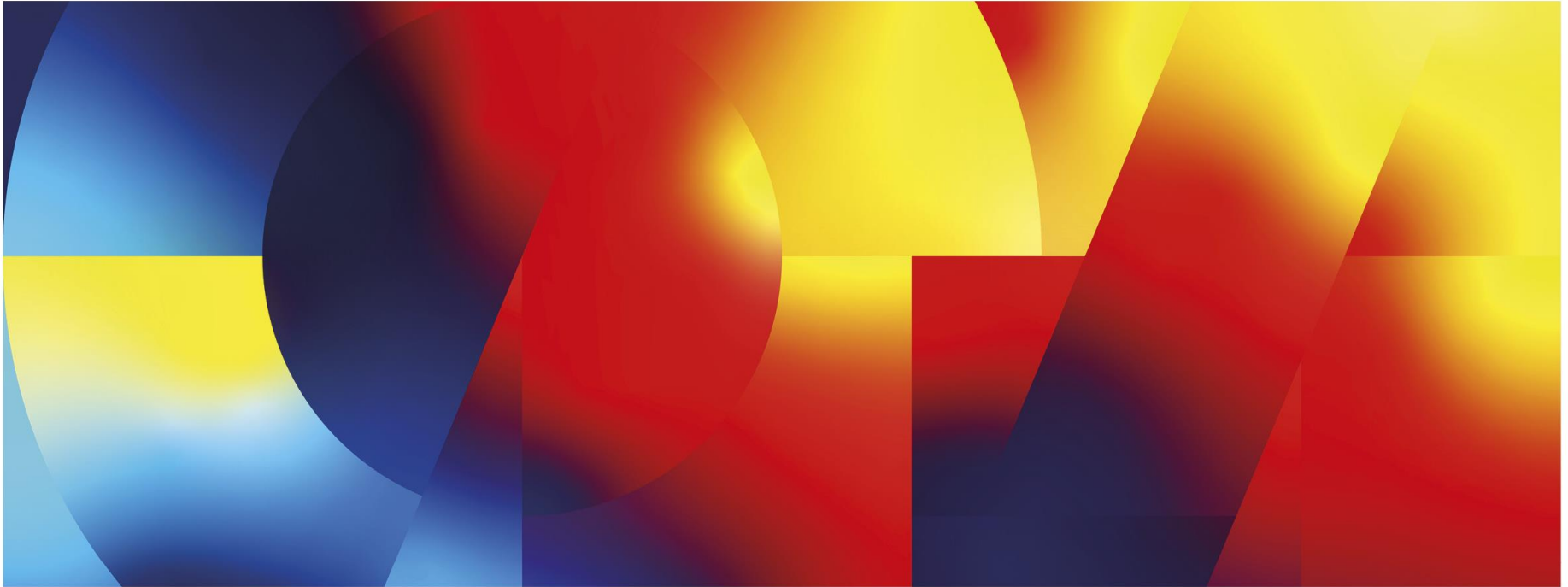


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Disability discrimination claims in the SEND Tribunal



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Introduction

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2. SEND Tribunal procedure
3. Typical claim example
4. Key tips for avoiding and winning claims

Overview of the SEND Tribunal

What is the SEND Tribunal?

- **Special Educational Needs and Disability Tribunal**
- Part of the First-Tier Tribunal
- Deal with certain types of claims in relation to disabled schoolchildren:
 - EHCP disputes
 - Disability discrimination claims against schools
- Cases are heard by a Judge and a 'Specialist Member'

Which schools can disability discrimination claims be brought against?

- State-funded schools:
 - Fully-maintained schools
 - Voluntary-aided schools
 - Academies
 - Free schools
- Nurseries which are operated/managed by state-funded schools
- Independent (private) schools

- **Not** private nurseries
- **Not** private businesses which are based on a school site
- **Not** FE colleges

When is a pupil ‘disabled’?

“6. Disability

(1) 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”

- Physical or mental impairment
- Which has an adverse effect on ability to carry out normal day-to-day activities
- Which is substantial
- Which is long-term

- Tribunal will consider medical evidence if there is a dispute e.g. EHCP, educational psychologist report

What types of discrimination can SEND Tribunals deal with?

