

DECISION

Date of Birth: 2012
Appeal of: The Parents
Type of appeal: Disability Discrimination Claim
Against: The Responsible Body
Date of hearing: 2023

Persons present:	The Parent	<i>Parent</i>
	The Parent	<i>Parent</i>
	Responsible Body Counsel	<i>RB Counsel</i>
	Responsible Body Solicitor	<i>RB Solicitor</i>
	Responsible Body Witness	<i>Headteacher</i>
	Responsible Body Witness	<i>Teacher</i>
	Responsible Body Witness	<i>Head of Governors</i>
	Responsible Body Witness	<i>Teacher</i>
	Responsible Body Witness	<i>Teacher</i>

1. **Introduction** – The Child was born in May 2012, and is therefore 11. The Child is currently attending another school, which specialises in supporting pupils with anxiety. Prior to July 2022, the Child attended at a School (the School). It is against the latter that the Child's parents bring a claim on the Child's behalf alleging disability discrimination on the part of the school staff.
2. The Child lives with their parents and younger sibling, who still attends the school.
3. **The Parents Case** - The parents complain about the use of force applied to the Child on three separate occasions (Jan 2020, April 2021, and March 2022). The parents argue that by physically moving the Child into school the School has directly discriminated against the Child. They allege that this amounts to breaches of sections 13 and 15 of the Equality Act 2010 as the Child has been treated unfavourably/less favourably than a child who did not have a disability. They also allege that anticipatory reasonable adjustments were not made by the School by not identifying and putting support in place regarding the Child's Additional Learning Needs (ALN). These issues, they argue, contributed to trauma and a significant escalation in the Child's difficulties and ultimately resulted in the Child being unable to attend school for some time. We were

informed by the parents that the Child is still struggling with anxiety in relation to attending school at the date of the hearings.

4. The parents have set out what reasonable adjustments they say should have been made and the dates from which the complaint begins:
 - a. A Teaching Assistant (TA) should have been provided for a group that the Child was part of from November 2020;
 - b. A referral ought to have been made to the Local Authority (LA) Educational Psychology service after mid-November 2020;
 - c. The School failed to address the communicative environment or put in place selective mutism strategies as recommended by a Speech and Language Therapist (SALT) in mid-March 2022.
 - d. The School should have carried out a risk assessment in respect of the Child.
 - e. The School should have put in place a behavioural plan for the Child.
5. The parents also raise an issue as to whether they have been victimised by the school's decision to restrict email responses to them and raised issues as to how the formal complaint they made to the School was dealt with.
6. **The School's Case** – The school denies that it has discriminated against the Child at all. In respect of all three incidents of physically moving the Child into school, safety was the school's justification. It also argued that it did put reasonable adjustments in place and did not victimise the parents as alleged. The school denied it had not managed the parents complaint appropriately.
7. **Representation** – The Parents appeared in person, and RB Counsel, represented the school. We are grateful for their hard work, and for the way that they have presented their respective cases.
8. **Case Management** – An application to strike out portions of the claim was refused in a decision dated April 2023. Consideration has also previously been given as to whether the allegations made by the Parents are capable of amounting to a continuous course of conduct as some of the allegations are outside the six-month time limit within which claims must be brought. It was concluded that the matter is alleged, are capable of forming such a continuous course of conduct, but the decision as to whether or not they did was left to the final hearing once evidence had been fully considered.
9. **Evidence** - We have considered a main bundle of written evidence, and a supplementary bundle, and a video recording where the Child's distress can be heard. We also heard evidence from all the individuals above, save for Counsel. The Class Teacher kindly attended at short notice to give

evidence when it became apparent that they had been involved in one of the three incidents. We take into account all of this evidence and also the provisions set out in the Equality Act 2010 (the Act) and the Code.

10. **The Law** – The other relevant law is as follows:

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.*

26 Harassment

- A person (A) harasses another (B) if—*
- c) A engages in unwanted conduct related to a relevant protected characteristic, and*
 - d) the conduct has the purpose or effect of—*

- a) *violating B's dignity, or*
- b) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

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.*

11. 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.

12. What are the Child’s disabilities within the meaning of the Act? – Section 6 of the Act states

“A person (P) has a disability if—

- e) *P has a physical or mental impairment, and*
- f) *the impairment has a substantial and long-term adverse effect on Ps ability to carry out normal day-to-day activities.”*

13. The School conceded that Autism is a disability within this definition. It accepted that the Child has a disability. There were some issues raised as to when they were aware of the Child’s disability. The Parents also argued that the Child had a disability in respect of the Child’s severe anxiety, and also in respect of a specific learning difficulty.

