



## DECISION OF THE TRIBUNAL

### 1. Background

(1) The claimant is the mother of the child. Together the claimant and the responsible body are referred to as the parties.

(2) The claimant gave notice of a reference to the Tribunal under section 18(1) of the Education (Additional Support for Learning) (Scotland) Act 2004, as amended (the 2004 Act) dated March 2016 concerning a co-ordinated support plan (CSP) made on January 2016. The reference was disposed of by a decision of the convener dated October 2016, which found that the CSP made on January 2016 was not adequate and required the responsible body to amend it by November 2016. The CSP was amended on November 2016.

(3) The present claim was made to the Tribunal on June 2016. It was not conjoined with reference as to do so would have resulted in unacceptable delay in determining the reference, contrary to the overriding objective set out in rule 3 of the Additional Support Needs Tribunals for Scotland (Practice and Procedure) Rules 2006.

(4) This claim now falls to be determined.

### 2. Procedural history

(1) Case conferences took place by telephone on October and December 2016. The case conference on October 2016 took place between the convener and the representatives for the parties.

(2) The case conference on December 2016 took place between the convener and Solicitor for the claimant, RB representative being unable to dial in to the case conference.

(3) A number of directions were issued by the convener.

(4) The claim proceeded to an oral hearing over 3 days in February 2017. By agreement the parties each lodged final written submissions on 20 February 2017.

### **3. Preliminary matters**

(1) The convener explained the procedure which the Tribunal proposed to adopt in the hearing.

(2) No preliminary matters were raised by either party at the beginning of the hearing.

### **4. Documentary evidence and witnesses**

(1) The Tribunal had before it a bundle of papers comprising papers numbered T1 to T10, C1 to C32 and R1 to R441.

(2) In the course of the hearing, two further documents were lodged: an individualised educational programme in respect of the child up to date as at 23 September 2015 and a copy of the Minute of the Young Person's Planning Meeting (**YPPM**) of 30 January 2017, which was included with the papers at R432 but which was missing its final page.

(3) The Tribunal heard oral evidence from **Witness A**, a child and family worker; from **Witness B**, social worker; from **Witness C**, Support for Learning Leader, School A; from **Witness D**, Consultant Child and Adolescent Psychiatrist; from **Witness E** additional support for learning teacher with RB; from **Witness F**, Head of Direct Help and Support (an advice service providing advocacy and support to parents and children with additional support needs); and from **The claimant**, the mother of the child.

## **5. The child's views**

(1) At the case conference on October 2016, the parties' representatives undertook to discuss and if possible agree a mechanism by which the child's views – if she wished to express them – could be made known to the Tribunal. The claimant lodged with the Tribunal a document, in which she had noted the child's responses to a number of questions which the claimant had put to her on two occasions approximately one week apart.

(2) In the course of the hearing, given the nature of the claim, it was agreed by parties that the child's views could best be made known by reference to the documents lodged and by questioning of the witnesses. It was open to the parties to make such submissions as they wished on the views of the child at the end of the hearing.

## **6. Relevant statutory provisions**

(1) The principal relevant statutory provisions which the claim concerned are noted below.

### Equality Act 2010

(2) Section 85(2) (pupils: admission and treatment, etc.) of the 2010 Act provides that:

“The responsible body of such a school must not discriminate against a pupil–

- (a) in the way it provides education for the pupil;
- (b) in the way it affords the pupil access to a benefit, facility or service;
- (c) by not providing education for the pupil;
- (d) by not affording the pupil access to a benefit, facility or service;
- (e) by excluding the pupil from the school;
- (f) by subjecting the pupil to any other detriment.”

(3) Section 15(1) of the 2010 Act provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(4) Section 85(6) provides that “A duty to make reasonable adjustments applies to the responsible body...”.

Education (Scotland) Act 1980

(5) Section 14(1)(b) of the Education (Scotland) Act 1980 (**the 1980 Act**) places an obligation on an “education authority” (which is the “responsible body” in terms of section 85(9)(c) of the 2010 Act) to make special arrangements for a pupil to receive education elsewhere than at an educational establishment where the pupil is unable, or it would be unreasonable to expect the pupil, to attend the establishment due to prolonged ill health.

Education (Additional Support for Learning) (Scotland) Act 2004

(6) Section 1(1) of the Education (Additional Support for Learning) (Scotland) Act 2004 (**the 2004 Act**) provides that:

“A child or young person has additional support needs for the purposes of this Act where, for whatever reason, the child or young person is, or is likely to be, unable without the provision of additional support to benefit from school education provided or to be provided for the child or young person”.

(7) The meaning of “school education” is, by virtue of section 29(2) of the 2004 Act and section 135(1) of the 1980 Act, given in section 1(5)(a) of the 1980 Act.

## **7. Principal areas of agreement**

(1) The child has a disability in terms of section 6(1) of the Equality Act 2010.

(2) The responsible body has the responsibility to make reasonable adjustments in terms of the Equality Act 2010.

(3) Failure to make such adjustments would amount to discrimination on grounds of disability in terms of the Equality Act 2010.

(4) The child has additional support needs in terms of section 1 of the Education (Additional Support for Learning) (Scotland) Act 2004.

(5) The child has additional support needs arising from her diagnosis of autism spectrum disorder and her significant mental health issues. These factors are

complex as they have a significant adverse effect on the child's ability to attend school (paragraph 14 of Minute of Agreed Facts).

