**DECISION OF THE TRIBUNAL**

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| **List of Witnesses:**  **Witnesses for Claimant:**  ‘**the claimant**’  Consultant Nurse Education Adviser and Expert Witness ‘**witness A**’  **Witnesses for Responsible body:**  Head of Service with the responsible body ‘**witness B**’  Head teacher of school A ‘**witness C**’  Former Depute Head teacher at school A ‘**witness D**’  Acting Depute Head teacher at school A ‘**witness E**’  Additional Support Needs Assistant and Classroom Assistant at school A ‘**witness F**’  Additional Support Needs Assistant at school A ‘**witness G**’ |

**Claim**

1. This is a claim alleging discrimination in relation to physical interventions by school A staff with the child, and an exclusion of the child.

**Decision**

1. We find that discrimination under the Equality Act 2010 (**the 2010 Act**) took place in the following respects:
2. The responsible body adopted an unreliable approach to attributing the cause of the child’s distressed behaviour (under s.15 of the 2010 Act).
3. The responsible body excluded the child from school without justification (under s.15 of the 2010 Act).
4. The responsible body denied the child the opportunity to benefit from a proper recording system of distressed behaviors (under s.15 of the 2010 Act).
5. The responsible body denied the child the opportunity to benefit from being handled by staff members of school A who were adequately trained in accordance with the responsible body’s policy on the use of restraint (under s.15 of the 2010 Act).
6. The responsible body’s policy on physical intervention fails to properly address the relevance of the 2010 Act to its operation (under s.19 of the 2010 Act).
7. As a result of these findings, we make the following remedies:
8. a formal statement that discrimination has occurred as noted above;
9. that the responsible body makes a written apology to the child (in terms of SPSO guidance on apology) within one week of the expiry of the appeal and review periods relating to this decision, should no appeal or review be pursued;
10. that the responsible body and their staff undertake relevant externally provided training with a focus on avoiding and reducing the use of physical intervention, restraint and exclusion from school, such training to be completed by April 2023;
11. that the responsible body reviews, develops and revises its policies on physical intervention, restraint and exclusion from school, in line with the recommendations set out by the report by the Children and Young People’s Commissioner Scotland, ‘No Safe Place: Restraint and Seclusion in Scotland’s Schools’ (CYPCS, 2018) and the principles of national guidance on exclusion, this process to be completed by December 2022;

and

1. the policy review ordered at d. above should involve the direct input from disabled pupils who have been affected by restraint and/or exclusion in the past, making use of the Children in Scotland guidance on ‘Meaningful Participation and Engagement of Children and Young People’ (2019) and observing the Children and Young People’s Commissioner Scotland’s ‘7 Golden Rules for Participation’.

**Process**

1. The claim was lodged in July 2021. It was case managed to a hearing which took place across four days in February and March 2022. That case management process included a decision issued by the legal member on a preliminary issue, namely time bar. That decision was issued in September 2021.
2. The bundle consisted of documents with the following numbering: T001-065; C001-434 (including witness A’s cv at C416-428 and final submissions at C429-434, including those on remedies); and RB001-510 (final submissions, including those on remedies, at RB480-510). Included were witness statements for all of those who gave evidence, except for witness B (although witness B is the author of the document at RB387-388). Also included was a joint minute of agreed facts (T056-063), which included (at T063) a list of agreed remedies, should a finding of discrimination be made.
3. We should mention the evidence of one witness in particular, witness A. He lodged a detailed expert report (C252-312). Witness A’s cv (C416-428) presents him as having considerable expertise in the use of physical interventions. The responsible body points out that he has had limited experience of working with children. However, having considered his report and heard his evidence, it is clear that principles relating to physical interventions apply across all environments, including those in which witness A has experience as well as in a school context. Other than that minor challenge, the responsible body does not doubt witness A’s expertise. We refer below to several examples where his evidence assists our conclusions. We should add that we accept the responsible body’s point that where witness A strayed into commenting on legal matters in his report and oral evidence, he stepped outside his expertise, and we therefore took no account of those parts of his evidence.

**Findings in Fact**

*General findings in fact*

1. The child was a pupil at **school A** until June 2021. School A is a mainstream primary school under the control of the responsible body. The child was a pupil at school A for the whole period relevant to this claim. In August 2021, the child transitioned to secondary school and started attending the local secondary school, **school B**. The child remains a pupil at school B.
2. The child has attention deficit hyperactivity disorder (‘**ADHD**’), diagnosed in 2016. ADHD can result in the child’s distressed behaviour escalating extremely quickly. The child’s ADHD can cause him to behave impulsively, and to be confused, irate and uncontrollable. The child’s ADHD can inhibit his ability to listen properly and to communicate effectively when he is distressed.
3. The child has presented distressed behaviours in school A since he was in primary 1, the first noted incident of anger having taken place in March 2015. In primary 3, due to his increasingly distressed behaviours, he spent most of his time being taught in a one-to-one environment with a learning support teacher. In September 2017, school A staff suggested that the child’s needs would be better met at an alternative educational provision. The claimant rejected this suggestion. During his time in primary 4, the child was, with some effort, integrated into his class. He remained in class for primaries 5, 6 and 7.
4. During primary 6 the child sometimes became highly dysregulated and was physically violent towards other pupils.

*Findings in fact on the incidents of school A staff interventions*

1. There were a total of seven incidents relied upon by the claimant and during which school A staff intervened in relation to the child. These incidents took place on the following dates (in date order):

24 August 2020 (‘**incident A’**)

2 September 2020 (‘**incident B’**)

21 September 2020 (‘**incident C**’)

23 September 2020 (‘**incident D**’)

9 November 2020 (‘**incident E**’)

17 November 2020 (‘**incident F**’)

19 November 2020 (‘**incident G**’)

*Findings in fact on incident A*

1. Incident A involved the child throwing a snack across a classroom. The child swore and shouted at pupils and staff members. The child held onto the classroom doorframe,preventing witness E from entering the classroom. Witness E needed to gain access to the classroom urgently, due to her concern about another pupil with a medical condition. Witness E asked the child to remove his hand so that she could enter the classroom, explaining the reason to the child. The child did not comply with this request. He reacted in a way that indicated that he found this request funny. Witness E lifted the child’s fingers from the doorframe to enter the classroom. The child moved aside.

