



DECISION

Date of Birth: 2010
Appeal of: The Parents
Type of appeal: Disability Discrimination Claim
Against: The Responsible Body
Date of hearing: 2022

Persons present:	The Parent	<i>Parent</i>
	The Parent	<i>Parent</i>
	Parent Representative	<i>Parent Barrister</i>
	Responsible Body Representative	<i>RB Barrister</i>
	Responsible Body Witness	<i>SENCO (ALNCo)</i>
	Responsible Body Witness	<i>Headteacher</i>

DECISION

- Introduction** – This is a claim for disability discrimination under the Equality Act 2010. It is brought by the parents of the Child against the School (Responsible Body). The Child is now 12 years of age and lives at home with their parents and sibling. The Child is autistic. The Child attended the School as a weekly boarder, as the Child did their junior School. The Child was permanently excluded from the School in November 2021.
- We note that the Child's older sibling still attends the School. The Child's sibling is also autistic and has had difficulties at school. The Parent clearly told us that they were pleased with the way that the School have managed those difficulties, and that as a result the Child's sibling was succeeding at school.
- The parents were represented by the Parent Barrister (Counsel) and the school by the RB Barrister (Counsel). We are most grateful to them for the written documents they produced prior to the hearing, and for their assistance during the hearing in what has been a complicated case.
- Some special measures had to be put in place to assist the Parent, who was particularly anxious about giving evidence. At short notice the RB Barrister kindly provided a document setting out the headings that they would ask questions about, which was provided to the Parent prior to the hearing to assist with this process.
- We heard this case over two days of evidence and took more than a day to make and draft our Decision. I apologise to the parties for the time it has taken for this Decision to be provided due to other commitments and the time required to complete this Decision.

6. **The Parents Case** – The parents case is that reasonable adjustments were not put in place, nor appropriately considered in the decision to exclude. Further, that the Child has been discriminated against by being unfavourably treated in connection with the Child's disability and has been victimised as a consequence of the actions of the parents.
7. **The School's Case** – the school denies any discrimination, or victimisation. In so far as is necessary, it also defends part of the claim on the basis that the exclusion was an important means of achieving a legitimate aim.
8. **Reinstatement** – At the start of the hearing we were told that the claim for reinstatement at the school was not pursued and that the Child was now attending a different school.
9. **Our Approach** - We have approached this case by firstly considering the incidents involving the Child, and whether we can, or need to, make findings of fact concerning those incidents, and then going on to look at the decision-making process of the school in terms of the exclusion. We have also examined what information was available to the school, and when it became available. We have also, of course, considered whether the Child has a disability within the meaning of section 6 of the Equality Act. We have then considered whether the Child has been discriminated against and considered victimisation and remedies.
10. In arriving at our Decision we have considered all of the written and oral evidence, the Equality Act 2010 and guidance, and the authorities bundle, and additional cases, provided to us.
11. **History** - There is a considerable history in this case, which is contained in more than 2000 pages of documents. We identified the bundles we had as A, B, and C, for reference purposes.
12. The parties also agreed that some late evidence could be admitted by consent, being recent reports obtained when the Child was assessed by the Autism Assessment Practice. These have been compiled as part of the evidence gathering to consider whether the Child should have an Education, Health and Care Plan.
13. We will begin by considering the most serious two incidents, upon the basis that these were identified by the Headteacher of the School, as being the incidents which were regarded by the Headteacher as the most serious, and were the basis for the Headteacher's decision to permanently exclude the Child.
14. **The September 2021 Incident** – This allegation is that the Child stabbed another pupil with a biro, during the lunch hour at school. The school notified the Parent about this incident in an email on the same day, in the following terms:

*“From: The School>
Date: September 2021*

To: The Parent
Subject: The Child

Dear Parent,

I am emailing to inform you about an incident which occurred earlier today involving the Child and another pupil in the Childs year group. At lunchtime the Child stabbed another pupil in the chest with a pen – the pupil was not badly hurt but the pen did nick the top of the pupils skin and leave an ink mark down the pupils t-shirt. I have asked the Child and the other pupil involved to write a statement about what happened. The Child admits that they chased the other pupil out of the room and stabbed the pupil with a pen but the Child says it was because the other pupil deliberately sat on them; the other pupil denies this. We will be looking into this further tomorrow though we thought it best to inform you about the incident today."

15. The Parent replied a couple of days later is as follows:

"From: The Parent>

Date: September 2021

To: The School

Subject: Incident / social story work / short term & longer term solution possibility.

Good morning both

Just to share that I have had time to talk though the Childs views & ideas for solutions.

The Child started with drawing on their leg sat by the pupil then stabbing the pupils leg says it doesn't hurt & the pupil did it to their own leg. Then the pupil was pushed into the Child twice with some else pushing them ... the 3rd time said get off & the pupil refused to get off the Child when asked by the Child a number of time's (we advised if this provocation happens again the Child must say that they will report the child however this is easily said !) hence "triggered" Flight or fight response & the Child got angry kneeing the pupil off their lap which then the pupil ran off the Child chasing them – The pupil stopped still & turned around face on & this is when the Child had the pen & stabbed the pupil with it – The Child says the pupil walked off & had no idea it had indeed hurt them. We have talked through the action & how not to get "wound up" a solution. ASD children respond to social story work & we have done this.

The Child was at their last school physical pinned down by a bigger stronger pupil & dry humped in the boarding house a number of times with a number of other smaller pupils at that School. The Parent clearly made a written complaint as unacceptable. I believe in part this was a trigger & the Child having social immaturity & social reading is unable to identify their triggers. That is not a excuse the Child must learn not to react physically. The Child was bullied at their previous School. The Child has also said while at the School, the Child has been tripped up by some Year 8 pupils."

16. It is noteworthy that in this description there is no suggestion of any delay between the start of this incident, the chase, and the stabbing.

17. At 1145 to 1148 in bundle C there are statements from the victim of the stabbing and others. Initially the Child refused to give a statement setting out what had happened – see 1145 C. At some stage the Child did so however, and we set this out below.

“The Child:

at lunch time I was in the que for the masage chair and the pupil Was pushed on to me a few times then deliberately sat on me so I chased and stabled the pupil With a pen”.

18. Again, there is no suggestion of any delay between the various elements of what occurred.

19. From the evidence we have, there appear to have been two possible causes for this incident. One suggestion is of a child being pushed onto the Child, possibly three times. The other refers to the massage chair being turned off, possibly when the Child was sat on it. What does appear clear, is that the Child chased the other pupil from the room and down the corridor, whilst the Child had a Biro in their hand. The Child then used it in a stabbing motion on the other pupil in the upper chest area. We note that the Parent refers to the Childs actions as the Child having “stabbed”. The Child uses the same term.

20. There is some dispute about the degree of injury, but it appears that the outer clothing of the other pupil was pierced and that the pupil’s skin was also pierced to some degree. At page 22 of C there is a reference to punctured skin and a drag mark on the victim’s chest. A picture of the injury, albeit a rather poor one, appears at page 284 of bundle A.

