



Additional Support Needs

**DECISION OF THE TRIBUNAL**

**Claim**

1. This is a claim in which the claimant alleges that the responsible body has discriminated against the young person under the Equality Act 2010 ('the 2010 Act') by refusing the claimant's request that the young person is admitted to school during academic session 2020-21.

**Decision**

2. I ORDER the responsible body to admit the young person to school for the remainder of academic session 2020-21, on the same basis as he attended school during academic session 2019-20, namely three days a week at school A and two days per week at school B.
3. I ORDER that this admission takes place as soon as possible, and in any event by 15<sup>th</sup> September 2020, or by such later date as the parties may agree.

**Process**

4. The claim form was submitted in June 2020. The case statement dates were shortened and thereafter the case was managed by case conference calls and directions. The parties agreed that the claim is decided by a legal member alone and without a hearing, under rule 83 of the First-tier Tribunal for Scotland Health and Education Chamber Rules 2018 (schedule to SSI 2017/366) ('the rules').
5. I decided the claim on the basis of the bundle, consisting of pages 001-258 and in addition the parties' written submissions.
6. The witnesses (the claimant and the young person's mother and witnesses A-F) provided witness statements which are in the bundle.

**Findings in Fact**

***General findings on the young person***

7. The claimant is the father of the young person. The young person has autistic spectrum disorder ('ASD'). He also has a learning disability. He suffers from cluster headaches.
8. The young person is non-verbal. He does not use picture-based communication systems. He communicates by responding to objects which offer cues. For example, if shown a pair of swimming trunks, he would understand that this refers to swimming. In addition, he can communicate through gesture, for example gesturing towards his snack box. The young person requires close supervision and support. He requires prompting

during activities in order to help him maintain focus. He learns through repetition.

9. The young person relates to adults who engage with him on a regular basis. He enjoys social interaction. He can learn in one-to-one and in group settings. He can demonstrate a positive response to others by smiling and gesturing. His listening and attention skills are improving. He engages in turn-taking activities, uses computing equipment and enjoys looking at photographs.
10. The young person is physically able with excellent gross motor skills. He is a good climber and has good balance. He enjoys throwing and catching a ball and kicking a ball. He plays in the school playground. He enjoys swimming.
11. The young person can, with support and visual prompting, dress and undress and engage in hygiene routines. He can eat using a knife and fork.
12. The young person benefits from consistency in learning and support approaches and in staffing.
13. **[This paragraph has been removed by the Chamber President for reasons of privacy of the young person under rule 101(3)(a)(b)(c) and (4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**
14. The young person was diagnosed with cluster headaches when he was 16 years old, although he may have been suffering from them since at least the age of 14. These headaches present with sudden, severe episodes of pain around one side of the head and usually over one eye. These headaches cause the young person to exhibit behavioural disturbance and agitation. If untreated, these headaches can last for at least two or three hours. The young person's response to these headaches consist of three phases: pushing/pulling of people; obsessive behavior and an attempt to control others; marked agitation, including slamming doors, hitting his head and hand biting. Epilepsy medication is taken to alleviate the symptoms of these headaches. The occurrence of these headaches has reduced recently.
15. The young person has a co-ordinated support plan ('CSP') (085-098 of the bundle).

### ***Findings on the young person's schooling during academic year 2019-20***

16. During academic year 2019-20, until the closure of the schools due to the COVID-19 outbreak, the young person attended school on a split placement. He spent three days per week at school A and two days per week at school B. School A is a school for pupils with multiple and complex needs. School B is the young person's local mainstream school. Both schools are managed by the responsible body. The young person has not attended school since March 2020 due to school closures caused by the COVID-19 pandemic.
17. While at school during academic year 2019-20, the young person regularly engaged in a range of activities including: gym, dancing, gardening, road safety, painting, craftwork, fitness work, sensory activities, maths, computing, candle making, baking, cooking, music, work experience, library work, carpentry and visits to community centres, supermarkets and local walks.
18. By letter of 29<sup>th</sup> August 2019, the responsible body undertook that the young person would remain on a split placement between School A and School B for the full academic year 2019-20. This undertaking was given on the basis that the reference then before this Tribunal is withdrawn. On the basis of that undertaking, that reference was

withdrawn. The letter of 29<sup>th</sup> August 2019 also undertakes a post-school transition process, identifying a number of action points and deadlines for completion (019 of the bundle).

