Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AC/20/0088

Claim

1. This is a claim under the Equality Act 2010 (**2010 Act**). The claimant alleges that the child suffered disadvantage caused by discriminatory treatment by the responsible body in the way it provided education to her at school A.

Decision

2. The claim is dismissed. The way in which the responsible body provided education to the child was not discriminatory under section 85(2)(a) of the 2010 Act.

Process

3. The claim was case managed over an extended period, mainly by case management calls. A particular feature was the provision of assistance to the claimant on process and legal points at all stages of the case. This was in line with the duty to provide such assistance under rule 2 of the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366) (**the rules**), in particular rule 2(1)(c). The responsible body's representative assisted appropriately in engaging with that duty (see rule 2(1) which refers to the duty on the parties).

4. In particular, the claimant required assistance during the hearing to frame appropriate, relevant questions. The claimant was permitted to add a number of documents to the bundle at several points during the hearing process. In an e-mail sent at the time he lodged his written submissions, the claimant expressed gratitude to the tribunal for its firm but fair approach to this task.

5. The bundle (including additional papers added following a procedural hearing and written submissions) consists of page numbers as follows: T001-077, A001-234 and R001-350. The claimant lodged five short video clips (explained below). Finally, the claimant referred to a Scottish Government website (as set out in paragraphs 39-40 of his written submission). We took full account of all of this material, as well as all oral evidence, in reaching our decision.

6. The responsible body's representative sought an opportunity to respond to the claimant's written submissions (the responsible body having, by agreement, lodged its submissions first). We refused that request since the claimant did not raise any material new points that were not live issues during the hearing. We should add that we have not dealt with every point made by the parties in their written submissions. We have dealt with the

points that are relevant to the claimant's case as set out in the headings A)-G) below, and that are relevant to the 2010 Act.

7. The claimant's allegations stretch back to August 2016, when the child joined school A. The claim was lodged on 17 November 2020. Under rule 61(4) of the rules, we would normally only consider events from 17 May 2020 onwards. However, that rule states that conduct extending over a period is to be treated as done at the end of that period. Much of the claim consists of allegations of ongoing failures from August 2016. These parts of the claim are therefore on time.

8. For the other parts of the claim, we have discretion to entertain these if it is just and equitable to do so (rule 61(5)). We find that it is. There was a progression in the claimant's concern about educational provision for his child, and that concern peaked during 2020. There was no period of inactivity by the claimant. Further, the responsible body does not make a time bar point. This is not surprising, as it would be difficult, given the detail in the witness statements going right back to 2016, to argue that there was any prejudice caused by a delay in making the claim.

9. The child attended the hearing, at the start of the first day, to provide her views. She was pleasant and answered the tribunal's questions. She spoke of some of her preferences and the activities she likes to do. She expressed the view that she would choose to learn in English if she had to choose between English and Gaelic.

10. Finally, the witnesses for the responsible body gave their oral evidence largely in line with their witness statements.

Findings in Fact

11. In May 2016, the child was diagnosed with developmental co-ordination disorder ('**DCD**'). DCD is also known as dyspraxia.

12. The child has processing difficulties that adversely impact her ability to learn. The child experiences delay in most aspects of learning. The child finds it difficult to start a task, complete it and to retain learning from the task.

13. The child benefits from support with learning, to help her structure her thinking. The child would benefit from developing strategies to help her to learn independently.

The child's primary 1 at school A (session 2016-17)

14. On 16 August 2016, the child started attending primary 1 at school A.

15. When the child enrolled in school A, the claimant's wife completed an enrolment form in which she did not, when prompted to do so on the form, indicate that the child had a disability or any additional support needs.

16. The child's parents asked that the child attend school A's Gaelic medium class (**GMC**). When the child joined that class in August 2016, it consisted of one class for pupils from primary 1 to primary 6. There were no primary 7 pupils in the GMC at that time. In the GMC, almost all communication is in Gaelic in primaries 1-3.

17. During primary 1, the child was taught in the GMC by a class teacher with experience of working with pupils with a range of additional support needs, such as dyslexia, autistic spectrum disorder and developmental delay. That teacher was supported by a 0.2 full time equivalent (**FTE**) classroom assistant, which increased to a 0.8 FTE classroom assistant by January 2017. Older peers also supported the child.

