



## DECISION

**Date of Birth:** 2018  
**Appeal of:** The Parent  
**Type of appeal:** Disability Discrimination Claim  
**Against:** The Responsible Body  
**Date of hearing:** 2022

<b>Persons present:</b>	The Parent	<i>Parent</i>
	Parent Witness	<i>Health Visitor who attended part of the hearing.</i>
	Responsible Body Counsel	<i>RB Counsel</i>
	Responsible Body Witness	<i>School ALNCo</i>
	Responsible Body Witness	<i>Headteacher</i>
	Responsible Body Witness	<i>Class Teacher who Attended part of the Hearing.</i>
	Responsible Body Witness	<i>Nursery Assistant who attended part of the hearing.</i>

### Introduction

1. The Child was born in 2018 so is now aged four. From April 2021 until November 2021, he attended a School. The Parent, the claimant, worked at the same school on a voluntary training placement. The Parent removed the Child from school in November 2021 as a result of an incident which occurred the previous day. The Parent asserts that during a conversation with the Headteacher, the Child was excluded and that the Child was the subject of discriminatory language. What was said in that conversation is disputed and it was necessary for us to make findings of fact in that regard.
2. The Child is described during their time at the School as having speech and language delay and difficulties with their attention. Staff were concerned that the Child had additional learning needs and in fact the Child had arrangements in place for SALT input. In their case statement, the responsible body accepted that the Child has ALN and is disabled for the purposes of the Equality Act 2010. We agree.

## Preliminary

3. The filing of evidence in this case did not follow the usual straightforward course and directions orders over a period of time provided for further evidence to be filed. The hearing of this case started in September 2022, but was adjourned for the reasons set out in our order of the same date. When we started the adjourned hearing in November 2022, we had before us detailed evidence from the Parent and a number of witnesses. What we did not have was the Parent themselves. The Parent had attended the hearing in September 2022 by telephone, however, during exchanges of correspondence with the tribunal office after that hearing, the Parent confirmed that they had decided not to attend the adjourned hearing. The Parents letter in that regard is set out in the second supplementary bundle (p8).
4. In that letter the Parent refers to their conversation with the Headteacher in November 2021, which is highly contentious. If what the Parent says is true, the Headteacher was at best, dismissive and uncaring and at worst malicious in their attitude to the Child. The Parent says of that conversation in their letter, that as far as they can see, the whole case is based on one person's word against another's. The case is considerably more complicated than that, but the Parent nevertheless highlights a matter of fundamental importance. The Parents allegation is against a Headteacher of many years' experience in supporting children with additional learning needs, whose reputation would be damaged immeasurably if we were to find that what the Parent alleges is true, and our approach to remedy is inextricably linked to our finding as to what happened. This is not a matter which we could gloss over or avoid.
5. Further, the Parent alleges dishonesty amongst members of staff, including writing notes retrospectively, and forgery of documents. The Parent alleged that authorship of the class diary note for November 2021 was ascribed to a Nursery Assistant, but that the Nursery Assistant did not write it. In short, the Parent alleges conspiracy amongst school staff to deceive. The Parent told us at the hearing dated September 2022 that the Nursery Assistant had told the Parent that they did not write that diary note. The Parent also doubted the veracity of the note for November 2021 because of what the Nursery Assistant had said.
6. The application of the tests for discrimination can only be founded on facts, either admitted or proved, and we were faced in this case with a serious factual dispute. In order to assist in determining credibility, we had to look wider than those few moments of the conversation which took place in the Headteacher's office in November 2021. As far back as May 2022 it was indicated in a directions order that the factual dispute in this case was fundamental and that the process of determining what took place in November 2021 would be highly dependent on our conclusions in respect of reliability of the witnesses. That order followed an indication from the Parent that they was unable to attend the hearing as listed, and a request that it go ahead in the Parents absence. The Parent had also at that point rejected the possibility of postponing the hearing

to another convenient date. At a later date the Parent confirmed that they would attend the hearing.

7. In order to keep this case proportionate within the meaning of the overriding objective we decided that we should focus on the events of September 2021, and two dates in November 2021.

#### September 2021

8. In the Parents statement in the supplementary bundle (p11), the Parent says only this in respect of September 2021.

*“The Child was happy going into class and the Child did bump their ear on the way in, I was on placement and said if the Child did not settle I would take them home. They suggested Calpol and see how the Child got on. Teacher came to tell me the Child had a really good morning and I collected the Child at 11”.*

9. At the hearing before us in September 2022, the Parent went further. It was pointed out to the Parent that we wanted to be very clear about what, in the contemporaneous notes provided by the school, the Parent took issue with. The Parent drew our attention firstly to the note for early September 2021 which the Parent said was not true, and then to the incident in late September 2021. The Parent said to us that the Child bumped their ear on the door frame as they made their way into school, and that a Nursery Assistant was not watching the Child throughout the entire time. We indicated when we considered directions that we would not enquire into the incident in early September 2021 as it would be disproportionate.

