

Health and Education Chamber  
First-tier Tribunal for Scotland



Additional Support Needs

**DECISION OF THE TRIBUNAL**

FTS/HEC/AC/24/0097, FTS/HEC/AC/24/0098, FTS/HEC/AC/24/0253,  
FTS/HEC/AC/24/00254

List of witnesses

**For the claimant:**

Claimant

**For the responsible body**

Head Teacher, school A (witness A)

**Preliminary**

1. The claimant makes four claims in total. She makes two claims for child C and two claims for child R. The four claims all raise similar issues and seek similar remedies so it was appropriate to conjoin the claims and hear them together. To avoid repetition, it is also appropriate to produce one decision for all four claims.

**Claim**

2. The claimant relies on section 85(2) and (3) and section 13 (direct discrimination) of the Equality Act 2010 (**the 2010 Act**) which results from the responsible body:
  - i. excluding the children from attendance at school assemblies, school nativity plays and school trips to the pantomime since 2019 and
  - ii. failing to meet the children's curricular and health and well-being needs, removing the children from school A and socially excluding the children.
3. Section 85 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, affords the pupil access to a benefit, facility or service; by not providing education for the pupil; by not affording the pupil access to a benefit, facility or service; by excluding the pupil from the school; or by subjecting the pupil to any other detriment.
4. Section 85(3) of the Act provides that it is unlawful for a school to harass a pupil.

## Decision

5. The responsible body has not directly discriminated against the children or harassed the children for the purposes of Sections 85(2) and (3) of the 2010 Act which means that no contravention of Chapter 1, Part 6 of the 2010 Act has occurred.

## Process

6. We had access to and took full account of all four of the “bundles” of papers comprising:  
FTS/HEC/AC/24/0097 Pages T001-T061, C001-C047 and RB001-RB063  
FTS/HEC/AC/24/0098 Pages T001-T061, C001-C049 and RB001-RB077  
FTS/HEC/AC/24/0253 Pages T001-T034, C001-C015 and RB001-RB002  
FTS/HEC/AC/24/0254 Pages T001-T034, C001-C015 and RB001-RB002.
7. For ease of reference in this decision, page references refer to bundle FTS/HEC/AC/24/0097 unless otherwise stated.
8. Case management calls were held which addressed a number of procedural matters. At the case management calls, the claimant was directed to the relevant sections of the Equality Act 2010 and online resources about making a disability discrimination claim. Having had time to consider those resources, she confirmed that she was making claims for direct discrimination and harassment.
9. It was anticipated that the claimant would be represented at the hearing. Having sought legal advice prior to the hearing, the claimant decided to go ahead without legal representation the day before the hearing. In keeping with the overriding objective, the tribunal adopted an informal and flexible approach to the proceedings to ensure, so far as practicable, that the parties were on an equal footing procedurally, that they were able to participate fully in the proceedings and that the claim was dealt with fairly and justly.
10. At the start of the hearing, we discussed the remedies which were sought by the claimant. While not accepting the allegations of discrimination, the responsible body offered to work with the claimant to review practices and training at school A, identify any learning points and agree wording of a letter of apology for the upset and distress caused to the claimant. The claimant declined that offer. She sought a written admission that the responsible body discriminated against the children, an apology for how the children were treated and an assurance that staff training would be undertaken to prevent further discriminatory treatment. She wished to proceed with the hearing and stated that she would accept the tribunal’s decision about whether the children had suffered discrimination or not.
11. We allowed time during the hearing for the responsible body to produce further documents for each child at the request of the hearing members and for the documents to be considered by the tribunal and both parties. These included, for each child, minutes of meetings of the team around the child, support and behaviour plans, individualised learning plans (ILP’s) and educational assessments completed by the responsible body’s Educational Psychologist [RB037-RB055 and FTS/HEC/AC/24/0098 - RB26 and RB035-RB077]. We allowed the documents to be received although late, because they were relevant to the issues in dispute and they informed the tribunal’s assessment of the evidence generally.

12. An outline written submission was lodged by the responsible body [RB056]. The tribunal noted an error in the submission. The responsible body confirmed that the final sentence of the paragraph headed “Remedies” should read, “It would be the primary position of the authority, that *[the children]* have not been the subject of discrimination nor harassment [RB062].
13. At the conclusion of the evidence, we heard oral submissions from the responsible body. The claimant made a short statement.
14. School A comprises of a primary and a secondary provision. To avoid confusion in this decision, we refer to the primary provision as school A. We refer to the secondary provision as school C.

