

DECISION

Date of Birth: 2007
Claim of: The Parents
Against Responsible Body of: The School (1) and the Local Authority (2)
Date of Hearing: 2022
Persons Present: Parent *Parent*
Parent *Second Parent*
RB1 Representative *RB1 Barrister*
Divisional Director Education, School *RB1 Witness*
RB2 Representative *RB2 Barrister*
LA Head of Inclusion Services *LA Representative*

Preliminary issues

The RB1 Barrister, on behalf of the First Responsible Body made an application for the attendance of the Principal of the School, as an observer at the hearing. The First Responsible Body's solicitors had sent an updated attendance form to the Tribunal on a date in June 2022 indicating that the Principal would be in attendance as an observer, but not making any formal application for their admission.

The RB1 Barrister explained that the intention was that the Principal of the School would observe the hearing and that the RB1 Barrister would apply for the Principal of the School to join as a witness if any issue arose which required their evidence during the hearing.

The Parent objected to the Principal of the School's attendance on the basis that an annual review meeting had been abandoned because of the Principal's unanticipated attendance at the meeting. The parents had not been invited to the school sports day and allegations had been made against them which had never been clarified. The Parent was therefore objecting to the Principal's attendance as an observer.

The Second Responsible Body remained neutral in the application.

The Tribunal considered the application, noting the Parent's objection to the application, the difficult relationship which has existed between them and the school and the Principal for some considerable time. We reminded ourselves that both Responsible Bodies were legally represented by counsel whereas the Parents were on their own and had no witnesses to call. We reminded ourselves of the overriding objective of dealing with cases fairly and justly, which includes dealing with the claim in ways which are proportionate to the importance of the case and the complexity of the issues and ensuring so far as practicable, that the parties are on an equal footing

procedurally and are able to participate fully in the proceedings, avoiding unnecessary formality. Keeping the numbers attending to a minimum is a means of ensuring informality and of supporting unrepresented parties to participate in the hearing.

We concluded that to allow the Principal to participate without notice and without clarity about the role that the Principal was to take in the proceedings was not appropriate at such a late stage and the application was refused.

A second issue was the indication given by the Parent on the morning of the hearing that the second Parent no longer wished to participate in the proceedings and wished for their name to be removed from the case.

The Parent was asked at the start of the hearing to confirm the position in relation to the second Parent's participation. The Parent explained that the second Parent could only participate in the hearing until about 11.15 when they would have to collect one of the children from school and would not return until 11.45. The second Parent did not wish to take part but was in the room with the Parent and would provide information and enable the Parent to ask questions and give evidence. The second Parent could be heard speaking in the background.

The Chair explained that the Tribunal was quite prepared to work flexibly to enable both the Parents to participate in the hearing and that because the hearing was on video, there would need to be regular breaks during the day. The second Parent indicated that it would be possible to break at 11.15 and not to resume until 11.45 to enable the second Parent's participation.

On reflection and having more clarity about the structure of the hearing, the second Parent joined the hearing and participated fully in it, with breaks provided on an "as needs" basis to allow the Parents to fulfil their caring responsibilities.

Decision

1. The Parents claim that the Responsible Body of the School ("the First Responsible Body") and the LA ("the Second Responsible Body) unlawfully discriminated against their Child because of the Child's disability by treating the Child less favourably than they would treat others, contrary to section 13 of the Equality Act 2010.
2. Both Responsible Bodies accepted that the Child is a disabled person for the purposes of the definition in section 6(1) of the Equality Act 2010 and their disability is defined as follows from the information in the medical team's correspondence with the parents: The Child has left sided hemiplegia, cerebral palsy, limited

mobility, a diagnosis of Megalencephaly-Polymicrogyria-Polydactyly-Hydrocephalus syndrome (MPPH), a rare genetic condition with which the Child was diagnosed in 2019 and refractory epilepsy diagnosed in 2020. The Child has severe learning difficulties and suffers from anxiety and worsening obsessive compulsive symptoms which has an adverse and long-term effect on the Child's ability to carry out normal day to day activities.

3. The original claim had been submitted covering a wide range of issues and an extensive period of time, much of which lay more than six months prior to the making of the claim. Case management directions were issued in order to clarify the basis of claim and because the Parents were unrepresented and without legal advice, telephone case management hearings held to try to support the Parents in clearly identifying the basis of their claims.

4. Following the issue of paper directions, it was stated by the Parents that they found the language of the orders difficult to follow and in an attempt to clarify further without resorting to paper, a telephone case management hearing was arranged. On the first occasion when the telephone hearing was arranged, the Parents were unable to attend. The hearing was rearranged and the Parents participated on the February 2022. As a result of the discussions at that telephone hearing, in directions issued on a date in March 2022, the grounds of claim were both clarified and extended to include a further period from September 2021 to the date of the February telephone/video hearing.

5. The final hearing was initially listed for hearing in May 2022 but following concerns expressed by the Parent about lack of time for reading the tribunal bundle, issued to the family just before the Easter holidays, the hearing was postponed and relisted for two days in order to ensure that there was ample time to hear the relevant evidence and submissions.

6. The relevant elements of the claim were finally identified in directions issued on a date in March 2022. Elements of the claim pre-dating January 2021 were excluded as being out of time and permission granted at the hearing in February 2022 to extend the scope of the claim to include a second claim of failure to provide education from September 2021 to February 2022 on the same basis as the previous academic year's claim. The second claim was consolidated to be heard together with the initial claim. Two other elements were relevant for consideration and extended to both Responsible Bodies: and the detailed grounds of claim are set out below:

a) The Responsible Bodies failed to provide the Child with education by reason of the Child's disability for the periods from January 2021 to July 2021 and from September 2021 to February 2022.

- b) The Responsible Bodies failed to provide teacher interaction/remote learning sessions; safeguarding checks and wellbeing interaction from January 2021 to July 2021;
- c) The Responsible Bodies failed to provide suitable ICT and resources from January 2021 to Sept 2021.