### ***Findings on the request for an additional year of schooling for the young person***

19. On 14<sup>th</sup> April 2020, the claimant wrote to the responsible body requesting that the split placement in place for the claimant remains in place during academic year 2020-21 (025-028 of the bundle). Reasons for this request are set out in that letter.
20. On 23<sup>rd</sup> April 2020, the responsible body replied stating that due to staff having to deal with “critical and essential work”, a response would not be possible. On 1<sup>st</sup> June 2020 this claim was lodged. On 11<sup>th</sup> June 2020, the responsible body responded to the request of 14<sup>th</sup> April 2020, refusing it (letter at 240-251 of the bundle).

### ***Findings on transition planning for the young person***

21. Planning for the young person’s transition from school to adult services has been underway since 5<sup>th</sup> October 2018. Meetings to discuss this process took place between the responsible body and the young person’s parents on the following dates: 30<sup>th</sup> January, 1<sup>st</sup> May, 12<sup>th</sup> June, 3<sup>rd</sup> October, 23<sup>rd</sup> October, all 2019. A further meeting took place on 11<sup>th</sup> March 2020. The next meeting was due to take place on 2<sup>nd</sup> April 2020, but was cancelled due to the COVID-19 outbreak. The plan for the meeting on 2<sup>nd</sup> April 2020 was to introduce an independent facilitator who would assist in securing an agreement with the young person’s parents to agree outcomes using a Person-Centred Planning (PCP) format. That meeting has not taken place.
22. The young person’s family is currently supported by the support body from whom he receives support for three hours per week in the community.
23. A suitable care provider for the young person’s adult support has been identified. . That provider cannot currently accommodate new care requests due to COVID-19 restrictions.

### **Reasons for the Decision**

24. It is agreed that the young person has a disability under s.6 of the 2010 Act. In addition, it is agreed that the young person has additional support needs arising from that disability, as those needs are defined in s.1 of the Education (Additional Support for Learning) (Scotland) 2004 Act (‘the 2004 Act’).
25. The claimant argues that in refusing the request for an additional year of schooling, the responsible body has failed to comply with the duty to make reasonable adjustments under sections 20 and 21 of the 2010. In addition, it is claimed that this refusal amounts to discrimination arising from a disability, under s.15 of the 2010 Act. Both forms of discrimination are unlawful in the context of the admission and treatment of a pupil (s.85(1)(c) and (2)(c) and s.85(6), all of the 2010 Act), and this tribunal has jurisdiction over a claim that discrimination of this kind has taken place (schedule 7, para 8 of the 2010 Act).
26. The responsible body argues that no such discrimination has taken place.

27. I will deal with each allegation of discrimination in turn. In doing so, I have not dealt with every point made in submissions by each party; instead I have relied only on the main arguments.

### **A. Reasonable adjustments duty**

28. The applicable sub-sections are s.20(1)-(3) of the 2010 Act, which apply where a provision, criterion or practice ('PCP') puts a disabled person at a significant disadvantage on a relevant matter compared to a non-disabled person. In such a situation, in order to avoid unlawful discrimination, the responsible body requires to take reasonable steps to avoid the disadvantage.

29. The claimant argues that the PCP in this case is:

“..the requirement for disabled pupils to leave school by reference to their age and the number of years in attendance at school, in cases where an appropriate transition process has yet to be concluded..” (written submissions, para 37).