*Findings in fact on incident B*

1. Incident Bbegan during the lunch break. The child behaved in an aggressive, verbally abusive and threatening manner towards school staff. The child pushed a teacher aside and became violent, throwing pens and a metal hole punch at a member of staff. Staff members were afraid for their safety and escaped to a locked room. The child obtained a metal bar from a binding machine and held it in such a way as to suggest that he may use it to hurt a staff member. The child was persuaded by staff members to hand over the metal bar. During this incident, the child kicked an office door repeatedly. The child left the school building, continuing to shout and swear and ripping items off the walls and went to school A’s football pitch. During this period, school A staff who were present tried to calm the child. They did not physically intervene.
2. Incident B continued when the child reached the football pitch. Other pupils were playing football with a tennis ball. The child picked up the tennis ball and threw it onto a nearby roof. One of the pupils pointed out that the child had ruined their game. In response, the child ran towards that child and physically attacked her. He hit her arm and grabbed her clothing and hair in an attempt to pull her to the ground. Witness F physically intervened by placing her arms under the child’s armpits and moving him away from the other pupil by guiding him round 180 degrees. As soon as the child was moved away from the other pupil, witness F stopped her physical contact with the child. The child immediately returned to the other pupil to resume the attack. Witness F repeated her physical intervention. The child returned to the pupil to resume his attack for the third time, and witness F repeated her physical intervention. Witness F then asked all of the other pupils present to move to the other side of the football pitch and she placed herself between the child and the other pupils, allowing the child to have space. Witness F firmly told the child not to try to hurt the other pupils. The child approached witness F and shouted a threat of physical violence at her. Witness F remained calm and responded to the child that he would not be violent towards her.
3. The child turned and ran back into the school A building, claiming that witness F had hurt his thumb. Once back in the school, the child continued to shout and swear and hit doors. The child remained in the staff corridor area of school A, until the claimant arrived.

*Findings in fact on incident C*

1. Incident C occurred while the child was on school A’s outdoor football pitch. The child was reminded by witness F to stop swearing. The child swore in response to this request. The child was given a ‘red card’ by the football referee twice during the game for swearing. This was in accordance with class rules, which prohibit swearing during football.
2. The child became very angry and repeatedly threw grit in witness F’s face. As she tried to move away from him, the child kicked witness F’s ankles. The child continued to throw grit at witness F. Witness F sought assistance from the school janitor. The child, still angry, took the football and threw it away. He, along with other pupils, chased after the football. Another pupil reached the football first. The child lunged at this pupil in order to retrieve the ball. Witness F stepped in front of the other pupil to protect him. The child took hold of witness F’s arm and pressed his nails into her hand. He took hold of witness F’s thumb and bent it backwards. Witness F repeatedly asked the child to let go of her and told him that he was hurting her. The child did not let go. The school janitor intervened, causing the child to release his grip on witness F. The child then began to kick the janitor’s feet and legs.
3. The child continued to try to reach the other pupils. Witness F stood in front of the pupils, holding out her arms to discourage the child from reaching them. Witness C arrived. She asked the child what had happened. The child continued to move towards witness F. Witness C stood between the child and witness F to prevent him reaching her. Witness C tried to speak to the child, but he walked away, and kicked another pupil on the ankle.
4. The child proceeded to antagonise another pupil, and then dragged the pupil to the ground, kicking and punching him. The school A janitor lifted the child from the pupil. The child laughed and continued to goad the other pupil in an attempt to provoke a physical reaction from him. Staff members stood between the child and the other pupil to prevent physical contact. The child walked a few paces ahead and appeared to be calming down. With no warning, the child turned, fully extended his arm and struck the other pupil’s face. He seized the other pupil’s neck, forcing him to the ground. Witnesses C and E briefly used a technique on the child (**open c hold**) in order to move him off the other pupil. This technique involves placing one hand on the pupil’s upper arm and using the other hand under the child’s other lower arm with the holder’s palm facing upwards. The child continued to behave violently in an attempt to get away from staff members. Witnesses C and E spoke to the child in an attempt to calm him and de-escalate the situation. During this incident, the child kicked witness C two or three times and punched her on the arm. The child continued to verbally abuse staff members as he entered school A’s building.
5. Once inside the school A building, school staff tried to encourage the child to go into a spare classroom and sit on a couch. The child refused to do so. He was offered first aid and water but refused both. The child was pacing on the landing of the top floor of the school A building and verbally threatened school A staff members who were present and threw books around. When offered a cup of water, he poured the water onto the floor and stamped on the cup.
6. The child attempted to return to his classroom. School staff prevented him from doing so, given his distressed state. The child managed to push past witness C and other staff present, and entered the classroom. The child fell to the floor as he entered. The other pupils in the classroom were moved to the back of the room by staff members. Staff members continued to try to persuade the child to calm himself. The child moved towards his desk. School staff tried to prevent him moving further into the classroom. The child went underneath his desk. Staff members tried to speak with the child. The child then stood up and ran down the class towards the other pupils. Witness C intervened to prevent the child reaching the other pupils. The child swung around, crashing into a paper bin. The child stated that he wanted to stay with his class. He was encouraged by witness E to take time to calm down. The child ran into his teacher’s cupboard, picked up another pupil’s folder and ran to that pupil in an attempt to goad the pupil. The child then ran back to the cupboard and asked for his picture. Witness E gave the child that picture and reminded him that it has a calming effect and advised him to take time to look at it. The child folded the picture. The staff then removed the other pupils from the classroom in order to avoid the risk of any further incident. Staff members tried to engage the child with pens and paper and the picture. The child was told that the claimant had arrived downstairs and that he would have to speak to him. The child declined. The child ran downstairs and waited at the front door.

*Findings in fact on incident D*

1. Witness F was walking with the child and other pupils from the school A playground back to the school building following a break. Without warning or previous incident, the child stuck out his foot and tripped up witness F. Witness F lost her footing, but did not fall.
2. On entering the school building the child, instead of returning to his classroom with the other pupils, went to a cloakroom area. He met his brother and tried to encourage him to misbehave. A member of school support staff approached the child and tried to encourage him to return to his classroom. The child ignored this request and tried to enter a nurture classroom, which was locked. The teacher for the nurture classroom returned and unlocked the door. The child tried to enter. The teacher closed the nurture classroom door and proceeded to try to lock it. The child put his fingers between the door and the doorframe so that when the lock clicked into place, the child’s fingers were squeezed.
3. The child became very angry and blamed witness F for having caused his fingers to be sore. The child ran at witness F, grabbing hold of her and repeatedly punching and kicking her. He refused to let go of witness F despite other staff members requesting that he do so. A member of support staff physically intervened and tried to remove the child from witness F. The child dropped to witness F’s lower legs, took them in a ‘bear hug’ grip and pulled, causing witness F to fall to the floor, landing on the small of her back. Witness F narrowly missed striking her head on a bookcase behind her. This incident caused witness F considerable distress and physical pain. She became upset. While in tears, she got up and moved towards the staff room. The child followed her, shouting. Witness F was unable to finish the school day and went home, taking the following two days off work. Witness F reported the incident to the police on the morning of the incident before leaving the school.
4. As a result of this incident, witness F asked to be removed from the child’s support group. This request was granted and witness F did not work directly with the child following this incident.

*Findings in fact on incident E*

1. In November 2020, the child spread liquid soap over the hard floor surface of a spare classroom. School A’s janitor came to remove the soap. The janitor asked the child to leave the room to allow him to do so. The child refused and snatched paper towels from the janitor and tore them. The child also swung clips around with force. The child was informed that his actions were dangerous and that he could hurt someone. The child did not stop. While swinging his arm around, the child struck the janitor twice. The janitor ushered the child out of the room. The child then verbally abused the janitor. The janitor closed and locked the door and cleaned the room. On leaving the room, the janitor was again verbally abused by the child.

