	A Guide for Residential Child Care Practitioners and Managers about Physically Restraining Children and Young People
TCI Workbook	Therapeutic Crisis Intervention *Student Workbook, Sixth Edition*
IPA	Initial placement agreement
LSI	Life space interview
ICMP	Individual Crisis Management Plan
Technical Guidance	Technical Guidance for Schools in Scotland, *Equality and Human Rights Commission*
ASD	Autism spectrum disorder
ADHD	Attention deficit hyperactive disorder
2010 Act	Equality Act 2010
'rule' references	The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018
school	**[The name of the school has been removed by the Chamber President for reasons of privacy and anonymity of the child under rule 101(3)(a)(b)(c) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

Claim

1. The claim was lodged on 18 September 2020. The claimant believes she should only be subject to physical intervention or restraint without her consent in circumstances where it is used as a last resort, where it is a proportionate means of achieving a legitimate goal, and where proper organisational safeguards are in place. She relies on section 85(2)(f) of the 2010 Act, which provides that the responsible body of a school must not discriminate against a pupil by subjecting the pupil to [any other] detriment; and section 15(1) – discrimination arising from disability.

Decision

2. The responsible body has discriminated against the claimant by treating her unfavourably because of the distressed behaviours arising in consequence of her disabilities; and the responsible body cannot show that the treatment is a proportionate means of achieving a legitimate aim. This means the claimant has been subjected to a detriment, for the purposes of section 85(2)(f) of the 2010 Act, and a contravention of chapter 1 of part 6 of the 2010 Act has occurred. We make an order that the responsible body complies with the remedies set out in paragraph 90.

Process

3. Directions were made on 23 September 2020 that various documents be lodged by the responsible body following a request by the claimant; and case conference calls were

held on 6 and 24 November 2020 which addressed a number of procedural matters. Pages from Holding Safely were permitted to be lodged late. Witness statements were prepared, exchanged and lodged and accepted into the process as evidence in chief. A joint minute of agreed facts was prepared and written submissions were lodged.

4. We issued a social story to assist the claimant in preparing for her hearing. The claimant attended both days and remained present throughout. She was supported by her mother. The claimant prepared some art work which she shared on screen. She also used her headphones and her mobile phone as supports. She prepared a "stop" card to hold up to the screen if she needed a break.

5. The responsible body raised a question of whether all the incidents of restraint could be counted given their time frame. It was submitted that these may be out of time in terms of rule 61(4). The claimant denied this was the case. A decision was reserved on this until after evidence had been heard.

Findings in Fact

The claimant

6. At the time of making the claim, the claimant was 14 years old and at the time of the hearing she was 15 years old.

7. The claimant is looked after and accommodated by her local authority. She is on a compulsory supervision order. She is, and was at the relevant times, a pupil at the school, having been placed there on 25 July 2019, initially by a transfer under urgent necessity, and thereafter following a variation of the order on 15 August 2019. She lives and attends at the school due to a requirement of the order.

8. The claimant has ASD, ADHD and a learning disability; which are neurodevelopmental conditions. As a result of these she has difficulties in communicating how she feels and how she interacts with others. Her tolerance threshold is reduced, which results in many internal and external triggers. These include lack of structure, boundaries and predictability, insecurity in relationships, changes to planned events, being part of a larger group and sensory overload. The claimant finds social interactions challenging and has on occasions communicated her distress through kicking, biting, spitting and barricading herself in a room. She is anxious and needs consistency and routine. She can try to hide her anxiety when around unfamiliar adults, and tries to please others and worries when things go wrong (Cognitive Assessment; CSP; ICMP).

9. The claimant's weight is of concern and may cause difficulties with positioning/breathing if she is to be restrained (ICMP).

The school

10. The school has not prepared an accessibility strategy and has not done so in the past. The school's host authority has an accessibility strategy.

11. The school use a TCI behaviour management support system (TCI Workbook). It is mandatory for staff to receive training in this system. Staff had completed full or refresher TCI training throughout 2019 and 2020.

12. There is sufficient information available for the school to drastically reduce, if not eliminate, the need for high-risk physical interventions (TCI Workbook).

13. The employment of physical restraint techniques is a high risk intervention because of the

extremely dangerous and potentially harmful nature of acute physical behaviour and controlling it safely. Physical interventions should never be seen as an end in and of itself. Physical restraint can be justified when it is keeping a child safe from harming themselves or someone else. When restraint is employed it is critical to end this as soon as possible (TCI Workbook).

14. Before restraint is employed the child's ICMP must prescribe this (TCI Workbook R213). The claimant's ICMP prescribes the use of TCI physical intervention procedures and the use of safe holding techniques (ICMP R050 and T80).

15. If a child is overweight the use of restraint carries greater risk as it puts additional stress on the body and cardiovascular system. In a prone position, this inhibits the child's ability to properly contract the diaphragm and raise the ribs to enlarge the chest and inhale. In the supine position, the child has a reduction in lung volume and increased abdominal pressure (TCI Workbook R218).