18. On or around 25 August 2016, school A staff received a developmental milestone assessment from the child's nursery school (R017-026). Around that time, school A staff noticed that the child had some difficulties with her fine motor skills, especially her pencil grip and control. School A staff took four steps to deal with this: participation by the child in a motor skills group (**MSG**), use of a motor skills programme, short activity work and 1:1 support from the pupil support assistant (**PSA**). The child attended the MSG for 20 minutes each school week between September 2016 and June 2017.

19. After the MSG work was over, school A provided feedback to the child's parents and provided a booklet with key exercises to continue at home. As a result of the MSG, the child's core strength and bi-lateral coordination improved significantly.

20. During primary 1, the child's progress was measured using routine, ongoing oral assessments. This is the usual practice in school A.

21. The usual expectation for children in the GMC class at school A would be to achieve Early Level in the Curriculum for Excellence (**CfE**) by the end of primary year 2. This compares with the end of primary year 1 for children learning in English. The time difference is due to the immersion in a new language. The child was predicted to achieve Early Level in literacy and numeracy in the CfE during primary 3.

22. In May 2017, school A received an occupational therapy (**OT**) assessment for the child (R033-35). The recommendations directed to school A are: (a) the use of the disabled toilet and hand dryers; (b) the introduction of movement breaks for gross motor skills improvement; and (c) OT support sessions within school. The first two recommendations were, by the time of the OT report, being followed by school A. The third recommendation was put in place with a block of seven sessions with an OT worker in school.

The child's primary 2 at school A (session 2017-18)

23. The child started primary 2 in the GME class with similar support to that available in primary 1 in place. School A staff noticed that the child was not learning at the same pace as other pupils in primary 2.

24. Due to the child not making the expected progress during the primary 1 OT sessions, OT services carried out observations of the child and prepared reports dated 15 November 2017 and 5 December 2017 (R037-039 and R039-040). The recommendations in these reports, namely a child's plan meeting, independence, pre-writing skills and sensory diet, were, as far as possible, implemented by school A.

25. A child's plan meeting took place on 14 May 2018. A child's plan was drawn up following that meeting (R043-048). That plan was agreed with the child's parents.

26. The child made significant progress in her education during primary 2, including in: Gaelic understanding, better co-ordination and balance in PE, pencil grip and control, developing friendships, word shape recognition, counting and adding.

The child's primary 3 at school A (session 2018-19)

27. When the child started primary 3 in August 2018, the GME provision in school A was split into two classes: a class for primaries 1-3 (12 pupils) and a class for primaries 4-7 (8 pupils). For most of the academic year, two PSAs were working across the two classes, one working for three days per week, the other working for two afternoons per week. In June 2019, one of the PSAs stopped working in the primary classes. From then until May 2022, one Gaelic speaking PSA working for three days per week covered both classes. The reason for this change was the inability of the responsible body to recruit a replacement Gaelic PSA, despite efforts to do so. However, an English speaking PSA provided additional support during the latter part of this period.

28. School A staff recognised that the child required additional reinforcement of her learning in phonics, language and maths. This reinforcement was provided in small group work or individual work. School staff supported the child to avoid distractions. Extra thinking time during discussions was introduced to help the child. One-to-one support was provided by both a PSA and her class teacher. Differentiated work (suitable for the child's learning level) was provided.

29. The child's parents sought a repeat of year 3 for the child. School A staff and the responsible body's educational psychologist were opposed to this, since this would not bring any advantage to the child and would delay the child's introduction to English language learning. On 13 May 2019, the responsible body confirmed that the child would repeat primary year 3.

30. A child's plan meeting took place on 5 November 2018. As a result, an amended child's plan was produced (R050-056). At the meeting on 5 November 2018, the child's parents expressed concern about the level and appropriateness of support for the child in class. These concerns were the subject of correspondence and discussions between the child's parents and school staff during the course of that academic year.

31. A child's plan meeting took place on 25 March 2019. As a result, a further amended child's plan was produced (R061-068).

32. In 2019, the child's pediatrician, Doctor A, referred her to the speech and language therapy service (**SaLT**) for an opinion on the child's social communication skills. SaLT produced a report dated 3 June 2019 (R074-078). Five recommendations were made in that report, four directed at school A. All four recommendations were met by school A either in the provision already being made or by future provision. The child was discharged from SaLT following the report of 3 June 2019.

