

## CDC case law update 31 – October 2018



*This update is intended to provide general information about recent decisions of the courts and Upper Tribunal which are relevant to disabled children, young people, families and professionals. It cannot and does not provide advice in relation to individual cases. Where legal issues arise specialist legal advice should be taken in relation to the particular case.*

### ***C & C v The Governing Body of a School, the Secretary of State for Education (First Interested Party) and the National Autistic Society (Second Interested Party) (SEN) [2018] UKUT 269 (AAC)***

*The Upper Tribunal held that the First-Tier Tribunal had erred in holding that L, an autistic child with a 'tendency to physical abuse', did not have a disability for the purposes of the Equality Act 2010 as he fell within Regulation 4(1)(c) of the 2010 Regulations. The interpretation of regulation 4(1)(c) adopted by the First-Tier Tribunal was incompatible with Article 14 of the European Convention on Human Rights as it discriminated against certain groups of disabled children without justification.*

#### Case overview

This case concerned an appeal against the First-Tier Tribunal's ('FTT') dismissal of a claim that L had been discriminated against on the grounds of his disability in respect of a fixed-term exclusion from school.

L is a child with diagnoses of autism, anxiety, and Pathological Demand Avoidance. He was excluded from school on the stated basis of his aggressive behaviour, which included a number of violent incidents over a ten month period.

The FTT considered that L generally met the definition of a 'disabled' person for the purposes of the Equality Act 2010, but dismissed the part of the claim that related to the fixed-term exclusion on the basis that L had been excluded as a result of his 'tendency to physical abuse', and so, due to Regulation 4(1)(c) of the Equality Act 2010 (Disability) Regulations 2010 was to be treated as not falling within the definition of 'disability'.

In reaching this conclusion, the FTT had rejected an argument from the appellants that this regulation should be reinterpreted or disapplied to avoid a breach of Article 14 of the European Convention of Human Rights ('ECHR'), which prohibits discrimination, read alongside Article 2 Protocol 1 ECHR (the right to education).

The question for the Upper Tribunal ('UT') was whether regulation 4(1)(c) ('the regulation') needed to be read down or disapplied to avoid breaching Article 14 ECHR. Although the regulation had previously been considered by the UT and High Court in the education context, there had never been an argument directed to the impact of Article 14 ECHR on the proper interpretation of the regulation. The appellants argued that the interpretation of the regulation adopted by the FTT (following the earlier UT and High Court decisions) unlawfully discriminated

against children whose impairment(s) give rise to an enhanced risk of physical aggression and so may be held to have a 'tendency to physical abuse'.

The UT first considered the historical context of the regulation, in particular the public policy consideration that had led to their introduction, namely to avoid providing protection for people where the effect of their condition might involve anti-social or criminal activity.

The UT next considered the effect of Article 14 ECHR. It noted that this was not a freestanding right, but in this case could apply in conjunction with Article 2 Protocol 1 ECHR, which provides that no one shall be denied the right to education. The Tribunal held that, as it considered there was a difference in treatment between children like L and other disabled children because of the exclusion of children like L from the definition of 'disability' as a result of their aggressive behaviour, the central question was whether that difference could be justified.

The UT was of the view that it was only necessary in this case to consider the first and fourth stages of the test for proportionality, being the standard for justification in human rights case. The UT considered, on the first stage of the test, that in this case there was a legitimate aim behind the regulation. The key issue was therefore the fourth stage, being whether or not a 'fair balance' had been struck, taking into account the severity of the consequences of the regulation, the importance of its aim, and the extent to which it contributed to that aim.

In this case, little weight could be given to the Secretary of State's view that the regulation struck the right balance. The Secretary of State had not carried out the required detailed evaluation of the respective interests, and had consequently not formed a properly considered view.

The UT went on to hold that the consequences of the regulation were extremely severe, as it allowed schools to exclude children like L without having to justify this treatment insofar as far as behaviour demonstrating a 'tendency to abuse' was concerned, even though this behaviour might have been brought about a school's failure to make reasonable adjustments.

By contrast, if the regulation were not to apply, schools would still not be required to tolerate violent behaviour, but merely to show that they had made reasonable adjustments or justify the proportionality of any decision to exclude.

The UT noted that a 'particularly significant' number of pupils were affected by the regulation, and that it "would be hard to overstate the impact [of the regulation] on this particularly vulnerable cohort of children." Another "particularly weighty factor" was that aggressive behaviour was not a choice for autistic children, who might not understand their behaviour. Their behaviour could not properly be described as criminal or anti-social and to apply that label to children such as L was 'repugnant'.

The Secretary of State's arguments, including that a 'tendency to physical abuse' was a high threshold, that the regulation was narrowly focussed on such

behaviour and that an excluded child could rely on other safeguards were rejected by the UT.

Accordingly, the UT was “firmly of the view” that the interpretation of the regulation adopted by the FTT came “nowhere near” to striking a fair balance when applied to children such as L in the education context. As such, the interpretation of the regulation adopted by the FTT was incompatible with Article 14 EHRC, and so the regulation so as to mean that children such as L would still be considered ‘disabled’, or alternatively the regulation would simply be disapplied in L’s case and other similar cases.

The UT recorded that having allowed the appeal, the dispute between L’s parents and his former school had been resolved between the parties by a confidential agreement.

### What this means for children, young people and families

This UT decision means that children will, in the context of education, be protected against discrimination even where they have a condition that gives rise to a ‘tendency to physical abuse’ (in other words that their impairment(s) lead to an enhanced risk of physically aggressive behaviour). Children with conditions such as autism and ADHD will in future be protected against exclusion without proper justification, and receive the same protection as other disabled children in this regard.

### Implications for local authorities and other public bodies

Schools will in particular now be required to make reasonable adjustments for children where a recognised condition leads to a ‘tendency to physical abuse’. Given the high proportion of exclusions of children with conditions such as autism which rely on the exception in the regulation, this will prove a potentially very significant change. Schools will also need to justify the exclusion of all ‘disabled’ children in proportionality terms if a claim of ‘discrimination arising from disability’ is advanced under section 15 of the Equality Act 2010, which will often be the case.