14. Expert evidence was available in this case. It was contained in two reports by a Consultant Clinical Psychologist with 19 years post-qualification specialist experience of psychological and diagnostic assessment of adults and children with learning disabilities and neurodevelopmental conditions. In the Consultant Clinical Psychologist’s first report dated November 2009 they state:

*“The Child is a young Child with a longstanding history of **separation anxiety** which has not resolved despite maturation, and **quite severe anxiety in social situations**. There is not a clear predisposing factor for the Child’s anxiety, but **it is quite pervasive**. The Child is also struggling with **outbursts of aggression**, often directed towards their sibling but also their parents. During these outbursts, the Child presents as very distressed, and at the same **time unable to ask for comfort or manage their emotions in any way.**”*

and

*“...there are significant differences within the Child’s different cognitive skills and (these) **could indicate a specific learning difficulty** which will become more apparent as the schoolwork gets more complex.”*

The Consultant Clinical Psychologist’s conclusion is uncertain in that the Consultant states:

*“I cannot rule out ASD at this point, though the Child’s difficulties are likely explained by the Child’s **severe anxiety**. However, there is also not a clear explanation for why the Child’s anxiety developed in the first place and why it persisted and **is so severe**.*

*It is my clinical opinion that there are **two main hypotheses**; firstly that the Child has **significant social anxiety and insecure feelings regarding relationships**, with anger whenever feelings of insecurity are triggered, and secondly that the Child may indeed **have mild ASD, and these hypotheses are not mutually exclusive.**”*

The report also contains the following significant information:

*“The parents report that they have tried a variety of strategies for the Child’s aggression. These include trying to manage triggers, avoiding overwhelming the Child or putting pressure on the Child, sending the Child to their room, removing privileges, working with the Child to develop mutually agreed consequences (strategy suggested by EPS in July when the Parent phoned for tips) and restraining the Child by holding their wrists when the Child is hitting out, (on one occasion or taking the Child down to the floor by gently holding the Child’s wrists for everyone’s safety). **Unfortunately, some of these strategies may be inadvertently increasing the Child’s distress, since from my observations, the Child is in a ‘fight-flight’ type response mode and has too little control over their (huge) internal distress for the threat of consequences to stop the Child being aggressive. I have advised them not to use restraint at all, since it is likely to increase the Child’s anxiety and distress, and also due to the risk of accidental injury to the Child.***

As a result, one of the recommendations was:

*When the Child is having an outburst, keep talking to a minimum, **move out of the Child's personal space**, but continue to offer comfort at regular intervals and give a clear message that you are available to talk when the Child has calmed down.*

15. In the Consultant Clinical Psychologist's report dated the September 2021 the assessment was fuller, as follows:

"...a full diagnostic assessment in September 2021. The Child was observed in school in clinic and at home, and was assessed by myself (Consultant Clinical Psychologist) and a Speech and Language therapist. Areas covered by the assessment included a developmental history, cognitive assessment, language and social communication assessment, autism specific assessment (ADOS) and mental health screen and behavioural observation."

It was further documented that:

"(The Child) avoids sensory stimulation and finds noise in particular overwhelming. The Child has very limited friendships and can be controlling within those relationships."

"It is my opinion that the discrepancies in scores may be causing the Child some unexpected difficulties in certain areas, in that the Child's ability to take in and retain visual information may be better than for verbal information, and also if the Child needs to make a written response, this may be more effortful for the Child" (diagnosis report, September 21). As a result of these "unexpected difficulties with certain tasks, The child may not meet expectations, and may experience frustration and low self-esteem due to finding some tasks unexpectedly hard or taxing."

16. A Speech and Language Therapist carried out an assessment of the Child as part of the expert assessment. The Speech and Language Therapist's findings within the diagnosis report were:

"The Child's difficulties with auditory memory and grapheme translation may be causing the Child additional worry and are at odds with the Child's general ability levels". The Speech and Language Therapist also found "The Child presents with some difficulty with receptive language/information processing as well as social interaction difficulties. This auditory memory or processing difficulty should be investigated further and does not appear to be a pure language difficulty"

17. The diagnosis was now a firm one being:

It is my clinical and professional opinion, shared by the Speech and Language Therapist, that the Child meets diagnostic criteria for Autism Spectrum Disorder, with linked and significant anxiety present across situations.

The previous recommendation set out above was repeated. In addition the following was set out:

*“The Child’s school and plans for secondary education will need to take into account the Child’s **severe anxiety and the Child’s ASD**. The Child may benefit from having a discreet ‘time out’ card where the Child can request a sensory break in a quiet place during school time without asking directly, given the Child is displaying signs of anxiety during class.*

The Child may also benefit from being able to use a quieter entrance to the school prior to the bell and general rush, so the Child does not have to enter the school with the other children.”

And

“The Child would benefit from being assessed by the Educational Psychologist for possible dyslexia/ specific learning disability. The Child’s difficulties with auditory memory and grapheme translation may be causing the Child additional worry and are at odds with the Child’s general ability levels.”

18. We have concluded that both the Child’s ASD and severe anxiety meet the definition of disability within the Act. They both amount to a mental impairment which was long term in its effects and impacted on the Child’s daily functioning. In particular the severe and pervasive anxiety caused the Child difficulty in going into school in the mornings.

