

SCOTLAND / JUDGMENT

ES v K School [2009]

ScotSC 34 (08 May 2009)

[2009] ScotSC 34

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JUDGMENT

OF TEMPORARY SHERIFF PRINCIPAL COLIN G McKAY in the cause ES, as parent and legal representative of LS APPELLANT / PURSUER against K School RESPONDENTS / DEFENDERS GLASGOW , 8 May, 2009 . The Sheriff Principal, having resumed consideration of the appeal, Allows same; Recalls the interlocutors of the Sheriff complained of dated 30 September and 30 October 2008; before answer, allows to parties a proof of their respective averments but excluding therefrom the following averments upon Record, namely; (one) in Article 9 of Condescendence from and including the word "Behaviour" in line 6 to and including the word "Further" at the beginning of line 16; (two) in Article 10 of Condescendence the term "Section 28B(1)" where it occurred in line 4; (three) in Article 11 of Condescendence, the word "Further" where it occurs at the beginning of line 1; and from and including the words "The effort" where they occurred in line 2 to and including the word "Further" where it occurs in line 11; Assigns the cause to the Diet Roll of for the purpose of assigning a diet of proof; Reserves the question of the expenses of the Appeal; and decerns. Temporary Sheriff Principal NOTE :- (1) This is a summary application made in terms of the Disability Discrimination Act 1995 as amended by the Special Education Needs and Disability Act 2001 (the amended 1995 Act hereinafter referred to as "the Act") in which the Appellant and Pursuer, as parent and legal representative of her son, seeks a decree of declarator that the Respondents and Defenders, the proprietors of a school, and as such the "responsible body" for the school in terms of the Act, discriminated against her son; seeks a decree of reduction of a decision to exclude her son from the school; and an order for re-admission of her son to the school. After sundry procedure, a record was made up and a debate took place before the Sheriff on 20 and 21 August 2008 . On 30 September 2008 the Sheriff issued a judgment in which he sustained the Defenders' first plea-in-law, a plea to relevancy and specification, and dismissed the action. Expenses were determined on 30 October 2008 when the Pursuer's liability was modified to nil. Against this judgement the Pursuer has appealed. (2) At the outset Mr Nesbit, for the Appellant, advised me that the she no longer insisted in her appeal so far as her application fell under Section 28B(1) of the Act but, as set forth in the Note of Appeal, maintained that the Sheriff erred in law in dismissing the application so far as falling under Section 28B(2) and Section 28C. In addition, Counsel for the Respondent informed me that in the event the appeal was allowed then parties were agreed in seeking a proof before answer but

under deletion of the averments as I have recorded in my interlocutor. (3) I heard the appeal on 3 February and 19 March 2009 . In the course of the appeal reference was made to the following authorities:- D v Bedfordshire County Council & Another

(2008) EWHC 2664 (Admin) ; R v Governing Body of Plymouth High School for Girls

(2004) EWHC 1923 (Admin) ; Governing Body of X School v SP and Sendist

(2008) EWHC 389 (Admin) ; McAuley Catholic High School v CC, PC & Sendist

(2003) EWHC 3045 (Admin) ; Aberdeen Development Company v Mackie, Ramsay & Taylor 1977 SLT 177; Taylor v Glasgow City Council, judgment of Sheriff W Totten, dated at Glasgow 16 November 2006 ;Gibson v Strathclyde Regional Council 1992 SCLR 902. Lewisham London Borough Council v Malcolm

(2008) 3 WLR 194 On 19 March I heard further submissions in relation to two other cases, T v Governing Body of OL Primary School and SENDIST

[2005] EWHC 753 (Admin) ; and Governing Body of PPC v DS and others [2005] All ER (D) 64. I made avizandum on that date. Reference was also made to the Act and the Code of Practice for Schools under Part 4 of the Act. The relevant provisions of the Act are set out in Appendix 1 annexed to this judgement. Copies of all authorities, the Act, the Code of Practice for Schools (UK wide) - a statutory Code promulgated by the Disability Rights Commission (now within the Commission for Equality and Human Rights) - and Guidance for Scotland (non statutory) on the Code were made available to the court. The Note of Appeal (4) I have incorporated this as it sets forth the averments which the Appellant maintains justifies her case under Section 28B(2) and are also those averments subject to the attack by the Respondents related to relevancy and specification. The Note of Appeal is in the following terms, "The sheriff erred in law in finding that the case was bound to fail and dismissing same in relation to the duties contained in 28B(2) and 28C(1)(b) of the Disability Discrimination Act 1995 ('the DDA'), for the following reasons: i) The Sheriff dismissed the action on the basis that the two averments he refers to on paragraph 12 of the note" (Article 9 of Condescendence) "were insufficient to allow a Section 28B(2) case to go to proof or proof before answer. However, even after deletions and amendments to the Record agreed during the course of the debate, the Pursuer's averments in relation to that "reasonable steps" duty are substantial and include the following averments in article 10 of condescendence: "In particular they failed to wait/or the outcome of the medical assessments before taking disciplinary action. It would have been reasonable to wait until the end of the academic year before taking disciplinary action. It was unreasonable to take a decision on whether or not to permanently exclude the child little more than a month after the Pursuer had informed the school she was arranging to have the child assessed for ADHD. They failed to request assistance from East Dunbartonshire Council with regard to L's additional support needs in terms of Section 7 of the Education (Additional Support for Learning) (Scotland) Act

2004. Further they discriminated against L in failing to take reasonable steps. The Defenders' senior management team and the staff of its junior school failed to carry out sufficient reasonable adjustments before excluding L. They failed to await the expertise and support of outside agencies, such as assistance from ADHD Direct or input and guidance from a psychiatrist and other assistance. They failed to draft and implement an Individual Education Plan for L and failed to produce an individual learner profile to support him. They failed to work collaboratively with L's parents and failed to discuss how his behaviours at school mirrored those at home and what strategies could be successfully implemented between home and school. They failed to provide support during unstructured activity times, such as the provision of a quiet place to go or structured activities. They failed to offer L counselling. They failed to offer L suitable and appropriate guidance and pastoral support. They failed to offer L a mentor and failed to offer him a key worker or trusted member of staff to whom he could talk. They failed to wait until such time as a diagnosis of L's condition was known before excluding him from the Defenders' school. They failed to implement a positive behaviour management programme and a system of rewards. They failed to implement an escalating sanction system to assist L to understand the seriousness of his behaviours. They failed to manage L's peer relations and support him in avoiding conflict situations." The Pursuer's pleadings also include the following averments in article 11 of condescendence: "They failed to take reasonable steps not to place L at a disadvantage as compared with other pupils who were not disabled with ADHD. The Defenders ought to have waited for the outcome of the assessments prior to taking a decision on exclusion from school. Had the Defenders done so then their decision would have been likely to have been different. The Defenders would have implemented appropriate strategies and supports to allow L to remain at the school and to complete his secondary education successfully." These averments set out the Pursuer's "reasonable steps" case in full and the Sheriff erred in limiting himself to consideration of the averments laid out in paragraph 12 of the note. ii) The Sheriff, in paragraph [12] of the note states that "The latter sub-section [i.e. 28C(1)(b)] is the one which might, in my view, have afforded L a remedy, but, as I have stated what is pled in support of a case under section 28C(1)(b) is clearly insufficient to amount to a relevant case." In light of the pleadings referred to above, the Sheriff erred in concluding that those pleadings were insufficient to amount to a relevant case. Further, having concluded that the Pursuer's son may have a remedy in terms of the Act, the Sheriff erred in dismissing the case following debate. iii) The Sheriff erred in reaching the conclusions he did at paragraph [14] of the note. Applying, as he did, *Jamieson v. Jamieson* 1952 SC (HL) 44 the Sheriff erred in concluding that this case is one which is bound to fail. It cannot be said that the case would necessarily fail even if all the Pursuer's averments (as referred to above) were proved." (5) The appeal is effectively in two parts. Firstly, does the Act allow of an action to reduce a decision to exclude a child from a school based upon the provisions of Section 28B(2) and 28C (the "reasonable adjustments" or "reasonable steps" provisions) or can such a reduction be based solely and exclusively upon Section 29B(1), (the "less favourable treatment" provisions)? This latter alternative was the Respondents' primary submission upon which

they maintained the appeal should fail. The second part of the appeal was related to other relevancy and specification matters in the pleadings based upon a case under Section 29B(2). (6) In paragraph (i) above the Appellant refers to "deletions and amendments to the Record agreed during the course of the debate". I should make it clear that the appeal was conducted upon the Record, No. 13 of process, certified as at 6 October, 2008 . (7) In addition, although the Sheriff's judgement at first instance refers to "the Section 28C(2)(b) case" and "the Section 28B(2) case" separately, I have treated them as one and the same, namely, an application under Section 28B(2). In my view Section 28C is supplementary to Section 28B(2) in that it contains the obligations with which a responsible body is to comply in terms of Section 28B(2). The relevant statutory provisions (8) In my view, for the purposes of this appeal, the relevant provisions in issue are, "28A Discrimination against disabled pupils and prospective pupils (1) It is unlawful for the body responsible for a school to discriminate against a disabled person- (a) in the arrangements it makes for determining admission to the school as a pupil; (b) in the terms on which it offers to admit him to the school as a pupil; or (c) by refusing or deliberately omitting to accept an application for his admission to the school as a pupil. (2) It is unlawful for the body responsible for a school to discriminate against a disabled pupil in the education or associated services provided for, or offered to, pupils at the school by that body." (3) (regulations provision. none has been enacted) "(4) It is unlawful for the body responsible for a school to discriminate against a disabled pupil by excluding him from the school, whether permanently or temporarily. 28B Meaning of "discrimination" (1) For the purposes of section 28A, a responsible body discriminates against a disabled person if- (a) for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and (b) it cannot show that the treatment in question is justified. (2) For the purposes of section 28A, a responsible body also discriminates against a disabled person if- (a) it fails, to his detriment, to comply with section 28C; and (b) it cannot show that its failure to comply is justified. (3) In relation to a failure to take a particular step, a responsible body does not discriminate against a person if it shows- (a) that, at the time in question, it did not know and could not reasonably have been expected to know, that he was disabled; and (b) that its failure to take the step was attributable to that lack of knowledge. (4) The taking of a particular step by a responsible body in relation to a person does not amount to less favourable treatment if it shows that at the time in question it did not know, and could not reasonably have been expected to know, that he was disabled. (5) Subsections