- Direct discrimination (s.13 Equality Act 2010)
- Indirect discrimination (s.19 Equality Act 2010)
- Failure to make reasonable adjustments (ss.20&21 Equality Act 2010)
- Discrimination arising from a disability (s.15 Equality Act 2010)
- Harassment related to disability (s.26 Equality Act 2010)
- Victimisation (s.27 Equality Act 2010)

'Section 15' claims

“15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

- Unfavourable treatment
- Because of something arising in consequence of disability
- ‘Objective justification’

'Reasonable adjustments' claims

- Obligation upon schools where a disabled pupil would be put at a substantial disadvantage compared to other pupils not sharing their disability as a result of:
 - A 'provision, criterion or practice' ("PCP") imposed by the school;
 - A physical feature of the school's premises; or
 - Not being provided with a particular auxiliary aid.
- The obligation on the school is to take such steps as is reasonable to avoid the disadvantage, for example by:
 - Modifying or disapplying the PCP;
 - Removing, altering or providing a reasonable means of avoiding the physical feature; or
 - Providing the auxiliary aid in question.

What type of practical issues does the SEND Tribunal deal with?

- Permanent exclusions
- Suspensions
- Bans from school trips
- Failure to follow EHCPs
- Failure to provide additional equipment e.g. tablet or laptop
- Failure to provide access to additional facilities e.g. 'safe space'
- Not building additional exercise breaks into a pupil's timetable

- However, **not** admissions challenges in state-funded schools

- Anything reasonable to remedy the discrimination
- **But** not financial compensation
- Examples:
 - Reinstatement following a permanent exclusion
 - Making a note on the pupil's record that a suspension was discriminatory
 - Directing the school to take certain steps, such as:
 - Written apology
 - Staff training
 - Reviewing policies
 - Creating new procedures or staff guidance
 - Requiring a school to provide extra tuition
- No legal powers to enforce judgments

SEND Tribunal procedure

Lodging a claim

- No court fees
- Parents are not usually legally represented
- Time limit of 6 months from the date of the alleged discrimination
- Tribunal analyses the claim and decides which claims/allegations are to be registered and under which legal 'labels'
- School has 30 working days in which to file its response (halved in permanent exclusion cases)

Case management

- Registration order will contain a directions timetable
- Witness list must be provided with the response – tactical decision
- **No** order for written witness statements
- Tribunal target is to hear claims within 20 weeks (6 weeks for permanent exclusions) of registration
- Preliminary hearings are rare

The hearing

- 1-day hearing
- Default approach is video hearing unless a party applies for an in-person hearing
- Evidence not given under oath
- Witnesses don't ordinarily 'take turns' to give evidence
- Written judgment within 10 working days

Typical claim example

Typical claim form

“Max is 10. He has autism and ADHD. He has an Education and Healthcare Plan and a 1-2-1 TA.

On 11th May 2023 he was given a 2-day suspension. School said that he became upset at lunchtime when another boy that school know he doesn't get on with was cheating at a game in the playground. They claim that Max tried to punch the other boy, who I know has issues with Max and probably provoked Max on purpose. Max then wanted to go inside and he broke a lock by kicking a door open. School then suspended him because he wouldn't go back to his class when lunchtime ended and was shouting in the corridor.

Max can't manage his behaviour and emotions when he becomes dysregulated. It is completely unfair for school to punish him for something which he can't control and this is discrimination. The school doesn't follow his EHCP and that is why things like this happen. He wouldn't be getting excluded if school just made the reasonable adjustments which they should be making.

Max also gets angry and frustrated in class if he doesn't understand the work, which then escalates and leads to him getting in trouble. I have told school that he needs to be allowed to leave class and blow off steam whenever he needs. He needs to have a designated room or outside area where he knows that he can go to let out energy. School say that they don't have a suitable room inside and that letting him wander unsupervised in the corridors or outside would be a safeguarding issue. At the moment he just runs down the corridors and his 1-2-1 follows him closely. This makes him more frustrated, less likely to calm down and more likely to get in trouble for disrupting other classes or damaging things.”

Typical registration order

“Max has an EHCP and it seems likely that he is disabled under section 6 of the Equality Act 2010. However, unless the RB accepts this, it will be a decision for the Tribunal to make at the final hearing.

The 2-day fixed-term exclusion is best considered as a claim of disability arising from a discrimination under section 15 of the Equality Act 2010. Exclusion is inherently unfavourable treatment.

The complaint that his EHCP is not being followed does not contain any specific details of any alleged failures. It is best considered as part of the question of whether the fixed-term exclusion can be objectively justified (if necessary) rather than as a separate reasonable adjustments claim.

The claim form alleges that Max should be able to take breaks from the classroom when he is angry or frustrated and be given a designated area. It is likely that the RB will apply a ‘PCP’ that children in Max’s class are expected to sit in a designated seat and follow the work set for the class. This complaint is best considered as a complaint of a failure to make reasonable adjustments to that PCP.

