Additional Support Needs
Tribunals for Scotland

DECISION OF THE TRIBUNAL

Claim Procedure

1. This is a claim under the Equality Act 2010 in which the claimant seeks certain remedies (C39-40, claimant's submissions, paras 30-31). A hearing took place in May 2015, followed by further procedure, including a period for written submissions, followed by deliberations between the tribunal members. The bundle consists of Tribunal papers (T1-T65), claimant's papers (C1-40) and responsible body's ('RB') papers (R1-R47).

2. The further procedure prior to the directions for written submissions related to points on which we formed the view that additional evidence may be required. This led to the hearing being adjourned for the parties to agree wording of the Behaviour Support Plan ('BSP'), in the event that we made a finding that discrimination had occurred. Directions were issued in May 2015 (T46-47) on this further procedure. In the event, wording was not agreed, and the parties sought time to lodge further written evidence. Directions were issued later in May 2015 (T48) setting a deadline for further written evidence and subsequent deadlines for written submissions. Following receipt of that further evidence and submissions, the tribunal deliberated.

Summary of the Decision

The tribunal finds that discrimination under s.21 of the 2010 Act has occurred and grants the following remedies:

1. The tribunal finds and declares that the responsible body discriminated against the child in relation to access to the 'Safespace' facility, by failing in its duty to take reasonable steps under the first and third requirements of the duty to make adjustments in s.20(3) and (5) of the 2010 Act, and in so doing, discriminated against the child under s.21 of the 2010 Act.

2. We order the responsible body to issue a formal letter to the child and his parents apologising for having discriminated against the child. This written apology must comply with the Scottish Public Services Ombudsman's guidance on apology. The written apology must be issued by August 2015.

3. We order the responsible body to amend the child's Behaviour Support Plan by replacing the text in the section under the heading 'Plan for Implementation of the 'Safe Space'' with the following text:

"1. Timetabled individual sessions should be used to make the child aware of the Safespace within the Support for Learning Unit of the school A and to encourage its appropriate use there.

2. The child will be taught and encouraged to use a PECS symbol for Safespace as one way of indicating that he wishes to use the Safespace.

3. School staff should encourage the child to make use of the Safespace when he is experiencing sensory overload.

4. The Safespace should be considered by school staff for use when the child shows signs of sensory overload, for example putting his fingers in his ears, repetitive verbal tics, increase in anxiety and agitation."

We order that these changes are made and that the new BSP is issued to the relevant school staff and the claimant by the date on which the child returns to school in August 2015, following the current summer break.

[Part of this paragraph has been removed by the Chamber President for reasons of judicial utility under rule 101(3)(c) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]

4. We order that the responsible body complies with the terms of the amended BSP in full from the date of its issue, and that the amended part of the BSP may only be further amended where there occurs a material change of circumstances following the issue of the amended BSP.

Findings in Fact

1. The child is a pupil at the school A. He is 18 years old. The claimant is his father. The child has attended the school A since October 2012. He is due to attend there for at least one more academic year from August 2015.

2. The child has a diagnosis of Autistic Spectrum Disorder (ASD). Due to this, the child has severe sensory processing difficulties, which can have an impact on his behaviour. His receptive and expressive language skills are impaired. He has impaired social communication skills. His language and communication skills are delayed and disordered.

3. The child shares his classroom with one other pupil (sometimes there is a third in the room). The child uses a room adjacent to his classroom, known as the 'Quiet Room' (or 'Multi-sensory Room'). In that room, the child has access to a number of resources including a CD player, bouncy ball, peanut ball, big cushion for sitting on and a weighted blanket. The child uses the Quiet Room regularly for peace, calming, exercise and listening to music. The Quiet Room is provided for in the child's CSP (C21).

4. The child's behaviour can be challenging, consisting on such occasions of stamping, biting, hitting, nipping, smearing, removing continence aid, throwing and tipping objects. Instances of such behaviour are not common, but the school staff do, on occasion, require

to use calming techniques to help the child relax. For example, in March 2015, following a school trip, the child, while in the Quiet Room, became suddenly anxious and loud. Calming techniques were employed by staff; the child remained in the Quiet Room, but was upset and his parents were contacted, leading to the child being taken home. In May 2014, the child became anxious while out on another trip. Calming techniques were successfully used by staff members.