19. **The School’s Decision that the Child did not have Additional Learning Needs (ALN)** – in late-November 2021, the Parents requested that the School should consider if the Child had ALN, pursuant to section 11 of the 2018 Additional Learning Needs and Education Tribunal (Wales) Act. In mid-January 2022, the school determined that the Child did not have ALN. The parents then asked the LA to reconsider this decision in late-January 2022. The LA confirmed it would do so and arranged for an assessment by its Educational Psychologist which was received in mid-March 2022. The LA then decided, pursuant to section 12 of the 2018 Act, that the Child did have ALN. In March 2022, the school was asked by the LA to prepare an Individual Development Plan for the Child as a result, which was first drafted in May 2022. It will be seen that the correct procedure was followed under the Act. Whilst we are surprised that the School could have decided that the Child did not have ALN, given the reports it

had received from the Consultant Clinical Psychologist alone, this is not a matter within our jurisdiction and has been appropriately dealt with by the LA under the provisions of the 2018 Act.

20. **What did the School Know about the Child's Disabilities, and when?** – We note that there had been previous concerns about the Child going into school. This was apparent by April 2018. We have seen a letter at A120 dated 01/18, which was written to support the Child's admission to a School. Although this appears to have resolved at the Child's previous school and was some time previous to the matters we have to consider, the concerns were sufficient to warrant a referral to CAHMS, and at a young age. The Parent recollected that they had shared the letter verbally with the School. There must have been some discussion about such issues as an extended transition period for the Child was arranged over a 2-month period. The Child had about 4 weekly visits. We heard evidence that on the first visit the Child could not come into the classroom and that the Child was distressed during some of the visits. This must have been witnessed by School staff. Accordingly, the School must have been aware there was a difficulty with the Child coming into school.
21. We also note that on other and previous occasions a member of staff, would sit with the Child in the School yard until the Child was ready to go into the building. It is the Parents case that this approach changed when the Headteacher became Headteacher.
22. The first of the Consultant Clinical Psychologist's reports was sent to the school report in November 2020 by email. The school will therefore have been aware of the Child's "severe anxiety" from this date, that it was "pervasive", and that the Child could have distressing "outbursts", which the Child could not control, and might also have a specific learning difficulty. The School would have been aware of the differential diagnoses, being anxiety and/or ASD. At this time the parents asked for the Pastoral Plan to be updated and for a referral for an Educational Psychology assessment. The School had this knowledge before the second and third incidents.
23. The second report was sent to the school in October 2021 by email. From that date the additional information and firmer diagnoses would have been available to the school.
24. The parents also provided information from an Art Therapist. During this therapy the Child *"identified and discussed anxiety-inducing situations for them, such as being asked to talk in front of a group"*. This was relevant to a specific event we have heard about. The Child was very stressed and anxious about having to carry out a presentation in mid-March 2022 (the presentation) when the Child's attendance was already very low. The

Child's difficulties were drawn to the attention of the school and the Education Social Worker (ESW) by the Parent.

25. We will now turn to consider the incidents where the Child was brought into the School.
26. **Incident 1 – late-January 2020** – In relation to the first incident, the Headteacher and Teacher told us they took the Child by the hands, walked with the Child in through the gates and then let go of the Child's hands. The Child then continued to walk in by themselves. The Headteacher said, "*The Child was fairly compliant. The Child did not resist. The Child was not happy that we moved them through.*" The Headteacher accepted the Child was distressed. For a period, the Child then sat in the nursery class before the Child moved through to sit outside their classroom.
27. We note that on this occasion the School gate concerned was the infant gate to the side of the School. It was not the gate adjacent to the main road. Insofar as there was a risk from traffic it would as a result have been less of a risk on this occasion.
28. The evidence of the teaching staff regarding this incident has to be weighed against what the Child has said and the content of contemporaneous documents. We did not hear direct evidence from the Child and appreciate it would not have been appropriate to do so given the Child's difficulties in discussing these matters. The Child does not like to discuss their emotions or events that have upset them, and it has not been possible to obtain a full history of what the Child says occurred for these reasons.
29. The Parent sought to criticise the staff members evidence and to show it to be unreliable. In certain respects, it did strike us that staff members were seeking to minimise what had occurred e.g. over distances involved and the use of force. In relation to this incident, we do not find that the staff were seeking to deceive us in any way, but there were conflicts in their evidence. The Headteacher said that they held the Child's hand in their statement. In the Headteacher's oral evidence they conceded that both them and the teacher took the Child's hands. The Class Teacher said in their evidence that the two staff held the Child's elbow and arms. Whichever is correct, some physical contact was made with the Child who was distressed by the incident and took some time to calm and become more regulated. The Child spent some time sat outside their classroom with a friend. The Child then went into their class.
30. At A161 there is a DOJO Message sent home by the Child's Class Teacher. It reveals that the Child was upset. It states the Child had to be moved in for the Child's own safety. It also says attempts had been made to persuade the Child

to come into school for 20 minutes and an offer was made to allow the Child to come in through the main entrance. The Class Teacher was not sure why the Child was upset. The Parent flags in their response that there had been difficulties in the past. The Class Teacher clearly identifies the need *“to come up with a more definite plan for the morning if the Child is upset.”*

31. It is accepted that no risk assessment was carried out and no plan was formulated to manage the Child going into school if the Child was distressed. There was no more formal notification to the parents about this incident: just the DOJO message.