### **The children’s views**

15. The children’s views were not sought due to the claimant’s concerns that any attempt to do so would be unproductive and could have a negative impact on their well-being. We were, however, able to gain a good sense of the children and their likes and dislikes from the evidence. The claimant submitted photographs of the children and short statements from a number of people who provided regular support to both children, which gave us a greater sense of their identities and personalities and an indication of their interests and preferences.

### **Findings in Fact**

#### *Child C*

16. Child C is autistic. She has complex and severe learning and development needs. She is non-verbal but vocal. She uses visuals, concrete resources and technology to support communication and learning.
17. Child C was evaluated in October 2023 using the Vineland-3 assessment. Based on teacher assessment, she scored 25 on the Vineland Adaptive Behaviour Composite. Her score corresponds to a percentile rank of <1 in all areas [RB052]. She requires a high level of support across all domains.
18. In August 2024, child C was learning at pre-early level (C027).
19. Child C benefits from a predictable and structured routine and a safe, quiet space. She requires a whole communication approach including verbal and visual prompts. She requires scaffolding and support with transitions [RB053]. She is routine-driven [RB022 and witness A].
20. Child C is keen to access education. She enjoys puzzles and technology like a laptop. She needs a sensory based curriculum [RB049 and C025]. She can show distress by crying or screaming or by behaviours that could hurt others such as nipping, scratching and hair pulling. She can also self-harm.
21. Child C has had input from the Educational Psychologist, Speech and Language Therapy and Social Work. She has had further assessment and support from child health professionals in the Community Paediatric Service and CAMHS [C024-026].

22. Child C required a high level of individualised support at school A in comparison to the peers in her class [RB049].
23. Child C required adaptations to support her to transition to secondary school [RB054].
24. Child C suffers from anxiety. She is now prescribed medication to reduce her anxiety.

#### *Child R*

25. Child R is autistic. He has complex and severe learning and development needs. He does not interact with his peers or make eye contact.
26. Child R was evaluated in September 2023 using the Vineland-3 assessment. Based on teacher assessment, he scored 22 on the Vineland Adaptive Behaviour Composite. His score corresponds to a percentile rank of <1 in all areas [FTS/HEC/AC/24/0098 - RB037]. He requires a high level of support across all domains.
27. In August 2024, child R was learning at pre-early level (C027).
28. Child R is very active. He enjoys movement which helps him to regulate. He has a short concentration span. He needs an individualised sensory based curriculum. He is best suited to a quiet environment with simple stimulation [FTS/HEC/AC/24/00098 - C026].
29. Child R is not always able to communicate his triggers for distress.
30. Child R enjoys sensory equipment and toys. He is routine-driven. He dislikes loud and unpredictable noise. When anxious, his breathing becomes more laboured [RB022 and witness A].
31. Child R has had input from the Educational Psychologist and from the dietitian. He had further assessment from child health professionals in the Community Paediatric Service [FTS/HEC/AC/24/00098 - RB035-RB062].
32. Child R required a high level of individualised support at school A in comparison to the peers in his class [witness A].
33. Child R required adaptations to support him to transition to secondary school [FTS/HEC/AC/24/0098 - RB039].
34. Child R is undergoing assessment for, and is now prescribed medication, for ADHD.

#### *Schools*

35. Schools A, B, C and D are all managed by the responsible body.
36. Schools A, C and D are all located on one campus along with another primary school.
37. School A is a specialist school for pupils and young people with mild to moderate learning disabilities from age 5 to 18.