5. The child takes medication to help him relax, reduce his anxiety levels and to improve his concentration.

6. The child has a Coordinated Support Plan ('CSP') under the Education (Additional Support for Learning) (Scotland) Act 2004 ('the 2004 Act') (at C14-23). In that CSP, there is provision for a 'Safespace' to be made available within the complex additional support needs provision for the child and for his use of this facility to be incorporated in the child's Behaviour Support Plan ('BSP'). This provision in the CSP was an agreed addition following a negotiation between the claimant and responsible body of a previous reference to the Tribunal under the 2004 Act. This provision in the CSP appears under the 'Additional Support Required' column of that document (at C21).

7. A facility known as a 'Safespace' has been purchased by the responsible body. It has been constructed in a room in the Support for Learning Unit of the child's school. 'Safespace' is a trade name for a tent-like structure available for children who may benefit from the provision of a 'chill out space' or an area in which to calm down following a crisis situation, such as an episode of challenging behaviour. The Safespace has been constructed since January 2015. A description of the uses of the Safespace is set out in publicity material at C5-C6.

8. The responsible body was required by the Tribunal to construct the Safespace facility in the school A following a reference by the claimant under the Education (Additional Support for Learning) (Scotland) Act 2004 ('the 2004 Act') in which the claimant argued that the responsible body had not complied with the terms of the child's CSP.

9. A BSP was prepared by the responsible body for the child (C24-25). The current version of the BSP contains a section on 'Plan for Implementation of the Safe Space' (C25). This section of the BSP sets out the conditions under which the responsible body expects the Safespace to be used for the child. Since these conditions have not yet been met, the child has not used the Safespace. The child has been shown the Safespace.

10. A Safespace facility is available for the child at home. It was installed there in 2010. It is very beneficial for the child, and its use had an impact on his sleeping, anxiety levels and medication dosage. It has also successfully been used at home by the child himself and by family members to help calm the child during episodes of challenging behaviour.

Reasons for the Decision

1. The parties accept that the child has a disability as defined under s.6 of the 2010 Act, and it is clear to us that this is the case. The claimant argues that the responsible body ('RB') has discriminated against the child in failing in its duty to make adjustments under s.20 of

the 2010 Act in relation to the provision of the Safespace facility. The RB argues that it has complied with this duty.

2. The terms of s.136 of the 2010 Act have the effect of requiring the claimant to make out a *prima facie* (on the face of it) case, and if this is done, the burden of proof then shifts to the RB. This dynamic is explained in the Explanatory Notes to the 2010 Act at the relevant part of paragraph 443 as follows:

> "This section provides that, in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act."

So, the ultimate burden falls on the RB, as long as the claimant has led evidence which points to a breach of the Act having occurred.

3. The claimant argues that the RB has failed to comply with the first and third requirements, being component parts of the duty to make adjustments, as set out in s.20(3) and (5) of the 2010 Act. The RB is obliged to comply with these requirements – Schedule 13, para 2.

4. Guidance on the 2010 Act is available, in particular the Equality and Human Rights Commission's documents *Technical Guidance for Schools in Scotland* 2013 ('the Technical Guide'); *What equality law means for you as an education provider: schools* 2010 ('the 2010 Guide') and *Reasonable adjustments for disabled pupils Scotland* 2014 ('Reasonable adjustments guide'). There is a degree of overlap between these documents. We will take into account all three documents in considering the meaning of terms in the 2010 Act.

The first requirement – general conditions

5. This requirement applies where a provision, criterion or practice of the RB puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Where this situation arises, the RB is under a duty to take reasonable steps to avoid that disadvantage. If the RB has failed in this duty, it has discriminated against the child (s.21(1) and (2) of the 2010 Act).

6. Breaking this requirement down, 'substantial' means 'more than minor or trivial' (s.212(1) of the 2010 Act). For present purposes, there is one 'relevant matter': provision of education or access to a benefit, facility or service: Schedule 13, para 2(4)(b) of the 2010 Act.

7. On 'provision, criterion or practice', although undefined in the 2010 Act, guidance on this phrase is provided in the Technical and 2010 Guides. At paragraph 6.20 of the Technical Guide the following appears:

> "The duty in relation to provisions, criteria and practices covers the way in which a school operates on a daily basis, including its decisions and actions."

Although not bound by this interpretation, this seems to us to be a sensible one, given the width of the statutory wording. The 2010 Guide suggests that the wording should be interpreted widely and includes 'the way that education, or access to any benefit, service or

facility is offered or provided' (page 21). Again, we agree that this describes part of what is included in the definition of 'provision, criterion or practice'.

8. Further guidance is available in relation to the 'relevant matter' definition (above). In s.212 (the general interpretation provision) s.212(4) provides:

> "A reference (however expressed) to providing or affording access to a benefit, facility or service includes a reference to facilitating access to the benefit, facility or service."