10. We turn firstly to the class note for late September 2021 which says as follows:

*“The Child came in screaming today and holding their ear. I called the Parent back and said that I think the Child has earache. The Parent said that the Child must have bumped their ear on the way in and the Nursery Assistant said that the Child didn't. The Parent continued to say that the Child must have bumped their ear when the Nursery Assistant brought them in and the Nursery Assistant said the Child didn't as the Child was holding the Nursery Assistant's hand and the Nursery Assistant was talking to the Child and would have seen the Child walk into the door frame. The Parent asked if I could give the Child Calpol which was administered at 8.30 a.m.*

*The Child has been pushing a lot today and would not share any toys. The Child snatched the toys from the children and then would throw them across the classroom. The Child has started screaming quite loudly I am not sure if it is their ear that is hurting, I spoke to the Parent and they said that the Child has started doing that at home too. (main bundle p227)*

11. That note was written by the Class Teacher, and we have in the second supplemental bundle, the Class Teacher's statement (p18) and that of the Nursery Assistant (p29), both of whom were directly involved. It is not

necessary to cite their statements *verbatim* but they describe a sequence of events from the Child walking into the school entrance towards the Nursery Assistant, who was holding the door open with their back, and then starting to cry and pull at the Childs ear as the Child walked through towards the Class Teacher. The Class Teacher describes the Child as screaming and pulling at their ear in the classroom. This is entirely consistent with the Class Teacher's contemporaneous note of the Parents comment when they spoke again, about 20 minutes later and the Class Teacher pointed out that the Child had been screaming loudly and the Class Teacher wondered if the Childs ear was hurting. The Class Teacher records the Parent as saying "*the Child has started doing that at home too*".

12. After that morning, there then followed a sequence of emails which only became available to us in the second supplemental bundle (p25-28) and which record in late September 2021. The Parents intention to take the Child to the GP, and just two days later confirmation from the Parent to the Class Teacher as follows:

*"We saw the GP and the Childs ears are inflamed so the GP gave the Child antibiotics"*.

13. The Parent wrote again in early October 2021 to tell the Class Teacher that they had taken the Child back to the GP on Thursday (September 2021) and that

*"(The GP) said the Childs ear was still red but that the Child was fine we then spent Saturday night in hospital, the Childs got septic tonsillitis and ear infection"*.

14. Firstly, we note that the Parent confirmed that both ears were inflamed and were treated with medication, and secondly that the infection still troubled the Child some nine days after the Child first began crying and tugging at their ear. These e-mails are entirely consistent with what the Class Teacher and Nursery Assistant both say and support our conclusion that in late September 2021, the Child was in the early stages of infection which was causing them distress, both at home and at school; which was treated with antibiotics, and for which we have evidence from the Parent. Our conclusion is reinforced by the Class Teacher's contemporaneous record, which we accept as accurate, of the Parents comment that the Child had started screaming at home also.

15. The Childs ear pain was not caused by banging it on the door frame because that did not happen, and we accept the evidence of the Nursery Assistant in that regard. We reject the allegation by the Parent that the Nursery Assistant was not watching the Child properly throughout the time the Child made their way in. We accept what the Nursery Assistant says at paragraph 14 of their statement. We also reject the Parents assertion that the Child was not distressed. Doubt in respect of that is dispelled not just by the descriptions of events from the Class Teacher and the Nursery Assistant, but from the fact that the Child continued to be distressed in class and had to be given Calpol about twenty minutes after arriving. We note also, and we accept as reliable

and corroborative of our conclusion, the class notes for September 2021, which show that the Child continued to be unsettled and was screaming and pulling at their ear.