38. The primary provision of school A comprises of two buildings. One building is for children in primary 1 to primary 3. The other building is for children in primary 4 to primary 7.
39. School B is a specialist school for pupils and young people with severe and complex learning disabilities from age 5 to 18.
40. School C is the secondary provision of school A. It is located within school D. School C has subject specific and specially adapted classrooms within and throughout school D.
41. School D is a mainstream secondary school. It is a large academy with a roll of over 1,000 pupils. It is a busy and noisy environment.
42. Pupils in school C move around school D with the mainstream classes. Pupils in school C can have up to 91 transitions each week [RB054].
43. The other pupils in school A have a range of learning disabilities which are less severe and less complex than the learning disabilities of the children.
44. Prior to the children's induction into primary 1, witness A assessed both children's needs as severe and complex. The assessment was that school A could not meet the children's needs. The responsible body's recommendation was that both children should attend school B. Despite that assessment and recommendation, the claimant and the father of the children requested that both children attend school A. The responsible body acceded to the parental request that both children attend school A.
45. Both children commenced in primary 1 in school A in August 2017. They attended school A from primary 1 to the end of primary 7 in summer 2024.
46. School A endeavoured to meet the needs of the children. It secured an additional pupil support assistant specifically for each of the children to help them to access education at school A. It devised a bespoke curriculum and highly personalised learning plans for each of the children. School A held multi-agency meetings with the claimant and a range of health professionals to support each of the children at a very differentiated level [RB026-RB053].
47. School A liaised with school B to access specialist resources for both children. It purchased additional specialist resources for both children such as an iPad and software for child C. It adapted classrooms. Teachers from school A visited school B to observe teaching there to help them to meet both children's needs in school A. It reviewed staff training to ensure staff were trained to deliver a sensory based curriculum to meet the needs of both children.
48. School A was unable to replicate all of the specialist resources available at school B. It was unable to replicate the quieter and calmer environment at school B.
49. When discussions about the children's education between the claimant and school A had broken down, witness A sought to continue to engage with the claimant. She hired external accommodation as a neutral venue for meetings and focused discussions on the children's health.
50. School A was unable to meet the primary education needs of both children. From primary

4 onwards, the responsible body's assessment was that both children should attend school B.

51. School B meets both children's curriculum and wellbeing needs.
52. School C is unable to meet the secondary education needs of both children.

### *Assemblies*

53. School A holds nine assemblies each year. The assemblies form part of the school curriculum. Pupils are timetabled to attend assemblies.
54. School A makes adaptations to deliver assembly content to pupils according to their individual needs including any disabilities, sensory needs and religious beliefs. Some pupils watch the assemblies from their classrooms using a Promethean display. Others do alternative activities, such as outdoor activities, instead of attending assembly.
55. Initially both children went to assemblies in primary 1. Attending assemblies was distressing for both children due to their sensory needs. Child C became upset. She communicated her distress by pulling at her hair, biting, vocalising that she was wanting to leave and pulling staff towards the door. Child R cried. Over the course of the children's primary years, school A tried various strategies and resources to alleviate the children's distress at assemblies such as sensory chews, favourite toys or redirection without success.
56. Attending assemblies in person was not conducive to the children's wellbeing. School A assessed that the assembly content was better delivered to both children in a more individualised approach in class. One example of that individualised approach was that the children participated in an outdoor road safety activity on a cycle track in the school grounds as an alternative to attending a road safety themed assembly [witness A].

### *Nativity Plays*

57. School A puts on a nativity play each year at a local church. The children prepare for the nativity play in school. There are also 3 rehearsals at the church.
58. Both children participated in the nativity play in primary 1 and played the role of sheep. Classroom assistants took some of the children's familiar resources to the church so they were available to comfort the children if they became distressed. Both children became distressed at the rehearsals. Staff members tried to soothe the children and keep their anxiety low as they waited for their turn to appear in the play. Child C was self-hurting by pulling her hair. Child R struggled to sit down. He became very anxious. His anxiety was indicated by his quickened breathing. Members of staff took both children to a quiet space to wait there then walked with them once around the main area of the church. The children became more distressed so the staff took them back to the quiet space to lower their anxiety and settle them again before they appeared in the play. Both children were distressed after their appearance in the play [RB020 and witness A's oral evidence].
59. School A followed a similar approach in primary 2. Both children were extremely distressed at the rehearsals. School A took both children to the church for the play and used the quiet space again to settle the children. Child C started to take off her costume.

She became vocally distressed. Child R began to cry. After the second rehearsal, school A contacted the claimant regarding concerns about the children attending the nativity. Both children attended the nativity play but were too distressed to participate in the play [RB020 and witness A's oral evidence].

60. Attending the nativity plays was not conducive due to the children's wellbeing. School A offered the claimant alternative activities for the children. The alternatives included activities in the music room, a bouncy castle or helping to create the scenery for the play.