21. As a result of this incident the Child was excluded from school for a period of three days.

22. One of the issues in the case is how quickly after the Child became angry the incident of the stabbing occurred. There are references to two games of table football having been played between the start of the incident, and the stabbing. There are also references to the start of the incident being at the beginning of the luncheon period and the stabbing having occurred at the end. The Parent has asserted that the stabbing occurred quickly after the Child had become annoyed.

23. We heard evidence from the Headteacher, and we have examined the contemporaneous documents. These show that there was a gap between the start of the incident and the stabbing.

24. There is clearly a conflict of evidence as to the issue of time lapse. We have not heard evidence from any of those present at the time and so all of the evidence presented to us is hearsay evidence and we have not had the opportunity to question any witnesses directly.

25. This issue is relevant to whether or not the stabbing incident arises out of the Child's disability. As an expert tribunal we are familiar with children with autism becoming dysregulated or having "meltdowns". Once they have become dysregulated what follows is usually one continuous event. If there was a time lapse between the incident which first upset the Child, and the stabbing, we might conclude that this was not necessarily an incident which occurred during the course of such a "meltdown" relating to the Child's disability.

26. We also note at page A282, further on in the email of September 2021 from the Parent, the Parent says:

"My point is unfortunately the Child is vulnerable as the Child can't read the social clues to remove themselves & is not able to keep a low profile- The Child is what the Child is! This can then build up & the loading for a trigger as the ALNCo rightly identifies it's helpful to understand what they are. This is still working progress"

27. This clearly suggests that identifying "triggers" which cause the Child to become emotionally dysregulated is still difficult. Further, it suggests, unsurprisingly for a child with a diagnosis of autism, that social clues are missed, and social naivete is a functional difficulty. The latter, in our view, may have contributed to this incident developing. The Child is unlikely to have been able to read the social cues. If the Child was focussed on using the massage chair, and someone turned it off, or if a pupil repeatedly sat on the Child, that might have caused the Child to become dysregulated and would be linked to the Child's autism. The time lapse before the stabbing does not seem to fit with the Child becoming dysregulated. We have little evidence of how the Child becomes dysregulated and came into conflict with others to ascertain if there is any pattern to the Child's behaviour, either in terms of triggers, or how the Child responds once they have become dysregulated.

28. We note that the victim of this incident was the child of a member of staff at the school. The victim's parent wrote to the school, in particular setting out the effects on their child, as follows:

Email from the victim's parent:

Dear School,

We wanted to write and say thank you for the support shown to the victim following the incident with the Child recently and that we appreciated the action that the school took. It was quite shocking to see the injury that the victim was left with, and that puncture wound is still healing but the bruising has subsided. Unfortunately, the victim is still apprehensive around the Child and we thought it best you were fully aware of this.

The victim was certainly traumatised by the event and we had quite a few teary nights over this which you might not be aware of as the victim is keen for everything to appear normal. Having taken advice regarding the incident my understanding is that the victim's response can be quite common after such a

traumatic incident. We have been advised to monitor this closely and would appreciate if you could do the same in school.

That said, we have our own concerns surrounding the victim's safety and wanted to express these concerns given the circumstances now that we have had time to reflect upon the incident. It is important that you are aware of just how anxious the victim is around the Child and we are actually extremely concerned about any similar event happening again as I know that it is not always possible to supervise these children.

Kind regards,

The parent.

29. The effects upon the victim were not inconsequential.
30. Overall, we consider that there is a sufficient nexus between this incident and the Child's disability. The Child appears to have a history of coming into conflict with others in social situations where there is no adult supervision, and the Child is unable to read the situation so as to avoid conflict arising. The Child would not have liked others invading their personal space or turning off the chair. The Child has difficulty with turn taking. We find that these are a significant cause of this incident, and it is therefore connected with the Child's disability.
31. We also note that in their email the Parent makes the following suggestion with reference to the lunch time period:
- "Going forward the Child has identified that lunch time can get "boring & the Child needs to be busy...the Child had a drum tasting & talked to the music teacher about this helping the Child with ASD ... the suggested is you have a music room & drum set that the Child can go into practice at lunch & that offers the Child the ability to remove themselves in a socially acceptable way. Would this be practical?"*
32. **The October 2021 Incident** – This allegation is that the Child was found in possession of two sharpened objects, which the Child had in their blazer pocket.
33. We have the record of accounts of two other pupils who saw the Child sharpening the implements.

Account 1

P1 saw the Child with: spoon, big rock, scalpel handle, wood.

Where did the Child get the implements from?

The Child found the spoon behind the bush. wasn't sure where the Child found the rock or the wood. The Child also had the other silver implement on their person already but wasn't sure when they got that. It was only the spoon the Child found behind the bush.

When did the Child find them? Lunchtime – as in the CCTV.

Scalpel – The Child had it on themselves already.

Did the Child show them to you?

The Child took something out of their pocket, and thinks it was the scalpel when the Child showed them the spoon. The Child had broken the spoon themselves and started to sharpen it.

Did the Child say what they was going to use them for? No, didn't ask. can't remember what they were talking about. bumped into the Child, but they were not normally together so would not normally initiate conversation. They had a small conversation about blacksmithing. The Child was sharpening the spoon on the windowsill and watched them but did not ask why the Child was doing that, P1 just assumed the Child liked sharpening things.

Did the Child talk about them as a tool to make things with at home? The Child said they do blacksmithing at home. The Child also stabbed a piece of wood to see how sharp the spoon was.

Did the Child talk about it as a weapon at any stage? No. told me to speak to somebody who knows more...

Account 2

a few days before the end of half term (thinks Monday/Tuesday):

the Child said that they enjoy blacksmithing. The Child was sharpening a butter knife from the School Classroom before the incident on Friday. The Child was using a rock outside the School Classroom and scraping it along the rock to sharpen.

The Child told that me they have done a Level 1 blacksmithing course.

The Child said to (who thinks it was a threatening joke) that the Child was going to bring one of the implements that they created into school. The Child also said that they were going to "shank someone up with a metal spoon." thinks the Child was trying to be scary and it was probably a joke.

did not see the scalpel.

said the Child was always rough around people and the Year 7's were scared of the Child. This mostly happened when the Child was angry – the Child would just flip.

34. It is not clear from these accounts the circumstances under which these pupils were interviewed, or indeed precisely when they were interviewed.
35. The Headteacher carried out an investigation, which included the interview of the Child in November and viewing CCTV footage. The investigation took some time as the parents did not attend the school for a meeting initially. The headteacher then wrote to the parents in a letter of November 2021, which is at C182. That letter contains a description of what the headteacher believed occurred. We note that it contains some additional information from the other two pupils which is outside that contained in the descriptions set out above. We do not have the source material for this additional information.
36. We have seen a record of an interview carried out with the Child in November 2021. We set it out in full below.