The first requirement – application to the child

9. It seems to us that the claimant has four main strands to his argument that this requirement has not been met:

> (1) that the child has not been familiarised with the Safespace such that he can make effective use of it;
>
> (2) that the child is unable to communicate his desire to use the Safespace;
>
> (2) that the conditions in place for the use of the Safespace are too onerous; and
>
> (4) that the Safespace should be relocated.

10. In our view all four questions fall squarely within the terms of the first requirement.

11. They relate to a 'relevant matter' since they relate to access to a facility (Sch 13 2(4)(b)), namely the Safespace facility, and to the facilitation of access to it (s.212(4)).

12. There also exists a 'provision, criterion or practice', namely the provision of the Safespace facility, the criteria under which access to that facility is regulated (under the child's BSP) and the practice of how access to that facility is regulated.

13. On the question of substantial disadvantage, such a disadvantage is one which is more than trivial or minor. The disadvantage requires to be measured in comparison with pupils who are not disabled. The RB argues that, on the evidence we have, we cannot make that comparison (paragraphs 7, 9 and 13 of his written submissions, R43-45). The claimant argues in his response that the examples in the Technical Guide demonstrate that the matter is considered from the viewpoint of the disabled person only. In our view, the claimant's approach to this question is the correct one. Although it would appear that there is a comparison exercise to be conducted, in fact all the claimant needs to show is that the child is at a substantial disadvantage due to his disability. This is supported by the approach to the similar predecessor legislation to the 2010 Act in the case of *Archibald v Fife Council* 2004 SC (HL) 117 where it was made clear that the duty to make adjustments in relation to a disabled person does not require the kind of 'like for like' comparison involved in sex or race discrimination cases (para 64 of the judgment). The House of Lords in that case also made it clear that the adjustments duty requires that the disabled person is treated more favourably than others (paras 47 and 57). This case is cited with approval as applicable under the 2010 Act by Sandra Fredman in her 2011 text *Discrimination Law* (Clarendon Law Series, 2nd ed.) where she states (after quoting from the *Archibald* case), at page 216:

> "…the role of the comparator has been broadly construed so that, in effect, it is sufficient to show that, because of her disability, a person is at a substantial disadvantage."

This would seem to be a sensible approach to the interpretation of s.20(3). Any other approach would be highly artificial and illogical. In the present case, it is clear that the Safespace is not designed for the use of pupils who are not disabled (and disabled in a particular sense).

14. This does not mean that a comparison between the child and a non-disabled pupil is not possible in this context. If a comparison were required, it could be said that the comparison is between the provision of the Safespace to help the child feel calm and techniques which (no doubt) would be used by teachers to prevent or de-escalate challenging behaviour from a non-disabled child. While we did not hear evidence about such techniques, it seems to us that in any school, it is obvious that teachers will take steps to de-escalate a behavioural challenge from any child (whether disabled or not). The potential disadvantage for the child is that access to the Safespace might assist in such cases. In the case of a non-disabled child, there would be no need for access to such a facility, and so such a child has access to the full range of applicable de-escalation techniques, unlike the child (assuming there is a problem with the child's access to the Safespace). We should emphasise that we need not engage in such an analysis, given the interpretation adopted by the House of Lords in *Archibald*. If we are wrong about this, however, a comparison is possible, as outlined in this paragraph.

The first requirement - was there a s.20 disadvantage?

15. Turning to the question of disadvantage in this case, in our view, the 'provision, criterion or practice' in relation to the Safespace facility is such that the child suffers the disadvantage of a practical lack of access to that facility. This access is hampered in three senses, namely the first three of the four strands of the claimant's argument, listed above: facilitation, communication and conditions for use. We will now turn to each of these.

16. Firstly, the child is not familiar with the facility. It is in a different room from the rooms he normally occupies in the school (the classroom and the Quiet Room), and so he cannot see it while in the school. The evidence we heard indicated that the child has seen the Safespace on one occasion. However, he has not used it (in the sense of spending time in it) and has not been encouraged to use it. It is clear that the RB accepts that the Safespace is 'Additional Support Required' since it is mentioned as such in the child's CSP. Further, there is evidence (from the claimant and from the advocacy worker – see T41-42) that a similar facility has been used successfully at home. We accept the point made by the RB that home and school are different environments and that what works at home may not work at school. However, this does not mean that what works at home will not work at school; it only means that one cannot blindly apply a facility from home at school and assume it will work there. The fact that a similar facility helps the child at home is evidence that it <u>may</u> be of benefit to the child at school. The child's lack of familiarity with the facility offers the disadvantage that he is unlikely to ask to use it when he feels that it might be of assistance to him. Further, such lack of familiarity also carries the disadvantage that teachers in the school are unlikely to encourage the use of the Safespace for the child. It may be that the child will not favour the use of the Safespace, or that teachers will not find it useful very often

(if at all), but the child's lack of familiarity with the facility seriously hampers potential access to it.