30. It seems to me that this is not a PCP, but is instead a description of the requirement which the responsible body have applied in this particular case. There is no evidence to suggest that this approach is one which has been taken in relation to any other pupil in respect of whom an appropriate transition process has not been concluded. In *Nottingham City Transport Ltd v Harvey* [2013] Eq.L.R. 4, (Employment Appeal Tribunal), Mr Justice Langstaff (EAT President) stated (about the predecessor Act to the 2010 Act) at para 18:

““Practice” has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.”

31. The responsible body does have a policy it applies for post school transition planning (234-237 of the bundle) and there is reference there (at 234 of the bundle) for the need to transition plan for young persons. The narrative in that part of the policy document does refer to the concept of 'young person' as one which removes the difficulties which have arisen when a pupil has remained in school between the ages 18 and 19. This might suggest that the responsible body views the extent of the obligation to educate young persons as applying only as far as pupils of that age. If that were the position, that could represent a policy of not educating beyond the age of 19 (which would cut across the fact that the concept of 'young person' has no upper age – see the 2004 Act, s. 29(1)). However, I am not persuaded that I can reach that conclusion on the information available. The statement in that document may well (rather clumsily) be a reference to the 18-19 age group as the most common instance of post S6 education, rather than an upper age limit for such education.

32. Since no PCP has been identified, there cannot be discrimination under s.20(1)-(3) of the 2010 Act. I find that no such discrimination has occurred.

## **B. Discrimination arising from a disability**

33. There is a two-stage process to the application of section 15(1) (s.15(2) does not apply in relation to this claim):

Stage 1: Did the responsible body treat the young person unfavourably because of something arising in consequence of his disability? (section 15(1)(a))

If 'Yes', then:

Stage 2: Can the responsible body show that the treatment is a proportionate means of achieving a legitimate aim? (section 15(1)(b)).

### ***Section 15(1), Stage 1***

34. The answer to this question in the current claim is: Yes.

35. It is clear that the educational provision in place for a number of years (including in academic year 2019-20) for the young person (a split placement between school A and school B), is in place as a direct consequence of his disability. It is also clear that the statutory obligation to arrange a post-school transition arises as a result of the young person's disability (see the Additional Support for Learning (Changes in School Education) (Scotland) Regulations 2005 SSI 2005/265, 'the transition regulations'). The request by the claimant for an additional year of schooling for the young person arises in consequence of his disability. If the young person were not disabled, he would not require a transition plan and would not have requested an additional year of schooling pending the implementation of a transition plan. The young person's disability and the refusal of the request for an additional year of schooling are causally directly connected, and so the refusal is something 'arising in consequence' of the young person's disability.

36. On whether the child was treated 'unfavourably' as a result of the treatment (the refusal of the request), that is in dispute.

37. The responsible body argues that the young person would not benefit from another year at school, and that arrangements for care from the support body are sufficient for his post-school period, until a full transition plan is put in place. The claimant argues that the young person would benefit from remaining in school on a split placement between school A and B, on the same basis as in academic year 2019-20, until a full transition plan is made and put in place.

38. The word 'unfavourable' is one which has an ordinary and natural meaning, and so should, in the absence of any definition in the 2010 Act, be given that meaning. There is no need for proof that any 'treatment' was deliberate or malicious for it to be regarded as 'unfavourable'; the motivation for the treatment is irrelevant. There is, however, no need to define the word more generally, since treatment which would affect the educational, emotional or mental wellbeing of the young person, would clearly be 'unfavourable'.

39. There is clear evidence that the young person's educational, emotional and mental wellbeing will be likely to be detrimentally affected by the treatment (refusal of the request for an additional year of schooling) by the responsible body.

