Summary of the decision

1. The tribunal finds that the responsible body has not failed to comply with the duty to make reasonable adjustments in terms of section 21 of the Equality Act 2010. The claim is therefore dismissed.
2. The claim for indirect discrimination in terms of section 19 of the Equality Act 2010 is not well-founded and is also dismissed.
3. Parties are directed to lodge written submissions in respect of the references relating to the Co-ordinated Support Plans within one month, that is by 17 May 2019.

Introduction

1. In August 2018, the claimant lodged four claims in the Health and Education Chamber Additional Support Needs Tribunal. These relate to disability discrimination claims under the Equality Act 2010 (the 2010 Act) and references under the Education (Additional Support for Learning) (Scotland) Act 2004 (the 2004 Act) in respect of his twin sons (hereafter referred to as the children). These four cases have been combined.
2. The disability discrimination claims relate to claims of indirect discrimination and failure to make reasonable adjustments. In particular, they relate to the refusal by the respondent to directly fund an ABA educational programme provided for the children as part of a flexi-schooling arrangement, which has been agreed between the parents and the respondent.
3. The references under the 2004 Act relate to Co-ordinated Support Plans (CSPs) prepared for the children in June 2018. The claimant disagrees with the plans in respect of the factors from which additional support needs arise; the educational objectives that have been set taking account of these factors; and the type of support proposed to help to meet the objectives, all as set out in the papers apart to the references.
4. A hearing to hear evidence in connection with all four cases took place on 29 January and 27 and 28 February 2019. At the hearing the claimant was represented by a solicitor and the respondent was represented by counsel.
5. At the outset of the hearing, consideration was given to the order in which the claims/references should be determined. It was agreed that it was appropriate to first consider and determine the Equality Act claims, the outcome of which has a direct bearing on the contents of the CSPs.

6. It was therefore agreed that evidence would be heard over the three days allocated in respect of all four claims/references, that the tribunal would make a written determination in respect of the Equality Act claims first, and that parties would thereafter (unless matters could be agreed) (and without hearing further evidence) provide written submissions in respect of the CSP contents references.
7. The tribunal heard evidence for the claimant from Witness 1, specialist speech and language therapist; Witness 2, child and educational psychologist; and Witness 3, board certified assistant behaviour analyst, as well as the claimant. For the respondent, the tribunal heard evidence from Witness 4, depute head teacher of School A; Witness 5, educational psychologist; and Witness 6, speech and language therapist. The tribunal heard evidence based on witness statement/expert reports (which were taken to stand as evidence in chief), supplementary questions and cross examination.
8. The tribunal was referred to a joint volume of documents. These documents are referred to in this decision by page number. A number of documents were permitted to be lodged, although late.
9. An issue arose during the course of the hearing relating to the status of the children's most recent personal learning journals. A request was made by the tribunal at the outset of the hearing on 29 January for sight of these documents, which was repeated at the hearing on 27 February. These were made available to the tribunal, and to the claimant (because it transpired that the parents had not seen them). At the close of proceedings, the claimant's representative inquired as to the status of these documents, given that his application for an order for further documentary evidence relating to the children's progress was refused at the case management stage by another convener (legal member). The respondent's representative stated that he had not intended to lodge them and was not relying on them. The claimant's representative said that he did not intend to rely on them. Given their uncertain status, the tribunal decided that they should not be lodged, or referred to, and were not relied upon in our deliberations.
10. An advocacy statement for the children dated 28 January 2019 was lodged, and taken into account by the tribunal.
11. Although it had initially been proposed that the tribunal would view video evidence, on reflection the claimant decided not to rely on it.
12. Although it proved possible to complete the evidence in the three days allocated, it was agreed that parties would submit written submissions within seven days of the hearing (that is by 7 March 2019) on the Equality Act claims only. Parties were subsequently invited to make supplementary submissions in response, if so advised by 15 March 2019. Although a provisional date of 18 March to hear oral submissions had been proposed, in the interests of the overriding objective, it was decided that the matter could

be determined on the basis of written submissions alone. Unfortunately, as it transpired, that meant that follow up submissions were required in response to the points raised in supplementary submissions, which were to be lodged by 7 April 2019. A members' meeting then required to take place on Thursday 11 April 2019.

13. The tribunal considered that it was appropriate at this stage to set out the facts which are relevant for the Equality Act claim only. Further findings in fact relevant to the CSP references will be set out in due course in the second part of this decision relating to those references.

Key findings in Fact

14. On the basis of the evidence heard and the productions lodged, the tribunal finds the following facts admitted or proved, relevant to the Equality Act claims:
15. In November 2010, the children were both diagnosed with severe autism and global development delay subsequently diagnosed as severe learning disability, as well as dyspraxia, hypermobility and hypotonia. They are pre-verbal and have very poor receptive understanding.
16. They have additional support needs in terms of section 1 of the 2004 Act and they are disabled in terms of section 6 of the 2010 Act.
17. The respondent is the responsible body for School A in terms of section 85(9)(c) of the 2010 Act.
18. The children are currently educated in terms of a flexible schooling arrangement (FSA), approved by the respondent, which provides for their attendance at School A part-time, and the part-time provision of a bespoke ABA programme delivered at home, the latter currently being funded by the parents.
19. The parents have requested that the respondent directly fund an ABA educational programme provided at home and to adopt consistent approaches and staffing, delivered by experienced ABA trained and qualified staff, for the children while at school, including supervision by a board certified behaviour analyst (BCBA). This request has been refused.
20. In terms of the FSA, the children attend School A on Tuesdays and Thursdays, gradually increased from mornings only. The flexible schooling arrangement document drawn up by the respondent included, until October 2018, specific mention of the need for liaison between home and school.
21. School A is a mainstream school with 520 pupils. The children are in separate classes at the request of the parents. Each child has a full-time pupil support assistant (PSA).
22. The children are making incremental progress at school.

23. The children receive full-time one to one support from PSAs while attending School A except for 30 minutes each day when the PSAs are on lunch break.
24. The parents have engaged two tutors who help with the children's care needs when the children's mother is caring for the boys when their father is at work, as both children require constant supervision and direction. These ABA trained tutors assist with the delivery of an ABA programme at home three days each week.
25. The parents chose an ABA based approach because they consider it to be the most appropriate pathway for the children. This commenced in January 2011 and is supervised by a board certified behaviour analyst. The parents consider that the boys have made life-changing progress following the ABA approach. They fear that to stop or limit ABA approaches may lead to regression.
26. The parents use a number of tools to assist with the children's education. In particular, an app called Proloquo2Go was introduced as part of the ABA programme. The parents consider this to have been transformational in giving the children a voice and as a viable means of communicating. The parents also use PROMPT and Talk Tools, which is an pro-motor placement therapy treatment, as well as Choiceworks to assist with scheduling.
27. Since the introduction of the ABA programme, the children have made significant progress in the use of everyday skills, including feeding, dressing and toileting. The ABA methods have been reinforced at school. The parents have seen significant improvements in the children's behaviour such that they now cope well at the dentist and hairdressers, and have made significant progress in activities such as swimming, walking, and horseriding. The children have increased independence.
28. Until around one year ago, there was appropriate collaboration between the parents and the school in regard to applying some of the techniques used in the ABA programme at school. For example, the PSAs attended the children's home to observe the approach to feeding and toileting at school. The children use Proloquo2Go at home and at school. Use is not made of Choiceworks, nor of Talktools, because the latter is not now recommended by the councils SLT.
29. The parents have obtained a private diagnosis of verbal dyspraxia, although this is disputed by the respondent.
30. The respondent acknowledges and respects the right of the parents to provide an ABA programme at home.
31. The respondent makes use of PECS, the equivalent of "fading", task analysis, and a form of functional analysis which are recognised as techniques used in ABA approaches.