17. Secondly, and in any event, the child has no means of expressing a wish to use the facility. The evidence indicates that the child uses communication aids via a system known as PECS, but that there is no symbol he could use to indicate his desire to access the Safespace facility. Familiarisation with the Safespace and the introduction of the PECS symbol in the school context should be simultaneous so that the child will know what it is he is asking for when using such an aid. It seems to us that the child currently suffers from a disadvantage in being unable to access the Safespace if he is unable to indicate to staff that he wishes to access it. This does not mean, of course, that the child should be permitted to access the Safespace whenever he asks for it; that will be a matter to be managed on each occasion. We note here too that the child's CSP emphasises the need for him to be encouraged to make use of symbols to indicate his needs (C17, middle column) and that the child is 'increasingly aware of when he requires quiet time..' (CSP at C15 under 'Profile', 6th paragraph). These parts of the CSP indicate to us the RB's acceptance of the advantages of enabling the child to indicate when he wishes to use a particular facility.

18. Thirdly, the conditions set out for the use of the Safespace are, in our view, too onerous. This leads to the disadvantage that the child's access to the Safespace facility is seriously impaired. Those conditions are set out in the final section of the child's BSP. Taking together the child's CSP, the publicity material on the Safespace indicating its uses and the child's BSP, in our view an illogical and confused picture emerges. The Safespace is stated to be designed for various purposes, namely as a 'chill out' space, for 'crisis management' and as a 'therapy and sensory space' (Safespace publicity material, C5-6). Taking the current BSP wording, it is clear that the Safespace is designed for use by the child principally as a 'crisis management' tool. The BSP wording (C25) refers to two or more behaviors/difficulties over a two week period being the trigger for the use of the Safespace. Challenging behaviour examples are listed. It seems to us to be illogical to require two or more instances of challenging behaviour before the Safespace is to be used. If the facility is to be used to assist in preventing or de-escalating challenging behaviour (as appears to be the case from the description in the publicity material – C5-6) then its use is merited in each such instance. Indeed, if the 'trigger' incidents are to be separated by a period of up to two weeks, it is difficult to see how two such instances are necessarily connected such that use of the Safespace then becomes justified. Further, the examples of challenging behaviour in the CSP are such that, in our view, are likely to lead to the Safespace being used only in the most serious instances of such behaviour. The difficulty with this approach is that it does not provide for the use of the Safespace as a 'chill-out' tool, to assist with episodes of sensory overload. The claimant indicates in his own evidence that at home the child uses the Safespace there for 'periods when he is anxious or in need of some time to himself, and he will communicate to us his wish to be left alone' (see his statement at T44, para 13). It seems to us that the Safespace at school may be able to be used in this way too, not just in response to challenging behaviour. It is not possible to say how likely such use is at school, since the child has not, as noted above, been introduced to the facility, nor is its use encouraged.

19. We note the position of the RB's witnesses on the Safespace. Witness A suggests in her written statement that the RB acquired the Safespace 'in order to accommodate [the claimant's] view' (T40, para 16). In her oral evidence she made it clear that she would not have recommended the purchase of a Safespace for the child. Witness C in his written

statement indicates that he would view increased use or availability of the facility to not be in the child's best interests, and that this would be a 'retrograde step' (T49, para 5). In our view, these opinions sit ill at ease alongside the CSP, which lists the Safespace as 'Additional Support Required'. The suggestion in witness A's statement is that the Safespace was acquired simply to accommodate the claimant's wishes; but the CSP is not a document to record the claimant's view of what is needed for the child; it is a record of the RB's view. It seems to us to be distinctly odd to find the RB having accepted that the child needs access to a Safespace alongside the evidence of the professional witnesses, who suggest that the current lack of access is acceptable. It is not appropriate for us to ignore what is a legally binding document recording the child's needs. In our view, once the RB accepts that a Safespace is required, it is legally bound to provide reasonable access to it. Reasonable adjustments must, in our view, be made to that end. It is not sufficient, in our view, to purchase and construct the facility, but through a failure to act and unduly onerous conditions, effectively deny any access to it.