*Findings in fact on incident F*

1. In November 2020, the child behaved in an aggressive and threatening manner towards another pupil. The pupil was trying to get away from the child who pursued him. Witness F advised the other pupil to go up a stairwell and lock himself into a classroom. Witness F stood at the foot of the stairwell to prevent the child from following the pupil. The child tried to pull witness F away from the stairs. Witness F asked the child to release her, but he refused and swore at witness F. He told her he wanted to go up the stairs to pursue the other pupil.
2. Witness G was in the vicinity and came to assist witness F. Witness G asked the child repeatedly to leave witness F. He refused to do so. Witness G placed her arms around the child’s waist, locked her fingers and attempted to pull the child away from witness F, using a technique whereby the holder stands behind the pupil and adopts a loose hold to try to stop arms moving (**cross-body hold**). The child pushed his elbows backwards, causing witness G to release her grip and fall backwards onto the floor.

*Findings in fact on incident G*

1. In November 2020, the school A janitor physically intervened with the child in the school gym hall to prevent injury to another pupil. He used a cross-body hold on the child to prevent injury to another child. He used an open c hold to guide the child away from another child.

*Findings in fact on the exclusion*

1. The child was excluded from school A for two days following incidents in September 2020. On that date, the child became angry with witness E after she asked him to complete a task in class. The child shouted and swore at witness E. Witness E allowed the child space and time to complete the task. Witness E then offered to help the child with the task. The child became very angry and threw the computing device he was using several times. He accused witness E of breaking the device. He then left the classroom, slamming the door with some force. The child went to the school office and instructed office staff to call the claimant so that he could speak with him. The office staff reminded the child that he should be in class and that the class staff would help him. The child responded by repeatedly swearing.
2. The child returned to the class. He was offered further help with the task, and agreed to this, but when witness E approached, the child swore and stormed out of the classroom, slamming the door. The child entered another classroom (a primary 6 classroom which he was aware he was not permitted to enter due to COVID restrictions). A member of support staff in that classroom asked the child to leave. The child reacted in an abusive, aggressive and threatening manner, and was smiling. The child refused to leave the classroom, standing in the doorway to prevent the classroom door being closed. During this incident, the child displayed aggressive body language towards the support staff member and attempted to engage another pupil in the class by being abusive about the member of support staff.

1. The support staff member continued to attempt to close the classroom door. However, the child placed his foot in the door to prevent it. The support staff member asked him to remove his foot and the child complied, but continued to be verbally abusive to her. The child appeared to be amused during this incident.
2. The door to the classroom was locked by a member of staff in the class. A member of support staff was in the corridor with the child. She asked the child to return to his classroom. The child continued to try to enter the other classroom. On finding it locked, the child kicked the support staff member on the shin. She told the child that this was unacceptable behaviour, and again asked him to return to his class. The child refused and continued to shout and swear at her. The support staff member tried to call for assistance, but the child prevented this by hanging up the call. The child then left the area and returned to his class. Later, he tried again to enter the primary 6 classroom, applying his shoulder to the door and kicking it hard several times while using abusive language.
3. As a result of these events, witness C decided to exclude the child. That exclusion was intimated to the claimant by letter of the same date (RB037). There were three reasons for the exclusion, firstly to restore order to the school, secondly to restore safety for the child, staff and pupils and thirdly to plan for the child’s safe re-admission to school.
4. The child returned to school following the exclusion. An action plan for his return to school was formulated by school A staff (RB327-8). In summary, the plan provided nurture activities for the child each Monday morning. It also provided a consequence for inappropriate behaviour during morning and lunch breaks, so that the child would spend the following break with staff inside. The plan allowed the child to ‘earn’ any lost break time back by behaving in a positive way or by completing learning tasks.

*Findings in fact on the causes of the child’s behaviour*

1. Training on ADHD for some school A staff was delivered in May 2019 during a 2-hour session focused on pupils aged between 3 and 7 years.
2. In September 2020, witness C briefed key staff members involved in supporting the child that they should form a view as to whether any future distressed behaviour shown by the child arose from ADHD or alternatively was deliberate behaviour, not caused by his ADHD. Witness C offered advice to staff members to the effect that ADHD would not necessarily be the cause of the child’s distressed behaviour.
3. Witness E analysed the child’s behaviour using a scale of 1-10. She concluded that the child’s behaviour was deliberate if she judged it to be within the 1-5 range and therefore not caused by ADHD. Witness E concluded that the child’s behaviour was caused by his ADHD if she judged it as at above 7 in the scale. Behaviour measuring 6 or 7 in the scale was judged by witness E as being borderline between the two.
4. The scale used by witness E was devised by her, based on her professional experience. It was not based on any objective criteria nor was it brought to the attention of the educational psychologist attached to the school.

*Findings in fact on the recording of physical intervention incidents*

1. The responsible body operates (and over the relevant period, operated) a policy which covers incidents involving physical intervention with a pupil in any of its schools. That policy is entitled ‘Guidance on Managing Challenging Behaviour’ (‘**MCBG**’). The current version of that guidance is dated February 2019.
2. The MCBG states principles within which all physical interventions should take place. These principles are that physical interventions with pupils in schools should only be used as a last resort when all other strategies have been considered; physical interventions should serve to de-escalate or prevent a violent or potentially violent situation; physical interventions should not be used as a method of enforcing discipline or compliance.
3. The MCBG also states that any restraint of a pupil should be done in a calm and reassuring manner and must be reasonable. ‘Reasonable’ is defined as the minimum restraint a responsible adult would exercise to prevent physical injury. Further, the MCBG states that restraint should be an act of care, not punishment and should be released as soon as possible.
4. The Crisis and Aggression Limitation and Management (‘**CALM**’) system is a face to face, online and modular learning resource developed and provided to train and equip staff to avoid, prevent and, as a final resort, manage aggressive and violent behaviour. The MCBG states that any use of CALM techniques must be logged in a Restraint Log. A template of such a log is provided for this purpose (Appendix 6 of the MCBG). When a physical intervention of any kind has been used, staff members should complete an Incident Record form. A template of this form is provided (Appendix 1 of the MCBG).
5. The MCBG provides, in Appendix 2, a template titled: ‘Form for Assessing and Managing Expected Risks For Children Who Present Challenging Behaviour’.
6. School A staff recorded incidents involving the child mainly using pastoral notes and a document titled: ‘Record of Calms Holds, Moves, Restraint’ at RB047-048 (**restraint log**).