(6) The responsible body made a co-ordinated support plan on January 2016 and revised it on November 2016.

(7) The child has not attended school at all since October 2015 with the exception of attendance for one half-day on December 2015.

## **8. Matters in Dispute**

(1) The nub of the claim is that the responsible body "...failed to make the reasonable adjustments necessary to allow [the child] to engage effectively in education. The authority has failed to provide [the child] with an adequate and effective education. The claimant has repeatedly sought an outreach programme of education for [the child] and this has been refused without further explanation" and that the "...issue is ongoing, culminating in the issuing of a wholly inadequate CSP on 5.1.16 and ongoing failure to provide education" (page T6).

(2) RB representative in his email correspondence to the Tribunal of January 2017 (14:13) referred to rule 5(4) and (6) of the Additional Support Needs Tribunals for Scotland (Disability Claims Procedure) Rules 2011 and submitted that reference to matters which occurred prior to 6 months before the date of this claim should be excluded from consideration at the hearing. The Additional Support Needs Tribunals for Scotland's Administration copied that correspondence to the parties' representatives along with the response of the convener, which noted–

"It appears that RB representative seeks to exclude statements and witness statements lodged by the claimant. The claim – which was lodged when a reference was before the Tribunal covering similar ground (RB representative having indicated in response to that reference that in his view it should in fact be a discrimination claim) – states, at page D6, 'that this issue is ongoing, culminating in the issuing of a wholly inadequate CSP on 5.1.16 and ongoing failure to provide education, a reference has been raised under reference ...'. Given the ongoing nature of the conduct complained of, the terms of rule 5 and it appears that it is sought to use the rule to exclude certain statements made by witnesses (rather than to argue that the claim itself is out of time and should not be considered), this matter requires full submissions to be made by both parties. It is open to RB representative to raise this matter at the oral hearing for consideration."

(3) This matter was not raised as a preliminary matter at the beginning of the hearing.

(4) In the course of the hearing, RB representative raised the issue of the period of events to be examined. Given the ongoing nature of the alleged discrimination, the Tribunal was satisfied that it was open to the Tribunal to consider all the evidence of alleged discrimination prior to the date of the hearing and to weigh that evidence in coming to its decision. Given the ongoing nature of the alleged discrimination, it did not appear to the Tribunal that the claim was out of time in terms of rule 5(6). If, however, the claim is out of time given the foregoing, the Tribunal considers it just and equitable to consider the claim.

(5) For completeness, the Tribunal noted that in the summing up for the responsible body at section E, RB representative submitted that the Tribunal should not have regard to certain evidence. No preliminary matter was raised at the beginning of the hearing and no objection was taken by RB representative to any evidence in the course of the hearing and, accordingly, the Tribunal has had regard to all of the evidence before it.

## **9. Oral evidence**

(1) The Tribunal heard oral evidence from the witnesses listed at paragraph 4(3) above. Each of the witnesses gave evidence in a straightforward manner and appeared to the Tribunal to seek to answer the questions put to them to the best of their ability. It appeared to the Tribunal that each of the witnesses had a good rapport with the claimant.

## **10. Findings in fact**

(1) The child was born on March 2003. The claimant is the child's mother. The child lives with her mother and two siblings.

(2) At primary school, the child presented as an academically able pupil. She was awarded a scholarship to an independent school in Primary 6. The child did not settle in the independent school and returned to her previous primary school. The child has always displayed some challenging behaviours. Her mental health and behaviour deteriorated significantly in the summer of 2013, and around this time she started to refuse to go to school. The child has not attended school regularly since

December 2013 and not at all since December 2015. The child's difficulties attending school arise from her diagnosis of Autism Spectrum Disorder (**ASD**) and mental health issues. The conditions significantly limit the child's ability to benefit from, or meaningfully engage with, education without significant support.

(3) The claimant requested assessment for a CSP in respect of the child by letter dated April 2014. RB representative replied by email on April 2014 agreeing to the request for assessment.

(4) The claimant raised proceedings before the Tribunal in respect of the failure to provide a CSP. The Tribunal issued a direction on December 2015 requiring that a finalised CSP be issued no later than January 2016. On January 2016, the responsible body issued a finalised CSP. After proceedings before the Tribunal on October 2016, the CSP of January 2016 was found to be not adequate and the responsible body was required to amend it by November 2016.

(5) After proceedings before the Tribunal, the CSP of January 2016 was amended on November 2016.

(6) The child is enrolled as a pupil at School A. The child did not participate in School A's transition programme for new pupils.

(7) The child was not expected to commence attendance at School A in August 2015. Towards the end of the summer of 2015, the child decided that she would attend School A and that she would do so on a full-time basis. The claimant informed School A. The claimant provided Witness C with detailed notes about her child. Witness C prepared from those notes an individualised educational programme which was updated on September 2015. That programme set out provision for the child to have a corridor pass to allow her to leave lessons early and thus avoid crowds and noisy corridors, to be able to communicate in writing either on paper or through her telephone, and to be allowed to use her telephone to de-stress.

(8) The child attended School A until October 2015. The child has not attended school since October 2015, with the exception of attendance on 22 December 2015.

