



## DECISION OF THE TRIBUNAL

### Disability Discrimination Claim

This is a claim under the Equality Act 2010 ('the 2010 Act') in which the claimant alleges certain breaches of the 2010 Act by the responsible body.

The tribunal had regard to documentary evidence, contained in the bundle (written pages) as well as three days of oral evidence from those in attendance for the parties. The claimant had also submitted a reference to the tribunal seeking that the tribunal overturns the decision of the responsible body to refuse a placing request. By agreement the two matters were conjoined and the evidence heard as part of the same hearing. This avoided the necessity of witnesses being called to give evidence to two separate hearings. Two separate decisions arise out of that hearing – one in respect of each application.

At the conclusion of the oral hearing the parties lodged outline submissions and gave oral submissions.

### A. The Decision

1. The tribunal found that certain breaches of the Equality Act 2010 occurred. These are outlined in the determinations in paragraph 55, below.
2. We order the responsible body to issue a written letter of apology to the child and to his parents (in terms of Scottish Public Services Ombudsman guidance on apology). This letter should be issued within

28 days of the release of this decision and a copy must be submitted to the tribunal.

3. We order that the responsible body and their staff undertake relevant training.
4. We order that the responsible body reviews, develops and revises its policy on exclusion, together with its policy on inclusion and equality and its accessibility strategy.
5. We order the responsible body to review, develop and revise its equality outcomes and policy under the public sector equality duty to adopt relevant policies and targets for the reduction of the exclusion gap which exists in responsible body's area for children with autism.

#### B. The Evidence

In addition to the written evidence, Joint Minute of Admissions and written outline submissions, oral evidence for the responsible body was taken from Witness A, Witness B and Witness C. Oral evidence for the appellant was taken from the appellant. In general terms, we found the evidence from the witnesses to be credible, reliable and helpful. This was not a case where there were significant factual disputes as the parties were largely in agreement as to the behaviour exhibited by the child in the lead up to each of the exclusions. Where the parties differed was as to the cause of the behaviour.

The child did not attend during the hearing but the tribunal had the opportunity to consider a report from the Advocacy Service providing his views. The advocacy Worker was only able to meet with the child shortly before the hearing and the report, dated December 2017, was tendered during the course of the hearing (T33-T35).

#### C. Findings of Fact

1. The child was born in September 2008. His mother is the claimant. The child has been diagnosed with autism spectrum disorder, sensory impairment, a learning disability, poor communication skills and physical disability. He has joint hypermobility and suffers from sore legs daily. He cannot always regulate his body temperature resulting in overheating. This can impact upon his behaviour either in the form of aggression or absence seizure which manifests itself as a blank, vacant expression and failure to respond to others.

2. The child is a disabled person in terms of Section 6 of the Equality Act 2010.

3. The child attends at the Additional Support Needs base within School B, being a school under the management and control of the responsible body. The child is presently in primary 5 in a class of 6 children with additional support needs. The class has one class teacher and two support assistants. All teaching staff are trained in MAPA (Management of Actual or Potential Aggression) and de-escalation techniques. The child has an Additional Support Plan and an Individualised Educational Plan.

4. School B are aware that when the child is anxious he can display certain behaviours: he can overheat, exacerbating his behaviour; he can leave the room, throw things around and shout at people. Within the school the child has a written protocol regarding how best to support him and to prevent his behaviour from escalating. Triggers causing his behaviour to escalate are identified as:

- Placing any form of demand upon the child which may make him feel threatened and will lead to a “fight or flight” reaction.
- Over stimulation or tired, including sore legs.
- Being within a competitive environment with other children.
- Doesn't know what is happening next as he may already have an idea what is happening, his idea may be different from what is originally planned.

Behaviour which the child may display when he is heightened:

- Running away.
- Lashing out at staff.
- Taking his anger out on objects such as kicking walls.
- Verbally abusive towards staff.
- Screaming and shouting out.
- Non-responsive to verbal instructions.

When the child is in a heightened state the support to be offered:

- Staff member allocated takes lead, unless asking for assistance, no other staff to intervene.
- Give the child space if he is in a safe environment, if not staff must remain close by at all times.
- If the child is lashing out, for example, kicking walls or objects, as long as the child is not at risk, allow him to do so until it is safe for staff to intervene.
- When the child is at the peak of his heightened state, staff do not interact with the child, showing no eye contact or verbally communicating with him. As he begins to de-escalate, staff can start to give the child verbal instructions such as “Do you want to talk?” and offer the feelings book.
- Staff must be patient and allow the child to display his emotions and actions in his own time.

