Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

List of witnesses

For the claimant:

The claimant
The claimant's father – 'witness A'
Additional Needs Assistant at school A – 'witness B'
The child

For the responsible body

Support for Learning Teacher, school A - 'witness C'
Head Teacher, school A – 'witness D'
Principal Teacher Support for Learning school B: 'witness E'
Class Teacher at school A – 'witness F'
Quality Improvement Officer for responsible body – 'witness G'

Claim

1. In this claim, the claimant argues that the responsible body has discriminated against her daughter in its provision to her of education. The main parts of the claim relate to transition planning (from primary to secondary school) and the provision of remote education during the Covid-19 lockdown between January and March 2021.

Decision

2. The claim is dismissed since no unlawful discrimination under the Equality Act 2010 (**the 2010 Act**) has taken place.

Process

3. The claim was managed through a number of telephone case conference calls, between the legal member, the claimant and the responsible body's solicitor (in June, July, July, August and August, all 2021), and by a series of directions (May, June, July and August, all 2021).

4. The bundle consists of T001-089, A001-173 and R001-107. In addition, the claimant lodged an audio recording of an online meeting which took place in March 2021. The bundle includes witness statements from those who gave oral evidence: witnesses A (A116-120), B (A046), C (R024-032), D (A018-023), E (R036-038), F (R033-035) and G

(R076-078 and R079-080). None of these witnesses strayed in any material way from their written statements when giving oral evidence.

5. A hearing took place on Cisco WebEx, an online hearings platform, in August and September 2021. The evidence of witnesses A and F was taken by telephone only, due to technical difficulties.

6. Written submissions were exchanged and are in the bundle at A141-173 and R081-108.

7. Subject to what we say in the next paragraph, we took all of this material into account alongside the oral evidence.

8. The responsible body missed the deadline for the second round of written submissions. They had applied for an extension to the deadline since the solicitor who had dealt with the claim at the hearing was, by the time of the submissions, no longer employed by them. That e-mail was sent to the wrong e-mail address and by the time it was re-sent, and before the extension request was considered, the responsible body lodged a further submission (R101-108). The claimant objected to this further submission coming in late since the responsible body was aware that the solicitor would be leaving before the end of the hearing process, and because they would have the advantage of having seen the claimant's response to their initial submissions. We decided that it would be unfair to consider the further submission from the responsible body. Two errors had been made – with the e-mail address and, more importantly, in not putting in place cover for the change in personnel. No reason was advanced for either error. We therefore left the responsible body's additional submission out of account in reaching our decision.

9. The child gave evidence in the presence of the tribunal only. The general areas of questioning were agreed by the parties in advance. A detailed summary of what the child said was recounted to the parties immediately afterwards. Following day 2 of the hearing, the claimant asked to have access to the recording of the child's evidence. We granted that request and the claimant and responsible body's representative listened to that recording.

10. The child gave evidence in a very clear, cooperative and pleasant way. She expressed some anxieties around going to school B, and these are reflected in the findings in fact. She also expressed some disquiet about how maths was taught online, which is also reflected in our findings in fact.

Findings in Fact

General findings

11. The child was born on July 2009. The claimant is the child's mother. The claimant and the child live together.

12. The child attends school A. She is in primary 7 there. The child was due to attend secondary school at school B from August 2021. Schools A and B are managed by the responsible body.

13. The child has a global and significant impairment in her intellectual and adaptive functioning. The child has a learning disability. The child's ability to retain and process

information is very poor. The child learns better with visual aids rather than learning though the use of language only. The child is a literal learner. The child requires extra time to process information during learning. She requires prompting with some self-care skills, including brushing her teeth and hair, bathing, and using cutlery. The child is anxious around roads. Her coordination is poor. The child can be sensitive to noise. The child tends to become anxious about changes of routine; she needs support to manage these as well as repeated reassurance.

14. The child had a co-ordinated support plan (**CSP**) which was discontinued in October 2019, since no external agencies were providing support to the child by that time. The child previously had input from speech and language and occupational therapy services.

Findings on the child and school A

15. Between 2016 and June 2018, the child had a shared placement between school A and the support centre. The support centre is a language support service. The child attended the support centre for two mornings a week. Attendance at the support centre stopped in June 2018 since it was decided that the child's needs could be met fully in school A.

16. During academic session 2020-21, the child was supported in her school A class by an Additional Needs Assistant (**ANA**), witness B. Witness B was allocated 7.5 hours per week to support the child in class during primary 7. This allocation increased to 15 hours in session 2021-22, in order to assist the child with the transition process to secondary school.

17. Witness C, Support for Learning Teacher at school A, provides support to the child both directly and by liaising with the child's class teacher (witness F) and her ANA (witness B).

Findings on the deferral process

18. In August 2020, the claimant indicated to school A staff that she was considering making a request for the child's transition to school B to be deferred by one academic year (**deferral request**), which would mean that the child would undertake a further final year of primary school.