- (6) to (8) apply in determining whether, for the purposes of this section- (a) less favourable treatment of a person, or (b) failure to comply with section 28C, is justified. (6) Less favourable treatment of a person is justified if it is the result of a permitted form of selection. (7) Otherwise, less favourable treatment, or a failure to comply with section 28C, is justified only if the reason for it is both material to the circumstances of the particular case and substantial. (8) If, in a case falling within subsection (1)- (a) the responsible body is under a duty imposed by section 28C in relation to the disabled person, but (b) it fails

without justification to comply with that duty, its treatment of that person cannot be justified under subsection (7) unless that treatment would have been justified even if it had complied with that duty. 28C Disabled pupils not to be substantially disadvantaged (1) The responsible body for a school must take such steps as it is reasonable for it to have to take to ensure that- (a) in relation to the arrangements it makes for determining the admission of pupils to the school, disabled persons are not placed at a substantial disadvantage in comparison with persons who are not disabled; and (b) in relation to education and associated services provided for, or offered to, pupils at the school by it, disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled. (2) That does not require the responsible body to- (a) remove or alter a physical feature (for example, one arising from the design or construction of the school premises or the location of resources); or (b) provide auxiliary aids or services."

- (3)(regulations None enacted) "(4) In considering whether it is reasonable for it to have to take a particular step in order to comply with its duty under subsection (1), a responsible body must have regard to any relevant provisions of a code of practice issued under section 53A."
- (5) to (7) (Confidentiality requests - not an issue in this appeal) "(8) This section imposes duties only for the purpose of determining whether a responsible body has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such. " Parties' submissions. (9) I have recorded the submissions of Appellant and Respondents in some detail in Appendices 2 and 3 respectively annexed to this judgement. The Appellant, whilst accepting that the Sheriff had correctly determined that the application so far as laid under Section 28B(1) of the Act was irrelevant, maintained that the Sheriff was otherwise wrong in law to have dismissed the application. The Appellant submitted that she had stated a relevant case under Section 28B(2) and that her averments were both sufficiently specific and relevant to the craves. (10) The Respondents' primary submission was that since the Appellant had conceded that she could not maintain her application under Section 28B(1) for the reduction of the decision to exclude her son from the school - and, in addition, for an order for his re-admission - her application must fail because Section 28B(2) and Section 28C did not allow of an application to reduce the decision to exclude nor, as a consequence, could she seek an order for re-admission. It was not legally possible to plead a relevant case under these latter two sections for the remedies sought. According to the Respondents, the Sheriff at first instance, whilst reaching the correct decision in dismissing the application entirely, had not dealt with this aspect of the submission which had been made at first instance as well. Separately, even if the remedy of reduction and the order for re-admission were open to the Appellant under Section 28B(2) the Appellant's pleadings - in particular in Articles 10 and 11 of Condescence - were otherwise irrelevant and lacking in specification. The Respondents also maintained that the First Crave for declarator was incompetent for lack of specification. The Sheriff's determination (A) Section 28B(1) case (11) The Sheriff's judgement at first instance is substantially devoted to the relevancy of the Section 28B(1) aspect of the application.

Considering the views expressed in the House of Lords in *Lewisham v Malcolm* as to the appropriate comparator in a "less favourable treatment" case, it left the Sheriff with no option but to find the Appellant's application irrelevant so far as based upon Section 28B(1). His reasons for this are expressed in paragraph 6 of his judgement, "[6] In this case, having considered the decision of the House of Lords in *Lewisham London Borough Council v Malcolm*

[2008] 3 WLR 194 ,(which decision was issued after this action was raised) the appropriate comparator in this case under section 28B(1) is a child who had:-

1. been sent off for violent conduct during a rugby match,
2. been suspended from some rugby games as a result of that conduct and had had to apologise to the opposing school,
3. been involved in an incident of bullying and
4. had been the holder of an email account in the name of "wee wank" from which an email had been sent to a member of staff but which child had no disability. That is the correct and logical comparator according to the *Lewisham v Malcolm* decision and, on the basis of that case, this case must fail because that is not the comparator argued (in article 9 of the condescendence). Condescendence 9 is in, inter alia, the following terms: "..... The Defenders and their employees were at all material times under a duty to not treat Lawrence as a disabled pupil less favourably than pupils in relation to whom the relevant reason did not apply, that is a pupil whose behaviour had not been disruptive.", precisely the wrong comparator in terms of the House of Lords decision. The correct comparator was not argued, no doubt, for the reason that the defenders would have taken the same action against any child who had done these things. The same reason may also explain why there are no averments about how the defenders would have treated the comparator. Nonetheless, the absence of such averments about the treatment of the comparator is another reason why the action is irrelevant; such averments would be necessary to give the defenders fair notice of the case they would have to answer." He also notes in paragraph 5, "[5] The pursuer chose to respond to the defenders' debate rather than seeking leave to amend; had the pursuer sought leave to introduce a section 28B(2) case I would possibly have been prepared to grant leave; I cannot be any more certain than that not having heard arguments from parties directed towards such a course." As the Sheriff records, the Appellant chose not to amend and the appeal is on the basis that the pleadings as they stand are both relevant and sufficiently specific to allow of a proof before answer and are sufficient in law to allow of the remedies craved. (B) Relevancy of averments for Section 28B(2) and 28C case (12) Separately from the issue of the relevancy of the averments in Articles 10 and 11 to support the Appellant's craves, the Respondents also attacked the relevancy and specification of the averments in these selfsame Articles in themselves. The Sheriff at first instance observed in relation to this aspect of Counsel's attack, at paragraph 10 of his judgement, " The alleged breaches of duty (Article 10) Since the action as pled is fundamentally irrelevant because it

proceeds on the basis of the wrong comparator, the averments of breaches of duty in condescence 10 do not require to be considered in detail. The attack on these averments by Counsel for the defenders was detailed and substantial. However, had there been a relevant basis to the case, it would not in my view have failed because of the difficulties identified by the defenders in relation to the duties pled as some would clearly require inquiry into the facts before their relevancy could be determined. However, although I would have allowed the action to proceed to proof or proof before answer notwithstanding the lack of relevance and specification of a number of the averments in article 10, some of these I would have excluded because of their entire lack of relevancy or specification." And at paragraphs 11 and 12, " The section 28C(2)(b) case

- [11] I was urged by the pursuer's solicitor to allow the case to proceed to proof before answer on the issue of additional aids and services because, it was argued, what is or is not an additional aid or service is a matter of fact on which evidence should be heard. Although much of the debate was taken up with the defenders' attack upon the pursuer's case under section 28C(2)(b), I was unable to discern a relevantly pled case under that sub-section. That is not perhaps surprising since it is difficult to conclude that this is a case about the provision of additional aids and services or that such provision - whether an obligation on the defenders or not - would have resolved any issue which has arisen in this case. The defenders' position was that there was no requirement on them to provide auxiliary aids and services and that is correct. The section 28B(2) Case
- [12] In article 9 the pursuer avers: "Further, the defenders were at all material times under a duty to make reasonable steps (sic) to ensure that a disabled pupil was not disadvantaged as compared with a pupil without a disability" which, along with two scant averments in article 10; namely, "The defenders breached the duties imposed on them by section 28B(1), 28B(2) and 28C(1)(b) of the Act." and "They failed to sympathetically apply their school discipline/sanction policy to L." That amounts to what might arguably be the pursuer's section 28B(2) and 28C(1)(b) case. The two averments are, to an extent, incongruous and they are insufficient to allow such a case to go to proof or proof before answer. The latter sub-section is the one which might, in my view, have afforded L a remedy, but, as I have stated what is pled in support of a case under section 28C(1)(b) is clearly insufficient to amount to a relevant case." Discussion as to relevancy of Section 28B(2) case for the remedies craved (13) It will be seen that whilst exclusions are specified in Sub-section 4 of Section 28A this is not repeated in Section 28C whereas the two other areas, those of admissions (Section 28A(1)) and education or associated services (Section 28A(2)) are repeated in similar terms in Section 28C. This omission - if that is what it is - led the Respondents to the proposition that the only manner in which a decision to exclude a child from a school may be challenged as discriminatory in terms of the Act is under the "less favourable treatment" regime of Section 28B(1). Accordingly, since the Appellant had expressly abandoned that leg of her application, she could not now succeed in pleading a relevant case under Section 28B(2). (14) There are very few reported cases at appeal level in relation to the education provisions added to the Act in 2001. None in Scotland was cited to me on this particular point. There are

a number of English reported cases on the issue, *T v OL Primary School*, *PCC v DS and X School v SP* and *SENDIST* only one of which deals with this point specifically. These are all decided on appeal from Special Educational Needs and Disability Tribunals (*SENDIST*) by a High Court Judge sitting alone. In England and Wales the application form to the Tribunal appears more akin to employment tribunal application forms than the relative formality of the Initial Writ in Summary Application procedure in Scotland . The forms are more obviously designed for completion by lay persons rather than qualified lawyers. It contains sections such as, " How did the alleged discrimination take place? It is important that you explain what happened, why you consider it to be unjustified, who was involved and in what way your child's disability was the reason for the alleged discrimination. Please give as much detail as you can. If you have received letters from the school or LA which relate to the matter you are claiming about, you should send copies of those with this form as well as any other relevant information." and, "Putting things right We have no power to award money as compensation for any discrimination that may have taken place. If we decide in your favour, what would you like us to do?" (15) As to the authority of these English decisions in Scotland I take the view that they are at least persuasive and, unless there is some real conflict with the principles of Scots Law, ought to be followed. It is not desirable for the approach in Scotland to this issue to be fundamentally different from that in England and Wales . The statute applies throughout the United Kingdom as does the Code of Practice. (16) In *T v OL Primary School* the issue is touched upon only briefly and was not the subject of submissions, the point not being taken by Counsel for the school, the respondents in that case. The Judge (a Deputy High Court Judge) observed in paragraph 14, " The duty to make reasonable adjustments is expressed in similar terms to that imposed upon employers or service providers under Part II and III of the Act as a duty to take steps to remedy arrangements placing a disabled person at a substantial disadvantage. Compare, for example, section