33. The child made significant progress in her education during primary 3, including continuing to build on progress in primary 2. She made progress in the following areas: following instructions and completion of a task independently, answering in Gaelic, conversational and instructional Gaelic understanding, responding in class discussions, independence in changing for PE, fine motor skills (scissor work and pencil control in

drawing), formation of letters and numbers, copying short sentences and counting using coins.

The child's deferred primary 3 at school A (session 2019-20)

34. In meetings on 30 September and 2 December 2019, school A reviewed the child's plan and produced an updated version (R079-088).

35. Due to staff absences, school A was unable to provide all support for the child on a consistent basis.

36. School A closed from March 2020 until the end of the 2019-20 academic year, due to the Covid-19 pandemic. During that period, school A staff provided the child with work to do at home. School A offered live lessons on Microsoft Teams (**Teams**) to allow the children in the GME class to hear and speak Gaelic. The child's parents struggled with IT access over this period. School A staff assisted with numerous calls. Learning packs were delivered to the child's home. Once the child could join on Teams, she attended the live sessions and interacted during them. School A staff provided physical learning resources and advice with online learning resources.

The child's primary 4 at school A (session 2020-21)

37. In August 2020, school A produced an updated draft child's plan (R096-105). The child's parents chose not to be involved in the review process and did not agree to the proposed amendments in the draft. The updated child's plan was finalised in September 2021 (RB179-189).

38. Around the start of the academic year, a member of school A staff spoke with the child's parents about their preference for the child's education. The staff member believed that the child's parents expressed a preference for the child to focus on English reading and writing rather than Gaelic. The child's class teacher changed the plan for the child, to focus more on English reading and writing. On 1 December 2020, the child's parents expressed concern about this change and stated that they had not agreed to it. On receipt of this letter, school A switched the reading and writing focus for the child back to Gaelic, in line with the child's parents' wishes.

39. During the period from August 2020 and January 2021, communication between the child's parents and school A staff continued. The child's parents continued to express dissatisfaction with the support provided for the child, both in conversations and in writing. During this period, school A offered a review of the child's needs by the responsible body's allocated educational psychologist. The child's parents refused this offer.

40. School A closed to most pupils between January and April 2021, again due to the Covid-19 pandemic. During this period, school A provided differentiated work for the child. They also offered a daily live lesson to explain the work to be completed at home. Some online lessons were offered. The differentiated work offered to the child was prepared by her class teacher in individual plans, following concern expressed by the claimant that the child could not do the work. The child's class teacher and school A's head teacher offered to have discussions with the child's parents to better understand the child's learning needs while at home. The child's parents did not take up this offer.

41. On 18 and 19 February 2021, following a request from the claimant, witness C wrote to him outlining options for the child's return to school during the general school closure period as part of the responsible body's vulnerability criteria (RB142-144). The claimant agreed, and the child returned to school on 22 February 2021. The child joined the primary 1-3 GME class until the upper GME pupils returned to school in March 2021.

42. In May 2021, the child sat the Gaelic standardised assessments (**MCNG**) in reading, writing and numeracy. The Scottish Government introduced these assessment for the first time during the academic year 2018-19. The child's assessment results (A016-024) show that the child continued to have difficulties in writing, reading and numeracy.

43. Around this time, the claimant suggested that an independent educational psychologist (in other words, not the psychologist employed by the responsible body) should assess and report on the child. The responsible body agreed to this suggestion. The parties agreed a joint remit for this assessment. The responsible body agreed to fund this report. An educational psychologist with GME experience could not be identified. The parties agreed to appoint witness B.

44. Witness B contacted school A staff on 12 May 2021. Witness B visited school A on 14 June 2021. She spent time observing the child in her classroom and the playground. She spoke to the child's class teacher and witness C. The child's PSA was present in the class during witness B's visit. During witness B's visit to school A, the staff explained the supports in place for the child when the PSA not in the child's class.

45. By the end of primary 4, the child was working in the CfE First Level for literacy. She was making steady progress in the First Level for numeracy.

The child's primary 5 at school A (session 2021-22)

46. Witness B produced a report following her visit to school A on 12 May 2021 (RB146-172). Prior to this, witness B produced a draft of her report, which was discussed at a meeting, attended by witness B, school A staff and the child's parents on 24 August 2021 (minute at RB173).

47. Following the meeting on 24 August 2021, witness C and the child's class teacher produced a table (RB174-178) outlining the support the child needs as set out in witness B's draft report (first column). The table sets out the support in place already (second column) and the support that would be extended or introduced as a result of witness B's report (final column).