19. Deferral requests made to the responsible body are considered by a multi-disciplinary panel (**the panel**). Applications are made in writing on a pro-forma application form. The application form contains guidance on how it should be completed. The responsible body operates a policy for a repeat year (R065-067).

20. A meeting between school A staff and the claimant to discuss the claimant's wish to make a deferral request took place in September 2020. In October 2020, the claimant submitted detailed reasons for her deferral request. A meeting took place in October 2020 between the claimant, witness C and witness E. Also present was educational psychologist for the responsible body.

21. Between the end of October 2020 and early March 2021, witness C took a number of steps towards the completion of a deferral request form, including asking for information from the educational psychologist and from school B. In January 2021, witness C attended an online transition meeting with school A and school B staff. At that meeting,

the child was discussed. By this time, the Covid-19 pandemic had led to all Scottish schools closing. Schools were closed between around the end of December 2020 and around the end of March 2021 (**the lockdown**). As a result, all meetings and teaching took place online from January 2021 until Easter 2021.

22. By February 2021, witness C was completing the deferral request form. This was based on information from the January 2021 meeting, as well as input from witness D and attempts to obtain written input from the educational psychologist.

23. In March 2021, witness C completed the deferral request form (T013-022) and submitted it. She sent a copy to the claimant. The deadline for submitting the form was March 2021. Immediately on submitting the form, witness C realised that the claimant had not seen the final draft, and informed witness D. The claimant objected to the form having been submitted without her approval or signature, which is a requirement of the form. Witness D immediately withdrew this first version of the deferral form. It was not considered by the panel.

24. In March 2021, the claimant and witness A met online with witnesses C and D. That meeting lasted for around 90 minutes. The claimant recorded that meeting. Neither witness C nor witness D were aware that the claimant was recording the meeting. Witnesses C and D apologised for having submitted the deferral form without the claimant's approval or signature. They undertook to re-submit the form once it was approved and signed by the claimant.

25. In March 2021, the amended deferral form (T023-33) was re-submitted. The claimant was content with the content of this form and had signed it in March 2021.

26. The panel refused the deferral request and issued its reasons in March 2021 (T034-35). Included in those reasons was an invitation for a further deferral application by the end of May 2021 if reservations about the child's transition to school B in August 2021 persisted.

27. In early June 2021, a second deferral request was submitted. The panel considered this request on June 2021 and granted it, allowing the child to repeat her final year at school A. The panel issued reasons for its decision, which were primarily the child's mental and emotional health and her wellbeing as they related to transition to school B (A123-124).

28. As a result of the granted deferral request, the child is currently in a repeated final year at school A during session 2021-22.

Findings on the child and the transition process

29. Some children are part of an 'enhanced transition' process. This happens when a child needs a more individualised transition process to secondary school.

30. The responsible body usually begins the enhanced transition process from primary to secondary school in January of the child's primary 7 year. When deemed necessary, the transition process can start earlier, usually for children with complex needs.

31. An enhanced transition process for school B would usually involve small group visits to school B from Easter in the final primary school year. The main purpose of these visits

is to help children familiarise themselves with the school and to build relationships with school B staff.

32. The child was deemed by school A staff to require an enhanced transition process which was formally agreed at a school liaison group meeting on January 2021. This meeting was attended by staff from schools A and B. Information was shared about the child and supports were identified.

33. During the academic year 2020-2021, the child's views about transition to secondary school were obtained informally by school A staff: witness B, witness C and witness F. The claimant also informed school A staff of the child's anxieties about transition on a regular basis.

34. Transition planning for the child started on October 2020 with e-mail contact between witness C and a Support for Learning teacher at school B. Witness E was sent that e-mail. A meeting took place on October 2020 to begin to plan the child's enhanced transition.

35. In December 2020, witness C contacted school B asking for resources to support the child's transition to secondary school, such as a timetable and photographs. She received a timetable from school B.

36. Further correspondence and meetings took place between January 2021 and June 2021, involving staff at schools A and B, the responsible body's educational psychologist, the claimant and the child.

37. During the lockdown period, no transition visits to school B were permitted for any children and school B was not permitted to hold school visits for pupils from different schools until after May 2021.

38. School B identified that the child would benefit from the school's support for learning junior intervention package, which would allow the child to have daily enhanced support in addition to support within the classroom. Transport and lunch break support were also identified as necessary for the child at school B.

39. Between January and April 2021, the child had four online transition visits with a support for learning teacher at school B, supported by witness C. The child had an opportunity to discuss her anxieties and engaged positively in the visits. The child had four physical transition visits to school B in May and June 2021. A further visit to school B was planned for week commencing June 2021, but this was cancelled due to a Covid outbreak. Witness B accompanied the child on some of her physical visits to school B.

40. The child was offered more visits to school B as part of the transition process than those in which she participated.

41. After the visits to school B started, the child started asking witness B more questions, seeking reassurance for her anxieties about secondary school. These questions were repetitive. The child wanted to know what she would do when she attended school B, what classroom she would be in and whether witness B would be there. The child was reassured to an extent on meeting school B staff.