40. There are four main sources of evidence on which I have relied to support this conclusion.
41. The first is direct evidence of the benefits which school attendance had on the young person during academic year 2019-20. The young person's attendance during that year was limited by the COVID-19 pandemic, which meant that he did not attend school between March and June 2020. However, diary entries from school prepared during the period from 19<sup>th</sup> November 2019 to 18<sup>th</sup> February 2020 paint a very consistent picture of a young person who very much enjoys his educational experience. With the exception of a few very limited negative or neutral comments (for example 18<sup>th</sup> March 2020, described as a mixed day and 9<sup>th</sup> Jan 2020, where the young person was found to be quite unsettled during ICT), the accounts of his days at school over this period are glowing. He is presented as happy and engaged. A range of activities are mentioned as outlined in paragraph 17 above. All appear to be consistent with the furtherance of the young person's educational objectives set out in his CSP.
42. Secondly, there is evidence from the claimant and the young person's mother in their joint witness statement (060-068 of the bundle) about the benefits of school for the young person. At pages 061-064, the young person's parents set out in detail the benefits to their son of the educational arrangements in place in session 2019-20. The account is detailed and compelling, and is not contradicted by any evidence led by the responsible body (other than the general points made and addressed below).
43. Thirdly, there is evidence from three observations of the young person in class by witness B and set out in her Advocacy Report of 7<sup>th</sup> July 2020 (029-036 of the bundle). These observations took place in 2019, namely 3<sup>rd</sup> June 2019 (school A) and 28<sup>th</sup> June and 1<sup>st</sup> November 2019 (school B). In total, witness B observed the young person in class for around ten hours. Witness B was unable to update her report due to the COVID-19 pandemic. However, there is no evidence to suggest that what she observed is not representative of the experience of the young person at either school for the period of August 2019-March 2020.
44. Witness B concludes her report at 036 of the bundle:
- “During my observations to date, [the young person] has appeared to enjoy and benefit from his educational experiences in [schools A and B]. This is evidenced by his relaxed, happy demeanour in both settings, his knowledge of the routines and environments and his willingness to engage in a variety of positive activities. There is clear evidence of reciprocal warm, caring interactions between [the young person] and staff within both schools”
45. There is no evidence to contradict this conclusion, one which is carefully reached, is independent, and which is clearly explained in the report with reference to specific, directly observed examples.
46. Fourthly, there is skilled evidence from witness A in the form of two detailed reports, one dated 23<sup>rd</sup> June 2010 (045-059 in the bundle) and the other dated 3<sup>rd</sup> July 2020 (069- 081 in the bundle). Witness A's qualifications and experience (outlined in 071-073 of the bundle) are impressive and directly relevant to the questions upon which he provided his opinions. Further, in relation to both reports, witness A had access to a comprehensive

list of relevant documents (listed at 050 in the 2019 report and 074 in the 2020 report). He interviewed the young person's parents, as well as school staff, and in relation to his 2019 report, he met the young person.

47. Witness A's conclusion in 2019 on whether the young person would benefit from an additional year at school is clear – "Yes, without doubt". Indeed, the young person went onto attend school in academic session 2019-20, and, as indicated above in relation to the diary entries and witness B's final class observation, appears to have enjoyed the experience.
48. Witness A revisits this question in 2020, and reaches the same conclusion (080 of the bundle). He concludes that continued education would be likely to allow the young person to "maintain a meaningful structure of activity and learning in a safe and familiar environment" (080). He goes on to stress the benefits of continuing school education would be likely to include learning in a familiar environment and structure, meaningful activity and purpose and that this will all be a positive influence on the young person and limit stress.
49. In both reports, witness A discusses the importance of good transition planning. He concludes (at 080 of the bundle):

