

Health and Education Chamber
First-tier Tribunal for Scotland



Additional Support Needs

ASN_D_22_01_2021

List of witnesses

For the appellant:

Witness A: Foster carer

For the respondent

Witness B: Head Teacher, Community School

Witness C: Centre Leader, Agency A

DECISION OF THE TRIBUNAL

Word meanings: In this decision the following phrases or abbreviations are used

Technical Guidance	Technical Guidance for Schools in Scotland, <i>Equality and Human Rights Commission</i>
Included, Engaged	Included, Engaged and Involved Part 2: A Positive Approach to Preventing and Managing School Exclusions, Scottish Government (June 2017)
DLD	Developmental Language Disorder
1980 Act	Education (Scotland) Act 1980
2000 Act	Standards in Scotland's School etc. Act 2000
2010 Act	Equality Act 2010
2014 Act	Children and Young People (Scotland) Act 2014
ECHR	European Convention on Human Rights
UNCRC	UN Convention on the Rights of the Child
UNCRPD	UN Convention on the Rights of Persons with Disabilities
'rule' references	The First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018
CSP	Co-ordinated Support Plan
IEP	Individualised Education Plan
GT	Guidance Teacher
SLT	Speech and Language Therapist

Claim

1. The child is the claimant. The claim was lodged with the Tribunal in November 2020. The claimant believes that she was excluded from school on or around September 2020. Prior to the exclusion, she had been subject to a part-time timetable and not permitted to attend the school on a full-time basis. She relies on section 85(2)(e) and (f) of the 2010 Act, which provides that the responsible body of a school must not discriminate against a pupil by excluding the pupil from the school and by subjecting the pupil to any other detriment; and section 15(1) – discrimination arising from disability.

Decision

2. The responsible body has discriminated against the claimant by treating her less favourably because of the distressed behaviours, language and communication difficulties which arise in consequence of her disability; and the responsible body cannot show that the treatment is a proportionate means of achieving a legitimate aim. This means that the claimant has been discriminated against by being excluded from the school and from being provided with a lack of full time education, for the purposes of section 85(2)(e) and (f) of the 2010 Act; and a contravention of part 6 of the 2010 Act has occurred. We make an order that the responsible body complies with the remedies set out in paragraph 62.

Process

3. A case conference call was conducted in December 2020 at which time the order of proceedings and various documents to be lodged were agreed. Witness statements were prepared, exchanged and lodged and accepted into the process as evidence in chief. A joint minute of agreed facts was prepared (although not lodged until the day after the hearing) and written submissions were lodged.
4. We issued a social story to assist the claimant in preparing for her hearing. The claimant attended the hearing and remained present throughout, alongside her foster carer. The claimant had a “stop” card to hold up to the screen if she needed a break.
5. In adherence to President’s Guidance on The Child and the Hearing questions for the child were agreed in advance and her oral evidence was taken by one person, the tribunal member who is specialist in speech and language therapy.

Findings in Fact

The child

6. At the time of making the claim and the hearing, the claimant was 15 years old. Prior to April 2019 the claimant lived mainly with her mother and stayed with other family members from time to time. She was accommodated in foster care placements from April 2019 following an incident which resulted in her spending a week in hospital (Chronology R138). The claimant has been in the care of witness A, her current foster carer since December 2019.

7. The claimant is looked after and accommodated by the responsible body. She is on a compulsory supervision order with a condition that she resides with witness A.
8. The claimant has DLD, which means that she experiences difficulty in understanding and using spoken language. She will not always understand the words that people use. She has difficulty in following and keeping instructions or directions. She has difficulties with her working memory, in maintaining attention, concentration and processing complex information. She has difficulties in forming and sustaining relationships. She cannot manage or regulate her own emotions, which can result in distressed behaviours. She needs appropriate high level individual adult support to assist her to self-regulate and de-escalate (Draft CSP C044; Clinical Psychologist Report R246, Educational Psychologist Report R250, SLT Report R258).
9. The claimant has experienced a number of significant adverse childhood experiences (Review of Child's Support Needs Analysis R265; Chronology R126))
10. The claimant was assessed by a SLT in March 2019. This assessment was communicated to the claimant's mother, foster carer and the school by letter dated May 2019 (R258).
11. The claimant was assessed by a Clinical Psychologist, who carried out a cognitive assessment on a number of dates between July 2019 and March 2020. That assessment was communicated to the claimant's foster carer, social worker and the school by letter dated March 2020 (R246).

