



### **Decision of the Tribunal**

The Tribunal upholds the terms of the Claim and finds that the Responsible Body ('RB') has discriminated against the child in terms of section 85(2) of the Equality Act 2010 ("the 2010 Act").

The Tribunal orders the RB in terms of Schedule 17 paragraph 9 of the 2010 Act to:

- 1) Issue a written apology to the child and the Claimant in respect of the unlawful discrimination in terms of the "Scottish Public Services Ombudsmen (SPSO) guidance on apology" within 28 days of receipt of this decision;
- 2) Require that relevant staff within the RB, in particular those involved in school exclusion processes, undertake appropriate training on the use and purpose of exclusion in terms of managing challenging behaviours of pupils with disabilities, in order that the RB fulfils its obligations under the 2010 Act;
- 3) Reviews, develops and revises its policy on exclusion, together with its policy on inclusion and equality and its accessibility strategy in line with current Scottish Government guidance
- 4) Orders the RB to review, develop and revise its equality outcomes and policy under the public-sector equality duty in terms of section 149 of the Equality Act 2010 to adopt relevant policies and targets for the reduction of the "exclusion gap" which exists in the Authority for disabled pupils.

The Tribunal further determines that Regulation 4(1) of the Equality Act 2010 (Disability) Regulations 2010 does not apply in this case.

## Introduction

### The claimant

The Claimant has lodged a claim against the RB in respect of a series of school exclusions to which her child was subject when he was a pupil at two different primary schools under its control. It is the position of the Claimant that said exclusions contravened the terms of the 2010 Act. In particular, the Claimant avers that:

- 1) The child has been subject to a number of exclusions from schools related to the child's disability, which amounted to unfavourable treatment and unlawful discrimination in terms of section 15 of the 2010 Act;
- 2) The child was subject to seclusion, physical intervention, informal exclusions and part-time attendance related to his disability, which individually and collectively amounted to unfavourable treatment and was unlawful discrimination in terms of section 15 of the 2010 Act;
- 3) The RB failed to monitor the use of seclusion, physical intervention and informal exclusion in relation to pupils with disability (including the child) which resulted in no effective means of determining whether its use was excessive, justified, proportionate or appropriate and was therefore unable to take effective steps to reduce either the number of incidents or the gap between the rate of such incidents for pupils with disability and non-disabled pupils, contrary to the RB's public sector equality duty in section 149 of the 2010 Act; and
- 4) Neither the RB's policy on exclusions nor its guidelines for exclusions mention the 2010 Act or disabled pupils, neither its statutory equality planning nor its Accessibility Strategy address the issue of exclusion of pupils with disabilities and there is no specific monitoring of the rates for exclusions of pupils with a disability, and therefore no means of reducing either the number of exclusions or the gap between the rate of exclusions for pupils with a disability and non-disabled pupils, contrary to the RB's public sector equality duty in section 149 of the Act.

The claimant seeks the following remedies all in terms of paragraph 9 of Schedule 17 of the Act:

- a) The tribunal makes a formal statement that discrimination has occurred;
- b) The tribunal orders that the RB make a written apology (in terms of the SPSO guidance on apology);
- c) The tribunal orders that the RB and their staff undertake training;

- d) The tribunal orders that the RB reviews, develops and revises its policy on exclusion, together with its policy on inclusion and equality and its accessibility strategy; and
- e) The tribunal orders that the authority reviews, develops and revises its equality outcomes and policy under the public sector equality duty to adopt relevant policies and targets for the reduction of the “exclusion gap” which exists in the RB for disabled pupils, as well as monitor and where necessary reduce the use of seclusion, physical intervention and informal exclusion for disabled pupils in the RB.

### The responsible body

The RB resists the claim averring:

- 1) Each of the exclusions was on the basis that to allow the child to continue his attendance at the school would be seriously detrimental to good order and discipline in the school, or to the educational wellbeing of the pupils there, the Head Teacher being satisfied that the statutory test for excluding a pupil, as set out in Regulation 4 of the School’s General (Scotland) Regulations 1975 was complied with, and having taken into account internal local authority guidance that exclusion was only to be used as a last resort and imposed when no other disciplinary sanction was appropriate and the child was not therefore discriminated because of or as a consequence of his disability, but even if he were the response was a proportionate means of achieving a legitimate aim;
- 2) With the exception of that of 29<sup>th</sup> November 2017, the exclusions all involved a physical assault on another pupil, staff member or both and Regulation 4(1)(c) of the Equality Act 2010 (Disability) Regulations therefore applies as the behaviour of the child on these occasions amounts to a tendency to physical abuse of other persons, meaning the child is not to be treated as having an impairment under section 6 of the 2010 Act;
- 3) As the child’s conduct is related to his unwillingness to behave in a way that does not cause harm to staff or fellow pupils while at school and any exclusions or sanctions have been as a consequence of such behaviour, this was not unlawful discrimination in terms of section 15 of the 2010 Act any discrimination being a result of proportionate means used by the RB in achieving a legitimate aim, namely the protection of staff and pupils and the prevention of disruption to education at the school;
- 4) The Child’s exclusions have been justifiable in terms of the statutory test in Regulation 4 of the School’s General (Scotland) Regulation 1975; and
- 5) While its policies and practice guidelines on exclusion and physical intervention require to be updated, this process is underway and will take place without the necessity of any order made by the tribunal and any written apology should be limited to the failure to update its Exclusion Policy and have explicit reference to the use of safe spaces in its policy on physical intervention.

It is the position of the RB that the claim should be dismissed for the foregoing reasons.

### **Preliminary and Procedural issues**

There were a number of case management conference calls, attended by parties' solicitors and the legal member sitting alone. The claim was originally conjoined with a placing request reference submitted by the claimant in respect of the child seeking to overturn the decision of the RB refusing a placing request for the child to attend school A. Said order to conjoin both cases was subsequently revoked by the tribunal following new school provision for the child at school B. As separate witnesses were then required for each case this revocation was agreed by all parties.

A number of productions were lodged late by both parties and accepted by the tribunal without objection. Parties sought leave to subsequently amend case statements which was granted by the legal member in advance of the oral hearing dates.

A Joint Minute of Agreement was lodged following a direction from the legal member. A copy is contained in the bundle.