32. We have considered the content of the Positive Handling policy at D12. It states at point 7.

“A Positive Handling Plan (PHP) should be formed by the school in cases where it can be pre-determined that a learner is likely to require positive handling. This will be done with the agreement of parents/carers and in consultation with relevant agencies and the learner. This should be reviewed regularly.”

33. The Local Authority policy at annex A states:

“10.4 All parents will be informed after an incident where positive handling and physical intervention is used with a pupil.

And at

“13.1 If school are aware that a pupil is likely to require positive handling on more than one occasion, pre-planning is important and will include involving the parents to ensure they are clear about what specific action school might need to take and obtaining medical advice if the child has any specific health needs. A risk assessment and a Positive Handling Plan will be drawn up.”

34. A Pastoral Support Plan was put in place. The Plan refers to difficulty coming into school and anxiety issues, a CAHMS referral and the Child was placed on School Action for emotional wellbeing.

35. **Incident 2 – mid-April 2021** – This was the first day of term after the Easter holidays. The Child did not want to go into school. The Child remained outside the school junior gate, by the main road, for some time. The Parent decided to walk the Child’s sibling round to the infant gate first. The Child’s sibling was dropped off and then the Parent returned with the Child to the junior gate entrance. The Parent said they got back there by 10 to 9 at the earliest. The parent says they stopped about 20 metres short of the gate with the Child. The Teacher came out and went along to them. The Parent says that they were still present at this time. The Child was crying. The Parent says they heard the bell

being sounded indicating that the children were to go into school. This normally sounds at 08.55. The Parent recalls the Headteacher and Teacher then approached the Parent and the Child. Prior to this the Parent recollects the Teacher had been trying to encourage the Child to come into school but the Child was not moving. The Headteacher said, "*Come on (the Child) it is time to go.*" The Headteacher linked under the Child's arms. The Teacher did the same from the other side. The Parent did not seek to intervene. The Parent says that they was shocked by what occurred and did not therefore react. The Child was described by the Parent as being almost off the ground and as jumping. The Parent was not sure if the staff were lifting the Child. The Parent said the Child's feet were going off the floor and the Child was not walking in a normal way.

36. The school staff accept that the Timian technique was used. This involves holding the wrist with one hand and placing the other under the arm of the child. It is designed to be, and is recognised as, a restraint technique, in which the staff had been trained.
37. The Parent said the two staff members moved the Child in through the gates as the Child was unwilling to move. Staff do remember the Child holding on to the school railings and taking hold of the Child when the Child let go of them. The video taken by the Parent evidences the Child's distress which can be clearly heard. The video start is timed at 08.59.30.
38. There have been some discreet issues relating to this event. One related to timing. The evidence was contradictory. Overall, we have struggled to make sense of the timings around this event and can make no findings regarding this.
39. Another related to when precisely the Parent was present. The Parent says that they were present when the Child was moved into the school. The Teacher accepted that the Parent may have been but could not remember the Parent being there. The Headteacher said the Parent was there, but the Headteacher did not see the Parent leave. The Parents contemporaneous diary entry and subsequent email suggest the Parent was there. Whether the Parent was there when the Child was moved matters less, it seems to us, than the fact that the Child was physically moved into the school. We would add that it seems to us logical that the Parent would only have sought to take the video if the Parent was aware that the Child had been moved into the School and that the Child was upset by this. Considering all the evidence we find the Parent must have been present.
40. There was also an issue as to how far away from the school gates the Child was when outside the school and over what distance the Child was moved by the staff. Again, it seems to us that where the Child was and the distance over

which the Child was moved are less relevant than the fact is the Child was forcibly moved, about which there is no doubt.