Education – the school

12. The claimant was, at the relevant times, a pupil at the school, which is managed by the responsible body and which is the claimant's local mainstream school. The school is an all-through school comprising nursery, primary and six-year secondary departments serving the community and surrounding district. The claimant has attended the same nursery, primary and secondary school throughout her education.
13. The claimant had a full-time timetable throughout secondary 1. She had a part-time timetable in secondary 2 between March 2019 and May 2019. She returned to a full-time timetable in May 2019, after the former Inclusion Service Manager with the responsible body intervened and asked the school to arrange this.
14. The claimant has a CSP, which was prepared in December 2020 (joint minute, para 29 – although this was not lodged).
15. At the relevant times the claimant had no IEP, behaviour support plan or other specific plan to assess and manage behaviour in school and in classes.

Agency A - off site service for secondary school pupils

16. The claimant is timetabled to attend at Agency A, an off-site service for secondary school pupils from S1-S6 offering support to young people with social, emotional and communication difficulties.
17. The claimant first attended Agency A for a visit in April 2019. She attended for a tall ships experience, summer barbecue and a trip to a safari park between April and August

2019 as part of her transition to Agency A . She was issued with an Agency A timetable in August 2019 and has attended at Agency A in accordance with this or other timetables since then. Her weekly allotted time at Agency A has gradually increased from two mornings a week.

18. Prior to the first Covid-19 lockdown in March 2020, the claimant attended the school on a part-time basis, with part of her days spent attending Agency A.
19. As a result of lockdown, schools in Scotland closed for a period between March and June 2020. The claimant was provided with limited educational support during that time. Around July 2020 she was given a chrome book to assist in completing homework; however, she found written communication and online learning overwhelming and this became a barrier to her learning.
20. On return to school in August 2020, the claimant attended the school on a part-time basis, with part of her days spent attending Agency A.

Exclusion

21. On a number of occasions in September 2020 the claimant was told by school staff that she should not be in school and she needed to leave.
22. In September 2020, a decision was taken by the responsible body that the claimant would no longer have any learning opportunities delivered at the school. Neither the claimant, her mother nor her foster carer were consulted before this decision was taken. Therefore the claimant's views on this were not taken into account.
23. In September 2020, a meeting was held at the school to which the claimant was not invited. Her foster carer was present. She was informed that the claimant would no longer be attending the school. It is unclear whether the claimant's social worker attended the meeting but she disagreed with the responsible body's decision. It was agreed by the professionals in attendance that a letter would be written to assist in explaining their decision to the claimant. The letter was a hand written letter from the GT, dated September 2020 (T019).
24. The GT met with the claimant and her foster carer on 21 September 2020 and gave the claimant the letter and informed her of the decision that she would no longer attend classes at the school. The GT met the claimant for lunch on 25 September 2020 to discuss the claimant's feelings about the decision.

Exclusion

25. On or around 18 September 2020, the claimant was excluded from the school. Limited reasons were provided in the letter given to her, but were not otherwise discussed with or explained to the claimant. The claimant has struggled to comprehend the terms of the letter and the reasons for her exclusion.

Part-time timetable

26. Although she had been linking with the service since April 2019, the claimant first attended for timetabled sessions at Agency A from August 2019, at which time her timetable at the school became part-time. Her time at Agency A was gradually increased

and by November 2020 she was provided with three education slots in addition to her sessions with her key worker, totalling 12 hours and 05 minutes per week (including lunch and other breaks).

27. The claimant currently has limited access to Agency A and the school due to Covid-19 restrictions. She attends Agency A for 3 hours on a Tuesday and 1 hour 30 minutes on a Thursday. Throughout the course of the week the claimant has the opportunity to have Google Duo chats and wellbeing check-ups with the Senior Social Care Officer. She also now attends the school on Mondays, Wednesdays and Fridays for 2 hours each time, which commenced in December 2020 following a process of mediation.
28. The claimant is currently attending Agency A and the school and is progressing and engaging well in the learning opportunities.