*Findings in fact on physical intervention training*

1. The MCBG states (at paras 7.3-7.4) that the only training in physical restraint allowed by the responsible body is that provided by CALM Training Services Ltd, a training provider, and that staff who use these methods must have received the required training. The MCBG also states that CALM training must not be passed on by CALM trained staff to other staff who have not been CALM trained.
2. Responsible body staff trained in the use of CALM techniques require, under the MCBG, to maintain their skills through protected time and to be annually re-accredited.
3. No school A staff members have been fully CALM trained (as defined within the MCBG), and most have not been CALM trained at all. Some school staff have been trained in physical intervention within the Keeping Yourself Safe (**KYS**) training delivered by the responsible body within school A. This is a one-hour lunchtime training session. Some staff members have been trained within the TeamTeach system.

*Findings in fact on responsible body policy*

1. A significantly higher proportion of disabled pupils are subject to physical intervention in the responsible body’s schools than non-disabled pupils. A significantly higher proportion of disabled pupils are excluded from school by the responsible body than non-disabled pupils.
2. The responsible body’s policy of physical intervention (MCBG) does not mention children with disabilities, nor does it mention the Equality Act 2010, nor the need to avoid discriminating against pupils with protected characteristics.
3. The responsible body does not address the issue of the use of physical interventions with pupils with disabilities in their public sector equality duty policies or monitoring for education, nor in their Accessibility Strategy.
4. There is no routine monitoring of the rates of physical intervention of pupils with ADHD or of disabled pupils more generally. SEEMIS is the Standard Management Information System used within Scottish Education. ADHD is not listed as an item within the drop down menu on SEEMIS for additional support needs or any other category.
5. The responsible body’s policy on exclusions refers to exclusion as a ‘sanction’ and states that it should reflect the ‘seriousness of the inappropriate behaviour’ and refers to ‘considering alternative, more appropriate punishments’.

**Reasons for the Decision**

*The law*

1. The claimant argues that the responsible body has discriminated against the child by treating him in an unfavourable way because of something arising in consequence of his disability (under s.15 of the 2010 Act, referred to here as ‘disability discrimination’). He also argues that the responsible body has discriminated against the child indirectly (under s.19 of the 2010 Act, referred to here as ‘indirect discrimination’).
2. These types of discrimination hinge on two legally similar types of conduct by the responsible body: ‘unfavorable treatment’ (for disability discrimination) and ‘disadvantage’ (for indirect discrimination).
3. The similarity between these two concepts is clear from the case law and in guidance. The Supreme Court recently discussed the concept of ‘unfavourable treatment’ under s.15 in *Trustees of Swansea University Pension Scheme v Williams* [2019] 1 WLR 93 (***Williams***). Lord Carnwath (delivering the unanimous opinion of the court), adopted the following definition of ‘unfavourably’ from the Court of Appeal’s judgment:

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

Lord Carnwath goes on, at para 27:

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

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

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

Then at paragraph 5.21:

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

1. The content of the Technical Guide in this area was approved by Lord Carnwath in *Williams* (paragraph 27).
2. There are other parts of the definitions for each of the two types of discrimination. We will return to these later.
3. In the *Williams* case and the Technical Guide, ‘unfavourable treatment’ and ‘disadvantage’ are to be treated as similar concepts. The Technical Guide refers to ‘detriment’ as being a similar concept to ‘disadvantage’.
4. For a relevant detriment to be caused to the child, that detriment has to result from (a) treatment by the responsible body (for disability discrimination) or (b) as a result of a provision, criterion or practice (**PCP**) applied by the responsible body (for indirect discrimination).
5. For both types of discrimination argued in this claim, the responsible body can justify its conduct if it can be said to be a proportionate means of achieving a legitimate aim (s.15(1)(b) and s.19(2)(d)). When we consider proportionality below, we do so in the context of the tests set out by the Supreme Court in *Akerman-Livingstone v Aster Communities Ltd*. [2015] AC 1399, as applied in the education context in by the Upper Tribunal in England and Wales in *F-T v The Governors of Hampton Dene Primary School* [2016] UKUT 468 (AAC), para 37.
6. Finally (on the law) there is the burden of proof. The initial burden is on the claimant to establish a case on the face of it, and if he does so, the burden then shifts to the responsible body (2010 Act, s.136). This is discussed in the Explanatory Notes to s.136 of the Act, para 443:

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 responsible body] to show that he or she did not breach the provisions of the Act.

1. This interpretation is supported by the Supreme Court in *Akerman-Livingstone v Aster Communities Ltd*. [2015] UKSC 15, per Lady Hale at para 19. See also the EAT decision in *Dunn v Secretary of State for Justice* [2018] EWCA Civ 1998, per Simler P at para 17, in reliance on an earlier Court of Appeal decision *Madarassy v Nomura International* [2007] EWCA Civ 33.
2. The claimant has established sufficient facts pointing to breaches of the relevant duties in s.15 and 19 of the 2010 Act, in respect of certain matters. In these areas, the responsible body has been unable to show that it did not beach those provisions.
3. We now turn to apply the facts to the law, and in doing so, we will address the following topic areas in order:

A. The incidents of distressed behaviour.

B. Attributing a cause to incidents of distressed behaviour.

C. The exclusion of the child from school.

D. The recording of incidents of physical intervention.

E. Training in the use of physical intervention.

1. In doing so, we will consider the position from the point of view of discrimination arising from disability under s.15 of the 2010 Act. We will then (in part F) consider the application of s.19 of the 2010 Act (indirect discrimination) before addressing remedies in part G.

**A. The incidents of distressed behaviour (findings in fact in paragraphs 11-29)**

1. We have not made any findings in fact in relation to the incident recorded as having happened in February 2020. As the responsible body points out, the only information on this incident is in the ‘Record of Calms Holds, Moves, Restraint’ at RB047-048 (**Restraint Log**). There are uncertainties about what is recorded as having happened, not least given that the incident involved two pupils.
2. Turning to the seven incidents considered above (A-G), the responsible body argues that, in each individual incident, the staff involved adopted actions that represent a proportionate means of achieving a legitimate aim. We agree. It is clear that in each incident a situation arose which had to be defused. In some of the incidents, the safety of pupils and staff was at risk. The safety of the child was also, at points, at risk. The legitimate aims were: restoring order, helping the child to become calm and avoiding harm to the child, pupils and staff. Proportionate means were used to meet these aims, for example by giving the child space, trying to move the child to or from an area, persuading the child to stop behaving aggressively and physically intervening to stop what was happening when he or others were at risk of harm.
3. We ought not take too narrow an approach to questions of proportionality, especially as these incidents were unfolding quickly and in a busy school where split-second decisions had to be made about what to do. We note that witness A supports this broad conclusion (C384-385).
4. However, the way in which these incidents were dealt with has to be viewed in the wider context within which distressed behaviour by the child was managed. We now turn to consider elements of that context.