Interview Questions for the Child November 2021

Spoon

1. *Where did you get the spoon?*

I found it in a bush outside the front of the School Classroom at lunchtime on Thursday

2. *What were you trying to make?*

It was already bent, so I snapped it and sharpened it to use when I carve wood at home.

3. *How long did it take to make?*

10-15 minutes - I shaped it on a wet stone at the back of the Classroom

4. *Did you keep it with you at all times? If so where on you?*

Yes I put it in my blazer pocket and forgot about it.

5. *Why did you keep it on you?*

I forgot I had it on me.

Other spike

6. *What was it before you started to sharpen it?*

I don't know, I found it in the bush outside the Classroom. (We believe it to be a scalpel handle)

7. *Where did you get it from? I found it under the same bush on Friday. Which date? I found the tweezers in the Classroom the week before (October)*

8. *How long did this take to make?*

10-15 minutes

9. *Again, did you keep this with you at all times too?*

Yes

10. *Why did you have this on you?*

I was going to use it as a tool to help with my carving.

11. *3 witnesses saw you sharpening one of these on a rock at school on Friday in October, around 1 pm, the last Friday before half-term. Do you remember doing this?*

Yes - some pupils saw me and said "are you making a shank?". I answered no. I'm not sure who they were and I can't remember if they were all boys or girls or some of each.

12. *A Teacher confiscated them from you later that day, around 4.30pm, do you remember having these confiscated from you?*

Yes

13. *Did you keep them on you between 1pm and when they were confiscated at 4.30pm? Were you in lessons during this time?*

Yes

14. *Were any other pupils involved in making these spikes? Or did you do it on your own? I did it on my own.*

15. *Was anyone else aware that you were making them?*

The only pupils who were aware were those pupils who saw me doing it.

16. *Is there anything else related to the making of these spikes that you would like to tell me?*

No

37. We are not persuaded from the evidence we have seen that the Child is shown to have lied about the timeline of when they found the spoon and the scalpel under the bush. The evidence seems to be somewhat confused, and the assertion made in the letter of November concerning this does not seem to

accord with the question-and-answer statement that we refer to above. We therefore do not place any reliance upon any suggested dishonesty of the Child on this point. The Child, or the other child, may have been mistaken. In any event, if this is a lie, children lie for many different reasons, and a lie cannot necessarily be taken as probative of “guilt”. See R v Lucas [1981] QB 720, as recently applied in *Re A, B and C (Children)* [2021] EWCA Civ 451.

38. What is clear from the evidence that we have seen is that the Child had sharpened two metal implements and had them on their person in their blazer at school.
39. **The Childs Intention** – The Child clearly stated when interviewed that they had made the implements to carve wood. The Child was seen by one of the other pupils to have with them some wood at the time that the Child was seen to be sharpening the implements. We note that in an e-mail dated October 2021 from the Parent, the Parent informed the School that the Child had been given a Swiss army knife for their birthday and a book about whittling objects from pieces of wood. The Parent then stated, *“in retrospect it was probably not the ideal gift with the Childs disabilities and lack of understanding”*.
40. We note that in the letter dated November 2021 the Headteacher states:
- “The Child stated when and where they found these implements and that the Child was making them to be tools for home to help make things out of wood. We had no evidence to suggest that the Child had an alternative intent for these implements.....”*
41. The Headteacher goes on to assert that their investigations with the police revealed that the items would be offensive weapons. Nevertheless, there seems to be an acceptance that they were not made with this intention in mind.
42. Even absent that intention, however, there is a risk in this case from the information available. The Child had previously used a Biro to stab another pupil. The Child had on their person two sharp implements. If the Child had become angry there is a risk that the Child might have produced and then used these implements, with the possibility of very significant harm being caused. We accept that the Headteacher had to take some action in relation to such a risk. That is not an end of the matter, however.
43. **Other Incidents** – We are aware from the papers that there are a series of other incidents described in relation to the Childs behaviour whilst at the School. They are set out in an appendix to the letter of the Headteacher dated the November 2021. Some of these involved other incidents of aggression, and some sexual misbehaviour. The Headteacher was clear that these other incidents were regarded as background information and did not play a significant part in their decision-making when it came to excluding the Child. The Headteacher was not even aware at the time that they made the decision of some of these other incidents as they had not been raised to the

Headteacher's level within the disciplinary chain, or they were only found out about later. We accept the Headteacher's evidence.

44. In relation to these other incidents, the investigations carried out are somewhat lacking or they were not fully investigated. We have concluded that there is insufficient evidence to make findings in relation to these other incidents, and we agree with the Headteacher's view that although they are important background information, they are not the significant issue in terms of the decision to exclude. We consider that it is appropriate that we concentrate, therefore, on the two "main" incidents in this case, namely the stabbing on the of September at the sharpening of implements in October.
45. **Behaviour at Junior School** - We have noted that there is information about the Childs behaviour contained within a referral form by the Deputy Head and Head of Learning Support at the Junior School, particularly at page 78 to 80 of bundle B. We note that these include an allegation of a further stabbing with a compass, and that the Child was aware that their sibling had previously been stabbed. We note that some of the behaviour set out on page 80 is described as having occurred in the last academic year at the Childs junior school. We were told by the Parent that these incidents had occurred prior to the Child commencing medication which had helped to calm the Child. The Parent also sought to put some of these incidents into context. Some of the incidents from the recordings appear to post-date the commencement of medication. We are aware that none of this information was available to the School. We also note, however, that we have none of the source information to support these accounts, little information as to when they occurred, and no information as to precisely what medication the Child was taking, when it commenced, whether it was altered so as to be more effective, and when it is said that it reached a level where it was proving to be effective. We also have note that the Child was not at school for the last three weeks of term but have no helpful information as to why this was. Other than concluding that the Child had some behavioural issues at their previous school, therefore, we have decided that we should not place weight upon these previous behaviours as we simply have insufficient evidence to establish what occurred, or the context in which they occurred.
46. **The Information Provided to the School** – The school was concerned that it had not been given full information about the Childs behaviours prior to offering the Child a place. The Headteacher told us that the school does have some pupils with a disability. It is a moot point whether the school would have offered the Child a place if had known all the information. We note that the Childs sibling attends the school, and schools often attempt to provide places for younger siblings when a child of the family already attends the school. We note that no attempt was made to withdraw the offer or to suggest that the Childs needs could not be met when further information and reports were provided, and these included the fact of the Childs diagnosis and reference to behavioural difficulties related to social skills.
47. We have attempted to put together the timeline of events concerning the information that was given to the school by the parents.

48. Firstly, the parents completed a registration form requesting that the Child be admitted to the School, dated May 2021. Within this form they ticked a box alongside a question which reads “Has your son/daughter ever received any form of learning support?”
49. The school responded by asking for further information and there was an email exchange as follows:

Morning

I wonder if you could give me an update regarding the learning support for the Child. We do need to have this information ready for Saturday.