(9) The child had a diagnosis of ASD prior to 15 June 2015 (page T65). She experiences high anxiety and sensory processing disorder and vestibular and proprioception issues. She has a tendency to self-harm and experiences suicidal ideation regularly. The child is also identified as fitting the profile of pathological

demand avoidance. Her difficulties impacted on her sleep pattern and attendance at school. She does not leave the house and struggles to tend to her own personal care. The child's psychiatrist, Witness D, has not carried out a full diagnostic assessment as, due to the child's presentation, her anxiety and her inability to engage with other people without becoming distressed, a full diagnostic assessment has not been possible. The diagnosis is based on information from the claimant, from the child's history, from the observations of professionals involved with the child and from Witness D' own observations of the child.

(10) The child has additional support needs arising from her diagnosis of autism spectrum disorder and her significant mental health issues. These factors are complex as they have a significant adverse effect on the school education of the child.

(11) Young Person's Planning Meetings (**YPPM**) take place irregularly. YPPMs met on approximately six occasions in 2015. In 2016, YPPMs met in February, March, April, August, October and November. The YPPM is chaired by a social worker, Witness B. It is attended by various people involved in providing care and services to the child, such as Witness C and Witness D, and is attended by the claimant.

(12) The child has been provided with a Barnardo's worker since 2015. The current Barnardo's worker, (Barnado's Worker), began her involvement with the child's family on November 2015, replacing a predecessor with whom the child had refused to engage. The purpose of the Barnardo's worker was to attend once per week for an hour or so at the child's home, ostensibly to engage with one of the child's siblings, but in fact to develop and build a relationship with the child. The purpose of this was to encourage the child to engage with another person. The Barnardo's worker provided to the child is paid for by the education authority. After ceasing to attend secondary school in October 2015 (with the exception of one afternoon's attendance on December 2015), the child was provided with a visiting teacher, a virtual learning environment in which it was sought to provide materials of interest to her, educational materials in hard copy which it was sought to provide materials of interest to her and three visits to the child's home by Witness C to attempt to engage with the child in respect of the virtual learning environment. The child did not engage with Witness C or with the virtual learning environment.



(13) The child has a disability in terms of the 2010 Act. The child has additional support needs in terms of the 2004 Act arising from her disability. Council A are the responsible body for the child in terms of section 85(9)(c) of the 2010 Act. It is the responsibility of the responsible body to ensure suitable provision to allow the child to access education.

(14) The child's disabilities have a substantial and long-term adverse effect on her ability to carry out normal day to day activities, in particular her rigidity with regard to routine, social skills, social interactions and behaviour, which affect all aspects of the child's learning. The child's presentation fluctuates throughout each day. She is very unpredictable. She experiences severe anxiety which makes it difficult for her to engage with people, including at times her family. The child will refuse to engage with people at all or will cease to engage at all with people with whom she has been engaging. When she does engage, she is unable to talk about emotions or feelings or sensations. The child reacts at times badly to direct questions and is unable or unwilling to respond to certain direct questions.

(15) In the early part of 2016, (Barnado's Worker) attempted on five occasions to get the child to leave her home to go to (Barnado's Worker)'s office on the basis that she would be doing so to accompany her sibling and provide support for her sibling. Each of the attempts failed, the prospect of leaving the house triggering the child's anxiety, and no further attempts were made. The child experiences high levels of anxiety and is frequently disengaged from services provided to her including such as child and adolescent mental health services (CAMHS). The child's anxiety is a significant barrier to her attending school. The child is isolated from her peers.

(16) In May 2016, the child's presentation deteriorated. She declined to engage even with the Barnardo's worker, (Barnado's Worker). (Barnado's Worker)'s presence in the family home caused distress to the child.

(17) In the course of the summer of 2016, the claimant engaged a psychology student, (H), to act as a personal assistant to the child. The claimant timetabled a series of family activities and outings. (H) would be with the family three days per week for six hours on each occasion. With the support of (H), the child was encouraged to leave the house, going to a[various public attractions] . The child had to use a wheelchair due to the deterioration in her physical health.

(18) In or before August 2016, the child asked to be provided with medication which she had previously been offered by Witness D. This medication is commonly referred to as anti-depressant medication, but is commonly used to address anxiety.

(19) In August 2016, the child's presentation improved markedly in terms of her willingness to engage, albeit from a very low base point.

(20) Subsequent to the improvement in the child's presentation in August 2016, a maths tutor was introduced into the family home to provide the child with 1:1 tuition. At the time of the hearing of this claim, the maths tutor had attended on five occasions and the child had been able to engage with the maths tutor on three of those occasions.

## **11. Reasons for the decision**

### Sections 20 and 85 of the Equality Act 2010: reasonable adjustments

(1) The Tribunal noted the terms of *Technical Guidance for Schools in Scotland (applying to the provisions in the 2010 Act which were brought into force on 1 October 2010, and the extension of reasonable adjustments to include auxiliary aids and services which was brought into force on 1 September 2012) prepared by the Equality and Human Rights Commission* (at pages R15 to R218) and in particular the terms of paragraph 6.16 (page R89), which provides:

“Some, but not all, disabled pupils will also have been identified as having additional support needs and may already be receiving additional support in school or may have a coordinated support plan. The fact that a disabled pupil is receiving additional support does not take away a school's duty to make reasonable adjustments for that pupil. In practice, many disabled pupils who also have additional support needs will receive the necessary additional support through an individualised educational programme (sometimes called an additional support plan) or a coordinated support plan, where the criteria is met. In that case, there will be no additional requirement on the school to make reasonable adjustments. However, some disabled pupils will not have additional support needs and some disabled pupils with additional support needs will still need reasonable adjustments to be made for them, in addition to any support that they already receive.”

