Health and Education Chamber
First-tier Tribunal for Scotland

Additional Support Needs

DECISION OF THE TRIBUNAL

FTS/HEC/AC/23/0078

Witness List:

Witnesses for Claimant:

Headteacher, The school (witness B)

Claimant

Witnesses for Responsible Body:

Former Headteacher, The school (witness A)

Headteacher, The school (witness B)

Claim

1. The claimant relies on section 85(2)(a), (b) and (f); and section 13 (direct discrimination); section 15 (discrimination arising from disability); and section 20 (failure to make reasonable adjustments) of the Equality Act 2010 (**the 2010 Act)** which result from the decision of the responsible body that the child be placed in a composite class with one other pupil from his year group who also has ADHD, with the effect that this removed the child from his usual peer group.

2. Section 85(2)(a) of the 2010 Act provides that the responsible body of a school must not discriminate against a pupil in the way it provides education for the pupil. Section 85(2)(b) provides that the responsible body must not discriminate against a pupil in the way it affords the pupil access to a benefit, facility or service. Section 85(2)(f) provides that the responsible body must not discriminate against a pupil by subjecting the pupil to [any other] detriment.

Decision

3. The responsible body has directly discriminated against the child; discriminated against the child for reasons arising from his disability; and failed to make reasonable adjustments for the child; for the purposes of section 85(2)(a), (b) and (f) of the 2010 Act, which means that a contravention of Chapter 1, Part 6 of the 2010 Act has occurred. These arise from placing the child in a P5/6 composite class without considering the child or his parent's views and by causing the child to experience disadvantage.

4. We make an order that the responsible body complies with the remedies set out at paragraph 90.

Process

5. Case management calls were held in August and October 2023 which addressed a number of procedural matters. Witness statements were prepared, exchanged and lodged. A joint minute of agreed facts was prepared (T029) and outline written submissions were lodged (T031-T042) with final submissions lodged after the hearing. We had access to and took full account of a folder of evidence ('bundle') comprising pages T001-T042, C001-C070 and R001-031 which contained all documents (including witness statements from each witness) lodged by both parties.

6. An independent advocacy report was considered to explore the views of the child. Due to the concerns of the claimant that engagement with an advocate would have a negative impact on the child's wellbeing and the child's refusal to meet an advocate, this did not proceed.

7. At the conclusion of evidence the tribunal invited both representatives to address the duty at section 12 of the Education (Additional Support for Learning)(Scotland) Act 2004 (**2004 Act**) in their final submissions due to the emphasis placed by witness A on the configuration of the child's class being designed to meet "the needs" of the child.

8. All witnesses gave their evidence online, using Cisco Webex. Parties, representatives and tribunal members attended the hearing in-person. A supporter was present for the claimant.

The child's views

9. Two drawings were lodged by the claimant (C060 and C062) and these were explained by the claimant as expressions of the child's views about school. The second drawing (C062) has two words written, 'shocked' and 'nervos'. These were written by the child on or around early January 2024 after the claimant prompted him to either write or draw how he felt about school when he moved into primary 6. The first drawing (C060) is one the child prepared some months before. The claimant explained that each building in this drawing represents the school and the person drawn in the middle is the child. There are images of army tanks, a 'stop' sign over one of the school images and an asteroid. These drawings gave us a glimmer of the child's views about school at the times he had drawn or written them.

10. Although we did not meet the child or have an independent advocacy report we were able to gain a good sense of the child from the evidence, particularly the evidence of the claimant. We learned from this that the child does not always want to go to school. This is a very common occurrence. The claimant used to ask the child how his day was after school but he does not want her to ask that now, instead, he wants to be asked if he is happy to be home. The child does not like to talk about school.

Findings in Fact

11. The child is 11 years of age. He lives with his mother (the claimant) and his brother in the family home.

12. The child has Attention Deficit Hyperactivity Disorder (**ADHD**) and displays traits of Autism Spectrum Disorder (**ASD**). The child struggles with socialisation (he is severely socially withdrawn with decreased interaction with others), has difficulty coping with change, as well as concentration, emotional and behavioural regulation and sensory issues. He is extremely anxious, impulsive, restless, and unable to concentrate and easily distracted. The child struggles with his organisational skills which have a direct effect on his ability to learn. He struggles to sit down and to focus on school work. The child has difficulties with his mental health and wellbeing (Joint Minute, T029; Educational Psychologist report, C047; Individual Education Plans (**IEP**), C050 and RB017).

