



Date of Birth: 10/10/14  
Claim of: The Parent  
Against: The Responsible Body of the School  
Date of Hearing: 2023

Persons Present: The Parents  
RB Counsel  
RB Headteacher  
LA representative  
RB Team Manager  
RB ALN Advisory Teacher

## **Decision**

1. **Introduction** - These claims are brought by the parents in respect of disability discrimination they allege has been carried out by the Primary School (the school) against their child.
2. The Child has a Statement of Special Educational Needs (the Statement). They have a twin who attends the same school. They have a diagnosis of Autism with associated difficulties with communication and social functioning. They live at home with their family.
3. **Representation** – the parents represented themselves. RB Counsel appeared for the school. We are grateful to them for the considerable work they have carried out in presenting their cases.
4. **Hearing** - The hearing took place over four days in 2023 and a further four hours was required for our decision to be further discussed by the panel in 2023.
5. **The Law** – The relevant sections under the Equality Act are as follows:

## **Section 6 Disability**

- (1) A person (P) has a disability if—*
- (a) P has a physical or mental impairment, and*
  - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

## **Schedule 17 Time limits**

*(4) (1) Proceedings on a claim may not be brought after the end of the period of 6 months starting with the date when the conduct complained of occurred.*

*(3) The Tribunal may consider a claim which is out of time.*

*(5) For the purposes of sub-paragraph (1)—*

*(b) conduct extending over a period is to be treated as occurring at the end of the period;*

*(c) failure to do something is to be treated as occurring when the person in question decided on it.*

*(6) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

*(a) when P acts inconsistently with doing it, or*

*(b) if P does not act inconsistently, on the expiry of the period in which P might reasonably have been expected to do it.*

## **13 Direct discrimination**

*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

*(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because*

*A treats or would treat disabled persons more favourably than A treats B.*

### **15 Discrimination arising from disability**

*1) A person (A) discriminates against a disabled person (B) if—*

*a) A treats B unfavourably because of something arising in consequence of B's disability, and*

*b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

*2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

### **19 Indirect discrimination**

*(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

*(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*

*a. A applies, or would apply, it to persons with whom B does not share the characteristic,*

*b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

*c. it puts, or would put, B at that disadvantage, and*

*d. A cannot show it to be a proportionate means of achieving a legitimate aim.*

*(3) The relevant protected characteristics are—  
disability;*

### **20 Duty to make adjustments**

*(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*

*(2) The duty comprises the following three requirements.*

*(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

### **21 Failure to comply with duty**

*1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

*2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*

*3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.*

### **Section 85 Pupils: admission and treatment, etc.**

*(1) The responsible body of a school to which this section applies must not discriminate against a person—*

*(a) in the arrangements it makes for deciding who is offered admission as a pupil;*

*(b) as to the terms on which it offers to admit the person as a pupil;*

*(c) by not admitting the person as a pupil.*

*(2) The responsible body of such a school must not discriminate against a pupil—*

*(a) in the way it provides education for the pupil;*

*(b) in the way it affords the pupil access to a benefit, facility or service;*

*(c) by not providing education for the pupil;*

*(d) by not affording the pupil access to a benefit, facility or service;*

*(e) by excluding the pupil from the school;*

*(f) by subjecting the pupil to any other detriment.*

*(3) The responsible body of such a school must not harass—*

*(a) a pupil;*

*(b) a person who has applied for admission as a pupil.*

*(4) The responsible body of such a school must not victimise a person—*

*(a) in the arrangements it makes for deciding who is offered admission as a pupil;*

*(b) as to the terms on which it offers to admit the person as a pupil;*

*(c) by not admitting the person as a pupil.*

*(5) The responsible body of such a school must not victimise a pupil—*

*(a) in the way it provides education for the pupil;*

*(b) in the way it affords the pupil access to a benefit, facility or service;*

*(c) by not providing education for the pupil;*

*(d) by not affording the pupil access to a benefit, facility or service;*

*(e) by excluding the pupil from the school;*

*(f) by subjecting the pupil to any other detriment.*

*(6) A duty to make reasonable adjustments applies to the responsible body of such a school.*

6. We bear in mind that in the case of *Williams v Trustees of Swansea University Pension and Assurance Scheme* [2018] UKSC 65, the Supreme Court held that the words “disadvantage”, “detriment” and “unfavourably” in the Act are similar in effect and also that the test is not purely objective so that regard should be had to what is reasonably seen as unfavourable by the person affected.

7. **Summary of the Parents’ Case** – Principally, the Parents complain that the Child has been excluded from school, and has been segregated from their class, both during the school day, and in unstructured times at break and lunch. They also alleged that they have been excluded from certain specific activities. They assert that the school has been ill equipped to manage the Child’s disability,

which has led it to discriminate against them by the exclusions and segregation.

8. **Summary of the School's Response** – In broad terms, the school, respond, by stating that it has not sought to punish the Child, has not discriminated against them, and has been putting in place reasonable adjustments. Those adjustments have included excluding the Child from school and providing them with a separate area for their lessons. The school asserts that it has been proportionate in its response to the Child's behaviour and it has had to have in mind the safety of the Child, members of staff, and other children at the school.
9. **The School** – The school is a small one with only 11 staff. No other children with a disability similar to the Child's attends.
10. **The Child's Disability** – The fact of the Child's disability within the meaning of section 6 of the Equality Act is accepted by the school.
11. **Background** - The Child previously attended at another School. That is some distance from their home and a change of school was decided upon by their parents. There was some discussion between the old and new school Headteachers about them. We do not know what information was passed during this conversation or what information the school had altogether about the Child and their needs. They started school at the Primary School at the start of the autumn term in 2020. Prior to this there were discussions about a placement at a private school, about 1:1 support, and about a specialist unit within a mainstream school. By July 2020 the Child's parents had resolved upon the Primary School, but they left open the option of another School in the future. The latter has a specialist unit within a mainstream school setting.
12. The school did have the information in the Child's Statement of Special Educational Needs (the Statement), dated 2020. We note at page 408 in the Statement it was provided that they would receive 32 ½ hours of support a week from a Teaching Assistant. That equates to support for the whole time the Child was at school, including breaks and dinner time. That would have put the school on notice that they required a great deal of support and attention. Their needs are set out in summary form in the Statement as follows:

*“The Child’s needs that require provision*

- *Difficulties associated with his Autistic Spectrum Disorder.*
- *Significant developmental delay and poor functional skills.*
- *Delayed receptive and expressive language.*
- *Social communication delay.*
- *Limited shared attention skills.*
- *Poor concentration skills.*
- *Independent self-help skills*
  - *Awareness of danger and keeping themselves safe.”*

13. The requirements so far as the TA support was concerned were expressed as follows:

*“The Child will be provided with 32.5 hours per week support from a Teaching Assistant (TA) Level 1. The TA will be ELKLAN trained and will work under the direction of the class teacher and the ALNCo.”*

14. **The Evidence** – We have considered two large bundles of documents and some additional late evidence. At the commencement of the proceedings the parents made an application for a number of documents to be admitted into evidence. These included updated versions of statements of evidence, Skybound reports, school policy documents and a report by a Board Certified Behaviour Analyst. The school did not oppose these documents being admitted, save for the report of the Board Certified Behaviour Analyst. In relation to that report it was pointed out on behalf of the school that it was a 61-page expert report regarding risk assessments by the school and a chart. It was stated that risk had not been raised by the Parents as an area of issue about which they would seek to admit expert evidence, despite having been asked to set out their case clearly. It was pointed out that the writer of the report had at no time met the Child. It was described as a very long and detailed report and submitted that its admission as late evidence would impede the hearing and it should not be admitted as an issue of basic fairness.

15. The Parents argued that they had sent the report to the school in June 2023, more than 5 days before the hearing was to commence. They pointed out that they had no other expert witness

or report to rely on. They asserted that the report was important because it answered questions about risk. They were disappointed that the Board Certified Behaviour Analyst had not attended as a witness and there had been some dispute about her fees.

16. They drew our attention to B1 377, which is an email dated the 16/02/22 in which the ALN Advisory Teacher advises the Headteacher to “update the risk assessment” but that it was not updated. They stated that the Board Certified Behaviour Analyst had reviewed the papers for her report. They also stated that they had emailed the Headteacher so they could see the Child at school, but the school did not respond. Enquiries revealed that the email appeared to have been sent but not received.