The tribunal considered detailed written evidence, written submissions and legal authorities in this case lodged by both parties. They are contained within the bundle at C1-271 on behalf of the claimant and RB 1-156 on behalf of the RB. There were further productions and papers considered by the Tribunal contained within D1-100 and T1-46.

The Tribunal heard oral evidence over two days with a further half day of oral argument and deliberations.

At the start of the evidential hearing on June the legal member explained that the oral evidence would require to consider the issue of whether or not Regulation 4 of the 2010 Regulations applied, as well as the disputed matters around whether or not discrimination had occurred in terms of section 15 of the 2010 Act as averred.

At the stage of written submissions the claimant stated that she was no longer insisting on the parts of the claim relating to physical interventions and informal exclusions in respect of the child.

### **The child's views**

At the case management stage it was stated by the claimant's solicitor that the child would find it too distressing to attend the tribunal in person. With the agreement of parties, the legal member issued a direction in accordance with the Presidents Guidance Note 03/2018 that the child's views around the issue of his exclusion were to be ascertained in so far as possible via an independent advocate. This was presented as a report lodged before the Tribunal and is contained within the bundle. The tribunal wishes to record its appreciation to the advocate for their prompt response in both meeting with the child and producing said report.

The views of the child were taken into account by the tribunal in reaching its decision.

### **Evidence and Findings in fact**

The following is a statement of facts found by the tribunal:

- 1) The child is a 10 year old boy. He has a diagnosis of Oppositional Defiance Disorder and is a disabled person in terms of section 6 of the Equality Act 2010.
- 2) As a consequence of said diagnosis the child experiences social, emotional and behavioural difficulties. He can display provocative and disruptive behaviours, hypervigilance and impulsivity; all of which are associated with his condition. He can find it difficult to accept other people's personal space and will test boundaries and become confrontational, and, at times, he will lash out at others, in particular when he is in a "heightened" or escalated emotional state. When in this heightened or highly emotional state he may be unable to calm down or manage his emotions and the behaviours associated with his condition. He will use inappropriate language when in a heightened state and has general difficulty coping with school routines and obeying orders. He has in the past had involvement with Child and Adolescent Mental Health Services (CAMHS) and Social work.
- 3) The responsible body are the RB in terms of section 85(9)(c) of the Equality Act 2010. The RB manages school C and school B where the child has been a pupil.
- 4) The child was enrolled in school C around January 2016 until around December 2017. He started attending school B on 8<sup>th</sup> January 2018 and continues to attend there on a part-time basis. Since around November 2017 he has attended school A, an independent specialist provision, on a part-time basis and he also continues to attend school B.
- 5) The child was excluded from school C on 12 separate occasions over the course of his attendance there. He has been excluded from school B on one occasion since enrolling there. Said exclusions, with the exception of one, occurred following the child exhibiting physically and verbally assaultative behaviours towards teachers and/ or pupils, threatening physical violence and disrupting the school routine. All of the foregoing behaviours arise as a consequence of his disability.
- 6) In the academic year 2016-17 the child was excluded from school for a total of 17.4% of the school year which comprised 38 days of exclusion over a 12 month period. During these periods of exclusion there was no alternative

educational arrangements offered to him. He has not received any home tuition and no such home tuition arrangements have been offered to him.

- 7) The exclusions referred to in the preceding fact are listed within the formal exclusion correspondence, statements and reports contained within the bundle. The reasons for the child's exclusions and the grounds relied upon by the RB follow a similar pattern. The child, often when in a heightened emotional state, would physically assault staff members and/ or pupils, become verbally abusive and exhibit persistently disobedient behaviours which were disruptive and threatening to others. The grounds relied upon by the RB for all of the said exclusions are stated in terms of Schools General (Scotland) Regulations 1975 Reg 4 and met the statutory test in this regard. This was not disputed by parties.
- 8) The child when exhibiting disruptive or threatening behaviours was at times removed from class and taken to a quiet room to be secluded whilst a pupil at school C. On occasion he was prevented from leaving said room by staff members. He would be kept in said room against his will when his behaviour became disruptive. There was no formal record kept of the use of these seclusions at the time they occurred.
- 9) From on or around November 2016 the child was required by school C to go home at most lunch times for remainder of the school day. From on or around December 2016 the child was permitted to attend school on a part-time basis only. He was not offered any home tuition or alternative means of education over this period.
- 10) The child has experienced a significant impact as a consequence of being excluded from school. He has been placed at a disadvantage and has not been able to access the curriculum in the same manner as his non-disabled peers. He was separated from his friends and his peers as a consequence of the exclusions and this impacted on his emotional well-being.
- 11) Disabled Pupils within the responsible body's area were excluded at a rate of 55 exclusions per 1000 pupils in 2012/2013 and 52 exclusions per 1000 pupils in 2014/2015. This compares to a rate of 21 exclusions per 1000 non-disabled pupils in 2012/2013 and 20 exclusions per 1000 in 2014/2015. The rate of exclusions for disabled pupils in the responsible body for this period is more than two-and- half times more than that for non-disabled pupils.
- 12) The RB's policy and guidance governing the Head Teacher's use of exclusion make no mention of the 2010 Act or of disabled pupils. The RB does not address the issue of exclusion of pupils with disabilities in their statutory equality planning, nor in their Accessibility Strategy. The RB does not specifically monitor rates of exclusion for pupils with a disability.

## **Evidence**

### **The child**

The child's views were recorded in the advocacy statement. He states that he did not enjoy his time at school C. He states that the teachers were mean to him. It was his perception that he just wandered around, was not allowed in class and was not included in anything. He stated that he did not understand why he had been excluded throughout his time at school C. He stated that it was not fair that he was not allowed to go into class and that it made him sad when he was excluded.

### **Witnesses**

Written witness statements were provided by each of the witnesses who gave oral evidence and were adopted as evidence in chief by each of them at the hearing stage. Oral evidence was provided by the following witnesses:

- 1) The claimant
- 2) Witness A (by telephone) (for the claimant)
- 3) Witness B (for the RB)
- 4) Witness C (for the RB)
- 5) Witness D (for the RB)

### **The claimant**

The claimant outlined her son's additional support needs. She explained that shortly after starting at school C she was advised by the Head Teacher that his behaviour was challenging and it was suggested that he come home at lunchtime each day. Following this his time in school was reduced to 1 hour and 15 minutes each school day. The claimant did not consider that she had much choice in these matters when informed of this plan by the school and went along with what was being suggested.

