



Additional Support Needs

**DECISION OF THE TRIBUNAL**

**Witness List:**

**Witnesses for Claimant:**

Pastoral Support Assistant (witness A)

Educational Psychologist (witness B)

Family member (witness C)

**Witnesses for Responsible Body:**

Depute Headteacher (witness E)

Principal Teacher Support for Learning (witness F)

Support for Learning Teacher (witness G)

**Claim**

1. This is a claim under the Equality Act 2010 (**the 2010 Act**). The claimant alleges that the child suffered disadvantage caused by discriminatory treatment by the responsible body in the way it provided, or failed to provide, education to the child at secondary school, and whilst at home during absences from that school.

**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) of the 2010 Act.

## Process

3. There were four case management calls, namely in July, August, September and November 2023. The claimant did not obtain legal representation and was an unrepresented party throughout. Late productions on behalf of the claimant were allowed in November 2023.
4. A further late production, an 18-page expert clinical psychology report, was sought to be lodged on the morning of the first day of the hearing. This was opposed by the responsible body. The lodging of the expert report was refused on the following basis:
  - The expert witness was not being called to speak to the report;
  - The purpose of the report was purely to provide corroboration of the psychological symptoms said to be displayed by the child and not to rely on any particular diagnosis;
  - Those psychological symptoms were already to be spoken to by witnesses B and C; and
  - The lodging of the report would cause a delay to the hearing.

## Findings in Fact

5. The child was diagnosed with learning disability at the age of about 7 to 8 years. Aged 12 years old, the child was diagnosed with Auditory Processing Disorder (**APD**).
6. The child was anxious about moving to secondary school. An extended transition period with significant planning for the move to secondary school was required. This resulted in the child spending a second year in primary 7. The child's anxiety about the move subsided because of the successful transition period in primary school.
7. The child missed the first few days of secondary school because of parental concern about the length of the taxi journey route to and from school. An alternative private taxi arrangement was organised which addressed the parental concern. The secondary school had no direct control over which taxi was allocated to the child or the route to be taken by that taxi.

8. As a result of administrative failure, following the retirement of the then principal teacher of support for learning, the detailed transition planning information for the child was not uploaded to the computer system operated by the secondary school. This error was rectified by collating all the necessary information from other sources. No harm resulted.
9. A further administrative error resulted in incorrect copies of the child's timetable being issued to the claimant. This error was rectified on the first day of the child's attendance at secondary school. No harm resulted.
10. The child does not like meeting groups or crowds of older teenagers whilst in secondary school. This need was addressed by the use of an Additional Needs Assistant (**ANA**) moving the child prior to the bell at all transition times, including arrival at and departure from school. An ANA was always available in the event the child required to leave a classroom at any point during the school day.
11. The child reported an incident at the canteen during the second week of secondary school. The ANA with the child had handed over to another ANA to take the child back to the classroom. The child was unaware of this arrangement and left the canteen by a different exit. In doing so, the child reported being stuck in a crowd that was moving towards them, being jostled and having comments made to them by other young people. This upset the child causing the child to cry.
12. The child returned to school the following day and performed well in class. A few days after the canteen incident, the child was kept off school by the claimant for a number of days before a graduated return to school. The reason given for the absence was the child's anxiety about the canteen incident.
13. On about four other occasions, the child has encountered a group or crowd of teenagers whilst transitioning between classrooms with an ANA during the school day. One of the occasions was because the child required a longer toilet break than anticipated and another occasion was in relation to a fire alarm. A third occasion related to a delay in leaving a classroom prior to the bell and the fourth occasion was when the allocated ANA stopped to assist another pupil during the course of the transition. At no point in time was the child left alone during the school day without the support of an ANA or a teacher.