13. The child can be distressed at home before and after school and he can have outbursts, (the claimant and school call these 'meltdowns'). The child shouts, screams, bangs doors and can become aggressive towards his brother. The child needs time to decompress after school and he often goes to his bedroom to do this and may draw or write. If he is given time alone to settle he usually calms down within an hour. The triggers for meltdowns are usually going to school in the morning and immediately after returning from school (claimant, C014). These meltdowns have occurred throughout the child's school years, and there were many occasions when the claimant let the school know about them.

14. Meltdowns continued throughout the child's primary 6 year increasing in frequency and severity between December 2022 and May 2023, resulting in violence towards the claimant and his brother and things within the home being damaged, which had never occurred before (claimant, C014). **Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 101(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366).**

1. In May 2023 the child had a panic attack, for the first time, following a severe meltdown. The child felt he couldn't breathe (claimant, C014). **Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 101(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366).**

2. **This paragraph has been removed by the Chamber President for reasons of privacy under rule 101(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366).**

The school

3. The child is currently a primary 7 pupil at the school, which is managed by the responsible body. The child attended the schools nursery for two years from ages 3 to 5 years. The child's school attendance has always been good (Joint Minute, T013).

4. The child has had support from a Pupil Support Assistant (**PSA**) throughout his time in the school.

5. The school has a small school roll with around 124 pupils. The school has a unique setting. There are three classrooms with two classes in each area. Classroom area 1 has the primary 1 and 2 classes. Classroom area 2 has the primary 3 and 4 classes. Classroom area 3 has the primary 5 to 7 classes. Each area is open which provides opportunities for classes to mix and work together (witness A, RB024).

6. Composite classes are common in the school given its small pupil roll. The child has always been placed in a composite class.

*School session 2022-2023 - primary 6 (**P6**)*

7. From nursery school through to the end of primary 5, the child was placed in a class with the same group of seven peers. These seven, along with the child and one other newer pupil made up the P6 cohort of pupils for the school session 2022-2023. There were seventeen P7 and nine P6 pupils at that time (a total of 26) (witness A, RB029).

8. During this school session there were four straight classes and two composite classes (witness B, RB029). When making up the composite classes the school followed the Scottish Negotiating Committee for Teachers Guidance, which provides that the maximum number in a composite class is 25. As a result of this, witness A created two composite classes, P5/6 and P6/7. School Guidance is that composite classes are usually compiled with no less than four children from a year group (witness A, RB023).

9. In order to place fewer than four children in the P5/6 class witness A had to obtain the approval of his Quality Improvement Officer.

10. The child was placed in the P5/6 composite class along with one other P6 pupil and twenty one P5 pupils (23 in total). The remaining seven P6 pupils were placed in the P6/7 composite class, along with seventeen P7 pupils (24 in total) (witness A, RB023). By the end of the school session the P6/7 class numbers had dropped to 22 in total (witness B, RB030).

11. The two P6 pupils placed in the P5/6 composite class (the child and 'child C') have ADHD. The result of placing the child in this class is that he was separated from the majority of his P6 peers.

The decision to place the child in P5/6

12. During the previous school session (2020-2021) following a disagreement between the claimant and witness A, the claimant asked that all communication from the school be in writing (email exchange, 28 May 2021, C063-64) which witness A agreed to.

13. The decision to place the child in the P5/6 class was taken by witness A after discussion with the child's class teacher and the Additional Support for Learning (**ASL**) teacher (witness A, RB025). The child and parents' views were not sought or considered before or after this decision. The decision and reasons for the new class composition were not explained to the child or his parents before the start of the new school session.

14. The school's practice is to send a letter to parents telling them about new class allocations at the end of each summer term. This is placed in pupils' school bags. The claimant did not find this letter in the child's school bag.

15. There is no written school record that explains the reasons for placing the child in the P5/6 class, nor is there any written school record of any consultation or discussion with the claimant or the child about the class composition.