41. There is also no doubt that the Child was extremely upset by this incident. It is recorded on the video. It involved the Child crying and holding onto the school railings. The Child remained on the school yard for about 2 hours before the Child had calmed and could enter their class.
42. After the event the Parent was phoned to be told the Child had calmed and an email was sent the following day saying that the Child had been escorted into school.
43. We regard this as a significant event for the Child. Steps should have been taken to ensure no such future event occurred in our view. The incident was clearly well outside the normal parameters concerning a child having difficulty entering school. Yet no risk assessment was carried out and no plan for any future event was created. Neither was a formal report of the incident forwarded to the parents at the time.
44. **Incident 2b – mid-April 2023** - On this occasion the Parent says the Child was again not willing to go into school and school staff again approached the Child. The Parent says that following a signal from the headteacher staff linked arms with the Child. The Teacher said they crouched down and touched the Child's arm. Whichever is correct, the Parent says that they said then intervened to say "No", and to make it clear the Parent did not want the Child to be physically handled. In any event, what is clear between the parties is, that on this occasion, there was no physical moving of the Child. We have therefore left this out of account in terms of disability discrimination, although we note that in the context of the other events that occurred, it shows that no further thought has been given as to how the situation might be better managed.
45. **Incident 3 – early-March 2022** – The Child's school attendance had dropped off to the extent that an Educational Welfare social worker had become involved in an attempt to assist. The Parent had contacted that service. On this occasion, the social worker was present and was trying to help get the Child into school.
46. The Child came to the gate but did not go in. The Educational Welfare social worker turned to the Parent and said, "*We will be ok*", to show the situation was in hand. The Parent walked away. The Child was left with the Teacher and Educational Welfare social worker. The Child was not sure they wanted to come in or move. The Teacher and Educational Welfare social worker were talking to the Child. Although the Child is described as not seeming to be tense, the Child was saying, "No, no." The Teacher said they could tell by the Child's voice the

Child was adamant they did not want to go in. The gate had to be locked leaving the three of them outside.

47. The Teacher tried to engage the Child by talking to the Child as they were walking around to the nursery gate to go onto the school. Along this route the pavement narrows, but the Child was not being moved by staff at this stage. At the nursery gate the caretaker approached asking to shut the gate. The Child, the Teacher and Educational Welfare social worker were still outside this gate at 9.45. The Educational Welfare social worker suggested moving the Child in now. The Educational Welfare social worker was taking the lead. As a result, the Teacher took one side of the Child and the Educational Welfare social worker the other. The Teacher used the Timian restraint hold. The Child was free to move their legs. The Teacher said, *"The Child walked freely but under duress if you like. The Child was not using their own legs to propel themselves forwards. If we had just linked arms with the Child, the Child would not have moved. The Child was not happy that they were being moved. The Child said "Ow, my leg hurts."* The Teacher says that the Child bent forwards and was released as the Child touched their leg. The Teacher then asked the Child if the Child could move and walk themselves in, to which the Child replied "Yes." The Child then walked with the Teacher and Educational Welfare social worker along the Lane, turned right and went into the staff carpark and in through the school main entrance. The Child then sat on comfy seats by the main office. The two adults sat next to the Child and praised the Child. The Child did not sit for long and returned to their class.
48. Thereafter an incident form was completed by the Teacher. Office staff called the Parent to say the Child had gone into school. The office staff did not mention the use of physical force. The Teacher conceded they did not ask the school staff to mention physical force. The Parents were not therefore appropriately informed of the use of force by the school.
49. The Parent phoned the social worker later that day, who referred only to having given the Child "a cwtch" (a cuddle). The Child stated that the force applied to them was not a cwtch. In the Child's terms the Child was indicating if it had been, the Child would have been able to easily break free from it and the Child said they were not able to do so. This is of some importance, in that the subsequent oral evidence we heard confirmed that it was clearly more than a cwtch that was applied to the Child, in that the Teacher considered they were utilising the Timian technique and understood that the Educational Welfare social worker was holding the Child on the other side in a similar way. We do not know if the Educational Welfare social worker had been trained in restraint techniques.

50. The School have argued that the Educational Welfare social worker was taking the lead on this occasion and that it is not responsible for the Educational Welfare social worker's actions. We do not consider that the School can escape its responsibilities in this way. School staff were "in loco parentis" and were responsible for the Child's welfare. The School knew in full the history of difficulties about the Child coming into school. The Teacher did not make any comment at the time about the use of restraint again on the Child, such as indicating that it was not appropriate or that the Parent had intervened on any previous occasion to prevent this type of force being applied. There was still no risk assessment and no plan. The School was therefore in our view at least equally responsible for what occurred on this occasion.

51. **Does it matter whether the Child was inside or outside the school premises when force was applied to them?** – We have considered this issue, and concluded that it does not. The Child was never on any occasion more than a short distance from the school gate, when the staff moved the Child in. The effect for the Child was identical, whether the Child was just outside the gate or just inside. The "defence" of the safety of the Child and other children is applicable either way. The issue for us is whether the application of the force to move the Child inside was discriminatory within the Act or not.

52. **Did parents sign anything to permit the use of force?** - At no time were the Parents ever consulted about the Child being physically moved into the school premises. They were clear that they would not have given them permission for this. There was no challenge to this evidence, and we accept it. We note that in mid-April 2022 the Parent stated that they intervened to prevent any further physical handling of the Child, and we accept what the Parent said about this.