7. The Tribunal had in evidence before it 1930 pages of documentary evidence submitted by the parties in relation to the claims. The Parents had submitted numerous documents, copies of email correspondence and letters in support of their claims and at the final hearing, confirmed that they had sent to the Tribunal all the relevant information they held regarding the conduct of the Responsible Bodies during the periods during which the allegations of discrimination were made and that they had nothing further to add.

8. It was explained to the Parents that although the elements of the claim (allegedly dating back in total 11 years against the Second Responsible Body and to September 2019 in respect of the First Responsible Body), as set out in the original notice and letter of claim, had been reduced to the period of six months prior to the making of the first claim in June 2021 and the specific dates of the second claim, the documentary evidence they had presented remained in the tribunal bundle and had been read by the panel in advance of the hearing. The documentary evidence provided useful context for consideration of the claim and assisted the tribunal in trying to unravel the sequence of events leading up to the periods of claim.

9. In the event that the parents were successful in any of their claims, the notice of claim submitted with the covering letter on the June 2021 identified the following remedies sought by the parents: a letter of apology from both parties; acceptance of their failings and changes implemented as a result to ensure avoidance of similar experiences and a continuation of the support for the Child from Inspired Learners to ensure the Child does not fall further behind.

10. During the hearing, the Tribunal considered whether an additional claim of less favourable treatment under section 15 of the Equality Act 2010 should be included in the claim. The suggestion was opposed by the First Responsible Body's representative on the basis that the case had been prepared on the basis of a direct discrimination claim only. The Tribunal concluded that the claim as identified in the directions was the appropriate one for consideration and proceeded on that basis.

Background to the claim

11. The Child had been a pupil at another school in the county borough until the parents removed the Child from school-based education in 2016 - 17. The parents

pursued an appeal to the Special Educational Needs Tribunal for Wales to change the placement named in the Child's statement of special educational needs. The Second Responsible Body conceded the appeal and named the School in Part 4 of the Child's statement before the final hearing and the Child took up the placement in 2017.

12. The placement had not been without its difficulties and on a date in February 2020 in response to an enquiry from the school about the Child's absence the previous day. The Parent wrote to the school stating that the Child was "...currently on sabbatical, until we iron out the creases in their provision." A meeting was arranged on a date in February 2020 to discuss the issues by the social worker and the Parent confirmed that the Child would return to school the following day, but the Child did not return until another date in February.

13. On a date in February 2020, The Parent agreed with the Child's class teacher that communication about the Child should be by email rather than through the daily home-school book because the Parents found the Child's class teacher's writing illegible. On a date in February, the Child's class teacher sent a report of the Child's day by email. On the same day, in response, the Parent asked the Class Teacher to stop sending emails. The Parent was critical of the school management and described the Class Teacher's report as "Going into overkill on the correspondence, is stupid and short sighted in the very least?"

14. As the introduction of pandemic restrictions loomed in March 2020, the Parent wrote again to the school on a date in March 2020 stating that the Child "...won't be in school for the foreseeable future, which is a direct result to safeguard our family from Covid-19". The Parents had two other children who suffered from asthma, one complicated by anaphylaxis and were particularly concerned about the possible impact of Covid 19 on the Child, with their multiple health complications.

15. Although the introduction of the first pandemic lockdown on the 23 March 2020 closed many schools in Wales, the duty to provide education continued and the Welsh Government did not at any time amend the statutory requirement on local authorities to make educational provision. The School remained open to its vulnerable students throughout the pandemic. It provided information to the LA regarding its functioning in annual reports, copies of which were provided in evidence. The first, dated a date in January 2020, confirmed that the school remained open, did not make any reference to the fact that the Child was not in fact in attendance and recorded that the school had difficulty with its broadband which precluded its being able to deliver virtual sessions that academic year, but expressed the hope that that would be provision that was available from September 2020.

16. Difficulties had arisen in the relationship between the Parent and the school to such an extent that the Child's class teacher wrote a report dated a date in May 2020 expressing their concern about the Parent's attitude towards them. The Class Teacher had been under the impression that they had a good rapport with the Parent when they met at the school gate but the Parent's emails were totally different and quite critical – so much so that the Class Teacher felt a little uneasy in the Parent's company the next time the Class Teacher saw the Parent and didn't look forward to the next email they would receive. The Class Teacher was sufficiently concerned to send copies of the correspondence to the school principal. The Parent was unaware of allegations made against them and once mentioned, consistently sought clarity about the nature of allegations made. The Parent failed to secure the details they sought up to the date of the final hearing although the Principal's report formed part of the documentary evidence relied upon.

17. The Child had been referred by the Second Responsible Body's Disability Children's Team to a Training Foundation, a registered charity, offering support for disabled children. The Training Foundation commissioned an Independent Organisation to support the family on a date in April 2020 and the support was ongoing. The provision was provided through a Welsh Government Covid grant funding to the Health Board. The Health Board had commissioned the Training Foundation for several years to provide a Parent Support Programme. The Independent Organisation is an organisation which provides tuition, support and training parents, carers and schools. The funding was intended to provide enhanced support for families of children with complex needs to support their children at home during the pandemic and was not special educational provision for the Child, as such. The sessions with the Independent Organisation from April 2020 were initially virtual and the Child continued to access those sessions for one hour a week throughout 2020 and 2021.

18. In August 2021, the sessions with the Independent Organisation returned to face to face, taking place at a small learning centre with one trainer. There were some disruptions again due to Covid restrictions but the Parents continued to attend the sessions to support the Child. The Parents transported the Child to those weekly sessions and remained with the Child throughout. The Parents confirmed that the Child had attended "many 1 to 1 sessions at the centre and assessments have been undertaken and overall a much better understanding of our child has developed. "

19. On a date in November 2020, the Parents requested that the school send all correspondence via the LA, as opposed to directly with the family because of difficulties encountered between the parents and the school. The Parent provided a detailed description of all the issues the family had with the School in their response to the Tribunal's request for further information in September 2021 and made reference to a telephone conversation with the LA Representative from the Second

Responsible Body on a date in November 2020, when the LA Representative was made “fully aware that the school had not provided the Child with education.”