48. A child's plan meeting for the child took place on 26 August 2021 between school A staff and the child's parents. That meeting was very positive. Following the meeting, school A produced an updated child's plan (RB179-189). This plan incorporated the recommendations made by witness B in her report.

49. Witness B provided an updated assessment of the child's educational progress in March 2022 (RB320-322). This was based on discussions with the child's parents and school A staff.

50. During primary 5 (until March 2022), the child made progress in reading, writing and numeracy.

Reasons for the Decision

51. The child has a disability as defined under section 6 of the 2010 Act. This is clear from the findings at paragraphs 11-13 above. This is conceded by the responsible body.

The law

52. The claimant's case is that the responsible body discriminated against the child in the way it provides education for her under section 85(2)(a) of the 2010 Act. In order to succeed, the claimant needs to provide some evidence of disadvantage/unfavourable treatment to the child caused by the responsible body's treatment in this area (concepts central to all of the main forms of discrimination under sections 13, 15 and 19-21 of the 2010 Act). This idea of disadvantage/unfavourable treatment has been described as follows:

> … it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person … The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. (Lord Carnwath in *Trustees of Swansea University Pension Scheme v Williams* [2019] 1 WLR 93 (Supreme Court) (***Williams***).

53. There is no material difference between the concepts of unfavorable treatment and disadvantage: *The Technical Guidance for Schools in Scotland* published in 2014 by the Equality and Human Rights Commission, paragraphs 5.44 and 5.21, an approach approved by the court in *Williams*.

54. Although the burden of proof on the claimant is not onerous, he requires to establish facts from which we could decide that the responsible body discriminated against the child (section 136(2) of the 2010 Act). Facts can only derive from evidence (directly or by inference). We may not find facts from assertion, assumption, suspicion or speculation. This point is of some importance in this claim.

55. We leave out of account any evidence and argument about the child's parents not raising certain matters with school A staff. This is legally irrelevant. The responsible body carries the legal duty to provide the child with adequate education, irrespective of any input (or lack of it) from parents.

56. In considering the issues, we will use the subject headings chosen by the claimant, and lettered A)-G) in his 'Grounds for Discrimination update' document at A091-092. This structure was followed by both parties in their written submissions.

A) Failure to recognise the child's learning difficulties from an early stage.

57. School A staff identified the learning needs of the child at a very early stage following her enrolment in school A. The developmental milestone assessment produced within one month of the child's enrolment at school A is detailed and practical. It gives a clear indication of the child's capabilities in each of the eight Scottish Government SHANARRI

principles areas, across five topic areas within each. This provides 40 specific indicators of the child's capabilities.

58. The responsible body did not cause the child disadvantage in their approach to her learning difficulties in primaries 1 and 2. The opposite happened: school A staff assessed the child's needs on an ongoing basis and put in place a number of appropriate supports.

59. The claimant argues that he made the child's DCD diagnosis known to school A staff when the child first enrolled there. Witness C explained that there was no indication of additional support needs or disability in the enrolment form, and that the first time she saw the letter confirming the diagnosis (A083-084, 26 May 2016) was when it was produced as part of the claim bundle. The claimant in his written submission suggests that he would have informed school A staff about the diagnosis earlier, but he does not say in terms that he did so. He produces no evidence of having done so. The evidence from school A staff was that they did not receive notification of the child's diagnosis earlier. We accept that evidence. To find otherwise would be to reach the view that several witnesses did know about it but covered it up in their witness statements and oral evidence. There is no basis for reaching such a stark conclusion.

60. We conclude that school A staff were not alerted to the child's diagnosis until the letter at A083-084 was lodged as part of this claim. The claimant states that he can't recall making the letter available before then. This, coupled with the evidence of a lack of mention of the condition in the enrolment form (which the claimant does not deny), and witness C's evidence on the point, take us to this conclusion.

61. The DCD diagnosis is not mentioned in the OT report of 8 May 2017 (R033-035). The report makes certain recommendations, which school A were already implementing or went onto do so.

62. Even if we were to conclude that the existence of the condition was drawn to the attention of school A staff at enrolment or shortly afterwards, it would make no difference to our decision. The approach of school A staff was not driven by diagnosis: it was driven by assessment, professional judgment and, ultimately, need. A diagnosis is not needed for support to be put in place. Witness C makes this point in connection with the DCD diagnosis in her statement at paragraph 33 (R280), in the sentence after the passage quoted by the claimant in his written submissions.