42. During the school year, the child has experienced nightmares, some of which are about attending school B. The child is anxious about noise in school B, as well as crowds and congestion. She is also worried about the possibility of being treated badly at school B by other pupils.

43. The transition process to school B was proceeding well. The child enjoyed her visits there (virtual and in person) and she has built good relations with school B staff.

Findings on online teaching

44. Due to the national lockdown, all schools were closed between January and March 2021. The 2020 festive break was extended by one week to allow teaching staff additional time to prepare for this new learning method. The child received teaching from school A in an online format between January and March 2021.

45. The child was included in whole class online lessons for all subjects during January 2021.

46. Following whole class lessons, witness F stayed online to answer any questions. He e-mailed additional work to be completed.

47. From the start of term in January 2021, the child received numeracy and literacy lessons with her class teacher, witness F, and one other pupil in addition to the whole class lesson. These additional lessons lasted around 30 minutes – 1 hour each day.

48. Numeracy and literacy education during lockdown was tailored to the child needs.

49. In February 2021, the claimant contacted witness F raising concerns about whole class online maths lessons, namely that the child felt the work being taught was too advanced for her (R044). The child was not participating fully in the classes, often pretending to write. The claimant proposed that the child spend time with the ANA instead. In February 2021, witness F replied (R044) to give permission for the child not to attend the whole class maths lessons. Alternative suggestions for numeracy activities were made.

50. The child stopped attending online whole class lessons for numeracy and literacy in early February, following this e-mail exchange. Instead, the child received individulaised tuition from witnesses C and B. In addition, it was agreed that witness F would send worksheets to witness B in advance of her meetings with the child, to prepare her for supporting the child. These actions were carried out. The child found this experience to be better. The child then found online teaching to be fun.

Findings on the 'work tray'

51. Witness C introduced a resource for the child to support her in-class learning. This consisted of a 'work tray' of activities which the child could choose to access independently of an adult.

52. The overall purpose of the 'work tray' was to assist the child to focus when she became distracted and to encourage her to be less dependent on adults.

53. The activities in the tray, such as dictionary work, Lego and sewing had specific learning intentions and were designed to assist the child with, for example, problem solving skills

or fine motor skills. The activities could be used by the child when she waited for the ANA to reach her in class. The activities changed each week and were introduced to the child by witness C or witness B.

Reasons for the Decision

54. The claimant sets out a case for discrimination under the 2010 Act of all four main types having occurred, namely direct discrimination (s.13); discrimination arising from disability (s.15); indirect discrimination (s.19) and failure to make reasonable adjustments (s.19-20).

55. The claimant is unrepresented and the responsible body is legally represented. We have decided that it is fair to consider all main issues raised by the claimant against each of these four discrimination types, whether or not that is the way the claimant's case is presented. This is in line with the overriding objective in rule 2 of the First-Trier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366) (**the rules**), in particular rule 2(2)(c), which requires assistance to be provided to ensure procedural equality between the parties. Given the complexity of the 2010 Act and the different types of discrimination, it would not be fair and just to expect the claimant to marshal her arguments strategically in the same way as someone who is legally qualified. We do not mean any disrespect to the claimant in taking this approach; her submissions are very detailed and very well written.

56. Our task is not to decide on a disputed complaint. We may only decide whether or not unlawful discrimination under the 2010 Act has occurred. That means that we need to apply the evidence and facts to the legal tests for discrimination. In addition, the case law makes it clear that we need not decide on every point and argument made by each party. Indeed, brevity in decision reasons has been commended by the appeal courts. We therefore concentrate only on the main points and arguments made in the claim. For example, the material at heading 7 of the claimant's initial written submission under 'Understanding the needs of the child' (A157-160) is either lacking foundation or has been dealt with under one of the other six headings in that document, so we do not specifically deal with that part of the submissions.

57. We had thought that the responsible body had conceded that the child has a disability, as defined under s.6 of the 2010 Act. In its submissions (R085) the responsible body suggests that the child has additional support needs, but not a disability. We are in no doubt on this point. The child clearly meets the definition of disability under s.6, as is amply demonstrated by our findings at paragraph 13 above.

The law

58. For all four main types of discrimination under the 2010 Act, one of two similar concepts are crucial. These concepts are:

    less/unfavourable treatment (direct and disability discrimination)

    disadvantage (indirect and reasonable adjustments discrimination)

59. The similarity between these two concepts can be seen in the case law and in guidance. The Supreme Court recently discussed the concept of 'unfavourable treatment' under s.15 in *Trustees of Swansea University Pension Scheme v Williams* [2019] 1 WLR 93 (***Williams***). Lord Carnwath (delivering the unanimous opinion of the court), adopted the following definition of 'unfavourably' from the Court of Appeal's judgment:

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

Lord Carnwath goes on, at para 27:

> …in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions..