16. We remind ourselves at this point that the Parent makes serious allegations of dishonesty and forgery against professionals charged with a public duty to provide education services to a disabled child. We are satisfied in respect of all matters relating to September 2021 that the Class Teacher and the Nursery Assistant were honest, reliable and accurate in the evidence that they provided and we reject as wholly without foundation, the allegations of dishonesty made by the Parent against them. We were troubled in particular by the subtle but significant change in the Parents description of events. In the contemporaneous note of the first conversation with the Class Teacher in September 2022 the Parent is recorded as saying more than once that the Child "*must have bumped their ear*", despite the Class Teacher twice correcting the Parent. We accept the evidence of the Class Teacher that they made that note at the time, and the only inference to be drawn from the Parents reply is that the Parent did not see the Child walk through the door. Then, before us, the Parent was clear that the Child bumped their ear on the door frame and added that the Nursery Assistant was not watching throughout the entire time. Not only is the Parents allegation at odds with the evidence of two witnesses who we have found to be honest and reliable, it was at odds with the contemporaneous note and the contents of the e-mails referred to above. The Parent was well aware when they appeared in front of us in September 2022 that the Child had an ear infection at the relevant time. The Parent had described the Child as having been screaming at home prior to coming to school, yet the Parent said nothing about that and maintained their assertion that the Child had bumped their ear and that the Nursery Assistant wasn't watching the Child properly.

#### The events of November 2021

17. The Parent took issue with whether the Child was sent into school with a wet nappy but went on to tell us that they doubted the rest of the contemporaneous note for that day. The Parents suspicion was based upon what they had been told by another Nursery Assistant. The Parent makes merely a broad brush assertion which has to be seen against a handwritten contemporaneous note produced by the first Nursery Assistant who tells us that they prepared the note for two dates in November 2021 with the second Nursery Assistant in the unexpected absence of the Class Teacher. We repeat, that allegations of dishonesty and forgery are extremely serious and we make plain that we have no doubt that the record provided by the first Nursery Assistant is accurate and reliable. There is no evidence whatsoever to cast doubt on the Nursery Assistant's honesty. Further we have no doubt that the second Nursery Assistant sat with the first Nursery Assistant, as the latter described, to agree the content of the note, and indeed the content of the note for the second date in November 2021. We express no view as to any discussions which took place between the Parent and second Nursery Assistant as we heard no

evidence in that regard, but we are satisfied that both Nursery Assistants are the joint authors.

#### The conversation of November 21

18. We turn now to the most serious of the factual matters which are in dispute. In the absence of witnesses to the private conversation between the Headteacher and the Parent, we look to the wider evidential picture. We have already made findings in respect of allegations which the Parent has made against the School staff and we regard those findings as significant makeweights in the balancing exercise which we must undertake.
19. We found the Headteacher to be open and persuasive. The Headteacher categorically denied the allegation levelled at them by the Parent. We take into account not only the Headteacher's experience with ALN children, but their standing, the positive ESTYN review in respect of standards, particularly standards of leadership, and the inherent improbability that a Headteacher would make such offensive remarks to the parent of a disabled child, but these factors do not in themselves tell us where the truth lies.
20. In September 2022, The Parent did not challenge the Headteacher about the facts of their conversation, and the Parent chose not to attend on the adjourned date, despite having been served with the new evidence from the Class Teacher and the Nursery Assistant. Those matters are not of course determinative, but what does weigh heavily against the Parent is our conclusion in respect of the Parents allegations about matters of September 2021.
21. Accordingly we accept the evidence of the Headteacher in respect of their conversation with the Parent on the morning of November 2021 and we expressly reject the allegations made by the Parent. The dividing line between the two versions is not insignificant and could not possibly be a matter of mistake.
22. Doubt, if there were any, about the Parents lack of honesty is dispelled by the change in their assertion that the Child was upset in November 21 because the Child hadn't been given toast, to an allegation that the school deliberately refused to give it to the Child. It is a change which again is subtle but significant as the Parent alleges that the failure to give the Child toast was the cause of the Childs dysregulation that morning.
23. In the Parents case statement of March 2022 (main bundle p22), the Parent simply says that they told the Headteacher that the Child had been given a crumpet on the morning of November 2021 instead of the Childs usual toast, but by the time the Parent filed their second statement the Parent had of course seen the contemporaneous notes which had been written up by the Class Teacher, from the handwritten note of the Nursery Assistant, who records as follows:

*“The Parent said there was no toast for the Child for breakfast so I asked if the Parent wanted me to give the Child a snack that the Parent had packed in the Childs bag which the Parent said yes to” p229*

24. In the Parents addendum dated May 2022 the Parent says that In November 2021 they provided a new loaf of bread but was told that the children would be having crumpets the next day. The Parent expressed concerns to the cook who, the Parent says, replied by saying the Parent was making their child fussy. The change in the Parents evidence turns an ordinary sequence of events into a deliberate refusal by kitchen staff to give the Child toast when a loaf was available. Not only did the Parent not mention this alleged conversation to either the Nursery Assistant or the Headteacher on the day, the Parent said nothing about it in their case statement, despite alleging that the failure to give the Child toast was the very cause of the Childs dysregulation and the events which followed on the morning of November 2021; events which were upsetting for the Child, the Parent and school staff. The RB Counsel expressly invited us to conclude that what the Parent says of their conversation with kitchen staff was not true and we do so conclude.