63. The claimant in his written submissions refers to school A having committed to a child's plan only after the OT report of 15 November 2017 (R037-038) was produced. There is no evidence available to us that suggests that a child's plan should have been prepared earlier than in primary 2, or that its earlier preparation would have made any difference to the support being provided for the child.

64. School A staff reacted to the recommendations of the earlier OT assessment of 8 May 2017 (R033-035). It is irrelevant that this assessment was initiated by the child's parents and not the school. We note that there were a number of recommendations in the OT report (5 of the 8) which were directed to the child's parents, only 3 were directed to school A, two of which were already being delivered and the third was already being considered. This does not suggest a situation of deficit in school A's provision of OT support.

65. The claimant asserts that deficiencies in early support for the child (including an earlier child plan) are evidence of the lack of any 'fruits of their labour'. The argument is that the poor performance of the child, as evidenced by the videos the claimant provided and the MCNG assessment results, must mean that the child was not adequately supported in her learning.

66. We must separate assertion from evidence and consider the source of the assertion. The claimant is not an education professional, nor is he qualified to give skilled evidence to the tribunal. We must, therefore, approach his conclusions on matters of professional educational practice with caution. The witnesses for the responsible body are, on the other hand, experienced professionals with extensive teaching experience. This means that, as long as we are satisfied the responsible body's witnesses are not being dishonest (and we saw no indication of this), their assessments of education issues are more reliable. This is not a criticism of the claimant; it is just common sense. There is clear evidence to suggest that the child has been making steady (if slow in the early years) progress in the key curricular areas while at school A**.**

67. This is backed up by witness B, a skilled, independent professional trusted by the claimant. Her oral evidence was that the child was performing as might be expected given her processing difficulties and the additional demand of learning in GME.

68. The claimant argues that 'detailed 1:1 support' for the child was only put in place following the child's plan meeting on 2 December 2019. However, the child received some 1:1 support from primary 1 (see witness C's statement at paragraph 11, RB283, paragraph 36, RB291 for primary 3 and paragraph 37 at RB292, referring to such support since primary 1). The child's former class teacher in his witness statement at paragraph 25 (RB231) also refers to providing 1:1 support for the child.

69. The claimant believes that the child has needed more 1:1 support than was being provided, but has produced no evidence to support this assertion. He relies on witness B's report on this point, but this is misplaced. Witness B notes the value of the 1:1 support she observed being provided (referred to as 'individualised support', RB158). But, in witness B's view, the child also needs to develop 'independent strategies…to enable her to access the planning needed to support her thinking as an independent learner'. She suggested that there should be a 'dynamic interplay' between 1:1 support and independent learning and that the amount of 1:1 support was not the main issue, but rather there should be an ongoing assessment of whether it is working. Witness B's report did lead to a more detailed articulation of 1:1 support in the next child's plan, but there is nothing in witness B's report that suggests that the child needed more 1:1 support than she observed as being in place.

70. The claimant argues that witness B has recommended the parameters for an effective partnership between school A and the child's parents and this is 'clearly not in place'. However, witness B does not conclude in her report (or in her oral evidence) that school A has failed in this regard. It is within the judicial knowledge of this specialist tribunal that relations between parents of pupils and schools can be difficult, and apportioning responsibility for such relations is a notoriously unreliable task. This is presumably why witness B does not attempt to do so.

B) Failure to assess for the possibility of Dyslexia/Dyscalculia to date.

71. We do not accept that the child ought to have been assessed for dyslexia by school A staff. Witness D was clear in her oral evidence that a dyslexia assessment would not provide any information to the school that they did not already have and that the child already uses software and tools and benefits from differentiation, all of which would be available to a child with a dyslexia diagnosis. The only professional indication that such an assessment might be considered is in the SaLT report of 3 June 2019 (R078) which states that such a diagnosis 'may be worth investigating further'. However it is not mentioned in the recommendations of that report.

72. There is no professional evidence to support an assessment for dyscaculia at all. The child's numeracy difficulties are documented extensively, and the support the child receives in this area is explained by witness B in her report (RB156-157). Nor was there any evidence that an assessment (or confirmation) of such a difficulty would have made any difference to the support that the child was already receiving.