20. On a date in June 2021, the Parents wrote to the Tribunal making formal claims of disability discrimination against the First and Second Responsible Bodies.

21. The initial notice of claim letter acknowledged that the First Responsible Body had sent what was described as a generic, class-based timetable by email on a date in April 2020 and that a further four weekly timetables were subsequently sent but it was claimed that nothing was sent by the school to the family again until March 2021. The allegation was that “Other than a few “how are you” calls many months later from office staff, that was as all the School provided and all the intervention they had with our child in that period.”

22. It was alleged that the Second Responsible Body had, among other things, breached their human rights as a family over a period of 11 years.

The claim of direct discrimination by reason of disability.

23. In the context of section 13 of the Equality Act 2010, the allegation of direct discrimination brought against the Responsible Bodies required the identification of a comparator – a child whose situation is the same as the Child’s in all material respects other than the Child’s disability. The comparator does not have to be a real person but can be a hypothetical comparator for the purposes of the claim. The relevant comparator would therefore be a child who does not have the Child’s disability but who is remaining at home for self-isolation purposes and is not attending the school. To establish unlawful discrimination, it is necessary to show that the Responsible Bodies have treated the Child less favourably than they treat or would treat others.

24. The allegations in relation to the First Responsible Body was that at the time of making the original claim in June 2021 “...current home learning or blended learning timetables did not offer or afford the Child any inclusivity at all.” The parents alleged that the Child was not viewed as part of the school: “It is nothing more than a bland breakdown of what to do as opposed to what is happening, how the Child’s peers are doing and what the collective group as a whole are doing.”

25. In relation to the Second Responsible Body, the allegation made by the Parents was that not only was educational provision not being delivered by the school but that the two Responsible Bodies were “...knowingly and purposely [stet] set up to fail and discriminate our child.”. It was alleged that the Second Responsible Body’s attendance and wellbeing “...is a weapon that is used to strike fear into parents, it is not used as it should be which is to help support parents and children alike.” The allegations were concluded stating that the local authority “...had either failed to act

by not appointing adequate support for the Child or acted with complete malice.” Such allegations set the tone of the Claimants’ attitude towards the two Responsible Bodies.

26. In response to the allegation, the RB1 Barrister on behalf of the First Responsible Body took a chronological path through the documentary evidence. In relation to the first allegation of failing to provide education for the Child during the period from January 2021 to July 2021, the First Responsible Body submitted that the stance taken by the Parent had materially affected the communication between the parties.

27. On a date in November 2020, the Parent had emailed the school to tell them that they should no longer communicate directly with the parents. Any correspondence should be through the local authority on the basis that responsibility for ensuring the Child’s educational needs lay with the local authority. The email was copied to the Child’s social worker and the LA Representative.

28. The LA Representative contacted the school and requested a chronology of the contact they had with the Parents. The First Responsible body provided that information in the form of a chart which was produced in documentary evidence. .

29. The Second Responsible Body arranged an Annual Review of the Child’s statement on a date in February 2021. In an email to the social worker dated December 2020, the Parent stated “On the annual review, we’re moving that back to February, the first 2 weeks would be great?” because “We need a mental break from this and nobody else will put this family first, the authority has had since August to come up with a date, 4 months and we’ve still not had a date confirmed by the LA...”.

30. Following the Annual Review meeting, the Director of Education and Inclusion Services wrote a letter to the Parents dated March 2021, in response to their letters to both the LA Representative and them dated February 2021, dealing with the many issues raised by them in the correspondence.

31. Under the heading “The Child’s access to Education”, the Director of Education and Inclusion Services provided a copy of the chronology of contacts and communication between the school and the parents. The Director of Education and Inclusion Services recorded the school’s interpretation of the Parent’s direction not to communicate with him directly, as a direction not to communicate with him at all, even in relation to access to the remote learning offer and wellbeing calls. The letter confirmed that “All schools are required to provide remote learning and wellbeing checks for learners not accessing face to face learning due to lockdown restrictions” and confirmed that the Director of Education would “..also have expected contact to be made during the Child’s absence from school, but it does appear that the breakdown in relationships appears to be a contributory factor. Irrespective of this, a remote learning offer should have been provided by the School as the

commissioned provider for the Child's education."

32. The letter recorded attempts to effect a resolution between the Parents and the school by the LA Representative and the Director of Education and confirmed that the LA Representative had liaised with the school to request that a remote learning programme is provided for the Child with immediate effect until the Child transitions back into school.

33. The Director of Education recorded in the letter that plans for the Child's full return to the School needed to be agreed and implemented and acknowledged "...that you have requested that the Child does not return to schools [stet] for an 8-week period so that the Child has an opportunity to adapt to new medication. I think it would be helpful to agree the commencement of a transitional return to school immediately following the Easter break. A multi-agency meeting should also be convened in the next 2 – 3 weeks to plan for this and we would greatly appreciate proposed dates for this at the earliest opportunity." That section of the letter concluded "Direct communication and partnership working with Ambito is essential to plan for this return and it is hoped that you would be receptive to attending such a meeting. The letter requested information about whether or not the Child was required to shield and made reference to guidance from the Royal College of Paediatrics and Child Health which indicated that very few children are clinically extremely vulnerable.

34. Blended timetables for the Child were sent to the Parents from a date in March 2021 and included embedded Word attachments and embedded materials in the left-hand column. The same format was followed every week for the remainder of the academic year and represents the general approach taken. Each planner made reference to the Child personally by name and made reference to the Child's particular circumstances in relation to the therapy provision.

35. The correspondence submitted on behalf of the First Responsible Body confirmed that timetables had been sent for the Child to access at home from a date in March 2021 on a regular basis to the end of term. RB1 Witness, Divisional Director of Education for the First Responsible Body confirmed in oral evidence that those were all the timetables sent during the relevant period and copies of the timetables were produced in evidence although the embedded links were not functioning in the tribunal bundle.