17. We considered the arguments above. The Parents had had multiple opportunities to clarify the issues and had not raised risk assessment as being one of these. On the other hand, risk was a clear issue in the case in our view. Indeed, it effectively formed part of the school’s case. The Parents act in person and in one of the parents case they are conducting the proceedings in a second language. The school were represented by senior Counsel who had had time to read and analyse the report. We noted that there had been time to object to the report being admitted before today. We were concerned that there would be some delay in starting the case today, and also that more delay might occur if the report was admitted. We had had no application to adjourn at this stage, although we had raised it with the RB Counsel during their submissions. Bearing all these factors in mind, we concluded that the report should be admitted. We concluded that unless the report was admitted there was a serious risk of prejudice to the Parents. As they pointed out, they have only the report to support their case about risk assessment. It enquired into an important issue in the case and there had been time for those representing the school to consider it.

18. Time was allowed for the RB Counsel to take further instructions at his request.

19. The RB Counsel then made an application to adjourn the case for today and tomorrow on the basis the report could not be fairly dealt with. They submitted that the school had made extensive efforts to see what it had to prepare for in the case, involving consideration of a lot of material. They submitted that the



adequacy of the risk assessment had never been raised previously and it had only been mentioned in passing. As a result it had been decided this was not an issue the school side needed to prepare reports on. It was stated that it had had no notice an expert report was planned. The RB Counsel referred to the email sent to the school. He said the Headteacher had not received it and that one email to a busy Headteacher is not adequate notice. They said that after the email there had been no follow up, and no attempt to raise the issue again including in the Case Management Hearing. They said that notice of the report last week was too late and that they could not put forward positive evidence to challenge it. They submitted that in the circumstances it would be grossly unfair to go ahead with the hearing now.

20. We considered the submissions made. We considered that risk was an issue flagged up by the parents in their Case Statement and was an important issue relevant to decision making about where the Child should be educated; with their peers or separate from them. We were of the view that there had been time to take instructions on the report given that it was made available a week before the hearing. We also considered that in our view the school's position was unlikely to change over the issue of risk assessment as the assessments we had were based on contemporaneous documents in the bundle. We considered that expert evidence called on the school's behalf, or further time, was unlikely to change this. We therefore refused the application to adjourn.

21. Further time was allowed to the RB Counsel to take instructions. At 15.15pm the RB Counsel submitted that it was the school's understanding that a large part of the report was about the way in which the school's risk assessment was compiled and related to recordings made. They stated that the evidence of school staff would be that the risk assessment was not solely based on the recordings but also upon other information available to the school. We then commenced the hearing of evidence in the case.

### **Assessment of Witnesses**

22. **The Parents** – We take account that the Parents appeared in person and do not have legal training. We considered their evidence to be genuine although rather unfocused. There were in fact few points in their evidence which were contentious, largely because they were not aware of the school's decision-

making processes at the time. There was an issue regarding whether there was a request for the Child to go home, or whether they were sent home. We will deal with this below. We also felt they had developed beliefs about certain issues and the approach that should be taken and have borne this in mind when considering their evidence. Overall, we found them to be honest witnesses who were trying their best to assist us.

23. **The Headteacher** – The Headteacher is the current Headteacher at the school. We considered the Headteacher to be honest and even handed in their evidence. They were frustrated occasionally that they could not answer questions as they had not had responsibility as Headteacher at the time. (They were a class teacher and not Headteacher for some of the relevant time). We felt they struggled at times in relation to the correct legal approach, for example in relation to exclusion. They were very candid about some of the school's recordings and their adequacy, in particular the ABC recording sheet. They were not assisted by the lack of contemporaneous documents. They had provided the whole of the content of the education file held in respect of the Child. They were not able to give evidence about some of the documents. They had not been involved in creating them or were not present at the material time, for example the occasion the photo was taken of the Child climbing. Overall, we found them to be trying their best to assist us, but for the reasons set out above they were handicapped in doing so.

24. **The ALN Advisory Teacher** – The ALN Advisory Teacher is a specialist teacher employed by the local authority. They were knowledgeable and professional. They were not willing to acknowledge some of the failings raised in practice regarding recordings. Their evidence was not assisted by the lack of sufficient contemporaneous documents setting out the details of discussions, meetings and advice. There were some areas of their evidence where they made assertions in absolute terms which we considered to be incorrect. For example, when asked about the upkeep of the Child's Individual Education Plan they said that there had always been an offer for a special school placement for the Child. The evidence they gave on this point was, we find, an overly simplistic view of what happened. It failed to take into account that there were discussions about trying to make the Child's placement at the school work with ongoing support, and their own expressed view that it should be able to be successful. (They had expressly stated

in an email that the placement could be made to work). They did not identify any documents to support their assertion that a specialist school placement had been available. We note that in fact, the formal offer of a placement at the other school was not made until March 2023 – see the letter from the Local Authority dated June 2023.

25. There was also an issue with their evidence about professionals outside of the school staff visiting every week to see how matters were progressing during part of the autumn term in 2021. The parents assert they had been told the visits would be every week. The ALN Advisory Teacher said they thought they were to be every fortnight as there were three professionals who would share the visits between them. We note the content of their email dated October 2021 at 372. The email refers to advisory teachers. When the evidence was questioned it was clear this frequency of visits did not occur. In their evidence the ALN Advisory Teacher said one of the professionals who was supposed to be visiting was a Speech and Language Therapist, who is employed by the Health Board and is not an advisory teacher. When The ALN Advisory Teacher was asked about the lack of visits one of her responses was that the Speech and Language Therapist was not her responsibility because she works for the Health Board. We considered this to be an unhelpful and defensive response. We find that the ALN Advisory Teacher was not aware that the visits were not as frequent as had been promised. We also find that they ought to have been aware of this and had not kept themselves informed. They eventually had to concede that visits were not as frequent as had been promised and again we note there is a lack of contemporaneous documents to assist, not only as to the frequency of visits, but also as to what was observed and discussed during the visits that did take place.

26. In relation to the Child's reintegration back into a classroom setting, the ALN Advisory Teacher asserted that there was a written plan. We looked at the emails referred to in the bundle in relation to this issue. None amounted to, or attached, a proper plan and we have concluded that this assertion was erroneous.

27. Having considered the issues above in relation to the ALN Advisory Teacher's evidence we have concluded that we must view their evidence with caution as we consider it not to always be reliable. We also consider that the ALN Advisory Teachers

contribution to what has occurred in the Child's case to have added to the difficulties overall. The approach they took, and that the school took, lacks structure, planning, monitoring and evaluation. Further, the lack of record keeping at the school was not correctly questioned by the advisory teachers in our view, and as a result, it was effectively encouraged as the correct way to work.

28. **Written Reports** – Within the papers we have a note of a visit made by a Private ABA Tutor to observe the Child at school in June 2021 between 9am and 2.30 pm. It sets out clearly a description of the Child's behaviour after lunch when they bent back the fingers of another pupil, and was kicking and hitting his TA. Eventually the Private ABA Tutor intervened and provided a worked example of how to manage the Child's behaviour. They were able to calm them, and then get them to re-engage. They also set out their view of why the behaviour had occurred in the following terms:

“It seems from the previous behaviour incident reports that each time the Child had an incident towards another child, it began with the staff they were with talking to another student, which would mean the function of these particular incidents are attention based, which is what I had observed in the incident on the 10th also. Advice given to the staff by myself was to not react to the Child once the behaviour has happened as that is what they are seeking out, whether it is a good or bad reaction, it does not matter in terms of the attention the Child is seeking out from his preferred staff.”

29. The Private ABA Tutor's Report sets out properly and in full the descriptions of the behaviour that they witnessed, the actions they took, their assessment of what the Child was trying to do through their behaviour, and the advice that they gave to staff. Importantly, in our view, it put the school staff on notice of the correct approach towards what the Child was doing, that is, to understand it as seeking attention and not as “bad” behaviour.