60. *The Technical Guidance for Schools in Scotland* published in 2014 by the Equality and Human Rights Commission (**the Technical Guide**) describes 'unfavourably' as follows:

> This means that [the disabled person] must be put at a disadvantage (see paragraph 5.21).

Then at paragraph 5.21:

> 'Disadvantage' is not defined in the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, is something about which a reasonable person would complain – so an unjustified sense of grievance would not amount to a disadvantage. A disadvantage does not have to be quantifiable and the pupil does not have to experience actual loss. It is enough that the pupil can reasonably say that he or she would have preferred to be treated differently.

61. The content of the Technical Guide in this area was approved by Lord Carnwath in *Williams* (paragraph 27).

62. There are other parts of the definitions for each of the four types of discrimination. However, as explained below, we find that the child was not treated un/less favourably and was not put at a disadvantage by any of the actions, omissions, policies or practices of the responsible body. For this reason, we concentrate on these concepts.

63. It is clear from the *Williams* case and the Technical Guide that 'unfavourable treatment' and 'disadvantage' are to be treated as similar concepts. The Technical Guide refers to 'detriment' as being a similar concept to 'disadvantage'. For ease of reference, we will use the term 'detriment' when referring to either 'unfavourable treatment' or 'disadvantage'.

64. For a relevant detriment to be caused to the child, that detriment has to result from (a) treatment by the responsible body (under s.13 and s.15 of the 2010 Act) or (b) as a result

of a provision, criterion or practice (**PCP**) applied by the responsible body (under s.19 and 20-21 of the 2010 Act).

65. Taking these two points (detriment and caused by the responsible body), we use the concept below of 'relevant detriment'. We now turn to apply these concepts to the relevant facts for each of the main areas of the claim: (a) Transition process, (b) Deferral process, (c) Allegations of dishonesty, (d) The child's 'work tray' and (e) Online learning.

66. It is clear that the issues raised in this claim fall within s.85(2) and (6) of the 2010 Act, providing jurisdiction for this Tribunal to deal with them under schedule 17, Part 3 of that Act.

67. Finally (on the law) there is the burden of proof. The initial burden is on the claimant to establish a case on the face of it, and if she does so, the burden then shifts to the responsible body (2010 Act, s.136, as discussed in the Explanatory Notes to the Act, para 443). The claimant has not established sufficient facts pointing to a breach of any of the duties in the 2010 Act having occurred. This means that the burden has not been satisfied by the claimant.

(a) Transition process (findings in fact paragraphs 29-43)

68. The publication *Supporting Children's Learning: Statutory Guidance on the Education (Additional Support for Learning) Scotland Act 2004*, *Code of Practice* 3rd edition, 2017 (**Code of Practice**) is of importance when considering how transitions should take place. This is especially since the Code of Practice has statutory status, under s.27 of the Education (Additional Support for Learning) (Scotland) Act 2004 (**the 2004 Act**). Section 27(8) requires that education authorities and appropriate agencies must have regard to the Code of Practice. Chapter 6 of the Code of Practice (pages 95-106) is dedicated to the subject of transitions.

69. The claimant raises a number of issues about the primary to secondary transition arrangements for the child. These are as follows:

    a) Failure to take steps to gather the child's views on transition.
    b) Failure to adapt the transition to meet the child's needs.
    c) Too much focus on school B visits to the detriment of in-class preparation at school A.
    d) Staff did not have an awareness of the legislative framework.
    e) Lack of involvement of witness B in transition planning work.
    f) Lack of clarity over who was responsible for the transition process.
    g) No transition planning document was prepared.
    h) No information about practical arrangements at school B.
    i) Pupil support planning for secondary school came too late.
    j) Secondary school visits were arranged on a week-to-week basis.
    k) Failure to consult with relevant professionals.
    l) Rushed transition process.

    We will consider each issue in turn.

70. **On (a),** we accept that taking the child's views on the transition process is an important aspect of that process. There is a statutory requirement to do so, in certain circumstances

(Additional Support for Learning (Changes in School Education) (Scotland) Regulations 2005 (SSI 2005/265)), (**the regulations**). However, that requirement only applies where the education authority seeks relevant advice and information from appropriate agencies and other persons they think appropriate (regulation 3(2)(b)). The obligation also applies to the views of the child's parent. For present purposes, we are prepared to assume that this obligation applies in this case. This means that the child and the claimant's views on the transition need to be considered.

71. We also accept that where these statutory obligations apply, and are not complied with, this would give rise to a detriment. This is since failure to follow a statutory requirement means that those whom it is intended to benefit lose the opportunity of compliance with it. In this case, the child would be one such individual. Further, the Code of Practice indicates that the views of the child should be taken into account (page 100, para 19, third bullet point).

72. The obligation to consider the child's views on transition was complied with in full. The taking of a child's views on such a matter need not be a formal, fixed process. This is especially the case for a child with needs such as the child in this claim. It is often best to take the views of a child in an informal way, since this is less likely to give rise to anxiety. Also, taking views at different points in the school year is wise, since a child's perspective on an upcoming change is likely to alter. All of this is within the judicial knowledge of a specialist tribunal and is supported by the evidence of witnesses B, C and G.

