



## **DECISION**

<b>Date of Birth:</b>	2008	
<b>Claim of:</b>	The Parent	
<b>Against:</b>	The Responsible Body of the School	
<b>Date of Hearing:</b>	2020	
<b>Persons present:</b>	The child	<i>The Child</i>
	The parent	<i>The Parent</i>
	The second Parent	<i>The Second parent</i>
	Headteacher of the School	<i>Headteacher</i>

### **Introduction**

1. This is a decision of the Panel of the Special Educational Needs Tribunal arising out of a claim issued by a parent of the Child, a child who was born in 2008. For the purposes of this decision, the child is referred to as the Child. The parent is the Parent. Where relevant, the Child's second parent, is referred to as the Second Parent. The Child's birth parent is the Third Parent. They have consented to the Parent commencing the claim on the Child's behalf but has taken no part in the proceedings or indeed in the hearing.

### **Background**

2. The claim is that the School, an independent school for children of secondary education age, discriminated against the Child between a date in November 2019 and a date in March 2020. The claim was issued

on a date in May 2020. Were the incidents on a date in November 2019 taken in isolation, then the claim being commenced on a date in May 2020 would have been commenced outwith the statutory time limit of requiring discrimination claims to be commenced within six months, as is required by Schedule 17 of the Equality Act 2010. For the purposes of this decision, the Panel adopts the reasoning that the discrimination amounted to a course of incidents between a date in November 2019 and a date in March 2020, the date upon which the last incident alleged took place – namely the day upon which the Child sat the entrance exam for a second time.

3. The circumstances that led to the claim may briefly be put as follows. The Child is now twelve years of age but at the time of the first incident on or about a date in November 2019, they were a pupil at the School. There is no dispute between the parties that the Child has Attention Deficit Hyperactivity Disorder, Tourette's Syndrome and Dyslexia. All of these are disabilities within the definition of the Equality Act 2010 which are entitled to the protection of the Act.
4. In order to gain admission to the School, the Child was required to undergo an admission examination. It appears that although it is alleged that the Preparatory School made the School aware of the Child's disabilities, no reasonable adjustments were made to assist them in sitting the entrance examination. They were not provided with additional time to complete the assessment; they were not given a prompter or reader to assist them and no auxiliary technical learning aids were provided for them. It is further alleged that there was a failure also to

provide the Child with a separate space to take the examination as being in a room full of other pupils would have an impact on his disabilities.

5. No explanation was apparently given at the time as to why reasonable adjustments were not made for the Child's benefit. In his Claim Form, the parent sets out a number of adjustments they believed should have been made and why these were reasonable and there is no detracting from those by the responsible body.
6. After the initial assessment, a complaint was raised with the School and as a resolution to the complaint made by the Parents, the Child was given a second opportunity to sit the examination. In advance of this opportunity, a number of arrangements were put in place by the school and for reasons which are unclear, these were departed from by the classroom teacher, who was supervising the Child's examination.
7. It is quite clear from the documents provided that the whole process caused significant distress to the Child, including issues of anxiety that arose over the Christmas 2019 period and it is suggested in the Parent's Case Statement that the Child's anxieties continued after the final incident.
8. In the documents provided to us, we have seen various documentation disclosed and we have, at page 26 of the bundle, a very poignant description of how the Child themselves felt after the examination process.
9. The claim was commenced on a date in May 2020. Directions were given in relation to evidence in June 2020 and the matter proceeded to a hearing in September 2020.

## **The Law**

10. The law relating to this claim is contained in the Equality Act 2010.

Section 6 of the 2010 Act provides the definition of a disability as being

“a person (P) has a disability if:-

- (a) P has a physical or mental impairment; and
- (b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities”.

10. There is no issue between the parties in this case that the Child has a disability within the meaning of the act and is therefore entitled to the protections contained in it.

11. Part 6 of the 2010 Act deals with discrimination within an educational setting and Chapter 1 in particular of Part 6 deals with issues relating to schools.

12. Discrimination arising out of a disability involves a situation where a pupil has been treated unfavourably because of something arising in consequence of their disability and involves the Claimant being put at a disadvantage. It is possible to prevent unfavourable treatment by making reasonable adjustments as is required by Section 20 of the Equality Act.

13. Making Reasonable adjustments means that it is possible to avoid unfavourable treatment and therefore avoiding the discrimination.

14. The burden of proving disputed facts is upon the person relying on those disputed facts. In this case the disputed facts are relied upon by the Parent. It is therefore for the Parent to prove those facts. The facts have to be proven on the balance of probabilities – namely that something more probably happened than not.