30. We have also been referred to a report by Skybound following observations of the Child in February 2023. It was relied upon by the school on the basis that it showed that the measures put in place by the school had been successful and we should look at the outcomes achieved when assessing what the school had put in place. We have reviewed this report carefully. Whilst it does contain positives, we also note that the Child is still outside of the

classroom for most of the time, and that their behaviours are still evident, with staff responding to their wishes in terms of removing them from assembly or their class when the Child indicates that they wish to leave. The Child only spent time in class when doing a preferred activity – cutting out. The Child exhibited a number of the same behaviours that have been occurring since they arrived at the school, namely, grabbing things from the top of a filing cabinet, having issues with certain children, running and jumping around, being restless and shouting out, running out into the yard, and lying on the floor. We do not regard this as significant progress and in particular regard the Child's lack of progress in their social functioning as evidencing their need to be taught how to function in school environments. We do not regard this report as evidencing sufficient progress for the Child.

31. The other report we had was that of the Board Certified Behaviour Analyst. It is entitled "*Review of Child Protections Concern Forms / Incident Forms / ABC Forms.*" There are a number of factors we have to take into account when considering what weight to give their report. We note that they have not seen the Child in person. We note they have not been to the school and have not discussed matters with school staff. The information they had was restricted to the records available, and what they were told by the Parents. We should add that we do not know the qualifications of the Board Certified Behaviour Analyst, but assume they are a Board Certified Analyst based upon the approach taken and the content of the report. We also do not know what their instructions were, but they are clear about the ambit of the work they have undertaken and has set this out. There was no effective challenge to the content of the report. Indeed, it was hardly mentioned during the hearing until closing submissions. We find the report is very thorough in its consideration of the papers, recordings and risk assessments. In relation to its analysis of those we find it to be a reliable and thorough report.

32. The report concludes that the record keeping and risk assessments in this case were poor, in particular concerning incidents which would lead to the Child's challenging behaviour, and what remedial steps were effective. We accept that conclusion as it is supported by what we have seen in the papers. We are aware from the evidence of the Headteacher that they have copied the entire contents of the Child's school file to ensure it was included in the case bundle and so we have all that there is. We

would expect a school at any level to be capable of properly recording incidents of behaviour and regard this as a significant deficit. We would also expect any school advised by expert teachers within the local authority to be able to provide an appropriate risk assessment. The Board Certified Behaviour Analyst's criticisms in their report and schedule are correct in our view. We have placed reliance on them. We have also formed our view about the quality of recordings and assessments relying on our own expert knowledge. In our experience it is well below the standard that we would expect. We will expand on this issue below. We accept that a mainstream school would not have the capacity to carry out in detail behavioural analysis as would be undertaken by an ABA certified practitioner. We are aware that a mainstream school would need to call in such expert assessment, from our own expertise.

33. **Recordings** – As stated, we were concerned about the quality of recording of incidents at the school. The recordings that we do have are inadequate in the sense that they do not enable analysis to be carried out. It is not possible to understand from them what has triggered behaviours, and what responses are effective for the Child. As a result they are inadequate in terms of informing an appropriate behaviour plan or assessment. They are required building blocks in the process. Without them it is impossible to properly manage a child's behaviours, or even to know how to approach them.
34. There is also more than one example of the behaviours being judged as being inappropriate behaviours, as opposed to being recognised as an attempt at communication or to gain attention. This should have been clearly apparent as it was flagged up in the report of the observation in June 2021 by the Private ABA Tutor. It is therefore disappointing that in subsequent recordings judgements are being made about the behaviour and it has been treated as "bad" behaviour.
35. The RB Counsel argued that if we were to find that the recordings were inadequate, this did not equate to disability discrimination. They submitted that there had to be a causal link between the lack of adequacy of the report recordings and the discrimination alleged. We find that there is such a link, in that if adequate recordings are not available as the building blocks to inform assessment, planning and future management decisions,

then an incorrect approach may be taken, leading to discrimination. We find that is what has happened in this case. We will expand on the recordings below in relation to specific incidents.

36. **Dynamic Risk Assessments** - it is part of the school's case that it was carrying out dynamic risk assessments in a fluid way, in order to manage the Child, their behaviour, and where they were at school at any given time. We consider this approach to have added to the problems in this case. Firstly, it provides no adequate paper trail to allow anyone assessing and working with the Child to see what was happening day to day. It meant there was a lack of information about triggers for behaviour, and what actions by staff were effective in managing the behaviours. Secondly, it contributed to a lack of communication between staff members. In relation to the dynamic risk assessments we note the comments in the Board Certified Behaviour Analyst's report as follows:

*The risk assessment does not include the 'dynamic risk assessment', describe how to work with a 'dynamic risk assessment' or indeed what a 'dynamic risk assessment' is. Kalantarnia, Khan, & Hawboldt, (2010) describe dynamic risk assessments as being created by taking information from incidents and near misses and adding possible events into a flow chart. This allows the person looking at the dynamic risk assessment to follow steps in the flow chart answering yes or no questions that leads to other yes or no questions. The flow chart then leads to the dynamic intervention. They differentiate it from a static risk assessment in that a more traditional static risk assessments only tends to have one solution i.e., 'if x occurs do y'. A dynamic risk assessment does not involve making up interventions as any instances of challenging behaviour occur. Following any incident an incident form should be completed that documents what interventions were used and whether they were successful. This in turn feeds through to the review of the risk assessment, dynamic or otherwise."*

37. We are clear from the evidence that the type of dynamic risk assessment described by the Board Certified Behaviour Analyst initially above was not what the school was employing. It was rather the latter, "*making up interventions as any instances of challenging behaviour occur.*" We find this practice was not appropriate for the reasons set out above. In conclusion, we

consider the dynamic assessment to have been a poor choice of approach and one which was ineffective for the Child.

38. **Incidents** – We will now start to consider the incidents relied upon by the Parents and decide whether there have been breaches of the Equality Act amounting to discrimination against the Child.
39. **Leaving the school grounds** - There was an incident in September 2020. The Child managed to leave the school grounds by getting under a gate. They were discovered by a member of the public some while later. We do not know where his TA was at the time. It should not have been possible for the Child to leave school in this way if he had been properly supervised the whole time as they should have been. Whilst this may well evidence a lack of adequate steps being in place for the Child on this occasion, this incident is of a different nature to those that follow, and we do not therefore consider it to have been part of the same course of conduct on the part of the school.
40. **Covid19 and the hub** - Life at school changed in 2021 when the Covid19 lockdown commenced. A hub arrangement was made at the school for some pupils. Initially the Child was not allowed to attend the hub but after a request was made by their parents they were permitted to attend. Their attendance at the hub is agreed by all parties to have been quite successful as it involved a smaller number of children, who had to be socially distanced in order to prevent transmission of Covid19. The parents allege that the provision made available for the Child was for restricted hours, and this was solely due to his disability. The Child's usual TA was prepared to make themselves available to support the Child during the period they attended at the hub. We do not know over what hours they were able to do this, and whether this was a significant factor in determining how long they could attend. We take note that this was all taking place during the Covid pandemic and that the school was doing its best in very difficult circumstances. It does demonstrate the lack of foresight on the part of the school in relation to the Child's needs arising from his disability. It also demonstrated that the Child could be successfully educated in the correct conditions.



41. We do not consider there is sufficient evidence for us to find that the decision that the Child could not initially attend the hub, or that he could only attend for restricted hours, amounts to disability discrimination. In doing so, we have considered what in the circumstances would be reasonable and proportionate in terms of the steps that the school took in order to manage a difficult situation during the pandemic lockdown. We consider that some greater leeway has to be given to the school during this period.
42. **March to June 2021** - The parents next allegation relates to the period between March and June 2021. This is not specifically included within the Appeal Notice or Case Statement provided by the Parents, and we have a sparsity of evidence in relation to this period. In the circumstances, we do not think it is appropriate to consider these allegations as part of the overall position, save as to context. We know that there is said to have been a difficulty with communication as to what was happening at school at this time. This limited the information that the Parents had and what they could tell us about this period. They allege that during this period the Child was internally segregated from their class and this included lunch time and break times. The Child's parents say they did not realise that they were not in mainstream class at times during this period. One of the reasons we do not have full evidence concerning this period is that it was during the previous Headteacher's tenure as Headteacher. It has been a repeated difficulty in this case that they have not attended as a witness, and it has not been possible for the school to access their emails as their email account has been permanently closed. It would have been of great assistance if they could have attended, having provided a witness statement and contemporaneous documents. As it is we have had to do the best we can with the information available. In relation to this period, however, we have not been able to make any findings due to the sparsity of evidence.
43. **September 2021** - During September 2021 there were several incidents when the Child exhibited behaviours which potentially placed themselves and others at risk. They involved actions like hair pulling and throwing items. As a result, there were discussions involving the school, the local authority, and the Child's parents, which ultimately resulted in them being placed outside of the classroom. There was an attempt to set a classroom workstation up for them initially, but the school decided that this was not sufficient. A separate area was therefore arranged for them

where they would be taught with the support of a TA. The Parents complain that this amounted to internal exclusion, and that was a sanction for bad behaviour. The school deny this and assert in response that they were making reasonable adjustments to ensure the safety of the Child, staff, and other children. They have stated that the behaviour policy that the school maintains was wholly suspended in the Child's case and that none of the actions they took were sanctions for bad behaviour. The Parents do not accept this.