36. In their letter dated March 2021, the Director of Education and Inclusion Services for the Second Responsible Body, acknowledged the difficulties in the relationship between the parents and the school but emphasised the school staff's wish to restore their relationship with them. The Director of Education urged that

direct communication should be reinstated between the school and the parent because communicating via a third party is not sustainable in the longer term.

37. The Parent gave evidence that they had sought advice from the Welsh Government during 2020 and that they had been advised that it was the Second Responsible Body's responsibility to secure the delivery of the Child's educational provision. The Parent had written to the LA Representative, the Second Responsible Body's Head of Inclusion, asking the LA to make those arrangements and directing that correspondence from the school should be directed to the family via the local authority because of a total breakdown in the relationship between the school and the family.

38. At the hearing, RB2 Barrister, representing the Second Responsible Body, confirmed that in the context of the first claim of failing to make educational provision for the Child, the Second Responsible Body stood behind the First Responsible Body and had discharged its responsibility towards the Child by naming the School in the Child's statement of special educational needs and delegating responsibility for delivery of the provision to the school. The Second Responsible Body therefore submitted that its statutory responsibilities had been discharged by the retention of the school as the appropriate placement for the Child.

39. During the pandemic, out of county placements were required to complete an "Out of county Covid 19 statement Provision Assessment" form to assist schools in considering how to adapt delivery of the special educational provision identified in Part 3 of the pupil's statement of special educational needs during the Covid 19 restrictions. It was not until the form was completed on a date in January 2021 that the school formally informed the Second Responsible Body that the Child had not attended school since March 2020.

Sept 2021 – Feb 2022:

40. When the school reopened after the summer holiday, the school sent an email to the Parent on a date in September to say the school would be in touch to discuss the Child's learning and contact was made in September 2021. The school asked what days the family wanted the timetable of activities sent home and what day was best for the Child to access the virtual session. There was no reply to that email.

41. On a date in September 2021, the school sent an email containing topics for the Child's studies and setting up a virtual learning session for the Child. They received a response the same day from the second parent containing criticism and complaints but not engaging with what was trying to be done by the school. There was a complaint about the timetable arriving after, rather than before the start of term and no update or newsletter to include the Child in the school population.

42. On the September 2021, the school delivered cooking materials to the home, in an attempt to facilitate the Child's learning, an action to which the Parents took great offence. The Head of Education had emailed that morning to state that the ingredients would be posted to the family home.

43. As a result of the delivery of materials by members of school staff to the home, a complaint was registered by the parents to the police containing serious allegations of criminal conduct relating to intimidation and harassment stating that the parents had requested in writing that the private educator "...please refrain from engaging physically with us." on two occasions. The email stated that the events of the 21 September had left the Parents "...feeling seriously violated, anxious, upset and worried. We no longer feel safe or relaxed in our own home owing to the actions...". The complaint provided further information stating that the school had "...stated resources "will be sent out via 1st class" after my wife requested "For any resources, please use the postal service/courier" on the September 2021." It was also confirmed that the school had confirmed that the school secretary and staff member would deliver the resources that afternoon. The letter to the police concluded stating: "The whole situation on behalf of the person in question feels very controlling, we feel as if we're being provoked and it feels as though the message coming through is – we know where you live, it just doesn't feel nice at all."

44. On the September 2021, the Head of Education sent an email to the Parents attaching the weekly planner and stated: "...the resources will be posted to your home address." The Parent wrote in response: "From this point forward & as a direct result of your actions, all communication is off the table with you and your organisation."

45. On the October, the Head of Education emailed the social worker to confirm that they had received a telephone call from the police regarding the delivery of resources and the Head of Education asked if the social worker was happy to deliver resources to the Parent. RB1 Witness sent the planner electronically and the social worker was asked to check whether the Parent wished the planner and the resources to be delivered by the social worker in future.

46. In oral evidence at the hearing, the Parent clarified that they had received emails from the Head of Education stating that the head of Education would post the items home. The Parents asked that neither the Head of Education nor any other member of staff come to the house. The Parent believed that the Head of Education had sent staff to the home despite two emails saying please don't do that. The Parent spent 20 minutes on the phone to the police and officer said that it was a civil dispute and that nothing untoward had happened. The Parent emphasised in oral evidence that the Head of Education had said they would post

the materials and that the Parents asked them twice not to send staff to the home. When the Parent explained that to the police, the officer said “that’s different” and said the Parent needed to have a conversation with the school. The Officer told the Parents that the Officer had warned the school they shouldn’t attend the home.

47. The incident happened around the time when the parents’ case statement was due in the Special Educational Needs Tribunal for Wales appeal. The Parent’s view was that the timing was deliberate to interfere with the parents’ preparation of the case statement. The Parent also considered that the school could have sent a teacher to offer home tuition for the Child. The Child was off school and the Parent could not understand why the staff had left raw food ingredients on the doorstep and had not offered tuition at home for the Child, Furthermore, one of the Child’s sibling’s had a nut allergy and could have been seriously affected by the ingredients had they touched them.

48. The second Parent explained that the bag of ingredients had been left on the doorstep when the family were not at home and weren’t expecting anything to be delivered. It was the middle of the pandemic and the ingredients were not labelled. The only other resources sent by the school were a one page cut out and no information – nothing else. If the teacher could drop off the ingredients they could have attended to offer the Child tuition. The second Parent was at a loss to understand why the delivery had been arranged when the parents were working on their case statement to the Tribunal.

49. RB1 Witness gave evidence that it was their instruction to send a member of staff to the house for a welfare check on the Child as the Child had not been seen for some time. The RB1 Witness asked the school secretary, who they believed had a good relationship with the Parents to deliver the ingredients and to check on the Child. The RB1 Witness emphasised that it was not the Head of Education’s instruction but their instruction because the RB1 Witness did not consider it appropriate to send food ingredients by post. The RB1 Witness also wanted to satisfy the school that the Child was alright as the Child hadn’t been seen for a long time. The RB1 Witness had been unaware that the Head of Education had written saying that that they would post them – The RB1 Witness suggested that to be an administrative error on the school’s part. The RB1 Witness was conscious that there were children who had not been checked by the school by their predecessor and the RB1 Witnesses priority was that all children not attending school were checked by phone or seen.