16. The LSI is designed to address the needs of the child following the use of restraint. The LSI is an essential tool in helping the child to learn and benefit from an otherwise dangerous and upsetting experience (TCI Workbook R224-225). LSIs took place after each incident of restraint listed at paragraph 17. On a number of these occasions the claimant's care plan was to be adjusted, but this did not occur.

Physical Intervention – the use of restraint

17. On the following dates, the claimant was subject to restraint by staff at the school:

    a) On 30 July 2019 restraint was used on three occasions during the day. The first (at 13:30) placing the claimant in a prone hold (lying on the chest, face down) by three members of staff for around 5 minutes; the second (at 16:00) a prone hold by two members of staff for around 25 minutes; the third (at 18:30) a supine hold (lying on the back, face up) by three to four members of staff for around 35 minutes.

    b) On 6 November 2019 the claimant was restrained in an unspecified way by three members of staff for around 5 minutes.

    c) On 27 November 2020 the claimant was restrained in an unspecified way by three members of staff for an undefined period.

    d) On 2 December 2020 the claimant was restrained in an unspecified way by three to four members of staff for around 8 minutes.

    e) On 13 March 2020 the claimant was restrained in an unspecified way by three to five staff for around 10 minutes.

    f) On 16 March 2020 at 10:10 the claimant was placed in a prone hold by three members of staff for around 8 minutes. At 21:00 the claimant was placed in a supine prone hold by three members of staff for around 5 minutes.

    g) On 29 March 2020 the claimant was restrained in an unspecified way by three to four members of staff for around 10 minutes.

    h) On 3 May 2020 the claimant was restrained in an unspecified way by three to four members of staff for around 10 minutes.

i) On 23 May 2020 the claimant was placed in a prone hold by three members of staff for around 10 minutes.

j) On 06 June 2020 the claimant was restrained in an unspecified way by three to five members of staff for around 10 minutes.

18. On more than one of these occasions, the child was physically injured as a result of the use of restraint. On two occasions police officers attended following the use of restraint (30 July 2019 and 6 June 2020).

Reasons for the Decision

General remarks on the evidence

19. The claimant spoke well and clearly in her oral evidence, which was consistent with her statement. Witness A is a skilled witness. He is a retired Lecturer in Nursing, a Consultant Nurse Education Adviser, with specialist interest in the field of physical intervention and restraint (CV A138). His written and oral evidence was balanced reflective and consistent. Where concessions were appropriate (such as the measured rather than finite conclusions he could reach from the limits of the information available in the safe hold forms and elsewhere; and that the claimant was not being asked to accept the staff member's account of what had led to the incident of the restraint in the LSI) we found that witness A was prepared to make these.

20. The respondent's witnesses were mainly consistent in their views, although at times we found their evidence less reliable. This is where the use of restraint as a last resort was explored and restraint reduction; and the events leading up to the use of restraint of the claimant. In their oral evidence witnesses B and C's answers were given through the prism of TCI using a generalised approach to all children, rather than individualised to the claimant. There was a lack of understanding of restraint reduction practice and current policy framework. For example, witness B thought that No Safe Place was more relevant to mainstream education; whereas witness E thought it relevant to the school. Witness B appeared not to fully appreciate the duty on the school to have its own accessibility strategy and witness E was vague on this. However, witnesses B and C were prepared to make concessions that the safe hold forms often did not record the type of restraint or the antecedents. Witness C conceded that staff had a responsibility to improve their recording and provide fuller accounts. Overall, we formed the impression that the respondent's witnesses had not taken adequate account of the claimant's views on the use of restraint.

21. We benefitted from the provision of detailed witness statements for all of the witnesses and reports from witnesses A and E. None of the witnesses deviated in any significant way from their statements/reports.

Preliminary matter: Timing of the claim

22. The responsible body asked us to treat all the incidents before March 2020 as out of time in terms of rule 61(4), which provides:

> (4) The First-tier Tribunal shall not consider a claim unless the claim has been received …. before the end of the period of six months beginning when the act

complained of was done. Conduct extending over a period is to be treated as done by the end of that period.

23. Rule 64(5) provides:

> (5) The First-tier Tribunal may consider a claim which is out of time ..... if in all the circumstances of the case, it considers that it is just and equitable to do so.

24. The act first complained of is the incident of multiple restraints which took place on 30 July 2019. If section 61(4) applies, this would mean that the five incidents before 29 March 2020 could not be counted. The claimant submitted that the claim was lodged in time having regard to the incidents as conduct over time – and if we were not satisfied on this point, if any part of the claim was outwith the six months time limit, it would be just and equitable in all the circumstances of the case for us to consider all the incidents.

Conduct extending over a period - section 61(4)

25. The five incidents which occurred before 29 March 2020 may be "struck out" if there is no reasonable prospect of establishing at a hearing that they formed part of a course of conduct together with the other incidents (*Caterham School v. Rose* UKEAT/0149/19/RN, para 61). The question may be continued to the hearing, to be determined following the hearing of evidence, as here. The Technical Guidance states: 'Where there has been a continuing process of discrimination taking place over a period of time, the six months begins at the date of the last discriminatory act.' (para 8.13) We are satisfied that this is the case here and that we must consider a continuing process in which there are a number of incidents of distinct discriminatory acts.