*Many thanks
The School*

*From: The Parents
Sent: May 2021
To: The School
Subject: RE: The School assessment day*

Hi

*The Child does not need any specific academic support or special adjustments. The Childs CAT scores are pretty good (the first 2020 is an outlier due to recent family trauma – The Childs sibling had been stabbed) and I attach a summary for your information.
The Childs Learning Support is about social understanding.*

*Kind regards
The Parents*

50. In May 2022 the Child was offered a place. In May 2022 the Parents accepted the place and a further email dated the May 2022 was sent to the school by the Parent which included the following:

“Also as the Childs Cats scores are very good, the Childs exam results average when the Child visits can the SENCO assess the Childs learning skills or is this something you do this anyway? The Childs current school has assessments for the new students.”

51. A reply came from the school as follows:

“We will observe the Child closely in the first term and the ALNCo (SENCO) will decide when a more formal assessment might be appropriate. The Child will be doing baseline assessments as part of their normal English lessons in the Childs first term.”

52. In June 2021 at the School's Open Morning, the Parents first mentioned to the SENCO and a Teacher that the Child had an Autism Spectrum Disorder ("ASD") diagnosis (A104).

53. An Internal email at A268 refers to this as follows:

SENCO

The Parent has just asked if you could assess the Child on the same day in June. The Child will be having tours etc until 4 pm. I have already told the Parent that you have another appointment. The Parent says the Childs CATs scores do not match the Childs results!

Teacher

June

54. In June 2021 the Parent attended a meeting with school staff. It was to discuss the Childs sibling, but the Child was also discussed. We have a note of the meeting as follows:

"June 2021

Meeting SENCO/Parent met to discuss the Childs sibling during the meeting

The Parent made reference to the following diagnosis of the Child

The Teacher joined the meeting as the Parent referred to ASD diagnosis and medication. No documents sent to school at this stage, only the

above school report.

EP (November 2018)

ASD Diagnosis (April 2021 Review)

Speech and language assessment (2018)

Boarder since year 4

Concerns surrounding emotional regulation/ effort variable

Difficulty understanding other peoples actions

SENCO requested documents

EP arrived

Documents sent in June (ASD document from Psychiatrist and information surrounding medication)"

55. We note that in this meeting specific reference was made to emotional regulation and difficulty understanding other people's actions.

56. An internal email from the SENCO states:

From: The SENCO

To: Teacher

Cc: Teacher

Subject: The Child/ September Year 7 starter

Date: June 2021

Attachments: The Childs report.docx

Morning Teacher,

The Parent came to see me on Saturday and explained that the Child has the following:

- 1. EP*
- 2. ASD diagnosis*
- 3. Daily medication to support the Childs difficulties*

I asked the Parent to send through the EP (please find attached). I have also asked the Parent for details regarding the ASD diagnosis and medication.

*Will keep you updated,
SENCO*

57. One of the reports forwarded by the parents as a result was compiled by an Educational Psychologist. It is dated October 2018 and includes the following:

“At times, the Child has been in trouble because the Child finds it difficult to self-regulate, which means that the Child may act impulsively without considering the consequences.”

“It is reported that the Child has shown some challenging behaviours in school this term, including one incident of physical aggression towards another student.”

58. Another report forwarded was by a Speech and Language Therapist. That report is dated November 2018 and includes the following:

“School staff kindly completed three behavioural questionnaires, it is important to note that staff had experienced about ten days of much more challenging behaviour from the Child, however, more recently they felt the Child had improved a lot.”

“In terms of the Childs behavioural presentation, the questionnaires completed by staff do raise some concerns with regard to the Childs social skills and the Childs attention skills.”

“In my view, the behavioural questionnaires completed by school staff do highlight a number of behaviours that may be indicative of an attention difficulty and some social skills difficulties. Further assessment by the Speech and Language Therapist working with the Child will be very helpful in gathering more information regarding the Childs emotional and behavioural presentation and it may also be appropriate to consider an assessment by CAMHS. It is very positive to hear that the Childs behaviour has improved, however, it is also important to be aware that the Childs behaviour has been extremely challenging at times and will therefore require close monitoring to ensure that the Child does not experience these difficulties again. Further assessment may help in being proactive in managing the Childs behaviours, rather than having to be reactive.”

59. By e-mail dated June 2021 the Parents forwarded the School a letter from a Doctor dated March 2021 stating that the Child does not have a diagnosis of ADHD but that the Childs *“impulsive and silly behaviours”* related to *“anxiety in the context of the Childs ASD diagnosis”*.

60. In June 2021 there was a further meeting to review the position between the SENCO (ALNCO) and the parents, and to discuss support for the Child. It was agreed that the Child would be disapplied from French so that the Child could be supported during this time by the ALN Department. This appears to be applicable to the Child's schoolwork as opposed to the Child's social/behavioural difficulties. There is no suggestion that the school or the parents raised the need for steps to moderate these difficulties during the meeting and no specific proposal put forward by either.

61. In August 2021, the Parent completed a medical form. It confirms that the Child has *"Autistic Spectrum Disorder (The SENCO has given full details)"*. In answer to a question about medical treatment, on the same form, the answer given is negative, which was contradictory to the information previously given. The form includes a concluding paragraph stressing how important it is that it has been completed fully and accurately. It goes on to specifically refer to past/present medical history.

62. At the beginning of the school term in September, at an inset day, the SENCO shared a pupil profile about the Child with other staff. This is at A200. It confirms that ALN support was to be provided instead of French. At number 2 it sets out the following under the heading, *"Self-regulation and social communication challenges (ASD diagnosis)"*

"The Child has some difficulties with social interaction. The Child is strong willed, has rigid thoughts and can act impulsively. Making friends can be tricky as the Child struggles with perspective taking and can 'take over'.

The Child can find unstructured time difficult

The Child takes daily medication to help them with their difficulties."

63. The parents argue that it is clear from this that the school was aware that the Child had these difficulties prior to starting school. They argue that other measures to assist the Child with these difficulties were not put in place at this time but were only included within Part B of the Pupil Centred Profile Plus document prepared in October. It is at A203. It is stated in that document that:

"Has difficulty waiting for their turn"

"On the Social Skills Improvement System questionnaire, the Child achieved a below average rating on the communication scale, empathy, engagement and self-control scales.

"It is important to be aware that the Child's behaviour has been extremely challenging at times and will therefore require close monitoring to ensure that the Child does not experience these difficulties again.

"The Child needs consistent instructions/ expectations regarding unstructured time"

64. It also includes information from the Speech and Language report as follows:

“Recommended support by Speech & Language assessment

The Child finds it difficult to self-regulate, which means the Child can act impulsively without considering the consequences.”

65. We know that there was a request from the parents not to contact the Child's previous school. They stated this was because the school did not know that the Child would not be going on to the secondary school to which pupils from that school would usually transfer. We can see this in the email below:

“Sent: May 2021

To: The School

Subject: Re: School assessment day

Thanks

Yes perhaps hold off for a bit. Gives us more time to let the school know.