44. On two days in September 2021, there were incidents where a child had bite marks left on their arm, and with pulling hair. On the second date in September the previous Headteacher telephoned the Child's parent. The school has argued that the Child's parent stated they would come in and pick the Child up. The Parents dispute this and say that the parent was told they had to come and take them home. In a document at pages 241 and 242 it is confirmed that the Child was sent home on this occasion, as alleged by the parents. The entry for the second date in September is unambiguous. In terms it says, "*The previous Headteacher decided it's best to send him home*". This supports what the parent told us. We have only hearsay evidence from the Headteacher to counter it. We accept the evidence of the parent on this issue. Accordingly, we find that the Child was sent home on this occasion.
45. **Behaviour Policy** - We note that in the school behaviour policy there is no requirement to keep careful records in relation to incidents of behaviour, or to set out what the records should contain. There is also no cross referencing to a Special Educational Needs policy. There is reference to making reasonable adjustments in respect of children with special educational needs.
46. The school told us they completely disregarded the behaviour policy when considering the Child's behaviour, and this is why they did not regard themselves as imposing punishments. We question the latter assertion. There are judgemental comments contained within some of the contemporaneous recordings, where the Child's behaviours are clearly being described in terms that are critical and steps are taken which are behaviour orientated. Examination of further incidents reveals this.

47. **Incident in September 2021** – In September 2021, a note, which we were told had been complied by the previous Headteacher, states:

*“Very disruptive – screaming, running Breaking things, attacking children. Throwing. Marks noted on arm – bite marks. Informed parents who picked him up at 1.30.*

*Complaints from parents that the Child was attacking pupils in a vicious manner.*

*Pulling hair, glasses”*

48. This description is in our view judgemental. It contains no information as to what led to the Child becoming dysregulated. The Child was excluded as a result. The following Monday there is a further relevant entry. It reads, *“The Child didn’t spend time in class today due to his behaviour last week. Parents have complained about the Child pulling hair/targeting individuals.”* The comments are again judgmental and the context in our view clearly shows that the Child was being punished for their behaviour. They had not become dysregulated on the Monday, but was excluded specifically because of *“their behaviour”* the previous Friday.

49. **Second Incident in September 2021** – In September 2021, after a hair pulling incident, the note at page 242 clearly states that the previous Headteacher had been contacted and *“decided it was best for them to be sent home”*. This was one incident in a day when they had otherwise worked well. Sending the Child straight home was not proportionate in these circumstances in our view. There is no record that other measures were considered. There is no record of how the decision was arrived at. The formal requirements relating to an exclusion were not complied with.

50. **The Climbing Photograph** - On another date in September 2021, the Child climbed up the side of a cupboard to obtain a soft toy that apparently had been placed on top of it. A photograph of this appears at page 684 in bundle two. There is no member of staff shown in the photograph, but we assume, having regard to the

school rules about children not having phones with cameras with them, that the photograph was taken by a member of staff. We are unsure why the member of staff took the photograph, rather than immediately attending to the Child, or how it can have come about that the Child was climbing like this when they should have had TA support at the time in addition to the class teacher. (We note from page 242 that the Child's TA was on a break). It suggests to us, however, that the priority on this occasion was gathering evidence to justify the school's actions, rather than ensuring the Child's safety. We note that it was at about this time a complaint was made by another parent about the Child's behaviour.

51. **Incident in January 2022** – In January 2022 the Child stabbed his TA in the hand. They dealt with this as follows:

*“The Child was told their behaviour was naughty and that it had made the TA sad.*

*The Child was also shown on a visual behaviour line green being good red being naughty that they had moved to the red.*

*The Child was told to move away and sit on sofa and 2 min timer was put on for their reflection time.”*

52. The note clearly evidences that what had happened was regarded as naughty behaviour that merited a negative response. The basis for using the “*behaviour line*” and “*reflection time*” is not explained in any contemporaneous documentation, and in particular there is no evidence base to demonstrate whether they were effective or whether the Child even understood why these responses were employed.

53. **Incident in February 2022** – In February 2022 a further incident occurred. The note of the incident states’ *“The Child was slightly unsettled just before going into class as (lion) teddy had to be left in withdrawal room.”* The Child grabbed another child by the arm when the TA turned to hand an iPad to the Class Teacher. The response was as follows:

*“The Child was shown that they had hurt and marked the other child’s arm and told it was not nice and to say sorry.*

*The Child was then taken back to the withdrawal room. The Child was shown a sad visual for his actions.*

*Whilst in the withdrawal room the Child had a 5 min time out and then went into the sensory tent to calm down.”*

54. In relation to this incident, we find it difficult to understand why the Child could not keep the lion teddy with them. This appears to have been one trigger for them. The TA looking away from them and giving attention to the Class Teacher appears to have been another. The response again shows that this was naughty behaviour warranting a negative response. A month after the previous incident the same TA then takes a different approach in that a “*sad visual*” was utilised rather than the behaviour line and then “*time out*” was employed. We also note the opinions expressed by the Board Certified Behaviour Analyst in their report which reinforce our view about this incident, what led to it, and how it was responded to. We accept their careful analysis of this incident.

55. **Punishment of the Child** - Having reviewed these recordings, and the responses to the Child’s behaviours we find that the Child was being punished for their behaviour. This demonstrates a lack of understanding of why they exhibited these behaviours, despite the clear characterisation of them the previous June by the Private ABA Tutor. They also demonstrate a failure to apply a consistent response and a response that had been trialled with the Child and had been recorded as being effective.

56. **Use of Time Out** - We also note the Board Certified Behaviour Analyst’s opinion regarding the use of time out as follows:

*“Note that for any type of time-out procedure to be effective the function of the challenging behaviour must be known, i.e., a functional assessment must have taken place. If a functional behavioural assessment is not carried out there is a risk that challenging behaviour will be increased inadvertently.”*

*“As mentioned above, time-out of any form is a punishment-based intervention. Punishment-based interventions have numerous side-effects which include increasing the probability of emotional displays, aggression, escape and avoidance from the punishing environment (Azrin, & Holz, 1966). Another problem with punishment-based interventions is that they do not teach skills. Modern approaches to behaviour change interventions generally incorporate functional behavioural assessment, skills teaching, and modifying the environment to avoid the use of challenging behaviour. This is especially important when designing interventions to use with children especially those who have a developmental disability (Sailor, Dunlap, Sugai, & Horner, 2009).”*

57. **Use of removal** – We also note the Board Certified Behaviour Analyst’s opinion about removal. They state:

*The reactive intervention section of the risk assessment states, “Removal of student - go for a walk / go to a calming area / go to the workstation etc”. This intervention is likely to increase the future frequency of challenging behaviour if the function of the challenging behaviour is escape (Taylor, & Miller, 1997). Conducting a functional behavioural assessment would reveal the function of the behaviours that the Child displays. An evidence-based intervention could then be chosen that matches the function of the behaviour and avoids increasing the frequency of challenging behaviour inadvertently.”*

58. Both of these comments demonstrate how important it is to understand what is behind the Child’s behaviours as the wrong approach in response to them can result in aggravation rather than mitigation of them. This is why proper recordings, consideration and interpretation of them, and the correct response to them, is so important. We find that the use of time out and removal was not appropriate as it was not applied with any real understanding of why it was being applied or the likely or even hoped for outcome once applied. This was not appropriate management of the Child’s behaviours.

59. **Other measures used by the school** – The school excluded the Child and removed them from the classroom in attempting, it asserts, to manage their behaviours. We will consider the appropriateness of these in turn.