26. Each incident of restraint was carried out by school staff who use TCI. They were all conducted under the same policy and practice regime which applied and continues to apply to the claimant. The IPA includes the use of TCI and it is prescribed in the claimant's ICMP. Restraint was triggered early in the claimant's arrival at the school and continued during the dates described for around 11 months before ceasing. We concluded that it had been used for that period as a mechanism for managing the claimant's behaviours and that it was a continuing course of conduct.

Just and Equitable – section 61(5)

27. Having decided that the incidents are part of a continuing course of conduct, we are not required to answer the question of 'just and equitable'; however, had we been required to do so we would have exercised our discretion to allow the five incidents before 29 March 2020 to be included for the following reasons.

28. This test has been considered on appeal by case law from the Employment Tribunal in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, the Court of Appeal. Lord Justice Leggatt explained how the test should be interpreted (at paras 18-19 and 25):

> "18. First, it is plain from the language used…that Parliament has chosen to give the….tribunal the widest possible discretion. [unlike some other time bar legislation], this legislation]…does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the

words of the provision or to interpret it as if it contains such a list….[T]he only requirement [is] that [the tribunal] does not leave a significant factor out of account…".

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)….

25. [In response to an argument that the claimant requires to advance a good reason for the lateness and some evidence to support that reason].., I cannot accept that argument. As discussed above, the discretion given by [the legislation to the tribunal].. to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard..".

29. The principles set out in *Abertawe* are based on, among others, a Supreme Court case, namely *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, at para 75. For these reasons, *Abertawe* should be regarded as the correct modern authority.

30. All rules, including rule 61, must be interpreted in line with the overriding objective in rule 2. Rule 2(2)(c) makes provision for procedural equal footing, which has application here. The claim was not raised earlier as the claimant was not aware of her rights to do so. She was 14 years of age, she was and remains a vulnerable child. She did not have the benefit of legal advice until 8 July 2020, when she met with her current representative. Proceedings were raised on 18 September 2020, once sufficient information to justify doing so had been obtained from the school. There has been no delay in acting to enforce the claimant's legal rights. As the claimant reminded us, the responsible body complained that, if anything, the case was brought "prematurely", without the opportunity for informal resolution or mediation.

31. In context, the length of delay is not significant, and well within the times in which a residential school might be expected to have to investigate matters in relation to restraint. The responsible body did not claim any prejudice in relation to the date at which the claim was lodged, and there is no question of it having affected the availability of witnesses, nor the cogency or volume of evidence available. In all of the circumstances of the case, it would have been just and equitable for us to have considered the case in its entirety.

General remarks on the legal test (2010 Act)

The claim

32. This is a case under Part 3, paragraph 8 of schedule 17 of the 2010 Act; being a claim that the responsible body has contravened chapter 1 of part 6 (School Education), because of a person's disability. Section 85(2)(f) provides that the responsible body of a school must not discriminate against a pupil by subjecting the pupil to [any other] detriment.

Discrimination arising from disability (section 15)

33. The claim is made under section 15 of the 2010 Act which provides that:

> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

34. Parties agreed that the claimant is a disabled person in terms of section 6 of the 2010 Act. Accordingly, section 15(2) does not apply. If section 15(1) is established then that will amount to subjecting the claimant to a detriment.

Unfavourable Treatment
(A treats B unfavourably because of something arising in consequence of B's disability)

35. Parties agreed that the 'treatment' is the physical intervention/restraint used by school staff; and the 'something arising' is the 'behaviour' of the child, recorded in the safe hold forms, to which the restraint was a response. We use the abbreviated term 'restraint'.

'Behaviour'

36. It is important we say something about the term behaviour. Language is important. The term suggests a level of choice, control and self-regulation, which the claimant is not able to exercise. The claimant was in a highly emotional state and experiencing stress in the periods leading up to the use of restraint; these are effects of her disabilities. The claimant cannot regulate her emotions, which means that she cannot choose to easily manage or navigate her way through periods of stress. "Aggressive behaviour is not a choice for autistic children." (*C & C v The Governing Body of a School, The Secretary of State for Education (First Interested Party) and The National Autistic Society (Second Interested Party)* (SEN) [2018] UKUT 269 (AAC) at para 81). "Rather such challenging behaviour is increasingly being described as "distressed behaviour" (ibid.). We adopt this term.

37. We turn now to consider the following questions.

Question (1): By using restraint, did the responsible body treat the claimant "unfavourably"?