The claimant considered that she was always on call for the school and was often contacted by telephone or expected to attend in person to calm her son down when he was in a heightened state. When she did attend she was asked by staff to take her son home in order that he might cool off. The claimant's recollection was that this happened around every second day and was not recorded as an exclusion. The claimant repeated that she felt that she had no choice but to comply with these requests by the school.

The claimant spoke of her son at times being kept in the quiet room at school C and there being no written record of these occasions. On one occasion both she and her son were kept in the quiet room whilst a member of staff held the doors closed with both the claimant and her son being prevented from leaving. She expressed concern about this as she did not consider that staff were appropriately trained or the incidents

recorded. The claimant expressed these concerns to the staff but was told that if she was unhappy for her son to be secluded in these circumstances she would require to be on call and available at all times.

The claimant referred to the use of restraint and stated to the tribunal that if her son required to be frequently restrained then there was something wrong and that the situation at school was not working for her son. She stated that neither the use of restraint or seclusion were effective in terms of managing her son's behaviours.

In relation to the advocacy statement, the claimant agreed that her son didn't really understand why he was being excluded from school. She spoke of the huge impact that the various exclusions had on him and that he spoke of taking his own life on occasion as he felt left out of things with friends and school.

The claimant stated that her son enjoyed seeing his friends when at school and that he had a close bond with the Support for Learning Teachers at school C despite everything that had happened. She advised the tribunal that her son was now at school B which included a part-time therapeutic placement at school A. He was, in her view, now on the right path and that he was now more able to self-regulate his emotions and that both school B and school A had worked with him on this. The claimant felt that for a long period of time her son did not know where he belonged however he was now having far fewer outbursts or impulsive behaviours at school and that this was really positive. She stated that both school B and school A schools were better at managing her son's behaviour. She also advised that when at home he was not likely to have any of the outbursts exhibited at school C school. She stated that she was able to de-escalate her son's behaviours at home and that he reacted better with one-to-one input when in an escalated state. She stated that there had never been any destructive or violent incidents at home beyond that of what she referred to as normal sibling fighting.

The tribunal was satisfied that the claimant's evidence was credible and reliable. She gave her evidence in a consistent and measured way.

## **Witness A**

Witness A provided evidence to the tribunal by telephone and in a report which she adopted as her evidence-in-chief. Witness A has extensive qualifications and experience in school exclusion which are listed in detail at C30-31. Witness A had not met with the child or the claimant in completing her report and confirmed to the tribunal that she had considered the bundle prior to giving her oral evidence.

Witness A's report addressed both the effect of school exclusion on pupils and whether or not the stated legitimate aim of the exclusions in this case - the protection of staff and pupils and the prevention of disruption to education - is one which is likely to be achieved by exclusions. She explained that the UK was unusual in the international



context as other countries promoted inclusion and did not use exclusion in schools. The process of exclusion is not seen internationally as being worthwhile or productive.

Witness A made reference to the negative impacts of exclusion on pupils. In her opinion these were well known, documented and supported by robust research which was well respected. This research had also established a clear link between attainment and exclusion and witness A supported its conclusions.

Witness A offered the opinion that there was no evidence that exclusions are necessary as a response to challenging or violent behaviour in order to protect the excluded pupil or other pupils and/or staff. The evidence was in fact to the contrary and showed that exclusion was harmful for pupils. She referred to alternative tried and tested methods which can resolve often very difficult situations including a restorative approach. Witness A stated that there was no evidence available to show that exclusions were necessary in order to enable a meeting to take place between the school and a child's family. Nor was there evidence available to suggest that exclusion was necessary to enable plans to be put in place to support a child prior to return to school: such planning should be an ongoing process. An exclusion, in her opinion, often indicated that the relationship between the school, the pupil and the family had broken down. Exclusion, in witness A's opinion, may paradoxically make it less likely for any meeting or planning to be constructive if it followed a period of exclusion.

Witness A highlighted the cumulative impact of exclusion in that the more that it happens the more ineffective it is and the impact for that child deepens. It can increase a child's sense of shame and fear. Witness A advised that the impact of exclusion for pupils with additional support needs was compounded in this regard.

Witness A stated that there was no evidence to suggest that exclusion was effective in achieving the RB's aim of protecting pupils and staff, referring to the high number of exclusions in this case. It was her view that these exclusions taught the child an unhelpful lesson that the behaviours work in that he got to go home from school. Witness A expressed concern that the exclusions in respect of the child treated each incident in isolation which, she stated, was disingenuous, unhelpful and did not sit comfortably with principles of exclusion in the current Scottish Government Guidance lodged at C43 in the bundle.

It was suggested to witness A by the RB that the exclusions were used as a last resort. The RB asked the witness how she would have dealt with the situation. In response witness A suggested that both school C and the RB should revisit their approaches in dealing with the child's behaviour, which she considered to be exceptional, as they did not seem to be working. She acknowledged that the measures and approaches used by school C in relation to the child were done with very good intentions and a strong sense of commitment, however it was her sense that the child's behaviour was a communication that his exceptional needs were not being met. She further responded that other countries, even in difficult circumstances, manage to avoid the use of

exclusion altogether by using a number of different approaches including restorative and nurturing approaches as an alternative to exclusion.

Witness A was a credible and reliable witness. Her expertise was unchallenged as was much of her evidence.

## **Evidence of the RB:**

### **Witness C**

Witness C is Quality Improvement Manager with the Additional Support Needs Team within the RB. She has extensive experience and qualifications in teaching children with such needs amongst other things.

Witness C confirmed that she had no case involvement with the child and has no role in the exclusion of individual children. Her role requires her, amongst other things, to work with Head Teachers and explore strategies for children. Her evidence made reference to the RB's current Exclusion Policy and she indicated that this document required to be updated and refreshed in line with current the Scottish Government Guidance. Witness C conceded that this policy should have been updated when the 2010 Act came into force. She nonetheless expressed the view that the key messages were already there and that staff were aware of these. It was her view that a clearer narrative was needed across the Authority on how they would work to prevent exclusions and that this training was ongoing. She confirmed that mandatory training on the 2010 Act was given to all staff as part of an induction process.