32. Given the progress which they have seen using the ABA programme, the parents wish this approach to be taken both at home and in school and to be provided by the education service through the FSA.
33. The respondent would not and does not fund or implement overarching ABA programmes.

Tribunal deliberations and decision – Equality Act claims

Outline of the provision sought

34. It may be helpful first to set out what this case is not about. It is not about the value or efficacy or appropriateness of ABA, or ABA programmes in general terms. The tribunal had no difficulty in accepting the evidence of the parents that the ABA approach has been transformational for the children and the parents.
35. Rather, this case is about whether or not the failure of the respondent to provide an ABA programme as part of the flexi-schooling arrangement at both school and home is a breach of the Equality Act 2010, specifically whether it would be a requisite reasonable adjustment and whether to refuse it amounts to indirect discrimination.
36. While we fully accepted the parent's evidence regarding the progress the children have made using the programme, we do not accept the evidence that they are not making progress at school. Indeed, we did not accept that many of the criticisms made of the school were valid, such as a lack of support for ABA technologies (for example we accepted witness 4's evidence that she was fully supportive of the use of the Proloquo2Go devices), or a lack of communication (for example we heard about home school diaries). We did accept that there had been a recent breakdown of communications, apparently on both sides, which appears to relate to frustrations regarding the finalisation of the CSPs.
37. We accepted the evidence of witness 4 in particular regarding the children's progress, including for example their level of engagement with PSAs and an increase in social interactions with classmates. We heard that the children now willingly go ahead of their PSAs into the classroom. While there was an acknowledgement that progress was not being properly documented, because of the way targets are framed, we heard that steps were being taken to address that. We heard in particular from Witness 5 regarding milestones for complex learners which were due to be introduced in March 2019, which recognise that one target can take a long time to achieve for complex learners, which will henceforth be broken down into small steps.
38. In coming to our conclusion that the children were making progress at school, we did also take into account the conclusions in the advocacy statement that the children were

less comfortable at school. While we might say that it is within judicial knowledge that children generally are more comfortable in a home environment rather than a school environment, we accepted the evidence, discussed later, of Witness 5 to lend support to that view.

39. The respondent has also stated that they respect the right of the parents to implement an ABA programme at home as part of the flexible schooling arrangement. The respondent agrees that they would (and do) support the use of some of the ABA "technologies" used, which we understood to be tools, approaches or methods, however they might be described. However, as stated by the respondent, "the difficulty in reaching agreement relates to the delivery of ABA, the interpretation of how that can be delivered and by whom."
40. With regard to what we understand is meant in general by "ABA programmes", we had regard to the Scottish Government's Understanding Autism Guide, which explains ABA as follows: "ABA based intervention always begins at the level of the individual and as such works to establish a personalised and individualised approach to curriculum planning in order to address key skill areas, including (but not limited to) communication, leisure, social academic and daily living skills. Skills are prioritised that will increase the quality of life for the individual and involves (sic) functional communication that may incorporate other augmentative systems to facilitate effective communication (eg vocal, PECS or sign). Generalisation is promoted from the start to ensure skills can be used across all environments. ABA uses key behavioural principles and breaks down learning into smaller component skills to teach as a developmental sequence (e.g. from simple to more complex skills). Targets and intervention procedures are clearly defined to aid consistent teaching and learning progress is recorded on each target ensuring decisions are based on data, and progress towards targets can be easily assessed. ABA is personalised according to the needs and strengths of the individual and adapted to how that individual responds. An ABA-based intervention can take place within any environment and appropriate education setting".
41. Further, in the Sign Guidelines, ABA programmes are described thus: "EIBI programs attempt to address a comprehensive range of behaviours associated with ASD, rather than focusing on one specific aspect such as communication, social skills or interaction. Given that ASD is a pervasive condition, these comprehensive programs are necessarily intensive. They vary considerably in terms of technologies and emphasis but are all based on ABA".
42. It is important however, when it comes to considering the application of the legal tests to the facts, to be aware of the specifics of the provision which the parents are seeking.

43. Throughout the hearing, we understood that the claimants were seeking the implementation of what was described as an ABA programme.
44. Witness 5's evidence was that ABA is an umbrella term, and that there are many different programmes or applications under that umbrella, and that methods can be used outwith the parameters of a particular programme. We accepted that the respondent did use some of the methods under the ABA umbrella such as PECS, the equivalent of "fading", task analysis, and functional analysis (although not in the same way as ABA). Witness 5 called these ABA "technologies", but we understood them and use them in this decision to be approaches which may form an aspect of an ABA programme.
45. We were however clear in our understanding that the claimant is looking for the implementation of an overarching programme. We understood from the claimant's representative's submission that the claimant was not necessarily seeking the specific programme which is currently in place, delivered by Skybound.
46. In terms of specifics, we understood that the ideal provision recommended, and sought by the claimant, was set out at section 11 of witness 3's report as follows:
    - ABA needs to be implemented throughout the waking day for 40 hours per week, in all environments, including school;
    - The children's skills need to be systematically generalised to all environments including school;
    - The children require part-time attendance at school (mornings only) and ABA out of school. It is essential that when in school, they are supported at all times by trained and experienced ABA tutors;
    - It is necessary for the children to receive ABA across the school holidays. Their programmes need to be in place for 48 weeks per year;
    - They require consultation of 6 hours per child, every six weeks from Board Certified Behaviour Analyst with at least 5 years' experience, and experience of working within a multidisciplinary team, including SALT due to the children's complex speech needs. The BCBA must also have completed PEAK Level 1 training and experience using Proloquo2Go with an ABA programme.
    - The children require weekly supervision of 3 hours each by a Board Certified Assistant Behaviour Analyst (or someone with a Masters degree in ABA). This supervision should be divided between home and school depending on the needs within the two environments.
    - Those working with the children in school and at home should be experienced ABA tutors and have undertaken the 40 hours Registered Behaviour Technician

Theory training and Talktools Level 1 as a minimum level of training or have at least two years' experience of delivering Talktools.

Does this tribunal have jurisdiction to hear determine the claim?

47. In terms of section 85(2) of the Equality Act 2010, the responsible body of a school must not discriminate against a pupil in the way that it provides education for the pupil; in the way that it affords the pupil access to a benefit, facility or service; by not affording the pupil access to a benefit facility or service; or by subjecting the pupil to any other detriment. By reason of section 85(6), read with Schedule 13, para 2, the duty to make reasonable adjustments applies to the responsible body of a school.
48. The respondent's representative argues that the relevant provisions of the Equality Act relating to schools cannot apply to the adjustment sought by the claimant, namely for the funding of the ABA programme currently "provided at home". In support of his submission, he argues that section 85(2) applies the duty to the responsible body of a school, as does para 2 of schedule 13, which is headed "the duty for schools". He also relies on the Explanatory Notes (para 890) which refer to the provisions applying to schools. He refers further to the language of the EHRC's Technical Guidance (page 7) which refers to education provided by a school.
49. The claimant's representative understood the respondent's representative to be objecting to the fact that the request is not for the programme to be provided "at school". He submitted that the phrase "at school" does not appear in part 6, chapter 1 or schedule 13 at all, and nor does the phrase "in school" or similar. He referred to caselaw and references in the Technical Guidance to examples of provision which did not take place at school, such as residential trips and work experience.
50. The respondent's representative submitted that he was not arguing that the provisions of the 2010 Act are restricted to what happens "at school" or "in school". He accepted that the location of the educational provision does not need to be at school. He submitted however that it must be education, or a benefit, facility or service, provided *by the school*. If the provision was being made by some other person or entity, it could not amount to discrimination by the responsible body for the school.
51. The claimant's representative submitted that the request was to make provision which was connected to the school. He submitted that the programme sought for the children is already approved by the the respondent and provision made for them in terms of a flexible schooling arrangement which specifies throughout the role of the school and school personnel.
52. The respondent's representative however submitted that "it does not avail the claimants to characterise the direct funding of the ABA educational programme provided at home

as being "part of the flexible schooling arrangement". That is because the current flexible schooling arrangement does not, in any way, entail the boys receiving at home, the education, benefits, facilities and services they receive at school. It is a matter of agreement that the provision at home is different; and is chosen by, and paid for, the claimant. There is no indication that the claimant intends that there would be any change to the nature of the provision at home, if the respondent was paying for it. Therefore it could not be provision made by virtue of section 85(2) and 85 (6)".