(2) The Tribunal noted the terms of paragraph 2 of chapter 2 of Supporting Children's Learning Code of Practice Revised Edition 2010, which states that the 2004 Act's:

"...reference to school education links both the 1980 Act and the Standards in Scotland's Schools etc. Act 2000 (referred to as "the 2000 Act"). The 1980 Act states that school education appropriate to the requirements of pupils, regard being had to the age, ability and aptitude of such pupils. It should be noted that this definition does not require pupils to be attending school in order to be receiving school education. For example, pupils could be receiving school education in hospital or at home when they are unable to attend school because of ill-health. The 1980 Act also places a general duty on education authorities to secure for their area adequate and efficient provision of school education."

(3) The Tribunal noted from the foregoing that pupils do not require to be attending school in order to be receiving school education and could, for example, be receiving school education at home or elsewhere when they are unable to attend school because of ill health.

*The CSP of 5 January 2016*

(4) The Tribunal turned its attention to the co-ordinated support plan (CSP) of January 2016 to ascertain whether it provides for additional support which discharges the responsible body's obligation to make reasonable adjustments. The Tribunal noted that, in the decision of October 2016 determining reference, the convener found that the CSP made on January 2016 was "not adequate".

(5) The measures of additional support specified in the CSP of January 2016 were:

"Speech and language therapist to provide advice, resources, training and consultation services to school staff on an occasional basis" and "Occupational therapist to provide resources, training and consultation services to school staff on an occasional basis".

(6) The persons providing the additional support specified in the CSP of 5 January 2016 were identified as "Speech and language therapist" and "Occupational therapist".

(7) The Tribunal was satisfied that neither of these measures of additional support were reasonable adjustments in terms of section 20 of the 2010 Act. They were measures for the occasional provision of advice, resources, training and consultation to school staff by a speech and language therapist and by an occupational therapist at a time when the child had already ceased to attend school. Accordingly, they did not appear to the Tribunal to be reasonable steps which would avoid the disadvantage suffered by the child.

*The CSP of November 2016*

(8) The Tribunal turned its attention to the CSP as amended on November 2016 (pages C8 to C13). It appeared to the Tribunal that it required to assess the CSP as amended on November 2016 (pages C8 to C13). If the CSP had been amended to include appropriate and adequate educational objectives, appropriate and adequate measures of additional support and appropriate specification of the persons who are to provide that support, the CSP might go some – or all – of the way to vindicating the responsible body by demonstrating that all reasonable adjustments had been made in respect of the child.

(9) Section 10 (reviews of co-ordinated support plans) of the 2004 Act imposes on every education authority an obligation to keep under consideration “the adequacy of any co-ordinated support plan...”. Accordingly, it appeared to the Tribunal that in assessing the CSP as amended on November 2016, it required to assess whether the educational objectives, additional support specified and the persons by whom that support should be provided rendered the CSP adequate or not.

(10) Having considered the CSP as amended on November 2016, the Tribunal was satisfied that the CSP is not adequate.

(11) The Tribunal noted RB representative’s statement at the end of the hearing:

“I agree the CSP is inadequate, but that follows inevitably from the inadequacy of the situation of the child being out of school for all this time.”

(12) The Tribunal again noted the paragraphs of the guidance and Code of Practice quoted at paragraphs 11(1) and (2) above.

(13) The Tribunal was concerned that the CSP continues not to be adequate for, essentially, the same reasons as the CSP when made on 5 January 2016 was found not to be adequate.

(14) The additional support required by the child to achieve the single educational objective set out in the CSP as amended on November 2016 is–

- “● Child and Adolescent Mental Health Service Consultant Psychiatrist provides anti-depressant medication and attends Child Planning Meetings.
  
- Social Worker is Lead Professional for the Team Around the Child.”

(15) The Tribunal was satisfied that the two additional support measures specified in the CSP were not reasonable adjustments in terms of section 20 of the 2010 Act. The providing of medication by a doctor to a patient is not a step (reasonable or otherwise) that can be taken by the responsible body to avoid the disadvantage suffered by the child. A social worker being lead professional for the team around the child is not a reasonable step taken to avoid the disadvantage suffered by the child. It is, essentially, a technical, administrative decision.

*Individualised educational programme*

(16) Having found no reasonable adjustments provided for in the CSP of January 2016 or the CSP of November 2016, the Tribunal turned its attention to the individualised educational programme (**IEP**) which was provided to the Tribunal in the course of the hearing. The Tribunal was advised that the IEP was up to date as at September 2015. It appeared to the Tribunal that the IEP did set out a number of reasonable adjustments, i.e. the provision of a corridor pass to allow the child to leave lessons early, allowance that the child be able to communicate in writing either on paper or on her telephone, and for the child to be allowed to use her telephone to de-stress. The Tribunal noted, however, that the IEP had not been updated beyond September 2015. The child had ceased to attend school in October 2015 (except for one afternoon's attendance in December 2015).

(17) Having found no reasonable adjustments provided for in the CSPs of January or November 2016 and a few reasonable adjustments provided for in the IEP, the Tribunal went on to consider the other evidence before it to ascertain whether other reasonable adjustments had been made.