Witness C advised that the RB routinely monitored their exclusions data and acknowledged that there may be exclusion gaps between disabled and non-disabled pupils. She accepted that the data collected in respect of the RB indicated that around one third of the children subject to exclusion within the RB area have additional support needs. Witness C explained that children were excluded for a whole range of reasons and that many children with social or emotional additional support needs who are excluded won't necessarily have a disability within the meaning of the Act. She accepted that more meaningful data was required by the RB in this regard.

In relation to the use of seclusion within the RB area witness C stated that there was a process for incident reporting and recording its use, however this was not systemised in any way and this was an issue that required attention. Witness C also advised that the RB was in the process of updating its policies on restraint.

Witness C conceded that the use of exclusion was not an optimal outcome for a child and that it was only used as a last resort and that the RB had a duty of care to everyone in a school building when issues with challenging behaviour arose.

Witness C stated that it was a glaring omission on the part of the RB that the RB's current policy entitled "School Discipline and the use of Exclusion", omitted to expressly

mention disability discrimination. The claimant's representative put to witness C that this was of relevance as the child is a pupil with a disability. Witness C stated in response that she was 100% confident that the Head Teacher made any decision to exclude the child with full awareness that his behaviours and disability were linked. Witness C contradicted this later stating that at times it was difficult to see to what extent the child's behaviours were linked as she was aware that he could behave appropriately at other times.

Witness C stated that the aim of the exclusions was the protection of staff and pupils. It was put to witness C that there was no evidence that exclusion was an effective means of pursuing the stated aims of the RB. Her response was that the law still permits it and that the case involved a complex child and required complex case management.

Witness C advised that informal exclusions should not be taking place and that a part-time timetable was a different thing.

## **Witness B**

Witness B is the Head Teacher at School B where the child currently attends. She has been qualified as a teacher since 1989 and is experienced in working with and education children with additional support needs.

Witness B explained that the child had settled well and was enjoying much of the school routine although at times he would challenge rules and routines and had shown destructive and violent behaviour towards property, staff and pupils. She described the one exclusion that had occurred from school B on 30<sup>th</sup> April when the child had kicked a teacher several times in the abdomen. She felt that while the exclusion had been a negative outcome for the child and for the school, it had been a last resort and had been justified. In her view, the purpose of the exclusion was for the educational wellbeing and safety of the child and the other children. She needed time to plan how the school were going to meet his needs and she had to bear in mind the safety of others in the school. She stated that the teacher was hurt badly and required a phased return to work. When questioned about why the school did not use the restorative approach she advised that the child was not his usual calm self, he had been lashing out and had not displayed any signs of anxiety or distress before the incident and had not shown any signs of remorse. Witness B was of the view that the child was a danger to adults and other children and would have been at risk if he had remained at the school. When questioned on how the exclusion was required for planning she advised that she used the time to review IEPs, visual timetable, records and had spoken to and sought advice from a variety of staff within and outside the school. As a result of some of those discussions a pupil-centred planning meeting was arranged. Witness B felt that this time was needed to ensure that she had sufficient strategies in place and that the child would also have been at school A for 2 days of the exclusion period.

Witness B outlined the arrangements currently in place following the exclusion and listed a range of successful strategies that the school now used which were subject to ongoing and daily review. Witness B confirmed that there had been no further exclusions and that the child was progressing well. In particular she advised that he was becoming more relaxed, settled and open to co-operating with staff over time. The approach of the school since the child had joined in January 2018 had been to get to know the child and plan a responsive curriculum around him. She also advised that the school were building up links with school A where the child attended on a part-time basis. Witness B was of the opinion that despite the issue of this exclusion, things were going very well for the child and that he was showing more of a sense of accountability despite the challenges of his disability.

### **Witness D**

Witness D is Head Teacher at school C and is experienced in working with children with additional support needs.

Witness D stated that when the child attended school C, he would often manage his behaviour well but when out of control he was unable to regulate his behaviours. Witness D stated that at times it was difficult to differentiate whether his behaviours were related to his disability or just because the child wanted something. Witness D described a period when the child first started at the school when staff were not all aware of the various de-escalation strategies to be put in place for him. She indicated that an element of upskilling of staff was required here.

Witness D advised that staff tried to use the restorative approach which she described as a blame-free way of approaching and managing challenging behaviours. Staff regularly sought advice from the child's mother about what was working at home. She explained that the child displayed regular violent outbursts towards peers and adults however was able to maintain friendships and positive relationships with staff. She described the child as having difficulty in coping in school and that his behaviours were often unpredictable. As the autumn term progressed in 2016, the child was excluded on five separate occasions. These exclusions related to the child being out of control and lashing out. The school were informed at around this time by the social work department that a support worker from the Crisis Intervention Team would be working with the family in relation to the child's behaviours.

Witness D advised that as the school year progressed in 2016/ 2017 the child took part in a series of "Boys Groups" which were weekly sessions run by the social work department during school time aimed at supporting social skills. The child struggled with this at times and on one occasion the police were called by the support worker due to the child behaving in a manner which endangered both him and others.

Towards the end of the school year in 2017, despite a high level of support from the Additional Support for Learning staff team within the school, witness D stated that the child's behaviour continued to escalate and his level of violence had led to further exclusions from the school.

Witness D stated that by the start of the new school term in August 2017, a Co-ordinated Support Plan ("CSP") was in place for the child as well as a new learning pathway which included OWLS (an outdoor learning programme) and music therapy. Shortly after this term commenced the family moved out of the school catchment area and the child commenced at school B in the new term of 2018.

Witness D stated that exclusion of a child is a last resort, conceding that it is not a solution to an issue nor is it beneficial to a pupil. She advised that she had a duty of care to protect the welfare of all pupils and staff within the school and ensure that the operation of the school is maintained in a safe manner. With reference to each of the exclusions to which the child was subject witness D was satisfied that the necessary statutory test was met on each occasion.