6. The duty to make reasonable adjustments does not, however, obviously appear to arise in relation to exclusions. Contrast section 28A , subsections (1), (2) and (4) and section 28C(1). Both sections cover admissions and education and services but there is no equivalent in section 28C to subsection (4) in section 28A . However the duty to make reasonable adjustments may apply in relation to exclusions as being part and parcel of the provision of education and associated services. The respondent before me does not argue that the adjustments duty does not apply to exclusions." (17) In *X School v SP & SENDIST* , the issue is not dealt with directly but it was a case concerned with fixed term - as opposed to permanent - exclusions and whether or not repeated fixed term exclusions were justified. The orders made by the Tribunal did not include a reduction of the exclusion decisions nor a requirement for re-admission. These were not live issues in the appeal as the child had been placed elsewhere. The Appellant was the school and the Tribunal had determined amongst other matters that, "We conclude finally that had the reasonable adjustments been carried out it" (the school) "would not have been justified to exclude N as a disabled child on the several occasions that she was excluded. To exclude her repeatedly for similar behaviour

would only serve, in our view, to exacerbate her difficulties." (paragraph 7N of the judgement) In dealing with the reasonable adjustments question the Judge referred to another case at paragraph 32 of his judgement, namely, *Governing Body of Olchfa Comprehensive School v IE and EE*

[2006] ELR 503 . In that case Mr. Justice Crane observed at paragraphs 49 to 51, "

49. The submission of Mr. Wilson was that the omission of explicit reference to exclusion in section 28C(1), in contrast to section 28A, where subsections (1) and (2) closely mirror part of the wording of section 28C(1), but which contains a separate subsection (4) dealing with exclusions was intentional. I note that the duty to take steps relates to the making of arrangements for admission, which is only one of the limbs of section 28A(1). Mr. Wolfe submitted that it would be surprising if Parliament intended to omit exclusion from the section 28C duties. 50. There is indeed a certain lack of symmetry in the two sections. However, I have come to the conclusion that the taking of steps "in relation to education" is a sufficiently wide phrase to embrace steps in relation to arrangements in relation to exclusion. Section 28C focuses on ensuring that discrimination will not take place, rather than on decisions that amount to discrimination. Hence the reference back only to section 28A(1)(a), and not to section 28A(1)(b) or(c) or indeed to section 28A(4). 51. I thus agree with the conclusion reached by Mr. James Goudie QC, sitting as a Deputy High Court judge, in *Governing Body of PPC v. DS and others* [2005] EWHC 1036 (Admin). " The Olchfa case was not the subject of submissions to me but it is clearly referred to in the *Governing Body of X School* case. I recognise it is primarily concerned with a Section 28B(1) application but it equally plainly raises the issue with which this appeal is concerned and the judge expresses his view of the matter in paragraph 50. (18) Finally, in *PPC v DS and others* the matter is considered expressly. The appeal was once again from a SENDIST tribunal, the Appellants being the school. The child had been permanently excluded and it was accepted that the exclusion amounted to "less favourable treatment". The question was whether the exclusion was discriminatory in terms of the Act. In the judgement Mr. James Goudie, QC, sitting as a Deputy High Court Judge, having set out the statutory framework, identifies the main issues, " Main

Issues

28. There are three main issues in the appeal against the Tribunal's decision. First, whether Section 28C is capable of applying to exclusions at all (and, if so, in what way). I shall call this the "statutory interpretation issue". Secondly, if Section 28C is capable of applying, whether Section 28C , and Section 28B(8) , can be relied upon when an allegation of breach of Section 28C is raised, but in the context of a justification defence in relation to less favourable treatment, not as a distinct complaint. I shall call this the "pleading issue". Third, if Section 28C , and Section 28B(8) can be relied upon, in addition to Section 28A , whether the decision to be made as to reasonableness/justification is one for the Tribunal itself, or rather whether the Tribunal should interfere only if the decision of the school is outwith the

range of reasonable responses. I shall call this the "role of the Tribunal" issue. Statutory interpretation issue

29. By contrast with Section 28A, Section 28C does not expressly refer to exclusions. This is unsurprising. Reasonable adjustments are not applicable to an exclusion as such. What would be very surprising would be if Parliament had intended that the requirement of reasonable adjustments should not apply as an alternative to exclusion.
30. In my judgment, the requirements not to discriminate in the provision of education, and to take reasonable steps to ensure that in relation to the provision of education disabled pupils are not placed at a substantial disadvantage, embrace taking reasonable steps in order to avoid exclusion. I conclude that the Tribunal was correct on the statutory interpretation issue." (19) None of the foregoing three cases was cited to the Sheriff at first instance. As with the last case cited, the issue, in my view, so far as the Respondents' primary submission is concerned, is one of statutory interpretation. The Act falls to be interpreted in a purposive manner. Parties agreed with this approach subject to the Respondents saying that such an approach could not justify any gap (lacuna) in the law being filled by such an approach. The mischief the Act seeks to remedy is discrimination related to a person's disability and, in the particular part with which this application is concerned, in schools. The Act was applied to schools in 2001 primarily by the insertion of Sections 28A to 28X in Part IV of the Act. In addition schools are required to have regard to the statutory Code of Practice promulgated in terms of Section 53A of the Act and, furthermore, a court when considering any decision in proceedings under Part IV of the Act - as these proceedings are - is likewise bound to have regard to the Code (Section 53A(8A)). (20) I share the views expressed in the three English authorities concerned with this issue of interpretation. I have earlier set out what I believe to be the relevant parts of Sections 28A, 28B and 28C for this appeal (the full text is in the appendix). Section 28A makes unlawful, discrimination against disabled pupils related to the disability in three particular respects. Sub-section 1 deals with admissions procedures; sub-section 2 deals with "education" provided for or offered to pupils at the school and "associated services" provided for or offered to pupils. Neither of these terms is defined. Sub-section 4 makes unlawful, discrimination against a disabled pupil by "excluding him from the school whether permanently or temporarily". (21) Section 28B deals with the meaning of "discrimination for the purposes of Section 28A" and provides, in sub-section 1 that "a responsible body discriminates against a disabled person if, (a) for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and (b) it cannot show that the treatment in question is justified." It is accepted this sub-section has no place in this appeal. (22) Section 28B continues in sub-section 2 to provide that "a responsible body also discriminates against a disabled person if (a) it fails, to his detriment, to comply with section 28C; and (b) it cannot show that its failure to comply is justified." The onus is on the responsible body. In addition, it is clear this section is supplemental to Section 28A which makes unlawful discrimination in the various aspects of school procedures and services. This raises the question of whether Section 28C applies to the act or conduct in question, - in this case, the decision to exclude -

and, if so, whether the responsible body has complied with that Section. (23) Section 28C requires a responsible body "to take such steps as it is reasonable for it to have to take to ensure that, (a) in relation to the arrangements it makes for determining the admission of pupils to the school, disabled persons are not placed at a substantial disadvantage in comparison with persons who are not disabled; and (b) in relation to education and associated services provided for, or offered to, pupils at the school by it, disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled." Thus the subsections expressly relate to "admissions" and "education and associated services", a mirror of the first two sub-sections of Section 28A. By contrast it does not refer expressly to exclusions, the matter referred to in sub-section 4 of Section 28A. This, of course, is the basis of the Respondents' proposition that the Appellant has no remedy for reduction of a decision to exclude, namely, it is not a matter covered by the duty to "make reasonable adjustments" or to "take reasonable steps". (24) The English cases brought the provisions of Sections 28B(2) and 28C into the field of exclusions by finding that the obligation to take reasonable steps to ensure that in relation to the provision of education and associated services disabled pupils are not placed at a substantial disadvantage must embrace taking reasonable steps in order to avoid exclusion. (25) In my view support is found for that approach by having regard to the statutory Code of Practice - as both the school and court are obliged so to do. Chapter 4 of the Code deals with, amongst other matters, what education provision is covered and what activities are covered. At Chapter 4.23 the Code states, " Education and associated services 4.23 'Education and associated services' is a broad term that covers all aspects of school life. This list exemplifies the range of activities that may be covered by the term 'education and associated services': It continues by listing a large number of such activities including amongst many others "school discipline and sanctions" and "exclusion procedures". The full list is in Appendix 4. (26) Whilst it is clear the obligation to take reasonable steps does not apply to the decision to exclude itself it would, in my view, be contrary to the intention of the Act if it did not apply where a school had failed to take reasonable steps or make reasonable adjustments which would or might, had they been taken or made, have prevented the need to exclude. That being so it would be inequitable if a decision to exclude, which had been preceded by such a failure, could not be reduced or set aside for that reason simply because decisions to exclude as such apparently did not fall within the ambit of a Section 28B(2) claim. There is nothing illogical in allowing such a decision to be reduced under Section 28B(2) where it appears that had the school taken certain steps or made certain adjustments - the obligation being upon the school - that would have prevented the need to exclude. Indeed it may be more accurate to say that where a school is unable to justify its failure in terms of the Act then it appears to me quite illogical to say that a decision to exclude which was preceded by such a failure and which would or might otherwise have been avoided, cannot be set aside for the reasons advanced by the Respondents in this appeal. It seems to me akin to a situation where a party to any case which involves a hearing before some body making a decision is deprived of an opportunity to make representations to that body before the decision is made, Such a failure would be a breach of the rules of natural justice and would entitle such a party to seek to have the