Reasons for the Decision

General remarks on the evidence

29. The claimant spoke well in her oral evidence. She was able to understand the questions and give clear responses. Her evidence is also set out in her written statement. Witness A's written and oral evidence was equally clear and consistent. Her attention to detail was impressive and we found her narration of events helpful. She presented her evidence in an objective, measured and balanced manner and we were able to attach some weight to this.
30. It was clear that the responsible body's witnesses were familiar with the claimant's personal and educational journey. Witness B clearly struggled to reach the decision to stop the claimant from attending classes at the school. He described this as the most difficult professional decision he has had to make. At times during his oral evidence he was defensive. As a result his responses did not provide clear answers to the specific points put to him. Witness C's evidence was largely limited to the claimant's experience at Agency A, for example, she was unable to clarify the extent to which, if at all, there was moderation of materials and an attempt to make sure there was consistency of materials across Agency A and the school (Agency A plans at 231-241). Both witnesses were aware of and familiar with the claimant's support plan (R263), which the responsible body relied upon.
31. We benefitted from the provision of detailed witness statements for each of the witnesses and reports from the clinical psychologist, educational psychologist and the SLT. None of the witnesses deviated in any significant way from their statements.

General remarks on the legal test

The claim

32. This is a case under Part 3, paragraph 8 of schedule 17 of the 2010 Act; being a claim that the responsible body has contravened chapter 1 of part 6 (School Education) of the Act, because of a person's disability. Section 85(2)(e) and (f) provide that the responsible body of a school must not discriminate against a pupil by excluding the pupil from the school; or by subjecting the pupil to any other detriment.

Discrimination arising from disability (section 15)

33. The claim is made under section 15 of the 2010 Act which provides that:

- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

34. Parties agree that the claimant is a disabled person in terms of section 6 of the 2010 Act. Accordingly, section 15(2) does not apply. If section 15(1) is established then that will mean that the claimant has been discriminated against by being excluded from the school under section 85(2)(e) and by being subjected to a detriment under section 85(2)(f). The detriment is the lack of full time education. We will deal with each in turn.

A. Exclusion

Question (1): By excluding the claimant, did the responsible body treat the claimant “unfavourably”?

35. Our answer here is yes. Section 85(2)(e) of the 2010 Act specifies exclusion as a way in which discrimination may occur. Included, Engaged (pp16-17) sets out the well-established detrimental impact that exclusion has on pupils, particularly within those groups of children where exclusions are more prevalent, which includes looked after children.

36. The responsible body deny that their decision to stop the claimant from attending classes in the school, which included moving all of her learning opportunities outwith the school building (R106, para 23), amounted to an exclusion. We are not clear what the responsible body think the difference is between their decision and an exclusion. The decision had the purpose and effect of bringing the claimant's attendance at the school to an end. The letter explaining the decision to the claimant (T019) states, “We have decided that it would be best for you not to come to school at all.” and acknowledges, “This decision will probably seem unfair to you.” When pressed on this, witness B said that although the claimant remained on the school roll she could not come back to school. If she had turned up at the school after September 2020 she would have been met by witness B who would have contacted the claimant's social worker and foster carer to discuss next steps. Witness A thought the school would probably have called the police. There was a clear intention that the claimant should not attend school and not access any classes. On any reasonable interpretation this amounts to exclusion.

37. The claimant does not understand why she was excluded, she was upset and angry at the decision, and remains of the view that she has been unfairly treated. She said she “has no clue” why she was excluded. She did not expect to be excluded. She thought she might have her timetable reduced further but not to be “kicked out of school.” It has reduced her access to education and removed her from one of the few familiar, consistent and constant environments in her life, which is a concern given the nature and complexity of her disability in the context of significant adverse childhood experiences. We formed the view that while the school were aware of these factors, the impact on the

claimant (and consequently on her behaviours) did not appear to be well understood. There was limited early engagement with partner agencies to support a full assessment of the effects of the claimant's disability in a proactive way.

38. We are satisfied that excluding the claimant from school and the manner in which this was conducted amounts to unfavourable treatment. Included, Engaged emphasises the need for schools to place a greater importance on inclusion through effective learning and teaching, promoting positive relationships and behaviour; and employment of preventative approaches which reduce the need for exclusion (page 7). We saw no behaviour support plans that would demonstrate an inclusive and preventative approach.

Question (2): Was the treatment because of something arising “in consequence of” the claimant’s disability?

39. Our answer here is yes. This does not appear to be disputed by the responsible body. They concede that their actions were taken in light of the claimant's disability and her other additional support needs.
40. The evidence suggests that the school was “fire-fighting” in a cycle of reaction and response. This meant that a reactive, rather than preventive approach was adopted. In other words, the child's distressed behaviours were dealt with when they arose, rather than anticipated. Had there been more focus on planning and prevention, this may have reduced the frequency of incidents and provided the claimant with a clearer understanding of what was expected of her and how issues would be dealt with. The claimant needs appropriate adult support to regulate and manage her emotions. The school consistently expected the claimant to be able to take individual responsibility for this. The school expected more from her than she could manage without support.
41. There was limited evidence to suggest that the school recognised that all behaviour is communication (Included, Engaged, p22). The school should maintain a consistent record of training events and key learning outcomes for all school staff in relation to understanding of additional support needs (including disabilities) for all pupils as well as for specific individuals, such as the claimant. The evidence provided to us was very limited. Although one in service day had been given over to staff training on the issues identified in the SLT report, we did not see how that had been translated into practice.