14. At times during the first and second secondary school years, the school has had difficulty recruiting a full complement of ANAs. Although not identified as a specific need for the child, the school agreed to provide a 1 to 1 ANA for the child. There was no delay in the implementation of this provision.
15. The ANA recruited for this role only remained in post for a short period of time. The reason provided by the ANA for leaving the role was that the perceived pressure and accountability from the claimant was untenable. Other ANAs have had to be supported by the school for similar reasons, namely the perceived immense scrutiny by the claimant affecting their health and wellbeing.
16. The child has been taught at secondary school with a mixture of mainstream education and support for learning. The precise proportion of each has varied over the first and second years. Latterly, in second year, the child was mainly educated in the support for learning base. A planned reintegration into some mainstream classes was interrupted by the child's prolonged absence from school for mental health reasons.
17. Throughout the child's time at school, the child had an iPad provided to her by the school. The iPad contained the relevant differentiated information about each of the subjects taken by the child. In the event that the child experienced any difficulty with accessing the information on the iPad support was provided by the ANA allocated to the child at any given point in time. The child was provided with an appropriately differentiated curriculum.
18. The child's specific auditory need was met by the school. The teachers at the school were familiar with, and used appropriately, the equipment required to meet the needs of the child's APD.
19. The child has been absent from school for about the past two months. The reported reason for the absence is mental health difficulties related to the child's reaction to the canteen incident at the beginning of the first year.

20. The claimant informed the school that because of the child's mental health difficulties, the child was not able to learn at home during periods of absence. When the claimant informed the school that the child was able to participate in community learning, the school arranged for that to be started.
21. The child has a successful community-based learning provision in place with the support of an ANA already known to the child in the community. The child enjoys most of this learning provision although perceives some of the projects to be at too basic a level.
22. The child, whilst at school, presents as a very happy child who is always chatty and keen to engage. The child has a good sense of humour and enjoys banter. The child loves music and cooking. The child has a particular talent for art. The child was progressing well at school. The school's hope is that there will be a return to school with reintegration into some mainstream classes.
23. Throughout the child's attendance at secondary school, the responsible body has maintained regular contact with the claimant to discuss the progress and needs of the child. For the majority of that time there have been meetings between the claimant and at least one member of the senior management team on at least a fortnightly basis.

### **Reasons for the Decision**

24. Parties are agreed and we concur, that the child's diagnoses as referred to in paragraph 5 above, mean that the child has a disability under section 6 of the 2010 Act.

### ***The law***

25. The claimant's case is that the responsible body discriminated against the child in relation to eight different matters (as detailed in tabular form in paragraph 32 below). As we understood the claimant's submission, it was that the responsible body discriminated against the child under subsections 85(2)(a) to (d) and (f) of the 2010 Act.
26. To succeed, the claimant needs to provide evidence of either:
- (a) less/unfavourable treatment or

(b) disadvantage to the child,  
caused by the responsible body.

27. These two similar concepts are central to all the main forms of discrimination under sections 13 (direct discrimination), 15 (discrimination on the basis of disability), 19 (indirect discrimination) and 20-21 (reasonable adjustments discrimination) of the 2010 Act.

28. 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**)).

29. 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*.

30. In relation to causation, the relevant unfavourable treatment or disadvantage must result from either:

- (a) treatment by the responsible body (sections 13 and 15 of the 2010 Act) or
- (b) a provision, criterion or practice applied by the responsible body (sections 19 to 21 of the 2010 Act).

31. Although the burden of proof is not onerous, the claimant 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.

32. The claimant alleges that the responsible body discrimination against the child in relation to the following eight matters.

| Alleged discriminatory treatment | Type of discrimination alleged |
|----------------------------------|--------------------------------|
|----------------------------------|--------------------------------|

|  |                           |
|--|---------------------------|
| The management of the transition from primary school to secondary school | Sections 15 and 20-21     |
| Transitions within school to avoid crowds                                | Sections 15 and 20-21     |
| Delay in the provision of a 1-1 ANA                                      | Sections 15 and 20-21     |
| Access to mainstream education   | Sections 19 and 20-21     |
| Failure to provide an education when the child had prolonged absences    | Sections 13, 15 and 20-21 |
| Failures to meet needs arising from APD                                  | Sections 15 and 20-21     |
| Differentiation of the curriculum  | Sections 15, 19 and 20-21 |
| Ongoing issues with access to education – present education not suitable | Sections 13, 15 and 20-21 |