53. Relying on the case of *DM v Fife Council*, and the Technical Guidance, the respondent's representative submitted that direct funding of the ABA programme currently provided at home would have to be sought under part 3 of the 2010 Act, because where an education authority makes provision other than as a responsible body of a school, the provisions relating to public functions would apply rather than education. Consequently, he argues that this tribunal cannot make an order directing the respondent to fund the ABA educational programme at home.
54. In supplementary submissions, the claimant's representative submitted that it is not correct to state that the provision must be "by the school". He relied on section 85, which he submitted sets out the duty of the responsible body (not the school). He stated that the legislation uses the phrase "by the school" only twice, in relation to accessibility strategies in England and Wales. He points out that in the Technical Guidance the term "school" is stated to be used for ease of reference. Given that schools managed by education authorities do not have a separate legal identity, and are not capable of having employees, the logic of the respondent's representative's submission is that school trips organised by school staff would be covered under Part 6 and if they were organised by head office staff under Part 3, but both might be involved. The claimant's representative submitted that the position adopted by the respondent would mean that a school providing home tuition or other academic supports to a disabled pupil absent from school due to their disability would not be covered by this part of the Act.
55. We did not accept the respondent's representative's submission, by reference simply to the wording of the relevant statutory provisions in Part 6, chapter 1. Section 85(1) makes reference to "the responsible body of a school". Section 85(2) states that "the responsible body of such a school" must not discriminate against a pupil etc. Section 85(8)(a) states that, in Scotland, this section applies to a school managed by an education authority. Section 85(9) states that the responsible body of a school within section 85(8)(a) (ie a Scottish state school) is the education authority. We conclude therefore that "the responsible body of a school" is "the education authority". Replacing the former with the latter, we conclude that it is the education authority which is liable for

any discrimination against a pupil, and this does not necessarily require to be perpetrated "by a school".

56. We noted too that as discussed below in relation to the reasonable adjustments duty, that Schedule 13 refers to a PCP applied "by or on behalf of A". Where A is the responsible body of a school to which section 85 applies, ie the education authority. The fact is then that a PCP can be applied "on behalf of" the education authority.
57. We did not consider that the respondent's representative's reliance on *DM v Fife Council* assisted him at all. That is a case which concerned the provision of education to a young person who was over 18. It concerned the interplay between the 2004 Act and the 2010 Act, including the public sector duty. It concerned questions of duties and powers to educate young people over 18. In particular, it included a claim for age discrimination, which clearly could not be pursued under Part 6 Education because chapter 1 relating to schools does not apply to the protected characteristic of age (section 84).
58. To the extent therefore that the respondent's representative argues that claims relating to the provision of education at home should be pursued under Part 3, we did not accept that submission. We accept that the respondent could in principle fund educational provision by a third party at home, for example because a pupil was ill and unable to attend school. We accept that any potential claims in that regard are pursued under Part 6, not Part 3.
59. We assumed in any event that the respondent's representative was not arguing that this was the whole answer to this case, and that his submissions relate to the provision of the ABA programme at home.
60. In any event, we find that this tribunal does have jurisdiction to consider this question in respect of the provision at both home and school.

Reasonable adjustments

61. Given our conclusion that we do have jurisdiction to determine this matter in respect of both provision at home and at school, the key question for determination in this case is whether or not the respondent has failed in its duty to make reasonable adjustments by refusing to directly fund the ABA educational programme provided at home as part of the flexi-schooling arrangement and for the respondent to adopt consistent approaches, delivered by ABA trained staff, for the children while at school.
62. The respondent has accepted that the children have additional support needs and that they are disabled for the purposes of the 2010 Act and we conclude that the duty to make reasonable adjustments in general applies, in terms of section 85(6).

63. A responsible body is therefore under a duty to make reasonable adjustments in terms of section 20, and any failure to comply with that duty will amount to discrimination contrary to section 21. Schedule 13 of the 2010 Act applies to cases involving schools, and states at paragraph 2 that the responsible body must comply with the first and third requirements.
64. The first requirement is set out in section 20(3) as follows: "the first requirement is a requirement, where a PCP of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".
65. Schedule 13 para 2(3)(a), states that the reference to a PCP in the first requirement is a reference to a PCP applied by or on behalf of the responsible body of a school.
66. The third requirement is set out at section 20(5) as follows: "the third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid". The duty includes the provision of auxiliary services and means anything that constitutes additional support or assistance for a disabled pupil, such as a piece of equipment or support from a member of staff.
67. The respondent's representative contends for the addition of the phrase "at the school for which the respondents are the responsible body". However, as discussed above, we consider that there are no grounds to insert these words into the statutory provisions and to restrict the scope of the provision in the way that he has proposed.
68. Schedule 13 para 2(4)(b) states that in relation to both the first and third requirements, the relevant matters are the "provision of education or access to a benefit, facility or service".
69. Schedule 13 para 2(3)(b) states that in relation to both the first and third requirements, the reference to "a disabled person" is a reference to "disabled pupils generally".
70. This reference to "disabled pupils generally" confirms that the reasonable adjustments duty is an "anticipatory duty", for cases in the education context, as is the case for the provision of goods and services and the exercise of public functions. These provisions replace similar provisions in the DDA where the duty was also anticipatory. The particular implications of the anticipatory duty were explained by Sedley LJ in *Roads v Central Trains Ltd* 2004 EWCA Civ 1541 (a claim regarding access to railway premises by a wheelchair user) in relation to the equivalent provisions under the DDA: "Manifestly no single feature of premises will obstruct access for all persons, or - in most cases - for disabled persons generally. In the present case, for instance, the footbridge is not likely to present an insuperable problem for blind people. The phrase "disabled person" in

s21(2) [of the DDA] must therefore be directing attention to features which impede persons with one or other kinds of disability: here, those whose disability makes them dependent on a wheelchair. The reason why it is expressed this way and not by reference to the individual claimant is that s21 [of the DDA] sets out a duty resting on service providers. They cannot be expected to anticipate the needs of every individual who may use their service, but what they are required to think about and provide for are features which may impede persons with particular kinds of disability – impaired vision, impaired mobility and so on. Thus the practical way of applying s.21 [of the DDA] in discrimination proceedings will usually be to focus the question and the answer on people with the same kind of disability as the claimant".