The Parent”

66. At C126 there is the Spring 2021 report available in respect of the Child from their previous school. This does make some reference to behaviour and social difficulties. There is a lack of detail, however.

67. At page A291 there is a Multi Agency Referral Form dated the November 2021. It was completed by the school. It contains the following:

“Concerns were raised by the Child's previous school as follows: The Child had a history of challenging behaviour. The Child pushed boundaries and broke rules; being rude to and disrespecting staff, disrupting lessons by refusing to cooperate/making noises/shouting out etc. The Child was unkind at times to other children.”

68. The significance of this, it seems to us, is that the junior school had this information, and it could have been shared with the School. What other information could have been shared is not discernible from this description. In particular, it would have been helpful if information as to when during the school day the Child exhibited the behaviours, and whether any triggers had been identified which caused or contributed to them.

69. **Disability** – The issues of disability was conceded in this case, quite properly, by the school. Nevertheless, we wished to see the assessments which supported the diagnosis of autism. We would expect these to be included in a report stating such a diagnosis. We were not provided with such a report. We were provided with correspondence from a psychiatrist, which referred to a diagnosis of autism. As an expert Tribunal we were surprised that there was not further information available to inform the diagnosis. We made enquiries, and gave directions, that any original report should be made available. This included enquiries being made with the psychiatrist directly. No further documents have been provided to support the original diagnosis and the Doctor

confirmed by email that they did not have any such documents now in their possession. We have also seen a letter from the Doctor dated the November 2021 which confirms the diagnosis.

70. The absence of the assessments which informed the diagnosis resulted in this source of information not being available to the school. This will have hindered it in determining what steps might be required to support and assist the Child at school.

71. We agree with the SENCO's evidence that autism is a broad spectrum of difficulties and that knowing a child is autistic is not particularly helpful. What is required is an understanding of what that individual child has difficulties with and what causes the child to become dysregulated. Of course, the school could have made further enquiries itself to better understand these issues.

72. **Conclusion** - Prior to the Child starting at the school we can see from the papers and the evidence that we have heard the school were aware that the Child had a diagnosis of autism, and associated social interaction and behavioural difficulties. As a result, the Child could become dysregulated, and was in receipt of medication to assist. The full extent of the Child's difficulties was not apparent.

73. We note that in bundle B at page 129 there is a further report from a Doctor dated November 2021. This contains a far longer history in relation to the Child's difficulties than is apparent elsewhere. It includes the following,

"The main support needs to be environmental, in terms of identifying an appropriate setting and support plan for the Child within school."

74. The extent of the Child's history must have been within the knowledge of the Parents. Incidents apparently occurred during the Child's attendance at their previous school. This information was clearly not shared with the School. Although we have not come to any conclusions about the Child's behaviour when the Child was younger, we consider this default by the parents to be serious. It would have assisted the school, and no doubt also the Child, if the full information had been provided. Whether this was by way of inadvertence or deliberate intent matters not. It is surprising that the information was not shared with the school given that it appears the parents and the school had a good relationship prior to the current dispute coming into being and the parents were content with the support provided by the school to the Child's sibling. The information should have been provided and this is a material factor in causing what went wrong in this case.

75. We noted that in their evidence the Parent confirmed that they were content with the school's advice that not all school staff should be told that the Child had a diagnosis of autism. Nevertheless, it was clear from the SENCO's evidence that the staff were told at the inset day prior to the beginning of the Autumn term. This information therefore does not assist either way.

76. **The Equality Act** - We will now turn to look at the Equality Act and whether there have been breaches of its terms.

77. Section 15 states:

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.

78. Subsection (2) does not apply in this case as the school knew of the disability.

79. The provisions of the Act are applied to schools by virtue of section 85 as follows:

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.*

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

*(7) In relation to England and Wales, this section applies to—
(a) a school maintained by a local authority;*

(b) an independent educational institution (other than a special school);
(c) a special school (not maintained by a local authority).

(9) The responsible body of a school to which this section applies is—
(a) if the school is within subsection (7)(a), the local authority or governing body;
(b) if it is within subsection (7)(b) or (c), the proprietor;”

80. **When was the Decision to Exclude Made** – Two significant communications were written by the school in relation to the decision to exclude the Child. These are dated November. On behalf of the parents, it was argued that the first letter demonstrated that a decision to exclude the Child had already been made, and this would be of significance because at this stage the Child's version of events had not been provided as the Child had not been interviewed by the headteacher. This did not occur until the middle of November.

81. The Child was told not to attend a School Day in October. Thereafter, as we understand it, the Child went home for a two week half term. During this period the school asked the Parents not to return the Child after half term prior to the completion of their investigation. This inevitably caused delay in the decision-making process, as did the difficulties that the parents said they were having in attending a meeting at the school as part of the process. They were not able to attend until the middle of November.

82. In Early November 2021 the school sent an email which included the following:

“I think we are due to meet, with a time and date to be confirmed. In preparation for this meeting, I write to clarify the school’s current position rather than ambush you on the day which would not be fair. Having reviewed the Child's case, in consultation with all the staff involved, it is with regret that we do not see how a return to the School is possible, or for that matter that a return is in the Child's best interest.”

“Based on the above alone, I do not feel I am able to put in place the required measures to keep pupils safe in the Child's School House with the Child present. It is our professional opinion that the Child requires much higher levels of supervision than we are able to offer. Sadly, these incidents have not been isolated, there have been a number of other examples of poor or inappropriate behaviour that I have not gone into here as they are more background rather than central to the decision being reached.

All this has happened in just four weeks at school when you consider the Child's time away so far this term. In short, our experience thus far has shown that we are simply not able to cope with the Child's behaviour and we feel the best course of action is for you to find a more appropriate setting for the Child. I remain happy to meet to discuss further but I thought it only fair to share in advance the school’s position.”

83. In early November 2021 an email in response was sent by the Headteacher to Solicitors instructed by the parents which included:

“The Child has not been permanently excluded, I wrote previously out of courtesy, prior to any meeting to forewarn you of the seriousness of the situation.”

84. The Headteacher conceded in evidence that with the benefit of hindsight the Headteacher might have phrased the email differently. The parents and their Solicitors interpreted it as a decision having been made that the Child could not return to the School. The last sentence does appear to leave the door open however. Overall, the letter is at best ambiguous. The headteacher does not use the word “exclusion.” We are aware that on occasions schools “manage” similar situations by arranging for a child to be transferred to a different school rather than being excluded. We suspect the letter was written with the best of intentions and, as it says, was intended to put the parents on notice of how serious the situation was before coming to a meeting. Nevertheless, overall, it was not helpful. The Headteacher gave evidence that at this stage they had not decided to exclude the Child. We found the Headteacher to be a candid and honest witness who was doing their best to assist the Tribunal. We accept the Headteacher’s evidence. We do not therefore find that a decision to exclude had been made as at early November. We find that it was made in order to write the letter of mid November 2021, after the Child has been interviewed.