38. We were referred to the case of the Supreme Court in *Trustees of Swansea University Pension Scheme v Williams* [2019] 1 WLR 93 where the meaning of the word "unfavourably" was considered. In that case, the claimant argued that certain pension arrangements made by his employers were unfavourable to him, contrary to section 15(1)(a). Lord Carnwath, with whom the other Justices agreed, said:

> [28] …. It is necessary first to identify the relevant "treatment" to which the section is to be applied. In this case it was the award of a pension. There was nothing intrinsically "unfavourable" or disadvantageous about that. By contrast in *Malcolm* [2008] AC 1399, as Bean LJ pointed out [2018] ICR 233, para 42, there was no doubt

as to the nature of the disadvantage suffered by the claimant. No one would dispute that eviction is "unfavourable"…

39. The Supreme Court was in agreement with the reasoning of the Court of Appeal. That included the following statement by Langstaff J:

> [24]…[the word "unfavourably"] has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person . . . The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life.

40. Accordingly, there are types of treatment which may be considered "intrinsically unfavourable" while others will require to be judged, following an assessment on which a broad view is to be taken, judged by broad experience of life. The responsible body suggested that an example of intrinsically unfavourable treatment might include school exclusion - but not the use of restraint.

41. It was accepted that the burden of proof here rests on the claimant. The claimant referred us to No Safe Place and submitted that it would be difficult to think of a reason why the use of coercive force on a vulnerable child would not be considered unfavourable.

Is the use of restraint on a vulnerable child intrinsically unfavourable?

42. Our answer is yes. In some cases it is possible to proceed with the view that some treatments are automatically unfavourable. This is one such case. The use of any form of physical restraint (whether standing, sitting or floor – supine or prone) on a vulnerable child is intrinsically unfavourable. We agree that it is difficult to think of a reason why it could be considered otherwise.

43. We accept that there are exceptional situations in residential establishments when physically restraining a child is necessary (TCI Workbook and Holding Safely). The responsible body suggested that it follows therefore that physical restraint of a child is not, intrinsically, treating that child unfavourably. In fact, there are circumstances, in which not restraining a child could be treating her unfavourably. In judging whether an instance of physical restraint is unfavourable, it is necessary to take into account all of the relevant circumstances. We have some difficulty with this proposition. The fact that something is permissible does not mean that it cannot be considered intrinsically unfavourable. Take eviction for example (as in *Malcolm*), or exclusion, both permissible in law. However, had we reached the view that the use of restraint is not intrinsically unfavourable, we would have judged it to be unfavourable. Our reasons for that can be found at paragraphs 49 to 68.

The use of restraint in schools in Scotland: No Safe Place

44. The first topic the Children and Young People's Commissioner for Scotland chose to investigate was the use of restraint and seclusion in Scotland's schools. This was decided based on careful consideration of the rights issues at stake and the implications of those rights being breached, the vulnerability of the children involved and the extent of concerns raised. He was concerned about the use of restraint as a method of behaviour management. He heard that children can be restrained in response to challenging behaviour, without any consideration of what may lie behind that behaviour or the individual child's rights and needs. He acknowledges that there may be times

when the use of restraint is a necessary response as a measure of last resort to prevent harm to a child or to others. But under any circumstances it has a profound impact on children (No Safe Place, pages 4-5).

The use of restraint in residential care

45. A child who has been placed in the care of the local authority is by definition a vulnerable child. Here, the claimant had been urgently transferred to the school when her former placement had broken down, which means the usual planning and transitions which would have been expected to take place did not happen.

46. We are aware of the challenges of providing education to children with complex neurodevelopmental needs during the Covid-19 pandemic; not least the heightened anxiety which children may experience and its impact on their ability to engage with family members and other support networks. While we accept that the use of restraint in residential care is permissible, it ought not to be used as a tool for managing distressed behaviour; and for some children it may not be appropriate for use at all. The use of restraint had a detrimental impact on the claimant. It was carried out against her will, which violated her right to respect for her bodily integrity. This amounted to an interference with her right to respect for private life under Article 17 of the UNCRPD, Article 16 of the UNCRC and Article 8 of the ECHR.

47. It is worth contrasting the use of restraint with the recent change to the law in Scotland which prevents parents from using any form of physical punishment on their children (Children (Equal Protection for Assault) (Scotland) Act 2019). Those providing care to looked after children do so in a position of trust. As documents relied on emphasise, restraint should only ever be used as a last resort. Where restraint is likely a risk assessment must be in place - and regularly reviewed. All of this underscores our decision that the use of restraint on a vulnerable child is intrinsically unfavourable.

Assessing the incidents of restraint

48. Had we not decided that restraint is intrinsically unfavourable we would have had to reach a judgement on each of the incidents following an assessment on which a broad view is to be taken, judged by broad experience of life, which we do here. We found witness A's summary of each event a helpful aid. There was a common framework in use by the school (TCI) and a common mechanism of recording (safe hold forms); however, we saw no evidence of learning from one incident to the next. We were not provided with any contextual risk assessments. The only document which referred to the use of restraint (ICMP) postdated the incidents. The concerns we now outline are common to each of the incidents of restraint.

(a) Recording of incidents of restraint: safe hold forms

49. Each safe hold form is a record of a significant and dangerous event and merits care and attention. The child and parent(s) ought to be able to easily understand the journey towards the use of restraint, what happened, who was involved, how long it lasted, what happened afterwards and what will happen differently to avoid the use of restraint. In this case, there were a number of critical failures in recording. Although witnesses B and C uniformly suggested that the forms did not adequately capture the "antecedents", these were the only records lodged.