16. The claimant was aware that the child was being placed in a composite P5/6 class. She was not aware that there would be only one other P6 pupil in the class. She discovered this at the end of Easter term in March 2023 when the school class photograph was sent home.

17. During his time in the P5/6 composite class the child was taught by three different teachers, his former P5 class teacher and witness A, between August and October 2022, and a new class teacher, from October onwards. The child and nine to ten other pupils were supported by a PSA and the ASL teacher.

*School session: 2023-2024 - primary 7 (**P7**)*

18. After consulting with the claimant and the child's father, and because school numbers allowed, witness B returned the child to his core group of peers in his primary 7 year in a composite P6/P7 class.

19. Since this time the child's meltdowns have reduced in frequency.

20. The child has had one class teacher and continues to receive the same level of support from the PSA and ASL teacher as he had in the P5/6 class.

School staff training

21. The school holds no central record of staff training. The only records which exist are held by individual teachers as evidence of their continuing professional development. For that reason it is not possible to be precise about the range of training undertaken by staff.

Reasons for the Decision

General remarks on the evidence

22. We benefitted from the provision of detailed witness statements for all of the witnesses. None of the witnesses deviated in any significant way from their statements.

23. Witness A was headteacher at the school until November 2022. He made the decision to place the child in the P5/6 composite class. He appears to have a good knowledge of the child. However, his evidence on the decision making process to place the child in the P5/P6 class was less reliable and we preferred the evidence of the claimant on this point. Witness A's evidence was implausible here. His insistence that he "would have" discussed matters with the claimant was not supported by any written records or recollected dates and details of discussions.

24. Witness B is the current headteacher at the school and started there in April 2023. She appears to know the child well and could speak with some degree of certainty about various impacts of school on the child. Although reluctant at times, where concessions were appropriate these were made, which meant that we found the evidence of witness

B to be more balanced. For example, when asked whether she accepts that the child's self-belief and confidence remain his main difficulties, she conceded that the move to the P5/6 class with only one of his P6 peers would not have been a positive thing for the child's self-belief if he did not know it why it was happening.

25. The claimant presented her evidence in a balanced and measured manner. She made a number of concessions where these were appropriate, which added to our overall impression of her evidence. For example, she accepted that changes in family circumstances will have had an impact on the child.

General remarks on the legal tests (2010 Act)

Burden of proof

26. It is accepted that the initial burden of proof starts with the claimant and then shifts to the responsible body (2010 Act, section 136). The Explanatory Notes to the 2010 Act at the relevant part of paragraph 443 explain the effect of section 136 as follows:

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

27. We turn now to consider the three types of discrimination that the claimant relies upon.

Discrimination arising from disability (section 15)

28. Parties agree that the child is a disabled person in terms of section 6 of the 2010 Act and after considering the evidence, we agree. Accordingly, the exception at section 15(2) does not apply. If section 15(1) is established then that amounts to subjecting the child to a detriment. There is a two-stage process to the application of section 15(1):

Stage 1: Did the responsible body treat the child unfavourably because of something arising in consequence of their disability? (section 15(1)(a))

If 'Yes', then:

Stage 2: Can the responsible body show that the treatment is a proportionate means of achieving a legitimate aim? (section 15(1)(b))

Stage 1

Unfavourable

29. We are satisfied that the child has been treated unfavourably.

30. The meaning of unfavourable is to place someone at a disadvantage, even if this was not the intention. Disadvantage is not explained in the 2010 Act but the generally accepted approach is that, '…. a reasonable person would consider that a disadvantage

has occurred. It can take many different forms such as denial of an opportunity or choice, deterrence, rejection or exclusion.' (*What equality law means for you as an education provider: schools,* Equality and Human Rights Commission, page 14). 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 (*Technical Guidance for Schools in Scotland* (***Technical Guidance***)*,* paragraph 5.21).

31. The claimant refers us to the Supreme Court case of *Trustees of Swansea University Pension Scheme v Williams* [2018] UKSC 65 where the meaning of the word 'unfavourably' is considered. The Supreme Court was in agreement with the reasoning of the Court of Appeal, which included the following statement by Langstaff J:

> [24]…[the word 'unfavourably'] 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.