"With respect to the duration, in my view [the young person] is best to remain in his current school situations until a clearly developed plan of appropriate support is agreed for the transition and for the vision of [the young person's] future activity. I appreciate that the lack of sufficient plan and supports is not necessarily the responsibility only of the education department. However, transition before a suitable plan of support and activity is ready to be implemented is likely in my view to result in significant emotional-mental harm."
50. The responsible body presents evidence to the effect that the young person would not benefit from another year of schooling. Witness E expresses concern around the exhaustion of the opportunity for academic work, given that the young person performs at SQA National Level 1 and is not able to progress to Level 2 (254-255 of the bundle). A similar concern is expressed by witness F in her statement (258 in the bundle, para 4). However, witness E indicates (at 254) that the young person was taking some level 1 qualifications in academic year 2019-20. It is not clear that he completed those when his attendance ended in March 2020 due to COVID-19. If not, he may be able to continue that work in session 2020-21.
51. In any event (and more importantly), both witnesses E and F refer to the prominence of life skills and visiting the community (254-255 and 258, para 5 of the bundle). Indeed, the prominence of life skills is clear from the young person's CSP (090-096 of the bundle). The educational objectives outlined there do not focus on academic attainment, but rather concentrate on skills across contexts, language and communication, social interaction, play, behaviour, independence, motor skills, self-help and self-care. While some of the qualifications the young person has been undertaking (listed at 171-174 of the bundle) clearly contribute to these educational objectives, given their nature it is clear that they can be advanced in activities outside formal qualifications. In other words, even if the young person were unable to take any qualifications in the current academic year, activities at school would be able to continue and contribute to the attainment of the CSP educational objectives. The young person was involved in many of these activities between November 2019 and March 2020 (as evidenced by the diary entries in the bundle). I can see no evidence which suggests that the utility of those activities suddenly stopped when the schools closed. Any evidence that exists on this point (for example from witness A) suggests the opposite is the case.

52. Further, there is no indication as to whether or not witnesses E and F have met the young person, or seen him in the classroom. By contrast, witness A has met the young person (in 2019) and witness B has spent 10 hours observing him in the class, split between school A and B and between the last two academic years.
53. In addition, witness E (at 256 of the bundle) expresses the view that the young person would benefit more from transitioning into adult services than returning to school for another year. However, this conclusion is, in a sense, reached in the abstract. There is no current plan for adult services for the young person. It is difficult therefore to see how a comparative conclusion like this is able to be reliably reached. By contrast, there is an abundance of material about the suitability of a further year for the young person in school (in particular from witness A).
54. For all of these reasons, I prefer the evidence of witnesses A and B as being more helpful, reliable indicators of the appropriateness of a further school year for the young person than the evidence of witnesses E and F.
55. I therefore conclude that the refusal of the request for an additional year of schooling for the young person constitutes unfavourable treatment for the purposes of s.15 of the 2010 Act.

### **Section 15(1), Stage 2**

56. It is relevant to consider the burden of proof in relation to this part of the definition.
57. Although the general burden of proving discrimination begins with the claimant (s.136 of the 2010 Act), the burden of establishing that s.15(1)(b) applies falls on the responsible body. In other words, when considering how the burden of proof operates in s.15, looking at the matter overall, the claimant must establish that discrimination has occurred. If so, the burden shifts to the responsible body. However, it seems to me that the burden of establishing the component part embodied in s.15(1)(b) rests wholly on the responsible body, since the language indicates that the responsible body ('A') must show that the treatment is a proportionate means of achieving a legitimate aim. It would be difficult (if not impossible) for the claimant to discharge even a *prima facie* burden in relation to s.15(1)(b). It is not uncommon in statutory provisions of this kind (where a party has to establish what is effectively a 'defence') for that person to bear the burden of proof on that matter. The same reasoning applies to the similarly worded provision in s.19(2)(d). This interpretation is supported by Lady Hale in the Supreme Court in *Akerman-Livingstone v Aster Communities Ltd*. [2015] 1 AC 1399 at para 19.
58. For the avoidance of doubt however, even if I had taken the view that the burden of proof in relation to s.15(1)(b) falls on the claimant, I would have decided that that burden had been discharged.
59. The claimant's representative points out in his written submissions that the responsible body does not explicitly address the s.15(1)(b) test. This is correct. However, it would be unduly harsh not to take the responsible body's submissions as a whole, to see if, in effect, what is being offered is an argument of a proportionate means of achieving a legitimate aim.
60. Although not identified as such, I am prepared to infer that the responsible body advances transition planning for the movement of school pupils from school education onto adult provision as a legitimate aim. It would be difficult to argue that it is not, especially given the statutory duty on the responsible body to take steps to make



arrangements for the post-school transition of young persons (see the transition regulations, in particular regulations 2(e), 3 and 4). The performance of statutory duties must, by definition, be a legitimate aim for a responsible body.