50. On seven occasions the type of hold is not specified. On nine occasions we could not be certain how many staff were engaged in restraint; and the term ‘support’ or ‘supported’ was used in four incidents when the claimant was being moved to another area without any description of what was involved in that. In one form no information is provided to advise whether the claimant was injured. Witness A could think of no functional reason why staff members, highly trained and frequently recertified as competent in the use of TCI, could not detail the techniques used when completing a recording form. We formed the view that there was a failure to recognise the significance and importance of the accuracy of recording.

51. Witness B advised that where (redacted) names appear in the ‘Staff Involved’ section (as they did in every form) this indicated the number of staff involved in the restraint, although one would be a ‘witness’ observing. According to the record this would mean that in some incidents the child was restrained by more than three staff; which is contrary to the evidence of witnesses C and D who stated that restraint would involve three staff. Given the redactions there was also no way of knowing the gender of staff, which is important given the claimant’s preference for female staff.

52. The same omissions and errors appeared in every record. Declarations that the report was a true and accurate account are not signed by a senior manager. No information was provided to confirm if the form was sent to ‘SCWIS’ or the host education authority. Witness B advised that this was certainly done but no record of this was lodged. The host authority was incorrectly specified in every form.

53. In order to ensure that children are safeguarded and protected, recording of incidents of restraint is essential. Failure to do so creates a confusing landscape, both for the school staff trying to use these materials and particularly for parents and children who attempt to interpret the information provided (No Safe Place, page 16). Better recording, from the first incident onwards, may have reduced the use of restraint. Witness A suggested that had the documentation been clear and signposting the way to de-escalation, it might have been possible to get to restraint reduction sooner.

(b) De-escalation

54. The claimant presents with complex distressed behaviours which are undoubtedly challenging at times. We do not underestimate this but we thought that had more effective restorative, stress management and crisis management work been undertaken with the claimant outside crisis times, this could have led to her being supported without the use of restraint at points of crisis. We were concerned that the claimant may have been pre-emptively restrained. We were concerned at how quickly the school began using restraint. There were three separate incidents of restraint on the first day it was used (30 July 2020), which was five days after her arrival.

55. In each record, we could not identify when the precipice of the claimant’s distress had been reached and why restraint was ultimately considered necessary, especially where there was evidence of compliance. We see this when the claimant complied with the instruction to put the glass down and when she was asked to put the pen down. In both cases she did this with some force, but, in so doing, she demonstrated a degree of compliance that rendered the respective situations less dangerous overall.

56. Witnesses B, C and D were pressed on prevention and de-escalation and could not provide a strategy for the child beyond the limited descriptors in the ICMP. For example, there were no obvious scripts or phrases with safe words and no evidence of autism specific supports and no protocol. Witness A examined each of the forms and concluded that the preventative strategies intended to avoid the need for restraint were inadequate or static, not changing to better de-escalate, to avoid restraint; "or that they were always thought likely to be the end point of the hierarchical approach to crisis management and became a self–fulfilling prophecy." We agree.

57. We cannot conclude that the school was engaged in tailored preventive work in any of the incidents before restraint was used (and after), when the documentation does not support that. It was submitted that the cessation of restraint after the last incident in June 2020 was evidence that the claimant had settled into the school. If that was the case, it took 11 months for this to happen, which is excessive. We note that the cessation of restraint coincides with the claimant's decision to seek legal advice in July 2020.

(c) Triggers

58. The responsible body suggested to witness A that the restraints had been a response to physical assaults by the claimant on staff and not a response to the claimant absconding etc. Witness A responded that the assaultive behaviours were how the incident ended up. Had staff been better able to distract, hurdle help etc. then it may not have resulted in the need for restraint. He suggested that restraint comes at the end of a long chain. We agree. There was an over-reliance by the school on assaults on staff as the trigger for restraint when there was evidence of earlier triggers. These include knowing her mum was on the campus and a four hour LAAC meeting not having a clear plan for Christmas and the impact of the Covid-19 restrictions. None of the recorded triggers for the incident are associated with an assault on staff but the trigger for the use of restraint is.

59. These triggers were predictable, especially for professional staff working in a residential care setting. Plans, strategies and concessions should have been made. The claimant was known to present with severe and complex behaviours. Her transfer to the school surrounded a clearly emerging pattern of dysregulated behaviours. We would have expected to see an autism tailored risk assessment with clear de-escalation strategies. Instead, staff appeared hyper alert to physical risk. Some of their responses did not work well. Examples of this can be seen when the claimant did not respond well to being asked to talk about how she was feeling during a crisis incident, or to being crowded. We saw no evidence of learning, such as planning to stand back and allow her to calm down without being asked to speak.