73. Witness B makes no mention of dyslexia or dyscalculia in her reports, nor in her oral evidence, nor does Doctor A in her letter of 2 September 2019 (T016-17), despite her reference to the SaLT report's conclusions.

C) Failure to provide targeted differentiated support that adequately supported the child's processing difficulties until the September 2021 child's plan.

74. We do not accept this criticism of the responsible body. There is a significant body of evidence, both in the bundle and from the oral evidence, to indicate that the child was provided with adequately targeted and differentiated support for her processing difficulties.

75. Even during primary 1, the child's difficulties were noticed and steps were taken to meet these (see the findings in fact at paragraphs 18-19, above). Those steps continued throughout the child's education and were formally documented in the child's plans (of which there have been six between May 2018 and September 2021).

76. Witness B carried out a thorough and independent review of the needs and provision for the child. She does not identify any material gaps in that provision. Indeed, she stated in her oral evidence that there was nothing that school A had not put in place in terms of support for the child. The changes made to the child's plan following witness B's report are mainly to specify in more detail support that was already being provided.

77. The claimant in his written submissions (paragraph 34) sets out a list of differences between the September 2021 and August 2020 plans. However, these are differences in expression, not in substance. Even if there are differences in substance, witness B in her oral evidence indicated that she was content that school A staff have a real connection with the child, think deeply about her needs and have an understanding of them. At no point in her written or oral evidence does witness B raise any concerns about the child's educational support; indeed she was 'confident' that things were in place for the child. This is important given witness B's experience, the material she had available (observations, interviews and documents) and her independence. The claimant accepts that witness B is professional, has expert knowledge and is unbiased (written submissions, paragraph 35).

78. The claimant seeks to persuade us that the conditions within which witness B observed the child in school A were 'staged'. Central to that suggestion was that the PSA was in the child's class when witness B observed and that since the PSA is in the child's class only 1.5 days per week, it cannot be a coincidence that she was there when witness B visited. There is no substance to this suggestion. There is no evidence for it. It is based solely on the claimant's speculation. In any event, this notion was explored with witness B in her oral evidence, and she was clear that what she observed seemed genuine, and 'naturally occurring' with no indication of discomfort.

79. Some of the claimant's arguments focus on the child's educational attainment. He argues that had the necessary support been in place earlier, the child's attainment would have been higher. There is no evidence to support this. The evidence that does exist suggests that the child's attainment is in line with her learning difficulties. That was the conclusion reached by witness B, when asked in her oral evidence to consider the child's attainment as set out in the table at RB278-279. We note here that the claimant accepts in his written submissions (paragraph 33) that even with the best of support, the child's attainment would be behind that expected of a child without her support needs.

80. The claimant in his written submission asks us to ignore this part of witness B's evidence since she cannot determine if the child was making progress after only one visit. We do not agree with this characterisation of witness B's evidence. She is a very experienced educational psychologist who gave her evidence in a measured, responsible manner. Her view on this point was not based on one visit, but on her qualifications and experience. The question being asked was not about the visit, but about progress of the child as evidenced in a table. Witness B is qualified to comment on this. Had she felt she could not, she would have declined to do so.

81. The claimant also argues that witness B's evidence on this point was about a child with learning difficulties generally and suggests that a question he asked witness B robbed her answers on this point of any force. We do not agree. While witness B did refer to children with additional support needs in her answer, it is clear from the context of her evidence that she saw her answer as applying to the child. In her answer, she confirmed that the progress documented in RB278-279 would be what she would expect to see – she referred to it as slow progress, but progress. She described it as a steady trajectory, not as rapid as other children and in keeping with the child's additional needs. We are in no doubt that these answers apply to the child and reflect the views of a highly qualified and independent professional.

82. We agree with the evidence that the MCNG assessment is of limited value as an indication of the child's abilities and progress. This standardised assessment was described by witnesses B and C as being a blunt tool offering only a 'snapshot' of the child's ability, which other forms of ongoing assessment can capture better.

83. There was a discussion in the written submissions of the conditions under which these assessments took place. However, we do not find that discussion relevant to our decision. Since the test is of limited value, even if it could have been conducted under different conditions, not doing so does not represent a hurdle or disadvantage to the child. In any event, we do not accept that there is evidence to suggest that Scottish Government guidance was not followed for the child's MCNG assessments, since there

is a tension between providing support and not causing undue advantage and both points apply in the relevant guidance.

