School Exclusions and Disability Discrimination

McGibbon v Glasgow City Council

The Equality and Human Rights Commission recently provided legal assistance in the successful case of McGibbon v Glasgow City Council, a case we supported via our access to justice project, in which Iain Nisbet of Cairn Legal acted for Mrs McGibbon.

This case was taken by the mother of a nine year old child who had been excluded from school on a few occasions following behaviour that was linked to his Asperger's diagnosis. Due to his disability, his distress tended to build up and the interventions made by the school did not de-escalate matters, which led to him lashing out and ultimately being excluded.

Disability, under the Equality Act 2010, is defined as a physical or mental impairment that has a substantial and long-term effect on your ability to do normal day-to-day activities. As such, disability covers Autistic Spectrum Disorders such as Asperger Syndrome.

If an impairment does not fall under the legal definition of ‘disability’ then the duty to make reasonable adjustments does not apply and the Act does not protect the disabled person from discrimination.

This case dealt with the issue of Regulation 4 of The Equality Act 2010 (Disability) Regulations 2010. These regulations set out some conditions which are excluded from the definition of ‘disability’ under the Equality Act. One of those ‘excluded conditions’ is having a tendency to physically or sexually abuse others. The ‘tendency to physical abuse’ exception is often relied upon when a school is challenged for excluding children with a diagnosis of Autistic Spectrum Disorder (ASD) for behaviour that arises as a result of their condition. That was what happened in this case.
The Additional Support Needs Tribunal for Scotland (now the First-Tier Tribunal for Scotland (Health and Education Chamber)) found that the child in this case did not have a tendency to physical abuse and that the child was unlawfully discriminated against by the school’s decision to exclude him. The Council was found to have discriminated against the child on the grounds of discrimination arising from disability, indirect discrimination and failing to make reasonable adjustments.

The tribunal also found that the Council had failed to make reasonable adjustments for the child by failing to provide direct education psychology input, having withdrawn that support in 2015.

The Council couldn’t justify treating the child unfavourably by excluding him and so the tribunal made a finding of discrimination arising from disability. The tribunal said that if the reasonable adjustments had been made, the question of exclusions may never have arisen.

The Council’s exclusions policy was found to have been indirectly discriminatory and the Tribunal said that the policy did not achieve a 'level playing field'. The tribunal further concluded that Glasgow City Council’s exclusion policy led to a higher proportion of disabled pupils, particularly children with ASD, being excluded. Their policy was the same for all children. While the policy stated that additional considerations may apply where the child has additional support needs, it seems that such considerations were not being taken into account, given the disproportionately high exclusion rates for disabled pupils.

The tribunal stated,

“Many disabled or ASD pupils will exhibit behaviour which is as a result of their condition. Reasonable adjustment is required to meet the needs of that pupil. If no such adjustment is reasonably made, the application of the policy to that pupil in the same manner as application to a non-disabled pupil, without differentiation, is discriminatory.”

During the hearing, the tribunal heard evidence from Dr Gillean McCluskey, an expert on school exclusions. She advised that other countries find it “shocking” that exclusion is used in Scotland. She was extremely concerned that disabled children and children with additional support needs are still more likely to be excluded from school and the exclusions figures are not decreasing in the same proportion compared with non-disabled pupils.
In other countries, the focus is on inclusion. Even if there are difficulties, a solution is found to ensure that each child knows they are part of a community. She advised that exclusion is not particularly effective and can be detrimental to the child involved, as well as having an adverse impact on the other pupils.

Dr McCluskey’s view was that if the relationship between school and pupil has broken down, excluding the child will not help. She highlighted that it is extremely rare that a child or family feels the situation is better after exclusion. Dr McCluskey acknowledged that exclusion is used for the more serious issues but it is ineffective and potentially makes matters worse for that pupil, their family and the wider school community.

On a more general note, out-with this case, the UN has called for the practice of unlawful exclusions, to which disabled children are particularly at risk, to be abolished (UN CRC, 2016)

The Commission is concerned that many disabled children find themselves excluded from school and excluded from the protection of the Equality Act 2010. The tribunal highlighted the Commission’s technical Guidance in stating that, “it is difficult for an exclusion to be justified in circumstances in which a school has not complied with its duty to make reasonable adjustments for the pupil. Such are the circumstances in this case.”

Glasgow City Council has been directed to make an apology, ensure staff undertake training, revise its exclusion policy and routinely monitor (and work towards reducing) exclusion rates of disabled pupils.

The case was a real victory for disabled children and their families. Excluding a child for behaviour arising from their disability is not only discriminatory and damaging to the individual, but has an adverse impact on the wider school community.

The child in this case now attends a new school, within the same local authority area, where he is well-supported, happy and thriving.