61. On proportionality, it has been made clear by the Supreme Court in a number of cases, in particular in *Akerman-Livingstone v Aster Communities Ltd.* [2015] UKSC 15, para 28 (as applied in the education context by the Upper Tribunal in England and Wales in the case of *F-T v The Governors of Hampton Dene Primary School* [2016] UKUT 468 (AAC); [2017] E.L.R. 38, para 37) that this concept can be considered by asking three initial questions:

(a) Is the objective sufficiently important to justify limiting a fundamental right?

(b) Is the measure rationally connected to the objective?

(c) Are the means chosen no more than is necessary to accomplish the objective?

There is then a fourth, overall question to be considered:

(d) Is the unfavourable treatment proportionate to its likely benefits?

62. If the answer is 'yes' to each of these four questions, then the proportionality test has been satisfied. If the answer is 'no' to any of them, it has not been.

63. The responsible body advances, in essence, two arguments to support its case that the refusal of an additional year of schooling for the young person is a proportionate means of achieving its legitimate aim of transitioning young persons onto post-school provision.

64. The first such argument is that the young person would not benefit from another year at school. For reasons I advance above in discussing the question of unfavourable treatment, I do not accept that this is the case, and I refer back to my reasons on this.

65. The second such argument is that the post-school transition planning has been delayed by a lack of co-operation by the young person's parents. That lack of co-operation includes: failure to accept the responsible body's recommendations for transition and failure to respond to requests for information/arrangements for meetings (see the letter from the responsible body to the claimant of 29<sup>th</sup> August 2019 at 238-251 of the bundle and in particular at 248-250 of the bundle).

66. I do not accept this argument for three reasons.

67. Firstly, these acts of alleged non co-operation have not been established in evidence. Both parties agreed that this case could be decided without oral evidence. The allegations of lack of co-operation are refuted by the claimant. In the absence of compelling documentary evidence to resolve this factual disagreement, I could only resolve it by hearing oral evidence. I could have sought oral evidence, even although the parties had agreed that I could determine the claim without it. However, there are other reasons for rejecting the lack of co-operation argument (below) which mean that such oral evidence would not have assisted in deciding this claim. I would add that while I have not decided this factual issue (and therefore have made no findings in fact about it), I note that, according to the responsible body (witness D at 252-253 of the bundle), the young person's parents met with the responsible body on six occasions since January 2019 (with a seventh meeting agreed – see the finding at para 21 above). It seems to me then that the young person's parents have, at least since the start of last year, been cooperating to some extent. Co-operation involves engagement, even where that engagement consists of disagreement with the proposed transition arrangements.
68. Secondly, even if I were to accept the responsible body's assertion that the transition planning had been delayed by the young person's parents' lack of co-operation, this would make no difference to the question of whether discrimination under s.15 had taken place. This is because the statutory duties of the responsible body apply even in the face of lack of parental co-operation. If that were not the case, parents would have a veto over all post-school transition planning for young persons. No such veto exists. While it is, for obvious reasons, best if the family of the pupil are on board with the planning process, the duty owed by the responsible body is owed to the young person, not the young person's parents. This is clear from the terms of the transition regulations. The obligation there is to seek and take account of the views of the young person's parents (regulation 3(2)(b)(ii)), not to follow those views. It is true that the obligation to provide information in regulation 4 only applies where the consent of the young person's parents is given, but it was not suggested in any of the evidence before me that such consent was sought, or that it was refused. Indeed, information of the kind specified in regulation 4 has been shared with appropriate agencies.
69. Thirdly, as the responsible body accepts, at least part of the reason for the latest delay is the current COVID-19 pandemic. A meeting was organised to take forward the transition planning exercise in April 2020. There is no suggestion that the young person's parents had indicated that they would not attend this meeting. While it is not possible to reliably speculate as to the likely progress of the process had that meeting taken place, it is possible that the transition process could have moved on from that meeting, in time for the start of the 2020-21 academic year. Of course, the pandemic is a matter which is outwith the control of both parties.
70. Having said that, the COVID-19 pandemic does not remove the obligations of the responsible body to comply with the transition regulations. I note here that on 7<sup>th</sup> May 2020 the Scottish Government published adapted guidance to cater for transition planning and implementation during the COVID-19 outbreak (214-219 of the bundle). In that document, three aims are identified (Aims A-C). There are a series of Tasks, Considerations and Resources for each of the three Aims. Aim A sets out as a Task the identification of a representative from each of the lead partner organisations to meet "frequently by video or teleconference to oversee delivery of the tasks set out in this guidance" (216 of the bundle). Aim B indicates that a plan should be in place for all young people who are at a critical point of transition, in particular school leavers (217 of the