73. The child's views on transition were taken in a number of ways and on different occasions. There is no evidence to suggest that the child was reluctant or felt unable to express her views on the transition.

74. Firstly, her views were taken in a formal context, as part of an Educational Learning Overview by the school, leading to a document produced in October 2020 (T042-044, referred to by witness C in an e-mail to the claimant of October 2020 (A037)). The child's views about secondary school are recorded in the last page of that document (T044).

75. Secondly, witness B took the views of the child informally on two occasions at the start of primary 7 (A046, fifth bullet point).

76. Thirdly, witness C took the child's views on an informal basis (see e-mail of March 2021 at R075, and her witness statement at R029, para 20).

77. Fourthly, witness C asked witness B to confirm her thoughts about the views of the child (R074-075).

78. Fifthly, witness F had a short conversation with the child about her views on transition.

79. Sixthly, the views of the child on transition were taken by the educational psychologist for the responsible body and attached to the deferral application in March 2021 (see the reference to these at T029).

80. Seventhly, the views of the child on transition were communicated on a regular basis to the responsible body by the claimant. Taking a child's views does not necessarily involve doing so directly, and a parent can be an important source of those views, not least since

a parent has a deep understanding of the child, and can report what is expressed at home. There is ample evidence of the claimant providing regular information about the child's perspective of transition throughout the child's primary 7 year, both generally and in the context of the completion of the two deferral applications (discussed below).

81. On the question of detriment, there was no detriment to the child in the way in which her views on transition were taken, or on the timing of taking those views.

82. The claimant relies on an apparent discrepancy between the accounts of witnesses D and B about whether the child had provided positive views about moving to secondary school. In our view, there is no relevance to this point. We need only deal with evidence of matters which have caused detriment to the child. Even if witness D was being dishonest (which we do not accept given her demeanor in oral evidence), we see no detriment to the child. We note that the child became distressed after overhearing discussion of this in an online meeting at home. However, we do not see that this distress caused any detriment in the sense defined above. In any event, the responsible body cannot be held responsible for an overheard conversation – that is not treatment or something done by the responsible body, one of which, as explained above, is required. Also, it is possible that the child expressed different views about the transition on different occasions to different people while in different settings.

83. **On (b),** the transition plan that was put in place catered adequately for the child's needs. The visits to the secondary school went well (which the claimant accepts). The child developed a good relationship with the Support for Learning teacher at school B, who managed the school B visits. The views of the child and the claimant on the transition process were taken into account. There is no evidence available to us to suggest that more needed to be done.

84. Witness B, who knows the child well and who has a very good relationship with her, reported in early March 2021 that the child 'was going to be nervous, but nothing major'. She goes on: 'The only things she mentioned to me were about getting lost in the school and maybe not having any friends to play with' (e-mail of 4 March 2021, R074). This suggests that while in school the child was not expressing significant worries or having serious misgivings about attending secondary school. The claimant does point to nightmares, lack of sleep and increased anxiety. There is material in the Advocacy Report suggesting that the child was worried about going to secondary school (T084, end para 1). The child also expressed concerns over crowds, being pushed around, being tripped up, people writing horrible things about her and calling her names (T085).

85. We therefore accept that there is evidence that the child has, during her primary seven year, felt anxious about the prospect of attending secondary school. This is not surprising given her learning disability, her history of anxiety, and the natural anxiety of children transitioning to secondary school. It is reasonable to infer, given the timing of these feelings, that they relate to the impending transition, at least in part. However, considering all of the evidence, we find the steps taken in the planning and implementation of the transition process to be appropriate and that the child's needs were taken into account in that process. While the child's anxieties increased during the transition, we cannot infer that this was due to any inadequacy of the transition process. This comes back to the point at paragraph 64 above about treatment or a PCP causing any detriment. The fact that those feelings and the transition process coincided in time

is not an indication that one was caused by the other; rather it is simply an indication that transition was on the horizon. No relevant detriment was, therefore, caused.

86. **On (c)**, we refer to our answer to (b), above. There is no evidence to suggest that more in-class preparation for the transition ought to have taken place. The child's views on the process were taken at various points (see paragraphs 67-73, above). Steps were taken to plan the transition in accordance with her needs. In our view (supported by the evidence of witness C), a greater focus on transition might have been to her detriment. It would run the risk of highlighting the transition, with the possibility of heightening the child's anxiety about it. Staff reassured the child at the time and such anxieties were not thought to be outwith the expected responses during an enhanced transition process. No relevant detriment took place in this area.

87. **On (d)**, it is correct to say that the evidence indicates that school A staff were not aware of the legislative framework around transitions. While this is unfortunate, there is no evidence that this lack of knowledge led to a detriment for the child. We have explained above how the transition process operated for the child (paragraphs 29-43). This is outlined in detail in the chronology prepared by Support for Learning teacher and witness E (R057-064), the accuracy of which is not in dispute. We cannot see what would have been done differently had the school staff been aware of the legal framework relating to transitions. What is clear is that school A and B staff were aware of the relevant practicalities for an effective transition, and this is more important than any legal knowledge.