20. One further issue (the fourth one listed above) is the location of the Safespace. This structure has been built and is in position in a classroom in the Support for Learning Unit in school A. However, it is not in a room adjacent to the child's classroom or the Quiet Room he uses (which is adjacent to his classroom, also referred to as the 'Multi-Sensory Room'). The claimant, in reference to additional written evidence lodged by the parties, casts doubt on the evidence of witness B where she indicated that the Safespace could not be installed in the Quiet Room since it is too large to fit into that room. The claimant points to correspondence from Safespace (e-mail at T60) with a plan showing the Safespace situated within the Quiet Room. He also points to the minute of a meeting at T57 where witness A is recorded as referring to a plan to deploy the Safespace in the Quiet Room. In additional evidence lodged by the RB, namely a statement of witness C, with a floor plan of the Support for Learning Unit of the school A attached (T49-50), it is suggested that the space in the Unit could be reviewed with a view to placing the Safespace in the Quiet Room.

21. In our view, moving the Safespace to the Quiet Room (or to any other room in the Support for Learning Unit) is not a reasonable adjustment under s.20(5) of the 2015 Act. There is evidence to indicate that the Quiet Room, which is designed for the sole use of the child, is beneficial to him (see witness A's written statement at T38, para 4, witness C's statement at T49, para 3 and more specifically witness B's statement at R34, para 7). One point we make above is the lack of familiarisation with the Safespace. Until the child has been familiarised with this facility, and his attitude towards its use can be discovered, in our view it would be premature to move it into the Quiet Room. Indeed, doing so at this stage could adversely affect the child's enjoyment of the Quiet Room. We do agree with the claimant's observations about the apparent discrepancy between the written evidence he lodged and the evidence of witness B on whether the Safespace would fit into the Quiet Room (see his written submission at C33-34, paras 4-5). However, we are not satisfied that even if the Safespace would fit into the Quiet Room, that it would have been reasonable for the RB to place it there, to avoid the disadvantage to the child. Further, there is no evidence to suggest that the location of the Safespace has, in itself, hampered its use. We appreciate that this is due to the other adjustments, listed above, not having been made, but we can only proceed on the evidence available to us.

The first requirement - was the disadvantage 'substantial'?

22. Having reached the view that, in the three ways identified above, the child has suffered the disadvantage of lack of practical access to the Safespace facility, we need to consider if that disadvantage is substantial. We are in no doubt that it is. In our view, considering the child's recent period of stability in the classroom offers only a limited viewpoint on this question. Although the evidence suggests that the child is doing well, and episodes of challenging behaviour are only occasional, this, in our view, misses the point. It is not possible to know whether or not the child might find the Safespace a useful facility and for which purposes. It is possible that, even following familiarisation and encouragement of use, he may not favour its use, and the staff members may find the other facilities adequate for the child's education. Equally possible is a situation where (especially given the child's regular use of the Safespace at home) the child wishes to use it regularly, and that staff members may find it a useful resource. The difficulty is that it is not possible to tell until the child has been familiarised with the facility and can express a view as to when he would like to use it. The staff at the school, if following the current BSP, are not likely to find themselves in a situation where the Safespace will be used at their behest. A situation involving a serious hindrance of potential access to a facility which is accepted by the RB as required additional support to meet educational needs offers, in the context of this case, a substantial disadvantage. Such a disadvantage could not, when viewed in this way, be described as 'minor or trivial'.

The first requirement - could the RB have made reasonable adjustments to avoid this disadvantage?

23. In our view, this question should be answered in the affirmative. The avoidance of the disadvantage would have followed the taking of the following steps: (1) taking steps to familiarise the child with the Safespace by scheduling some induction visits to the facility, explaining how it could be used; (2) developing a means of communication for the child to express his desire to use the Safespace; (3) developing reasonable guidance for staff members on the triggers for the use of the Safespace. Had each of these actions been taken, the disadvantage of restricted access to the Safespace would have been avoided.

24. The question then is: are these adjustments reasonable? The Technical Guide offers some guidance on the factors to be considered in deciding if certain adjustments would be reasonable. These are described (with examples) at paras 6.29-6.53 of that Guide. It is important to note that we are considering here whether the RB ought to have taken certain steps to have avoided the disadvantage. We are not considering whether such steps should be taken now. This is in line with the duty to make adjustments in s.20 of the 2010 Act being a proactive one – to take steps in advance to avoid the substantial disadvantage.