Witness D advised that there was in place a wide range of supportive and, where necessary, disciplinary measures for the child to try and meet his needs and assist him when de-escalation was required. This included the use of rewards and incentives, individually tailored activities and enabling him to communicate directly with his mother by phone. Staff were provided with training to ensure that consistent and effective approaches to de-escalation were in use. Witness D further stated that the school was updating practice on the use of seclusion and time out, in line with RB current guidance. She was also aware of RB's plans to review their current exclusion policies.

Witness D was clear that she did not look on the exclusions with any sense of pride and that the exclusions occurred when there were sustained periods of the child being out of control. With over 300 people in her care it was necessary to make sure that no one was seriously injured. As well as the exclusions being an opportunity to keep everyone safe, witness D advised that she used the time of each exclusion to plan and put supports in place when the child returned. This included numerous discussions with the Claimant as well as risk assessment, reviews and staff change.

On the use of seclusions, witness D advised that these had occurred when child was taken to a safe place and prevented from leaving. She made reference to key transition times like playtime, when the child might be removed to a quiet room if he was assaulting staff or children and that this would help calm him down. Witness D stated that no record of the use of these seclusions had been kept by the school.

Witness D stated that following discussion with the social work department who had informed her that the family kept a number of dogs, no arrangements for home tuition were put in place. There had been no consideration of permanent exclusion of the child as witness D stated that he was not acting in a dangerous manner; he was a warm and

friendly boy and really engaged. Witness D stated that she was clear that school C was able to meet the child's needs.

Witness D on cross examination suggested that exclusion may be a "good thing" on balance as it taught the child consequences. There was no other option in the "critical moment" where people could be hurt in the event of serious injury or protection of a child.

Witness D conceded that she did question herself around the level of exclusion however maintained that she applied the relevant statutory test, sought advice and considered her duty of care to staff and children within the school. Witness D stated that on the basis of the level of violence she felt that the school was not able to function unless the child was excluded.

The tribunal was satisfied that all of the witnesses were credible and reliable save for certain aspects of the evidence given from witness D and witness C. In particular, the tribunal was unable to rely on witness C's evidence around the use of exclusion at school C. Witness C's confidence that the Head Teacher at school C excluded the child in full awareness that his behaviours and disability were linked was subsequently contradicted by her when she stated that it was difficult to see to what extent the child's behaviours were linked as she was aware that the child could behave appropriately at other times. A similar view was expressed by witness D, Head Teacher at school C who suggested that at times it was difficult to differentiate whether the child's behaviours were related to his disability or just because the child wanted something. The tribunal found itself unable to rely on these parts of evidence. There was evidence, in both written and oral form, including from witness D herself, which linked the child's behaviours which led to his exclusions directly to his disability.

#### **Preliminary Issue ( Regulation 4)**

It is submitted by the RB that the claim should be dismissed as the child should not be treated as having an impairment in terms of Regulation 4 of the Equality Act 2010 (Disability) Regulations 2010.

It is contended by the RB that all of the exclusions bar the exclusion on 29th November 2017, followed a physical assault, either on another pupil or staff member or both and that the behaviour of the child on these occasions amounted to a tendency to physical abuse of other persons. If the tribunal accepts this to be true, it is submitted that Regulation 4(1)(c) of the 2010 Regulations applies and the child is not to be treated as having an impairment under section 6 of the 2010 Act which would in turn place him outside the scope of the 2010 Act.

Regulation 4 of the 2010 Regulations excludes certain conditions from the protection of the 2010 Act. It states that:

“4. (1) For the purposes of the Act the following conditions are to be treated as not amounting to impairments:-

- (a) a tendency to set fires
- (b) a tendency to steal
- (c) a tendency to physical or sexual abuse of other persons
- (d) exhibitionism
- (e) voyeurism”

In considering whether the child has a tendency to physical abuse of other persons the tribunal considered the case of *X v. Governing Body of a School (SEN)* [2015] UKUT 7 (AAC) which sets out the following principles in determining the issue:

- 1) the phrase “a tendency to physical or sexual abuse of other persons” must be considered in the round [103];
- 2) the words “tendency to physical ... abuse” take their meaning from their context [114];
- 3) the issue is ultimately one of fact for the tribunal to determine by considering all the circumstances of the individual case [115];
- 4) an element of violent conduct on its own may not be sufficient to meet the definition, the greater the level of violence, the more readily it will fall within the meaning of “physical abuse” [116];
- 5) while there is no requirement for any knowledge that what they are doing is wrong, if the conduct is “something akin to a spasmodic reflex” it would not meet the terms of the definition [117];
- 6) the existence of some sort of misuse of power or coercion is of relevance to this question, a finding of physical abuse in the absence of these factors would be likely to require careful justification [118];
- 7) in principle, in some circumstances a tendency to physical abuse may be revealed in a one-off incident, so long as there is evidence of a tendency to physical abuse [120];
- 8) this is a challenging task for the tribunal, but one which flows from the choice of the use of a more complex concept of “physical abuse” rather than, for example “violence” or “assault”.

The tribunal agreed with the claimant’s submission that the Upper Tribunal has made it clear in this decision that the terminology used is not synonymous with “violence” or “assault”. The tribunal agreed with the claimant’s submission further that this is an error

which the RB seems to have fallen into in their submission on this point at RB32, para. 7.

The tribunal considered all of the evidence before it in determining this issue. In particular the tribunal noted that the child had exhibited violence in all but one of the incidents resulting in exclusion whilst a pupil at school C. The evidence suggested that these incidents occurred in large part when he was in an escalated or heightened state or out of control. There was no evidence of incidents of such violence at school A or within the family home beyond what the claimant referred to as the usual sibling conflicts. The tribunal did note that the child had assaulted a member of staff at school B, however this appeared to be an isolated incident and the child had continued to make significant progress at his new school with no further incidents of violence or assault being recorded. Witnesses concurred throughout that the child was a kind and caring child who enjoyed spending time with his peers.

The tribunal found no evidence that there is, on the child's part, a misuse of power or coercion. In such circumstances, the Upper Tribunal has been clear that a finding of a tendency to physical abuse "would be likely to require careful justification" [cf.118]

The tribunal also accepted the claimant's argument that each of the exclusions in question had other operating reasons which were unconnected to the behaviour which is said to be excluded by Reg 4(1). Reasons including verbal abuse, spitting, insolent or offensive behaviour, general and persistent disobedience and threat to or damage to property are listed throughout the reasons for exclusion. It was evident therefore that the exclusions themselves were not solely for the violent or assaultive elements of the child's behaviours. The tribunal considers that these additional reasons were clearly related to the child's disability.