### **Issues in dispute**

15. The only issue in dispute in this case is whether there was discrimination in relation to the first attempt at the entrance examination in November 2019 – whether in essence the failure to make reasonable adjustments led to unfavourable treatment. The Responsible Body accept that there was a failure to make reasonable adjustments but that this was innocently done. The Claimant alleges that the failure was caused by a systemic issue at the school. Although we do resolve the issue, it has minimal bearing in the remedies in the case as the school had already conceded that the events of the second entrance exam did amount to discrimination.

### **Issue not in dispute**

16. Both the Claimant and the Responsible Body accept that when the school teacher departed from the agreed protocol relating to the Child's second entrance examination in March 2020 and required them to supervise a class whilst also invigilating the exam, this amounted to the Child being treated less favourable due to his disability and this therefore amounted to discrimination.

### **Evidence**

17. As indicated above, we received a very comprehensive Case Statement prepared by the Parent. This incorporated information as to the Child's feelings after the admissions process but also various emails between

the school and the Parent and Second Parent between the first and the second incidents. We have, for example, an email at page 30 of the bundle from the Headteacher to the Parent and Second parent setting out the proposed reasonable adjustments to be utilised at the re-sitting of the exam.

18. Also in the bundle, we have a number of documents disclosed to the Parent and Second parent pursuant to GDPR disclosure requests. Included in that disclosure is confirmation that the Preparatory School had disclosed to the School the fact that the Child required reasonable adjustments to be made. This was not disputed during the course of the evidence. Our attention was drawn to a Minute relating to a meeting on a date in September 2019 where the attention of the School was drawn to the Child's disabilities and a reference to the fact that the Preparatory School believed that the Child would "be fine" without adjustments being made. It was on the basis of that discussion that the original examination proceeded.

19. The Parent took the Panel through his Case Statement, highlighting various documents to us and he presented a vigorous and comprehensive case on the Child's behalf. They invited us to find that there was a systemic failure in the school which led to the discrimination. The Parent invited us to consider the fact that the systemic failure extended into the second occasion when the classroom teacher felt able to depart from the agreed procedure and carried on teaching their own class, thereby discriminating against the Child and his examination. Further, the Parent invited us to consider the fact that the Primary School

should have shown the most recent psychological assessment carried out in relation to the Child to the School and if the Primary School failed to disclose that report, that the School should have made enquiries of its own volition to establish the degree of the Child's disabilities and how they would impact on his examination performance.

20. The Headteacher gave evidence on behalf of the school. They had overall responsibility at all material times for the supervision of the examination process. The Headteacher was candid in the extreme in admitting at the outset of the hearing that the Classroom Teacher had departed from the agreed protocol in relation to the Child sitting the examination and there was no good reason why this happened although they did not take into account that they had the responsibility of teaching a group of pupils. The Headteacher told us that in previous years, they had held regular meetings with the Headteacher of the Preparatory School where issues relating to potential disabilities were flagged up and they confirmed that in previous years, a reader and a scribe had been provided to other children. They were aware that a note had been prepared by the Preparatory School after the meeting on a date in September. They did not consider the note to be an accurate Minute. They had never been asked to approve the Minute and had never been invited to make comment and amendment to it. The Headteacher was candid in admitting that the normal process of administration did not function at all in relation to the first incident of discrimination and as a result of the failings in the process, parents were now encouraged to apply directly to the School rather than rely on the Preparatory School to

facilitate admission to the School on their behalf. The Headteacher told us how the internal processes had now been changed and they were candid in admitting that there were difficulties and tensions in the relationship between the Preparatory School and the School.

21. When asked by the Parent why they had not challenged the Headteacher of the Preparatory School in relation to their “they will be fine” comment in relation to the Child, the Headteacher stated that they did not challenge the comment because they respected the Headteacher of the Preparatory School’s views. The Headteacher confirmed that the school does make special arrangements following JCQ guidelines, although they are not required, as an independent school, to follow it. The Headteacher told us that in addition to the removal of the preparatory school’s involvement with the admissions process, the application form now asked whether reasonable adjustments were required and asked for details of any additional learning needs.

### **Analysis**

22. At the outset of the hearing, we heard from the Child. We felt that the Child was able to make us quite aware of his disappointment and anxieties as a result of what happened at the School. It was quite clear to us what the effect of the issues had been upon them and we found the Child to be a mature individual who was clearly attuned to issues surrounding the school and their impact upon them. We were very impressed with the Child and would wish for the Parent and Second Parent to tell them this.