53. **Risk Assessment and Plan** – It is correct to assert that at no stage was a risk assessment carried out or a positive handling plan formulated as to how better to manage the situation when it was difficult for the Child to come into school. The school had some knowledge about these difficulties prior to the first incident. The Child had been having some difficulties coming into school but there would have been no significant incident. This may be because the situation was managed by the Child being allowed to come into the school grounds and calm whilst overseen by a member of staff. It was the schools' case that the three main incidents we have dealt with above were sporadic and had large spaces between them. We do not accept that it was appropriate or sufficient to not review the situation following the first incident. Indeed, we would go so far as to say that if there had been a proper risk assessment and a plan that have been agreed by all parties, including in particular, the parents, and the Child, so that everyone understood what should happen if the Child was having difficulty going into school, then the subsequent incidents may well not have occurred at all. There was in our view a probability that the Child would

have similar difficulties coming into school in the future and this ought to have been properly risk assessed and planned for.

54. The most serious incident, we find, was the second incident, in the sense that the Child's distress was quite severe during this incident. All steps to ensure that such an incident never occurred again ought to have been taken. They simply were not. There was therefore a third incident which in our view was wholly avoidable.

55. The lack of a risk assessment and plan also goes to the proportionality of the School's actions, and we bear that in mind in our analysis in relation to the sections of the Equality Act.

56. We will now analyse the various statutory provisions to see if discrimination has been proved in this case in relation to the three incidents.

57. **Direct Discrimination** – Whilst we consider that the Child did receive less favourable treatment than other children at the school, we do not consider that this was motivated by the Child having a disability. Rather, the treatment was concerned with getting the Child into school.

58. **Indirect discrimination** – The issues and our findings in respect of them are as follows:

a. A applies to B a provision, criterion or practice ("PCP"). – The practice that we consider was applied was that all children must be brought onto the school premises when the bell sounded so that the school gate could be shut and locked and the premises made secure. We heard evidence from the Parent, that this practice was more rigorously enforced once the Headteacher had become the new headteacher. On occasions, prior to this, the Child had been allowed to remain in an outside area of the school grounds until the Child had settled, whilst being appropriately supervised by a member of staff, and then was allowed to join their class. We accept, on the evidence we have heard, that on the three occasions that the Child was physically moved into the school it is this practice that was being applied, although on the third occasion there was a larger gap in time before the Child was moved into the school grounds.

b. B has a protected characteristic – The Child had a disability at all relevant times in that the Child had an anxiety about entering the school premises and autism, which constitute a protected characteristic.

c. A also applies (or would apply) that PCP to persons who do not share B's protected characteristic. The practice was applied to all children that attended the school. They were to come in when the bell was sounded so that the gate could be closed, and the premises secured.

d. The PCP puts or would put persons with whom B shares the protected characteristic at a particular disadvantage compared to others. – Any pupil who had difficulties entering the school premises as a result of a disability would have been placed at the same disadvantage by the application of the policy or procedure. It would have resulted in force having to be applied to cause such an individual to enter the school premises.

e. The PCP puts or would put B to that disadvantage. – The Child was put at a disadvantage as the Child was not allowed to enter the school when they wished to but was made to enter the premises by force being applied to them. The Child found this very distressing in the short term, and it exacerbated the Child's anxiety about going to school in the longer term, so the child's attendance was reduced and then stopped altogether.

f. A cannot show the PCP to be a proportionate means of achieving a legitimate aim. – The School sought to justify its actions on the basis that there is a main road adjoining the school and there was concern that the Child might run into the road. There is no evidence at all that the Child had ever run off from school or absconded.

59. Further, the school could have sought the assistance of the Parent by calling them back to the school over the phone. The Parent would not have been far away having only recently left the Child. Alternatively, the school could have ensured a member of staff stayed with the Child and allowed the Child more time to come into school.

60. It does not assist the school's case that at no time did they carry out a risk assessment, which could have considered the risks and in particular weighed the risk of the Child running off, or into the road, against the risk to the Child's wellbeing resulting from the distress caused to the Child, and the longer-term effects on the Child's anxiety about attending school. It would also have weighed the risks of any other child attempting to leave the school premises if the gate was not secured. Such an assessment would have considered the Child's disabilities as they were understood by the time of each of the incidents. There was not even any consideration given to carrying out a risk assessment. It was concluded that the incidents were isolated and unlikely to occur again. We consider that given the Child's past history of difficulties coming into school, in respect of which the school had previously put in place adjustments, and the evidence that became available over time about the Child's disabilities, this view was an ill-considered one. In these circumstances the School are in real difficulties arguing that the practice relating to the closing of the school gate was a proportionate means of achieving a legitimate aim. In the absence of a risk assessment or any adequate evidence that it considered and weighed the

risks the School have been unable to show a proportionate approach. This also supports the parents' argument that the priority for the school was ensuring the gate could be closed and locked rather than consideration of the Child's needs and the Child's disabilities.