33. We will deal with these eight matters below. However, by way of a general observation, where there are differences in view on any of the issues, we have preferred the evidence of witnesses E, F and G over any other witness. This is because we must separate assertion from evidence and consider the source of the assertion. The claimant is not an education professional and did not give evidence. The claimant was, however, the source of virtually all the evidence led by the claimant against the responsible body. This was confirmed by witness B. The witnesses for the responsible body are, on the other hand, experienced professionals with extensive teaching experience. They also gave evidence of matters they witnessed firsthand. This means that, if we are satisfied the responsible body's witnesses are not being dishonest (and we are so satisfied), 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 way the child presented and behaved at the school was different to the way the claimant reported matters. Again, this is a common scenario and not a criticism of the claimant.

***The management of the transition from primary school to secondary school***

34. The claimant submits that not following through with the transition plan is a failure to make a reasonable adjustment. Reliance is placed by the claimant on the apparent failure by the retired teacher to upload the relevant information. The evidence does not

support this submission. Whilst it was agreed that there was an error in failing to upload the detailed transition information, there was clear evidence that all of that information was, in any event, obtained by other means, including from the claimant. Further, the evidence was that all parts of the detailed transition planning were in fact implemented at the start of the child's secondary school education. We accepted the evidence of witness G on this issue as the witness was an experienced teacher who was present at the relevant time. Witness G gave evidence in a straightforward matter and made concessions where appropriate. The claimant relied on the evidence of witness B on this issue, asserting that that witness had given evidence to support the claimant's submission. We reject that assertion. Witness B was clear in evidence. The witness was asked if the child spent a lot of time in Support for Learning (**SFL**). Witness B replied stating that they did not have the data to answer that question. In many respects, witness B was the main witness for the allegations made by the claimant. This is borne out by the claimant's heavy reliance on the evidence of witness B in submission. However, we have come to a completely different view about the evidence of witness B. Our view is that witness B went to great lengths to explain that they had a limited involvement in matters. In particular, the only information about the child's experience at the start of secondary school came from what the claimant told them. Witness B's analysis of the allegations made by the claimant fell far short of what is required to satisfy the legal test of unfavourable treatment or disadvantage. As we understood witness B's evidence, it was to the effect that even the best planning cannot prevent unforeseeable errors from occurring. The errors that did occur were not blameworthy, in the opinion of witness B, but rather a feature of something that is difficult to achieve in difficult circumstances. We accepted that evidence and agree with it, on the facts of this case. The errors relied upon by the claimant do not amount to unfavourable treatment or disadvantage.

35. We can understand the claimant's frustration at errors occurring. We do not rule out that some errors can, in principle, be viewed as sufficiently serious to constitute a failure to make a reasonable adjustment. However, on the facts of this case, the details of the transition plan were successfully communicated to the school, albeit in a fashion that created some inconvenience by requiring the claimant to supply some of this information. Thereafter, the transition plan was implemented. In these circumstances, the responsible body did not treat the child unfavourably. If there was an error in relation to placing the child wholly in SFL at the outset, this was not sufficient in of itself to constitute



unfavourable treatment or disadvantage. The responsible body were fully aware of the support required by the child and put in place reasonable measures to address the support required. Those measures included using SFL for some classes and mainstream for other classes. The measures were successful. The error which occurred at the canteen bore no relation to the proportion of time spent in SFL.

36. The claimant also submits under this head, that the reasonable adjustments were not consistent enough in the first few weeks which led to the child being harmed. The logical analysis of this submission confirms the evidential position that reasonable adjustments were made. What is alleged is that they were not consistent enough. We disagree with this submission for the same reasons as outlined above, namely that any errors identified do not amount to unfavourable treatment or disadvantage.