(d) The type and duration of restraint

60. We found use of floor restraints to be particularly excessive and especially the prone hold. The duration of restraint was of concern. We heard no evidence about what might be considered a healthy maximum; however TCI and Holding Safely emphasise that restraint should last only as long as necessary. Restraint interferes with dignity, liberty and security of person. In our view, every second a child is restrained should be counted. Every second creates and increases risk. We were concerned to hear that the time

recorded was an approximation, although we note that witness A made no criticism of this.

61. The claimant's weight is a concern which heightens risk from the use of floor restraint. We were concerned that this would impinge on her ability to breathe. Although a member of staff witnesses the restraint, there was no evidence of how life signs were monitored.

(e) Restraint as a last resort

62. Although witnesses B and C were insistent that restraint was only ever used as a last resort there was insufficient evidence to support this. We would expect to see an overarching restraint reduction policy and learning from one episode of restraint to the next for this to have been the case. Instead, there was a reliance on the claimant being able to understand and process what had happened, despite her cognitive limitations.

63. The claimant told us in her statement that she didn't know what was taking place afterwards. She thought she had to agree to something. Witness B said in her oral evidence that the TCI policy was tailored to each child but we saw no evidence of this. We gained no sense that staff knew what worked best for the claimant. There was an unreasonable expectation that she would be able to regulate her emotions. On more than one occasion her inability to do so was described as being a choice on her part (R014 "she chose to assault staff"; R034 "she had chosen not to follow these supports" and R120 "she chose not to accept this advice"). There was a reliance on her being able to manage her own distressed behaviours, which are manifestations of her disabilities.

64. In her statement the claimant states that she was not happy about being restrained. She was restrained against her will. She was injured more than once. She did not think she needed to be restrained. She felt she could calm down on her own without having to be restrained. She wasn't happy about being held face down on the floor. She told us what helps her to feel calm, which includes listening to music, hugs and sitting down and speaking to someone. The claimant did not feel the school understood her ASD. She does not feel listened to.

(f) Restraint reduction policy

65. Witnesses B and F emphasised the contract (IPA) the host authority enters into with the school, which includes an acknowledgement that the school uses TCI (which applies to every pupil). However, the school had and has no restraint reduction policy. Witness B acknowledged the absence of a policy as fair criticism. She advised that they intend to do something about that and are moving on to the seventh edition of TCI training, which offers a "much more therapeutic approach and takes trauma into account". However, at the times of these incidents and this hearing a restraint reduction policy was not in place.

66. In conclusion, even if we had not found the treatment to be intrinsically unfavourable, taking a broad view judged by broad experience of life and having regard to the relatively low threshold of disadvantage which is sufficient, we would have been satisfied that each incident of restraint (at paragraph 17) was unfavourable.

Question (2): Did the distressed behaviour, to which the restraint was a response, arise "in consequence of" the claimant's disability?

67. We are satisfied that the distressed behaviours referred to in the safe hold forms arise from the effects of the claimant's disabilities. This led to the use of restraint on the dates specified. The onus proving the reverse falls on the responsible body (*Akerman-Livingstone v Aster Communities Limited* [2015] UKSC 15, Baroness Hale at para [19]).

68. The claimant contended that no evidence was led to suggest, much less prove that the restraint incidents were not because of something arising in consequence of her disabilities. Nor was this raised as a basis on which the claim was resisted. There is ample evidence for us to conclude that the restraints took place because of something arising in consequence of the claimant's disabilities. No evidence was lodged to the contrary.

69. The responsible body's suggestion that we would not be able to robustly assess the effects of a claimant's disabilities without medical evidence (see *McNicol-v-Balfour Beatty Rail Maintenance* [2002] ICR, 1498) fails to take account of the wealth of evidence available to us (which includes that of the Principal Forensic Psychologist and the skilled witness) and the specialist nature of this Tribunal. *McNicol* considers whether the claimant's back pain was a physical or mental impairment, which is in stark contrast to this claimant's well established diagnosed neurodevelopmental conditions. Mummery LJ goes on to state that:

> [19] It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects.

70. The Technical Guidance states: "The unfavourable treatment must be because of something that arises as a consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability. The consequences of a disability include anything that is the result, effect or outcome of a disabled pupil's disability." (5.45-46). We accept that there are contributing factors, which include the claimant's early childhood experiences. These are part of who she is but they do not overcome the effects of her disabilities. Witness E explained that ASD is "integral to who [the child] is". Her development is directed and impacted by her neurodevelopmental behaviours and her experiences and relationships.

Neurodevelopmental effects

71. The CSP describes the child as vulnerable as a consequence of her diagnoses. Her mother notes that whilst behaviour needs to be addressed it is essential that attempts are made to understand the ways in which ASD has been a factor and that behaviour can often result from communication difficulties or from prolonged exposure to highly stressful situations. The ICMP notes the claimant's anxiety associated with her ASD and that her anxieties will at times lead to her becoming overwhelmed and fixated on her understanding of events, at which time she "does not have the capacity to take on board a perspective that differs from hers." The Care Plan recognises the need for ASD specific approaches throughout. The antecedent behaviours referred to by the school in their Overview of Education and Approach report include anxiety, overwhelming sensory information, and not understanding the social behaviour she is trying to imitate.