84. The claimant sought to challenge the evidence of the child's attainment being at the CfE First Level for some subjects. However, witness E's evidence was clear on this point – that a pupil can be working partly at one level and partly at another, where only part of the lower level requirements have been met, but the pupil is working on some of the higher level requirements. We did not find the claimant's attempts to undermine this evidence during his questioning to be persuasive. Once again, we rely on the skilled evidence of education professionals. Their job involves continuous assessment of pupil progress, and there is clear evidence that this has been happening for the child during her attendance at school A.

85. The claimant submitted five video recordings in evidence. Two were of the child reading from an English book and from a Gaelic book in August 2021 and February 2022. Two were of the child writing in English and Gaelic in the same months. The final video showed the child completing a maths task in February 2022. The claimant notes an improvement in reading and writing between August 2021 and February 2022. He also asserts that the video evidence is consistent with the MCNG results. He argues that these two sources of evidence point to the child being at Early Level for literacy and numeracy. He asserts that the improvement shown in the videos is evidence that the changes in the September 2021 child's plan had a positive impact.

86. We do not agree. The video evidence is limited in its value since the clips are short and the exercises were not carried out in a school environment. They were not designed or implemented by an education professional. As for the comparison between the videos and the MCNG results, the claimant is not qualified to perform this task reliably. Only education professionals can reliably undertake educational assessments. We cannot accept non-skilled evidence on a subject that involves opinion. There are many possible reasons for an improvement in the child's educational performance over a 6-month period. Pinpointing one recent event as being the cause represents a highly unreliable assumption.

87. While the claimant does not address this point in detail in his written submissions, he has previously criticised school A for a reduction in its PSA support for the child following the departure of a PSA in June 2019. We do not detect any disadvantage to the child as a result of this. We rely here on the assessment of witness B who, when observing in 2021, could detect no gaps in the support being provided.

88. For these reasons, we prefer the evidence of the school A staff on the child's level of attainment and progress in the relevant subject areas. One final point here – the claimant states that the attainment table is 'central' to the responsible body's argument about progress. We do not agree – there is a wealth of other evidence of progress, not least the oral evidence of the school A staff.

D) Failure to create the correct educational environment until the September 2021 agreement to enable the child to make attainment gains comparable to her potential.

89. At the procedural hearing on 23 May 2022, the responsible body's representative sought clarification of the phrase 'educational environment' in this ground of argument. As noted at paragraph 7 of our directions of 24 May 2022, the claimant accepted that this wording

is generic and refers to points covered by arguments A) to C) and E) to F) of the claimant's discrimination grounds document.

90. In his written submissions, however, the claimant addresses this ground in detail. Since the responsible body lodged its written submissions first, it could be said to be prejudicial for the claimant to address this argument in detail, even although the responsible body did touch on it (briefly) in its submissions.

91. However, having examined the claimant's submission under this argument, no such prejudice exists. The points made by the claimant are about: staffing issues, correspondence between the claimant and school staff, relationship between the claimant and school staff, an issue with a reading book which was sent home for the child and the issue of whether the child's development is being affected by excessive 1:1 contact at the child's parents' request. Except where considered under a different heading, we cannot in any of these issues detect any treatment of the child alleged by the claimant that could be said to have disadvantaged or created a difficulty for her. We therefore say no more about these points.

E) Stopping the child's formal reading and writing in Gaelic from August 2021 to November 2021 to favour English without the permission of the child's parents.

92. The relevant part of the claimant's written submission on this point begins at paragraph 68, the earlier paragraphs offering a background narrative.

93. The decision to switch from Gaelic reading and writing to English literacy between August and November 2021 was made in error, due to an apparent misunderstanding of a conversation between the claimant and a member of school A staff (see the findings in fact at paragraph 38).

94. The claimant argues that the child was disadvantaged as a result. The responsible body asks us to find that she was not.

95. We find that there is no evidence from which we can infer that the change in focus over this period caused a disadvantage to the child. It would be impossible to isolate the impact of a relatively short period of change. While we appreciate that disadvantage can consist of a loss of opportunity, there is no way of knowing whether, assessed broadly, the child lost a learning opportunity because of the change of language focus.