71. This approach was endorsed in relation to the exercise of public functions in *Finnigan v Chief Constable* 2013 EWCA Civ 1191 where the CA indicated that the same approach was applicable to the EqA, and clearly therefore also to the education provisions.
72. Relying on *Finnigan* and *DM v Fife Council*, the respondent's representative submitted that it is necessary to specify the class or group of disabled persons in order that a respondent can "anticipate" the needs which that group have in common. The respondent's representative thus suggests that instead of "disabled pupils generally", for the purposes of this case, the provisions at 20(3) and 20(5) should read as "pupils with autism/learning disability".
73. We had no difficulty accepting the proposition that we should identify a class or group of pupils whose needs the respondent would require to "anticipate". We were not however able to accept the respondent's representative's argument that it was not possible to specify the class or group of disabled persons in this case.
74. As we understood his argument, the respondent's representative submitted in this case that, because the claimant states that the failure to make the provision they seek amounts to a substantial disadvantage for both boys, that is not sufficient to found a requirement under section 20(3) to make a reasonable adjustment. That, he argued, is because the provision sought by the claimant in this case is, on their own evidence not capable of being applied to any group of disabled persons in general (referring to evidence of both witness 2 and witness 3 that this level of ABA would not be appropriate for children with autism in general). For other autistic children, alternative approaches would be more effective. The provision of a programme of the type sought by the claimant could only be made after the needs of the child in question had been assessed. However, in that case the provision would be made "by deciding on an individual basis" how the child's needs were best met. This, he argued, is not an anticipatory adjustment.
75. As stated above, we accept, relying on *Central Trains*, *Finnigan* and *DM v Fife Council*, that it is necessary to specify the class of pupils. Thus the requirement is for the

responsible body to take such steps as are reasonable to have to take to avoid the disadvantage, where a PCP puts those with the same kind of disability as the claimant at a substantial disadvantage. As Sedley LJ stated, the correct approach is to consider people with the same kind of disability as the claimant. In this case, the children have ASD. We are of the view that the evidence in this case clearly supports the conclusion that the class of pupils who would potentially be disadvantaged by the failure to make the reasonable adjustments contended for is children with autism. We heard evidence from witness 3 that ABA has been shown to benefit pupils with autism in particular. It is an intervention which is used in particular for people with autism, as confirmed by Scottish Government guidance and as further discussed below. We therefore accept the claimant's representative's submission that *DM v Fife Council* can be distinguished on its facts because here we do have material before us to identify the class of people for whom the application of the PCP would result in substantial disadvantage, as discussed further below.

76. The focus at this first stage then is whether the PCP puts children with autism at a substantial disadvantage. The fact that it may not benefit all pupils with autism is nothing to the point. It is not until the reasonableness question is considered, that is whether the adjustment contended for is a reasonable one, that the circumstances of the individual claimant are relevant. Thus the question of the disadvantage to the individual claimant is considered, not when looking at whether the PCP causes substantial disadvantage to the group, but whether the adjustment contended for would be reasonable taking account of the individual circumstances and whether the disadvantage can be avoided for the individual.
77. This is clear from the Technical Guidance for Schools in Scotland which the claimant's representative relied on (issued after the *Central Trains* case and which contradicts the respondent's representative's suggestion that there is a tension between paras 6.13 and 6.40). In particular at paragraph 6.40 it is stated that "Schools need to think carefully about what adjustments can be made to avoid the disadvantage experienced by the individual disabled pupil. In line with additional support for learning, the needs of the individual pupil are central. Even pupils with the same disability might need different adjustments to overcome the disadvantage. It is important not to make assumptions about a disabled pupil's needs, because this may lead a school to provide a completely ineffective adjustment".
78. With regard then to the articulation of the first requirement in a case relating to section 85, reading Section 20(3) with Schedule 13, and in the context of this case, it is appropriately stated as follows:

> "The first requirement is a requirement, where a provision, criterion or practice [applied by or on behalf of the education authority] puts [children with autism] at a substantial disadvantage in relation to [the provision of education or access to a benefit facility or services] in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".

79. Similarly, the third requirement (reading section 20(5) with schedule 13) should be articulated for the purposes of this case, as follows:

> "The third requirement is a requirement where [children with autism] would but for the provision of an auxiliary aid [or auxiliary service] be put at a substantial disadvantage in relation to [the provision of education or access to a benefit facility or service] in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid or service".

80. In essence then, the duty is to take such steps as it is reasonable to have to take to avoid the substantial disadvantage to children with autism caused by a PCP applied by the education authority or caused by the absence of an auxiliary aid or service (the third requirement.
81. We therefore require to consider the following questions:
    - What is the PCP?
    - What is the auxiliary aid or service?
    - Does the PCP/failure to provide the auxiliary aid or service put children with autism at a substantial disadvantage in comparison with persons who are not disabled?
    - Are the adjustments contended for reasonable steps to have to take to avoid the disadvantage?

What is the PCP?

82. In this case, there is a dispute about the articulation of the PCP. Much was made of this during the course of the hearing, and subsequently in submissions.
83. In the claim forms the claimant submits that "it would be reasonable for [the respondent] to directly fund the ABA programme provided at home as part of the flexible schooling arrangement and for them to adopt consistent approaches, delivered by ABA trained staff for [the children] while at school".

84. Initially in submissions, the claimant's representative articulated the PCP as "the practice of refusing to make arrangements (whether financial or practical arrangements) for the provision of ABA programmes for children with autism".
85. In supplementary submissions, the claimant's representative conceded that the use of the phrase "ABA programs for children with autism" was not helpful, and that it was clear that the PCP which is in fact in place is much wider.
86. The claimant's representative understood that this "practice" was denied by the responsible body, who deny having a policy on the matter one way or the other. He submitted, with reference to the appropriate passages of evidence, that the evidence supports the conclusion that the Council did not "do" ABA programmes within schools.
87. He relied in particular on a position paper of the Council Psychological Service, which stated that "Focusing on ABA or any other specific intervention would limit the ability of the Education Service to be responsive and flexible to the wider range of needs demonstrated by children on the autistic spectrum and with other additional support needs. For these reasons, the respondent's Education Service does not fund or promote individual therapeutic interventions for any additional support needs".
88. In supplementary submissions, the claimant's representative made it clear that he was founding on the failure of the respondent to respond to his calls for them to specify their position on ABA, or if as claimed they have no position on it, to set out the circumstances in which a programme of the sort requested would be allowed by them.
89. The respondent's representative submitted that there was no such practice adopted by the respondent. The respondent's representative submitted that "the respondents are willing to use, and do use, ABA approaches, techniques and technologies for [children with autism] consistent with paragraph 6.3.1 of the SIGN guidance, and do so if they consider that would meet additional support needs". He submitted that the circumstances do not indicate any particular PCP being adopted by the respondent. They indicate a particular decision made in the circumstances of this one case.
90. Relying on *Eweida*, the claimant's representative submitted that "even in the absence of a formalised policy on the matter, the position adopted by the council in this case (that an ABA programme will not be implemented) is capable of constituting a PCP. Here the respondent has been asked to depart from this PCP and to make provision at school and at home for an ABA programme, in line with the one already running under the FSA".
91. The respondent's representative brought to our attention in his submissions the fact that at 6.3.2 of the SIGN guidance the terms "ABA programmes such as PECs", "ABA-based technologies" and "ABA-based interventions" are used more or less interchangeably, "so the term ABA programme" does not have in itself a specific meaning". We took the respondent's representative's submission to be an argument relating to the refusal to

implement so-called ABA "technologies", which was denied by the respondent, rather than a refusal to implement an ABA "programme".