The claim is registered in relation to:

- (a) the 2-day fixed-term exclusion on 11th May 2023 as a claim of discrimination arising from a disability.*
- (b) the claim that the RB has failed to make a reasonable adjustment by not providing Max with a designated area to go to when angry or frustrated during lessons.”*

Questions to be decided – s.15 claim

“the 2-day fixed-term exclusion on 11th May 2023 as a claim of discrimination arising from a disability”

- Is Max ‘disabled’ and did the school have knowledge of his condition?
- Is a fixed-term exclusion ‘unfavourable treatment’?
- Did the behaviour for which Max was excluded arise ‘in consequence of’ his condition?
- **If so, can the school objectively justify the exclusion? Specifically:**
 - **Was the exclusion intended to achieve a legitimate aim?**
 - **If so, was it a ‘proportionate means’ of achieving that aim?**

Objective justification – typical factors a Tribunal would consider

- Detail of the account provided of the incident by the school – CPOMS and witness evidence
 - How serious was the violence?
 - How extensive was the disruption to classes?
 - How did staff react – did they follow de-escalation strategies?
- Are there any major failures to follow the EHCP generally?
- Has the school generally taken appropriate steps to support Max's needs e.g. engagement with appropriate external agencies, specific measures in place to support Max?
- Has the school followed its behaviour policy and any behaviour plan or risk assessment document?
- Have there been previous similar/serious behaviour incidents:
 - Helpful if the school can show that it has previously been more lenient with Max than others
 - Helpful if the school can show that it reviewed and if necessary changed arrangements as a result
- What purpose can the school say that the exclusion served?

Questions to be decided – reasonable adjustments claim

“the claim that the RB has failed to make a reasonable adjustment by not providing Max with a designated area to go to when angry or frustrated during lessons.”

- Is Max ‘disabled’ and did the school have knowledge of his condition?
- Was there a ‘PCP’ that children in Max’s class are generally expected to sit in a designated seat and follow the work set for the class?
- If so, does that PCP put Max at a substantial disadvantage compared to others not sharing his condition?
- **If so, would it be reasonable to provide Max with a designated area to go to when angry or frustrated during lessons?**
- If so, has the school taken reasonable steps to do so?

Reasonable adjustments – typical factors a Tribunal would consider

- What documents can the school produce to show that consideration has been given to Max's specific needs regarding sensory breaks (e.g. EHCP, support plan, risk assessment, discussions with parents)?
- How frequently does Max become overwhelmed to the extent that he can't participate in the lesson?
- What other strategies are in place to deal with this situation (e.g. fidget toys, personal exercise book, iPad with headphones)? *Allowing him to leave class is a significant adjustment in itself.*
- Does the evidence (e.g. CPOMS entries) support Max's mum's claim that being followed by his 1-2-1 leads to further escalation of his behaviour?
- Would it be reasonable to allow Max to roam the corridors unsupervised?
- Would it be reasonable to allow Max to go outdoors unsupervised?
- Would it be reasonable to keep a room at school free at all times in case Max needs to use it?
- **Would it be reasonable to take any other steps e.g. could there be a number of designated 'safe spaces' with sensory toys where Max could be observed at more of a distance by his 1-2-1?**

Key tips for avoiding and winning claims

Key tips – procedures and documents

- Often the first thing that SEND Tribunal will look at is whether procedures have been followed – in particular the behaviour and exclusion policy.
- Make sure that all relevant staff are familiar with any relevant documents for a pupil with SEN:
 - Support plan
 - Behaviour plan
 - EHCP
 - Risk assessment
 - Positive handling plan
- Maintain detailed contemporaneous notes on CPOMS
 - Include details of how behaviour disrupted classes and/or impacted upon other pupils.

Key tips - EHCPs

- Be seen to seek external advice and support where there are significant concerns about behaviour or the risk of suspension or permanent exclusion for a SEN pupil (para. 55, DfE guidance on exclusions).
- Consider seeking an early EHCP review if there is a serious concern of suspension or permanent exclusion of a pupil with an EHCP (para. 56, DfE guidance on exclusions).
- Contact the LA regarding an emergency EHCP review after any suspension of a pupil with an EHCP.
- Raise any concerns with EHCP recommendations pro-actively.

Key tips - adjustments

- Consider the pupil's individual needs and any medical advice
- Document any adjustments which are in place e.g. in a support plan
- Parental engagement
- Review effectiveness
- If a potentially helpful and/or proposed adjustment isn't feasible for any reason, explain this to parents and keep a record to show that this has been carefully considered

Key tips - exclusions

- **Be confident in justifying why a lesser sanction wouldn't be appropriate in these circumstances**
- Can you provide evidence of previous incident(s) where an exclusion could have been issued but wasn't?
- Use the exclusion period to explore potential further support options
- Reintegration meetings – ensure that they are purposeful rather than a 'tick-box' exercise.
 - Parental engagement
 - Clear steps put in place to minimise the risk of further exclusions
- Beware of the 'unofficial exclusions' trap