50. On a date in October 2021, once again pursuing their enquiries about the allegations made by the school about their conduct towards staff, the Parent sent a letter to the home of the Child’s class teacher regarding the Class Teacher’s tenure as the Child’s class teacher at the School. In oral evidence at the hearing, the Parent explained that the First and Second Responsible Bodies’ failure to provide them with

the details of the allegations made against the Parent had put the Parent in a position where the Parent had to find out where the class teacher lived, so that the Parent could write to the Class Teacher directly at the Class Teacher's home.

51. On a date in October 2021, RB1 Witness sent an email to the Parent with materials for the following week. The email confirmed that the hard materials would be delivered by the Child's social worker.

52. On a date in November 2021, the Parent emailed the school to indicate that they would like the Child to start transitioning back into school attendance. Discussions ensued during November and a first visit took place on the November and the Head of Education summarised to RB1 Witness in an email what had happened on that day. The communication continued about a second visit, which took place on a date in December 2021.

53. The correspondence indicates that the Parent agreed to get in touch with the school again to arrange further transition days, but the Parent did not get in touch in the build-up to the Christmas holidays or at the start of the new term.

54. The second Parent clarified that once the Child had received their full vaccination at the end of November, the family had arranged a holiday before Christmas, so that they were away from home and the Child was unable to attend the refresher days. The Parent further clarified that the family had been waiting for adaptations to be made to the house which would require them to move out for a period so that building work could be undertaken. They received confirmation a date in December 2021 that the work would be started in the new year and the Parent then had to find alternative accommodation for the family, which was eventually found two counties away from the School.

55. On a date in January 2022, a member of school staff wrote to the parents stating that the school were keen to transition the Child back into school and the Parent's response was that the Child's attendance would be sporadic for at least two months whilst waiting for the LA to make school transport arrangements.

56. On a date in January 2022, the Parents confirmed that school transport arrangements were in hand and the start date for the Child to attend school would be immediately after the February half term. On a date in February 2022, the Parent confirmed that the transport would be in place from a date in February 2022. Two further "keep in touch" days were arranged one in January and another on a date in February 2022, but the Child did not attend the second.

57. On a date in March 2022, a draft transition plan was prepared setting out what was proposed to be transition up to full attendance from March to April. The timetable was sent to the parents on the March. The Parent disagreed with the proposal that

the Child's attendance at school should be increased from fully at home to full attendance at school over just four weeks. The Parent considered that period of transition too short.

58. The correspondence taking place between a member of school staff and the Parent in November and December 2021 indicates that attempts were being made to arrange for the Child's return to school from that point but that the Parents were engaging only on their own terms, as suited them.

59. The Parent submitted at the hearing that the school are the professionals and that the medical team and consultants had said they needed to sort out the Child's return to school. The school proposed that the Child went from no attendance to full attendance in four weeks. That had made the Parent feel worse – the school were given the opportunity to re-establish the relation again and the consultants have seen that the Child has done 12 hours per week.

60. A fresh assessment of the Child's ability to swallow was required to inform the school prior to the Child's return. They had suggested to the Parent that the Child could attend for a half day session without requiring food and drink. The Parent did not consider that to be appropriate. The Parents had refused to consent to the community medical team sharing information about the Child and consequently neither Responsible Body had access to up to date information about the Child's medical condition or difficulties.

Failure to provide virtual learning sessions for the Child

61. The second issue raised by the Parents was the provision of virtual learning sessions for the Child. The evidence provided in support of the First Responsible Body's position was a copy of the email dated March 2021 from the Head of Education to the Parents, sending a copy of a blended learning timetable; including a request for therapist assessment to offer a more direct, bespoke plan for home learning; information about the class teacher and lead LSA and direct contact details for them with encouragement for the parents to make direct contact with the individuals identified in order to discuss the activities in more detail. The email stated that if the Parents did not consider the activities to suit the Child, then they could contact the class teacher and LSA to work together to find suitable alternatives. The Head of Education confirmed then that the school would send out a plan every Friday for the following week and to let the Head of Education know if that day is not suitable.

62. The timetable for the week beginning March 2021 covered topics such as language, literacy and communication activities, integrated OT, Physio and Salt advice, as well as maths, expressive arts and health and wellbeing. The timetable made reference to the inability of the school to make provision of direct therapy which required an assessment of the Child to be completed "...following an

assessment at your convenience. Please let us know what dates are suitable for you.”

63. From the email dated March 2021, it is apparent that the Parents had provided feedback on the first planner and the Head of Education requested that they contact the school to arrange an up to date assessment. The email stated: “We can discuss how to deliver the assessment as safely as possible, I can show you our current risk assessment for when we have essential visitors/assessments on site and we can also discuss the virtual assessment option. The parents were asked about undertaking a school visit and assessment. This was a consistent theme in every email sending the blended learning timetable together with access offered to teacher and urging for dates for assessments.

64. The Parents challenged the First Responsible Body in respect of the failure to provide virtual learning sessions for the Child. They did not understand why it had taken so long to set up the sessions and why the Child had only received one 30-minute session in 18 months.

65. RB1 Witness, Divisional Director of Education for the First Responsible Body gave evidence that virtual learning was available from January 2021 to May 2021 but that the school had been told that they were not to have any contact with the family. It was only in March 2021 that the letter from the Director of Education was received saying that contact should be reinstated. The school did not have any direct contact with the family from the receipt of the November 2020 email until they had received assurances from the Second Responsible Body that communication was to be restored with the family.