### *Pantomimes*

61. School A organises a trip to the pantomime at a local theatre as an option each year for pupils in primary 1 to primary 3.
62. In primary 1, both children travelled to the pantomime in the school minibus which allowed flexibility with travelling times. Both children had their own teaching assistant to support them at the pantomime. Teaching staff and a further teaching assistant were also present.
63. Child C was seated with a teaching assistant at the pantomime. She became distressed. She indicated that she wanted to leave by pulling on the teaching assistant's hand. She was taken out to the foyer to help her to regulate but did not settle. Witness A and another teacher stayed with child C in the foyer.
64. Child R sat briefly in the pantomime on a booster seat or on the teaching assistant's knee. He was distressed by the loud and unpredictable noise and effects of the pantomime. He showed distress by holding on to a staff member and by altered breathing. He was given a chew ring and familiar toys to comfort him. He struggled to remain seated so he was taken out to the foyer half way through the first half of the performance to help him to regulate.
65. After the interval, staff tried to take both children back into the pantomime but the children became distressed. Neither child was able to remain in the pantomime. Child C indicated that she wanted to leave by pulling at staffs' hands.
66. School A relayed the events at the pantomime to the claimant. It invited the claimant to accompany the children on the trips to the pantomime.
67. At the request of the claimant, the children attended the pantomime again in primary 2 and 3. The children were both distressed and upset at the pantomimes. They were comforted by staff and offered toys, ice-cream and sweets to help them to settle. They were unable to settle even in the foyer so they were taken back to school.
68. Attending the pantomime was not conducive due to the children's wellbeing. School A offered other activities for the children as alternatives to the pantomime trip. Those activities included an online singing activity, a trip to the play park, art activities or games. School A also sought advice from school B and invited the children to attend a Singing Hands activity at school B.

### *Primary 7 Timetables*

69. Every child in school A has a bespoke timetable. The timetables are adapted to meet pupils' needs and to make best use of the school resources. Both children had bespoke timetables which were differentiated to meet their needs and to make best use of the school resources including support to meet their sensory needs.
70. In primary 7, both children were timetabled for a full day in school from 9am to 3pm. Their timetables were an appropriate balance of academic learning and classes in the mornings and less academic activities in the afternoons in keeping with their needs [witness A].

#### *Transition to Secondary Provision*

71. Pupils at school A do not automatically transition to school C. They are allocated places in secondary provision according to their needs. The majority transition to school C. Others transition to school B or to a hybrid provision between schools B, C and D.
72. When the children were in primary 6, the responsible body began to plan for their transition to secondary school [RB050].
73. The claimant's preference was for both children to transition to school C. At the request of the claimant, the responsible body attempted to transition the children to school C. Witness A met with the claimant and gave her a tour of the school C.
74. As part of transition planning, primary 7 pupils at school A visit school C each Friday to attend classes there. School A made adjustments to facilitate the visits for the children. The adjustments included the use of visual aids, reduced and individualised timetables and the attendance of the children's dedicated pupil support assistants. School A sought advice from the Educational Psychologist who observed the children in school C and offered advice. School A took the children's own box work and toys to school C to provide familiarity.
75. Despite the adjustments by school A, the children became distressed during the transition visits. They showed their distress by pulling staff to show that they wanted to leave. Child C showed distress by behaviours such as biting and nipping others.
76. In December 2023 when the claimant was in school A to collect the children, witness A attempted to talk to the claimant about the children's transition to secondary school. The claimant declined to talk to witness A.
77. The responsible body met with the claimant and her advocate in February 2024. They discussed the planning for both children's transition to secondary school [T034].
78. The responsible body's assessment was that school C was not suitable for the children. It decided that the children should be placed in school B for their secondary education. The responsible body wrote to the claimant in May 2024 confirming that its recommendation for the secondary stage of the children's education was school B [RB004].
79. The responsible body's Chief Education Officer (CEO) and Head of Education met with the claimant in August 2024 to discuss both children's education. Following the meeting, the CEO and Head of Education wrote to the claimant and reiterated the responsible body's view that the children should be placed in school B for their secondary education,

and the reasons for that view. She confirmed that places were available for the children at school B from the beginning of session 2024-2025. She implored the claimant to take up that option [C027 – C028].

80. The claimant did not accept the responsible body's assessment that the children should be placed in school B for their secondary education. She did not accept the offer of places for the children at school B. She wished the children to attend school C.
81. There was no curricular option within school C that would align to the working levels of the children.
82. The children have attended school B since October 2024. They have settled in well at school B and are making good progress [RB023 – RB024].