(18) The Tribunal noted that the child had support from a Barnardo's worker ((Barnardo's Worker)), who attends once per week; has a visiting teacher in the form of a maths tutor; has been provided with a virtual learning environment; has

previously been provided with educational materials in hard copy; and has been visited at home by Witness C. It appeared to the Tribunal that these are all reasonable adjustments which have been made.

(19) The Tribunal noted that the support provided by a Barnardo's worker is relatively long-standing, (Barnardo's Worker) having begun her involvement with the child's family on November 2015, replacing a predecessor from Barnardo's who had been providing support to the family with whom the child was no longer prepared to engage. Given the oral evidence heard by the Tribunal as to the child's presentation, even taking account of her noted improvement in presentation since August 2016, the Tribunal was surprised to note from the end of (Barnardo's Worker)'s witness statement of January 2017 (page R430) that she planned on ending her support with the family in February 2017 and did not see an ongoing role for her service. The Tribunal noted from (Barnardo's Worker)'s oral evidence that the position had changed and a decision was taken at a YPPM in January 2017 that her involvement with the child should continue. The Tribunal is satisfied that this is a reasonable adjustment.

(20) The Tribunal noted that relatively recently the child had been provided with 1:1 tuition at home with a maths teacher. The Tribunal was satisfied that this is a reasonable adjustment.

(21) The Tribunal was conscious that the support being provided by Barnardo's and by the maths tutor is small in scale. The Tribunal is, however, cognoscent of the evidence from Witness D as to the child's situation, her severe difficulties in engaging with people, that the improvement in her presentation since August 2016 is improvement measured from a very low base point and that the introduction of people requiring to engage with the child has to be handled carefully.

(22) The Tribunal noted that the child has been provided with access to a virtual learning environment. The Tribunal noted that there is a dispute between the parties as to the ease with which the virtual learning environment can be accessed and the claimant's view that there are superior virtual learning environments which could be made available to the child in place of the virtual learning environment currently made available. The Tribunal did not have sufficient detailed evidence to allow it to determine that the virtual learning environment currently made available to the child

is inadequate or deficient in comparison with any other virtual learning environment that could be made available. In the circumstances, the Tribunal was satisfied that the provision by the responsible body of the virtual learning environment was a reasonable adjustment.

(23) The Tribunal noted that the child had been provided with educational materials in hard copy. The Tribunal was satisfied that that was a reasonable adjustment.

(24) The Tribunal noted with concern that the use of the virtual learning environment and the provision of hard copy educational materials petered out in the early part of 2016. Again, however, the Tribunal noted the opinion of Witness D, who explained that the child is starting from a very low base in terms of her engagement with others. Prior to August 2016, she was actively resistant to engaging with others, but since August 2016 she is passively engaging and making some requests for engagement.

(25) The Tribunal noted the terms of paragraphs 6.22 to 6.26 (page R191) of the *Technical Guidance for Schools in Scotland (applying to the provisions in the 2010 Act which were brought into force on 1 October 2010, and extension of reasonable adjustments to include auxiliary aids and services which was brought into force on 1 September 2012) prepared by the Quality and Human Rights Commission*, which provide:

“6.22 The duty to make reasonable adjustments requires schools to take what are referred to in the Act as ‘reasonable steps’ to make adjustments.

6.23 The Act does not say what is ‘reasonable’. This allows flexibility for different sets of circumstances so that, for example, what is reasonable in one set of circumstances may not be reasonable in another.

6/24 The purpose of the duty to make reasonable adjustments is to enable disabled pupils to have access to an education as close as is reasonably possible to the education offered generally to pupils.

6.25 The crux of the reasonable adjustments duty is not whether something is an auxiliary aid or whether it is an adjustment to a practice, but whether it is something that is **reasonable** for the school to have to do. It is not possible for a school to justify a failure to make a reasonable adjustment; the question is only whether or not the adjustment is reasonable.

6.26 While it is not possible to say what will or will not be reasonable in any particular situation, some of the factors that are likely to be taken into account in deciding what it is or is not reasonable for a school or an education authority to have to do are set out in **paragraph 6.29**. These factors are based on those that tribunals and courts have already taken into account when considering reasonable adjustments under the equivalent provisions in the DDA 1995.”

(26) The factors set out in paragraph 6.29, which are not exhaustive, include:

- The extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil
- The extent to which support will be provided to the pupil under the Education (Additional Support for Learning) (Scotland) Act 2004, as amended
- ...
- The effect of the disability on the individual”.

(27) Having noted from the CSPs of January and November 2016 that no support appears to be being provided to the child under the 2004 Act, and having noted the reasonable adjustments which have been made, the Tribunal went on to consider whether there were any additional or alternative reasonable adjustments that should have been made. In doing so, the Tribunal had regard to the evidence before it and the remedies sought by the claimant. The claimant invited the Tribunal to order the responsible body “...to immediately make provision for [the child] to engage in her education”. This appeared to the Tribunal not to be a reasonable adjustment in terms of section 20 of the 2010 Act. This is simply a general statement which adds nothing to the dispute between the claimant and the responsible body, which concerns what provision should in fact be made.