Once the child’s behaviour has de-escalated, support is to be offered:

- Staff to support him to a quieter space to talk in a relaxed environment.
- Use the feelings book to talk about his feelings and to try to establish what brought on his behaviour.
- Offer the child a drink.
- Refer back to his daily visual timetable and go on to next activity.

5. The child has been excluded from School B on three occasions:

- i. Commencing 17<sup>th</sup> May 2017 for a period of three days ('the first exclusion');
- ii. Commencing 7<sup>th</sup> June 2017 for a period of two days ('the second exclusion'); and
- iii. Commencing 29<sup>th</sup> November 2017 for a period of 5 days ('the third exclusion').

6. The claimant made a placing request to the responsible body (who is the respondent in a placing request) in April 2017 requesting that the child be placed at a private residential school for children with complex needs, namely School A. This was formally refused by the responsible body by letter dated 5<sup>th</sup> June 2017.

7. The child has made two visits to School A, the first in March 2017 and the second on 15<sup>th</sup> November 2017. He was also observed in School B by the Deputy Head of School A on 28<sup>th</sup> November 2017, shortly before the evidential hearing of this claim.

8. The first exclusion occurred following an incident on 16<sup>th</sup> May 2017. There had been a build-up in the child's challenging behaviour since the school Easter holidays. The incident began when the class was walking from school to the library. On the way there, the child kept running ahead. Witness C decided that it would not be safe for him to walk back and arrangements were made for a car to come and collect him.

9. Witness B and another took the child back to school in the car. In the car the child was agitated and was whispering rude comments to the other adult, Adult A, saying "shut up" and "poo poo face". They arrived back at school the child was taken into a separate room from his classroom. At break time he went into the playground for playtime. The child was shouting at another boy who was in the train area. The other children were removed from the train area and taken inside. The child was outside with Witness B and Adult A and was shouting at Adult A, using similar language to before. The

child then pushed Adult A twice. The child was asked not to hit her but then proceeded to punch Adult A on the back and to slap her arm. Witness B then spoke with the child to tell him to stop but the child continued to chase Adult A and to hit her on the back. Adult A went into the school to get away from the situation and the child began hitting Witness B. Witness C at this point went into the playground to assist Witness B.

10. Attempts were made to calm the child using the MAPA (Management of Actual or Potential Aggression) and de-escalations techniques but were unsuccessful. Dad was called to come to the school. At that time, he advised that the claimant was away on holiday in Dubai. The school had not been made aware of this change in the child's home situation prior to this. The child refused to go home with Dad and stayed in school until the end of the day.

11. The reason stated at the hearing for the exclusion was the build-up of his behaviour and physical assaults against staff. The letter of exclusion stated "Physical violence against members of staff". No appeal was lodged with the responsible body's Education Appeal Committee in respect of the period of exclusion.

12. The second exclusion occurred following an incident on 6<sup>th</sup> June 2017 when the child was reported to be upset at around 2.45pm. Shortly before then the child had chosen to play tennis as his reward activity. He became upset that there was another pupil there as he only wanted it to be his teacher, Witness C, and him. Despite attempts to resolve matters, the child began to get upset and ran back to the class. Witness C followed him to the class, the other children having been sent to a different room.

13. The child started picking up chairs and throwing them at Witness C. Witness C went behind the door where she could still see the child but wouldn't get hurt. Witness B arrived at this point and the child started shouting at her. The child started upsetting tables and throwing chairs at Witness B and shouting at her "I hate you, you are making me move school",

“You know at the end of this term I am going to a different school”, “You have ruined my life. I am getting a message on Friday [9<sup>th</sup> June]. You are making me move.” At this point the taxi escort arrived at the classroom. The child saw her and ran out of the room with his schoolbag and went home in the school taxi. The claimant was telephoned to advise of the incident and the exclusion paperwork was posted through the letterbox of the family home.

14. The reason given for the exclusion was that there had again been a period of unsettled behaviour, including various comments about not wanting to leave the school, damage to school property and violence towards staff. The letter of exclusions stated “Holding chairs about his head and throwing in teacher’s direction. Shouting aggressively.” No appeal was lodged with the responsible body’s Education Appeal Committee in respect of the period of exclusion.