66. On a date in May, the Parent wrote an email saying the Child had been unwell and suggested a move to virtual sessions. The Parent suggested that the sessions could take place at 11am on Wednesdays as the best time for the Child. The Head of Education responded immediately with a plan setting out the proposal, commencing with the first session at 11am on the a date in May 2021 with the Child’s teacher and LSA. The Head of Education outlined a draft plan forwards from that date for weekly sessions moving to a one hour session on a date in May, just before the half term holiday, then an hour long session on a date in June, increasing to 90 minute sessions from a date in June to the end of term.

67. On a date in May, the school secretary tried to call the Parents to see if the Child was better. The Parent responded that contact should be by email until “...we receive an insight into those allegations.”, referring back to issues which had arisen between the parents and school in 2020. In the Parent’s email, the Parent asked to check that the session on the date in May was one to one with the teacher, with no LSA present. The email stated: “If you personally could forward us the details for

that session on Monday to give us time to prepare and to prepare the Child, we'd be very appreciative."

68. On a date in May – the Head of Education responded to the Parent's email and asked for confirmation that the timings of the virtual sessions were suitable.

69. On a date in May, the Parent responded by email stating: "Please refer to the email sent to the school secretary last Friday."

70. On a date in May 2021 – RB1 Witness emailed the Parent emphasising that the school was keen to re-engage but explaining that the school policy required two staff present to safeguard all parties present in a virtual session.

71. On a date in May at 9.22 the Parent responded to RB1 Witness " I acknowledge receipt of your email sent yesterday (2.45pm), I am currently at work, we will collaboratively respond at our earliest convenience."

72. On a date in May at 13.00, the Head of Education sent the Teams link for the session "Please find the link to the session we arranged for today, you referred in your email to a Monday session, would you prefer to have that introductory session then?" One copy of the email at page 1382 indicates that the virtual invite/call was to take place at 13.30. The copy submitted by the Parent showed the time of the session was either 8.30 – 9.30 (EDT) or 1.30 – 2.30 (Five hours behind London time).

73. On a date in May 2021, the Head of Education sent the timetable and asked about proceeding with the virtual sessions. This was chased by the school secretary on a date in May when the secretary asked if virtual session with the Child was going ahead that week.

74. It was not until a date in May 2021 that the Parents responded explaining why the sessions were not accepted.

75. On a date in June, a detailed response to that email was sent by RB1 Witness, inviting the parents to a meeting to move things forwards. Arrangements were offered to resolve the problem and the parents and school finally agreed to a virtual session for the Child at the start of July 2021. The email found a centre ground, where it was agreed that the TA would stay in the room with the class teacher throughout the session but remain out of camera shot so that they would not be visible to the Child. Once that issue was resolved, a session was arranged for a date in July and proceeded albeit briefly as a meet and greet session for the Child with the class teacher.

76. Following the successful session, the school emailed on a date in July to ask whether the next session would take place on a date in July. The Parent responded the same day to state that the family were not able to proceed with that session. No reasons or explanation was provided but the session was cancelled by the Parent. At the hearing, the Parent gave oral evidence that the family had taken a holiday before the end of term and that no further virtual learning sessions had been arranged. The second Parent confirmed that the family had gone away on holiday on a date in July and it was not possible for any further sessions to be arranged.

77. The Head of Education emailed on a date in July with the latest timetable and blended learning plan and asked what day would be convenient for the virtual session the following week. The Parent emailed the school on two dates in July asking for feedback from the first session held in July. The feedback from the class teacher was sent by email on a date in July. On the same date, the school secretary sent the family details of the term dates for the forthcoming academic year and the Head of Education sent a summer planning document for the Child. On a date in July, the school secretary sent the Parent a copy of the summer new letter and term dates and warm wishes for the summer holiday.

78. The school term ended and school closed on a date in July and – no further virtual learning sessions were arranged that term.

79. The LA Representative gave oral evidence at the hearing that they had been liaising with the Head of Education regarding the very problematic relationship which had developed between the parents and the school and the parents wish not to have direct contact from the school. The LA Representative confirmed their view that day to day responsibility for the delivery of educational provision, once named in a child's statement lies with the school and that direct communication was important. Because the family appeared to have a good relationship with the social worker, the LA Representative asked the social worker to be the conduit in terms of getting a date from the Parents for the annual review meeting. Attempts to arrange the AR had been ongoing since July of 2020 but without success. It was eventually set up for February 2021 at the Parent's request.

The failure of the Responsible Bodies to make IT provision for the Child.

80. The final claim was made on the basis that the Child is reliant on technology because the Child is a visual learner and relies on the support provided by technology to learn. It was submitted that the Parents were unable to provide that consistency and continuity at home without any offer of IT support for the Child. The second parent clarified in oral evidence that part of the provision required in the home tutoring was access to YouTube videos but the school had not offered any equipment, virtual sessions or other equipment that the Child might need to support their learning until the claim had been made to the Tribunal.

81. RB1 Barrister on behalf of the First Responsible Body submitted that it was the school's general understanding that there wasn't any request made for IT equipment or resources for the Child and in terms of the general approach taken whilst children were not present, the approach reflected the general position that the school had not provided IT equipment for pupils to use at home. The RB1 Barrister relied on the evidence given by the Parents when they had indicated that they had been able to engage in some virtual sessions with the school, had been able to engage virtually with Inspired Learners and therefore had suitable equipment available for the Child.

82. RB1 Witness confirmed that the school was not in the practice of sending teachers home in person to assist with learning. During the period of the restrictions, the school did not close their doors and managed with what resources they had available. Each student had their needs met through blended learning or remote sessions and therapists also engaged with parents and children remotely. All of those were available to students who were not attending school but the school was not in a position to send home laptops and some therapeutic needs could not be met because of the remote provision but they did what they reasonably could.

83. RB1 Barrister submitted that, to the extent that was suggested or implied, but there was a contradiction in the Parents' complaints in that they did not want the Child to attend school because of the Child's heightened risks if the Child contracted Covid, yet complained that the school did not send staff into the home.