## **Reasons for the Decision**

### *General remarks on the evidence*

83. In setting out these reasons we do not assess every argument and fact which was before us, nor are we required to do so, We have chosen only those arguments and facts which significantly influence the legal tests we must consider. We have, however, made detailed findings in fact about the events preceding the claims because they substantiate our conclusions.
84. We benefitted from formal written statements by witnesses for the responsible body and informal witness statements by the witnesses for the claimant. The witnesses did not deviate in any significant way from their statements.
85. Witness A was the headteacher at school A throughout the time of the children's attendance there. It was clear that she knows the children well. Her evidence was consistent with the documentary evidence in the bundle. We found that she clearly contextualised how the responsible body attempted to meet the needs of the children but was unable to do so. For example, she described how the responsible body provided specialist resources and altered classrooms but it was unable to replicate the calmer environment of school B. We found her evidence to be balanced, reflective and consistent. She spoke of her admiration for the claimant and of the claimant's maternal love for her children. When giving evidence about times when her relationship with the claimant had become strained, she remained objective and acknowledged that the claimant was always coming from a place of concern for the children.
86. It was clear to us that the claimant has made enormous efforts to provide for the children and support their needs. She generally presented her evidence in a measured manner but, at times, she was reluctant to make appropriate concessions. For example, she did not accept witness A's evidence that school A is a school for children with mild to moderate learning disabilities or that school B is a school for children with more complex learning disabilities. She did not accept that child C requires support with toileting despite evidence to the contrary [RB023]. We found that her interpretation of the children's support needs was one-sided and lacked objectivity.
87. Despite the dispute between the parties, we found that there was a reasonable consensus between them on the central facts about the events which occurred at the time of the

alleged discrimination. The issues for the tribunal really revolved around the assessment of both children's needs and whether the actions of the responsible body amounted to less favourable treatment of the children or harassment because of their disabilities.

88. These general observations affect our assessment of the evidence, the weight we attach to it and its application to the relevant legal tests.

### ***General remarks on the legal tests (2010 Act)***

#### *Burden of proof*

89. 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:

“... 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.”

#### *Child C's needs and Child R's needs*

90. It is important to state that while both children have autism, their autism manifests in different ways. Their needs are different. They may both benefit from some similar strategies but they also benefit from different strategies.
91. We found that there was a disconnect between the claimant's view of the children's needs and how their needs should be met, and the assessments by the health and education professionals.
92. Witness A told us that the children's needs were assessed by the responsible body as severe and complex. Her evidence is that both children are working on the milestones curriculum which is suited to pre-early level.
93. A Vinelands assessment is a professional tool used to assess cognitive ability. It looks at adaptive behaviours which are the things the people need to do to function in their everyday lives and their transferable skills [witness A and RB051].
94. The Vinelands assessments for both children identified significant developmental delay. They are indicative of severe and complex learning disabilities. They indicate that the children's profile of needs generally falls within the low range of functioning [RB053 and [FTS/HEC/AC/24/0098 - RB038]. They show that both children require a high level of support across all domains of adaptive functioning at both home and school. They recognise that although the children may show more skills across different settings such as at home and in school, skills are not securely developed until they can be evidenced across settings.
95. The disconnect between the claimant's view of the children's needs and the assessments of their needs by health and education professionals is demonstrated by the Vinelands assessment for child C [RB051 – RB052]. It includes evaluations by the claimant and by

the class teacher. (The Vinelands assessment for child R did not include an evaluation by the claimant.) The standardised scores for child C are as follows:

Parent Vineland Table of Results

ABC	Standard Score (SS)
Adaptive Behaviour Composite	64
<b>Domains</b>	
Communication	60
Daily Living Skills	64
Socialisation	69

Teacher Vineland table of results

ABC	Standard Score (SS)
Adaptive Behaviour Composite	25
<b>Domains</b>	
Communication	20
Daily Living Skills	31
Socialization	20

96. Both children's ILP's have consistently documented their learning needs. For example, their ILPs dated November 2022 refer to using objects of reference for communication which is indicative of pre-early stage of development [Child C - RB041; Child R – RB029].
97. The children's communication methods are also indicative of severe and complex needs. For example, they communicate by physically leading by the hand which is consistent with a child with autism and additional support needs at pre-school level.
98. We found the claimant's evidence on the children's needs difficult to reconcile with the broader, professional assessment of their needs. We found that her evidence about the children's needs reflected her own assessment of their needs which was based upon activities the children were able to do at home. It did not take a broader view of their ability to replicate activities in different environments.
99. The claimant lodged a number of supporting letters. The letters speak very positively of the children but they do not suggest cognitive functioning which is substantially different from the professional assessments.
100. Taking all of these points together, we prefer the assessments of both children's needs by the health and education professionals. They are well placed to understand pupils with whom they are working and to use their professional training and judgement to assess pupils. They have access to professional tools to assess and diagnose intellectual and development disabilities recognising that the children may present differently in different environments. In a general sense, parents know their children best but, when it comes to assessing the children's learning needs, we prefer the evidence of the education professionals. We are satisfied that both children have severe and complex learning disabilities.
101. We turn now to consider the two types of discrimination that the claimant relies upon.
102. Parties agree that child C and child R are both disabled persons in terms of section 6 of the 2010 Act. After considering the evidence, we agree.