The tribunal further had regard to the opinion of witness A, who stated to the tribunal that these behaviours were more likely to be the communication of an unmet need. There had been no educational psychological assessment, observation or engagement beyond a brief attendance at a review meeting. It was conceded by witness D that this failure did not meet her expectations as a Head Teacher. Despite repeated exclusions for escalating behaviour, there appeared to be no robust assessment of the child's needs.

For these reasons, there was insufficient evidence to support the argument made by the RB that the child has a tendency to physical abuse of other persons in terms of the 2010 Regulations.

In reaching this conclusion the tribunal was also mindful that at the time of the child's exclusions, and during the period leading up to this tribunal hearing, there appeared to be no proper consideration of the application of the Regulations by the RB in relation to any decision to exclude him.



## **Disapplication of the 2010 Regulations**

The claimant's solicitor referred us at the stage of oral submissions to the decision of the Upper Tribunal in the case of *C and C v The Governing Body of a School (SEN)* [2018] UKUT 269.

This very recent decision involved a child with complex and challenging behaviours which caused them to lash out violently placing them within the definition of a “tendency to physical abuse” in terms Regulation 4. The Upper Tribunal concluded that in the context of education, Regulation 4(1)(c) of the 2010 Regulations violated the right of a child with a recognised condition that is more likely to result in a “tendency to physical abuse” not to be discriminated against under Article 14 of the European Convention on Human Rights when read in conjunction with Article 2 of Protocol 1 of that Convention. The Upper Tribunal, in terms of section 6(1) of the Human Rights Act 1998, took the view that the Regulations in these circumstances should be disapplied.

The dicta in this case mirrored the argument offered by the Claimant's solicitor in written submissions (at paragraph 63, C125) which was advanced in the Claimant's written submissions prior to the foregoing judgement being issued.

Both parties were in agreement that whilst this case is not directly binding upon the tribunal, it would be at the very least persuasive authority. The tribunal took the view that it would follow the reasoning in this case. Whilst this decision is from the Upper Tribunal in an English case with separate structure and jurisdiction from our own, it has been the practice of this tribunal, when determining and interpreting the application of Regulation 4, to follow the guidance issued in English Upper Tribunal cases. The tribunal saw no reason why it should depart from this approach.

Therefore although the tribunal did not find that the child fell within the scope of the 2010 Regulations on this occasion having regard to all of the evidence placed before us, we took the view that the Regulations would not have applied in this case in any event following this recent decision from the Upper Tribunal.

### **Discrimination Arising from Disability (Direct Discrimination)**

Section 85(2) of the 2010 Act provides that the RB of 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.

Sub-sub-sections (a), (b), (c), (d), (e) and (f) are relied upon in this case.

The Claimant alleges discrimination in this regard in respect of three separate issues

- i. The child's exclusion from School
- ii. The use of seclusion
- iii. Education of the child while excluded

It is a matter of agreement between parties that the exclusions, and other disciplinary sanctions referred to above, were in pursuit of a specific aim, namely the protection of staff and pupils and the prevention of disruption to education at school C and school B's. It is also a matter of agreement that when the child was excluded no arrangements were put in place by the school to provide him with an education.

In any claim where a person alleges discrimination under the 2010 Act, the burden of proving his case starts with the claimant. Once the claimant has established sufficient facts which establish that a breach of the Act has occurred then the burden shifts to the RB to establish that the treatment or breach is a proportionate means of achieving a legitimate aim.

### **Exclusion**

In determining this issue the tribunal requires to ask itself the following questions, which are considered below:

- 1) Did any of the decisions to exclude the child amount to unfavourable treatment in terms of section 15(1)(a) of the Act?
- 2) Was the decision to exclude the child because of something arising from his disability in terms of section 15(1)(a) of the Act ?
- 3) Was the treatment a proportionate means of achieving a legitimate aim in terms of section 15(1)(b) ?

This case did not involve a significant dispute around the facts. Parties were, broadly speaking, in agreement about the behaviours that led to the exclusion of the child on the dates stated.

- 1) Did any of the decisions to exclude the child amount to unfavourable treatment?

The tribunal concluded on this issue that each of the decisions to exclude the child in each school amounted to unfavourable treatment. Section 85(2)(e) of the 2010 Act specifies exclusion specifically as a way in which discrimination may occur. There was

evidence contained within the Scottish Government's guidance as well as from witness A, on the detrimental impact that exclusion has on pupils. The child himself expressed a view to the tribunal within the advocacy statement that he did not understand why he was excluded and that the exclusions made him sad. There was evidence provided by the claimant that her son had expressed suicidal thoughts following a period of exclusion. The decisions to exclude him created a barrier to his education and placed him at a considerable disadvantage to that of his peers.

The tribunal was satisfied having regard to all of the evidence available to it that all of the exclusions in this case amounted to unfavourable treatment.

2) Was the treatment because of something arising in consequence of the child's disability?

The tribunal was satisfied that the exclusions occurred because of something arising in consequence of the child's disability. There was sufficient evidence of this, particularly written within the child's Co-ordinated Support Plan where it is noted with reference to the child's diagnosis that Oppositional Defiance Disorder is not a diagnosis of mental health but one related to the child's behaviours. It is further stated within this CSP that this diagnosis gives rise to outbursts of inappropriate physical and verbal behaviour and specific reference is made to the comments of the CAMHs consultant who diagnosed the child's disability in this regard, confirming that the child's diagnosis was related to his behaviours. The child's Co-ordinated Support Plan makes express reference to this link as does the record of the multi-agency meeting where there is also express reference to the child's frequent and impulsive behaviours causing physical harm to others.

The child's treatment i.e. the exclusions, were because of behaviours which arise from his disability. There was evidence in oral and written form before the tribunal which allowed it to safely conclude that on account of his ODD, when in an escalated or heightened state, the child was unable to self-regulate and would lash out at others. Whilst there was evidence that the child at times was able to manage his behaviours appropriately, the evidence was that all of the exclusions had occurred when the child was effectively out of control and unable to regulate his behaviour. These behaviours arose from his disability and the treatment that he received was because of these behaviours.