85. **Unfavourable Treatment** - The first issue is whether the Child been treated unfavourably. That is not a difficult issue in this case. The Child has been excluded from school permanently and therefore the Child has been treated unfavourably.

86. **In Consequence of the Disability** - The second issue is, was that unfavourable treatment because of something arising in consequence of the disability?

87. We do know from the papers and from the oral evidence, that the Child had difficulties with social interaction, in reading social cues, and was somewhat naïve in their world outlook. The issue for us is, were the behaviours in October attributable to the Childs disability. We have no professional evidence, and in particular expert evidence, to establish whether the behaviours exhibited in October, (the sharpening of utensils into pointed objects and then retaining them on the Childs person), were actions arising in consequence of the disability. We did not have the original assessments to support the diagnosis and have no description of behaviours at that time.

88. The wrongdoing in relation to this incident was the sharpening and retaining of the implements. It was naïve of the Child to openly sharpen the implements where they could be observed by other pupils and indeed by CCTV. It was certainly naïve for the Child to retain them, in the sense that the Child was likely to be discovered with them whenever they were removed from their jacket. This was particularly so when the Child knew that other pupils had seen them with the implements.

89. It was also naïve of the Child to retain the items on their person when the Child says one of the other pupils asked if the Child was making a “shank”, which we understand to mean an improvised weapon. The Child has always denied this was their purpose, but this conversation did not apparently cause the Child to think about how others might interpret the Childs possession of the implements.
90. The Child referred to a blacksmithing course and doing whittling. The other children refer to this during the conversation with the Child at the time. These are activities in which the Child was interested. Children with ASD can pursue activities in a single-minded way and without regard to the consequences of their actions. We note that when asked the Child did not give the answer that many young persons who carry knives would give, that the Child was carrying it for “self-defence” or because the Child felt safer. This does not seem to have entered the Childs thinking.
91. We noted the Headteacher’s evidence that the Childs behaviour may or may not be attributable to their disability. The Headteacher was unable to say.
92. Overall, taking all these matters into account, we consider that there is a sufficient link between the actions of the Child and their disability.
93. There is no requirement that the school should be aware that the “something” referred to in the Act has occurred in consequence of the claimant’s disability – *See York City Council v Grosset [2018] EWCA Civ 1105*. It is sufficient if there is a nexus established.
94. **Proportionate Means of Achieving a Legitimate Aim** - The third issue is whether the school can show, as a defence, that the treatment is a proportionate means of achieving a legitimate aim. The test is an objective one about which we must make our own determination – *See York City Council v Grosset [2018] EWCA Civ 1105*.
95. This issue relates firstly to the degree of risk in our view. This goes to the proportionality of the response. The Headteacher told us that the basic concern of the school was to ensure the safety of staff and other pupils, and this is a legitimate aim. The history of a previous stabbing incident in September combined with the Child having sharpened implements on their person creates an obvious risk of harm. We note, however, that no formal risk assessment was carried out. Such an assessment would have had to take account of why the Child had created and retained the implements. If, as appears to be accepted, the Childs intention was to use implements for whittling, there is a significant reduction in the risk. A risk still remains, however, purely as a result of the Childs possession of the items. One weakness in the school’s approach, however, is the absence of any adequate risk assessment.
96. A further question arises, as to whether permanent exclusion was a proportionate response to achieve the legitimate aim. This is particularly so in the context that no other measures had been put in place after September, and the Pupil Profile Plus measures had not yet been tried.

97. In *South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Mrs C Billingsley*, Appeal No. UKEAT/0341/15/DM, Mitting J reviewed the law concerning reasonable adjustments, in the context of an employment case. He concluded thus:

“17. Thus, the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show that the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under section 15(1) of the 2010 Act.

18. It is in the end a question of judgment and evaluation for the Tribunal, taking in to account a range of factors, including but not limited to the chance. A simple example may suffice to illustrate the point. If a measure proposed by an employee as a reasonable adjustment stands a very small chance of avoiding the unfavourable treatment arising out of her disability to which she would otherwise be subjected, but it was beyond the financial capacity of her employers to provide it so a Tribunal would be entitled to conclude that it was not a reasonable adjustment. Indeed, on those facts it would be difficult to justify a conclusion that it was a reasonable adjustment. In the case of a large organisation by contrast, where a proposed adjustment would readily be implemented without imposing an unreasonable administrative or financial burden on the employer then the obligation to take it may arise notwithstanding that the chance of avoiding unfavourable treatment was very far from a certainty.”

98. The measures put in place prior to the exclusion clearly focussed on academic additional learning needs. They included no measures at all to assist and support the Child with their social difficulties. No attempts had been made to obtain further information after September. The extent of the Childs behaviour and difficulties was not known yet. As a result, no adjustments were able to be put in place. Even a brief discussion with the previous school would have revealed very pertinent information. It would also have assisted if the parents had come forward with that information initially and had fully set out the behavioural difficulties that had been experienced at junior school.

99. As a result of the September 2021 incident a decision was made to exclude for the Child for three days. That decision was a drastic one in the context that the Child had only been at the school for three weeks. No other fairly obvious steps were taken at that time. At that stage it is our view that the school should have trawled through the reports it had, questioned the parents about the Childs history, and asked questions of the junior school. As a temporary measure the Child could have been supported/supervised more closely during unstructured times during the day. There was not much time to put additional steps in place before the incident in October 2021, but there was sufficient time to take these

further steps. There is the possibility that taking these actions might have prevented what occurred in October.

100. In the context of no reasonable steps having been put in place, and no adequate risk assessment having been carried out, we have to decide whether the decision to exclude permanently was proportionate. We have a little difficulty in concluding that a period of exclusion was appropriate. We base this on the risk of serious harm that might have arisen from the Child carrying sharpened items on their person. The fear, clearly, would have been what might have happened if the Child had become angry with another pupil or teacher. The issue, though, is whether more should have been done prior to arriving at the decision to exclude permanently.

101. In considering this we also have to consider the policies that were in place at the school. We accept, having reviewed them, that there is nothing in the discipline policy or the exclusion policy which makes provision for children with additional learning needs or disability. It is simply absent. We are told by the headteacher that they took into account the Child's disability when arriving at their decision, but clearly the overriding issue for the Headteacher was safety for school staff and pupils. The Headteacher does not appear to have considered any lesser period of exclusion, or any other supportive measures that might have been put in place, even to the extent of trying to educate the Child away from an interest in sharpened objects. The school should have considered them. Only if it did so, and rejected them, should a permanent exclusion have been imposed. In particular, there was no consideration of whether any risk that the Child posed could be mitigated by having a member of staff with the Child for certain periods of time. This assessment was never made or considered. It should have been.

102. **The Duty to Make Reasonable Adjustments** – This is set out in the sections below.

“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.

Part 6 (education) Schedule 13

Schedule 13

The duty for schools

2(1) This paragraph applies where A is the responsible body of a school to which section 85 applies.

(2) A must comply with the first and third requirements.