The child and parent's views

32. The child has been denied the opportunity to be heard, his views were not sought or considered before the decision was taken to place the child in the P5/6 class, nor were his parents. He was given no choice in the matter. Even if he expressed a preference which the school did not agree with, he would have had the opportunity to be heard. Given his struggle with self-belief, this may have helped the child to feel respected, included and valued.

Continuity of P6 peers

33. The claimant submits that by placing the child in a class with only one peer who also had ADHD with a new cohort of [P5] peers, the responsible body treated the child unfavourably. The effect of this is that the child lost the continuity of at least seven of his P6 peers. This is significant as the child has been in composite classes throughout his time in school, which means he was taught alongside a number of different pupils but always with his P6 peers. The duration of this connection is important. It was in place from his nursery school (age 3 to 5 years) through to primary 5 and then restored in primary 7. When we consider the child's challenges with change, we consider this to have been a significant change which had the effect of placing a hurdle before the child in terms of his severe socialisation difficulties.

34. Witness A suggested that being in the P5/6 class would not make a difference to the child because he does not have particular friendships. The claimant submits this is not a relevant factor. What matters to the child is the continuity of his peers. The claimant explained that the child is familiar with that group and to the child familiar means comfortable, which makes a huge difference. The claimant submits that the evidence of witness A on this point demonstrates a lack of understanding of the child's needs and his wellbeing. We recognise the distinction the claimant makes and we prefer her evidence on this point. It is the continuity of peers which is important to the child not friendships within that group, which the child has great difficulty in forming.

35. Witness B accepted that the child had a hurdle placed in front of him by the change in his peer group. When asked to reflect on how she would have approached the decision, witness B said that she would have made the same decision as the previous headteacher, but would have consulted meaningfully with the child and his parents. Once the claimant spoke to her in April 2023, she made some adjustments so that the child had the opportunity for more contact with his peers. Witness B accepted that the child needs structure, that he is low in confidence and being singled out causes him anxiety. She accepted that being separate from his peers might have led to meltdowns. Witness B accepted that meltdowns at home suggest the child is masking at school. She accepted the child could have been placed at a disadvantage. Witness A accepted that the child and child C may have felt singled out by being the only two P6 pupils in the P5/6 class.

36. To prove a disadvantage, it is enough that the child can reasonably say that he would have preferred to be treated differently. It is reasonable to infer that the child may have had a view on where he was placed. The child's remarks during his most severe meltdown in May 2023 (Claimant, C014) that he "didn't have any friends and that his new friends did not like him", are compelling. Separating the child from his P6 peer group placed an unnecessary hurdle before the child which meant that he would have to integrate and learn within a new class composition without the continuity of his P6 peers.

Teachers

37. The child had three teachers in the P5/6 class in contrast to the P6/7 class who had one teacher. Witness B accepted that this would have been difficult for the child. The claimant suggests that witness A, who was one of the three teachers, would have been an authority figure in the child's mind rather than a teacher. When considered in the context of the child's needs, it is reasonable to conclude that the change of teachers, even though the first two of these were familiar to him, would have caused him anxiety. This amounts to a disadvantage.

Meltdowns

38. The claimant submits that the child felt left out at school and this triggered an increase in the frequency and severity of his meltdowns at home and the deterioration in his mental health. We heard there was an increase in the child's meltdowns for a number of months. While we accept the evidence of the claimant on this point, there were other factors during this time, which could have contributed to the change. The child has always struggled to attend school and often needs time to decompress when he comes home. This is not a new behaviour. For these reasons we cannot conclude that there is a direct causal link between child's meltdowns and being placed in the P5/6 class. **Part of this paragraph has been removed by the Chamber President for reasons of privacy under rule 101(3)(b) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018 (schedule to SSI 2017/366).**

Treatment

39. The 'treatment' in this case involves the decision to place the child in the P5/6 composite class without seeking and considering the views of the child and the child's parents. This same treatment applies to all three of the types of discrimination relied upon by the claimant.

Something arising in consequence of the disability

40. The 'something arising' is the child's difficulties with his academic level due to his challenges with socialisation, change, anxiety, mental health and wellbeing (paragraphs 11 to 14 above). If we accept witness A's evidence that the reason for placing the child in the P5/6 class was to meet his needs we must conclude that he was placed there because of his ADHD. The child's needs arise from his ADHD. It is artificial to suggest that the child's needs can be separated in some way from his ADHD.