(28) The claimant invited the Tribunal to order the responsible body “...to provide an online learning package to be made available to [the child] with a mentor to guide her for when she is unable to attend school”. As referred to above, the child has been provided with a virtual learning environment and the Tribunal was not provided with sufficient detailed evidence to allow it to decide that an alternative virtual learning environment would be better or more appropriate. The child is not attending school at all. It does not appear to the Tribunal to be reasonable to order the responsible body to provide the child with a full-time mentor. It appeared to the Tribunal that that would not be reasonable given the evidence which the Tribunal



heard about the child's presentation, her anxiety and her difficulty with engaging. To make such an order would risk harming the progress since August 2016 which has been made in engaging with the child. It appears to the Tribunal that decisions to introduce an individual to work with the child are sensitive decisions which require to be carefully calibrated. Accordingly, it appears to the Tribunal that such decisions are decisions which require to be taken on an ongoing basis in light of the child's circumstances at the time, taking account of the advice of those who attend the YPPM, in particular the advice of Witness D. It appears to the Tribunal that these are decisions which would be facilitated by a well-crafted, appropriate CSP which provides structure for the YPPM to operate under.

(29) The claimant invited the Tribunal "...to construct a situation for [the child] to be involved with her school course work and classmates in a virtual way, when she is unable to attend school". It is not clear to the Tribunal what is meant by an order "to construct a situation". Again for the reasons given above, given the child's dynamic condition and that she is not attending school at all, decisions about introducing some electronic mechanism for the child to be involved with course work and classmates are decisions which require to be made on an ongoing basis in light of the child's presentation at the time. The Tribunal noted the evidence of Witness F that the child does not see having access to her peer group as important. Accordingly, the Tribunal was satisfied that it would not be reasonable to make an order in the terms sought.

(30) The claimant invited the Tribunal "...to allow [the child] to communicate in a way that is comfortable to her, that is via text, email or in writing rather than direct, verbal communication". It did not appear to the Tribunal that the responsible body was not allowing the child to communicate in ways which are comfortable to her. It appeared to the Tribunal that those engaging with the child do so in the knowledge that communication is a difficult and complex aspect of the child's presentation.

(31) The claimant invited the Tribunal "...to provide [the child] with a speech and language therapist to provide advice, resources, training and consultation services to school staff on an ongoing basis". The Tribunal was satisfied that those engaging with the child have sufficient knowledge and experience to enable them to do so. It did not appear to the Tribunal to be reasonable to order the provision of such

support to school staff on an ongoing basis at this stage when the child is not attending school.

(32) The claimant invited the Tribunal to order the responsible body "...to provide staff training on disability discrimination, within 3 months, to Education Authority staff who have responsibility to and provide services to [the child]". From the evidence before it, it did not appear to the Tribunal that there was a deficit in knowledge of disability discrimination in respect of those engaging with the child.

(33) The claimant invited the Tribunal to order the responsible body "...to provide additional staff training to all those who have contact with [the child] in respect of Autism Spectrum Disorder, particularly pathological demand avoidance tendencies generally and specifically in relation to how this affects [the child]". It did not appear to the Tribunal that there is a deficit with regard to understanding Autism Spectrum Disorder or pathological demand avoidance, either in respect of those professionals engaging with the child or, more generally, amongst the staff at School A.

(34) In light of the foregoing, the Tribunal is satisfied that the responsible body has met its duty in terms of section 85(6) of the 2010 Act to make adjustments in terms of section 20(3) ("take such steps as it is reasonable to have to take to avoid the disadvantage") and (5) ("take such steps as it is reasonable to have to take to provide the auxiliary aid") of the 2010 Act in so far as it is reasonable to do so, given the evidence which the Tribunal heard about the child's fluctuating presentation, particularly in the course of 2016 and taking account of the extent to which any particular step would be effective in overcoming the substantial disadvantage suffered by the child and the effect of her disability on her.

(35) For the foregoing reasons, the Tribunal is satisfied that the responsible body has met its duty to provide education for the child and has discharged its responsibility in terms of section 14 of the 1980 Act. Accordingly, the Tribunal is satisfied that the responsible body has not discriminated against the child by not providing education for her (in terms of section 85(2)(c) of the 2010 Act).

Equality Act 2010: sections 85(2) and 15

(36) Section 85(2) (pupils: admission and treatment, etc.) of the 2010 Act provides that:

“The responsible body of such a school must not discriminate against a pupil–

- (a) in the way it provides education for the pupil;
- (b) in the way it affords the pupil access to a benefit, facility or service;
- (c) by not providing education for the pupil;
- (d) by not affording the pupil access to a benefit, facility or service;
- (e) by excluding the pupil from the school;
- (f) by subjecting the pupil to any other detriment.”

(37) Section 15 (discrimination arising from disability) of the 2010 Act provides:

“(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.”

(38) The Tribunal noted paragraphs 69 and 70 of the Explanatory Notes to the 2010 Act:

***Section 15: Discrimination arising from disability***

**Effect**

69. This section provides that it is discrimination to treat a disabled person unfavourably not because of the person’s disability itself but because of something arising from, or in consequence of, his or her disability, such as the need to take a period of disability-related absence. It is, however, possible to justify such treatment if it can be shown to be a proportionate means of achieving a legitimate aim. For this type of discrimination to occur, the employer or other person must know, or reasonably be expected to know, that the disabled person has a disability.

## **Background**

70. This section is a new provision. The Disability Discrimination Act 1995 provided protection from disability-related discrimination but, following the judgment of the House of Lords in the case of London Borough of Lewisham v Malcolm [2008] UKHL43, those provisions no longer provided the degree of protection from disability-related discrimination that is intended for disabled people. This section is aimed at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment. ...”