decision reduced for that reason. The failure would be in the procedures adopted by the body in question and thus a matter preceding the determination. Similarly, in an appeal under the Act if there are defects in the "exclusion procedures" - which, in my view, would readily include a failure to make reasonable adjustments or take reasonable steps to avoid an exclusion - that should equally entitle the disadvantaged party to seek a reduction of the decision. (27) This approach still leaves open to the school the answer or defence provided by the Act in each of the Section 28B(1) and (2) cases, namely, that the less favourable treatment or failure to make the reasonable adjustment was justified, the burden being on the school so to show. (28) Thus I am satisfied the Appellant is entitled to seek a reduction of the order to exclude and for an order to re-admit in her claim under Section 28B(2). It is now necessary to examine whether she has a relevant and sufficiently specific case under that section. Discussion of other relevancy/specification/raises issues (29) The Appellant's case is that her son has Attention Deficit Hyperactivity Disorder ("ADHD") and for that reason is disabled for the purposes of the Act. The Respondents do not admit this. That is a matter for proof. She also avers that she raised the possibility that her child had this condition with members of staff at the school whilst in Primary 5. That would be about a year to 2 years before the exclusion. The Respondents' answer is to admit the Appellant raised the issue but that their learning support department did not believe the child had ADHD. It seems to me their view about that is open to challenge and so can be explored in a proof. Then the Appellant avers that she attended a meeting in February 2007 with the Rector of the school concerning her son's behaviour but accepts she did not, at that meeting, raise again the issue of ADHD. However, she also avers that following the meeting she wrote to the Rector on 14 February, 2007 raising the issue of ADHD once again. The Respondents accept that letter was received and did raise the issue of ADHD. It seems to me this date may be important in that it raises the possibility that the school was made aware of the possibility of a disability in the child which might have a bearing upon his behaviour and that this preceded the decision to exclude. In my view that raises the prospect for the Appellant that there may have been reasonable steps which the school ought to have taken to avoid exclusion prior to reaching the decision to exclude. Again this is something to be explored in a proof. (30) Under reference to *Gibson v Strathclyde Regional Council*, the Respondents maintained that where issues of "reasonableness" were raised in pleadings the Appellants were required to provide a "comparator" in terms of what others might do. Thus, in *Gibson*, a reparation action, the Pursuer was required to aver practice of other local authorities. According to the Respondents the Appellant had plainly failed so to do and so, as in *Gibson*, the action fell to be dismissed. In my view *Gibson* is of no assistance to the Respondents in this case. *Gibson* is a reparation case in which the Pursuer sought damages for injuries sustained in an accident when she fell over an uncovered inspection drain. The practice of other local authorities was directly relevant to her case so far as related to a "reasonable practice". In this application under the Act there is no remedy in damages for a breach of any of the duties. Section 28C(8) provides, " This section imposes duties only for the purpose of determining whether a responsible body has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such." This is not a reparation

action. For that reason alone, in my view, Gibson can be distinguished. The Act imposes on the Respondents a duty not to discriminate against a disabled pupil or prospective pupil for a reason related to his disability. It requires them as a responsible body to consider what reasonable steps they might have to take in terms of Section 28C(1) not simply in relation to the child in question in this appeal but in general. It is an anticipatory duty as well as an ongoing duty. The anticipatory duty to consider what reasonable adjustments the school should make to avoid discrimination is made clear in paragraphs 12 and 13 of Chapter 6 of the Code; "6.12 The duty on schools to make reasonable adjustments is anticipatory. It is the potential for a substantial disadvantage that should trigger a consideration of what reasonable steps might need to be taken. Schools cannot, in general, wait until a disabled pupil has arrived before making reasonable adjustments. This may be too late and it may not be possible to take reasonable steps before the pupil is placed at a substantial disadvantage. 6.13 The reasonable adjustments duty is owed to disabled children in general, not simply to individual disabled children. This means that schools will need to review their policies, practices and procedures, as a matter of course, to ensure that they do not discriminate against disabled children. It means that schools should not wait until a disabled child seeks admission to the school or is admitted as a pupil to consider what reasonable adjustments it might make generally to meet the needs of disabled pupils". (31) The onus or burden is also on the school - not the Appellant - to show that the exclusion was justified even if they had taken all steps which might be regarded as reasonable (Section 28B(8)). In so far as there is any requirement for the Appellant as a party seeking a declaration of discrimination to aver what the Respondents as the "responsible body" might have done then a reference to the Code of Practice, applicable to all "responsible bodies" would appear to me to be adequate notice of the case to answer. Chapters 5 and 6 contain numerous examples of what might be expected of a responsible body in the way of making reasonable adjustments or taking reasonable steps. The Code also expressly recognises that the position may be different in different schools (Chapter 6.15). Practice in other schools may be of little relevance. For this reason too, in my view, Gibson can be distinguished (32) So far as a diagnosis of ADHD is concerned the Appellant avers such a diagnosis has now been made but it was in June 2007, some 3 months after the decision to exclude. Thus, according to the Respondents it came too late. However, there are averments by the Appellant raising this diagnosis as a possibility well before the decision to exclude. It seems to me that is sufficient for the Appellant to be allowed a proof as to the Respondents' state of knowledge. If the Respondents did not know of the disability or "could not reasonably be expected to know" and its failure to take a particular step - assuming there was such a step or adjustment it could reasonably have taken - was attributable to that lack of knowledge, then the responsible body may be found not to have discriminated (Section 28B(3)). There is a similar exception for less favourable treatment in 28B(4). However, the onus lies on the responsible body to bring themselves within these exceptions. (33) As to the Respondents' knowledge or what they might reasonably have been expected to know the Appellant has averments which, if proved - and they are to an extent admitted - might place an obligation on the Respondents to allow some investigation before proceeding to determine the proposal to exclude. Chapter 7 of the Code

gives some guidance about this. "7.8 It may not be immediately obvious that a child is disabled. Underachievement and difficult behaviour may, in some cases, indicate an underlying disability which has not yet been identified. A responsible body may have difficulty claiming not to have known about a disability if, on the basis of such indicators, it might reasonably have been expected to have known that a pupil was disabled. 7.9 It will be in the interests of responsible bodies to ensure that schools are proactive in seeking out information. If they are not, the responsible body may not be able to claim lack of knowledge about a pupil's disability. The Code gives some examples which are not particularly apposite to this appeal but the general statements of the duty on the school, in my view, raise the issue here whether the Respondents took sufficient reasonable steps in all the circumstances to meet their obligations under the Act and the Code. The Respondents do aver that they took the advice of their learning support department who did not think the child had ADHD. That may be the case but it seems to me that the Appellant is entitled to explore the reasonableness of that opinion in a proof. (34) As to the Appellant's averments concerning what the Respondents called "auxiliary aids or services" - the Respondents being under no obligation to provide these (Section 28C(2)(b)) - the Respondents' answer to these averments is simply one of denial. The specific averments attacked on this basis are recorded in the Appendix of the Respondents' submission - at paragraph 15. It may be that, in so far as these averments might require the school to provide additional staff, they go too far since the school are not obliged to do that. However, an "individual learning plan" does not seem to me necessarily to have that implication; nor the provision of a "quiet place" or "structured activities"; nor a "failure to offer counselling". This last matter may depend upon whether the school already has a provision in place to deal with such issues. These are matters which need to be explored in a proof. (35) The averments identified by Counsel in paragraph 17 of the submission fall into a different category. If the school were unaware of the fact that the parents were seeking a medical report or like assessment of their child and the parents did not tell the school then it may be the school cannot be criticised for not awaiting such a report. However, in view of the averments raising the issue of prior knowledge of the possibility of there being a condition which might amount to a disability for the purposes of the Act, it seems to me a proof is necessary to determine that. If the averments about the possibility of there being a disability are not made out then the averments identified by Counsel in this paragraph may not be relevant. (36) As to the duty specified in paragraph 18 of the submission about "a positive behaviour management programme" it is not necessarily the case that the school were not under an obligation to provide one. Once again if the possibility of a disability is raised the school is under the obligation to address that issue and if that might require such a programme - assuming it does not require additional resources - it could well be reasonable for the school so to provide. Importantly it would be for the school to consider what reasonable steps it might take to address the problems related to the disability. I accept that assumes any problems were related to the disability but that is a matter for proof. (37) In paragraph 19 of the submission the Respondents submitted the averments there recorded were too general, the Respondents posing the question what would suitable support and guidance have been.