**B. Attributing a cause to incidents of distressed behaviour (findings in facts at paragraphs 36-39)**

1. Several witnesses told us about their approach to ascertaining the underlying cause of the child’s distressed behaviour during the incidents discussed above. Members of school A staff were asked by witness C to form a view about the cause of the child’s behaviour on particular occasions, namely: was it caused by ADHD or was the behaviour deliberate?
2. The training offered to school A staff about ADHD appears minimal – one two-hour session in 2019. It is not clear who attended the session (although witness F did). Witness F was unable to recall the detail of that training. It is therefore not clear that school staff who were supporting the child in the later years of his time at school A had a good understanding of ADHD from this training. Lack of proper training about the condition and its effects would make it more difficult for staff to develop a good understanding of the child’s behaviour. There was no evidence available to suggest that staff at school A were trained or qualified to make a judgment about whether behaviour was ADHD-related or not.
3. Indeed, there was no evidence available to suggest that such a judgement could be made in relation to the child. Witness C referred to a letter of June 2020 from a Specialty Doctor in Community Paediatrics (RB171-172) in support of such a distinction. Witness C also relied on a subsequent telephone call with the doctor. Witness C further referred to conversations with the child’s educational psychologist and his ADHD nurse. However, witness C did not explain in her evidence how these sources justified an approach of attributing the child’s behavior either to ADHD or as being deliberate with these seen as mutually exclusive.
4. The letter from the doctor (the only documentary source relied upon by witness C) states that the child’s ‘challenging behaviours….may in part be linked to [his ADHD], particularly his impulsivity’. He goes onto say that ‘Some of these also appear to be choice behaviours’, but that does not help the responsible body’s case. The doctor is simply stating that such behaviour can have other causes. Further, he does not refer to any particular incident, and only speculates in general terms.
5. Witness C explained that she concluded from her contact with the doctor that ADHD would not necessarily lead to physically violent behaviour. This does not assist us. Witness C did not state that she had been informed that ADHD cannot lead to the kind of behaviour the child was displaying. Indeed, the parties have agreed that ADHD can result in the child’s behaviour ‘escalating quickly’ and that during these times, the child is ‘impulsive, confused, irate and uncontrollable’ (T056).
6. Witness E devised a scale to attribute cause, but we are not convinced that this scale is valid or reliable, and it appears to relate primarily to the child’s level of arousal. It is not underpinned by any professional advice or objective criteria. It is a purely subjective tool devised by her. We appreciate that professionals can rely on their qualifications and experience to judge situations, but we are not persuaded that these extend to being able to conclude whether or not ADHD caused the child’s behaviour on particular occasions.
7. The doctor in his letter makes reference, in particular, to impulsivity as a feature of ADHD. It is a matter of agreement that the child’s ADHD can result in his behaviour escalating extremely quickly, and that during these times the child is impulsive, irate and uncontrollable, and he is not able to listen properly or communicate effectively (T056). During each of the incidents, there is clear evidence of anger, lack of control, inability to listen, rapid escalation and impulsivity. Applying all of that to the findings we make on the incidents above, it is highly likely that the child’s ADHD was the key driver for his behaviour.
8. Some school staff placed reliance on the fact that during some of these incidents the child was smiling, laughing or ‘gloating’ and therefore interpreted these as deliberate acts not influenced by ADHD. Witness E in her evidence accepted that laughing inappropriately could be an impulsive act. Given the context of the incidents, we were not persuaded that these were reliable signs that the behaviour was not related to ADHD.

1. This unreliable approach to attributing the cause of the child’s behaviour led to treating the child unfavourably, as defined above. In essence, that unfavourable treatment amounted to blaming the child for behaviour which arose from a disability preventing him from exercising control over his actions.
2. The language of blame is used throughout the written and oral evidence, for example in numerous references to ‘poor choices’ and the need for the child to ‘accept responsibility’. One consequence of that approach appears in the language of the return to school plan devised following the exclusion of the child (RB327-328) where there is reference to the child making an effort to treat people with respect with poor choices leading to a loss of break times. This is the language of negative consequences for actions, not the language of support for behaviours driven by a disability.
3. We reach our view on this point on the balance of probabilities. Further, and in any event, the responsible body bears the burden of proving that the approach used by school A staff was reliable and was not discriminatory. They have not discharged that burden.
4. This unfavourable treatment happened because of something arising in consequence of the child’s disability, since the child’s distressed behaviour (which led to the unfavourable treatment) in each incident happened in consequence of his disability.
5. It could be argued that the actions of the school A staff were motivated by a legitimate aim, namely to isolate the cause of the child’s behaviour so that steps to address it could be taken. However, school A staff cannot show that the treatment is a proportionate means of achieving such an aim. The approach to attributing cause was not based on any sound professional advice or on any other objective basis. Further, the approach was flawed since it did not take proper account of the symptoms of the child’s disability, which were clearly on display in each of the incidents.
6. The unfavourable treatment (adopting an unreliable approach to attributing the cause of the child’s distressed behaviour) therefore represents discrimination against the child under s.15 of the 2010 Act.

**C. The exclusion of the child from school (findings in facts in paragraphs 30-35)**

1. The decision to exclude the child following incidents in September 2020 was unjustified. The reasons given for the exclusion were inapplicable. There was no evidence that order in the school had broken down as a result of the child’s behaviour. Indeed, his behaviour on this occasion was less extreme than on some earlier occasions. Safety for the child, staff and pupils as the second reason is not a valid reason for excluding the child. School staff had managed to deal with numerous (and more serious) incidents of distressed behaviour by the child without excluding him. It is not clear from the evidence why this incident triggered a need for exclusion. The final reason (planning for the child’s re-admission) is also flawed. There is no reason for a two-day period without the attendance of the child being needed in order to produce the plan which was prepared (RB327-8).
2. Given the lack of valid reasons for excluding the child, his exclusion represents unfavourable treatment. In all exclusions, the child is sent home, and is deprived (during the period of the exclusion) of access to school education.
3. As we conclude above, the incidents of distressed behaviour were caused by the child’s ADHD and the result of his disability. The exclusion was therefore something which arose in consequence of the child’s disability.
4. Given our conclusions on the reasons for the exclusion, the actions of school A staff were not motivated by a legitimate aim. Even if they were, the responsible body cannot show that the treatment was proportionate. Excluding the child was not necessary for the stated action to be taken to redress the situation. There was no evidence to suggest that if the child had stayed in school (as he had done following more serious incidents) the situation could not have been managed. In essence, exclusion was an extreme and inappropriate reaction to what had happened.
5. The unfavourable treatment (the exclusion) therefore represents discrimination against the child under s.15 of the 2010 Act.

**D. The recording of incidents of physical intervention (findings in facts at paragraphs 40-45)**

1. The importance of recording incidents of distressed behaviour by pupils in schools in a detailed way is clear. Official findings for the Scottish Parliament by the Children and Young Peoples Commissioner Scotland (‘**CYPCS**’) in 2018 state:

Without systematic recording of all incidents of restraint and seclusion, schools and local authorities cannot be confident that they are fulfilling their duties to the children in their care, or that their staff are acting lawfully and in line with agreed policy.(No Safe Place: Restraint and Seclusion in Scotland’s Schools, 2018, p12).