92. It had however been apparent to the tribunal throughout the hearing that parties were distinguishing an ABA programme and so-called ABA "technologies", which we readily understood to be approaches, or methods or techniques. We therefore understood an ABA programme not to be one specific method, intervention or technique, but rather to be an overarching educational provision such as the one delivered by Skybound in this case.
93. It was this that we understood to be referred to and we have, as the respondent's representative did in his submissions, set out the specifics of the "programme" which is being sought as an adjustment by reference to the recommendations in the report of witness 3.
94. In coming to our conclusion on the question of a PCP, we relied on a number of principles. These principles have been established primarily in the employment context when interpreting the concept of PCPs for the purposes of indirect discrimination, but nevertheless they are relevant here. The first is that these provisions are construed broadly (*Starmer v British Airways* 2005 IRLR 862); it is for the claimant to articulate the PCP (*Allonby v Accrington and Rossendale College* 2001 EWCA Civ 529); but it is a question of fact for the tribunal (*Jones v University of Manchester* 1993 IRLR 218); it includes formal or informal policies and it can be framed as a negative (EHRC Code of Practice); there is no requirement for it to be an absolute bar and it extends to a discretionary management decision applied only to the claimant (*Starmer*).
95. We accept the evidence of the respondent's witnesses, and in particular witness 5, that the respondent is not adverse to the use of, and does use, methods which could be described as ABA approaches. Although she said that she was not aware of a practice or a policy in regard to the use by the respondent of ABA programmes, we did not consider that she was an appropriate witness to confirm council policy. However, we conclude, relying on the position paper, as well as oral evidence regarding the practice of the council, there is a refusal by the respondent to implement ABA programmes, of the sort that is proposed here.
96. It follows that we accepted the claimant's representative's submission that the respondent operates a policy or practice that it will not fund ABA programmes.
97. Our conclusion on this point was reinforced by the factors which the respondent relied on when arguing that the implementation of such a programme would be unreasonable, discussed further below.
98. The respondent's representative argued that even if it were correct that the respondent has a PCP of "refusing to make arrangements for the provision of ABA programmes for

children with autism" that would still not be a PCP for the purposes of section 20(3) because it could only be a practice adopted in relation to children with autism and not pupils in general. Relying the case of *Finnigan*, he submitted that "it cannot be said that this case concerns a practice (or a criterion or provision) which the respondent applies to everyone. At most it concerns a practice which the respondents adopt in choosing between specific types of provision for children with autism. Therefore section 20(3) has no application in this case".

99. We did not accept that submission. We consider that the respondent's representative's reliance on *Finnigan* is misconceived in this context. In that case the PCP which was relied on was criticised as impermissibly including the adjustments sought, rather than simply the base position before adjustments. That is not the case in relation to the PCP identified here.

100. A PCP can be framed in the negative. Here the PCP is not making arrangements for the provision of ABA programmes. Although the claimant's representative had added in submissions (but not in his claim form) "for children with autism" he clarified his position in his supplementary submissions.

101. We conclude in this case that the PCP is the refusal to make arrangements for the provision of ABA programmes. We find as a matter of fact that this was a PCP which was applied not only to children with autism, but to all pupils. We find as a matter of fact that the respondent had a blanket policy of not funding ABA programmes. That impacts on all pupils, although we will turn later in this judgment to the question whether children with autism suffer a substantial disadvantage because of that policy. The identification of the PCP is of course crucial because it impacts on the application of the subsequent stages of the legal tests, which apply the PCP identified.

What is the auxiliary aid or service?

102. The claimant's representative also argued that there had been a failure to provide an auxiliary aid or service. He submitted that "the auxiliary aid or service in this case is the provision of the ABA programme across both school and home environments delivered by qualified and experienced staff in this specialist field" and submitted that the failure to make such provision amounts to substantial disadvantage for both children.

103. The respondent's representative suggested that this claim more readily sits within this provision, because the provision of ABA techniques by staff qualified in ABA could be described as an auxiliary service (referring to 6.58 of the Technical Guidance). However, since the claimant described the auxiliary aid or service as the provision of the ABA programme across both school and home environments delivered by qualified and experienced staff in this specialist field, this cannot apply in this case because, he

submits, the tribunal does not have jurisdiction to order the respondent to pay for the provision at home, and is in any event subject to the same objections made in relation to section 20(3).

104. We have discussed above why we do not accept that submission. We are of the view that the scope of "auxiliary aid or service" is wide enough to include ABA programmes, so that we find that there is a failure to provide an auxiliary aid or service.

105. We turn now to consider whether that failure, and/or the application of the PCP, places children with autism at a substantial disadvantage.

Does the PCP/failure place children with autism at a substantial disadvantage?

106. The reasonable adjustment duty is only triggered where a PCP is applied or where there is a failure to provide an auxiliary service (in this case the refusal or failure to provide ABA programmes) which puts disabled pupils generally (here children with autism) at a "substantial disadvantage".

107. The duty to make reasonable adjustments arises where children with autism are placed at a substantial disadvantage 'in comparison with persons who are not disabled' (Section 20(3) and (5)). Although this indicates a comparison with the general population, that is not how the relevant provisions have been interpreted. Although a comparative exercise is required, unlike direct or indirect discrimination, a like for like comparison is not appropriate **(***Archibald v Fife Council* [2004] IRLR 651 HL) and therefore there is no requirement to identify a comparator or comparator group in similar circumstances as under section 23 (*Griffiths v DWP* [2015] EWCA Civ 1265). As it is put in the EHRC Services Code, para 7.13, the disadvantage created by the lack of a reasonable adjustment is measured by comparison with what the position would be if the disabled person in question did not have a disability. As further explained in the EHRC Employment Code, on equivalent provisions, 'The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular PCP..... disadvantages the disabled person in question" (para 6.16). This approach was also approved in the education context by the Inner House in the *DM v Fife Council.*

108. We considered that the question here to be determined was whether children with autism, but for the PCP and/or but for the failure to provide the auxiliary service, are put at a substantial disadvantage in comparison with pupils who do not have that disability.

109. The requirement will only arise where any disadvantage suffered by the claimant is 'substantial'. This means 'more than minor or trivial' (s212(1)) (i.e. "of substance"/"material" rather than "large") which is a relatively low threshold.

110. Applying the identified PCP here, or the failure to provide the auxiliary service, could it be said that children with autism are put at a disadvantage which was more than minor or trivial?

111. The claimant's representative argued, relying on the SIGN guidance which lists ABA approaches under the heading "intensive behavioral and developmental programmes", and while recognising that ABA has a "wide range of applications at varying intensities", that the benefits of ABA programmes should be considered on a "case by case basis". He argued that a practice which means that the responsible body refuses to make provision for ABA programmes on a blanket basis, places pupils with autism at a substantial disadvantage, denying them access to an evidence based intervention which may well be of use to them.

112. The claimant's representative submitted that the evidence shows that it is working well for the children, and that to deny them this provision would result in substantial disadvantage.

113. In contrast, the respondent's position is that the evidence base for the efficacy of ABA is mixed. The respondent relies on the fact that while "current research indicates that there may be a benefit to using behavioural approaches for some children on the autistic spectrum…the research is not sufficiently refined to be able to determine the characteristics of children with autism for whom specific interventions are effective or ineffective. This leads them to conclude that "it is important to ensure that a range of intervention tools are available, as appropriate to the individual, and that there is ongoing assessment of impact and the outcomes achieved…..in keeping with the principles of GIRFEC".

114. We take it from that that the respondent accepts that there "may be a benefit" to ABA programmes. They may suggest that any benefit is outweighed by other factors, but that is a matter for consideration at the next stage of the test.

115. We heard evidence about the value not just of ABA "approaches" but also of ABA programmes. They are utilised in some schools in England and Wales.

116. We accept that ABA programmes, although not necessarily appropriate for all children (with autism) are an accepted approach, as confirmed not least by its inclusion in the Autism Toolbox, A Resource of Scottish Schools. There is evidence to support their efficacy (and no evidence to suggest that they are discredited) and evidence in this case that the children are benefitting.

117. Given the low threshold, here children with autism (including the children in this case) are deprived of the opportunity for ABA programmes funded at home or utilised at school. We accepted the claimant's evidence that the children were making progress under the programme and that it was benefitting them. We accepted that to deprive

them of the opportunity to be considered for those benefits would put them at a disadvantage, even to the extent of being deprived of a choice. We were of the view that this amounted to a substantial disadvantage, were they not disabled, and compared with pupils who are not disabled.

Are the adjustments contended for reasonable steps to have to take to avoid the disadvantage?