96. The child was learning in English during that period, so learning was taking place. Witness B expressed the opinion that reading in one language promotes learning in another language. Further, as pointed out by the head teacher in his letter in December 2020 to the child's parents (RB145), the child was still receiving exposure to Gaelic written and spoken language through general class work over this period. This all minimises the risk of disadvantage. We have to proceed on the basis of the available evidence, and it does not support a finding of disadvantage to the child.

F) Failing to take the views of the child's parents seriously and failing to recognise the child's parents as partners in the child's education.

97. We accept that a failure by a school or responsible body to take the views of parents seriously could cause disadvantage to a child. It is within judicial knowledge of a

specialist tribunal that poor parent-school relations can impact negatively on a child's educational wellbeing.

98. In his written submission, the claimant concludes this point by asserting that the school failed to implement a child's plan prior to September 2021 that could have helped the child attain better. This is part of a wider point the claimant makes that witness B's input was (as he says elsewhere) a 'game changer'.

99. We see witness B's input differently. The fact that the child's plan was changed following witness B's report does not mean that it was inadequate before then. Witness B certainly does not say that, nor does she even suggest it. It is not surprising that a report by an experienced independent specialist leads to changes – that would be almost inevitable. There is probably room for improvement in every child plan, given the right input. But perfection is not the standard. Witness B's input caused relatively minor substantive changes to the child's plan. Most of the changes involved the addition of detail to work that was already in place, and was contained in the pre-2021 plan.

100. Further, the agreement for the employment of witness B to prepare a report, and to implement its recommendations, is evidence of engagement between the responsible body and the claimant. The question of whose idea witness B's input was is neither here nor there. The claimant had already refused the offer of advice from the responsible body's educational psychologist. When the claimant suggested an independent professional, the responsible body agreed, and paid her fee.

101. More broadly, we reject the assertion that the responsible body has not taken the child's parents' views seriously or that it has failed to recognise them as partners. As the responsible body's representative sets out in her written submissions, there is ample evidence of significant efforts having been made across more than five years to regularly engage the child's parents in decision making about the child. This is evident not only in the child plan preparations, but also in correspondence and meetings evidenced throughout the bundle. It is difficult to see what more school A staff could have done to keep the child's parents engaged. School A staff and the child's parents did not always agree on what should be done, but disagreement is not the same as a lack of engagement.

G) Failure to adequately support the child through Covid-19 school closure periods.

102. There is a difference of opinion between the claimant and the responsible body on the appropriateness of the work school A staff sent during home schooling over the periods of the two Covid-19 lockdowns. Witness C in her written and oral evidence and the child's former class teacher in his written statement set out the steps taken. We find it difficult to accept (as the claimant asserts) that the child's class teacher sent homework inappropriate for the child's ability. There is no suggestion anywhere in the written or oral evidence that this was happening in the classroom. It would be very surprising if this happened when it came to home learning.

103. The response by school A's head teacher to the claimant about his complaints concerning home learning during the second lockdown period (A010) is comprehensive. It sets out the support offered, the basis for it and further steps that have been taken to improve it.

104. It is within judicial knowledge that the education environment for pupils and schools over the lockdown periods was unprecedented and brought significant challenges for everyone. It is within that context that we consider the evidence. Part of that context is the unfortunate but unsurprising challenges for all parents to engage children in home learning.

Conclusion

105. For the reasons explained above, we conclude that there are no facts from which we can decide that the responsible body has caused disadvantage to the child, or that it has treated her unfavourably in the way in which it has provided her education. This means the claim must be dismissed.

Alternative analysis

106. Even if we were satisfied that disadvantage/unfavourable treatment under the 2010 Act had occurred, it would not have altered our decision. This is because the claimant would not have been able, on the evidence available, to meet the tests for any of the four main discrimination types.

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

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

109. We reach this view since the responsible body has produced sound reasons for its approach to the support it has provided to the child since August 2016. These reasons demonstrate proportionate steps taken to educate and support a child in response to information and assessments available and in a professional manner.

110. Finally, on **reasonable adjustments discrimination** (ss. 20-21 of the 2010 Act) and bearing in mind that this duty is anticipatory in nature, in our view reasonable steps were taken to avoid any disadvantage. It is worth noting that the obligation is not to avoid disadvantage, but to take reasonable steps to do so. The steps taken here include: regular assessment of need; implementing recommendations from professionals; preparation of regular, detailed child's plans, and implementing them and the use of educational strategies appropriate to the child's needs, age and abilities. Those steps are explained above.