(3) For the purposes of this paragraph—

(a) the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf of A;

(b) the reference in section 20(3) or (5) to a disabled person is—

(i) in relation to a relevant matter within sub-paragraph (4)(a), a reference to disabled persons generally;

(ii) in relation to a relevant matter within sub-paragraph (4)(b), a reference to disabled pupils generally.

(4) In relation to each requirement, the relevant matters are—

(a) deciding who is offered admission as a pupil;

(b) provision of education or access to a benefit, facility or service.

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.”

103. We remind ourselves that the duty is an anticipatory one. The Act requires a school to put in steps to prevent disadvantage, and therefore prior to any disadvantage occurring.

104. **Suggested Reasonable Adjustments** - The parents have put forward certain reasonable adjustments they claim the school should have put in place. These are put forward with the benefit of hindsight and were not being set out prior to the Child starting at the School.

105. The parents suggested reasonable adjustments are set out in the Claim Form as follows:

“(1) Support for the Child during social time, particularly any unstructured time;

(2) The offer of alternative activities to unstructured play at lunchtime;

(3) Social support;

(4) Requesting a statutory education, health and care needs assessment from the County Council;

- (5) Offer training for staff about autism and how the Childs disability/disabilities manifest themselves;*
- (6) Offer training for staff on strategies to avoid difficulties with the Child;*
- (7) Offer training for the Child with social situations.*
- (8) The implementation of the "pupil profile+".*
- (9) Co-operate with MASH Team "family assessment" and allow a school observation*
- (10) Engage with a mentoring programme for the Child such as "Life Shed" or an alternative equivalent."*

106. Some of these adjustments are more long-term, for example applying for an Education Health and Care plan for the Child. It is likely that this would have been met by a response from the local authority that a graduated response is required, rather than moving straight to a plan being provided. In any event, if work had been commenced in, say, September 2021, we are confident that a plan would not have been in place by the middle of October. The assessment would have required input from the school, and they did not know the Child in September 2021. There would have been some time lag.

107. We also have to consider the question of whether a reasonable measure, such as having one-to-one support for the Child during unstructured times, might have prevented the incidents which arose. The incidents clearly occur during unstructured time. We question whether it would have been practical for the Child to have had someone with them all the time. This would have been difficult to achieve and of course would have come at considerable cost. We do not consider this to be a reasonable adjustment in the circumstances for this school to have made.

108. Would something lesser have assisted? We note that the incidents did not occur during time spent in the Childs House, which we would expect to be supervised, albeit loosely. They occurred during the lunchtime other than when the Child was eating. Some supervision during this period might have prevented the incidents. A member of staff would have been able to intervene to prevent the Child from sharpening the implements and to explain to the Child why having such implements would be considered inappropriate and dangerous and would be seen as a breach of school rules.

109. We also note that by the end of September 2021 there had been two incidents. One, earlier in September, involved damage to another pupils Fitbit watch following an altercation with the Child. The other was the stabbing with the pen. There was nothing to prevent the school contacting the junior school at this time to obtain information. The embargo relating to the Child going to a different school was now not relevant. The school had begun to create the Personal Profile plus. The School made no enquiries at all: of the parents or the junior school. A short telephone call with the junior school prior to mid-October 2021 would have provided useful information as to when the Child was more likely to become dysregulated and what might cause this. In addition, with or without this information, the school could have put in place greater supervision as a temporary measure.

110. In early Oct 2021, at 1 Q:08, the SENCO wrote to the Parent as follows:

*<SENCO> wrote:
The Parent mobile*

Morning The Parent

A Teacher and I are meeting with the Child next week to work on the Childs Plus Profile. We will then invite you in to go through the plan with you. I'll get back to you at the beginning of next week with some possible meeting times. In the meantime, I will speak to a Teacher about the music options for the Child.

*Kind regards,
SENCO*

111. The SENCO confirmed to us during their evidence that none of the measures set out in the Personal Profile Plus were in fact ever put into effect. We note that the measures include a quiet area, with Lego, for the Child to go to calm themselves if they were to feel themselves becoming dysregulated. At no time was a risk assessment completed.

112. We do not therefore have any evidence as to what might have happened if steps have been put in place. The school staff appeared to us from their evidence to understand that their actions were deficient. They accepted that they could have done more. The Headteacher said that they thought the fact that the parents were known to the school meant the staff were less thorough than they should have been regarding what the Childs situation was, and what the Childs needs were. That certainly is the position, we find, after the end of September 2021, as we have set out above.

113. Further, the School also failed to make sufficient reasonable adjustments to its disciplinary and exclusion policies in reaching the exclusion decision. The Headteacher told us in their evidence that they did make such adjustments, and there is reference in the letter of mid-November 2021 to the Headteacher having done so. The detail is not set out, however. The policies themselves do not assist. The reasonable adjustments that could have been put in place to support the Child, and to reduce any assessed risk following a risk assessment, were not considered. As indicated above, consideration could have been given as to whether a lesser period of exclusion could have been imposed, with work being undertaken with the Child to ensure the Child understood that sharpened implements were not to be fashioned or retained by them, and a trial period with measures in place to support the Child during unstructured times. In our view these all ought to have been considered, and in a transparent way, prior to a decision to permanently exclude being made.

114. **Admissions Policy** – On behalf of the parents it was argued that the school's admissions policy was deliberately discriminatory and designed to screen out disabled children.

115. The policies we have seen are out of date and need to be rewritten to take account of the provisions set out in the Equality Act 2010. Further, the admissions procedure should from now on always include contact with the previous school attended by the child to see what measures the previous school had put in place.
116. Although there was significant criticism of the admissions policy and approach, the fact remains that the Child was admitted. This was in the knowledge that the Child had a disability. The Child has not therefore been disadvantaged by any deficits in the admissions policy. There was therefore no prejudicial act in the Child's case in relation to the Child's admission.
117. We note that specific arrangements for the entrance exam were offered but were declined. We heard evidence that there were other children at the school who had various additional learning difficulties, and this included other children who had autism, including the Child's sibling.
118. We do not find, on the evidence, that the parents have established that it was the policy of the school to screen out pupils who had additional learning difficulties or a disability.
119. **Claim of Victimisation** – The parents also seek to bring a claim under section 27 of the Act that there has been victimisation by the school. The section states:

“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.”*

Section 85

“(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.”

Section 86

Victimisation of pupils, etc. for conduct of parents, etc.

(1) *This section applies for the purposes of section 27 in its application to section 85(4) or (5).*

(2) *The references to B in paragraphs (a) and (b) of subsection (1) of section 27 include a reference to a parent or sibling of the child in question.*

(3) *Giving false evidence or information, or making a false allegation, in good faith is not a protected act in a case where—*

(a) *the evidence or information is given, or the allegation is made, by a parent or sibling of the child, and*

(b) *the child has acted in bad faith.*

(4) *Giving false evidence or information, or making a false allegation, in bad faith, is a protected act in a case where—*

(a) *the evidence or information is given, or the allegation is made, by a parent or sibling of the child, and*

(b) *the child has acted in good faith.*

(5) *In this section—*

“child” means a person who has not attained the age of 18;

“sibling” means a brother or sister, a half-brother or half-sister, or a stepbrother or stepsister.