15. The third exclusion occurred following an incident on 29<sup>th</sup> November 2017. On or about 13<sup>th</sup> November 2017 the claimant had advised the school in writing that the child would not be at school the following day as he was going to visit School A. The child appeared to revert to the unsettled behaviour that he had exhibited in June 2017, in particular, he had been taking himself out of class, refusing to participate in class and throwing things around. The child was described as “having a worry”. Sometimes he would not want to talk about it, other times he referred to leaving School B.

16. At around 10.40am on 29<sup>th</sup> November the child was upset and did not want to go into his classroom. He ran off and went into another nearby empty classroom. The child locked the door of the classroom. Witness C was able to unlock it from outside and as she started to open it the child came running to the door and slammed it. The door hit Witness C on the head. Witness C did not believe that the child intended that she should get hurt. Witness B arrived and sent Witness C to get first aid. She required to apply an ice pack.

17. Witness B asked another member of staff to watch the child through the window to ensure his safety. Witness B attempted to engage the child in

conversation using MAPA and de-escalation tactics. The child threw a chair and then a shoe at Witness B. The child shouted at Witness B “I hate you, you don’t want me here”. Witness B watched from a safe distance and the child began to calm down. He was offered a snack or toast but refused both. The child then chose to lock the door of the room and sat in the room quietly.

18. The claimant was called and arrived. The door was unlocked from the outside using the staff access key. The child attempted to stop the claimant from entering the room but she was able to push her way in. The child did not wish to go home. The child was upset that he would not be in school. After a while, the child calmed and agreed to leave the school with the claimant. The claimant collected the exclusion papers on the way out of school.

19. The reason stated for the exclusion was that the child had become very upset, had been taking himself out of class and his violence towards staff. The letter of exclusion stated “Inability to listen and follow instructions. Throwing furniture”. No appeal was lodged with the responsible body’s Education Appeal Committee in respect of the period of exclusion.

20. The child was asked to comment on the first two periods of exclusion, the third having happened only shortly before the oral hearing. The child did not want to talk about what had happened and was then asked how he felt when he was asked to stay at home. He responded, “I was unhappy”, “I wanted to go back to school, to my friends”, “It was unfair, I didn’t know you could be asked to leave for three days” and “I was angry it happened and then it happened again for another three days”.

21. The child has exhibited challenging behaviour at School B previously. Such behaviour has included aggression, including physical, towards staff and other pupils; throwing chairs; kicking walls and turning tables over; and assaulting another pupil. The claimant had asked the school why the child had not been excluded on those occasions, when his behaviour had, in her view, been equally bad. The response from the school was to ask if she would prefer if they did exclude him for such behaviour.



22. The difference between these behaviours and the behaviours leading to the exclusions, the tribunal was told, was that normally if the child throws things, it is not with the intention of hitting anything or anyone. On the particular dates narrated above, however, he was clearly directing his behaviour at the teachers. The description of not previously having directed his behaviour at other people is not consistent with school records of the child's past behaviour, as described above. The witnesses for the responsible body were clear in their view that the child's heightened disruptive behaviour exhibited in the periods up to all three of his exclusions was directly related to his worry that he was not wanted at School B and that he would be leaving to go to another school. The tribunal is also persuaded that this worry either led to or exacerbated the child's behaviour on each of the three occasions.

23. The decisions to exclude the child were taken at the time of the incidents, as was the decision about how long each exclusion should be for.

24. The responsible body has written Operating Procedures, and Procedure A8 is headed "Exclusion Procedures." (C41-57). The Exclusion Procedures narrate, inter alia, that in line with The Schools General (Scotland) Regulations 1975, Regulation 4, that there are two grounds on which a pupil may be excluded. Ground 2, which is the relevant ground for our purposes, states that this operates where the Education Authority considers that in all of the circumstances to allow the pupil to continue his/her attendance at the school would be likely to be seriously detrimental to order and discipline in the school or the educational wellbeing of the pupils there. In relation to a pupil with ASN, the grounds on which a pupil may be excluded are the same as they are for pupils who do not have ASN. However, additional considerations require to be taken into account where the pupil has ASN. This is not elaborated on. Exclusion is described as a "sanction" to be used only where other appropriate courses of action have been tried and have not been successful, unless the nature of the incident is considered so serious as to merit exclusion without having tried other courses of action and where, in all of the circumstances, the school is of the view that exclusion is necessary and

appropriate. (C44). Examples of where the pupil's continued attendance at the school may be detrimental to order and discipline and the educational wellbeing of other pupils are stated as-