### **Direct discrimination (section 13)**

103. We find that the children have not been subject to direct discrimination.
104. Direct discrimination occurs where, because of a protected characteristic, a person is or would be treated less favourably than another. It compares the treatment of the person

with the protected characteristic to the treatment of a person without the protected characteristic. The person without the protected characteristic is called a “comparator”. In this case, the protected characteristic is disability.

105. There must be no material difference between the circumstances relating to the person with the protected characteristic and the comparator (2010 Act, section 23(1)).

106. The starting point is section 6(3)(a) of the 2010 Act. It refers to the concept of a person who has “a protected characteristic” being a reference to a person who “has a particular disability”.

107. The relevant parts of the Explanatory Notes to the 2010 Act explain:

[38] Where people have the same disability, they share the protected characteristic of disability.

[91] ...like must be compared with like ... The treatment of the claimant must be compared with that of an actual or a hypothetical person – the comparator – who does not share the same protected characteristic as the claimant ... but who is (or is assumed to be) in not materially different circumstances from the claimant ... Those circumstances can include their respective abilities where the claimant is a disabled person.

108. Identifying an appropriate comparator therefore requires consideration of what is meant by a “particular disability” and the “same disability.”

109. In *Fife Council v AB* 2024 UT 72, the Upper Tribunal considered the meaning of section 6(3)(b) of the 2010 Act. It refers to the concept of persons who “share a protected characteristic” being a reference to persons who “have the same disability”. Lord Fairley says, ‘The more difficult question, however, is what is meant by “the same”?’ He goes on to discuss possible different approaches to defining what that means, such as by reference to a recognised classification of the degree or extent of the type of disability in question [paragraphs 30-35].

110. The discussion in *Fife Council v AB* is informative when considering section 6(3)(a) and the similar difficulty of defining what is meant by “a particular disability”.

111. In this case, we find that it is unnecessary to identify a comparator. Given all the circumstances and the steps taken by the responsible body, we cannot conclude from the evidence that any pupil whose circumstances were the same as, or not materially different from, the children’s was or would have been treated more favourably by the responsible body than the children were treated. It is clear from the evidence that the policies and practices of school A to offer a bespoke and individualised learning plan would be applied to any pupil with similar circumstances to the children. We cannot conclude that the children were treated less favourably than any other pupil with similar circumstances so there is no basis to go on to consider whether such treatment was because of their disability.

112. Even if we had to identify a comparator, there is no evidence from which we can reasonably conclude that any pupil, regardless of their circumstances or any disability, was or would have been treated more favourably than the children. We would not have

reached a different decision no matter how widely the comparator was defined.

113. On the contrary, we accept witness A's evidence that school A adapts its curriculum to meet the needs of each individual pupil. It recognises that children are all different and makes different provisions for each child, as it did for both children (witness A). The support and behaviour plans and the ILP's we received for each child provide evidence of the appropriately differentiated support provided by school A. We were also impressed by how witness A used creative solutions such as hiring external accommodation as a neutral venue to meet with the claimant and try to get her to re-engage with the responsible body and discussions about the children's education. If anything, our impression is that the children were treated more favourably than other pupils, irrespective of their circumstances and any disability.
114. An underlying premise of the claimant's position is that everybody should be treated equally and should be involved in everything. We do not agree with that premise. All children in Scotland have a right to education but the claimant does not reflect upon how their education must be delivered. To treat all pupils equally would disadvantage some pupils and could amount to indirect discrimination.
115. We find that school A made adaptations to meet the children's needs and to avoid the children suffering distress. Those adaptations were appropriate and were made in the best interests of the children. The children were treated differently from other pupils at school A. They were not treated less favourably than any other pupils.