88. **On (e)**, we accept that witness B was not involved in every stage and meeting of the transition *planning* process. However, such involvement in the planning process would not be expected of an Additional Needs Assistant. Witness B was appropriately involved in the *implementation* of the transition process, including accompanying the child on some of the visits to school B. Witness B was consulted on the child's views about transition (A046 and e-mail at R075). She worked closely with and had a good relationship with witness C who, as the Learning Support Teacher at school A was involved in the transition planning process for the child. There is no reason given why witness B should have been directly involved in transition planning meetings. There is no evidence of a relevant detriment here.

89. **On (f)**, we agree that one individual was not appointed as someone with overall responsibility for the transition process. This is recommended in the Code of Practice (page 100, para 19, bullet point 8). There is good reason for this, especially as transition planning can involve a number of staff from two schools, as well as other health and educational professionals. However, we cannot detect any detriment to the child resulting from this omission. There is no evidence that the child knew that this should happen and had not happened. There is no evidence of any disorganisation or lack of coordination between professionals as a result of this omission. Again, there is no relevant detriment.

90. **On (g)**, there is no requirement, in the legislation or guidance, for a physical, written transition plan. Transition planning can operate without one. What is important is that there are clear and consistent lines of communication between the two schools involved, and there is evidence of such communication in this case. Such communication allows planning to change and evolve according to the child's needs. This is especially the case here, where for a significant proportion of the school year there was uncertainty about whether the child would attend secondary school from August 2021 or August 2022 (or

in a hybrid arrangement from August 2021). A 'strong timeline of events' was promised in April 2021 (T052), and had not, by the time of the last hearing date in September 2021, been provided. However, this should be viewed in the context of a further (successful) deferral application in June 2021, and a postponement of the child's transition to school B until August 2022. What is clear is that the transition process continued appropriately during the first half of 2021, until that deferral decision (see the chronology at R057-064) and it is not clear from the evidence how a written plan or timeline of events would have changed this. We can see no relevant detriment here.

91. **On (h)**, in our view, arrangements for the provision of information about the practical arrangements for the child at school B in terms of her timetable, transport and breaks would normally be made in the summer term prior to the start of secondary school. Given the child's disability and her resultant needs, providing that information too early would not necessarily assist her, and could cause anxiety, especially if arrangements needed to change. Again, this factor needs to be viewed in the context of uncertainty (until June 2021) about whether the child would remain at primary school or attend secondary school in academic year 2021-22. If information about practical arrangements for the child at secondary school had been provided in the early part of 2021, and the claimant had decided to pursue a deferred year, this would have led to confusion and possibly disappointment on the part of the child. Of course, the claimant might counter that provision of those arrangements would have avoided the need for a deferred year, but given the range of issues the claimant had about the transition process (this is only one of 12 such issues), it seems likely that the deferral application would still have been made. Again, we can see no relevant detriment here.

92. **On (i)**, similarly, we regard pupil support planning as a matter which ought to occur close to the start of the new school year. By that time, the secondary school will know what its pupil roll and its staffing situation will be. In this case, the claimant argues that at a stage two weeks before the end of the school year (in June 2021), there was no clarity about whether witness B would undertake additional hours of work with the child when she moved to school B. Again, this has to be viewed in the context of an application for deferral of the transition to secondary school. It would be surprising if planning at this level (number of hours of support and personnel to provide it) had taken place while that application was pending. In any event, it seems to us that this planning could have taken place on time had the deferral application been refused (around 2 months before the start of the new academic year).

93. In any event, there was no detriment to the child caused by the planning not having taken place by June. There is no evidence to suggest that the child was aware of this or that she was affected by a lack of clarity on this matter. No relevant detriment exists.

94. **On (j)**, there is no evidence that the child was affected in any way by arranging visits on a week-to-week visit basis. The claimant concedes that these visits went well. Given the child's disabilities, we take the view that such an arrangement was suitable for her, since planning too far in advance might cause her to become anxious. Such an arrangement would also allow for flexibility and responsiveness to the child's needs and wishes. There is no relevant detriment here.

95. **On (k)**, we do not accept that the responsible body ought to have consulted with professionals other than those who were involved in the transition process. The child's CSP had ended over a year earlier, due to non-involvement of health professionals. The

claimant was seeking further referrals, but the responsible body could only react to information available at the time.

96. The child was seen by a clinical psychologist for a cognitive assessment in 2017. At that time, she indicated that transition to high school is often a key time to consider reassessing children or if there is a "significant deterioration in [the child's] behaviour or functioning" (T059). The child's paediatrician, in March 2021 (T062-63) suggested that repeat cognitive testing would be helpful. However, a further letter on 8 June 2021 (A103) states that the clinical psychologist did not recommend repeated testing at that time and that it would not change the level of support that the child would receive for transition. The issue of transition is mentioned, in the context of anxieties, but there is no indication that this is a major concern that requires further professional input.