61. Continuing Course of Conduct - We have also considered whether the three incidents amount to a continuing course of conduct. It was argued on behalf of the School that they were isolated incidents with large periods of time elapsing between them and therefore were not a continuous course of conduct. We note that in many ways, each incident is similar. The same practice was being followed in relation to the Child. The Child would have had the same difficulties on each occasion. Each application of force was to bring the Child into the school and was applied in a very similar way. There was no consideration in between the events as to whether this was an appropriate method of dealing with the difficulty that the Child was experiencing coming into school. In short, the school did not consider that it was doing anything wrong. That is because it failed to consider, either the possibility, or latterly the certainty, that the Child had a disability. (The School did not need to know the Child had a disability for the purposes of section 19 of the Act). The Child's recurring difficulties in entering the school premises ought to have flagged this up for the school, and ought to have made it consider other ways of approaching the problem. An obvious starting point would have been a risk assessment. Bearing all this in mind, we have concluded that these incidents were a continuing course of conduct.

62. Conclusion Regarding the Three Incidents - We therefore find that the school discriminated indirectly against the Child in relation to the first, second and third incidents when the Child was moved with force by staff into school.

63. We do not consider that the School deliberately discriminated against the Child because of the Child's disability. We conclude that this is a case of lack of knowledge rather than deliberate intent to discriminate against the Child.

64. Discrimination Arising from Disability - We have also considered whether there is discrimination in this case arising under section 15 of the Act. The issues are:

a. Did the claimant's disability cause, have the consequence of, or result in, "something"? – The Child had real difficulties entering the school. We do not believe that the Child could help this. Indeed, there has been no evidence put forward by the school that the Child could. This arose from the Child's severe anxiety and was probably also related to the Child's ASD. The Child's disabilities caused or resulted in the Child having a difficulty with entering the school premises. We find that amounts to the "something" within the section.

b. Did the school treat the Child unfavourably because of that “something”? – The school applied force to the Child by moving the Child into the school when the Child was unable at the time to do this themselves. We find that to have been unfavourable treatment. On the evidence we heard no other child was treated in the same way as the Child. It was as a direct result of the Child’s inability to enter the school that the Child had force applied to them and was treated unfavourably.

65. The School was certainly aware from the Consultant Clinical Psychologist’s reports that the Child had a disability before the second and third incidents.

66. As set out above, we do not consider that the treatment of the Child was a proportionate means of achieving a legitimate aim.

67. We therefore find that the Child has also been discriminated against on this basis as well in respect of the second and third incidents.

68. **Further Incidents** - In relation to the incident of April (incident 2b) we have concluded there is not sufficient evidence for us to make a finding of discrimination. In relation to the “carried like a hammock” incident we have only the Child’s hearsay evidence in relation to this. We are uncertain as to what precisely the Child meant by this. We are unable to determine what if anything occurred or when. It was denied in by the School staff in their direct evidence. We have concluded that we are unable to make a discrimination finding relation to this allegation.

69. **Harassment** - We have also considered the issue of harassment. The issues are:

a. A engages in unwanted conduct related to disability – Moving the Child into school forcibly was, we have no doubt, “unwanted” by the Child. Indeed, all of the evidence points to it causing the Child significant distress. This is clearly audible on the occasion that the Parent attempted to video what was occurring. We have already concluded that the Child could not help themselves in relation to their difficulty in entering the school. It was caused by or resulted from the Child’s disability. We find that the unwanted conduct was therefore related to the Child’s disability. The force would not have been applied if the Child had been able to walk into school.

b. The conduct has the purpose or effect of violating B’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. - Whilst we do not consider the purpose as violating the Child’s dignity, we conclude that it had that effect, and further that it created a degrading and humiliating environment for the Child at that time. We heard evidence that force had not been applied in the same way to any other child. The Child will have felt that they had had been singled out and treated differently. The Child did not like to appear different from their peers. There was clear evidence that the Child did not want to go into class separately from their

peers and waited for a couple of hours before doing so. We have no doubt that the Child must have been acutely distressed and embarrassed as a result of what happened to them. In so finding we bear in mind the Child's perception of these events, clearly shown by the Child's immediate distress, what the Child told the Parent about the events, and the long-term effects on the Child in that the Child did not want to, or eventually feel able to, attend school. As there was no proportionate reason justifying the conduct it cannot have been reasonable to have treated the Child in this way.