#### *Assemblies, nativity plays and pantomimes*

116. School A endeavoured to include the children in all school activities including assemblies, nativity plays and pantomimes. Both children initially participated in all events in primary 1 with the purpose of seeing their specific challenges and trying to support them to access the activities they were able to do. When it was apparent that these activities caused the children to become too distressed or were not conducive to their wellbeing, school A offered alternative activities to attempt to meet the needs of the children.

#### *Reduced Timetables*

117. The claimant contends that the children's timetables were severely reduced in primary 7. We do not agree. It is clear to us that the children had bespoke timetables which were differentiated to meet their needs and to make best use of the school resources. The children's primary 5 and primary 7 timetables are presented differently but the content is very similar [T039 and FTS/HEC/AC/24/0253 - C015].

#### *Transition to secondary school/Exclusion from school C*

118. The claimant contends that the children were effectively excluded from school C. It is clear from the evidence that the claimant was aware that the responsible body was planning for the children's transition to secondary school from primary 6 onwards, that its assessment was that both children should transition to school B and that both children were offered places at school B. The claimant did not accept that assessment or the offer of places at school B. She maintained that she wished the children to attend the school C [FTS/HEC/AC/24/0253 – T020].

119. We do not accept that the children were effectively excluded from school or treated less favourably than others. The primary 7 visits to school C reflected the provision which the children would be offered there. Those visits were too distressing for the children. Their response to the visits confirmed the assessment of the responsible body that the children should not transition to school C.
120. The responsible body acted reasonably in assessing both children's needs and offering them secondary places at school B because school B met the children's curriculum and wellbeing needs. The fact that the responsible body's assessment did not align with the claimant's wishes does not mean that they treated the children less favourably than others.

*Did the responsible body treat the children less favourably than others?*

121. The claimant was aware from the start of the children's primary education that assessments by the responsible body indicated that it could not meet the needs of the children [FTS/HEC/AC/24/0253 - C004]. Despite those assessments, our overwhelming impression from the evidence is that the responsible body did everything it could reasonably do, and more, to meet the children's curricular and wellbeing needs.
122. At the hearing, the claimant acknowledged that both children are making good progress at school B and she wants them to remain there. That evidence supports the assessment by the responsible body that the children should be placed in school B. It negates the suggestion that the responsible body treated the children less favourably by allocating them places at school B.
123. Taking account of the needs of both children, and those of other children in school A, it is clear that both children both required much more intensive and different support to that required by the other pupils. The evidence demonstrates that the responsible body had a clear rationale for its decision making in relation to the children which was shared with the claimant. There is no evidence from which we can reasonably conclude that the responsible body treated the children less favourably than others.
124. Taking all of this together, we find that the responsible body did not treat the children less favourably than any other pupil is treated or would be treated. It is clear from the evidence we accept that school A and the responsible body went to what, in our view, amounted to quite extraordinary lengths throughout the whole of the children's primary education to respect the views of the claimant that the children should attend school A and to endeavour to meet their needs. The responsible body's treatment of the children can only be described as favourable, not unfavourable. We did not identify any contravention of Chapter 1, Part 6 of the 2010 Act by the responsible body.

### **Harassment (section 26)**

125. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of-
- (i) violating B's dignity, or
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B (section 26(1)).

126. In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-
- (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect (section 24(4)).
127. In this case, A is the responsible body. B is child C, child R or both children. We accept that the claimant may have felt that she was pressurised and harassed by the responsible body but, considering the purpose and effect of the responsible body's treatment of the children as set out in paragraphs 111-124, there is no evidence from which we can reasonably conclude that it violated the dignity of the children or created an intimidating, hostile, degrading, humiliating or offensive environment for them.
128. We find that the responsible body did not harass either of the children.

*Other forms of discrimination*

129. As the claimant was unrepresented at the hearing, it is in keeping with the overriding objective to address whether the children have suffered any other form of discrimination beyond those relied upon by the claimant. For the same reasons set out in paragraphs 111-124, we find that the children were not placed at any disadvantage when compared to others who did not share their disability. They were not treated unfavourably because of something arising in consequence of their disability. The children have not suffered any form of discrimination, harassment or victimisation.

*Which remedies are appropriate?*

130. Since we have decided that the responsible body did not discriminate against the children, we need not consider the question of remedies.

**Paragraphs 58 and 59 in this decision have been edited by the Chamber President for to preserve the anonymity of the child under rule 101(4) of the First-Tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018.**