72. Witness A formed the view that the claimant's behaviours were probably related to her diagnoses, anxiety levels and poorly developed coping strategies, which included running away from staff, climbing trees and absconding from the campus, self-injury, impulsive physical and verbal aggression. Witness E completed a cognitive and adaptive functioning assessment, which concluded that the claimant's General Adaptive Composite score was 69 (placing her in the 2nd percentile). The assessment records that the claimant's ability to make independent choices, exhibit self-control and take responsibility when appropriate; and her ability to interact socially, express and recognise emotions are within the extremely low range. Her ability to protect her physical well-being and prevent and respond to injuries (including following safety rules and showing caution) are in the low range. The claimant's general adaptive functioning is in keeping with her diagnoses.

73. In their witness statements witness B refers to the claimant's developmental profile and specific needs during a crisis phase; witness C records an awareness of the claimant's diagnoses and acknowledges that these may cause her to have difficulty in communicating how she feels and how she interacts with other; and witness D attributes a "variety of concerning behaviours" to the difficulties the child had as "a young person with ASD, ADHD and a learning disability having to readjust" to the lockdown phase of the pandemic.

Question 3: If the answer to questions 1 and 2 are yes - has the responsible body shown that the treatment was a proportionate means of achieving a legitimate aim?

74. The *Akerman* case sets out the correct approach to proportionality:

> [28] The concept of proportionality contained in section 15 is undoubtedly derived from European Union law, which is the source of much of our anti-discrimination legislation. Three elements were explained by Mummery LJ in R (Elias) v Secretary of State for Defence *[2006] 1 WLR 3213*, at para 165:
>
> "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"
> …
> this concept of proportionality, which has found its way into both the law of the European Union and the European Convention on Human Rights, has always contained a fourth element. This is the importance, at the end of the exercise, of the overall balance between the ends and the means: there are some situations in which the ends, however meritorious, cannot justify the only means which is capable of achieving them. .. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

75. <u>On the first two tests</u>, parties agreed (joint minute T075) that the responsible body, in using restraint, was pursuing the aim of safeguarding the claimant's welfare, and/or the welfare of staff and other pupils. It was accepted that these are legitimate and important aims, and that the use of restraint was rationally connected to these; however, the claimant does not accept that restraint was a proportionate means of achieving that aim.

76. The Technical Guidance states that “It is for the school to justify the treatment. It must produce evidence to support its assertion that it is justified and not rely on mere generalisations.”(5.49); and “In a case involving disability, if a school has not complied with its duty to make relevant reasonable adjustments, it will be difficult for it to show that the treatment was proportionate.” (5.38).

77. We are not satisfied that at the time of each of the incidents the school had adequately discharged its duty to make reasonable adjustments. They did not appear to fully understand the effects of the claimant’s disabilities and how these manifested during times of stress. The responsible body used a broad TCI policy approach, rather than a tailored approach to match the child’s needs. Witness A felt that staff had a poor understanding of the impact of the claimant’s neurodevelopmental conditions on her ability to benefit from the practice of diversionary approaches. There was insufficient evidence available to conclude that other less restrictive interventions were either attempted or attempted well enough to have a likely dampening effect on the claimant’s anxiety and impulsiveness.

78. On the third test, there appears to us to be a culture in the school of using restraint as a tool to manage behaviour. We see this in their emphasis on TCI in their IPA agreements, and the absence of a restraint reduction policy. There was a lack of information in the safe hold forms to detail the journey leading to the use of restraint. For these reasons, we could not conclude that restraint was used as a last resort, which means that we cannot say that the means chosen were no more than was necessary.

79. Witness A refers to a “preponderance of prone or supine floor restraint”. He notes that these are highly likely to be high in the hierarchy of secure responses in TCI. These presented a higher risk of injury to the claimant. On occasion prone restraint was initiated immediately. Witness B said that following discussion between psychological services and the Lead TCI Instructor on 11 or 12 January 2021 it was decided that prone restraints are not safe for the claimant and would not be used. Witness E thought that this remained under discussion; and witness D was unaware that the prone restraint was not to be used. Witnesses B and E could not explain why this was considered to be unsafe now, rather than earlier.

80. On more than one occasion, the claimant was physically injured as a result of the use of restraint. She said she wasn’t happy about being held face down to the floor. “I burst the blood vessels in my face because of it – that was painful. I didn’t want them on top of me.” No assessments appear to have been undertaken into the impact of the incidents of restraint on the claimant’s wellbeing and her mental health.

81. We observed no significant shortening in the duration of restraint. Witness A argued that had restraint reduction and preventative strategies been developed in a way more suitable for the child’s cognitive abilities then fewer episodes of restraint, lasting less time might have been expected to have been seen. He was not convinced that the quantity and type of restraints represented minimising practice.