70. **Reasonable Adjustments** – We will consider the suggested adjustments put forward by the parents in turn. Before doing so we record that the School did put in place or offer other support for the Child. It made a safe space available to the Child. It tried a coded method for the Child to request time out. It offered time carrying out crochet and advised that the Child could play a more limited role in presenting the project. It also compiled, and amended on one occasion, a Pastoral Support Plan for the Child. We note that there was limited engagement by the Child in respect of some of the support offered as the Child did not wish to be seen as “different” from their peers (as is not uncommon). We conclude that the School tried to meet the Child's needs and take account of the Child's disabilities. We particularly mention the Teacher, the Child's class teacher for the main period with which we are concerned, who we thought clearly cared for the Child and was seeking to do their best to support the Child.
71. **Delay in Referral to the LA Educational Psychology Service** – We take into account that as a result of the Covid19 and its effects on a large number of children there have been difficulties in accessing Educational Psychology services. We heard evidence about those difficulties in the Child's case and that the School followed the usual procedures for making a referral. It could not refer via any other route. Indeed, we heard from the Headteacher that the Headteacher was one of the headteachers who pointed out the inadequacies of the system leading to a new system being put in place. We have concluded that in all the circumstance the delay in accessing the Educational Psychology service was not a failure to put in place a reasonable adjustment. We find that the School did what it could in difficult circumstances.
72. **Failure to provide a “Group TA”** – The parents were seeking a TA who would be present in the classroom so that he/she could support the Child but not in an obvious way. The School's view was this was not necessary in that the Child was able to attend to their studies and was sufficiently supported by the staff already employed within the Child's class. We do not know if the Child would have accepted such an approach. Other attempts to support the Child were rejected by the Child or were relatively short-lived. The Child was, we find, concerned as to how their peers regarded them and not being identified as “different.” The suggestion of a “group TA” reflects this. There was evidence in

respect of the Child not wishing to be seen to enter their classroom at a different time to their peers and not wanting to be taken out of the classroom to be supported. We conclude that the Child would probably not have tolerated such provision for long. In the circumstances we do not find that this would have amounted to a reasonable adjustment.

73. Failure to Follow the Recommendations Regarding Speech and Language

– We heard clear evidence that the recommendation for training in relation to mutism was carried out. We accept that evidence and do not therefore make a finding that this amounted to a failure to put in place reasonable adjustments.

74. Conclusion About Reasonable Adjustments – Overall and taking into account our findings and the evidence set out above, we do not consider that the school has failed to put in place reasonable adjustments for the Child.

75. Victimisation and Handling of Complaint – The parents also assert that they were victimised by the school in that the school determined that their emails would only be answered after five working days rather than three days, which was the norm. The parents assert that this was motivated by them raising matters which were of relevance to the Equality Act 2010. Whether this was an appropriate decision on the part of the school, or not, we do not consider that it is sufficiently serious to come within the ordinary meaning of the word “detriment” to the Child or the Parents within section 27 of the Act. It amounts to a difference of 48 hours. On the evidence we do not consider that the School would have waited for 5 days to respond to an urgent issue if it had arisen. Further, we do not consider that the School’s decision was “as a consequence of” the parents raising issues in respect of discrimination under the Act. Rightly or wrongly, we consider it was motivated by the stated desire to manage the flow of emails to ensure staff welfare was maintained.

76. The parents also assert that the complaint that they made to the school about its actions/lack of action were not dealt with appropriately. We do not consider that this is a matter within our jurisdiction. What we can do is prescribed by statute and this is not included. Neither do we consider that this application could amount to discrimination against the Child. It was rather an issue for the Parents.

77. Remedies - The parents suggested a number of possible remedies. Some of these have either now become irrelevant because events have moved on, for example through the Child having moved to a new school or were no longer pursued. Issue was not taken by the School as to the appropriateness of the matters pursued if we made findings of discrimination. The parents requested:

- A. An apology from all those involved in the handling of their complaint and the issues that led them to need to complain in the first place (Governors and head teacher). As we have concluded that the issue of how the complaint was dealt with is outside of our jurisdiction, we do not order this. We have dealt with the underlying issues in our findings.
- B. A written letter of apology from the head teacher to the Child, so the Child can know that they were not the issue and that the individuals who forced the Child in were wrong to do this. - We will direct this. It is important for the Child to understand that they were not at fault.
- C. Training of relevant staff and governors on understanding Autistic children with an internal presentation. We direct this training should be carried out.
- D. That measures be put in place to prevent issues we have highlighted happening again to other SEN (ALN) children. - Along with training this involves a review of the School policies, which we direct.

ORDER

1. The School has discriminated against the Child on three occasions in January 2020, May 2021 and March 2022 by using physical force to bring the Child into school.
2. The Headteacher of the School shall write a letter of apology to the Child, in terms appropriate to the Child's age, setting out that the School was wrong to move the Child into the school by applying physical force to the Child. The letter shall be sent by 12 noon on a date in mid-August 2023 and a copy will be forwarded to the Tribunal.
3. The School staff and Governors will undergo training on Autism and anxiety including in respect of understanding Autistic children with an internal presentation.
4. The School will review its policies in relation to children with Autism and anxiety and update them as necessary.

5. Orders 3 and 4 above must be completed by the end of April 2024 and the Chair of the School Governors must write to the Tribunal confirming that they have been completed with the dates of when the tasks were completed.

ORDER: Claim allowed.

Dated July 2023