1. The report describes inconsistencies in reporting practices across local authority areas, stating:

This creates a confusing landscape, both for school staff trying to use these materials and particularly for parents and children who attempt to interpret the information provided. (page 16)

1. The responsible body’s policy for recording incidents in the MCBG (with two exceptions, which we will come to shortly) is clear. When physical intervention is used, this should be recorded by involved staff members on an Incident Report form (C169, para 6.4) in a template in Appendix 1 of the MCBG (C183-184). Importantly, that form requires a description of the incident and a record of actions taken to avoid recurrence. There is no evidence to suggest that this form was completed in relation to most of the incidents which involved physical intervention by school A staff members. No explanation for this failure to follow clear policy is offered.
2. The MCBG Appendix 2 (C186-188) is also relevant. Unfortunately, Appendix 2 is not mentioned anywhere within the main body of the MCBG, which we assume is an omission. However, the purpose of the template is clear from its title: ‘Form for Assessing and Managing Expected Risks For Children Who Present Challenging Behaviour’. Although not referred to in the main body of this policy document, it seems to us that this form ought to have been used by school A staff in relation to the child. The child had presented challenging behaviour from an early age (see the findings in fact at paragraph 9 above). These repeated incidents should have given rise to expected risks. The form shows that risks should be identified and assessed, as well as options to reduce risks, followed by a behaviour management plan and recording of how the plan is to be communicated. Staff training issues should be recorded and the behaviour management plan should be evaluated. This system is robust and detailed, focusing on cause, risks, future management and the wider picture (for example, in identifying training needs). Again, there is no evidence to suggest that this form was completed in relation to the child, even although it is clearly relevant. No explanation is provided for this.
3. Appendix 6 of the policy requires a record to be kept of any incident where there is physical intervention or where physical restraint is used. Unfortunately, the title of this document and the description do not match, as the description refers to its relevance ‘where there is a physical intervention or physical restraint used’, whereas the title is ‘Restraint Log’. In the main body of the MCBG, (para 6.2, C179), Appendix 6 is stated to be relevant to CALM techniques. This is confusing. Again, there is no evidence to suggest that this form was completed in relation to the child, despite CALM techniques having been stated as used in connection with some of the incidents, namely incidents C, F and G.
4. Turning to the recording practices which were in place, these are of two types. Firstly, there are pastoral notes. A number of these are included in the bundle in relation to the incidents. The template used here is basic. It consists mainly of a free text box in which the author is presumably expected to describe the incident. There is no requirement to identify what caused the incident, what risks were presented or how school staff can learn any lessons from what happened. It is a generic form and is not geared towards the management of risk. Also, the responsible body accepts that there are no pastoral records for two of the incidents in question, namely incidents F and G.
5. Secondly, there is the restraint log. This is in tabular form. It does not closely resemble any of the appendices in the MCBG and was devised by witness D. It is closest in format to the template in Appendix 6 of the MCBG (C201-202), although it lacks detail (for example, on timing of the incident and triggers). It records 21 incidents involving 8 pupils (including the child) in one and a half pages. It is designed to record the use of certain holds or techniques (described as ‘CALMS’). It is not a document for the comprehensive recording of incidents of physical intervention. There are no general descriptions of the events leading up to the use of a physical intervention technique. There is no detailed description of the techniques used, with general labels adopted (for example the open c hold or the cross body hold). There is no indication of what happened after the use of the technique or the impact of the use of the technique. There is no record of triggers for the incident, nor is there any indication of reflection about the incident. As a recording tool from which lessons may be learned, it holds little real value. This view was supported by the expert evidence of witness A, with whom we agree.
6. Witness C referred to debriefing meetings having taken place after each incident, but there is no record available to us of what was discussed during these meetings or what was agreed as outcomes. There are risk assessments and child plans, a number of which are available to us. However, these documents are not used for the purpose of recording incidents; rather, they are designed to be influenced (in part) by incidents.
7. This brings us to the question of unfavourable treatment. The recording system in place at school A for incidents involving the child was wholly inadequate. Indeed, it was virtually non-existent. This is despite years of incidents of distressed behaviour. It is impossible to know the extent of the impact that a proper, robust, detailed system of incident recording would have had on the way the child’s distressed behaviour was managed. It is perfectly possible that had the MCBG recording protocols been followed, the incidents may have been dealt with differently. The child’s risk assessments and child plans could have been populated differently. These are opportunities for the child which have been missed – a missed opportunity is one of the types of unfavourable treatment, as noted above. The child was denied the opportunity to benefit from a proper recording system. This denial arose in consequence of the child’s disability since, as we have concluded above, we are satisfied that the incidents which fell to be recorded were incidents which were caused by the child’s ADHD.
8. There is no legitimate aim in relation to this question, since we have concluded that the responsible body has failed to implement an adequate incident recording system. We therefore need not consider proportionality.
9. The unfavourable treatment (the denial of an opportunity to benefit from a proper distressed behaviours recording system) therefore represents discrimination against the child under s.15 of the 2010 Act.