97. There is no evidence of a significant deterioration in behaviour or functioning. In our view, there was no basis on which the responsible body could justify consulting with CAMHS or with the child's paediatrician in connection with the transition process.

98. The same applies to speech and language therapy and occupational therapy input. There was no evidence of current need, and consultation with the relevant agencies was therefore not required nor expected.

99. We point to the fact that the legal obligation to consult with professionals is at the discretion of the education authority (transition regulations, regulation 3(2)(a) which refers to 'as the authority thinks appropriate'). Since there is no evidence to support an argument that consultation with health professionals would have led to any practical input, there is no relevant detriment.

100. **On (l)**, the claimant argues that the transition process was 'rushed'. We do not agree. We accept that the main implementation of the process, under the responsible body's policy for enhanced transitions, started in January 2021. However, it is important to distinguish between planning for transition and implementing the transition. In the chronology provided by the secondary school staff (R057-64), the planning process started on October 2020. At the meeting on October 2020 (which the claimant attended with representatives from each school and the responsible body's educational psychologist), it was agreed that transition support would commence in January 2021 (R064). It is clear, then, that the planning process started in October 2020. The policy was to start the enhanced transition in January 2021.

101. Witness D indicated that it would not be wise for school A staff to begin a transition process too early in the school year, since pupils need to settle into primary 7 first before introducing ideas about secondary school. This seems sensible and proportionate.

102. We also note that the claimant began asking for deferral of the transition to secondary school early in the child's primary 7 year.

103. There is no evidence of detriment to the child caused by the speed of the transition process. Given her disability, it seems to us that it was sensible not to start the implementation process too early, since this might lead to unnecessary anxiety. By March 2021, witness B, who is close to the child, was reporting that the transition process was not causing major issues (R074). This suggests that by that time, the child did not feel rushed or anxious about the speed of the process. Indeed, there is evidence from

witness B to indicate that the child became more anxious about the transition once visits to school B started. It is fair to assume that had those visits started earlier, the child's anxiety would have increased. There is no evidence of the child feeling rushed in the views expressed by the child in her Advocacy Statement or in her evidence to the tribunal.

(b) Deferral process (findings in fact in paragraphs 18-28)

104. The claimant raises a number of issues, as follows:

a) Scepticism about the chances of success of a deferral application.
b) Delay in making the deferral application.
c) Views of the child for June 2021 form not gathered.
d) Option of a 'buffer' in the transition process.
e) Issues with the first deferral form.
f) Promise of increase in support hours.
g) Allegations of failure to complete deferral forms properly.

105. **On a),** we see no detriment to the child in connection with predictions by school staff and the responsible body's educational psychologist on the possible outcome of the deferred year request. There is a distinction between a prediction and a pre-judgment; the claimant conflates these. It is clear to us that despite the views that the deferral application would not be likely to be granted (an assessment which was not unreasonable since the amended deferral application was refused), full efforts were made in completing the amended and second applications. The claimant was content with those applications when submitted.

106. **On b),** we agree with the evidence of witnesses C and D that making the application later in the year is better than doing so earlier. The claimant asserted that her child would only mature by six weeks in the whole of her final primary school year. No evidence was provided for this assertion, nor can we infer this from any evidence available to us. Witnesses C and D, who are qualified and experienced teaching professionals, gave evidence that the child (along with other children) would mature over the course of the year. There is more information available about a child as the year progresses, so a deferral application can be made too early. This seems logical, since it must be difficult to know at the start of the year how much a child will progress. We do not see any difficulty in compatibility between the idea that an application for deferral can be made at any time, but that it is usually best made later in the academic year. A later application for deferral for the child was most likely to benefit her, rather than be a detriment. There is no relevant detriment here.

107. **On c)** we see no merit in the argument that the views of the child should have been taken afresh for the June 2021 application, given that they were taken for the March 2021 application. There is no evidence to suggest that the views of the child had changed. The responsible body's educational psychologist is entitled to exercise his professional judgement on this matter. In any event, if the claimant thought the child's views had changed, she could have made that point as part of her views expressed on the June 2021 form. She did not do so. There is no relevant detriment to the child here.

108. **On d),** it is clear from the panelDecision Record of 10 June 2021 (A123-125) that the option of a 'buffer' (an extended transition stretching into the child's first term of

secondary school) was fully explored. The reasons for not pursuing that or the option of transitioning fully in August 2021 are clearly stated in that Record. The claimant supported the option that the panel adopted. We can see no relevant detriment to the child arising from how that option was considered and decided upon.

109. **On e),** the responsible body has accepted that the process followed for the submission of the first deferral application form was flawed. The form was submitted without consultation with the claimant, and without her signature, as required. However, the form was immediately retracted and was not considered bythe panel. Instead, a new deferral form was prepared, the claimant was consulted on it, was content with its comments and signed it before submission. The child was not directly involved in the process of submission of the form, and there is no evidence to suggest that she knew anything about it. There is therefore no relevant detriment to her arising from this.