- A serious breach of school discipline;
- A criminal act (such as a serious assault or serious racist incident)

25. Exclusions by Head Teachers may operate at three levels: Level 1 – up to 5 school days, Level 2 -6-10 school days and Level 3 – 11-15 school days. The decision as to which level of exclusion is appropriate takes into account whether all other measures have been tried but have not proven successful; whether there have already been exclusions at the lower level; and the seriousness of the breach of discipline i.e. a more serious breach of discipline may warrant a level 2 exclusion without the pupil having previously received a level 1 exclusion.

26. The Exclusion Procedures for the responsible body (at C56) para 8.9 require schools and Education Authorities to be aware of legislation relating to human rights and other relevant legislation. They should ensure that any decision to exclude complies with duties relating to anti-discrimination. The Exclusion Procedures do refer to the Equality Act 2010 in so far as avoiding direct discrimination, but we note that it is only at the final paragraph of that written procedure, after guidance that particular considerations should be given to individual circumstances, with examples such as whether an exclusion would impact upon attending at an exam (8.6), that there is mention of a requirement for schools to be aware of the terms of the 2010 Act, and then it only relates to direct discrimination. It does not go on to also raise awareness of indirect discrimination or discrimination arising from disability. Witness A advised that the responsible body are in the process of reviewing their procedures with a view to bringing them into line with the Scottish Government guidelines – “Included, Engaged and Involved Part 2: A Positive Approach to Preventing and Managing School Exclusions.” (a copy of which was lodged at C111-C174).

#### D. Reasons for the Decision

27. We start by noting that the 2010 Act does not prohibit schools from excluding pupils with protected characteristics, but it does prohibit schools from excluding pupils because of their protected characteristics or from discriminating during the exclusions process. Schools also have a duty to make reasonable adjustments to the exclusions process for disabled pupils.

28. Firstly, we consider whether there has been discrimination arising from a disability (section 15 of the 2010 Act). Secondly, we consider whether there has been indirect discrimination (section 19 of the 2010 Act). Each of these forms of discrimination is referred to in s.25(2) of the 2010 Act.

**Note: A sentence from paragraph 28 has been removed in this publication, following a decision by the President under rule 101(3)(c) of The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 ('the 2018 Rules') (Schedule to SSI 2017/366), taken to reflect the outcome of a review process.**

29. In considering each of these aspects of the case, we have to be mindful of the burden of proof. In any claim where a person alleges discrimination, harassment or victimisation under the 2010 Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act.

30. In terms of Section 6 (1) of the Act 2010, a person (P) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. There is no dispute between the parties that the child is a child who has a disability in terms of the Act.

31. Section 15 of the Act 2010 - Discrimination arising from Disability.

(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.

32. In order to consider if there has been a breach of this section by the responsible body, we require to ask the following questions:

- i. Did the decision to exclude the child from school amount to unfavourable treatment?
- ii. Was the decision to exclude taken because of something arising in consequence of the child's disability?
- iii. What was the legitimate aim that the exclusion was meant to achieve?
- iv. Was the exclusion a proportionate means of achieving the legitimate aim?

To answer these we determine as follows:

i. Unfavourable Treatment.

33. To exclude a child from school means to remove him from education and from his peer group. This is clearly unfavourable treatment. Indeed, section 85(2) of the 2010 Act states that a responsible body may not discriminate against a pupil in certain ways, including, in terms of S85(2)(e), by excluding the pupil from the school. Accordingly, it is clear that exclusion is something that is considered as a clear risk factor for discrimination.

ii. Arising as a Consequence of Disability.

34. In our view, all three exclusions arose from behaviour exhibited by the child arising out of his disability. In addition to autism, the child is described as having a sensory impairment, a learning disability, poor communication skills and physical disability. This and his inability to regulate his body temperature when anxious, results in overheating and impacts upon his behaviour in the form of aggression.