As the tribunal concluded that the exclusions from each school amounted to unfavourable treatment because of something arising from the child's disability, the burden of proof falls to the RB to prove that the exclusion was a proportionate means of achieving a legitimate aim.

- 3) Were the decisions to exclude the child a *proportionate* means of achieving a *legitimate* aim?

The tribunal had regard to the “Technical Guidance for Schools in Scotland”, (issued by the Equality and Human Rights Commission) where it states at paragraph 5.49:

“It is for the school to justify the treatment. It must produce evidence to support its assertion that it is justified and not rely on mere generalisations.”

It was a matter of agreement between parties that the exclusions were in pursuit of a specific aim, namely the protection of staff and pupils and the prevention of disruption to education at each school. This however was not necessarily reflected in the evidence. Witness D stated several different reasons for the exclusions that had been imposed which included keeping everyone safe, giving the child time to reflect and cool off, offering a fresh start, and wiping the slate clean for the child. She stated further that the exclusion would also send a message to the tight-knit school community and make clear that certain behaviours would not be tolerated. The purpose of the exclusions, at least in part, contained a punitive element. This did not accord with the RB’s stated aims.

It was further stated by both Head Teachers in their evidence that the exclusion process allowed for planning and review of the arrangements in place for the child. There was no evidence to support that exclusion was necessary for this to take place at either school. The tribunal noted that a planning meeting to review arrangements for the child at school B took place after he had returned. Whilst the tribunal accepted the evidence of witness B that extensive discussions with staff may have taken place when the child was excluded, the child would have been in attendance for two days of that week at the part-time placement in school A in any event. There was no reason put to the tribunal why such discussion and planning could not have taken place over this time without the need for exclusion. There was no convincing evidence that exclusion was necessary in order to conduct planning or review arrangements for any child. Moreover the tribunal agreed with witness A’s evidence that exclusion would be counter-productive to this process as relations between the school, child and family would often be strained as a consequence.

The tribunal went on to consider whether, in any event, the decision to exclude the child was a proportionate one. The Tribunal did not consider, having regard to all of the evidence, that any of the exclusions were required to achieve the aim of keeping all children (including the child) and staff safe. It was the child’s perception that he was being punished. He was sent home for days at a time following his lashing out or being unable to de-escalate. The objective of each of the exclusions was not always clear. When the aim was to protect others within the school, there was no evidence produced by the RB to show that exclusion periods, at times in excess of 2 or more days, were required to achieve this. In relation to the single exclusion that had occurred at school B, the exclusion took place at the end of the school day following a violent outburst

where a teacher was injured. The incident report at RB60 states that following gentle persuasion the child calmly entered his taxi and returned home. Following this there was evidence that the child would have been on his part-time placement at school A for some of the exclusion period. It was not clear to the tribunal on what basis an exclusion for 3.5 days was required to protect staff and pupils having regard to the evidence.

In determining the issue of proportionality, the tribunal were referred again to the Technical Guidance which states at paragraph 5.38:

“In a case involving disability, if a school has not complied with its duty to make relevant reasonable adjustments, it will be difficult for it to show that the treatment was proportionate.”

The RB failed to provide the child, whilst a pupil at school C, with specific input from an educational psychologist in respect of repeated incidents of exclusion. The child did not appear to be assessed, or observed in school, by an educational psychologist. There was evidence that an educational psychologist had attended a review meeting for the child; however witness D in her evidence confirmed that this did not meet her expectations for educational psychology input. It was her understanding that there had been a lack of capacity of educational psychology staff across the RB area. There had been no involvement from the education psychologist in relation to the exclusions and she was not able to speak to anyone from CAMHS, where the child had previously been seen. It is unknown what, if any, benefit this may have had on the child's behaviours, however it is difficult to see upon what basis the RB was satisfied that they had made all reasonable adjustments for the child in its absence.

It was clear that the staff and Head Teachers in both schools made efforts to avoid further exclusions for the child. Both sought advice and following the last exclusion in April 2018, the Head Teacher at school B made significant efforts to review the arrangements in place for the child. However, there was little evidence before the Tribunal that the child's status in terms of the 2010 Act was properly taken into account when the decisions to exclude him were made. There was evidence that staff in each school were doing their very best to manage the complex needs of a young child in what were no doubt stressful circumstances for all, including a teacher being fairly seriously injured at the end of April. However, the RB had in place a policy which evidence suggests has not been updated for over 20 years and which omitted to consider the needs of disabled persons such as the child.

## **Seclusion**

In considering this issue the tribunal again requires to ask itself the following questions:

- 1) Did any of the decisions to seclude the child amount to unfavourable treatment?

2) Was the decision to seclude the child because of something arising from his disability?

3) Was the treatment a proportionate means of achieving a legitimate aim?

1) Were the seclusions unfavourable treatment?

In its own policy, the RB defined the use of seclusions as the supervised confinement of a person in a room in isolation. The child was taken to a room on his own, prevented from leaving and held there against his will, effectively having his liberty deprived. The child was isolated, deprived of access to his peers and to the curriculum at these times. The tribunal was satisfied that this amounted to unfavourable treatment.

2. Was the treatment because of something arising in consequence of the child's disability?

The evidence was that these seclusions occurred when the child was in a heightened state and at key transition times within the school. The child was removed to a quiet room if he was assaulting staff or children in order to help calm him down. These seclusions occurred following the child's behaviours when in an escalated or heightened state. The Tribunal was satisfied therefore that the use of seclusion was because of something arising from his disability and makes reference to our reasoning in terms of the exclusion issues in the preceding section.

3) Can the RB show that the treatment is a proportionate means of achieving a legitimate aim?

There was no proper record of the use of these seclusions kept at any time by the school. Whilst the RB has since devised a new policy which requires that seclusion is a risk-assessed, personalised, reported, recorded and reviewed strategy this policy was not in place when the child was secluded. The tribunal were unable to conclude upon what basis the seclusion was used as there are no records of its use, purpose or outcome in respect of it being used for the child. In the absence of these safeguards the RB were unable to demonstrate to the tribunal that the use of seclusion could be justified as proportionate to a legitimate aim in these circumstances.