84. At the hearing, the LA Representative gave evidence that the Second Responsible Body were not asked to provide any resources or learning, nor had the LA Representative received such a request by the Access and Inclusion team, even when the relationship had broken down between the school and the parents. The LA Representative confirmed that the Parent had flagged to them that the school wasn't providing the Child with an education and the LA Representative followed that issue up through correspondence with the school. The LA Representative tried to facilitate a way forwards and arranged a meeting but was not asked to provide resources.

85. By way of clarification, the LA Representative explained in oral evidence the Second Responsible Body's approach to the supervision of provision by schools in the small minority of pupils with special educational needs and disability who are in out of county placements. The LA Representative told the Tribunal that: 'The local authority will consider the provision of education in schools and the standard of provision and if there are significant concerns raised by Estyn or Ofsted, will look at the provision offered. If safeguarding concerns are raised, if sufficiently serious, the local authority may decide not to place children there until the concern is addressed. The supervision is undertaken in part through Annual Review meetings

so that the child's progress can be assessed. As a result of the pandemic and because the Welsh Government did not suspend any of the statutory duties for the provision of education for children with special educational needs and disability, the local authority devised a proforma for all pupils with a statement asking the schools to confirm the provision that they were putting in place and none of the statutory duties had been relaxed. We provided that enhanced supervision during the pandemic. We recognised which schools were open and in line with WG guidance. We knew the School was open and that provision was being made there. The statutory duties weren't lapsed and there was recognition that it would be a best endeavours approach and we would have to ensure that the statutory special educational needs and disability provision was met as best as we could under those circumstances, with blended learning. The necessary infrastructures had not previously been put in place. There was that understanding that the learning wouldn't look as it had prior to the pandemic.'

Tribunal's conclusions with reasons

86. We have considered very carefully the evidence presented in support of the claims and in defence of them in the context of the provisions of the Equality Act 2010.

87. We have set out in the decision a detailed chronology of correspondence and events in order to explain the evidential basis of our conclusions.

88. Both Responsible Bodies accepted that the Child is a disabled person for the purposes of the definition in section 6(1) of the Equality Act 2010. We accept that analysis and confirm that we find the Child to be disabled. The Child's disability is defined as follows: The Child has left sided hemiplegia, cerebral palsy, a diagnosis of MPPH, a rare genetic condition with which the Child was diagnosed in 2019 and refractory epilepsy diagnosed in 2020. The child has severe learning difficulties and suffers from anxiety which prevents them from participating in normal day to day activities in line with their peers.

89. The situation of the family is complex and places them under a great deal of pressure, especially over the last two years coping with the many difficulties caused by the pandemic. The Child continues to be the subject of medical assessment and investigation, with the potential of making the Child's condition even more complex. The Child has a rare and recently diagnosed condition, the full effect of which is not yet known and the attempts to clarify the Child's diagnoses are still ongoing.

90. The case has a long history and we have read the voluminous documentary evidence and tried to understand the events and their chronological sequence as the situation developed. It is fair to summarise that for the Parents there was a lot going on in terms of concerns about the Child's school placement, the educational provision delivered at the School, an appeal against the contents of the statement in 2021, as well as the concerns about the Child's access to education whilst the Child remained at home.

91. The first claim we considered very carefully was the allegation that the Child had been treated less favourably than another because of their disability. We have identified that the appropriate comparator would be a child who was a pupil at the School who was also self-isolating at home but did not have the Child's disability. Neither of the legal representatives addressed the issue of the comparator in detail, RB1 Barrister's position being that there could not be a comparator because every pupil at the School is disabled. The relevant case law provides that the comparator does not have to be an actual person and that the comparator can be a hypothetical one.

92. We concluded that for the purposes of the comparison, the appropriate comparator is a pupil at the School without a disability, who is self-isolating and receiving education at home.

93. Evidence was provided that although the school had remained open for its most vulnerable pupils throughout the pandemic, the school had provided home education packages for all pupils who were unable to attend school and were self-isolating. By September 2021, all the other pupils had returned to school and the Child remained the only pupil who was self-isolating at home. It was the evidence of the First Responsible Body that the school's home education programme had been commended by Estyn during 2020.

94. The relevant period of claim was from January 2021 to the end of the academic year, and then a second period from September to the end of February 2022.

95. It is not in dispute that the school did not make any educational provision for the Child from January to early March 2021. The First Responsible Body accepted that neither educational provision nor communication was made with the Child or the Child's family from January to March 2021.

96. For the purposes of the legislation, in order to make a finding of discrimination against the First Responsible Body, the less favourable treatment must be because of the Child's disability. It is that link which we have been unable to find in the evidence. The Parent had made it clear to the school on a date in November 2020 that they should not have direct contact with the parents and the school had interpreted this as being a direction that they should not make contact with the parents at all. The reasons for the failure to make educational provision was therefore the poor or non-communication by the school, as a result of the Parent's direction and not because of the Child's disability. Another child without the Child's disability, whose Parent had directed that there should be no direct communication with the family would have been treated in the same way. Equally, a child without the Child's disability whose Parent had not directed that there should be no direct communication with the family would have been provided with the same educational provision as the Child subsequently received from the school. Consequently, we cannot conclude that the First Responsible Body unlawfully discriminated against the Child because the Child's treatment was not because of their disability. We concluded that the evidence did not support the conclusion that the Child had been treated less favourably than the comparator by reason of their disability.

97. In relation to the Second Responsible Body, we are satisfied that they did discharge their obligation in relation to the Child by providing the placement named in the Child's statement and delegating responsibility for making the relevant educational provision to the school. The Second Responsible Body put in place the necessary steps to carry out the annual review on a date in February 2021 and to direct the implementation of a home education package from a date in March 2021. The Second Responsible Body did not therefore unlawfully discriminate against the Child because of their disability.

98. In relation to the second period under consideration from the start of the autumn term in 2021 to the end of February 2022, the evidence from the correspondence alone demonstrates that the school had regularly provided planned work for the Child with personalised timetables sent to the Child's home from the beginning of term to the date on which the Parent once again directed that correspondence with the family should cease. The incident relating to the delivery of ingredients and resources was an exceptionally low point in the relationship with the school, with very serious allegations of criminal behaviour, harassment and intimidation.