### ***Transitions within school to avoid crowds***

37. The claimant's submission on this issue is very similar to the submission on the first issue. The claimant relies on witness B to assert that the reasonable adjustment of transitions between classes occurring about 10 minutes prior to the bell, did not occur consistently enough. We reject this submission for the same reasons as detailed above. Witness B could not provide relevant evidence on whether there was a failure to implement this reasonable adjustment as the witness had no direct knowledge of it. The claimant did not give any evidence at all. When these matters were put to the school staff witnesses (witnesses A, E, F and G), they denied that this had occurred frequently. The very few occasions when the responsible body accepted it did occur were explained by the surrounding circumstances (as narrated in paragraphs 11 to 13 above).

38. As submitted by the claimant, witness D, the child, did provide views to the effect that the ANAs did not show up on time for the transitions. We accept that this is the child's perception of matters. However, when this was put to witness E, a very experienced teacher in a senior managerial role, the response was that the perception of the ANAs would be different to the perception of the child on this issue. We accepted the evidence of witness E on this matter. It is consistent with all the other evidence in the case on this issue, namely, that the transitions were in the main being managed appropriately. They had only failed on a very few occasions.

39. In all these circumstances, there was no unfavourable treatment or disadvantage to the child. On a few occasions the reasonable adjustment, of an early supported transition by an ANA, has not succeeded in avoiding a group or a crowd of teenagers. However, that is simply a reflection that perfection cannot reasonably be achieved in this difficult situation. The responsible body's obligation is to take reasonable steps to avoid the disadvantage. There is no legal obligation to ensure the avoidance of disadvantage. In this case, the responsible body fulfilled its legal obligation.

### ***Delay in the provision of a 1-1 ANA***

40. The claimant's submission relies on an alleged delay of 8 months in providing a 1-1 ANA. The evidence does not support this submission. There was no evidence of any delay in any recruitment process. Evidence of timing of appointments is not evidence of delay. There was no delay. Accordingly, there was no unfavourable treatment or disadvantage. In any event, the child did not require 1-1 ANA support to meet identified support needs. Rather, the responsible body, considering all the difficult circumstances, chose to provide 1-1 ANA support to see if this would improve continuity for the child. That led to the situation described in paragraph 15 above.

### ***Access to mainstream education and Differentiation of the curriculum***

41. These two issues will be discussed together as they have significant overlap in the submissions by the claimant.

42. The claimant's submission relies on many matters not led in evidence. Reference is made to assertions made by the claimant during complaint correspondence and in emails. The claimant then uses these assertions to assume and infer outcomes that support the submission. Most of these matters are not evidence. The child expressed some views suggesting that some of her work in mainstream classes was too hard. The claimant infers from this view that the classwork was not being differentiated to the child's level and concludes this was discrimination on the part of the responsible body. This type of analysis is the pattern for most of the claimant's submissions. We do not accept the inferences made by the claimant.

43. The only relevant positive evidence on this issue was to the effect that differentiation was the responsibility of each teacher. The child received a differentiated curriculum via either printed work or via the iPad, in each case with the support of an ANA. The child would not necessarily know whether the work was differentiated as they would only see the version before them and not the version given to other children. We accepted the evidence of witnesses F and G on this issue.

44. Similarly, the claimant relies on the views of the child to assert that the community education currently being provided by the school over the course of the last two weeks, is not suitable for the child. However, the context of this education provision is as part of an overall plan to rehabilitate the child gradually to school education whilst mindful of the nature of the mental health difficulties reported to be faced by the child. Seen in this light, we are satisfied that the school is paying careful attention to the specific needs of the child and tailoring the education package to suit those needs. An ANA known to the child has been recruited to assist the child with the current community-based education. It is quite clear on the evidence that the child is enjoying the current education provision and benefitting from it.