## **C Education whilst excluded**

In considering this issue the tribunal again requires to ask itself the following questions:

- 1) Did the failure of the RB to provide education to the child when at home amount to unfavourable treatment?
- 2) Was the lack of such provision because of something arising from his disability?
- 3) Was this a proportionate means of achieving a legitimate aim?

1) Unfavourable treatment:

The child did not receive access to education when he was excluded from school. It is likely that this impacted on his learning. The child was not allowed to access the curriculum in the same way as his peers. The child's exclusion was a barrier to his education and the tribunal was satisfied that this was unfavourable treatment.

- 1) Was the treatment because of something arising in consequence of the child's disability?

The tribunal, for the same reasons recorded at the preceding paragraphs determining this issue, concluded that this treatment did arise from the child's disability. The child was excluded due to his behaviours which arise as a consequence of his disability.

- 1) Was the failure to provide education whilst the child was at home a proportionate means of achieving a legitimate aim?

The RB did not provide education of any sort whilst the child was excluded. There appeared to the tribunal to be no discussion with the claimant or the child on how this could be achieved at any level. The Head Teacher of school C in her evidence stated that home schooling had been considered by her but discounted as the social work support worker who had previously worked with the family advised that the Claimant had dogs in the house. Any concerns about this had never been discussed with the claimant which, as her solicitor points out, would have been preferable. No alternative arrangements at home or anywhere else appear to have been considered or offered to the child. The RB therefore was unable to demonstrate to the tribunal that the failure to provide education was a proportionate means of achieving a legitimate aim.

### **Indirect Discrimination**

Section 19 of the Equality Act 2010 states:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

“(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

The Tribunal considered each aspect of this statutory test below.

**(a) A applies, or would apply, it to persons with whom B does not share the characteristic**

The RB's current policy on exclusion is applied in the same way to both disabled and non-disabled pupils. The policy makes no reference to the 2010 Act or to the Technical Guidance associated with it. The policy applies to persons who do not share the protected characteristic of a disabled person such as the child in exactly the same way as it does to those that do.

**(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it**

The statistical evidence before the tribunal, which was a matter of agreement, showed that disabled pupils within the responsible body were excluded at a rate of 55 exclusions per 1000 pupils in 2012/2013 and 52 exclusions per 1000 pupils in 2014/2015. This compares to a rate of 21 exclusions per 1000 non-disabled pupils in 2012/2013 and 20 exclusions per 1000 in 2014/2015. This discrepancy is material in the tribunal's finding that the exclusion policy in question puts children with a disability such as the child at a disadvantage when compared to those without such a disability. The only conclusion that the tribunal can make, in the absence of any alternative explanation from the RB, is that it does place children with a disability at a disadvantage.

The tribunal does not require to be satisfied that the exclusion policy in question puts every disabled child at a disadvantage (*Essop & Others v Home Office* [2017] UKSC 27 at para 27. It is a typical feature of indirect discrimination that some members of the disadvantaged group will not in fact suffer the disadvantage (*Essop* at paragraph 35).

**(c) it puts, or would put, B at that disadvantage**



The Tribunal was satisfied that the policy for exclusion in the responsible body puts the child at a disadvantage. The child, due to his disability, is more likely than non-disabled children to be excluded due to behaviours which he may exhibit which are linked to his disability in terms of the current policy. On each occasion that the child was excluded, the school were aware of his disability and the behaviours that he would be likely to exhibit as a consequence. The child was disadvantaged in terms of the policy and practice of the RB in this regard.

**(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

In consideration of this issue the tribunal was referred to the Technical Guidance which states at paragraph 4.10:

““Behaviour and exclusions policies that result in a higher proportion of pupils with a particular protected characteristic being excluded are likely to result in indirect discrimination unless their application can be justified as being a proportionate means of achieving a legitimate aim”

No justification is pled within the RB's case statement in relation to the indirect discrimination case. It is not clear what the legitimate aim of the exclusion policy is said to be. The RB was unable to demonstrate that the current exclusion policy was a proportionate means of pursuing a legitimate aim in terms of the Act.

The RB is now in the process of updating the exclusion policy acknowledges that the policy should have been updated to take account of disability as a protected characteristic. This is of no consequence when the tribunal are being asked to find that the policy in place at the time the child was excluded indirectly discriminated against the child. It was that policy which placed the child at a disadvantage and it is the terms of that policy with which the tribunal must concern itself.

**Section 149 of the 2010 Act**

Section 149(1)(a) states that a public authority must, in the exercise of its functions...

“have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under this Act.”

It was a matter of agreement between parties that pupils in the responsible body with a disability are two and a half times more likely to be excluded than non-disabled pupils. It was further a matter of agreement between parties that the RB does not address the issue of exclusion of pupils with disabilities in their statutory equality planning or their Accessibility Strategy. The RB does take steps to monitor the rates of exclusion of pupils with disabilities, however it was clear that the RB has not adopted an effective means of reducing either the number of exclusions or the gap between the rate of exclusions for pupils with a disability and non-disabled pupils. There was compelling evidence before the tribunal on the negative impact that exclusion had on children, said

impact being compounded for children with additional support needs such as the child. Whilst not all children with additional support needs will have a disability in terms of the 2010 Act, the evidence was that some children within this group will have a disability and will be placed at a disadvantage within the meaning of the Act.

The tribunal agreed with the claimant's argument that it is difficult to see how the RB, as a public authority, can be said to have, in the exercise of its functions, had due regard to the need to eliminate discrimination in terms of section 149 of the Act.

Evidence in this case often focussed on whether or not exclusion was an appropriate or effective means of managing behavioural issues children with ASNs as well as the impact that exclusion had on children. The tribunal was clear from the outset that we were not charged with determining this issue. Whether exclusion is an appropriate or effective means of dealing with any challenging behaviour of children with ASNs is a matter for others to decide. The role of the tribunal in this case was to determine whether or not any single act of exclusion in relation to the child and the RB's policy underpinning its use were discriminatory within the context of the Equality Act 2010. The tribunal found that they were for the reasons stated and accordingly finds the claims established.

The Tribunal is grateful to party's agents for the careful preparation of submissions and steps taken to assist the tribunal throughout the hearing stage.