That, it seems to me, is the school's responsibility under the Act. It may well be there was none but it is for the school to establish that. (38) Finally, in paragraph 20 of the submission, the Respondents criticise the reference to a failure to request assistance from the local education authority under Section 7 of the Education (Additional Support for Learning) (Scotland) Act 2004. If the school was aware of the disability or ought reasonably to have been aware of it then it seems to me they might well be required to consider whether it was a reasonable step to make such a request of the local education authority. Section 7 of that Act provides, " (1) Where an education authority receive a request of a type specified in subsection (2) relating to any child or young person- (a) belonging to the area of the authority, but (b) for whose school education the authority are not responsible, the authority may, in accordance with the arrangements made by them under section 6(1), comply with the request. (2) The types of request referred to in subsection (1) are- (a) a request from a person specified in subsection (3) to establish whether the child or young person in relation to whom the request is made- (i) has additional support needs, or (ii) would, if the education authority were responsible for the school education of the child or young person, require a co-ordinated support plan, (b) in the case of a child or young person being provided with school education at an independent school or a grant-aided school, a request from the managers of the school to establish whether the child or young person would, if the education authority were responsible for the school education of the child or young person, require such a plan. " (39) Reference was made in submissions before me and the Sheriff at first instance to *Jamieson v Jamieson* 1952 SC (HL) 44 and the observation there per Lord Normand, at p 50, that the test of relevance is the same for all actions: "The true proposition is that an action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved." Similarly, Lord Reid said, at p 63, that "If it can be shown that, even if the pursuer succeeds in proving all that he avers, still his case must fail, it appears to me to be highly advantageous that time and money should not be spent on fruitless inquiry into the facts...." It seems to me that if the Appellant establishes that the Respondents knew or ought to have known that her child might have ADHD, then it is not a foregone conclusion that the action should be dismissed. (40) Under reference to MacPhail's Sheriff Court Practice at paragraph 20.05 and the case of *Aberdeen development Co v Mackie Ramsay & Taylor* 1977 SLT 201 the Respondents maintained the Appellant's first crave was incompetent for lack of specification. The first crave seeks only a declarator that the Respondents discriminated against the Appellant's son contrary to sections 28A, 28B and 28C of the Act. In itself it does not go on to state in what way there was discrimination but that is found in the articles of condescendence supporting the craves. If it is established that there was discrimination in terms of the Act then the subsequent craves are the operative ones, one seeking reduction and the other an order for re-admission. Accordingly, in my view, the first crave, whilst seeking a declarator only, does not stand alone and is a sufficient basis, if granted, for the remedies subsequently sought. Decision (41) In his judgement, the Sheriff at first instance as I have earlier recorded dealt briefly with the issue of the alleged breach of duty as averred in article 10 of condescendence. He was of the view that " had there been a relevant basis to the case, it would not in my view have failed because of the difficulties

identified by the defenders in relation to the duties pled as some would clearly require inquiry into the facts before their relevancy could be determined. However, although I would have allowed the action to proceed to proof or proof before answer notwithstanding the lack of relevance and specification of a number of the averments in article 10, some of these I would have excluded because of their entire lack of relevancy or specification." Since, in my view, it is open to the Appellant to seek the orders craved under Section 28B(2), I share the Sheriff's view that an inquiry into the facts is necessary before any decision on relevancy is made. As to Section 28C(2)(b) I agree there is no obligation on the Respondents to provide auxiliary aids or services but the pleadings disclose that the Respondents do have a learning support department and so it seems to me appropriate before determining this matter to know what "auxiliary aids and services" the Respondents may already have in place for disabled children. What the Respondents have done in the pleadings is simply to deny the averments in article 10 without averring anything about steps they may have taken to address their obligations under the Act. As far as the Respondents' answer to Article 11 is concerned that could amount to the defence of justification open to the Respondents under the Act. Whether it affords them an answer may depend upon whether they took any steps to address their duties under the Act in relation to the Appellant's child. It seems to me the first issue will be to determine whether the child was disabled for the purposes of the Act and thereafter whether the Respondents knew or ought to have known about the disability. Only then will the issues of compliance with duties and justification fall to be determined.

(42) In all these circumstances, I am satisfied that the appeal must succeed. I have recalled the interlocutor of the Sheriff and, as agreed by parties, allowed a proof before answer. The case will call on the Diet Roll for that purpose. Parties were agreed the issue of expenses should be reserved. APPENDICES 1,2, 3 & 4 ATTACHED/ Appendix 1 28A Discrimination against disabled pupils and prospective pupils (1) It is unlawful for the body responsible for a school to discriminate against a disabled person- (a) in the arrangements it makes for determining admission to the school as a pupil; (b) in the terms on which it offers to admit him to the school as a pupil; or (c) by refusing or deliberately omitting to accept an application for his admission to the school as a pupil. (2) It is unlawful for the body responsible for a school to discriminate against a disabled pupil in the education or associated services provided for, or offered to, pupils at the school by that body. (3) The Secretary of State may by regulations prescribe services which are, or services which are not, to be regarded for the purposes of subsection (2) as being- (a) education; or (b) an associated service. (4) It is unlawful for the body responsible for a school to discriminate against a disabled pupil by excluding him from the school, whether permanently or temporarily. (5) The body responsible for a school is to be determined in accordance with Schedule 4A, and in the remaining provisions of this Chapter is referred to as the "responsible body". (6) In the case of an act which constitutes discrimination by virtue of section 55, this section also applies to discrimination against a person who is not disabled. " (2) In the 1995 Act, insert the Schedule set out in Schedule 2. 28B Meaning of "discrimination" (1) For the purposes of section 28A, a responsible body discriminates against a disabled person if- (a) for a reason which relates to his disability, it treats him less

favourably than it treats or would treat others to whom that reason does not or would not apply; and (b) it cannot show that the treatment in question is justified. (2) For the purposes of section 28A, a responsible body also discriminates against a disabled person if- (a) it fails, to his detriment, to comply with section 28C; and (b) it cannot show that its failure to comply is justified. (3) In relation to a failure to take a particular step, a responsible body does not discriminate against a person if it shows- (a) that, at the time in question, it did not know and could not reasonably have been expected to know, that he was disabled; and (b) that its failure to take the step was attributable to that lack of knowledge. (4) The taking of a particular step by a responsible body in relation to a person does not amount to less favourable treatment if it shows that at the time in question it did not know, and could not reasonably have been expected to know, that he was disabled. (5) Subsections (6) to (8) apply in determining whether, for the purposes of this section- (a) less favourable treatment of a person, or (b) failure to comply with section 28C, is justified. (6) Less favourable treatment of a person is justified if it is the result of a permitted form of selection. (7) Otherwise, less favourable treatment, or a failure to comply with section 28C, is justified only if the reason for it is both material to the circumstances of the particular case and substantial. (8) If, in a case falling within subsection (1)- (a) the responsible body is under a duty imposed by section 28C in relation to the disabled person, but (b) it fails without justification to comply with that duty, its treatment of that person cannot be justified under subsection (7) unless that treatment would have been justified even if it had complied with that duty. " 28C Disabled pupils not to be substantially disadvantaged (1) The responsible body for a school must take such steps as it is reasonable for it to have to take to ensure that- (a) in relation to the arrangements it makes for determining the admission of pupils to the school, disabled persons are not placed at a substantial disadvantage in comparison with persons who are not disabled; and (b) in relation to education and associated services provided for, or offered to, pupils at the school by it, disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled. (2) That does not require the responsible body to- (a) remove or alter a physical feature (for example, one arising from the design or construction of the school premises or the location of resources); or (b) provide auxiliary aids or services. (3) Regulations may make provision, for the purposes of this section- (a) as to circumstances in which it is reasonable for a responsible body to have to take steps of a prescribed description; (b) as to steps which it is always reasonable for a responsible body to have to take; (c) as to circumstances in which it is not reasonable for a responsible body to have to take steps of a prescribed description; (d) as to steps which it is never reasonable for a responsible body to have to take. (4) In considering whether it is reasonable for it to have to take a particular step in order to comply with its duty under subsection (1), a responsible body must have regard to any relevant provisions of a code of practice issued under section 53A. (5) Subsection (6) applies if, in relation to a person, a confidentiality request has been made of which a responsible body is aware. (6) In determining whether it is reasonable for the responsible body to have to take a particular step in relation to that person in order to comply with its duty under subsection (1), regard shall be had to the extent to which taking the step in question is consistent with compliance with that request. (7) "Confidentiality

request" means a request which asks for the nature, or asks for the existence, of a disabled person's disability to be treated as confidential and which satisfies either of the following conditions- (a) it is made by that person's parent; or (b) it is made by that person himself and the responsible body reasonably believes that he has sufficient understanding of the nature of the request and of its effect. (8) This section imposes duties only for the purpose of determining whether a responsible body has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such. " Enforcement: Scotland 28N Civil proceedings (1) A claim that a responsible body in Scotland - (a) has discriminated against a person in a way which is unlawful under this Chapter, or (b) is by virtue of section 58 to be treated as having discriminated against a person in such a way, may be made the subject of civil proceedings in the same way as any other claim for the enforcement of a statutory duty. (2) Proceedings in Scotland may be brought only in a sheriff court. (3) The remedies available in such proceedings are those which are available in the Court of Session other than an award of damages. (4) Part 3 of Schedule 3 makes further provision about the enforcement of this Chapter and about procedure. (5) In relation to civil proceedings in Scotland , in that Part of that Schedule- (a) references to sections 28I, 28K and 28L, or any of them, are to be construed as a reference to this section; (b) references to the Tribunal are to be construed as references to the sheriff court. " Enforcement, etc. 28V Enforcement, remedies and procedure (1) A claim by a person- (a) that a responsible body has discriminated against him in a way which is unlawful under this Chapter, (b) that a responsible body is by virtue of section 57 or 58 to be treated as having discriminated against him in such a way, or (c) that a person is by virtue of section 57 to be treated as having discriminated against him in such a way, may be made the subject of civil proceedings in the same way as any other claim in tort or (in Scotland) in reparation for breach of statutory duty. (2) For the avoidance of doubt it is hereby declared that damages in respect of discrimination in a way which is unlawful under this Chapter may include compensation for injury to feelings whether or not they include compensation under any other head. (3) Proceedings in England and Wales may be brought only in a county court. (4) Proceedings in Scotland may be brought only in a sheriff court. (5) The remedies available in such proceedings are those which are available in the High Court or (as the case may be) the Court of Session. (6) The fact that a person who brings proceedings under this Part against a responsible body may also be entitled to bring proceedings against that body under Part 2 is not to affect the proceedings under this Part. (7) Part 4 of Schedule 3 makes further provision about the enforcement of this Part and about procedure. " (2) In Schedule 3 to the 1995 Act (enforcement and procedure), insert the provisions set out in paragraph 2 of Schedule 3. B 1602/07 APPENDIX 2 ES as parent and legal representative of LS v K SCHOOL Appellant's submission and reply to Respondent (43) Under reference to the Note of Appeal, Mr Nesbit submitted that the Sheriff had dismissed the Appellant's application under Section 28B(2) on the basis that there had been only two averments by the Appellant. He maintained that in so deciding the Sheriff had overlooked substantial averments in support of the "reasonable steps" duty under that section. These averments were set out in the Note of Appeal and were also found in Articles 10 and 11 of Condescendence. He submitted they