118. The duty arises only in respect of those steps that it is reasonable for the responsible body to take to avoid the disadvantage experienced by the disabled person. What is reasonable in any given case will depend on the individual circumstances of the disabled person. The test of reasonableness in this context is an objective one (*RBS v Allen* 2009 EWCA Civ 1213).

119. While we accepted that if there is no prospect of a disabled person benefiting from a proposed adjustment, it is unlikely to be reasonable (*Romec Ltd v Rudham* EAT/0069/07), nor does there have to be a good prospect of an adjustment removing a disadvantage for that adjustment to be reasonable (*Noor v Foreign and Commonwealth Office* [2011] ICR 695 EAT).

120. A respondent is not entitled to require a disabled person to pay the costs of complying with the duty to any extent. However the cost of an adjustment may be a relevant factor in determining whether it is reasonable (section 20(7)).

121. The EHRC Technical Guidance sets out at para 6.29 some factors which should be taken into account when considering what adjustments it is reasonable for a school to make, namely: the extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil; the extent to which support will be provided to the pupil under the 2004 Act; the resources of the school and the availability of financial or other assistance; the financial and other costs of making the adjustment; the practicability of the adjustment; the effect of the disability on the individual; health and safety requirements, the need to maintain academic, musical, sporting and other standards; and the interests of other pupils and prospective pupils.

122. In his submissions, the claimant's representative considered in turn the various factors to be taken into account when determining whether adjustments were reasonable.

123. The respondent's representative submitted that these factors are indicative, and non-exhaustive, which we readily accepted. He submitted that in deciding whether the adjustment is reasonable the tribunal ought to take into account the reasons set out by

the respondent for declining to make the provision in this case. Those are summarised in the respondent's case statement form at pages R144 and R145.

124. We considered these factors and the respondent's reasons in our deliberations as follows:

The extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered

125. The claimant's representative relied on the evidence of the claimant's witnesses to confirm the efficacy of the current ABA programme in meeting the children's additional support needs. He submitted that its efficacy as an intervention for pupils with autism is further confirmed by its inclusion within the Autism Toolbox and SIGN Guidance.

126. As discussed above, the respondent's position is that the evidence base for the efficacy of ABA is mixed. The respondent relies on the fact that while "current research indicates that there may be a benefit to using behavioural approaches for some children on the autistic spectrum…the research is not sufficiently refined to be able to determine the characteristics of children with autism for whom specific interventions are effective or ineffective".

127. We have discussed above the fact that we have accepted that the children have made progress under the ABA programme, and we accept in principle that any disadvantage suffered by the children could potentially be overcome by the implementation of the programme at school as well as at home.

The extent to which support will be provided to the pupil under the Education (Additional Support for Learning) (Scotland) Act 2004, as amended

128. The question of the need for the CSPs to be amended will require to be considered following the determination of the Equality Act 2010 case.

The effect of the disability on the individual

129. The claimant submits that the children's significant learning difficulties are currently being effectively addressed by way of their ABA programme at home. As above, we accept that the children are benefitting from the ABA programme at home.

The practicability of the adjustment

130. It was this aspect which caused us to question in particular whether such an adjustment, to implement the programme at school in particular, but also to fund the provision at home, was a reasonable one.

131. The claimant's representative submitted that the transition to implementing the ABA programme in school as well could be easily and smoothly achieved given that experienced practitioners with a strong track record of success were in place.

132. In contrast, the respondent has serious concerns about the practicability of working with a third party provider. In particular, in their response they stated that "the delivery of [Curriculum for Excellence]….would be significantly compromised by a third party provider directing the teaching and learning approaches to be used", and relied on Building the Curriculum 3 (page 18), which states "Whenever a child [is]….undertaking learning activities, the school retains the responsibility for planning, with its partner, the most appropriate educational provision for that child….partner organisations will need to share an understanding of the experiences and outcomes to which they are contributing."

133. The claimant's representative submitted that it is not uncommon for schools and education authorities to engage external consultants in matters of additional support needs, and for independent third party providers to be involved in the provision of social work services, as well as being part of a multi-agency planning for children with additional support needs. Further and in any event, the claimant's representative confirmed that the claimant is not necessarily seeking the use of "a private partner" in relation to the implementation of the ABA programme. He suggested that the BCBA could be engaged on an individual basis, as an employee or on a consultancy basis, and might (over time) look to support an existing member of staff to achieve the necessary qualifications. Arrangements could be made to recruit or second the person in question, which would also allow the respondent to build up an expertise in this area.

134. The respondent set out a number of specific and practical concerns with ABA in their response, in relation to which we heard evidence. Their position is that as an education provider they must be aware of concerns evidenced in the research and respond to advice, especially from SLT and Educational Psychology.

135. The respondent expressed particular concerns about:

a. the training of staff by a third party provider, and who would approve it and ensure it was well-delivered;
b. the provider requiring respondent's staff or NHS partners to implement a strategy contrary to accepted practice and advice;
c. who is responsible for quality assurance;

d. delivering CfE across the breadth of the curriculum and to the appropriate depth alongside the implementation of ABA which directs learning in a prescriptive way;
e. linking assessments and target setting to the teacher's role in assessment and target setting using CfE, national guidance on assessment, benchmarking and planning for learning where practices may be differing;
f. linking assessments and advice provided by other local authority agencies (as required by the 2004 Act).

136. In considering these submissions, we took account of the evidence which we heard from witness 5 in this regard. She expressed concerns about an exclusive ABA approach. In particular she expressed concerns about potential difficulties if an ABA programme recommended an approach to teaching which was incongruent with the practice of the respondent. She gave the examples of the approach to teaching literacy, such as concerns about the approach of ABA programmes that to be able to read a sound the children would have to be able to produce the sounds verbally. She had specific concerns about the use of Talktools, which is not recommended by SLT.

137. She also gave the example of approaches to assessment, noting for example that psychometric testing which is used by Skybound is not considered best practice by the council. Witness 5 in any event queried the efficacy of the individual assessments currently being undertaken by Skybound, which record only linear progress, but make no comparison with other groups at the same age and stage. We understood witness 5 to say that it would not be possible to take the same approach to assessment in the classroom, not least because it could not be integrated with the CfE approach.

138. She was of the view that limiting the approach taken in this way may disadvantage the children by not giving them the benefit of alternative approaches available to other children in the area; she thought that access to a wider range of support strategies and teaching approaches may be of benefit to them, and that flexibility was needed to respond to the best educational practice and knowledge which is continually evolving and to ensure teaching methods can be adapted to be most effective.

139. Concerns were also expressed by witness 6 in particular regarding the use of Talktools and PROMPT, which are techniques which are not advocated or supported by the respondent due to professional guidance and clinical decision-making related to the use of pro-motor approaches.

140. We heard about the difficulties that would arise if the ABA programme were to focus exclusively on ABA methods and particularly if it were to run in parallel with other teaching methods in the classroom setting, and if tutors trained in this alternative discipline were tutoring alongside class teachers following Curriculum for Excellence.

141. We had particular concerns about the compatibility of the ABA programme with Curriculum for Excellence. Witness 5 in oral evidence suggested that the approach taken by the ABA programme was not compatible with Curriculum for Excellence. She had concerns about a class teacher working alongside an external provider taking differing approaches to learning. She had concerns about implementing national guidance on assessment, benchmarking and planning for learning where practices may differ. She said it would be challenging for a class teacher to plan lessons and the curriculum according to an approach with which they were not familiar, or duty bound to take. It would take a very high degree of planning to integrate the ABA approach with CfE, and she was "not sure practically how that would work". She gave an example of the music group, which is based on a different underlying pedagogy which was not in keeping with the ABA modelling/reinforcing behaviours approach. She was not aware of any situation where external providers were teaching a different programme from other children in the class, and she was not aware of any other school in Scotland implementing an ABA programme.