99. We found the Parent's actions and evidence particularly disingenuous in this context when, having alleged that the school's visit to their home was a form of "we know where you live" intimidation by them, the Parent was at the same time undertaking their own investigation to uncover the home address of the Child's former class teacher, the Child's class teacher so that the Parent could write to the Class Teacher to ask about the allegations made about the Parent's conduct directly. The Parent sent the letter to the Child's class teacher's home address on a date in October 2021 and parallels could be drawn between the allegation of intimidation made by the Parent to South Wales Police on a date in September and the sending of a letter to the Child's class teacher's home address on a date in October 2021.

100. The Parents do not appear to dispute that the timetables were received: their issue was with the contents of the timetables and the lack of resources provided and support for the family.

101. We have read the planners carefully and note that they were sent with an instruction that if there were any queries or questions, then they should be directed to the school. We were not presented with evidence of the extent to which the Parents asked the school for support or assistance in delivering the contents of the planners to the Child although there was feedback to the school at least to the first planner for the week commencing a date in March 2021. Unless they were informed, the school could not be expected to be aware that the family was struggling to deliver the Child's provision. We have concluded that the Parents did not contact the school to explain their issues with the planners or the lack of resources, or the need for IT support and they were given the opportunity to do so in every email sent covering the delivery of a week's planned activities.

102. In relation to the quality of the provision made for the Child, it may be that the provision could have been organised differently or better, but it remains that the

provision of education was made available to the Child during the period in question, although it did not satisfy the parents in quality, quantity or support. We could not conclude from the evidence presented that the Child was treated less favourably than another child in the same situation because the school's evidence was that the same arrangements were made for all pupils who self-isolated at home.

103. The First Responsible Body having complied with the Second Responsible Body's direction to deliver remote learning for the Child, from March 2021, they had undertaken their statutory responsibility to ensure provision was made. The annual review meeting was arranged to comply with the Parent's expressed wish to defer to February 2021 and provided an opportunity to explore the provision described for the Child in the Child's statement of special educational needs. We were satisfied that the Second Responsible Body encouraged the reinstatement of direct communication between the school and the parents and directed the school to make remote educational provision for the Child. This arrangement started on a date in March 2021 and continued until the end of the academic year. The Second Responsible Body also sought to make arrangements for ensuring the Child's return to education at school but the planning was delayed because the Parents revoked consent to call a multi-agency planning meeting.

104. During the second period of claim from September 2021 to February 2022, since we have found that the school delivered educational provision from September to the date when the Parent again stopped direct communication, the Second Responsible Body cannot be implicated in a failure to provide education and continued to deliver planners and commenced arrangements at the family's request to reinstate the Child into school based education, when the family was ready.

105. From November to February 2022, the Parents confirmed that they wished the Child to transition back into school once the Child had been fully vaccinated. We noted that in correspondence earlier in 2021, the Parent had requested that the Child should be transitioned back into school commencing eight weeks later when the Child had had an opportunity to familiarise with their new medication. The reasons for the delayed return to school therefore changed over time. As soon as the Parents confirmed that they wished to transition the Child into school, the transition process was commenced immediately, with a visit at the end of November, very shortly after the emails from the Parent confirming the intention to return the Child to school and further visits were planned although some were not taken up. We have concluded that the provision was made available to the Child to access as and when the family wished and the school could not have engaged differently given the grave difficulties in the relationship with the Parents. The evidence did not support the conclusion that the Child was treated less favourably than the notional comparator. The Responsible Bodies did not therefore discriminate against the Child because of the Child's disability during the second period of claim.

106. In relation to the second claim of failure to deliver virtual lessons to the Child, the picture is a complex one, in respect of which the Child's disability has played no part at all. The decision has set out in paragraphs 61 – 79 above, the detailed

sequence of events leading up to the first virtual session and the missing of the first planned session on a date in May 2021. It presents an object lesson in the risks of email correspondence, the difficulties where direct communication is not available and the ease with which misunderstandings can happen.

107. From reading the correspondence and analysing the sequence of events, we have concluded that the Head of Education misinterpreted the Parent's email of the date in May, making reference to the link being sent "for the session on Monday" as suggesting that the session would be held on Monday, instead of Wednesday, rather than the link being sent on Monday. The Parent, for their part, failed to respond in time to RB1 Witness's email to confirm that the arranged session at 11am on the date in May was agreed, because the Parent had previously objected to the session proceeding, on the basis that it would not be a one-to-one session for the Child and their teacher, without an LSA present.

108. On the morning of the date in May, the Parent acknowledged receipt of RB1 Witness' email but did not confirm, as requested, that the session was effective. It is therefore disingenuous to rely on the late sending of the link by the Head of Education at 1pm that day, to suggest that that was the reason why the session did not take place. The failure was not for a want of trying on the part of the school, but an understandable misinterpretation of separate email threads between the school and parents. We conclude that the failure was not because of the Child's disability and was not in any way discriminatory. Since the school offered to set up and tried to deliver virtual sessions for the Child commencing from March 2021, we conclude that this is not a meritorious claim.

109. In relation to the Second Responsible Body, we conclude that the school having primary responsibility for delivering the provision, the Second Responsible Body had appropriately carried out its statutory responsibilities in relation to the Child's education by delegating the responsibility to the school named in the statement and encouraging the resumption of direct communication between the parents and the school.

110. In relation to the third claim, the Parents did not provide any evidence to support the assertion that IT equipment and resources were required and more importantly, that they had communicated a request for equipment or support to the Responsible Bodies. Where the evidence did not show those issues to have been raised with either Responsible Body, the claim must fail.

111. Since we did not make any finding of unlawful discrimination, it is not necessary to go on to consider an appropriate remedy.

Order: *The claims are dismissed.*

Dated July 2022