25. We need not go through all of the factors outlined in the Guidance. It is sufficient for us to explain the context in which the Safespace was acquired. The RB agreed to wording in the CSP providing for a Safespace facility. The RB then purchased that facility. A tribunal decision in December 2014 forced the construction of that facility such that it is available for the child. The facility was constructed in January 2015. Since then, in our view, there is no reason for the RB not to have taken the steps to avoid the substantial disadvantage we have

described. This is not a situation where the RB was not aware of the needs of the child – these were clearly identified in his CSP and he was well known at the school, having attended there for almost three years. The RB must be taken to have understood the purpose of the Safespace since it agreed that reference to it should be included in the child's CSP. We should add here that the CSP is a legally binding document which contains the education authority's conclusions (and their conclusions only) as to *inter alia* the additional support required by the child (2004 Act, s.9(2)(a)(iii)). Its legally binding nature comes from the RB's duty to ensure that the additional support specified in the CSP is provided (2004 Act, s.11(5)(b)). Against this background, it was incumbent on the RB to ensure that the Safespace was available for use by the child. In our view, there is little point in accepting in a legally binding document that a facility is needed for a child only to allow a situation to develop whereby that facility cannot, effectively, be used. There is no evidence of resource issues around the taking of these steps.

26. There was evidence to suggest that the room in which the Safespace is located is frequently occupied by other pupils, in timetabled classes. One potential issue is, then, the impact that access by the child to the Safespace might have on other pupils who may need to use the classroom. This could be relevant to the reasonableness factor in the Technical Guide entitled 'The interests of other pupils and prospective pupils' (paras 6.52-6.53). However, the RB, although addressing some of the reasonableness factors in its submissions, does not address this one. It does not argue that the interests of other pupils who need to use the classroom in which the Safespace is located could be adversely affected, leading to an argument against the child's access being a reasonable adjustment. We can only assume, then, that this is not a point upon which the RB seeks to rely. Aside from that, there was no clear evidence to the effect that timetabling problems would have been unable to be resolved, had the RB taken steps to try to avoid the disadvantage referred to above. We refer here back to our comments above on the burden of proof. Further, the RB has accepted that timetabled sessions for the child in the Safespace can be provided, suggesting that any timetabling issue would not offer a complete bar to the child's use of the Safespace in its current location.

27. On a related point, the RB appears to suggest in its written submission that this case ought to have been a CSP reference and not an Equality Act claim (R45, paragraph 19). If, as appears to be the case, there is a suggestion that the remedies sought have been sought under the wrong Act, we would have expected a competency challenge to have been made at an earlier stage. We should add that we do not accept that such a difficulty exists. The CSP in this case is relevant as an important background factor in considering the reasonableness of the steps to avoid the disadvantage, and more generally. The claimant's case is not based on failure to comply with the CSP, nor does he ask the Tribunal to amend it. He seeks an amendment to the BSP, a remedy which is not available on a CSP reference. It is true that the CSP and BSP are closely related. However, in the absence of an Equality Act claim, there would be no legal means of challenging the content of a BSP, allowing an education authority to decant any detailed provision on support to be provided into the unchallengeable BSP, leaving the challengeable CSP vague. We do not suggest for a moment that this has been the aim of the RB, but in the absence of the 2010 Act, it could have led, in this case, to a lack of independent oversight of the provision of additional support for a disabled child.

Conclusion on the first requirement

28. In our view, the RB failed in its duty under s.20(3) of the 2010 Act to avoid substantial disadvantage. The RB therefore discriminated against the child under s.21(2) of the 2010 Act.

The third requirement – general conditions

29. This requirement applies where the lack of provision of an auxiliary aid puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Where this situation arises, the RB is under a duty to take reasonable steps to provide that auxiliary aid. If the RB has failed in this duty, it has discriminated against the child (s.21(1) and (2) of the 2010 Act).

30. The only differences between the duties in the first and third requirements are that the latter does not require a 'provision, criterion or practice' and the reasonable steps to be taken refer not to avoiding the disadvantage, but to providing the auxiliary aid. Otherwise, the tests are very similarly worded.

Is the Safespace an 'auxiliary aid'?

31. In our view, the Safespace is an 'auxiliary aid'. While this term is not defined in the 2010 Act, the Technical Guide offers a definition:

> "…[auxiliary aid']..generally 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."

Again, although not obliged to accept this definition, it seems sensible and so we adopt it. In this case, we are in no doubt that the Safespace is an 'auxiliary aid'.

32. We have outlined our views above on the meanings of the component parts of the first requirement; we adopt those comments on the parts of the wording of s.20(3) and (5) of the 2010 Act which are common.