35. For each period of exclusion, it had been noted that there had been unsettled behaviour for a period of time prior to the exclusion. The witnesses were clear that the child had a worry and did not want to leave School B and was feeling rejected by them at the thought that he was to attend at another school instead. We note that the exclusions come close in time after events relating to the placing request; namely his visit to School A, the anticipated outcome of the placing request, and a further visit to School A and observation by the Depute Head of that school as part of the preparation for this hearing. His disability limited his ability to express his worry, leading to heightened behaviours, which in turn led to his exclusions.

36. The decision to exclude the child on all three occasions was justified by the school by the build-up of his behaviour over a period of weeks prior to the date of the actual incidents as described above, along with use of physical violence against staff. The school was aware that the child was suffering from heightened anxiety arising from his worry over leaving School B. In their submissions, the responsible body sought to persuade that a “tendency to physical violence to others should not be treated as a disability”, thus arguing that it was the child’s use of violence towards staff, which they described as being out of character for him, that was the reason for the exclusions and that this use of violence did not arise from his disability. We are not persuaded that the child’s use of violence, as described, can be separated from his disability.

37. The school was aware that, when in a state of heightened anxiety, the behaviours that the child can exhibit, as set out in the protocol for him, include being verbally abusive towards staff, lashing out at staff and taking his anger out on objects such as kicking walls. The behaviours exhibited by the child on each occasion that he was excluded are entirely consistent with the behaviours described in the protocol, and accordingly we are satisfied that all three decisions to exclude were taken because of something arising in consequence of the child's disability.

iii. Legitimate Aim of Exclusion.

38. In his evidence, Witness A stated that the primary purpose of exclusion, in his view, was to keep the child or others safe from harm. The period of exclusion allows a meeting to be set up between the school and other agencies to discuss the behaviour of the child and how best to avoid further exclusions by identifying and reducing the stress on the child. The length of the period of exclusion was a decision delegated to the Head Teacher of the school and could take into account the timings of when a meeting could be arranged.

39. The evidence of Witness B, who was the person who took the decision to exclude, was that the exclusions were not for one off events, but because of a build up of behaviours and the fact that the child had a worry over the possibility of leaving the school, he didn't know how to cope with the worry and so he took it out on the staff. As the outcome of the placing request was outwith the control of the school and was not one that they could affect, the decision was taken to exclude the child from school as he "needed time to think". The length of the period of exclusion was determined taking into account the level of escalation of behaviour and the severity of the specific incident. This gives it the nature of a sanction or punishment. We accept the evidence of Witness B, as the primary decision maker, that this was the aim of the exclusion, which, in fact, is in line with the responsible body's policy on exclusions. Additionally, despite requests from the claimant that there should

be involvement from the Educational Psychologist, this did not happen. Nor were there any additional targets added to the child's plan after each exclusion to identify how the child could be supported to avoid future exclusions.

40. The Exclusion Procedures of the responsible body describe exclusion as a sanction, with the period of exclusion to be determined taking into account the severity of the breach of discipline.

41. The practice as exercised here did not have a legitimate aim. The aim, as described by Witness B, was 'to give the child an opportunity to think' as she did not believe that she could affect the worry caused by the uncertainty over the placing request. The differing lengths of the periods of exclusion were a sanction reflecting in how she viewed the severity of his behaviour. This is not a statutory basis for the exclusion of a child (the only statutory bases are those provided in regulation 4 of the Schools General (Scotland) Regulations 1975) (SI1975/1135)). Given that Parliament has prescribed that exclusions may only be based on certain statutory grounds, an exclusion which is not justifiable on those grounds is, by definition, unlawful. An exclusion which is not lawfully founded cannot be said to be in pursuit of a legitimate aim.

iv. Proportionate Means of Achieving a Legitimate Aim

42. The fact that the legislation requires us to consider whether the exclusion is proportionate confirms that there may be circumstances which justify the unfavourable treatment arising as a result of a child's disability. The claimant having satisfied us that section 15(1)(a) has been met, it is for the responsible body to satisfy us that the decision to exclude was proportionate. The tribunal take into account that the child's behaviour included throwing chairs and physically hitting staff. We do not wish to minimise such behaviour, but the behaviour complained of was not so out of line with the behaviours detailed in his protocol, and as we have accepted the evidence of

the witnesses for the responsible body, that the behaviours were as a result of the child's worry over possibly leaving School B, we determine that they do not necessarily constitute a serious breach of discipline such that exclusion was the only option.