60. **Welsh Assembly Guidance on Exclusions** - There is Welsh Assembly Guidance in “Exclusion from schools and pupil referral units” in relation to exclusions. It considers exclusions when a child is sent home even with the parents’ agreement, as follows:

### ***Exclusion from schools and pupil referral units***

*“1.6.2 Unlawful exclusions, more commonly referred to as informal or unofficial exclusions, are unlawful regardless of whether they are done with the agreement of parents or carers.*

*Unlawful, unofficial or informal exclusion refers to:*

- sending learners home for disciplinary reasons, but not following the procedures required for formal exclusion*
- learners being sent home for either short periods of time, or for longer indefinite periods which can sometimes result in the learner not returning to school at all.*

*For example, where a learner is sent home for disciplinary reasons for part of a school day, the school may view this as a ‘cooling off’ period and not take action to exclude the learner formally. There is no basis in law for this and the relevant regulations do not state a minimum length of exclusion, so if a learner is sent home, even for short periods of time, this must be **formally recorded** as an exclusion.*

### **1.14 ‘Voluntary’ withdrawals**

*1.14.1 Influencing or encouraging parents/carers to ‘voluntarily’ withdraw their child from school as a way of dealing with difficult or challenging behaviour is not an appropriate response.”*

61. **Exclusion of the Child** - There is no issue that the Child was effectively excluded from school on several occasions in September 2021, December 2021 and January 2022. As set out above, one recording confirms that the Child was sent home by the previous Headteacher. On other occasions, there was discussion, initiated by the school, about whether or not the Child should go home. We have set out the guidance section above about “voluntary withdrawals” to underline that parental consent should not be taken into account. We do find, as a matter of fact, that either the school made a decision that the Child should go home, or that a request was being made by the school that they should be taken home. In addition, we note that there is a lack of appropriate paperwork, setting out in full the reasons why it was thought appropriate, and most importantly, proportionate, for the Child to go home. This lack of a paper trail, our finding that the Child went home at the school’s direction or request, and the Welsh Assembly guidance, makes it impossible for us to conclude that these responses were proportionate. The burden lies upon the school to establish this, particularly in circumstances where they have breached Welsh Government guidance. It has simply failed to do so. As such we cannot find this to have been a reasonable adjustment either.

62. **Removing the Child from class etc.** - The Child was also removed from the classroom, as set out above. The school has argued that this too was proportionate and a reasonable adjustment having regard to the Child’s behaviours, and the need to protect them, staff, and other pupils. We heard evidence that the Child was unable to cope within the mainstream classroom, from the school’s perspective, and would clearly indicate that they did not wish to remain in the classroom setting, or in assembly hall, by saying so. We were told by the school that the situation has gradually improved, and that now the Child is spending more time in the mainstream classroom, but this has been a very gradual process. The school said that this has been carried out at the Child’s pace. We note they are still not fully integrated back into the main classroom, or even close to it, however. In terms of the reasonableness and proportionality of this approach, we have again considered the Welsh Assembly Guidance. It states:

*“Internal exclusion (also known as internal seclusion), which can be used to diffuse situations that occur in school that require*



*a learner to be removed from class but may not require exclusion from the school premises. The exclusion could be to a designated area within the school, with appropriate support, or to another class on a temporary basis, and may continue during break periods.*

### **1.10 Removal of learners for specific lessons**

*1.10.1 Learners may be removed from a class, on a one-off basis, as part of a school's range of sanctions against disruptive behaviour. Learners should not, however, be removed regularly from specific lessons as a way of dealing with disruptive behaviour unless other suitable arrangements are made for the learner's education. In these circumstances the situation should be discussed with the parent/carer and learner, and the school should review the arrangements regularly, with a view to the learner returning to the lessons. Removal of learners for specific lessons is not classified as an exclusion.*

*1.16.2 For a learner with a statement, where this process has been exhausted, the school should liaise with their LA about initiating a formal review of the learner's statement."*

63. We note that the school were faced with a difficult situation. Sometimes the Child's behaviour was hurting other children, and, understandably, other parents were complaining about this because they wished to ensure that their children remained safe at school. Initially setting up a workstation within the class as a first response was in our view appropriate. When this was deemed insufficient, the school decided that the Child would have to be in a separate area for a period. That position had to remain proportionate and reasonable, however.

64. At page 56 in bundle 2 there is an email dated September 2021. In response to the introduction of a different timetable for the Child and being taught in a separate area, the Parent raised the issue of how long the arrangements would continue in asking, "*Please, can also ask what the approximate time frame the timetable will be implemented for?*" The response from the ALN Advisory Teacher was:

*"The Child will have a tailored individual timetable **on a long-term basis** however, the aim is to gradually integrate most of their learning activities back into the classroom and for them*

*to be able to build their tolerance of participating in a busy environment so that they can benefit from and enjoy classroom sessions with their peers. The additional TA support which we will formally request at their Emergency Annual Review next Friday will enable school to staff the inclusive sessions in a way which make the sessions positive for the Child and also support school in being able to proactively manage any behaviours which may occur in a busy mainstream environment. The timescale for this will be as short a time as possible but will be solely dependent on the Child's responses and their ability to cope in the environment."* (our emphasis.)

65. All the information set out in the guidance above demonstrates the need to follow procedure, record decision-making, and ensure that seclusion is kept to the minimum period necessary. This is required in order to justify a decision that it is, in fact, proportionate, and/or a reasonable adjustment. This is where we find the school, with advice, has erred. It was important, once the situation where the Child was out of the classroom had been arrived at, to properly plan for the Child's reintroduction into the classroom, and to place some form of timetable upon this, even if it had to be altered, subsequently. Otherwise it was likely that the position would be allowed to continue without any proper check on time passing as measured against an appropriate timescale. This is important in that we accept that the treatment of the Child offended against the Welsh Government's definition of seclusion as a restrictive practice, defined as "*put in a room and not able to leave of their own free will.*" We note the comment of the Board Certified Behaviour Analyst as follows:

*"The Welsh Government (2022) goes on to state that "The best way to avoid restrictive practices is to work preventatively and meet needs before crisis arises". This has clearly not happened for the Child as there has been no attempt to teach them skills to enable them to communicate their wants and needs with their peers or staff." - Welsh Government (2022) Reducing Restrictive Practices Framework: Guidance*

We note that the Board Certified Behaviour Analyst comes to this conclusion based on the papers they have reviewed. It is confirmed in our view by the papers and evidence we have considered and by

the very longevity of the separation of the Child from their peers across settings.

66. **Annual Review** – There is reference in the papers to an Emergency Annual Review. We are unsure if this formally took place as there is no documentary recording of it. We are also unsure as to whether the Child’s Statement was finalised in an amended form. As we understand the position, there were some discussions about increasing the amount of TA support for the Child, so that he would have 2-to-1 support at all times. If there was no formal early Annual Review and subsequent amendment of the Child’s Statement, with all that it entails, this misses the opportunity to review the Child’s position fully, and removes any right of appeal the parents would have had as a result.
67. The failure to carry out proper risk assessments, formulate proper plans, and base all of this on adequate recordings, has in our view, led to the Child remaining outside the classroom situation for an excessive period. Their position could and should have been managed better. We find therefore that the school’s actions cannot amount to a proportionate response or reasonable adjustments.
68. **TA Support for the Child** – Another issue in this case is the provision of adequate TA support for the Child. The first TA identified in the papers whilst the Child was at the school, is described as having a good working relationship with the Child, although there were still some incidents during that academic year, as referred to in the assessment by the Private ABA Tutor. The TA gave notice that they were going to leave approximately a week before the end of summer term in the 2020/2021 academic year. This caused problems in terms of employing someone else at short notice to start in September 2021, and the difficulties with TA support during that month may well have been a contributing factor to the Child’s behaviours that month. Thereafter, there was discussion about two TAs being required, which initially was to be for the following two terms. Once the decision had been made there were difficulties in obtaining two TAs. The Headteacher told us that she had been attending to this by seeking TAs from agencies, but this clearly was not effective. We note that it was not until February 2022, that consideration was given to employing a permanent TA to support the Child. We note, of course, that given the child’s autism, changes

in provision will it be difficult for the Child to accept, and this probably also was a contributing factor to their behaviours.