41. We turn now to consider the following questions.

Question (1): Did the responsible body treat the child unfavourably?

42. Our answer here is yes, for the reasons set out in paragraphs 43 to 52 and the reasons that follow.

43. Before reaching the decision on where to place the child, witness A should have sought and taken account of the child, the claimant and the child's father's views. Witness A was well informed about the impact of the child's disability and how this impacts his learning. He was fully aware of the additional supports the child needed in order to benefit from his education.

44. We are not persuaded that the claimant was informed by witness A of the plan to place the child in the P5/6 class and the composition of that class. The claimant was not surprised that the child was placed in a composite class as he has always been in a composite class, it was the composition of the class that upset her. It is likely, from her reaction to the class photograph in March 2023, that had she been aware she would have held a strong view. She is likely to have shared this with the school. There is a long history of regular communication with the school on other matters.

45. Witness A's evidence on this was vague. He said he "would have discussed this" with the claimant at the IEP meeting in February 2022. He said "the seed was planted" then and reviewed again in June 2023 (RB023). Witness A's evidence on this point was not persuasive. We consider it unlikely the claimant would have forgotten this. Witness A is aware that the child struggles with change. Although the familiarity of his P5 class teacher continued for part of the first term and the child was in the same classroom, he was separate from all but one of his P6 peers. Despite this, witness A did not ask the child or his parents what they thought of the plan. They were given no opportunity to consider or to influence the decision.

46. Given the numbers of pupils the school had to manage we can see that two composite classes were necessary in the school session 2022/2023. Witness A suggested that the placement of two P6 pupils with ADHD in the P5/6 class was not specifically about the ADHD but more about how best to meet the needs of the pupils (RB024). There were other children in the P6 cohort with additional support needs. It is not clear why the two children with ADHD were selected.

47. The views of the child and his parents on the placement may or may not have altered the decision of witness A but if he had still proceeded to place the child in the P5/6 class, reasonable adjustments could have been put in place to support the child at school and

at home. The failure to consider these views amounts to unfavourable treatment. The child was denied the opportunity to know about the plan and to influence the decision. The child was denied an opportunity to express a view in the matter.

The views of the child and his parents

48. The responsible body has a number of duties to consider regarding the views of the child and his parents.

49. The responsible body is under a statutory duty to seek and take account of the child and the child's parent's views when determining what provision to make for their additional support needs. This is found in section 12 of the Education (Additional Support for Learning)(Scotland) Act 2004 (**2004 Act**). The responsible body concedes that there is little, if any, evidence to show that this duty had been complied with. Despite this, they submit that the support provided to the child was wholly appropriate. We are not satisfied that this duty was discharged.

50. The claimant refers us to Article 12 of the United Nations Convention on the Rights of the Child (**UNCRC**) which provides that a child who is capable of forming his or her own views be given the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. There is nothing to suggest that the child lacked the capacity to express a view when the decision was taken. The child likes to draw to decompress. He may have expressed his views in this way or by using a range of other means.

51. General Comment No 12: *The right of the child to be heard in education and school* (2009) states that:

> 'Teaching and learning must take into account life conditions and prospects of the children. For this reason, education authorities have to include children's and their parents' views in the planning of curricula and school programmes.' (paragraph 107).
>
> 'Giving children's views weight is particularly important in the elimination of discrimination, prevention of bullying and disciplinary measures.' (paragraph 109).
>
> In decisions about the transition to the next level of schools or choice of tracks or streams, the right of the child to be heard has to be assured as these decisions deeply affect the child's best interests. (paragraph 113)

52. We are not satisfied that the responsible body had regard to the child's Article 12 rights. The UNCRC is the most widely ratified human rights treaty in history. It has recently been incorporated into Scots law, which means (once implemented) that public authorities must not act in a way that is incompatible with UNCRC requirements. Children's rights under the UNCRC are now legally protected.

53. We place some weight on the failure of the responsibly body to consider the child and his parents' views, as this is a discrimination claim. Where other relevant rights are not considered or given due regard this adds weight to the claim that the child was treated unfavourably.

Question (2): Did the unfavourable treatment arise in consequence of the claimant's disability?