82. We were not satisfied that the school understood that distressed behaviour is communication (No Safe Place). The claimant has not been meaningfully involved in discussions around the use of restraint, and her views on the subject have largely been ignored. Three My World discussions were held on the subject of “safe” (R098 on 24 July 2020; R100 on 6 July 2020; and R104 on 04 June 2020) none of which explored the

claimant's views on the use of restraint. Safeguards to avoid and minimise or remove the use of restraint are missing, including evidence of learning from prior incidents. In the absence of these we cannot conclude that the use of restraint can be justified as a proportionate means to a legitimate aim (see Tribunal case D/20/08/2018, page 20).

83. The responsible body do not have an Accessibility Strategy, nor have they ever had one despite a statutory requirement to consult on, prepare, and review under the Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002. The absence of this and their lack of awareness of it means that a key driver for improving accessibility for disabled pupils is missing. Although witness B was able to "confidently say" they do not practice restraint more on disabled pupils, no record was lodged to that effect.

84. On the fourth test, it is important to consider the inherent imbalance of power between adults and children. No Safe Place reports:

> "There is an inherent imbalance of power between adults and children. Children are entitled to higher standards of protection due to their age and vulnerability. This is a point well recognised in international human rights law. The Universal Declaration on Human Rights states explicitly that children are entitled to special care and assistance. This concept also runs as a thread throughout the UN Convention on the Rights of the Child (UNCRC). This power imbalance is exacerbated when adults are in positions of authority and trust, and when children are particularly vulnerable due to disability or other Additional Support Needs. Because of this, additional protections are enshrined in the UN Convention on the Rights of Persons with Disabilities (UNCRPD)."

85. The use of restraint on children with autism in schools has been raised as an issue of concern by the UN Committee on the Rights of the Child in 2016 and the need for the UK to "adopt appropriate measures to eradicate the use of restraint for reasons related to disability within all settings" noted by the UN Committee on the Rights of Persons with Disabilities in 2017.

86. These ought to have been well known to the responsible body as an established part of the residential child care policy landscape. In this context, the requirement for the responsible body to prove that the treatment was a proportionate means of achieving a legitimate aim is of particular importance. As we have explained, we were not persuaded that restraint was used as a last resort. Simply making a statement to that effect does not make it so. There must be evidence of the steps taken which leave the school with no other alternative to the use of restraint. The safe hold forms do not provide that.

87. The post-incident LSI conducted shortly after the restraint is an important element of the process, and relied on by the responsible body as demonstrating the claimant's involvement in and acceptance of the process. However, witness A had no way of determining that the claimant understood the process. We could see no adaptation of the process to take account of the claimant's cognitive and communication challenges. The claimant said she felt she just had to agree for the form. She didn't feel she had a choice. We were concerned that the LSI often took place very soon after the restraint which may have further impacted on the claimant's ability to engage meaningfully. Witness D described an LSI which followed on from the incident itself, during which the claimant was distressed and crying. This limited the value of the LSI as a tool for meaningful learning, evidenced in changes to care planning and preventative and reactive practices. "Without an effective means of exploring and understanding the [claimant's] views and experience of restraint, a valuable tool in reducing its use is lost, thus rendering it disproportionate." (Witness A A118)

88. The safe hold forms have critical omissions and inconsistencies which leads us to question how levels of restraint are measured and evaluated for reduction. Accurate recording is an important procedural safeguard. "Without systematic recording and audit of all incidents of restraint…, schools and local authorities cannot be confident that they are fulfilling their duties to the children in their care, or that their staff are acting lawfully and in line with agreed policy." (No Safe Place A016)

89. The school policy on the use of restraint provides insufficient safeguards. It was informed by Holding Safely (2005) and TCI procedures; however, witness A was unclear how the amended Holding Safely guidance (2013) was incorporated and therefore unclear on how the school intended to ensure restraint reduction. Witness A also referred to the Restraint Reduction Network Training Standards (BILD 2019) which acknowledges a "growing recognition among professional bodies and government departments … that whilst the use of any kind of restraint may on rare occasions be necessary to keep people safe, it is also traumatic and must be minimised in therapeutic settings." By 2019 the school should have developed, published, and regularly reviewed a policy on their use of restraint. No such policy existed. The ICMP lacked detail and did not provide a clear behavioural support programme likely to avoid the need for restraint. Witness A's view was that the policy adopted for use was incomplete and dated.

Remedies

90. We order the following remedies:

a) That the responsible body make a written apology to the claimant (in terms of SPSO guidance on apology) within 14 days of this decision;

b) That the responsible body and their staff undertake relevant externally provided training with a focus on avoiding and reducing the use of physical intervention/ restraint and that this commences within 6 months of this decision;

c) That the responsible body reviews, develops and revises its policy on physical intervention/restraint, in line with the recommendations set out in No Safe Place. This should involve direct input from disabled pupils who have been affected by restraint in the past, making use of the Children in Scotland guidance on "Meaningful Participation and Engagement of Children and Young People" (2019) and observing the Children and Young People's Commissioner Scotland's "7 Golden Rules for Participation". This should be completed within 12 months of this decision.

The timescales we provide take account of the impact of the pandemic. Our hope is that wherever it may be possible, these will be completed within a shorter time. We thank both representatives for their courtesy, assistance and professionalism.