were sufficient to allow the case to proceed to a proof or proof before answer. (44) The duties relied on were set forth in Sections 28A, 28B and 28C. It was unlawful for the responsible body, in this case the Respondents as proprietors of the school, to discriminate against a disabled person if it fails to his detriment to comply with Section 28C and it cannot show that its failure to comply is justified. "Discrimination" was defined Section 28B. Section 28C set out the duty on the responsible bodies for schools such as the Respondents. This was referred to in the Code of Practice and in case law as either a duty to make "reasonable adjustments" or to take "reasonable steps". The Appellant relied on Section 28C(1)(b). Section 28C(2) limited the duty and 28C(3) allowed for regulations. No such regulations had been promulgated to date. Under reference to Section 28C(8) he pointed out that it was only where the matters specified in Section 28B(2) were shown to exist that unlawful discrimination had occurred. (45) For the Appellant to succeed it was not enough that there had been a breach of Section 28C. There must also be detriment to the disabled person - in this case the Appellant's child - and also that the responsible body was unable to demonstrate that its failure to comply was justified. The DDA provided for a statutory Code of Practice for Schools and he referred to that and in particular Chapter 6. He drew my attention to most of the paragraphs between paragraphs 6.5 and 6.30. He submitted that paragraph 6.9 demonstrated that there was not a particularly high threshold for the appellant to overcome. It was not only an anticipatory duty but also a general one. It did not rely on a party making requests for adjustments but on the school itself planning ahead to avoid substantial disadvantage to disabled pupils. Paragraph 6.15 demonstrated that there was a single duty to take reasonable steps to avoid substantial disadvantage to a disabled pupil but that there were many different ways of so doing. The onus was on the responsible body and the code listed a series of factors to which regard should be had. (46) Under reference to the case of *D v Bedfordshire County Council* he maintained that the High Court in England had there set out the approach in considering the issue of "reasonable steps". The case had concerned a dispute over transport of a pupil to and from an after school club. The issue had been an adjustment to the time of collection and whether or not the school required to make such an adjustment. He drew my attention to paragraph 23 which set out an approach for a court to consider whether there had been a breach of Section 28B(2):- "23. These provisions demonstrate that in any particular case the following questions can arise:

- (1) whether the child is or was at a substantial disadvantage in comparison with pupils who are not disabled;
- (2) whether or not the provision in connection with his transport from school to his home falls outside the duty imposed by the Act because it constitutes an "auxiliary aid or service";
- (3) whether the provision of transport being sought was a provision which it was reasonable for the LEA to provide;
- (4) assuming a failure to make a reasonable adjustment, whether or not the failure is or was justified." (47) There was not a great deal of case law in relation to Section 28B(2) and specifically the issue of whether or not the matter involved a reasonable adjustment. Those

cases there were seemed to demonstrate that there was an overlap between the question of whether the adjustment was reasonable and whether the failure to make such an adjustment was justified. In the Bedfordshire County Council case, having set out the four steps, the court at paragraph 37 of the judgment dealt with these issues of reasonable adjustment and whether or not the making of such adjustment was justified almost as one. Paragraph 37 almost solely dealt with the issue of justification so the court seemed to equip rate these two matters. (48) In *R v The Governing Body of Plymouth High School for Girls* the issue concerned a senior pupil with visual impairment. There had been a failure to arrange a work place experience for her and this was found to be discriminatory. The case demonstrates that there is a fluid boundary between reasonableness and justification. He drew my attention in particular to paragraphs 46 to 51 of the judgment. The judgment had started with the issue of justification in these paragraphs and ended up with a discussion of the reasonable steps which might be taken. (49) In terms of the legislation itself it was clear that under Section 28B(2)(b) the onus to consider the taking of reasonable steps and the taking of reasonable steps as such lay on the responsible body. Thus it was also for the Respondents as the responsible body to demonstrate that there were no reasonable steps that they could have taken. There was a crossover between the two duties as could be seen from Section 28B(8). The consequences of a failure to comply with the duty in Section 28C could be two fold. Firstly, it could lead to a finding of unlawful discrimination under Section 28B(2) and/or it could affect the Respondents' ability to justify a less favourable treatment under Section 28B(1). Looking at the duty under Section 28C, a failure to comply with that duty and an inability to justify that failure was a reflection of Sections 28B(2) and (8). Under reference to *The Governing Body of X School* he drew my attention to what the judge had to say about the reasonable adjustments duties. That case, in common with the case under appeal, involved a child with ADHD and the issue of exclusion from school. After this case was decided but before the hearing of the appeal, the House of Lords decision in *Malcolm & Lewisham London Borough Council* was issued and affected the interpretation of the "less favourable treatment" provision to the extent that *The Governing Body of X School* case would not have succeeded on that particular leg. (50) However, it was not overturned or disapproved in relation to what it had to say about the reasonable adjustments duties. He referred in particular to paragraph 7 of the judgement at paragraph M of the Tribunal's decision which dealt with the issue of reasonable adjustments:- "We noted the range of options available to the school to assist them to deal with N. When asked which had been used on which occasion however we were simply told that they had been used without example. We considered it to be more likely than not that such strategies that had been tried had been tried in no more than a piecemeal way without analysis and there was certainly no clear analysis of N's good behaviour in order to learn from it. Further there had been no attempt to contact Dr Elhussein, or any outside agent (such as an educational psychologist) for guidance. In our view the responsible body ought to have contacted Dr Elhussein and other professionals for advice; analysed the causes of N's good behaviour with a view to learning from it; and formulated a plan which systematically utilised the various strategies devised for her. They amount to reasonable adjustments [that] could have been made." (51)

He drew attention to the similarity between those reasonable adjustments and the averments upon which the appellant relied in this particular case. He also drew my attention to paragraphs 33 and 34 where the Court made reference to the Secretary of State's most recent guidance (in England) and approved reliance on that guidance and the terms of paragraph M above. The Court discussed the "reasonable steps" duty and emphasised that the question of making reasonable adjustments or taking reasonable steps was for the school. (52) What was averred by the appellant in this case was not a series of duties but one single duty to take such reasonable steps as were required to avoid substantial disadvantage to the disabled pupil, the Appellant's child. The Appellant clearly averred the detriment to the child and the substantial disadvantage in question at the end of Articles 10 and 11 of Condescence. Thus in Article 10:- "This was to his (the child's) detriment. L experienced disruption to his education and was not in receipt of the supports and strategies which would otherwise have been implemented because of the failings of the Defenders and was ultimately substantially disadvantaged by being permanently excluded from the school" and in Article 11:- "-they breached Section 28C(1)(b) and Section 28B(2) of the Act. This was to his detriment. The exclusion was to his educational detriment." (53) So, on the assumption that these averments were proved it was for the Respondents to argue, if so advised, that the duty had been complied with, namely, that they had taken such reasonable steps as were necessary, or indeed that the failure to do so was justified. The fact that the duty was an anticipatory duty according to the Code of Practice supported the submission that it was for the Respondents to show or demonstrate compliance. It was significant that the factors listed in the Code of Practice would be known to the school but unlikely to be known to a parent or child. The Appellant had set out on record a number of steps as to how the duty could have been complied with but there may well be other ways of so doing. That however was a matter for the Respondents. Their duty was satisfied once that substantial disadvantage had been avoided and once the limit of reasonableness had been reached by them. (54) Accordingly the Appellant, having averred the duty, having averred the detriment and disadvantage to the disabled pupil and having given ample indication of ways in which the duty might have been complied with, the requirements of specification incumbent upon the Appellant had been satisfied. It was now for the Respondents, if so advised, to make averments in answer as to the issue of reasonableness and/or justification. (55) As to the cases of OL Primary School and PPC v DS , both cases relating to exclusions, one permanent , the other temporary, in the OL case, at paragraph 14 the Deputy High Court Judge (the same in each case) observed, "However the duty to make reasonable adjustments may apply in relation to exclusions as being part and parcel of the provision of education and associated services. The respondent before me does not argue that the adjustments duty does not apply to exclusions."; and in the other, at paragraphs 28 to 30, " 28. There are three main issues in the appeal against the Tribunal's decision. First, whether Section 28C is capable of applying to exclusions at all (and, if so, in what way). I shall call this the "statutory interpretation issue".