The third requirement – the question of provision

33. It could be said that the Safespace has been provided, in the sense that it has been constructed and placed in a room in the child's school. However, in our view, the provision of an auxiliary aid requires that such an aid is <u>effectively</u> provided; in other words that it is provided such that it can be reasonably used for the purpose for which it is intended. Any other interpretation of 'provision' would not be sensible, since the purpose of the obligation in s.20(5) is clearly that the disabled child is able to access the auxiliary aid. This interpretation is supported by the meaning of 'relevant matter' in Schedule 13, para 2(4)(b) of the 2010 Act which refers to 'provision of education or access to a benefit, facility or service'. In addition, some of the examples in the Technical Guide support this interpretation: at para 6.9, reference is made to an example involving computer equipment being supplied which cannot then be used; and at para 6.10, the example of provision of information refers to it being in an accessible format, which is specifically provided for in s.20(6) of the 2010 Act.

The third requirement – application to the child

34. The same questions, around familiarisation, communication of desire to use and conditions attached to use, apply in connection with this requirement as they do for the first requirement. We refer also to our observations above on substantial disadvantage, on comparison with persons who are not disabled and on reasonable steps. Our views on the relocation argument apply here too.

35. It seems to us that the steps which could have been taken to avoid the substantial disadvantage in relation to the first requirement apply equally in relation to the third requirement. The steps identified in paragraph 23 above, if taken, would, for the reasons outlined in relation to the first requirement, have led to the 'provision' of the Safespace as an auxiliary aid (bearing in mind our comments on 'provision', above).

Conclusion on the first requirement

36. In our view, the RB failed in its duty under s.20(5) of the 2010 Act to avoid substantial disadvantage. The RB therefore discriminated against the child under s.21(2) of the 2010 Act.

Remedies

37. The claimant seeks several remedies. We will deal with each in turn. We have the power to make any such order as we see fit (not including compensation) – 2010 Act, schedule 17, para 9.

(1) A formal declaration that the RB discriminated against the child

38. Given our findings above, we have no difficulty in granting this request. Indeed, such a finding is necessary in this case, given the further remedies we are prepared to grant.

(2) A formal written apology

39. We feel that this request is a reasonable one. In our view, there is little to mitigate the acts of discrimination. As we indicated above, the RB purchased the Safespace with the child in mind, and alongside an obligation to comply with the CSP. It is of some surprise to us that the RB chose to apply public resources to the opposition of a CSP reference rather than simply constructing the Safespace which the RB has accepted is needed for the child. Having constructed the Safespace, the RB has had ample opportunity to develop conditions and practices for its use for the child which could have represented reasonable steps under the first and third requirements. The RB chose not to do so, and instead chose to apply further public resources to oppose this claim. In the meantime, it is possible that the child could have had the opportunity to access the Safespace since it was constructed in January 2015. He has been denied that opportunity due to discrimination by the RB. In these circumstances, in our view, a formal written apology to the child and his parents in the terms requested by the claimant is reasonable and proportionate.

(3) Alteration of the child's BSP

40. The claimant asks for the final part of the child's BSP to be effectively re-written to provide for a new regime for the use of the Safespace by the child.

41. We agree that this section of the BSP should be re-framed. We are conscious here of the guidance in the 2010 Act on how we should exercise our remedial powers: in particular, with a view to obviating or reducing the relevant adverse effect (2010 Act, schedule 17, para 9(3)). Here, the adverse effect of the RB's failures to make reasonable adjustments has been the restriction of the child's opportunity to access the Safespace facility. It seems to us that the steps which we find should have been taken to comply with the first and third requirement duties of s.20 of the 2010 Act may now be taken. The focal point for those steps is the wording of the BSP. That document must (in compliance with the legally binding CSP) contain the conditions of the use of the Safespace by the child. It seems to us, then, that the best way to obviate or reduce the adverse effect referred to is to change the BSP wording so that the steps which should have been taken by the RB can now be taken.

42. The three such areas are: familiarisation, communication of desire to use the Safespace and the conditions for its use. The claimant proposes wording which, in our view, is apt to cover each.

43. On familiarisation, he proposes the following wording:

> "Timetabled individual sessions should be used to make the child aware of the SafeSpace within the Unit and to encourage its appropriate use."

We accept that this wording, slightly adjusted for clarification, is reasonable, and affords the RB sufficient flexibility around what the familiarisation process should involve. Indeed, during a conference call in May 2015, the RB conceded that it would not object to wording on this point being added to the BSP in the event of a finding of discrimination. See the tribunal's directions of May 2015 (T48). This concession was made in the context of the second sentence at T33, which is similarly worded to the sentence proposed above. In these circumstances, the addition of this wording is appropriate.

44. On communication of desire to use, the following wording is proposed:

> "the child will be taught and encouraged to use the PECS symbol for Safespace as one way of indicating that he wishes to use the Safespace."