142. The claimant's representative relied on the evidence of witness 3 that there is no difficulty in combining the two, in the same way that ABA is used with the curricula in England and Wales and elsewhere, as required. He submitted that ABA is not a curriculum, but a methodology, about how not what is taught.

143. While witness 5 may well have accepted this, we noted that in the Autism guide it talks of an "individualized approach to curriculum planning". We were of the view that these concerns, about taking two different approaches to teaching, in a mainstream classroom led by a class teacher, were well-founded. We were of the view that witness 3 did not fully understand how CfE requires to be implemented. Even if the evidence in support of the efficacy of ABA fairs well in comparison with other approaches, the fact is that there are aspects of the programme proposed which are not approved and implemented by the respondent, following evidence based advice from SLT and educational psychology. It seems to us that it would not be possible or at least disproportionately difficult and resource intensive to marry the ABA approach with the CfE approach in a mainstream classroom in particular. We therefore accept the evidence of the respondent's witnesses that the delivery of the required curriculum may be compromised by the interventions of ABA trained tutors.

144. We accepted that other concerns expressed by the respondent had some force. In particular, it was appropriate for them to take account of quality assurance issues in respect of training of, and accountability for, staff of by a third party provider.

145. In supplementary submissions, the claimant's representative confirmed that the claimant is seeking a situation in which the tutors, and the supervisory BCBA, are

employees/agents of the respondent who would work both at school and in the home, with a view to moving towards full-time school attendance.

146. However, we were of the view that that even if the specialists were to be employed or engaged by the respondent that would not address these concerns, particularly about alternative approaches to teaching being taken in parallel. Further, every adult working with the children would have to have a basic understanding of this ABA approach, as the burden could not lie only with the PSAs to implement the programme throughout the school day.

147. For all these reasons, we did not consider that the proposed adjustment specifically in relation to the delivery of the ABA programme at school was practicable, and we considered that this was a factor which should be afforded significant weight.

The resources of the school and the availability of financial or other assistance; and the financial and other costs of making the adjustment

148. The cost to the respondent of implementing the claimant's request is a matter of agreement between the parties. They are £27,431.50 per child, with additional, non-recurring training costs for year one of £10,303.50 per child (although the claimant's representative said that employing trained and experienced ABA tutors would negate these additional costs).

149. The claimant's submission is that "the costs associated with their programme are not unreasonable when set against the potential escalation (without ABA) from two support assistants in the mainstream (current provision) to a supported special education placement, to residential care (the cost of school B for children with Autism is £140,000 Monday to Friday including transport).

150. We understood that the parents are not now seeking provision of ABA outwith the school week, nor the additional travel costs which may be incurred if the BCBA is at a distance, as the current providers are.

151. The respondent has concerns about the cost implications of the issues around the interplay with the third party provider in particular, which they consider to be unquantifiable. Their position is that what the claimant's request is going beyond what other schools might spend, and indeed given the recommendations of witness 3, their statutory duty to provide education in terms of the 2004 Act.

152. We did not understand the respondent to be relying specifically on the cost of the provision when it came to the question whether this was a reasonable adjustment. Rather their concern was about incidental and follow-on costs of provision by a third party provider.

153. In coming to our conclusion on this question, we have taken into account the fact that there will be additional unquantifiable costs both financial and in resource terms of engaging and dealing with a third party provider, and ensuring that all adults in the school working with the children have a basic understanding of the approach taken, which we understand is the approach in school D, where the whole school has embraced the philosophy.

Health and safety requirements

154. The claimant's representative submitted that in the absence of an effective ABA programme, the approach taken at school is reinforcing negative and challenging behaviours, and will lead in the longer term to developing risks to their health and safety. We did not accept that submission.

155. On the point made about the difference in behaviours at home and at school, we noted the evidence of the claimant's witnesses. It was also the subject of comment by the independent children's advocacy worker, as highlighted by the claimant's representative: "Both children would bang the table, rock back and forth, flap their hand and fidget indicating distress, in school only, I did not observe this on the two occasions I saw them in the home." (p7). "Both boys were also observed to shout and cover their ears with their hands in school." (p6 & 7). "Both children's behaviour in terms of their engagement, interaction and enjoyment vastly differed from the classroom setting to that of the home setting." (p8).

156. We did not accept, on the evidence that we heard, that there was any risk to the children's health and safety if the respondent does not implement the ABA programme. We accepted the evidence of the respondent's witnesses that the children are making progress at school and we had no concerns about their welfare.

157. We noted witness 5's evidence that there were sensory aspects of a mainstream classroom which could be unpredictable, and she would anticipate, as with all children, that they would be more relaxed and comfortable in their home environment especially as they spend significantly more time there.

158. We thought that this was an inevitable result of balancing their unique needs while giving them the opportunity to mingle with their peers which mainstream brings. By its very nature, a mainstream environment with have a number of distractions, and will present challenges for children with sensory and processing difficulties.

The need to maintain academic, musical, sporting and other standards

159. The claimant's representative submitted that without the ABA programme, the children's educational standards are likely to regress.

160. The parent's position is that the children have benefited from ABA provided at home. This is the choice of the parents which the respondent has been content to accommodate. It could not be said however, that the failure to fund ABA at home or to implement the programme contended for at home would impact on these standards, because the parents are free to continue to fund the ABA programme at home should they wish. We did not believe that the evidence` supported the conclusion that, with the current agreed support for certain ABA approaches, the children would not continue to progress, as we have found that they are progressing at school.

The interests of other pupils and prospective pupils

161. The claimant's representative submitted that there is an inherent benefit to all pupils in children with disabilities being educated alongside non-disabled pupils in a mainstream school.

162. While we accept that there are such benefits, we did hear some evidence regarding the potential impact on other pupils if tutors were teaching alternative methods to other teachers in the classroom. We have taken this into account in our overall assessment of the reasonableness question.

Other factors

163. The respondent submits in their response that they have made such adjustments as are reasonable in this case. These "have included adjusting the school week at parental request, working with partners to implement supportive strategies and working with parents to monitor and develop in-school delivery" and in particular agreeing the flexi-schooling arrangement. They stated that they have delivered a range of interventions, some of which are (in their view) ABA recognised, such as PECS, Task Analysis or chaining, prompting, fading and modelling, as well as other supports and resources set out in their response, including: Proloquo2go following training delivered by the parents, one to one PSAs who have had training on the children's specific needs; learning via the community; and access to the sensory room and ball pit at school C. The respondent thereby considers that it has taken all reasonable steps to meet the parents wish to implement ABA across the two environments of home and school. The respondent's witnesses also offered, in the evidence to this tribunal, to take further appropriate steps to address the parents' concerns, short of implementing the programme, and have also

offered to consider other alternatives, such as specialist provision. We accept that the respondent has gone to some lengths to accommodate the children in a mainstream setting.

164. Further, we did not consider that it was therefore appropriate or reasonable for the respondent to fund the ABA programme at home (and to supply tutors or supervise tutors, or for them to be supervised by a third party provider) where a different approach to learning was being taken that was not advocated, approved or required by the respondent.

165. Taking all of these factors into account, and in particular the practicability of implementing the ABA programme proposed, we came to the view that funding for the ABA programme at home and implementation of the programme at school, was not a reasonable adjustment.

Indirect discrimination

166. Section 19(1) of the 2010 Act, headed indirect discrimination, when applied to the protected characteristic of disability, states that "A person (A) discriminates against another person (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to [B's disability]". Section 19(2) states that "a provision criterion or practice is discriminatory in relation to [B's disability] if (a) A applies, or would apply, it to persons with whom B does not share the [disability], (b) it puts, or would put, persons with whom B shares the [disability] 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".