54. Having decided that there was unfavourable treatment we must now turn to the second question. Our answer here is, yes. Our reasons at paragraph 53 also apply here.

55. The *Technical Guidance* states: 'The unfavourable treatment must be because of something that arises as a consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability. The consequences of a disability include anything that is the result, effect or outcome of a disabled pupil's disability' (paragraphs 5.45-46).

56. The reasons provided for the child's move are centred on the child's lower academic level, his maturity, socialisation difficulties and the support he requires, which arise directly from the child's disability. Although witness A denied that the decision to place the child had anything to do with him having ADHD, in his oral evidence he repeatedly stated that the decision was based on the child's needs. It is simply not possible to separate ADHD from the child's needs when these needs arise in consequence of the ADHD. We accept the claimant's submission that the onus of proving the reverse falls on the responsible body (*Akerman-Livingstone v Aster Communities Limited* [2015] UKSC 15, Baroness Hale at para [19]). The responsible body has not satisfied us that the reverse applies.

Stage 2

Question 3: If the answer to questions 1 and 2 are yes - has the responsible body shown that the treatment was a proportionate means of achieving a legitimate aim?

57. We are not satisfied that the responsible body has shown that the treatment was a proportionate means of achieving a legitimate aim. Our reasons at paragraph 43 - 52 apply here.

58. The legitimate aim of the responsible body was to create two composite classes in session 2022/2023. The question is whether the treatment (paragraph 53) was a proportionate means of achieving a legitimate aim. The responsible body submits that the steps taken were reasonable in all the circumstances. It was a legitimate aim for the school to have two composite classes for the P5, P6 and P7 pupils. There was not a more suitable way to allocate the pupils to their respective classes.

59. The claimant refers us to the *Akerman* case, which sets out the correct approach to proportionality. That test requires consideration to be given to the following elements: (1) is the objective sufficiently important to justify limiting a fundamental right; (2) is the measure rationally connected to the objective; (3) are the means chosen no more than necessary to achieve the objective; and (4) is there an overall balance between the ends and the means.

60. The objective of creating the composite classes was important but it did not need to limit the child's fundamental right to be consulted and to express a view or to have the views of his parents considered. Placing the child in the P5/6 class was rationally connected to the objective but the means chosen were more than necessary to achieve the objective. There was no overall balance between the ends and the means.

61. The *Technical Guidance* states that 'It is for the school to justify the treatment. It must produce evidence to support its assertion that it is justified and not rely on mere generalisations.'(paragraph 5.49); and 'In a case involving disability, if a school has not complied with its duty to make relevant reasonable adjustments, it will be difficult for it to show that the treatment was proportionate' (paragraph 5.38). We go on to find that there was failure to make reasonable adjustments at paragraphs 83 to 89.

Direct Discrimination (section 13)

62. We are satisfied that direct discrimination has occurred. Our reasons at paragraph 43-52 apply here.

63. Direct discrimination occurs when you treat a pupil less favourably than you treat or would treat another pupil because of a protected characteristic. For this kind of discrimination we must identify a 'comparator'. The person with whom the child should be compared in this case is the non-disabled pupil – that is those pupils in P6 who are neurotypical (those with normal brain development and functioning who do not have ADHD or ASD).

64. It is not possible to justify direct discrimination, so it will always be unlawful (*What equality law means for you as a provider*: schools, paragraph 2.1). Unlike discrimination arising from disability, there is no opportunity for the responsible body to avoid a finding of direct discrimination where it can show that its actions were a 'proportionate means of achieving a legitimate aim' (2010 Act, section 19(2)(d)).

65. In order to show direct discrimination we must compare what has happened to the child to the treatment the comparator group received or would receive.

66. The child and child C are both neurodivergent (people whose brains develop or work differently – frequently used with reference to those who have ASD and ADHD). They are the only two pupils from the P6 cohort who were placed in the P5/6 class. The remainder of the group, the comparator group, are neurotypical. Although witness A stated that one or two have additional support needs, none have ADHD or ASD. It was more than a coincidence that these two pupils were selected. Witness A planned this with their needs in mind. It is reasonable to infer that their ADHD will have been at the forefront of his mind.

67. The comparator group was not separated from their consistent P6 peer group, although they were placed in a different classroom with a new teacher. The comparator group was not taught by three teachers over the school session. They did not have to adjust to the loss of the majority of their longstanding peer group.