45. In these circumstances, we are clear that there is and was no unfavourable treatment or disadvantage caused by the responsible body in relation to either of these two issues.

***Failure to provide an education when the child had prolonged absences and ongoing issues with access to education – present education not suitable***

46. There is considerable overlap in the submissions by the claimant on these two issues. Accordingly, they will be dealt with together here.

47. It is a matter of agreement that the child did not have direct teacher contact for education during periods of absence, except for the past two weeks. The claimant relies on this to allege that discrimination occurred. However, that is not the complete picture. The decision to keep the child off school was made on each occasion by the claimant. Whilst the claimant submitted that the decision was supported by witness B, an educational psychologist, that witness was at pains to convey that they did not discuss matters with the school staff but relied solely on what was being reported by the claimant. Witness B

was also clear that their support was based on the perceived need by the claimant to remove a child who was having mental health difficulties, from the cause of those difficulties.

48. In addition, throughout the periods of absence there continued to be regular meetings between the claimant and the school with a view to rehabilitating the child back into school when able. The child retained the ability to access education via the school supplied iPad with all class-based teaching being uploaded there. A sensitive approach had to be taken by the school. This was particularly so when it was emphasised to the school by the claimant that the child had mental health difficulties that may be triggered by discussion of the very issues that led to her being removed from school. The claimant advised the school not to discuss anything of an emotional nature with the child.

49. In these circumstances, we accepted the submission by the responsible body that the school had to be very careful about their interactions with the child. Whilst we do not accept that there was any duty on the claimant to actively ask for ongoing education whilst the child was off school, nonetheless the information and advice passed on by the claimant meant there was no ideal solution. By maintaining regular contact with the claimant and continually aiming to assist the child back to school, the responsible body did not cause any disadvantage or treat the child unfavourably, in our assessment.

### ***Failures to meet needs arising from APD***

50. The reasoning on this issue is almost identical to that expressed at paragraphs 42 and 43 above. The claimant relies on the views of the child to assert that the teachers did not know how to use the FM system correctly. That was at odds with all the other evidence in the case, particularly the evidence of witnesses F and G, which we preferred on this matter.

51. The other allegation made by the claimant is that the failure to provide pre-learning materials was discriminatory. Our assessment of the evidence is that the school actively assessed the recommendations made by the teacher for the deaf. They determined which recommendations would assist the child. They determined how best to implement those recommendations whilst mindful of not overloading the child in order not to create

or worsen the known anxiety. In these circumstances, we are satisfied on the evidence that there was no unfavourable treatment or disadvantage caused by the responsible body.

## **Conclusion**

52. For the reasons explained above, we conclude that the responsible body has not caused disadvantage to the child, and neither has it treated the child unfavourably. This means the claim must be dismissed.

## **Alternative analysis**

53. Even had we been satisfied that either disadvantage or unfavourable treatment under the 2010 Act had occurred, it would not have altered our ultimate decision. This is because the claimant would not have been able, on the evidence available, to meet the tests for any of the discrimination types.

54. 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.

55. For discrimination arising out of a disability and indirect discrimination, even if the other parts of the test were met, any unfavourable treatment would have been justified, on the basis that the treatment was a proportionate means of achieving a legitimate aim.

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

57. 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:

- i. ANA support in class;
- ii. access to differentiated learning;
- iii. modified timetabling;

- iv. support for transitions at the beginning and end of the day;
- v. leaving class early to avoid crowds during transitions;
- vi. breaks in double periods as required;
- vii. access to full time placement within SFL;
- viii. building educational opportunities around the child's needs and interests;
- ix. increasing ANA support and recruiting a specific 1-1 ANA;
- x. access to a built-up timetable out with the school premises, with individual transport and ANA support;
- xi. provision of online access to teaching staff every day as part of the built up timetable; and
- xii. ongoing regular meetings between the claimant and the school to discuss the child's progress and changing needs.