(39) The Tribunal noted the terms of paragraph 3.33 of Blackstone’s Guide to the Equality Act 2010 where, in discussing section 15 of the 2010 Act, it is stated:

“This form of discrimination addresses unfavourable treatment of a disabled person, where the reason for the treatment is not the disability itself, but something which arises in consequence of the disabled person’s disability. It is possible to justify treatment which would otherwise constitute discrimination arising from the disability by showing that the treatment was a proportionate means of achieving a legitimate aim. An alleged discriminator will not be found to have discriminated if s/he can show that s/he did not know and could not reasonably be expected to know of the claimant’s disability.”

(40) Paragraphs 3.34 to 3.37 of Blackstone’s Guide to the Equality Act 2010 state:

### **“1. Unfavourable Treatment**

The test in section 15 does not require a comparison between the treatment of the disabled person and the treatment of another person. The notion of unfavourable treatment will be satisfied if the disabled person is subject to any detriment, irrespective of the treatment of others. It is irrelevant whether a non-disabled person or a person with a different disability would have been subject to the same treatment in the same circumstances.

The notion of detriment is broad. Sometimes the detriment will be obvious, such as where a disabled person is denied an opportunity or subject to a loss. However, even treatment which a discriminator thinks is positive may constitute unfavourable treatment.

## **2. Causation**

It is not necessary for there to be a direct causal link between the disabled person's disability and the unfavourable treatment to which s/he was subjected. It is the *thing which arises in consequence* of disability which must have caused the treatment. The things which arise in consequence of a disability include anything which is a result, effect or outcome of the disability, such as, for example, absence from work, the need to be accompanied by a dog, or behavioural or capability issues.

## **3. Justification**

A person who otherwise would be liable for discrimination arising from disability can avoid liability if able to show that the treatment was a proportionate means of achieving a legitimate aim."

(41) It appeared to the Tribunal that where a pupil, in consequence of disability, has additional support needs such that the pupil requires a CSP in terms of section 2 (co-ordinated support plans) of the 2004 Act then the failure by a responsible body to provide a CSP, or the provision of a CSP which is not adequate, is unfavourable treatment in terms of section 15 (discrimination arising from disability) of the 2010 Act and subjects the pupil to detriment in terms of section 85(2)(f) of the 2010 Act and adversely affects how the responsible body provides education for the child in terms of section 85(2)(a) of the 2010 Act.

(42) It appeared to the Tribunal that, in consequence of the child's disability, there arise additional support needs which require additional support to be provided by the responsible body in the exercise of its functions, as well as in the exercise of its functions relating to education and by one or more appropriate agencies (within the meaning of section 23(2) of the 2004 Act) as well as by the responsible body itself, which result in the child requiring a CSP in terms of section 2 of the 2004 Act.

(43) The Tribunal noted that the claimant requested assessment for a CSP by letter dated April 2014 and that RB representative replied by email on April 2014 agreeing to the request for assessment. The Tribunal noted that the 16 week deadline was not complied with. The Tribunal noted that the CSP was only made after the claimant raised proceedings before the Tribunal and a direction was issued on December 2015 requiring that a finalised CSP be issued no later than January 2016, and that on January 2016 the responsible body issued a finalised CSP.

(44) The Tribunal is satisfied that in delaying to provide a CSP and in providing a CSP which is not adequate, the responsible body has treated the child unfavourably in terms of section 15 of the 2010 Act and has subjected the child to detriment in terms of section 85(2)(f) of the 2010 Act and has treated the child unfavourably in the way it provides education for the child in terms of section 85(2)(a) of the 2010 Act. Accordingly, the Tribunal is satisfied that the responsible body has discriminated, and continues to discriminate, against the child to the extent that it delayed in providing a CSP; provided a CSP dated January 2016 which was not adequate; and continues to provide a CSP, dated November 2016, which is not adequate.

(45) For completeness, the Tribunal is satisfied that the responsible body knew that the child had a disability. There is no legitimate aim the Tribunal could discern that could be achieved by providing a CSP which is not adequate.

(46) The problem in this case – and the Tribunal did not have any doubt that there is a problem – is not a failure to make reasonable adjustments, but is a failure by the responsible body to put in place an adequate CSP. The effect of this failure is that there is a lack of strategic oversight and a failure to co-ordinate measures of support and reasonable adjustments which would assist the child. No explanation was given by the responsible body as to why the CSP does not make reference to support which has been provided to the child, such as the provision of a Barnardo's worker (which is funded by the education authority), the provision of a virtual learning environment, the provision of educational materials, visits to the child at home by Witness C (or another member of school staff), the provision of a visiting teacher to provide the child with 1:1 tuition. While those measures of support are measures provided directly by the education authority and would not on their own justify a CSP, given that a CSP is required – because of the involvement of the NHS and social work – those matters should be included in the CSP, as they are measures of additional support which, along with measures of additional support to be provided by the NHS and social work, require co-ordination.

(47) Two matters in respect of the CSP of November 2016 and the position adopted by the responsible body before the Tribunal are striking. First the insistence, indeed persistence, that the sole educational objective should concern the child returning to full-time school education. Second the inclusion as an additional measure of support that the child's psychiatrist provide her with anti-depressant

medication. With regard to the first matter, the opinion of Witness D was that that educational objective is simply not achievable. (Barnado's Worker) also told the Tribunal that in her view a return to full-time school education was not possible. Witness D's evidence was that the child requires to take baby steps towards engaging with education and perhaps a partial return to school. Accordingly, it is difficult to see why, instead of identifying various stepped objectives which it could be sought to achieve as part of a co-ordinated process to engage her with education and to achieve a return to school (whether phased or partial or perhaps full-time), the CSP instead provides only, as it were, the sheer cliff face of "[The child] to return to full-time school education".