69. We further note that in the Child's Statement updated in June 2022, at 434 B1, it refers to 32.5 hrs support from a level 3 and 27 ½ 2<sup>nd</sup> TA support from level 1 TA. We are unsure when this level of TA support commenced but note that by June 2022 two TAs were formally required as set out in the Statement.
70. We have considered the statements we have seen from witnesses, approached by the Parents, at pages 162 and 164 to 167. These refer to the difficulties in providing adequate TA support for the Child, and the difficulties in relation to the work that was provided for them to carry out. They confirm the Parents's assertion that inadequate TA provision was being made for the Child. They also confirm that a mix and match approach was taken at times so that someone other than the Child's usual TA was with them.
71. We have considered whether the actions of the school were reasonable and proportionate in relation to the provision of TA support for the Child. We take note of the fact that it was difficult to obtain TAs, and in particular TAs with the right experience and qualifications, and who were also Welsh speakers, as this is a Welsh speaking school. The actions of the school had to be reasonable and proportionate, not achieving the impossible. Nevertheless, we are concerned about the delay in advertising for a permanent TA. It would have assisted us if we had clear documentary evidence to show what efforts were made to obtain TA support. We have carefully considered whether, therefore, the school has failed to show that their response was proportionate because of the delay. We have also utilised our own specialist knowledge of the difficulties of obtaining suitably qualified and experienced TAs, and particular those who are able to work in a Welsh speaking school. Overall, we have concluded that there is sufficient evidence to show that the lack of adequate TA support amounted to disability discrimination. More could have been done in our view to obtain TA support earlier, and to ensure that the TA support was consistent and properly trained to meet the Child's needs. The required factors within section 15 are met in that the Child has been treated unfavourably as the lack of TA support contributed to them being excluded and removed from the classroom, which were related to their disability, and the school has

failed to discharge the burden of proving that its response was proportionate.

72. **Removal Of ABA Support** - Another form of support for the Child before lockdown was through an ABA specialist attending their school. A further allegation raised by the parents is that the ABA therapy support phone number was ceased after the end of the academic school year in 2021. It is their view that the Child responded well to an ABA approach. We note that the Statement dated February 2021 at 422 also says ABA provision is only to continue for half a term. We also know, from the evidence, that there were difficulties as a result of Covid 19, as there were restrictions on who could come into school at various times which made attendance by an ABA therapist a problem. It is impossible for us to discern from the papers precisely when ABA support was withdrawn in terms of the school having formally decided it was no longer appropriate. We cannot see if consideration was given at any relevant stage for it to be reintroduced. We do not think there is sufficient evidence to establish that the reduction in the amount of ABA support was disability discrimination, however, on the basis that it is for the parents to prove that the Child was treated unfavourably because of something arising as a consequence of their disability. They have not proved this causal link. Neither have they proved that a provision criteria or practice was being applied here for the purposes of section 19 or 21.
73. **Lack of Autism Training** - The parents also alleged that there was a lack of autism training for school staff. This is partly associated with the difficulties obtaining TAs. COVID-19 also played a part here in that at the time the ELKLAN training was provided on a face-to-face basis, and therefore it was simply not taking place. We heard evidence from the Headteacher that there were attempts to ensure that staff were suitably trained. We accept their evidence. We do not find there is sufficient evidence to establish that a lack of autism training amounted to disability discrimination under the sections of the act in the difficult circumstances that pertained.
74. **Risk Assessment and Planning** - We note that the Board Certified Behaviour Analyst is critical of the assessment of the Child's behaviours and the planning about how to manage them. They conclude in relation to the risk assessments of May 2021, as follows:

*“The ‘Management Plan’ section still does not provide staff working with the Child with any strategies to prevent the Child from needing to use challenging behaviour. There are still no skills teaching strategies to prevent the Child from needing to use challenging behaviour to communicate. The use of challenging behaviour should be seen as a form of communication, especially for those who have communication difficulties.*

*The risk assessment does not provide staff with strategies or information on what to do should the Child start to show signs of the possible use of challenging behaviour occurring. It does not describe what those signs are that the Child is starting to move towards the use of challenging behaviour. The risk assessment also does not tell staff what to do if the Child does use challenging behaviour. There are several punishment-based procedures aimed at reducing challenging behaviour and there is still not a single example of an intervention based on increasing pro-social behaviour.*

75. We stress that the Board Certified Behaviour Analyst’s conclusions reinforce our own expert view. It was apparent during the hearing that we were concerned about the documentation in this case and the resulting lack of proper assessment of the Child’s behaviours and management of them. We therefore accept their conclusions as set out above.
76. **Continuing course of conduct** – There is a six-month time limit during which claims for disability discrimination must be brought. There is an exception if a continuing course of conduct can be established, when only the last event needs to be within the six-month time limit.
77. Some of the allegations in this case are outside the six-month time limit. We have therefore had to give consideration to whether a continuing course of conduct can be established. We have found that it can on the following basis:
- i. We are concerned with the overall approach of the school in terms of its management of the Child’s

behaviour throughout the time that they have been at the school.

- ii. It would be artificial to try to divide up the various incidents and the responses to them where the overall approach of the school has not changed.
- iii. Key issues relating to record-keeping, assessments and how to respond to the Child's behaviours have not changed.
- iv. The allegations are of a similar nature, and the defence by the school is the same in each case.

78. **Disability Discrimination** - We have considered section 15 of the Equality Act 2010 and the matters which have to be proved in order for disability discrimination to be made out. We take the view that the Child was treated unfavourably when they were removed from the mainstream classroom, from school by being sent home, and from the company of their peers at lunch and breaktimes. They were deprived of normal social contact with their peers, which is of great importance at this age, and from the mainstream lesson content and experience. For a considerable period they were effectively isolated with adults who were supporting them.

79. We also take the view that this unfavourable treatment was as a consequence of their behaviour, which is associated with their disability. Indeed, there has been no suggestion that their behaviour does not arise from their disability. It is the school's case that they did not punish them because of their behaviour as they recognise this.

80. The school were aware of the Child's disability and accept that they were disabled under the definition within the Act.

81. The issue in relation to section 15 relates to whether or not the treatment of the Child was a proportionate means of achieving a legitimate aim. The aim in this case is clear: it was to protect the Child, staff, and other members of the Child's class. We have little difficulty, of course, in finding that that this a legitimate aim.

82. The case turns on proportionality. The burden of proof in relation to establishing that the actions taken were proportionate lies upon the school. (Section 15(1)(b) of the Equality Act.) The lack of written records is of significance. We cannot follow the decision-

making process. We would have expected recordings which showed what triggered the Child's behaviour, what calming measures were successful for them, and to have seen a graduated response. We would have expected evidence that related those recordings to the decisions exclude the Child and to remove them from their classroom. We have no adequate recordings or notes to show precisely what advice was given by the local authority specialist teacher team, and what was being applied at any given time to the Child's behaviour. Neither was there a clear plan or targets set. No method of measuring any changes in behaviour was applied so that outcomes could be assessed, preferably with application to a timescale, which is also notably absent. None of this is apparent to us from the evidence in this case. The school also clearly breached Welsh Assembly guidance. In the circumstances, it is inevitable that we conclude that the school has not proved that the unfavourable treatment was a proportionate response. The Child has a Statement of Special Educational Needs. Without documentation relating to an urgent Annual Review, and without a clear document trail to show the decision making, there has been no means either of justifying significant deviation from the content of that Statement.

83. We add to these the findings we have made above concerning risk assessments, lack of adequate planning, lack of communication between staff and a lack of understanding of the Child's behaviours, and we have no difficulty in concluding in this case that the Child has been discriminated against under section 15 of the Act.
84. **Reasonable adjustments** – We have also considered the schools argument that it was merely applying reasonable adjustments. Given our findings about the school's failings above we cannot find that the steps it took constitute reasonable adjustments. Exclusion, removal from classes (seclusion) and from other parts of the school day, and exclusion from school events, are not, in the context of the Child's behaviours, reasonable adjustments. They are discrimination.
85. **Exclusion from Christmas Events** – It is alleged by the Parents, that the Child was excluded from the Christmas meal in 2021, from the Christmas concert, and in the second discrimination claim, from Carol singing on the schoolyard on the last day of school. There is no factual dispute that the Child was not in



attendance of any of these events. They were therefore subjected to a clear detriment.

