**Exclusion and SEND**

*What’s been happening?*

In the Upper Tribunal case of *C & C v Governing Body* [2018] *UKUT 269* (*AAC*), a 13 year old boy named *‘L’*, was excluded for physical violence at school. L suffered from autism, anxiety and Pathological Demand Avoidance. It was a common ground that episodes of violence were as a result of these conditions. It was also common ground that L would meet the definition of having a ‘disability’ under Section 6 of the Equality Act 2010 (‘2010 Act’), which defines disability as an individual having a ‘*physical or mental impairment which had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities’.*

Previously under Regulation 4(1)(C) of Equality Act 2010 (Disability) Regulations 2010 schools were afforded a defence if the behaviour of the child or young person who has a ‘disability’ (under Section 6 of 2010 Act) amounted to a ‘*tendency to physical…abuse.’*  This meant that children like L and other children with similar conditions were not protected from discrimination, because their challenging behaviour was deemed as ‘a tendency to physically abuse’, even if the behaviour was a direct result of the child’s or young person’s condition.

However, the Upper Tribunal found that Regulation 4(1)(C) was incompatible with the human rights of children with a recognised condition that is more likely to result in a ‘tendency to physical abuse’.

*What does it all mean?*

The case of *C v C* means that it will no longer be possible to reject claims that the definition of disability is not met for children who display violent outbursts as a result of their condition. The way in which these types of cases must now be defended is by the school making out a justification argument i.e. that the decision taken to exclude a child was proportionate to a legitimate aim. In *C & C* the Tribunal emphasised that:-

*78. […] So long as the school could show that the exclusion of a pupil who had been violent as a result of his/her disability was a proportionate response, taking into account the legitimate aim of protecting the needs, well-being and interests of the other pupils and staff, and any reasonable adjustments that have been made, the exclusion would in all likelihood be a lawful one. The emphasis is on ‘reasonable’ adjustments. There is no need to show that all possible adjustments have been made, irrespective of cost or practicalities. Further, naturally, the more serious the behaviour the easier it would be to justify the exclusion under the terms of the Equality Act.*

Unfortunately there is little useful guidance that can be provided on what will and what will not be considered reasonable as this will vary infinitely from case to case and is acutely fact sensitive. It is suggested that the following questions ought to be asked by the school prior to any exclusion of this nature:

* Have all relevant external agencies (Educational Psychologist, Occupational Therapist, Local Authority) been contacted to assist with or recommend de-escalation strategies for the child involved (such as having a ‘safe space’, access to fiddle toys or snacks, having access to a lunchtime or classroom teaching assistant, emotion coaching, or having the opportunity to speak at any time to a designated adult with whom she has a bond)?
* Have less drastic measures been explored (fixed term exclusions, time outs, flexible schooling, flexible timetable, a managed move etc.)?
* Have relevant reasonable adjustments been made to the Behaviour and/or Exclusion Policies? For example, have the child’s ‘triggers’ been assessed and catered for in tailoring the disciplinary procedures to mitigate the likelihood of a behavioural crisis? Has the Exclusion Policy itself been adjusted to take account of the child’s behavioural difficulties?
* Has the SEN Policy been followed? Regardless of whether a child has formally diagnosed SEN it is always prudent to follow the policy where it is recognised that the child has a condition (for example, an Attachment Disorder) which calls for reasonable adjustments.
* Is there an Education and Health Care Plan in place (and has it been fully complied with) or is it appropriate to apply for one (which, if successful, would provide more funding)?
* Has there been constructive and open dialogue with the parents about any previous incidents and their experience of the best way to manage the child when in crisis?
* If new measures have been implemented recently, has there been enough time for these strategies to ‘bed-in’ and actually make a difference to the child’s behaviour?
* Is there an explanation for the deterioration of a child’s behaviour that needs to be taken into account?
* What exactly is the risk of harm to other pupils and staff and have methods to alleviate that risk been explored?
* Has the impact on the child herself been considered in detail? Often the effects of an exclusion are all the more devastating to a child suffering with autism or other similar conditions.

Although not an exhaustive list, the above should provide schools and Governing Bodies with some guidance about the thought process that needs to be undertaken when taking these tough decisions. Importantly, however, the school does not need to make “all possible adjustments…irrespective of cost or practicalities”; reasonableness is enough. It is important that school evidence the steps and strategies that they have put in place in order to alleviate the behaviour of the child. They should provide evidence of advice taken from external agencies and how that was implemented. They have to show that reasonable adjustments were made so that a child was not in effect being punished for behaviour that was directly attributable to a disability.