167. We are therefore required to consider the following questions:

- What is the PCP?
- Does that put those who share the children's disability (autism/learning difficulties) at a particular disadvantage when compared with others who do not share that disability?
- Does it put the children at that disadvantage?
- Can the respondent show that the PCP is a proportionate means of achieving a legitimate aim?

PCP applied

168. The claimant's representative, relying on the PCP articulated above, argued that the respondent's practice of refusing all requests for ABA programmes places pupils with ASD at a particular disadvantage. They are the principal likely beneficiaries of such a

programmes which, while not autism specific, are widely recognised and demonstrated as effective for children with autism. That practice applies or would apply across the board, that is the respondent would also refuse a request for a child who was not disabled. Relying on the council's position paper, their opposition is to funding or promoting ABA or similar programmes for "any additional support needs". Such children are put at a particular disadvantage when compared with pupils who are not disabled, and specifically, do not have autism.

169. Relying on *Essop*, he argued that there is no requirement for a claimant to prove the reason why a PCP puts or would put an affected group at a particular disadvantage, as a causal connection is sufficient.

170. The respondent's representative argued that the claimant's claim fell at the first hurdle, that is that the claimant's PCP, namely "the practice of refusing to make arrangements (whether financial or practical arrangements) for the provision of ABA programmes for children with autism….. [which] is clearly a practice which is not applied to children who do not have autism", but rather that it was a practice by which the respondent determines the provision that they make for children that do have autism.

171. We are clear that a PCP can be framed in the negative, in respect of an omission or failure. While the claimant's representative framed the PCP in his submission as a practice of refusing to make arrangements for children with autism, he clarified his position in supplementary submissions. In any event, we have found as a matter of fact that it is a practice/policy which is applied not only to children with autism but also a practice which is applied to disabled pupils generally, and indeed non-disabled pupils. We have found as a finding in fact that the respondent would not fund ABA programmes for children with autism or for children without autism or for pupils with disability generally or for pupils without disability.

172. The respondent's representative seemed to suggest that the fact that there was no evidence of the respondent having refused an ABA programme to non-disabled pupils helped his argument. But that is to ignore the hypothetical nature of the provision, which uses "would put", provisions specifically inserted to comply with European law to include hypothetical comparisons and circumstances.

173. This is a necessary component of the indirect test, ie that it is a neutral provision which is applied to everyone (otherwise it would be direct if applied to one group sharing a protected characteristic and not another). We therefore accept that a PCP has been applied to everyone, as required by the provision.

Disparate impact

174. We accept on the evidence which we heard, and based on the documentary evidence lodged, that the claimant has sufficiently demonstrated that children with autism will suffer particular disadvantage compared with other disabled children, or children generally, by the refusal of the respondent to implement ABA programmes. We noted for example the evidence of witness 3 that the lack of ABA programmes has a disproportionate impact on autistic pupils, because such programmes are particularly suitable for them. This oral evidence was borne out by the documentary evidence, in particular at appendix 4 of her report, that "recent research had confirmed the EIBI (Early Intensive Behavioural Intervention) provides significant positive impact on a wide range of skills in children with autism, referring to some researchers who suggest that it is "the treatment of choice for children with autism".

175. This is supported by reference in the SIGN "Assessment, diagnosis and interventions for ASD: a national clinical guideline" (updated June 2016) that "EIBI, based on the principles of ABA delivered with an intensive…and comprehensive…approach can positively affect some children with ASD. A Cochrane Review concluded that while EIBI cannot be recommended universally, it should be considered on a case by case basis" and that "behavioural interventions may be considered to address a wide range of specific behaviours, including those that challenge, in children and young persons with ASD, both to reduce symptom frequency and severity and to increase the development of adaptive skills".

176. We therefore accepted the claimant's representative's submissions, and concluded that the respondent's policy of refusing to fund/implement ABA programmes is one which has a disparate impact, and particularly disadvantages, children with ASD, since we accepted the evidence that they were the primary beneficiaries of such programmes.

Children put at that disadvantage

177. It is clear that the children are put at that disadvantage since the respondent has refused to fund the ABA programme in this case, depriving them of the choice of such a programme and/or the opportunity to benefit from it.

Objective justification

178. On the question of objective justification, the claimant's representative submitted that the position adopted by the respondent cannot be said to be a proportionate means of achieving a legitimate aim, since the respondent does not set out a defence of objective justification in the case statement at all. The claimant's representative submitted that the question of objective justification (and how it might differ from the reasonableness question) was therefore academic because it had not been plead by the respondent.

179. We had not understood the respondent's case statement response to have precluded reliance on that provision (notwithstanding reference to the specific provisions of the legislation added to the case statement at R146 and R147). We were of the view that the evidence which we heard did indicate that the respondent would be relying on that provision, as well as on their submission that the adjustment was not reasonable in the circumstances.

180. However, we note that it is not relied on by the authority since the respondent's representative essentially made no submissions on the point, despite a direction from the tribunal to do so. Rather, he relied on the tribunal concluding that the claimant had not met the first hurdle, and therefore that the issue did not arise.

181. Clearly we did not agree. Conclusions on the evidence are a matter for the tribunal. It is for the tribunal having heard the evidence to make findings in fact. We were at a loss to understand the respondent's representative's position. It is standard practice to argue an "esto" case. It does not involve any acknowledgement that the primary argument is wrong. It is a universal practice for representatives to make their primary argument, but to proceed, in the event that the tribunal is not with them on that, to make an argument in the alternative. Although submissions on the point were invited from both parties, the claimant's representative did not consider it necessary to make any submissions on objective justification because the respondent's representative did not argue the point.

182. We have given careful thought to the appropriate response in this situation. We have however concluded that the fact that an argument is made or not made in submissions is beside the point when it comes to the outcome of a claim. The tribunal requires to base its decision on the evidence heard, and the facts found. We have therefore based our decision on our findings in fact as applied to the legal tests.

183. In particular, we were of the view that the evidence which we have heard does provide sufficient justification for the PCP. We have found that the evidence to implement an ABA programme in a mainstream school setting is not a reasonable adjustment. As is very common in cases under the Equality Act, the evidence which supported our conclusion that the adjustment sought was not reasonable also supports our conclusion that the PCP was a proportionate means of achieving a legitimate aim.

184. The PCP in this case was the refusal to fund ABA programmes. We have made a finding in fact that the respondent has taken a view that it will not fund ABA programmes. In particular, we have concluded that the respondent's policy at AC476, para 3.4 is a policy which is in place and is applied across the board, in particular "focusing on ABA or any other specific intervention would limit the ability of the Education Service Staff to be responsive and flexible to the wider range of needs demonstrated by children on the

autistic spectrum or with other additional support needs. For these reasons, the Council Education Service does not fund or promote individual therapeutic interventions for any additional support needs". We also heard evidence from witness 5 about the concerns that ruling out other methods or approaches might deprive a pupil of beneficial interventions. We accepted that this was a legitimate aim.

185. We then considered whether the means of achieving that aim could be said to be proportionate. In this case, we have heard about the lengths which the respondent has gone to, set out in paragraph 164, with a view to accommodating the wishes of the parents. Not least, the respondent has supported the use of the ABA programme at home as part of the FSA, and to accommodate as far as they are able ABA methods and technologies within their teaching at school, to liaise with the parents at home to replicate, so far as possible, the approaches being taken at home, and to offer further consistent approaches so far as they are able. We conclude therefore given that the PCP allows for discretion to that extent, that the response is proportionate in the circumstances.

Conclusion

186. Thus the tribunal finds that the respondent has not failed to comply with the duty to make reasonable adjustments in terms of section 21 of the Equality Act 2010; and that any indirect discrimination is objectively justifiable. The claims under the Equality Act not being well-founded are dismissed.

187. The parties are ordered to provide written submissions in respect of the references in regard to the CSPs within one month of this decision, that is by 17 May 2019.