Question (3): If the answer to questions 1 and 2 are yes - has the responsible body shown that the treatment was a proportionate means of achieving a legitimate aim?

42. Our answer here is no. The responsible body said that the aim of their action was to meet the needs of the claimant in providing her with an education which is directed to the development of the personality, talents and mental and physical ability and has specific regard to her age, ability and aptitude (Case Statement R120). There is no dispute that this is a legitimate aim. The question is whether exclusion was a proportionate means of achieving that goal.
43. The Technical Guidance states (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.” We could see no structured or consultative approach and no detailed evidence to suggest that exclusion was an effective or desirable means of achieving this aim.

44. The Technical Guidance states (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.” and, “The duty to make reasonable adjustments requires a school to take positive steps to ensure that disabled pupils can fully participate in the education provided by the school, and that they can enjoy the other benefits, facilities and services that the school provides for pupils.” (6.11).
45. A school’s duty to make reasonable adjustments is an anticipatory one. The responsible body’s submission that reasonable adjustments were made by providing the claimant with alternative forms of education outwith the school does not equate. Relevant reasonable adjustments ought to have been anticipated and made for the claimant within the school and there ought to have been evidence of a journey which eventually led the school to decide that exclusion was a proportionate response. By at least May 2019 there was sufficient evidence available to the school from the SLT to allow them to make relevant reasonable adjustments. We are not satisfied that this occurred.
46. Included, Engaged states that exclusion should only be used as a last resort (p7). We are not satisfied that the exclusion was a treatment of last resort. There were no formal strategies in place to support the claimant to benefit from her education in the context of her disability and learning needs. We could not identify any differentiation in classes for the claimant, despite obvious differences in her behaviour in different classes, for example maths, where she did not understand what was being studied. At the relevant times no CSP was in place, no IEP and no behaviour support plan. The responsible body has not provided the school with the specific input of the educational psychologist. Having repeatedly requested an educational psychology report for the claimant, her foster carer, witness A, was dismayed that one was produced as late as January 2021 (R250) and only in response to these proceedings.
47. The responsible body appeared aware of its duty to consult with the claimant and others. The responsible body should have been able to provide documented evidence of regular consultation with the claimant, her mother and foster carer, with differentiated communication to take account of the effects of the claimant’s disability. The use of Talking Mats as one example, was recommended by both the SLT and Educational Psychologist in supporting the claimant, but there was no clear evidence provided of this or other approaches being implemented with any regularity or consistency.
48. While witness C suggested that the plan used by Agency A was “essentially an IEP” this was not adapted or coordinated for use by the school; and it was not clear whether the school adopted any of their strategies. Also, IEP targets should be ‘SMART’ and related directly to the child’s learning aims. The examples provided by Agency A were not Specific, Measurable, Achievable, Realistic and Timely; and there was no clear evidence from school planning of specific educational aims.
49. The *Akerman* case sets out the correct approach to proportionality.

[28] The concept of proportionality contained in section 15 is undoubtedly derived from European Union law, which is the source of much of our anti-discrimination legislation. Three elements were explained by Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, at para 165:

“First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?

...

this concept of proportionality, which has found its way into both the law of the European Union and the European Convention on Human Rights, has always contained a fourth element. This is the importance, at the end of the exercise, of the overall balance between the ends and the means: there are some situations in which the ends, however meritorious, cannot justify the only means which is capable of achieving them. .. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.”