### The History

25. Before we turn to the application of the tests for discrimination, we feel obliged to dwell briefly upon the wider history of the Child at the School. Looked at in the round the Parent is alleging a catalogue of failures by the school to meet the Childs needs, both by design and default. Although the Parents absence meant that there was no opportunity for the Parent to be cross examined by the RB Counsel, we have the benefit of a detailed response by the Headteacher to that alleged history and we accept what the Headteacher says as accurate and reliable. We rely on two examples in particular to illustrate our concern at the approach of the Parent.

26. In the Parents statement of May 2022 in reply to the responsible body's initial evidence, the Parent says at p8, point15 (1<sup>st</sup> supplemental bundle), that *“The Child was only 2 and 1/2 when they started at the School. We had involvement from SALT which we requested as we had concerns regarding the Childs speech delay. **We had no other concerns regarding other areas of the Childs development**”* (The Parent emphasis). The Parent goes on in the next paragraph to say that *“Due to COVID the Child had not attended a nursery for over a year so we were unaware of any other difficulties as these behaviours weren't shown at home or in social situations”*. Yet we have two letters which reveal significant parental concerns about the Childs development. The first dated April 2021, two weeks prior to the Child starting at the School, to the Community Paediatrician at a General Hospital, who identifies concerns related to the triad of impairment, which is an early indicator of autism, with supportive observations from the parents, (p241 main bundle) and secondly, a letter sent to the school in August 2021 by the Parent which sets out a number of their concerns about the Childs developmental delay, lack of impulse control and poor response to teaching and guidance etc. (p284 main bundle).

27. At p5, point 19 the Parent alleges that they “had been trying to make an official complaint since November but I was totally ignored until January. The Headteacher points us to the e-mail they received in November 2021 from the School complaints department who says:

*“I have spoken to the Parent today and advised the Parent that they need to have a discussion with you (in line with stage one of the complaints policy) in the first instance.”*

28. It is manifestly untrue that the Parent was ignored until January, just as it is manifestly untrue that the Parents had no concerns about the Child save for speech delay in April 2021. Our conclusions below in respect of discrimination do not turn on these findings but the Parent has put in issue the honesty and professional integrity, not just of the Headteacher and all of their colleagues at the School, but even the staff at the School head office. Our findings, alongside our findings in relation to the matters considered in detail above, lead us to the conclusion that we must reject as unreliable the historical narrative as alleged by the Parent. We turn now to the question of discrimination.

#### Was there discrimination?

29. The question of discrimination in this case can be broken into two distinct areas, firstly, the actions that were taken or not taken prior to the morning of November 2021 and the approach of the Headteacher in the conversation which took place in their office.

30. The school had undoubtedly put in place measures to support the Child as a result of the Child's additional needs: the Child had 1:1 support available, there was an arrangement for input from speech and language therapist, sensory strategies were in place, and the school supported referrals for additional assessment, but we have to ask ourselves whether the day-to-day actions of the school satisfy the test for reasonable adjustments.

#### Reasonable adjustments.

31. The RB Counsel posed a question in closing: what adjustments could have been made, as the Child's needs in November 2021 were out of the ordinary?

32. The whole point of reasonable adjustments is that schools plan in advance to adapt support, not just to routine matters, but to out of the ordinary circumstances. Waiting until such circumstances arise is little more than fire-fighting, which may or may not be successful. We take into account the very limited professional advice which was available to the school at the time,



however, there was ample indication throughout the Childs time at the School that the Child may easily become dysregulated. There is not a distinct pattern of triggers for the Childs behaviour in the classroom, which reinforces our view that planning in advance to support the Child during unpredictable episodes of challenging behaviour ought to have been a priority. We accept that adjustments were made on a day-to-day basis, for example the movement of LSAs, but in order to form a view about the effectiveness of overall planning we need to consider what was said in that regard by the Headteacher.

33. The Headteacher told us that they believed that they had done enough to support the Child but just prior to that the Headteacher told us that they had not had any meeting with staff in advance of the open day, to consider the Childs needs. The Headteacher said that "*nobody had raised the need for such a meeting*". The Childs school attendance had been disrupted in the Autumn term 2021 and by the time of the incident November 2021, the Child had been absent for four weeks in total, in fact the week commencing a date in November 2021 was the Childs first day back after a three-week absence. The Headteacher confirmed that they hadn't discussed additional support for that week.
34. It is not enough to rely on a flexible response to any particular event. As conscientious and as caring as the staff were, the lack of forward planning amounted to a gap in the school's provision for the Child, which is sufficient for us to conclude that reasonable adjustments were not made for the Child and that therefore the Child was subject to discrimination because of the Childs disability within the meaning of s13 of the Equality Act. We shall return to degree when we consider remedy.