29. By contrast with Section 28A, Section 28C does not expressly refer to exclusions. This is unsurprising. Reasonable adjustments are not applicable to an exclusion as such. What would be very surprising would be if Parliament had intended that the requirement of reasonable adjustments should not apply as an alternative to exclusion.
30. In my judgment, the requirements not to discriminate in the provision of education, and to take reasonable steps to ensure that in relation to the provision of education disabled pupils are not placed at a substantial disadvantage, embrace taking reasonable steps in order to avoid exclusion. I conclude that the Tribunal was correct on the statutory interpretation issue." (56) The Appellant's contention was that the Respondents ought not to have excluded her son but should have taken reasonable steps to avoid the need for an exclusion. They had failed to do this. (57) In addition, so far as specification in the Appellant's pleadings was concerned, at paragraph 18 of the OL case the Judge had observed, " There was no error of law in their conclusion that there were no further or other reasonable adjustments which could or should have been made by the school. The Tribunal did not have to go into minute detail about what adjustments there might have been (see the decision of the Court of Appeal in *Electronic Data Systems v Travis*
- [2004] EWCA Civ 1256 , paragraphs 22 and 23)." It was not for the Appellant to identify in minute detail the reasonable steps the school might have taken but rather the Court should look at the evidence overall to determine whether the duty has been fulfilled. Mr. Nisbet submitted that this approach was that approved by the Judge in PPC under reference to the English Appeal Court case of *Collins v Royal National Theatre Board Ltd*.
- [2004] 2 All ER 851 . (58) In all these circumstances I should allow the appeal and recall the Sheriff's interlocutor. Under deletion of various averments, a matter which had been agreed with the Respondents' counsel, Mr. Nisbet was content with a proof before answer. Appellant's reply (59) In so far as the Respondents sought to support the Sheriff's decision for dismissal on the basis that the duties related to the provision of auxiliary aids and services, this argument proceeded on the basis that the primary duty rested upon the parents. That was simply not the case. The onus rests on the responsible body, the school, in so far as it raises a question of a reasonable step. There is one duty and that is to take reasonable steps. The Appellant had provided ample specification of the and the various duties listed in Articles 10 and 11 of Condescence were simply specific examples of the primary duty laid upon the responsible body. The matter of auxiliary aids and services was a matter for proof. It was difficult to come to a conclusion as to whether or not something amounted to an auxiliary aid or service without evidence of how it fitted into the provisions made for the child at the school. Whilst the Appellant accepted the distinction to be made between a provision of services and the application of a service provided, that still required evidence. The provision of a mentor could simply be looked at as an extension of pastoral support and required evidence to resolve these matters. (60) The Appellant did not accept that a document was an auxiliary aid. Under reference to paragraph 6.13 of the Code of Practice this came from part 3 of the DDA. It was about the

application of resources rather than the provision of resources. A plan for somebody's individual learning would more naturally fall under the head of practices. The way a pupil is taught does not become an auxiliary aid just because it is recorded in writing. The matter to be adjusted needs to be provided to the generality of pupils. Mr Nesbit then referred to the use of an auxiliary aid such as an item provided for a deaf child. The provision was the auxiliary aid or service but the adjustment to its use was not an auxiliary aid even though the provision of such an FM system would not be for the generality of pupils. (61) As to there being no factual basis for behaviour management programmes or sanction systems, that proceeded on a fallacy that the school was under a duty to be responsive rather than anticipatory. Paragraph 6.13 of the Code of Practice made it clear that the responsibility lay on the school to review its policies. (62) As to intimation to the school of steps being taken by the parents, Article 7 of Condescence showed that duties averred in Article 8 followed from meetings held in February 2007. It was against that factual background that the Appellant said it would have been reasonable for the school to wait. The school should not have proceeded without taking notice of the declared intention of the parents. It was for the Respondents to provide detail not the Appellant. (63) As to the craves, the principal question was whether or not a "reasonable steps" case can be used to found an exclusion case. The Respondents was correct to say that there was no direct reference to exclusion in Section 28C and that it was upon Section 28C(1)(b) that the appellant relied, that is to say, on the issue of education and associated services. Education and associated services was a deliberately broad term and broad enough to encompass the way in which a school goes about an exclusion, the exclusion procedure. A reference to the Code of Practice confirms that and in particular an examination of paragraph 4.23 in which a list of matters covered included the school discipline and sanctions and exclusion procedures. What the appellant complained of here was the procedure that the school did not wait for information they knew the parents were obtaining. (64) Section 28N set out the court's powers which were effectively the same as would be open to the Court of Session. If the attack could be, as it was, on the way in which the decision was reached then surely it was still open to the court to allow a remedy of reduction. (65) As to the declaratory crave, the Aberdeen Development Company case fell to be distinguished. There was a difference between a contractual case where there was an ongoing liability issue as in the Aberdeen Development Company case and this appeal where the question was whether or not a particular act of discrimination had occurred. The Respondents suggested that the particular failures should be specified but they failed to appreciate that the wider duty, the duty to take reasonable steps, was the specific duty incumbent upon the responsible body, the Respondents. Examples of the declarator in general terms could be found in paragraph 8 of The Governors of X School case and in paragraph 29 of the McAuley Catholic High School case. The declarators there were in similar broad terms to the declarator sought by the Appellant. B 1602/07 APPENDIX 3 ES as parent and legal representative of LS v K SCHOOL Respondents' submission (66) Counsel for the Respondents reminded me that the Appellant now accepted that the Sheriff's judgment was correct on the "comparator" issue (in line with

the House of Lords decision in *Malcolm*) and accordingly accepted that her case so far as pled under Section 28B(1) was irrelevant. (67) The Respondents' submission was two fold. Principally, since the only case upon which the Appellant now relied was under Section 28B(2), the reasonable adjustments case, the Respondents maintained that that section did not apply to a factual situation consisting of an exclusion from a school. Consequently the only breach of statute which the appellant now pled did not entitle her to the remedy she sought. Sections 28C with 28B(2) did not entitle the Appellant to seek reduction nor the order for re-admission. The only route to reduction of the decision to exclude was through Section 28B(1). In light of the decision in *Malcolm* the Appellant could have amended to provide an appropriate comparator under Section 28B(1) but had chosen not to do so and so now periled her case on Section 28B(2). (68) Separately, and in addition, the Respondents submitted that even if Sections 28B(2) and 28C did apply to the factual situation of an exclusion, the averments of duty pled by the Appellant were still irrelevant. Counsel said he had advanced these arguments before the Sheriff at first instance but they had not been recorded and so whilst the Respondents accepted the Sheriff's decision as correct, the Sheriff had not gone far enough in determining that the case alternatively pled under Section 28B(2) was also irrelevant albeit for separate and additional reasons. (69) Section 28A began with provisions for the admission to a school and made it unlawful to discriminate; continued to make it unlawful to discriminate against a child when the child was at the school and in receipt of education or associated services; and dealt with the third situation of an unlawful discrimination by way of exclusion from the school whether permanently or on a temporary basis. No regulations had been made in terms of sub-section (3). Thus Parliament in the Act had identified three particular situations of possible discrimination, admission to the school, attendance at the school and exclusion from the school. (70) Section 28B(1)(a) provided that there was discrimination by a responsible body if it treated a disabled person less favourably than it would treat others. This sub-section raised the issue of the comparator which had been determined in the case of *Lewisham London Borough Council v Malcolm* . Sub-section (b) dealt with the justification issue. However, the case so far as falling under Section 28B(1) was no longer insisted upon. It would have been possible for the Appellant to have challenged the exclusion if she had amended to provide a relevant comparator. Accordingly, the only avenue now open to the Appellant was Section 28B(2) upon which she now relied. Sub-sections (3) and (4) of Section 28B provided defences for the responsible body. Sub-sections (5) to (8) dealt with the issue of justification as a defence. In addition sub-section (8) allowed an applicant, seeking a finding of discrimination, to say it may be justified under Section 28B(1) but that you, the responsible body, have failed to make reasonable adjustments under Section 28B(2). The Respondents' primary submission was now that the Appellant could not challenge an exclusion decision under Section 28B(2). (71) Section 28C required the responsible body to take steps to ensure that there was no discrimination in two specific situations, namely (a) admission (as seen in 28A(1)) and (b) in education and services (as seen in 28A(2)). Section 28A(4) was not to be found in 28C. There was no question of it being a mistake or omission. A challenge to exclusion could only be made

under Section 28B(1). The provision requiring the making of "reasonable adjustments" or taking "reasonable steps" was for ongoing situations or in the relationship between the child and the school. Section 28C was not intended to apply to exclusions. (72) The Appellant might seek declarator that there was discrimination under Section 28B(2) or 28C. Section 28C did not entitle the Appellant to seek a decree of reduction of a decision to exclude. Accordingly Section 28B(2) averments do not provide a legal basis for the second crave of the Appellant's application. (73) Crave 3 was for an order for re-admission. The Appellant could have gone down that route by means of Section 28B(1) or 28C(1)(a) if she had made factual averments that following the exclusion of her child there had been an application for re-admission in the course of which the school breached Section 28B(1) or 28C duties. There were no such averments. Accordingly there were no relevant averments to provide a legal basis for craves 2 and/or 3. (74) As to crave 1, Counsel drew my attention to the observations in Macphail: Sheriff Court Practice (3rd Edn) at paragraph 20.05. Under reference to the authority there quoted, Aberdeen Development Company, he submitted that the crave was incompetent in that it lacked precision and specification. He drew my attention, in particular, to the observations at page 128 and page 181. Crave 1 had no specification of how the relevant sections had been breached. It may be that exclusion was what was meant but then there was no relevant basis to support that. If it was something prior to exclusion then there should be a specification of the act or omission. Counsel did not seek to say that the declarator was incompetent in that it did not seek to determine a live issue between parties. However, if the Respondents' submissions were accepted then that was an end of the Appellant's case. (75) Alternatively and separately, even if the Respondents' submission was not so far acceptable to the Court, the claim was still irrelevant on another basis. Stated briefly, certain of the duties pled in Article 10 of Condescence unquestionably related to the provision of auxiliary aids and services which were not covered by Section 28C duties; certain other duties were so lacking in specification as to be meaningless and the remainder of the duties were irrelevant for want of a proper factual basis in the pleadings. (76) As to the issue of auxiliary aids and services, the obligation on a school under Section 28C did not include auxiliary aids and services, (Section 28C(2)(b)). Auxiliary aids and services were not defined in the Act and Counsel drew my attention to provisions of the Code of Practice and in particular paragraphs 6.19 to 6.22. Paragraph 6.20 referred to Special Educational Needs (SEN) framework. Its purpose was to sit alongside the provisions of the DDA. The DDA did not provide an additional or "second bite at the cherry". Paragraph 6.20A gave an example of the provision of an aid under a SEN framework where the school could not obstruct the use of it but there was no obligation on the school to provide the aid for the child. Paragraph 6.21 dealt with the situation of independent schools where a SEN framework was not available. Parents might be charged a fee in this situation but the fact that a SEN framework was not available because Parliament had so determined did not mean that the DDA could be used to meet that "gap" if it might be so described. Under paragraph 6.22 independent schools could - and that was a permissive verb - provide the services. Accordingly the DDA could not be used as a back door to compel the school to provide the