68. There may have been other, lesser means of approach to the placement of the child. For example, there was sufficient space in the P5/6 class to add more than two P6 children. Although witness A said the placement was made because of the child's needs and the supports available to him, there was no evidence that there was any consideration given to placing the child in the P6/7 group and why this was not possible.

Failure to make reasonable adjustments (section 20(3) and schedule 13)

69. We are satisfied that the responsible body failed to make reasonable adjustments. Our reasons at paragraphs 43-52 apply here.

70. The claimant relies on section 20(3) which sets out the duty on the responsible body to take such steps as it is reasonable to have to take to avoid the substantial disadvantage to a disabled person caused by a 'provision criterion or practice' applied by or on behalf of a school. Section 21 states that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments and a responsible body discriminates against the disabled person if they fail to comply with that duty.

71. There need not be a 'good or real prospect of a proposed adjustment removing a disabled service user's disadvantage for that adjustment to be reasonable. An adjustment might be reasonable, and therefore required, where there is 'a prospect' that it will succeed' (*Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10 per Keith J at [17]; *Griffiths v The Secretary of State for Work and Pensions* [2015] EWCA Civ 1265 per Elias J at [29]) – a case referred to us by the claimant.

72. The responsible body denies there was a failure here. The claimant submits that the responsible body failed to make any reasonable adjustments which would have allowed the child to be placed with his P6 peers in the P6/7 class. We accept that two composite classes were necessary. Given the well understood profile and needs of the child it is reasonable to infer that witness A would have known the child's difficulties with change and socialisation, when he made the decision to place the child. Before the decision was made the responsible body had duties to seek and consider the views of the child and his parents as we note above. The failure to do this is itself a failure to make a reasonable adjustment. If the responsible body had considered their views it may have been possible to make reasonable adjustments to allow the child to be placed in the P6/7 class but even if that was not considered to be suitable, it may have been possible to make more reasonable adjustments to support the child in the P5/6 class.

73. There is evidence of some reasonable adjustments, which included maintaining the continuity of one of the three teachers for part of term 1. Another example was witness B's offer to return the child to his P6 cohort in April 2023, although this did not happen because of the claimant's concern that such a late change would be more disruptive to the child. These did not go far enough. In short, the responsibly body did not know what the child or his parents thought about his new class or what he himself might have needed to adjust to the change.

74. The claimant submits that had the child and child C been placed in the P6/7 class the child would have continued to receive the PSA support he needed. He did not receive one-to-one PSA support in the P5/6 class. Witness B confirmed that the child continues to receive the same level of PSA support in P7 now as he did in the P5/6 class. PSA support was not unique to the P5/6 class, although the number of hours allocated was greater. We did not hear any evidence about the precise amount of support given by the PSA to the child in the P5/6 class. He has always received PSA support (paragraph 18). We conclude from these factors that the PSA support would have been able to continue wherever the child was placed, although the responsible body may have had to adjust the allocation.

75. The claimant offers other examples of reasonable adjustments and these include consulting with the specialty (child health) doctor before deciding if placing the child in

the P5/6 class was appropriate and if not, to place the child in the P6/7 class with appropriate strategies to support the child to regulate, to undertake work in sizable chunks, for movement breaks, regular check-ins with the class teacher, as well as opportunities to leave the classroom environment when becoming stressed and overwhelmed. We consider that there would also have been value in consulting the Educational Psychologist.

Remedies

76. We order the following remedies.

a) The responsible body shall provide an explanation in writing to the claimant setting out why the claimant was not advised of the change of the composition of class for the child, within 7 days of this decision;

b) The responsible body shall make a written apology to the claimant acknowledging that discrimination has taken place (in terms of SPSO guidance on apology), within 7 days of this decision;

c) The responsible body shall review (or create if none exist) policies related to moving disabled pupils into composite classes, ensuring that consideration is given to the impact arising from additional support needs or disabilities. This should involve direct input from neurodivergent disabled pupils, 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*. This should be completed within 3 months of this decision;

d) The responsible body and their staff shall undertake relevant externally provided training with a focus on disability discrimination and the rights of children to have their views considered. This should commence within 6 months of this decision.