bundle). There is no evidence to suggest that this guidance has been considered or followed by the responsible body in relation to the young person, or even that the responsible body is aware of that guidance. No reference is made to this guidance in the responsible body's witness statements. There is no evidence to suggest that any remote meetings with the young person's parents have been arranged or have taken place. The latest meeting referred to by the responsible body's witnesses was the cancelled meeting due in April 2020. In the absence of evidence to the contrary, I can only infer that no action has taken place to progress the planning for the young person's transition since March 2020, over five months ago. It is therefore inaccurate to state that lack of cooperation by the young person's parents in combination with the COVID-19 outbreak have been the only causes of the delay in planning the young person's transition. Part of the cause would appear to be lack of any progress since March 2020. Although this claim is ongoing, that does not prevent the progress of transition planning. Further, the proposed transition timescales (at least the 2<sup>nd</sup> and 3<sup>rd</sup> of those listed) set out by the responsible body in the note attached to its undertaking of 29<sup>th</sup> August 2019 (019 of the bundle) were not met (and remain unmet). This is despite the fact that the 3<sup>rd</sup> stage was supposed to have been completed by 30<sup>th</sup> November 2019, over three months before the COVID-19 school closures.

71. Turning back to the four questions which contribute to the proportionality test, my answers are as follows:

(a) Is the objective sufficiently important to justify limiting a fundamental right?

72. Yes. The objective of properly planning for the post-school provision for a young person with additional support needs and a disability can be implemented by limiting the right to continuing education. This question is a more general one, related to the objective, not related to the approach in the particular case, unlike the three subsequent questions.

(b) Is the measure rationally connected to the objective?

73. No. The measure is the refusal of the request for a further year at school. This is not rationally connected with the objective, since the reasons advanced for the measure are not able to be justified given the evidence and the applicable law. On the evidence, it is clear that the young person would benefit from education for a further year (as explained above). On the law, the non-co-operation of the young person's parents (if it were found to have taken place) would not prevent the responsible body carrying out its obligations.

(c) Are the means chosen no more than is necessary to accomplish the objective?

74. No. The means chosen (to refuse an additional year of schooling) go further than is necessary to accomplish the objective. The objective could have been accomplished by avoiding such a strong focus on the views of the young person's parents, and a focus on what is right for the young person. Had that approach been taken, a viable transition plan might have been in place well before the latest planned meeting in April 2020. The refusal to permit the young person to attend a further year of school leaves him without schooling and without a proper post-school transition arrangement. In fact, the young person is left without even a post-school transition plan. No outcomes have been agreed on how the young person will be looked after post-school. While a care provider has been identified, that organisation is not taking new referrals due to COVID-19. The responsible body suggests that the young person could simply continue to benefit from the support by

the support body until an alternative provider can be identified and a plan is agreed (see this suggestion by witness D at 253 of the bundle, para 4.). However, the support from the support body amounts to only 3 hours per week. Also, there is no indication of timescale for this suggestion. Given that a plan has not yet been formed, and time will be needed for the plan to be implemented, such a course of action may be a number of months away, or longer. As the statement by the young person's parents puts it at 064 of the bundle:

"[the young person] has no Person-Centred outcomes identified, no budget, no service provider identified [and] no staff identified or trained..."