#### The conversation in the Headteachers office

35. We have already determined the facts of this conversation. There are two questions we must ask ourselves, firstly whether the Child was excluded as a result of that conversation, and secondly, was there discrimination arising from the Childs disability.
36. Whether a child is excluded is a matter of fact to be determined by us. Our starting point is that there was no disciplinary aspect whatsoever to the exchange between the Headteacher and the Parent. On the contrary, we accept what the Headteacher told us, both in their statement and in their oral evidence in November 2022 that they was guided by what staff had told them about the extent to which the Child was struggling to cope in the classroom. The Headteachers view was that the following day would be difficult for the Child to cope with in light of the anticipated disruption to the classroom routines by adult visitors, and the Headteacher explained that to the Parent.

37. Despite there being no mention of the word exclusion nor any decision imposed upon the Parent that the Child must not attend school the following day, we have to ask ourselves whether what was said amounted to voluntary exclusion, in other words, undue pressure on a parent to withdraw their child. We took into account the guidance at paragraph 1.14 of the Welsh Government Guidance on Exclusion from Schools and Pupil Referral Units 2019 and we are satisfied that what was said by the Headteacher did not amount to voluntary exclusion. The suggestion from the Headteacher that it might be better for the Child to stay at home was not part of a process to manage unacceptable behaviour, nor was it undue pressure or influence designed to bring about compliance, but rather was a proposal aimed at avoiding dysregulation and distress for the Child. The Child is a child who is highly sensitive to changes in routine and the Child's presentation on the morning of November 2021 and indeed on the previous morning was a sufficient justification for the Headteacher's concern. We accept that the Headteacher acted in good faith.
38. There was no exclusion.
39. It does not follow from this finding that there was no discrimination and we refer to our conclusion in respect of the gap in advance planning. Comprehensive advance planning would have identified various options for the Child in respect of changes to routine. That planning process would have considered how to manage not simply visitors who might be strangers to the Child but things like day trips, sports day, school inspections etc. The final decision would of course always be a matter of judgement in the moment, but a plan including options would ensure that there was no loss of education opportunity for the Child. We express no view on the merits of the possibility of the Parent sitting in the classroom with the Child whenever there might have been predictable disruptions to the Child's routine, but even that was not a matter which was discussed in the Headteacher's office. We recognise that the School did not have the benefits of professional advice, save for the extremely limited SALT input, but that ought not to have been a barrier to round-table discussions with the Child's parents to plan for foreseeable triggers for the Child's dysregulation.
40. The Headteacher told us that they did not explore options any further because the Parent readily agreed to the Child being at home but in our view that is not sufficient to avoid our conclusion that the Headteacher failed to make reasonable adjustments for the Child which were required because of the Child's disability within the meaning of s13 of the Equality Act.

### Remedy

41. It follows from our acceptance of the Headteacher's evidence about what they said in their office on the morning of November 2021, that there was neither disinterest nor malice on their part and our order in respect of remedy addresses the system in place at the School rather than the conduct of the Headteacher or indeed any of their colleagues, who we regard as

conscientious and caring throughout the Childs time at the School. We indicated above that we would return to the question of degree, as it is inextricably linked with remedy. Whilst we have concluded and there was discrimination against the Child because of the Childs disability, that discrimination is at the very lowest point of the sliding scale on which all of the circumstances giving rise to discrimination must sit.

42. That said it is essential that the school implements a policy of advance planning for any child with ALN. It has to be something more than *ad hoc* discussions, and the process must include parents. The RB Counsels suggestion that we should regard the events of November last year as out of the ordinary, suggests that we could see that test as offering some form of guidance for the School in drawing up a support plan, but the necessary approach is rather, to identify what is reasonably foreseeable and to construct a plan around that. Fixed events in the school's timetable which fall outside of the classroom routine are an obvious starting point for a child with ALN whose presentation may indicate a vulnerability to stress from variations in routine.
43. Claim allowed.
44. The responsible body shall write a letter of apology to the Parent which addresses the matters referred to in paragraph 40
45. The responsible body shall review its planning process for children with ALN, and shall take into account this decision, and shall ensure that all staff are made aware of their duties under any plan.

***ORDER: Claim allowed.***

**Dated December 2022**