120. The claim of victimisation is put on the basis that the content of the letter from the school dated mid-November 2021 (A182) shows that Protected Acts within the meaning of s.27(2)(c) of the Act were taken into account when deciding to exclude the Child. It is argued that the letter makes it clear that the Protected Acts by the parents were a reason for, or had a significant influence on, the School’s decision. If this was the position, it is argued, the exclusion decision amounted to victimisation: that the child was being punished in part for the acts of their parents. It need not be the sole reason, but only that it materially influenced the school's decision - See *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] per Lord Nicholls; *Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]–[82].

121. The specific wording of the letter relied upon is as follows:

"It is my belief that you did not disclose at the point of entry in May 2021 information about the Childs needs that would have been reasonably expected to be disclosed for the school to make further enquiries to enable us to make an informed decision about entry and whether we could cater for the Childs needs'.

"I am and remain deeply concerned that the reports were not disclosed in a timely manner nor as part of the admissions process as required."

122. In response to this part of the claim, it is submitted that even if Protected Acts can be identified, there is no basis for asserting that the exclusion decision was in part based upon such acts.

123. **What were the Protected Acts** – It is clear from the wording of section 27(2) that the Protected Act must be connected with the provisions of the Act. Paragraph c) is the most widely drawn subsection. It still requires the connection with the Act. We cannot see that the actions of the parents were carried out for the “purposes” of the Act, or “connected” with the Act. They were not carried out in order to bring a claim under the Act, or to say they would do so, or as a precursor to doing so. They were carried out to try to ensure the Child was admitted to the School. They were successful in that regard. We find that there is no sufficient nexus with the provisions and aims of the Equality Act.

124. It also has to be an “act” ie some positive action. There is no reference to omission. We do not believe that failing to tell the school of the extent of the Childs difficulties, or failing to forward the expert reports upon the child, prior to the admission decision being made, can constitute an act carried out in “*for the purposes of or in connection with this Act*”. We heard no evidence from the Parent that they were so carried out. Indeed, it was clear from the Parents evidence that they did not understand the concept of victimisation under the act at all. Accordingly, the Parent can hardly have been carrying out acts “*for the purposes of or in connection with this Act.*” We consider that these failures were omissions as opposed to positive acts.

125. Despite the findings in the previous two paragraphs, we will go on to consider the other requirements which the parents would have to establish to bring a claim for victimisation.

126. **Victimisation** - It will be seen that under the provisions contained in section 86, victimising the child, by excluding them, can amount to victimisation when a decision to exclude the child arises out of the conduct of their parents. Consequently, if the parents have proved that the Child was excluded [section 85(5)(e)] partly because they had failed to give information to the school, that is capable of being victimisation of the Child.

127. **Did the School Exclude Partly as a Result of the Parents Not Giving Appropriate Information to the School?** – We considered firstly the letter of mid-November 2021. Although it is quite right that the words relied upon by the parents are contained within that letter, there is of course other content. In particular, with reference to the decision to exclude, there are clearly set out what is relied upon in coming to the decision. The full wording in relation to the decision to exclude is as follows:

“Conclusion

The School Exclusion Policy stipulates that exclusion is to be used in exceptional cases and includes consistently poor behaviour as a reason to exclude. I am deeply concerned as to the number of incidents that have occurred over the very short period that the Child has been with us. This culminated in the latest incident where the Child manufactured and kept on their

person at school two sharpened implements which could be used as weapons. I am mindful when considering the appropriate sanction of the incident which occurred earlier in the term when the Child stabbed another pupil in the chest with a biro. My concerns relate to the safety and wellbeing of the other children due to the Childs frequent and unpredictable violent outbursts. In light of the Childs most recent behaviour it is my decision that the appropriate sanction for the Child is permanent exclusion. I am mindful of our duty to consider and make any reasonable adjustments to our policies and practices to take into account any diagnosis the Child may have. It is my considered view that the school made the necessary adjustments on receipt of the relevant reports which were disclosed to us after a place had been offered and that notwithstanding these adjustments, the latest behaviour of the Child warrants permanent exclusion. I am and remain deeply concerned that the reports were not disclosed in a timely manner nor as part of the admissions process as required. The Child does not currently have a Statement or EHCP and we are not required to contact the local authority to ask for an immediate review of any such statement or plan as there is not one in place. However, we will contact the local authority to make them aware of our concerns.

In light of the latest disciplinary incident, my decision is that the Child should be permanently excluded with immediate effect. Before applying this sanction, I am willing to consider allowing you to withdraw the Child from the school as an alternative. Any such withdrawal must be notified to me within two days from receipt of this letter. If you decide to voluntarily withdraw the Child there will be no right of appeal.

I appreciate this is not the outcome you were hoping for. I look forward to hearing from you as set out above and will do what I can to secure an alternative school for the Child.”

128. We have also carefully considered the oral evidence of the Headteacher. The Headteacher was quite clear that the rationale for the decision was principally the health and safety of members of staff and pupils and it was based on the two incidents of the stabbing with a Biro and the sharpening and retaining the implements. That is in our view consistent with the section of the letter that we have set out above. The Headteacher denied including the actions of the parents within their decision making. We thought that the Headteacher was an honest witness who was doing their best to assist us, and we accept the Headteacher’s evidence.
129. Although the Headteacher was clearly concerned about the lack of candour by the parents, we are quite sure that the Headteacher did not take this into account to any significant extent when making the decision to exclude the Child.
130. **Conclusion as to Victimisation** – For the reasons set out above, we reject the allegation of victimisation.
131. **Remedies** – The school accepted that an apology and review of policies would be appropriate, and we order both of those.

132. The school policies will need a wholesale review, which appears to be long overdue given the apparent age of some of the policies that we have seen.
133. Training for all school staff is in our view also appropriate in relation to the duties that are owed under the Equality Act.
134. Further we order that School records shall have an amendment attached to them setting out that this Tribunal has concluded that the permanent exclusion of the Child breached the Equality Act 2010.

Order

1. The School has discriminated against the Child.
2. The School has not victimised the Child.
3. Within 14 days of receipt of this Decision, all School records shall have an amendment attached to them setting out that the Education Tribunal for Wales has concluded that the permanent exclusion of the Child breached the Equality Act 2010.
4. The child and the Parents should each receive a written apology from the Chair of Governors of the School within 14 days of receipt of this Decision. A copy of the apology letters shall be filed with the Tribunal at the same time.
5. The School shall review all school policies to take account of additional learning needs and disability and the requirements of the Equality Act 2010, within six months of the receipt of this Decision.
6. The School shall arrange training for all school staff on the provisions of the Equality Act 2010 before the end of this academic year.

ORDER: Claim allowed in part.

Dated November 2022