86. In relation to the first two, the dinner and the concert, the school again assert that these were reasonable adjustments on the basis that the Child could not cope with these events at the time. It was therefore related to something arising in consequence to their disability.
87. We have seen no recordings which shows what other measures were considered. Alternatives, it seems to us, might have been the Child sitting with two members of staff, or asking one of the Child's parents to attend for either of these events. We find there is a lack of documentation to prove to the requisite standard that this was a proportionate response, given that other measures are not evidenced clearly as having been considered. The exclusion from these events has not therefore been shown to be proportionate or to amount to a reasonable adjustment.
88. In relation to the singing in the school yard, the schools defence to this is that it was just a mistake and is not therefore disability discrimination. This presupposes that there has to be some mental element to discrimination under all the relevant sections of the Act. This is simply not the case. Unfortunately, mistakes are made which amount to discrimination. For discrimination arising from disability, the motive for the treatment does not matter; the question is whether the disabled pupil has been treated unfavourably because of something connected with their disability.
89. We do not understand how it could have come about that this event was planned for at least a week in advance, as the evidence showed, and no steps were taken in terms of risk assessment or planning to ensure that the Child could take part. We appreciate that the Headteacher gave evidence that they did not understand how the other Teaching Assistant did not know about the event, as it had been flagged up a week before on the school's App and was discussed at lunchtime on the day in the staffroom, when they were present. The Teaching Assistant's statement, however, states they did not know that the event was to take place.
90. Once the singing had begun, we also are unsure why it is that school staff did not enquire about the Child returning to the yard

area so that they could be included in at least some of the activity. Asking the Parents why they did not bring them back themselves is not sufficient. The duty is not upon the Parents, but upon the school.

91. We therefore conclude this too was an act of disability discrimination under section 15. The Child should have been given the opportunity to take part.

92. **The Parents' complaint that they were treated differently to other parents who complained and this amounts to victimisation** - The allegation is made on page 43 of bundle 2. The Parents perceive it as unfair to them that when they made a complaint they were required to go through the school procedures, whereas one of the other parents that complained went directly to the Director of Education and was not required to go through the school's complaint procedures. We understand how this has led to a perceived feeling of unfairness.

93. The relevant section reads:

*"27. Victimisation*

*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

*(a) B does a protected act, or*

*(b) A believes that B has done, or may do, a protected act.*

*(2) Each of the following is a protected act—*

*(a) bringing proceedings under this Act;*

*(b) giving evidence or information in connection with proceedings under this Act;*

*(c) doing any other thing for the purposes of or in connection with this Act;*

*(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

*(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

94. The burden of establishing that the decisions or actions of the school, were "as a consequence of" a matter being raised by the parents under the Equality Act 2010, lies upon them. We note that they did not raise in the issue as victimisation in writing at the material time. We have nothing within any other contemporaneous

documentation to establish the motivation for the school's decision-making.

95. We find the Parents did raise issues relating to the Act and these were genuine and made in good faith. In relation to the Child we do not find that they have been victimised as we do not consider there is sufficient evidence to link the school's actions with a complaint of discrimination. We do not consider that this was the school's motivation.
96. In relation to the Parents some of the comments made in documents we have seen such as "mum needs to be educated" are at the very least inappropriate but we do not consider that these are sufficient to amount to a detriment under the Act.
97. We have also, however, considered the argument that taking the side of other parents over the Parents, as it is alleged, is not made out. The school were in a difficult position and were having to balance the effects on the different children and parents affected. We do consider that the insistence on the Parents going through the school complaints procedure, when other parents were not required to do so, is a detriment. This is probably to be laid at the door of the local authority, however, who ought to have ensured that all parents were treated equally by referring other parents to the complaints procedure and not short cutting the procedure.
98. Considering all of the above we do not consider we should make a finding of victimisation in this case against the school.
99. **Harassment** – The relevant law is as follows:

*26 Harassment*

*(1) A person (A) harasses another (B) if—*

*(a) A engages in unwanted conduct related to a relevant protected characteristic, and*

*(b) 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.*

*(4) 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.*

(5) *The relevant protected characteristics are—  
disability;*

100. This section can only be considered by us in relation to the Child. We have considered the Child's age and diagnosis in terms of his understanding of what was going on at the time in terms of their perception. We appreciate that at times, they may have been upset by what had occurred, particularly when they could not be in the same class as their twin, and when their behaviours were not understood or appropriately managed.

101. We are not persuaded to the appropriate evidential standard, however, that the Child has had their dignity violated or that there has been an intimidating, hostile, degrading, humiliating or an offensive environment for them. We are sure that the conduct was not intended to have this purpose on the school's part. There is simply no evidence that that was their intention.

102. Considering all the circumstances, we have concluded that there is insufficient evidence to meet the test required by the Act for us to make a finding of harassment.

103. **Special School** – The RB Counsel submitted that the underlying cause of the difficulties in this case was the fact that the Child should have been placed at a special school. If that is right, we comment that this is not a case where the parents had closed their minds to possible placement at a special school. They sought and received advice from the school and the local authority, as referred to above. In any event, this is not a defence under the Act.

104. **Remedies** – We consider it appropriate to order the remedies set out below.

105. We consider apology letters to be appropriate given the failings in this case.

106. We have considered some of the other remedies sought by the parents, such as reducing segregation and the school entrance

to be used. Apart from endorsing their wish that they should be included with their classmates in all activities, we do not consider it appropriate for us to order remedies in respect of these matters as they are better managed in his Statement of Special Educational Needs.

107. During the hearing there was evidence about ELKLAN training. The school are willing to have staff complete this, and if it has not yet been completed, we direct that it should be undertaken.

108. Training on inclusion/exclusion would also be appropriate in our view given the findings we have made and the lack of understanding of Welsh Government guidance.

109. We have considered the recommendations made by the Board Certified Behaviour Analyst. We would like to consider including these in the remedies we order. We have not received submissions as to this aspect of the case and will give the parties an opportunity to make such submissions.

110. We are also conscious that the Parents were still considering the Child moving to another school, when some of these recommendations would not apply as they are specific to the Child. We wish for them to clarify their position as to school placement once they have had some time to absorb this Decision. Once they have done so we wish to have short submissions from them and the school, and then we will make a final decision as to remedies.

111. We also consider it would assist if the Child's IEP was regularly reviewed and updated, at a minimum frequency of half termly, by their class teacher and the school ALNCO. It should set out clearly defined, realistic and measurable targets.

112. To assist the parties, we have divided up the remedies we are considering into those we make now and those we are considering making if the Child remains at the school.

### **Order**

1. The school has discriminated against the Child by:
  - a) Excluding them from school;
  - b) Removing them from class, break time and lunch time with their peers;

- c) Excluding them from Christmas lunch, the Christmas concert and carol singing in the school yard during Christmas 2022;
- d) Failing to provide adequate TA support for the Child.

**Remedies that we are ordering now:**

2. The Responsible Body of the Primary School shall send an appropriate letter of apology to the Child, and a separate one to their parents, by 12 noon on the 06/11/23, and shall forward a copy of the letters to the Tribunal.
3. Training on ELKLAN for all staff who work with children with ALN.
4. Training for all staff on inclusion/exclusion.
5. Training for all staff on how to write an incident report that includes:
  - a. When to write an incident report
  - b. Describing accurately what happened before the behaviour occurred.
  - c. Describing accurately the challenging behaviour
  - d. Describing accurately what happened after the behaviour occurred.
  - e. Legal requirements for incident report writing.
6. Training for all staff who write risk assessments on writing risk assessments that relate to challenging behaviour.
7. Training for all staff who work at the school on the functions of challenging behaviour.
8. The Responsible Body of the school shall review the Welsh Government (2022) Reducing Restrictive Practices Framework: Guidance on reducing restrictive practices in childcare, education, health, and social care settings and review and amend as necessary the school policies.
9. The school staff should immediately stop using punishment-based procedures until all other interventions have been attempted, implemented with fidelity, and proven to not work, e.g. time-out.

10. Paragraphs 2 to 9 shall be completed by the end of the summer term 2024 and the Chair of Governors must write to the Tribunal confirming these have been completed.

**Remedies we are considering ordering, subject to submissions**

11. In relation to the Child the following should be put in place as soon as possible, but in any event by the 31/01/24:

- i) An IEP that is regularly reviewed and updated, at a minimum frequency of half termly, by their class teacher and the school ALNCO. It should set out clearly defined, realistic and measurable targets.