43. Are we satisfied that either all other courses of action had been exhausted or that the incident was so serious that exclusion was necessary or appropriate? The tribunal find that we are not. The school did try various tactics as set out in the protocol, such as trying to talk to the child and leaving him in a room with the door shut so that he could be in a safe environment while he cooled down. They also requested another person to attend when they recognised that the child was targeting his upset at Witness C. However, we find that these actions did not go far enough. In terms of the protocol, staff are urged to “be patient”, and once the child's behaviours had de-escalated, staff should have offered support such as talking to him in a quiet environment; use a feelings book to give him the opportunity to talk about why he was upset, offer him a drink and then refer him back to his timetable and go onto the next activity. Had the school shown that all of these were either inappropriate or unsuccessful, then the exclusions may have been proportionate. We also take into account that the exclusions were of differing length, to reflect the severity of the behaviour – a sanction – rather than a reflection of what was considered necessary to ensure good order and discipline in the school or to protect the child or others from harm.

44. The second question that we require to answer is was the child indirectly discriminated against due to the decision to exclude him, under s.19 of the 2010 Act, causing a breach of s.85(2)(e)? We determine that he was. In coming to this decision, we had regard to the terms of s.19 and also to the relevant case law, including the case of *Essop & Others v Home Office* [2017] UKSC 27.

45. Section 19(1) states that a person (A) indirectly discriminates against another (B) if A applies to B a provision, criterion or practice which is



discriminatory in relation to a relevant protected characteristic of B's. In terms of section 19(2) of the 2010 Act, indirect discrimination will occur if all of the following four conditions are met.

- a) A school applies (or would apply) the provision, criterion or practice equally to all relevant pupils, including a particular pupil with a protected characteristic.
- b) The provision, criterion or practice puts, or would put, pupils sharing a protected characteristic at a particular disadvantage compared to relevant pupils who do not share that characteristic.
- c) The provision, criteria, practice or rule puts, or would put, the particular pupil at that disadvantage.
- d) The school cannot show that the provision, criteria or practice is justified as a 'proportionate means of achieving a legitimate aim'.

46. Disability is a relevant protected characteristic. It does not matter that the school did not intend to disadvantage pupils with the particular protected characteristic; what does matter is whether the provision, criterion or practice does, or would, disadvantage such pupils compared to pupils who do not share that characteristic. Disadvantage is not defined in the Act. A disadvantage does not have to be quantifiable and the pupil does not have to experience actual loss. It is enough that the pupil can reasonably say that he or she would have preferred to be treated differently.

47. For the claimant, there is no duty to explain why the provision, criterion or practice puts those with the protected characteristic at a disadvantage when compared with others.

48. The Tribunal considered each of the above conditions and determine as follows:

(a) A school applies (or would apply) the provision, criterion or practice equally to all relevant pupils, including a particular pupil with a protected characteristic.

The practice which was applied here was the practice of excluding a child whose behaviour (assuming further attendance at the school) would be likely to be seriously detrimental to order or discipline, in

circumstances where that behaviour involved aggression and violence towards a teacher. Evidence of the practice of exclusion of the responsible body comes from their Operating Procedure A8, Exclusion Procedures, already referred to earlier. (C41-73). We are satisfied that the responsible body would have applied this practice to all pupils whether disabled or not.

*(b) The provision, criterion or practice puts, or would put, pupils sharing a protected characteristic at a particular disadvantage compared to relevant pupils who do not share that characteristic.*

The protected characteristic in question is disability. We consider whether there is sufficient evidence for us to make a determination that their Exclusion Procedures put children with a particular disability, in this case, autism, at a disadvantage. The terms of the responsible body's Exclusion Procedures are referred to in paragraphs 24 to 26 of this decision. As noted, the Procedures make reference to direct discrimination but make no mention of indirect discrimination, indicating that the responsible body had not, in fact considered this when the Procedures were being drawn up. In this regard, the responsible body has failed to meet its duty under s.149(1)(a) of the 2010 Act, which states that a public authority must, in the exercise of its functions, have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act. Section 149(8)(b) confirms that reference to conduct that is prohibited by or under this Act includes a reference to a breach of a non-discrimination rule. With regard to whether the provision, criterion or practice has had the effect of putting such pupils at a disadvantage, the evidence put before us came from statistics obtained by the claimant and conceded by the responsible body. These figures stated that pupils in RB Area with autism were excluded at the rate of 53 exclusions per 1,000 pupils in 2012/13 and 64 exclusions per 1,000 pupils in 2014/15. This compares to 32 exclusions per 1,000 pupils of non-disabled pupils in 2012/13 and 25 exclusions per 1,000 pupils in