50. The exclusion, having been carried out without any of the statutory processes or safeguards and therefore being an unlawful exclusion, cannot be regarded as proportionate. By avoiding the formal exclusion process, the responsible body did not consider or comply with the requirements set out in the checklists in Annex C of Included, Engaged, including those specific to looked after children and disabled children.
51. Even on its own terms, the decision to exclude cannot be regarded as proportionate. The responsible body's aim was to improve the claimant's educational experience, but it only served to reduce her educational experience. She was already attending Agency A before the exclusion. She was not adequately consulted on her education. The responsible body made reference to offers of educational provision at a range of different establishments but there was no clear evidence of the nature of the educational support that would be available at these, the learning aims that would be targeted, nor a plan for how that support would be coordinated.
52. The fact that the claimant refused these should not have been unexpected, given previous experiences. It was submitted that the claimant's co-operation with suggested alternative provision was made less likely by the way in which the exclusion decision was taken. Her views were not sought. A decision was taken behind closed doors, and communicated to her afterwards. We agree. The only new education (at the school) she has received was provided after these proceedings were raised, a complaint raised by her foster carer, witness A, and mediation entered into.
53. The claimant is entitled to be educated in a mainstream school (section 15, 2000 Act) unless certain circumstances apply and it is presumed that those circumstances arise only exceptionally. The responsible body denies that this duty applies here and submits that mainstream school would not be suited to the ability or aptitude of the claimant - although she is now receiving mainstream education again. We are satisfied that at the relevant times the claimant would have benefitted from continuing to receive mainstream education. The opportunity to do so should not have been removed from her by exclusion, which lasted in the region of three months.
54. The suggestion that the claimant has been provided with a “bespoke education” (responsible body submissions, para 32 and 34) is not borne out when we consider the views of the claimant and her foster carer, witness A, which are that the claimant wants to receive a full time education spread equally across Agency A and the school. For her removal from mainstream education to have been “bespoke” there ought to have been consultation with the claimant, her mother and foster carer.

55. In her oral evidence, witness A made a reference to the responsible body's duties as a "corporate parent" under the 2014 Act. The evidence highlighted that communication and relationships between education and social work were complicated and not consistently well documented. There also appears to have been a lack of respect and consideration given to witness A's views in regard to the provision of educational psychology, CSP planning and attendance at meetings with regard to the decision of the school to exclude the claimant.

B. Lack of full time education

Question (1): by providing a lack of full time education, did the responsible body treat the claimant "unfavourably"?

56. Our answer to this is yes. All children in Scotland have a right to education and authorities have a duty to provide this. All children need to be included, engaged and involved in their education (Included, Engaged, page 12). In this case the claimant wants full time education. She herself requested the return to full time education in 2019 (Chronology R137 and paragraph 8 above).

57. The provision of a part time timetable would not be unfavourable if the claimant could not benefit from full time education but there was no evidence to suggest this.

Question (2): Was the treatment because of something arising "in consequence of" the claimant's disability?

58. Our answer to this is yes, for the relevant reasons set out at paragraphs 39 to 41 above.

Question (3): If the answer to questions 1 and 2 are yes - has the responsible body shown that the treatment was a proportionate means of achieving a legitimate aim?

59. Our answer to this is no, for the relevant reasons set out at paragraphs 42 to 55 above.

60. Reducing her attendance at school heightened the risks to the claimant, which are well documented (Chronology R216). It did not reconcile with her need for adult support, regulation, boundaries and clear communication. When she attended both provisions on a part-time basis, there were gaps between her times at Agency A and the school, which were not helpful and resulted in the claimant wandering around the school or elsewhere, which her foster carer, witness A, described as inappropriate. We agree. This would be inappropriate for any child but particularly so where, as here, the child has a disability and a history of engaging in risky behaviours.

Impact of exclusion and lack of full time education on the claimant's educational progress

61. The said treatment has had and is having a detrimental effect on the claimant's educational progress, her self-esteem and sense of inclusion. It was in breach of her rights to education, as set out in Article 2 of Protocol 1 of the ECHR, Article 28 of the UNCRC and Article 24 of the UNCRPD. It was in breach of her right to mainstream education under the 2000 Act. The provision of alternative provision at Agency A did not compensate for the decision to exclude the claimant or the lack of full time education.

Agency A is not a school or an educational establishment for the purposes of the 1980 Act. We did not accept that any of the circumstances set out in section 14 (Education for children unable to attend school) of the 1980 Act had been met. The claimant was able to attend the school and it would have been reasonable to expect her to do so. There was no evidence to suggest that she could not benefit from full time education.

Remedies

62. In light of our decision we order the following remedies:

- a) The exclusion of 18 September 2020 is immediately overturned.
- b) The responsible body readmit the claimant to the school with immediate effect, on the basis she has set out (half and half with Agency A), so that she is receiving a full-time education, and with access to such supports and reasonable adjustments at school as she may require following the extended period of interruption to her education.
- c) The responsible body review and revise the claimant's CSP to reflect the above provision within 2 months of the date of this decision.
- d) The responsible body reviews, develops and revises its relevant policies and practices on exclusion and inclusion by the end of the school term (June 2021), together with relevant externally provided training to support its revision and implementation by the following school term (2021/2022).