**E. Training in the use of physical intervention (findings in facts at paragraphs 46-48)**

1. The CYPCS made recommendations in 2018 about training, including that local authorities should ensure that restraint and seclusion is only carried out by staff members who are trained to do so (‘No Safe Place: Restraint and Seclusion in Scotland’s Schools’, 2018, p.40). However, it is within judicial knowledge (especially in a specialist tribunal) that training is needed for any member of staff likely to require to physically intervene in relation to a pupil.
2. It would be going too far to say that all members of staff in mainstream schools should be trained in physical intervention techniques. The responsible body in its MCBG states that when considering whether a staff member should undertake training in restraint, managers must take into account both the need for this type of training and the appropriateness of allowing that individual to undertake an act of restraint (MCBG para 5.9, C179). Although the term ‘restraint’ is not defined in the MCBG, it would appear that restraint is covered under the definition ‘restrictive physical interventions’, which are interventions designed to prevent, impede or restrict movement or mobility using direct force or restraint. Examples given include holding a pupil or blocking a pupil’s path (MCBG, para 1.5, C172). It is notable that there is no mention of a need for any physical contact to take place in order for an action to amount to a ‘restrictive physical intervention’ under the MCBG; the actions need only prevent, impede or restrict movement by the use of direct force or restraint. One of the specific examples given (blocking a pupil’s path) does not necessarily involve any physical contact. Looking at the seven incidents described above, we are in no doubt that all of them (with the possible exception of incident E) involved such ‘restrictive physical intervention’ under the MCBG. There is no mention in the MCBG of a distinction between ‘planned’ and ‘unplanned’ interventions. Where that distinction was referred to in oral evidence, we do not therefore regard it as being of any significance.
3. The need for staff members who have close contact with the child to be trained in restraint (as that term is defined in the MCBG) ought to have become clear, at the latest, by his time in primary 5 (academic year 2018-19). The child’s risk assessment prepared in May 2018 (towards the end of the child’s primary 4 year) (RB348-352) lists as ‘Hazards’: inappropriate behaviour, verbal or physical aggression, running out of class when angry, high levels of anger when entering/leaving school and attempting to leave the building. It is obvious from this list that physical interventions may be necessary, and this is reflected in the document itself, with numerous references to ‘CALMS strategies’ in the column under the heading ‘Controls’.
4. The child’s primary 6 class teacher, refers to the child as one of the children who ‘became highly dysregulated and resorted to physical violence..’ (para 10, RB286). She refers to regular incidents in that class involving a number of pupils (para 7, RB286). She also, in the same paragraph, refers to that class as having a very high number of children with additional support needs.
5. The first recorded use of restraint of the child occurred in February 2020 (RB047).
6. By May 2018, the school had developed a detailed risk assessment for the child to deal with inappropriate behaviour, verbal or physical aggression, running out of class when angry, high levels of anger when entering/leaving school and attempting to leave the building. By that time, therefore, the prospect of the need for physical intervention amounting to ‘restraint’ as defined in the MCBG ought to have been squarely in the mind of the responsible body. That being so, the responsible body ought to have ensured that all staff who would be likely to be dealing with the child were trained in the use of physical intervention. The MCBG states that ‘staff who use [physical restraint] must have received the required [CALM] training’ (para 7.3, C180). Given that the responsible body’s policy was that the only training in physical restraint which was allowed was that provided by CALM Training Services Ltd., the failure to ensure that all relevant staff were fully CALM trained by the child’s entry to primary 6 was a clear breach of that policy. Indeed, no staff at school A were (or have been, by the time of the conclusion of the hearing) fully CALM trained.
7. The aim of the responsible body’s policy on the provision of CALM training is self-evident: to ensure that specific training from a single provider is delivered. The fact that the transfer of CALM technique training from CALM trained staff to those not so trained is prohibited (para 7.3, C180) is a clear indication of the emphasis the responsible body places on the importance of this training. This approach to incidents of physical intervention is robust and clearly thought through. Witness A points out that the CALM approach accords with industry good practice (he refers to the British Institute of Learning Disabilities and the Restraint Reduction Network Training Standards) (C293).
8. The MCBG (in its current version) was in place from February 2019, and there is an obligation on head teachers/managers to ensure that staff members, where appropriate, are offered training in approved methods of physical intervention (para 4 e, C177). The failure to provide CALM training to all members of staff who would be likely to have contact with the child is a clear and direct breach of that policy.
9. One particular problem with the approach by the responsible body to physical intervention training is the lack of any written records of which staff members have taken which training courses, and when. This is a point made by witness A (C332). This lack of written record of staff training manifested itself during the evidence of witness C, when she attempted to name members of staff who had received some CALM training. She had difficulty in doing so and later corrected a name she had provided earlier in her evidence. This is despite numerous references to the importance of staff managing the child’s behaviour calling on ‘CALM trained staff’ in his risk assessments. A written record of training undertaken would have avoided any uncertainty. In addition, such a record would allow the responsible body (and school management) to monitor the overall training position within a school, both for numbers of staff trained (and whether that number ought to be increased) and for the need for any updated training.
10. Another aspect of the evidence which influenced our view on training was the confusion about the terminology for certain physical interventions. We are not convinced that even staff who used c-holds and cross-body holds were completely clear what those terms meant. These terms appear in the restraint log with no definition or explanation. There was also confusion about the origin of training on how to use those techniques – for some staff members, these techniques were introduced during KYS training; for others it was TeamTeach training; and for all there were references to CALM techniques (even although no school A staff member is fully CALM trained). This confusion has influenced the content of the child’s risk assessment documents, which contain repeated references to CALM techniques which are likely to lead to confusion for staff not properly trained in those techniques to understand what to do in practice. All of this uncertainty makes the use of techniques in a safe and consistent manner impossible. This underscores the inadequacies of the training regime in place at school A.
11. This brings us to the question of unfavourable treatment. It is impossible to conclude with precision the impact that proper training of those staff members involved in incidents of physical intervention with the child may have had on how those incidents were handled. We note that witness A describes the training provided by CALM Training Services as ‘providing bespoke learning resources to equip staff to avoid, prevent, and, in the final event, manage aggressive and violent behaviours in complex settings’ (C300). He goes onto explain that the physical skills components of the CALM course are ‘biomechanically evaluated and tested for user competence in face-to-face sessions before certification of learners is complete’ (C301). It is perfectly possible that at least some of the incidents involving the child may have been avoided or dealt with differently by staff members who were CALM trained. Given this, the child has suffered a loss of opportunity: he did not have the opportunity of access to staff trained in accordance with the responsible body’s policy on physical intervention.
12. We have considered whether the training provided to staff by the responsible body (namely KYS) was adequate such that it removes any loss of opportunity, even although it does not meet the responsible body’s own MCBG policy. However, we are not satisfied that this is the case. The responsible body argues that CALM techniques were acquired during the KYS training. There are a number of issues with this line of argument.
13. Firstly, the initial KYS training was delivered in August 2019 with the latest session being in August 2021 (RB167). There was no evidence about which staff members took the KYS training on the various dates it was provided. It is therefore impossible to know whether or not the staff involved in each of the incidents with the child had received KYS training in advance of those incidents. This uncertainty is a consequence of a lack of proper record-keeping of staff training dates and content, mentioned above.
14. Secondly, looking at the description of CALM training by witness A compared to the description of KYS training, it is obvious that CALM training is significantly more detailed and rigorous than KYS training. The summary of KYS training at RB110 expressly concedes that it is ‘not full CALM training’ but is an ‘outline of the CALM training modules available and what is involved in each’. The summary refers to ‘Basic principles of CALM physical intervention’, but makes it clear that the CALM training is more detailed. This point is amplified by the fact that the CALM theory training alone is taught across two days (witness C having completed this element of the training), which is followed by a further practical training session. In contrast, KYS training took place in lunchtime sessions in school A and lasted for around one hour and was repeated every year.

1. Thirdly, again as explained by witness A, CALM training refresher courses are required to maintain accreditation and there is a clear obligation in the MCBG to keep CALM accreditation up to date (para 7.4, C180). There is no such accreditation arrangement in place for KYS training.
2. Finally, as noted above, CALM training accords with good industry practice; there is no evidence of any relationship between the KYS training and good industry practice. This means that (bearing in mind that the responsible body bear the ultimate onus of proof on this point) they have not satisfied us that the loss of opportunity which came from a breach of the MCBG was balanced by the training that was provided. We should add here that there was reference to Team Teach, as a training programme undertaken with a different local authority by witnesses C and D. However, we were provided with very little information on the content of that course, and so could not make a reliable comparison between it and CALM training.
3. There is no legitimate aim in relation to this question, since we have concluded that the responsible body has failed to apply its own physical intervention training policy, and has failed to balance the resultant disadvantage with the training which was delivered. We therefore need not consider proportionality. Even if it could be argued that the provision of KYS training was a proportionate means of achieving the legitimate aim of training staff members in the use of physical intervention techniques, we would reject that argument. It is not proportionate for a responsible body to fail to follow its own policy and to instead put in place an inferior training regime to that required in its policy, one which does not accord with industry standards.
4. Again, the unfavourable treatment arises out of the child’s disability since the physical intervention training we suggest ought to have taken place is directly relevant to the incidents which, in turn, we have concluded arose out of the child’s ADHD.
5. The unfavourable treatment (the denial of an opportunity to benefit from being managed by staff members of school A who were adequately trained in physical intervention) therefore represents discrimination against the child under s.15 of the 2010 Act.