services. If the aids were there the school must facilitate their use but there was no duty in the first place. There was no duty on the school to have a child medically examined. (77) What were auxiliary aids? They might be, for example, an item such as a wheelchair or a document such as a personal learning plan. Auxiliary services might be provided by other persons such as a signing interpreter or a mentor. How does the responsible body draw a line between auxiliary aid, there being no duty to provide it, and a reasonable adjustment, there being a duty so to make. A reasonable adjustment is what the school does for all the children but does differently for a disabled child. Auxiliary aids or services were not generally provided to other children but the duty to make the reasonable adjustment arose where they were so provided and the adjustment was to make it easier for the disabled child to access the primary service, namely education. (78) In *D v Bedfordshire County Council* the child had Asperger's Syndrome. The child was transported to and from school with other children in a school bus. The school bus was provided by the local authority, being the local education authority responsible for the school. The child could not make his own way home without the bus but all the other children could do so in the event of a problem with the bus. There was a rigid bus timetable which required the bus to leave the school at 3.00 pm . That did not suit the child because he was attending a drama group and was so encouraged to do by the school. He did not finish until 4.30 pm . His parents sought transport at that time and the local authority refused. Under reference to paragraphs 35 and 36 of the judgment Counsel pointed out that the service was for all children and so was not an auxiliary service but a mainline service. In paragraph 34 the judge had distinguished adjustments from auxiliary aids. The bus was not an auxiliary aid or service but was the item provided for the provision of the service. (79) In *Taylor v Glasgow City Council* the child again suffered from Asperger's Syndrome. The question arising was set out in paragraph 2 of the judgment and dealt with in a debate on an agreed basis of fact as to the existence of a pupil support system. The decision on facts was not significant to the present appeal but the Sheriff had seen fit to make certain comments on the law. Counsel drew my attention to a variety of paragraphs in the judgment and in particular paragraph 21 where the Sheriff had distinguished between the provision of an aid or service and its application once provided. The application of a service provided did fall under the provisions of the DDA. Counsel submitted that paragraphs 27 and 28 contained the meat of the decision and in paragraph 29 there was discussion of the 2004 Act. In paragraph 31 the Sheriff clearly distinguished between the provision and application of something already provided. (80) Counsel then proceeded to examine the averments of duties in Articles 10 and 11 of Condescendence. As to the averments in Article 10:- "They failed to draft and implement an Individual Education Plan for Laurence and failed to produce an individual learner profile to support him. They failed to work collaboratively with Laurence's parents....."; "They failed to provide support during unstructured activity times, such as the provision of a quiet place to go or structured activities. They failed to offer Laurence counselling."; "They failed to offer Laurence a mentor and failed to offer him a key worker or trusted member of staff to whom he could talk.", the Appellant averred that the Respondents had failed to give him an auxiliary aid,

such as, for example, a structured activity plan. These "failures" were all averments of failures to provide auxiliary aids and services, for example, counselling service. Likewise a mentor or auxiliary worker was an auxiliary service. There was no obligation on the Respondents so to provide. (81) Leaving the issue of auxiliary aids and services, the other duties averred by the Appellant were irrelevant either for a material lack of specification or for a want of proper foundation in the pleadings. Counsel referred to *Gibson v SRC* in respect of the standard to be met where issues of "reasonableness" were raised in the pleadings. In particular he drew my attention to the observations of Lord Murray at 907E and 908B and of Lord Weir at 909B to C. (82) Counsel then identified the following duties averred by the Appellant in Articles 10 and, in the case of the last, 11:- "In particular they failed to wait for the outcome of the medical assessments before taking disciplinary action. It would have been reasonable to wait until the end of the academic year before taking disciplinary action. It was unreasonable to take a decision on whether or not to permanently exclude the child little more than a month after the Pursuer had informed the school she was arranging to have the child assessed for ADHD." "They failed to await the expertise and support of outside agencies, such as assistance from ADHD Direct or input and guidance from a psychiatrist and other assistance." "They failed to wait until such time as a diagnosis of Laurence's condition was known before excluding him from the Defenders' school."; and lastly, "The Defenders ought to have waited for the outcome of the assessments prior to taking a decision on exclusion from school." In the averment dealing with medical assessments none had been brought to the attention of the Respondents. Only in Article 8 of *Condescence* was there a reference to a medical examination by Mr Brown in June 2007 which was some 3 months after the exclusion order. There was no averment to suggest that such an examination was even in the contemplation of the Appellant. If the school was unaware of any medical examination why would it be reasonable for the school to have waited? The first mention of ADHD direct is in this reference to the examination by Mr Brown which was some 3 months after the exclusion. There was no averment that there had been anything intimated to the school for which they should wait. Likewise since there were no averments of intimation to the school, how long was the school to wait in the absence of any information about the steps the child's parents might or might not take. (83) As to the duties averred in the latter part of Article 10:- "They failed to implement a positive behaviour management programme and a system of rewards. They failed to implement an escalating sanction system to assist Laurence to understand the seriousness of his behaviours.", in so far as there was an averment that the school had never provided a positive behaviour management programme, since they were not under an obligation to do so and had not done so it was not possible for them to fail to implement it. They had no duty to provide it. A like observation applied to the duty regarding an escalating sanction system. (84) As to the lack of material specification in the duties following, "They failed to work collaboratively with Laurence's parents and failed to discuss how his behaviours at school mirrored those at home and what strategies could be successfully implemented between home and school." "They failed to offer Laurence suitable and appropriate guidance and

pastoral support." "They failed to manage Laurence's peer relations and support him in avoiding conflict situations.", the classic question for relevancy was "So what?" What would suitable support and appropriate guidance have been? These averments of duties were all far too general. (85) As to the duty averred at the outset of Article 10, "They failed to request assistance from East Dunbartonshire Council with regard to Laurence's additional support needs in terms of Section 7 of the Education (Additional Support for Learning) (Scotland) Act 2004.", The Appellant was simply endeavouring to use the DDA as a back door to get around the issue of support but that matter was covered by the SEN framework. (86) The appellant had referred to the Plymouth High School case but that was not a case where the plaintiff had sought a reduction of an exclusion order. Exclusion was not in issue at all in that case. It was purely a declaratory decision and there had been no discussion of auxiliary aids and services. (87) As to The Governing Body of X School, that had concerned an exclusion order but reduction had not been sought. Declarators had been sought that certain exclusions were discriminatory but the whole argument had proceeded on the basis of Section 28B(1), the route now abandoned by the Appellant. A reference to paragraph 1 of the tribunal reasons given in paragraph 7 of the judgment made it clear that it was unquestionably a Section 28B(1) case. The case had been before the Malcolm decision and so decided on the basis of a wrong comparator. It did no damage to the Respondents' primary submission that exclusion of a child did not give rise any remedy under Section 28B(2) or 28C. The case was also very different in fact from this appeal. There the medical practitioner had been long involved before the decision was made. That was not the case in this appeal. The Respondents had no difficulty with the submission that the school had a duty to listen if they were being told something but that was not the same as saying it had a duty to get medical advice. (88) As to the McAuley Catholic High School case, again no reduction of exclusion had been sought. In paragraph 50 of the decision exclusion had not been found to be discriminatory and the case had proceeded on Section 28B(1) and used the pre Malcolm comparator. Paragraph 47 of the judgment clearly used the language of a Section 28B(1) claim. An examination of paragraph 8 which looked at the Section 28B(2) issues, the duties, were similar to the ones averred in this appeal. Notwithstanding this there was no discussion in the McAuley case of auxiliary aids and services. (89) In relation to the OL Primary School and PPC v DS cases Counsel tendered written submissions which, along with a note of his submissions previously made, are in process. It was vital to look at the context of the OL Primary School case. It was a Section 28B(1) case (see paragraph 3 of the decision) as was the PPC case. The OL decision simply emphasised that the correct approach to challenge an exclusion decision was under that section. The PPC case made clear that the issue of reasonable adjustments did not apply to an exclusion decision as such (see paragraph 29 of the report). The only reason there was any discussion in the OL case about adjustments was because the Defendants, the school, raised the issue of justification. (90) In response to a question from me about a failure by the school to take reasonable steps or make reasonable adjustments at a stage prior to the making of the decision to exclude, Counsel maintained that Section 28C simply did not contemplate "reasonable steps" as applicable

to a decision to exclude. It did not form a basis for reduction of such a decision. It may be that there was a lacuna in the Act but, if so, that was a matter for Parliament to correct if it saw fit. (91) In all these circumstances the appeal should fail. Appendix 4 Extract from statutory Code of Practice Education and associated services 4.23 'Education and associated services' is a broad term that covers all aspects of school life. This list exemplifies the range of activities that may be covered by the term 'education and associated services': _ preparation for entry to the school _ the curriculum _ teaching and learning _ classroom organisation _ timetabling _ grouping of pupils _ homework _ access to school facilities _ activities to supplement the curriculum, for example, a drama group visiting the school _ school sports _ school policies _ breaks and lunchtimes _ the serving of school meals _ interaction with peers _ assessment and exam arrangements _ school discipline and sanctions _ exclusion procedures _ school clubs and activities _ school trips _ the school's arrangements for working with other agencies _ preparation of pupils for the next phase of education. 4.24 This list is not exhaustive, nor is it intended to be. Part 4 covers all education and associated services that are for pupils and prospective pupils. It does not include other services that are provided to the public. These are covered by Part 3 of the Act. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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