Again, in our view, this wording will obviate the problem of communication by the child in relation to the Safespace. In the final version we have ordered, we have changed 'the' to 'a' in line one.

45. On conditions for use, the claimant proposes two new paragraphs, the first of which is:

> "The Safespace should be used when the child begins to show signs of sensory overload, for example putting his fingers in his ears, repetitive verbal tics, increase in anxiety and agitation. School staff should encourage the child to make use of the Safespace when he is experiencing sensory overload."

46. We would prefer the following passages:

> "School staff should encourage the child to make use of the Safespace when he is experiencing sensory overload."
>
> "The Safespace should be considered by school staff for use when the child shows signs of sensory overload, for example putting his fingers in his ears, repetitive verbal tics, increase in anxiety and agitation."

47. The reason for the changes to what is proposed by the claimant are as follows. Firstly, the phrase 'begins to show signs' is too generous, since it arguably obliges the RB to use the Safespace as soon as the child first shows signs of sensory overload. It may be that other techniques could be used in class to resolve the issue. Secondly, we have adopted the phrase 'considered for use' since, again, we do not wish to unduly restrict the RB where there may be other alternatives, such as the use of the Quiet Room or techniques in the class. We realise that this means that the Safespace may not be used since it may never be considered as appropriate, but we need to ensure that the school staff are permitted a degree of flexibility to allow them to deal with each situation as they find appropriate. Further, the tone and overall content of the re-written part of the BSP makes it much more likely than currently that the Safespace will be used. Thirdly, we have separated and reordered the two parts of the claimant's proposed paragraph. We feel that encouragement of the use of the Safespace should be a stand-alone part of the BSP. Finally, we have added 'by school staff' for clarification.

48. Turning to the other paragraph relating to the use of the Safespace as proposed by the claimant, we decline to order its addition to the BSP. We did hear some evidence to the effect that the child uses the Safespace at home for privacy. However, there was no evidence of the child expressing a need for privacy in school. For this reason, there is no evidence to support the need to add this paragraph to the BSP, so we decline to order its addition. **[Part of this paragraph has been removed by the Chamber President for reasons of privacy and dignity of the child under rule 101(3)(a) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366)]**

49. The remaining part of the claimant's proposed wording is at the foot of C39:

> "The Safespace should be erected and available at all times and located in the Multi-Sensory Room, adjacent to the child's classroom."

We decline to order the addition of this wording to the BSP. The first part ("The Safespace should be erected and available at all times..") is unnecessary, since the RB is obliged to do this under a previous Tribunal decision (see the ASNTS President's letter of February 2015 to the claimant re implementation of that decision, at R31-32). The second part relates to the relocation of the Safespace facility, and we have commented on this above.

50. Finally, we have added the following order to the remedies granted:

> "We order that the responsible body complies with the terms of the amended BSP in full from the date of its issue, and that the amended part of the BSP may only be

further amended where there occurs a material change of circumstances following the issue of the amended BSP."

While the claimant did not request this remedy, it is designed to inject certainty into the amended section of the BSP. We heard evidence from witness B to the effect that consideration had been given to amending the BSP to remove any mention of the Safespace. We have to say that we cannot understand what such a move would be designed to achieve. Such a change would, in our view, breach the terms of the CSP. In the absence of the above remedy, the BSP, not being a statutorily protected document, might be vulnerable to adaptation. We wish to ensure, as far as we can, that this only happens where there is a clear justification for amendment. On the other hand, the RB must be permitted to amend the adapted section of the document where a clear rationale arises. In our view, the wording of this remedy achieves this aim.

Additional comments

1. We would urge the RB to consider closely the nature of the obligations under the 2010 Act. It is insufficient to simply say (as the RB's witnesses emphasised) that since the child is doing well, this means that no discrimination has occurred. In any event, although the child might be doing well with the current support in place, this does not mean that he could not benefit from access to additional available support.

2. We note that witness B had not read the policy document 'Best Practice for use of Quiet Rooms in schools' (C28-29) prior to the hearing. In addition, that document is unclear in its demarcation (if any) between guidance on the use of a Quiet Room and on the use of a Safespace. It is important that policy documents issued by the RB such as these are clear and that all staff using such facilities are aware of the content of these documents.

3. Finally, we are, in general terms, concerned by the approach taken by the RB in this case. In our view, much time and public resources could have been saved had the RB taken a more practical approach towards its statutory obligations. We hope that repeated Tribunal applications are not, in a similar case in the future, required in order for a disabled child to have the opportunity to access a facility which the RB has accepted is required.