**F. Indirect discrimination (findings in facts at paragraphs 49-53)**

1. The claimant argues his case under s.19 of the 2010 Act with reference to some of the policy documents used by the responsible body. We have therefore not addressed each of the above topic areas (A-E) in the context of s.19, since that is not the way this part of the claim was presented.
2. It is agreed between the parties that a significantly higher proportion of disabled pupils are subject to physical intervention in the responsible body’s schools than non-disabled pupils. It is also agreed that a significantly higher proportion of disabled pupils are excluded from school by the responsible body than non-disabled pupils. However, in order to be satisfied that these trends are caused by a discriminatory PCP under s.19 of the 2010 Act, some evidence of causation would be needed. As Lady Hale in the Supreme Court case of *Essop and others v Home Office* [2017] UKSC 27 notes at paragraph 25 a causal link between the PCP and the particular disadvantage suffered by the group and the individual is needed. The claimant in his submissions (C408, para 56 and para 59) asserts that the responsible body’s practice and policies on physical intervention result in the higher proportions referred to above. But there is no evidence from which this can be inferred to be the case. There is no evidence to suggest that, for example, the MCBG or how it is applied results in more physical interventions; that may be the case, but evidence from which that can be inferred is needed. The same applies to exclusion statistics. We are aware that the ultimate burden of proof rests with the responsible body, but there is an initial burden on the claimant (as mentioned above). This burden has not been discharged on this point.
3. It is agreed between the parties that the responsible body does not address the issue of the use of restraint on pupils with disabilities in their public sector equality duty policies, or monitoring for education, nor in their Accessibility Strategy. Again, there is no evidence from which we may infer that these policy omissions have led to any particular disadvantage to the child or to disabled pupils in the responsible body’s schools generally. To put it another way, there is no evidence from which we can conclude that had those documents referred to restraint of pupils with disabilities, this would have made any difference to how the child was dealt with in school A. Again, we are aware that the ultimate burden of proof rests with the responsible body, but the initial burden on the claimant (as mentioned above) has not been discharged on this point. We note also that we do not have jurisdiction over a breach of s.149 of the 2010 Act .The jurisdiction of the Tribunal under the 2010 Act is defined in Schedule 17, Part 3, para 8 of the 2010 Act, which refers to claims under Chapter 1 of Part 6 of the 2010 Act (ss. 84-89). That Chapter makes no reference to the duty under s.149. However, we have addressed this question since it is arguable that the s.149 duty can be relevant in a 2010 Act claim.
4. There is no routine monitoring of the rates of physical intervention of pupils with ADHD or of disabled pupils more generally: this is agreed between the parties. However, there is no evidence from which we can infer that the child was put at a particular disadvantage because of this. Once again, we are aware that the ultimate burden of proof rests with the responsible body, but the initial burden on the claimant (as mentioned above) has not been discharged.
5. It is agreed that the responsible body does not address the issue of exclusion of pupils with disabilities in their public sector equality duty policies or monitoring for education, nor in their Accessibility Strategy. While the child was excluded (unjustifiably, as discussed above), again there is a lack of evidence that the decision to exclude would have been any different had these policies referred to pupils with disabilities. There is no evidence to suggest that these documents were known about or considered by school A staff during the exclusion process. Once again, we are aware that the ultimate burden of proof rests with the responsible body, but the initial burden on the claimant (as mentioned above) has not been discharged on this point.
6. The responsible body has accepted that some of the language of their policy, especially its punitive nature relating to exclusion of pupils, is not appropriate and must be amended. We note that concession, but we cannot make a finding of indirect discrimination in relation to the wording. Again, there is no evidence available to connect the policy wording with the exclusion, meaning that we cannot conclude that the policy is discriminatory under s.19 of the 2010 Act. Once again, we are aware that the ultimate burden of proof rests with the responsible body, but the initial burden on the claimant (as mentioned above) has not been discharged on this matter.
7. Moving onto the MCGB, the position is different. It is agreed between the parties that the responsible body’s policy of physical intervention does not mention children with disabilities, nor does it mention the 2010 Act, nor the need to avoid discriminating against pupils with protected characteristics. The question is whether these omissions amount to indirect discrimination. The answer is: yes.
8. The PCP here is the MCBG policy. That policy applies to all pupils in the responsible body’s schools, and so it applies to pupils who are not disabled (s.19(2)(a)). The policy puts persons with ADHD at a particular disadvantage when compared with those who do not have it (s.19(2)(b)) and it puts the child at that disadvantage (s.19(2)(c)). These two provisions are clearly met since, as discussed above, part of the difficulty in how physical intervention in relation to the child was approached was a lack of understanding of the cause of the child’s behaviour. Had the MCBG made appropriate reference to the need to take account of conditions such as ADHD, and had it done so in a meaningful way, it is likely that staff at school A would have approached the question of the cause of the child’s behaviour differently. The way in which this was approached represents unfavourable treatment as explained above, and by the same token, it represents a particular disadvantage under s.19(2)(b).
9. There is no legitimate aim here, for the reasons described in paragraph 84 above.
10. The PCP here (the MCBG) is therefore indirectly discriminatory in its failure to address the relevance of the 2010 Act.

**G. Remedies**

1. The parties agreed remedies in advance in writing, should discrimination have been found to have occurred (T063). While this is unusual, this step is perfectly competent.
2. The parties had not, however, addressed timescales for the delivery of those remedies. While the 2010 Act does not require timescales for remedies, it is good practice to do so, since it makes remedies more practical. Both parties provided written views on timescales for each remedy.
3. On remedy a. (a formal statement on discrimination) this is provided in this decision.
4. Parties agreed that 7 days from the end of the appeal and review period was appropriate for remedy b. (an apology). We agree too.
5. As a result of a review application by the responsible body, which led to the original decision of April 2022 being set aside under s.44 of the Tribunals (Scotland) Act 2014 and being replaced with this one, certain changes were made to the original paragraphs 3.c. and 3.d, which are reflected in those paragraphs above. The reasons for these changes are explained in the decision on the review application, issued with this decision. The changes are to the original time limits for carrying out the remedies in those paragraphs, and a change to the wording of the original remedy in paragraph 3.c.