(48) With regard to the second matter, it appeared to the Tribunal that the responsible body is effectively, and concerningly, prepared to rely on a single strategy to achieve the single educational objective it has identified: namely that the child is provided with medication. The Tribunal has severe reservations as to whether the providing of medication by a doctor to the doctor's patient can be a measure of additional support in terms of the 2004 Act. It is difficult to see that the prescribing of medication – being a matter concerning the professional advice of a doctor and the consent of the patient – is a measure which can be co-ordinated in terms of a CSP.

(49) Further, it is worth noting Witness D's own evidence concerning the improvement in the child's presentation (albeit from a very low base) in August 2016. Witness D explained to the Tribunal that he could not categorically attribute this improvement to the prescribing by him of medication which the child has taken. The Tribunal noted that the child's presentation had improved prior to her being prescribed medication by Witness D to the extent that she had asked to be provided with medication. The Tribunal also noted that throughout the summer the claimant paid a student to engage with the child and that this engagement appeared to have resulted in some success, with the child leaving home and visiting, for example, a safari park and a zoo, amongst other places. It may well be that this engagement contributed to the improvement in the child's presentation. In short, the Tribunal was troubled by the fact that the CSP should focus so heavily on the providing of medication to the child such that – with the exception of a social worker to be the

lead professional for the team around the child – it failed to identify any other measures of support.

(50) It appeared to the Tribunal that the failure to provide an adequate CSP is not simply a technical or administrative failure, but is a failure that goes to the very heart of the circumstances of this case. A CSP which set out a series of appropriate and adequate educational objectives and identifies suitable, appropriate and adequate measures of additional support and the professionals who should provide those additional measures of support would provide a structure within which the YPPM could operate more effectively. In due course, if necessary, the minutes of the YPPM meetings could be compared with that adequate, comprehensive CSP to ascertain what, if any, progress the responsible body was making towards the suitable, adequate education objectives identified in the CSP.

(51) The child is entitled in terms of the 2004 Act to an adequate CSP. The Tribunal is satisfied that, in failing to provide the child with an adequate CSP, the responsible body has treated the child unfavourably and subjected her to detriment in terms of section 85(2)(f) of the 2010 Act.

(52) The child is entitled to an adequate CSP in terms of the 2004 Act setting out adequate educational objectives and additional measures of support and specifying the professionals to provide those measures. The Tribunal is satisfied that, in failing to provide an adequate CSP – in failing to identify adequate objectives and measures – the responsible body has failed to provide the strategic oversight and structure for the YPPM to operate in and that, in doing so, it has treated the child unfavourably and discriminated against her in the way it provides education for the child. The nature of the unfavourable treatment in the way that the responsible body provides education to the child arises from the failure to identify adequate educational objectives and measures referred to above. The YPPM is chaired by a social worker, Witness B, who has very limited direct involvement with the child and whose own service – social work – has very limited involvement with the child. Witness B is not an educationalist. Accordingly, it can only hamper Witness B in chairing the YPPM that appropriate step by step educational objectives have not been identified by the responsible body, nor have adequate additional measures of support been identified by the responsible body. Effectively, Witness B and the YPPM is being denied a useful overarching strategy which would inform the decisions taken at the YPPM



about engagement with, and educational provision for, the child. Accordingly, the Tribunal is satisfied that the responsible body has discriminated against the child in terms of section 85(2)(a) of the 2010 Act.

## **12. Decision**

(1) For the reasons given above, the Tribunal is satisfied that a contravention of Chapter 1 of Part 6 of the 2010 Act has occurred in that, in delaying to provide a CSP and in providing and continuing to provide a CSP which is not adequate, the responsible body has discriminated against the child in terms of section 15 of the 2010 Act by subjecting her to a detriment in terms of section 85(2)(f) and in the way it provides education in terms of section 85(2)(a) of the 2010 Act.

(2) The decision of the Tribunal is unanimous.

## **13. Disposal**

The Tribunal's powers are set out in paragraph 9(2) of Schedule 17 of the 2010 Act. The Tribunal orders:

- (a) the responsible body to issue, within 14 days of the date of this order, a formal written apology to the claimant for its delay in providing a CSP and for providing and continuing to provide a CSP which is not adequate, the terms of the formal written apology to comply with the Scottish Public Services Ombudsman's Guidance on Apology;
- (b) the responsible body to provide its additional support for learning staff who have responsibilities for preparing and drafting CSPs with appropriate training concerning identifying and drafting appropriate and adequate educational objectives, identifying and drafting appropriate and adequate measures of additional support, and appropriately identifying persons who can provide such additional measures of support, within 12 weeks of the date of this order;
- (c) the responsible body to amend the CSP to identify appropriate and adequate educational objectives; appropriate and adequate measures of additional support; and appropriate professionals to provide such measures of additional support (and orders the responsible body in doing

so to consult with appropriate people, including those people who attend the YPPM – in particular Witness D, Witness C and the claimant – and the claimant's solicitor), within 21 days of the date of this order.