2014/15. There was evidence that this information may include incidents of sending children home which would not have previously been treated as an exclusion (the policy being that all sending home of pupils should now be recorded as an exclusion) and that the statistics referred to related predominately to secondary school children. However, in the absence of more detailed analysis of the statistics, we require to accept these figures as being relevant as evidence of the results of the exclusion policy of the responsible body. What is relevant to our consideration is the discrepancy between the figures for children with autism and those without, and it is clear that the rate of exclusion is higher for children with autism. The responsible body put forward that the statistics for their education authority were at least comparable if not better than the statistics for Scotland as a whole. However, even if this is the case, it does not, of itself, evidence that indirect discrimination has not taken place. The responsible body presently does not monitor the rate of exclusion of pupils with autism and had been unaware that this exclusion gap existed. Witness A did state in evidence that, having had this brought to his attention, he will now begin to monitor the exclusion rates.

(c) The provision, criteria, practice or rule puts, or would put, the particular pupil at that disadvantage.

We are satisfied that the practice puts the child, and others who have that particular disability, at a disadvantage when compared with pupils who do not have a disability. We have already noted that the child's disability has a direct impact on his behaviour. This means that due to the child's condition, he is more prone than a non-disabled child to behave in the way he did during the incidents in question. The school was well aware of his disability and the likely impact upon his behaviour as a result of being under stress, but nonetheless he has been excluded from the school on three occasions because of behaviour arising from his disability.

*(d) The school cannot show that the provision, criteria or practice is justified as a 'proportionate means of achieving a legitimate aim'.*

The wording of s19(2)(d) is similar to the wording of s.15(1)(b). We have already determined under s.15(1)(b) that the aim of the exclusion policy here was to use exclusion as a sanction in cases where it was determined that there had been a breach of discipline. This does not come within one of the two statutory grounds for exclusion and so cannot be said to be a legitimate aim.

49. For these reasons, a case of indirect discrimination has been made out in relation to this exclusion.

**Note: Paragraphs 50-53 are not included in this publication, following a decision by the President under rule 101(3)(c) of The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 ('the 2018 Rules') (Schedule to SSI 2017/366), taken to reflect the outcome of a review process.**

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## **E. Determinations and Remedies**

54. Schedule 17 Part 3 paragraph 9 of the 2010 Act, gives the tribunal wide powers in relation to remedies. Section 9(1) of the 2010 Act applies if the tribunal finds the contravention has occurred. The section goes on -  
“(2) The Tribunal may make such order as it thinks fit.

(3) The power under sub-paragraph (2)—

- (a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates;
- (b) does not include power to order the payment of compensation.”

55. We make the following declarators of discrimination:

- (1) In excluding the child from school on 17<sup>th</sup> May, 7<sup>th</sup> June and 29<sup>th</sup> November 2017, the responsible body contravened its duty to avoid discrimination arising from disability (as defined in s.15 of the 2010 Act), contrary to s. 85(2)(e) of the 2010 Act.

(2) In excluding the child from school on 17<sup>th</sup> May, 7<sup>th</sup> June and 29<sup>th</sup> November 2017, the responsible body contravened its duty to avoid indirect discrimination (as defined in s.19 of the 2010 Act), contrary to s. 85(2)(e) of the 2010 Act.

**Note: Declarator (3) in paragraph 55 is not included in this publication, following a decision by the President under rule 101(3)(c) of the 2018 Rules, taken to reflect the outcome of a review process.**

56. We order the following remedies:

1. That the responsible body issue a written letter of apology to the child and to his parents (in terms of the Scottish Public Services Ombudsman guidance on apologies). This letter should be issued within 28 days of the release of this decision and a copy must be submitted to the Tribunal;
2. That the responsible body and its staff undertake relevant training;
3. That the responsible body reviews, develops and revises its policy on exclusion, together with its policy on inclusion and equality and its accessibility strategy; and
4. That the responsible body reviews, develops and revises its equality outcomes and policy under the public sector equality duty to adopt relevant policies and targets for the reduction of the exclusion gap which exists within the responsible body's area for children with autism.