23. It is the Panel's very clear hope that the Child will be able to flourish in his secondary education in a secondary setting that can provide for his additional needs and provide appropriate levels of challenge.
24. We fully appreciate why the Parent would wish us to find that there was a systemic issue in relation to the first incident of discrimination. We, however, do not agree with them that the system itself was a system that discriminated against the Child. There was a system in place which should have been followed and it seems to us that the problem in this case arose out of the incident on a date in September 2019 – the error was a human one. The system would have worked had the humans followed it – in the way that it appears matters were followed up in the past.
25. It seems to us that the problem in this case arose out of the incident on a date in September 2019. The Preparatory School should not have said to the Headteacher that "they will be fine". Similarly, we do not believe it was sufficient for the Secondary School to rely on the Headteacher's respect towards the Headteacher of the Preparatory School in making arrangements for the examination. There should have been a follow up. It seems to us that the difficulty arose from a failure to follow up on the initial disclosure that the Child had issues. A full investigation of that disclosure would have quite clearly, in our view, have led to an arrangement being put in place involving reasonable adjustments being made. The reasonable adjustment in November would have been those that were put in place for March and should have been followed by the Classroom Teacher.

26. It seems to us also that there was a failure to disclose by the Preparatory School the Educational Psychologist's report in relation to the Child and a failure by the School to follow up on what documentation, if any available, would have substantiated the various diagnoses in relation to the Child. The failure to disclose compounded the difficulties and prevented the Child from having a fair opportunity to sit the entrance exam. The responsibility is not solely that of the School.
27. We ask ourselves the rhetorical question of how did the School know that the Child would be "fine" without seeing source documentation and investigating those matters further? We say again - It seems to us that in relation to the November 2019 incident, the failure was that of individuals rather than of the system. A system was in place, which may have been defective in some aspects. Had the system been complied with, however, reasonable adjustments would have been made. We therefore find, on the balance of probabilities, that there was a failure to make reasonable adjustments in relation to the November 2019 entrance examination.
28. We find that those failures were caused by human error rather than systemic problems. We note that the school have changed their admissions procedures. This will hopefully avoid a repetition of the Child's difficulties for other children in the future.
29. We are satisfied that there was a system that worked well in the past but unfortunately the failure in November 2019 directly impacted upon the Child. The Panel is pleased to note that the reliance on the Preparatory School has now come to an end and that applications are now sent

directly to the School. This will also lessen the possible presumption on behalf of some parents ( not necessarily in the instant case) that transfer to the School is a semi-automatic process. We also are pleased to note that the application form to the School specifically asks for details of any additional learning needs and raises the issue of reasonable adjustments. Were these measures not in place, the Panel would have recommended that some method of signposting individuals to reasonable adjustments would have been required in the admissions process and it seems to us that a provision on the application form is the most appropriate manner of achieving this. Similarly, we would strongly recommend to the school that there be no reliance in the future on the information and comment of the Preparatory School. We would also suggest that there be a clear procedure in place whereby Minutes of meeting such as that on a date in September are minuted and that an agreed note and list of action points is agreed to avoid the human error that occurred in this case and the lack of information gathering happening again in the future.

30. For the avoidance of doubt, we agree with the submissions made by all parties that there was no good reason why the Classroom Teacher departed from the agreed set of arrangements put in place for the re-sitting of the examination. The Child was entitled to be protected from future anxieties in March and in that respect, the school failed them. The Headteacher who had arranged the reasonable adjustments was entitled to rely on the teacher and frankly, the Panel struggles to understand why the teacher did what they did, although we were still not

clear why they had teaching duties. It seems to us that this incident in March was a further example of a lack of communication and this further lack of communication led the school into a further incident of discrimination.

### **Remedies**

31. We have considered carefully the remedies that we should order in this case. We order that the following be done as remedial action.

- (i) The school shall write a letter of apology to the Child.
- (ii) A separate letter of apology should be sent to the Child's parents.
- (iii) The Child and his parents should be given an opportunity to have a meeting with the Headteacher, at which the Headteacher, on behalf of the school, should offer a verbal apology to the Child.
- (iv) A copy of the amended Admissions Policy should be made available to the Parent. Although there is no suggestion that the Child would now wish to be a pupil at the school, we hope that the Parent's concern that the incident should not affect another child in this way in the future will be addressed by having sight of the new arrangements now in place.
- (v) The school's Senior Leadership Team, the Classroom Teacher and the Trustees should undergo discrimination training. We would suggest that the school obtain information regarding this training from the Local Education Authority which supports maintained schools where the School is located.

- (vi) An amended protocol be drafted to manage those case where reasonable adjustments are to be made, avoiding the need for a teacher to supervise a class of students when also invigilating an entrance examination.

**ORDER**

The claim is proven.

The Responsible Body shall take that action which is highlighted under the Remedies Section above.

**Dated October 2020.**