- ii) In collaboration with a behaviour analyst, the Child's parents, and other specialists, write a positive behaviour support plan that:

- a. Defines the challenging behaviour by:

- i. Describing what the challenging behaviour looks like.

- ii. Documenting and monitoring the frequency of the challenging behaviour, with the information taken from incident reports.

- iii. Documenting and monitoring the location of the challenging behaviour, with the information taken from incident reports.

- iv. Documenting and monitoring who the challenging behaviour is directed towards, with the information taken from incident reports.

- v. Documenting and monitoring when the challenging behaviour occurs and how long it lasts for, with the information taken from incident reports.

- b. States the function of the challenging behaviour as defined by the functional behavioural assessment.

- c. Provides evidence-based interventions that:

- i. Prevent the need for challenging behaviour to occur by using:
  - 1. Skills teaching strategies to aid communication.
  - 2. Changes to the environment e.g. consistent approaches and people, routine, etc.
  
- ii. Manage early signs of challenging behaviour by:
  - 1. Stating what the early warning signs are that challenging behaviour maybe about to be used.
  - 2. Stating what staff should do to attempted to prevent this from occurring.
  
- iii. Respond to the use of challenging behaviour by stating exactly what staff should do.
  
- d. Update the risk assessments to reflect the positive behaviour support plan.
  
- e. In collaboration with the behaviour analyst monitor the data from incident reports, by means of graphical display.
  
- f. In collaboration with the behaviour analyst and parents modify the positive behaviour support plan and risk assessments as necessary.
  
- g. Assess the Child with the Wide Range Achievement Test – Fifth Edition (2017). This needs to be conducted by someone with experience of running this assessment with reluctant test takers.
  
- h. Assess the Child with the Assessment of Basic Language and Learning Skills—Revised (2008).
  
- i. Commission a functional behavioural assessment, carried out by a suitably qualified behaviour analyst, who has experience in conducting functional analysis in school settings and has experience in designing interventions.
  
- j. Provide all staff who work with the Child training on how to conduct a preference assessment, this



should include training on how frequently a preference assessment should be conducted.

- k. Provide all staff who work directly with the Child with functional communication training.
- l. Provide all staff who work directly with the Child training on how to teach social skills.
- m. Provide all staff with training in how to implement the positive behaviour support plan for the Child.
- n. Provide staff who work directly with the Child, coaching on how to use the interventions withing the positive behaviour support plan.
- o. Provide all staff who work directly with the Child with restrictive physical intervention training, that includes that restrictive physical interventions are only to be used as a last resort.

### **Directions**

- 12. The Parents shall inform the school and the Tribunal in writing by 12 noon on the 13/10/23 whether the Child is going to remain at the Primary school, or whether he will be moving to another school.
- 13. The Primary school and the Parents shall send to each other and to the Tribunal, written submissions as to the remedies that we are considering making, as set out under paragraph 11 above, by 12 noon on the 20/10/23.

**Dated October 2023**

## **Addendum to Decision – Remedies**

1. At the direction of the Tribunal, the parties have kindly provided written submissions on some remedies in this case. We have considered those written submissions.
2. All the remedies are considered appropriate by the Parents.
3. The school has agreed that a number are appropriate and have made specific submissions about some of the others. In relation to those submissions, we have made the decisions set out below.
4. The School has also made a general submission as follows:
5. *“While the RB does not object to many of the matters proposed in para 11 of the Tribunal’s determination, it does have significant concern that some aspects of the recommendations set out will have significant resource implications, as well as impacting on the education of other children in the school. As such, they will lead to a reappraisal of whether it is appropriate to override parental preference for mainstream education. The greater the impact on resources and the education of other children, the more likely it is that parental preference should be overridden.”*
6. We do hope that there will be no change of school for the Child, unless that is his parents wish. We consider that if the training and expertise that should have been in place or available to the school had been available, it ought to have prevented them from being discriminated against as set out in our Decision. It is important that such training is put in place, not just for the Child, but for all other children who have a disability and attend the school now or in the future. It is not simply an issue about what is provided for the Child. Whether it is the school, or the local authority and the school, that meets the costs is not a matter for us, but we comment that given the history of this case, where the local authority had knowledge of, and oversight of, the position, the local authority should be making a significant contribution. We hope it does so.
7. We accept that “ABC report” is a more appropriate term than “incident reports”.
8. We have amended the wording relating to “graphical display”. We do not intend this to be an expensive item, but rather that it should

be an aid to rapidly assimilating the position at any given time in a visual way.

9. We accept that if the assessment is carried out by a local authority Educational Psychologist, as the school submissions state it will, the required expertise will be applied. We have therefore directed this. We also accept that we need not specify the type of assessment as this is a matter for the Educational Psychologist. We were previously considering specifying the Wide Range Achievement Test – Fifth Edition (2017) (WRAT) as it contains a high visual content which may be more appropriate for the Child.
10. We have also directed that the local authority arranges an assessment of the Child by an appropriately experienced person using the Assessment of Basic Language and Learning Skills— Revised (2008). We have amended this wording so that the LA can arrange for it to be conducted flexibly. It allows its own Educational Psychologist to undertake it if they are trained to use it or, if necessary, seek assistance from a neighbouring authority, or ask an NHS Speech and Language Therapist.
11. We do not agree that training in respect of preference assessments is inappropriate as it is amending the Child's Statement of Special Educational Needs. It will have wider benefits in terms of staff knowledge and will benefit other children as well. The reason written submissions have been directed is because some of the remedies were not considered during the evidence. We note it is stated in the school's submissions to be already in place in respect of the Child and so there should be no difficulty in us ordering it.
12. Accordingly, the following additional further remedies are ordered:

In relation to the Child the following should be put in place as soon as possible, but in any event by the 31/01/24:

- iii) An IEP that is regularly reviewed and updated, at a minimum frequency of half termly, by their class teacher and the school ALNCO. It should set out clearly defined, realistic and measurable targets.

- iv) In collaboration with a behaviour analyst, the Child's parents, and other specialists, write a positive behaviour support plan that:
  - a. Defines the challenging behaviour by:
    - i. Describing what the challenging behaviour looks like.
    - ii. Documenting and monitoring the frequency of the challenging behaviour, with the information taken from ABC reports.
    - iii. Documenting and monitoring the location of the challenging behaviour, with the information taken from ABC reports.
    - iv. Documenting and monitoring who the challenging behaviour is directed towards, with the information taken from ABC reports.
    - v. Documenting and monitoring when the challenging behaviour occurs and how long it lasts for, with the information taken from ABC reports.
  - b. States the function of the challenging behaviour as defined by the functional behavioural assessment.
  - c. Provides evidence-based interventions that:
    - i. Prevent the need for challenging behaviour to occur by using:
      - 1. Skills teaching strategies to aid communication.
      - 2. Changes to the environment e.g., consistent approaches and people, routine, etc.
    - ii. Manage early signs of challenging behaviour by:
      - 1. Stating what the early warning signs are that challenging behaviour maybe about to be used.
      - 2. Stating what staff should do to attempted to prevent this from occurring.
    - iii. Respond to the use of challenging behaviour by stating exactly what staff should do.

- d. Update the risk assessments to reflect the positive behaviour support plan.
- e. In collaboration with the behaviour analyst monitor the data from ABC reports, display them in a graphical way to enable rapid assimilation.
- f. In collaboration with the behaviour analyst and parents modify the positive behaviour support plan and risk assessments as necessary.
- g. The local authority Educational Psychologist shall assess the Child and shall advise if more specialist assessments are required.
- h. The local authority shall arrange an assessment of the Child by an appropriately experienced person using the Assessment of Basic Language and Learning Skills— Revised (2008).
- i. Commission a functional behavioural assessment, carried out by a suitably qualified behaviour analyst, who has experience in conducting functional analysis in school settings and has experience in designing interventions.
- j. Provide all staff who work with the Child training on how to conduct a preference assessment, this should include training on how frequently a preference assessment should be conducted.
- k. Provide all staff who work directly with the Child with functional communication training.
- l. Provide all staff who work directly with the Child training on how to teach social skills.
- m. Provide all staff with training in how to implement the positive behaviour support plan for the Child.
- n. Provide staff who work directly with the Child, coaching on how to use the interventions withing the positive behaviour support plan.

- o. Provide all staff who work directly with the Child with restrictive physical intervention training, that includes that restrictive physical interventions are only to be used as a last resort.

**Dated October 2023**