110. **On f)**, the claimant accuses the responsible body of a 'dirty tactic' (A149) in offering an increase in support hours which might turn out to be temporary, in an attempt to persuade the claimant that the child should not have a deferred year. There is no basis whatsoever in the evidence for this assertion. In our view, it is purely speculative. There is therefore no relevant detriment.

111. **On g)**, a number of allegations are made by the claimant about failures by the responsible body to follow the deferred year application process properly in the submission of the first form (A152-155). We need not deal with these individually (although some have been dealt with above), since we can see no relevant detriment to the child even if we were to accept all of the points made by the claimant. The claimant was happy with the content of subsequent deferral forms (in March and June 2021) and was successful in securing an additional year of primary 7 for her child. We fail to see how any issues with the forms could have had a detrimental effect on the child.

(c) Allegations of dishonesty

112. The claimant makes a number of these (A156-157). We will not deal with each in detail here, but we have considered them. In our view, there is no evidence that school A staff were dishonest in their dealings with the child and the claimant. There are some discrepancies in evidence between witnesses, but that is to be expected in different recollections of past events. We found all of the responsible body's witnesses to be open, honest and credible in their evidence to us. There is a suggestion in the claimant's allegations that the school A staff were motivated by certain factors not connected with the educational welfare of the child. We did not have this impression from any of the evidence.

113. In any event, we cannot detect any sign of detriment to the child arising from any of the discrepancies identified by the claimant.

(d) The child's 'work tray' (findings in fact at paragraphs 51-53)

114. The claimant argues that the activities in the child's work tray were 'meaningless' (A151-152). This is contradicted by witness C, who explains in her statement that the purpose of the tray was to make the curriculum more accessible to the child and to encourage independent learning. The activities in the work tray had learning intentions

and helped the child to focus and to take ownership of her learning. The child told witness C that she enjoyed the activities and made suggestions for other activities she would like to have in the work tray.

115. Since witness C is an experienced teacher including in educating children with additional needs, we prefer her interpretation to the one suggested by the claimant. We regarded witness C as honest and reliable in her oral evidence. We see no reason to doubt her evidence. The claimant's assessment of the usefulness of this resource for the child is, in our view, speculative.

(e) Online teaching (findings in fact at paragraphs 44-50)

116. The claimant argues that the child was disadvantaged by being included in whole class maths lessons during a three or four week period in January 2021. These classes were arranged as a result of the national lockdown, which necessitated that all teaching had to be conducted online.

117. We accept that there is evidence that the child felt left out during the online whole class maths lessons because she was not able to understand all of the lesson content. However, we have to put this into context.

118. The context is of schools having to devise, at very short notice, a new way of teaching children. An additional week was added to the school break in January 2021 to help with preparation. There was no evidence to suggest that the child struggled in a whole class environment while in a physical class. Witness F explained to us that he included the child in the whole class online lessons so that she felt part of the class. It is fair to note that the child did not have the benefit of support from her ANA during January 2021. However, the child did have the benefit of daily 1:2 tuition by the class teacher as well as weekly individual teaching by witness C. Once the issue was raised (by the claimant), immediate action was taken.

119. Given all of that context, (returning to the definition of 'disadvantage' above), the complaint here gives rise to an 'unjustifiable sense of grievance'. This does not mean that something did not go well; but not everything that falls into this category can justify a claim under the 2010 Act. A sense of proportion is implicit in the definition of 'disadvantage'. There is therefore no relevant detriment here.

Alternative analysis

120. If we are wrong on any of our analysis above, the outcome of this claim would have been the same. This is since, even if there was a detriment to the child as a result of any of the above, the claimant would not have been able, on the evidence available, to meet the tests for the four discrimination types.

121. For direct discrimination (2010 Act, s.13), the child was, in no sense, treated less favourably than a child who is not disabled. Indeed, the reverse is the case.

122. For discrimination arising out of a disability and indirect discrimination, even if the other parts of the test were met, it is clear that any unfavourable/disadvantageous treatment would have been justified on the basis that the treatment or PCP was a proportionate means of achieving a legitimate aim (s.15(1)(b) and s.19(2)(d)).

123. In each of the five areas covered above, the responsible body has produced sound reasons for its approach (as explained above in each case). These reasons demonstrate proportionate steps taken to educate a child with a disability who is at a sensitive and changing stage in her education (these are the legitimate aims).

124. Finally, on reasonable adjustments discrimination (ss. 20-21 of the 2010 Act), and bearing in mind that this duty is anticipatory in nature, in our view reasonable steps were taken to avoid any disadvantage. It is worth noting that the obligation is not to avoid disadvantage, but to take reasonable steps to do so. In provisions for teaching in January 2021 and beyond, in educational provision generally, and in steps taken to prepare for the child moving to school B, the responsible body took steps which were reasonable to avoid any disadvantage to the child. Those steps are explained in each of the five areas above.