75. This is not in dispute. This effectively leaves the young person in limbo – a state which the transition regulations are designed to avoid. This proposed course of action is more extreme than is necessary to accomplish the objective than the alternative – to allow the young person to remain in education while a transition plan is formulated. In fact, the measure taken (the refusal of an additional year) means that the objective (post-school transition planning and provision) will remain unaccomplished, perhaps for some time.

(d) Is the unfavourable treatment proportionate to its likely benefits?

76. No. Given all I have said above, it is hard to identify the likely benefits of the young person being left in limbo. The refusal of an additional year of schooling is disproportionate to any (difficult to identify) benefits of that refusal.

77. Given that three of the four necessary questions (including the final, overall, question) are answered in the negative, the responsible body has failed to satisfy me that the treatment (the refusal of an additional year of schooling) is a proportionate means of achieving a legitimate aim.

78. As a result, the responsible body, in refusing the claimant's request for the young person to be educated for an additional year, has discriminated against the young person because of a matter arising from his disability, under s.15 of the 2010 Act.

## **Remedy**

79. Where discrimination has been found to have occurred, I am authorised to make any such order as I think fit (2010 Act, schedule 17, para 9(2)). That power may be exercised in particular with a view to "obviating or reducing the adverse effect on the person of any matter to which the claim relates" (2010 Act, schedule 17, para 9(3)(a)). The claimant's representative invites me to require the responsible body to admit the young person to school education for the whole of the academic year 2010-21, with the same split placement arrangement as took place for academic year 2019-20 (para 63 of his submissions). As an alternative remedy, the claimant's representative suggests such a requirement, but only for as long as may be required for the transition arrangements to be made (para 64). Given the nature of the discriminatory treatment, it is difficult to see any alternative to one of these two remedies.

80. The responsible body's representative does not address the question of a remedy in his written submissions, nor is this question considered as part of the responsible body's case statement.

81. While the claimant's representative's suggestion of an alternative remedy seems, on the face of it, sensible, I have adopted his initial suggestion of requiring admission for the entire academic year. There are three reasons for following this course.

82. Firstly, I can see that the alternative remedy could lead to disagreement resulting in uncertainty for the young person. There may be issues around what a “successful transition process” means, or when that point is reached, especially in a case where there has in the past been disagreement between the parties on the proposed content of the plan.

83. Secondly, there is no indication of when the transition process might be taken forward, far less concluded. There is no definitive timescale. There is no evidence to suggest that any meetings are planned. In these circumstances, there is every chance that it will take much (if not all) of the current academic year to have a transition plan agreed and implemented, a situation made more difficult by the current COVID-19 pandemic.

84. Thirdly, there is a facility for a review of this decision (rule 11 of the Tribunal rules and sections 43-45 of the Tribunals (Scotland) Act 2014). If a transition plan is agreed and can be implemented earlier than the conclusion of the current academic year, but the claimant does not agree that the young person should leave school to move into adult services in accordance with that plan, the responsible body could apply for a review of this decision, on the basis that it is in the interests of justice for this to happen, due to a change of circumstances. Such an application would, in all probability, require to be lodged outwith the 14-day time limit in rule 11(2)(b) of the rules, but it may be possible for a late application to be accepted (for example, under rule 102). I make no comment on the likelihood of such an application being considered were it to arrive outside the 14-day limit nor what the outcome of such an application might be. However, I rely on the possibility of such an application as part of my reasoning for adopting the claimant’s representative’s primary remedy suggestion.