# In the First-tier Tribunal Special Education Needs and Disability

Case Number **[insert]**

In the matter of the permanent exclusion of **[insert pupil name]**
Date of birth **[insert date]**

**[insert parent / caregiver name(s)]**

**Appellant / Appellant(s)**

- and -

Governing body of **[insert school name]**

**Respondent**

Grounds of claim

Please refer to the relevant guide as you complete this template. There are notes highlighted throughout to advise you while you complete this form. These notes should be deleted before finalising your written submission.

## Introduction

1. **[Insert pupil name]** is **[insert key details, for example, age, date of birth, year group, relevant disability]**. By their appeal, **[insert parent / caregiver name(s) or names]** (the Appellant) contendsthat the decision to permanently exclude **[insert pupil name]** from **[insert school name]** was contrary to the Equality Act 2010 (EA 2010). In particular, they contend that the permanent exclusion amounts to:

**[Choose one ground]**

## Background

### General background

1. **[Insert a short profile of the pupil, including any relevant diagnoses, etc.]**

### Events leading to permanent exclusion

1. In deciding whether to permanently exclude **[insert pupil name]**, the test that had to be applied by the head teacher is set out in the Department for Education’s guidance entitled ‘Exclusion from maintained schools, academies and pupil referral units in England: A guide for those with legal responsibilities in relation to exclusion’ (the ‘Guidance’). The critical questions were whether there had been a ‘serious breach or persistent breaches of the school’s behaviour policy’ and whether allowing **[insert pupil name]** to remain in school ‘would seriously harm the education or welfare of the pupil or others in the school’ (Guidance, para 15). Permanent exclusion must only be used as a last resort (Guidance, p. 4).

1. **[insert timeline of relevant events leading to permanent exclusion.]**

### The Governing Body’s decision

1. The question for the Governing Body was whether **[insert pupil name]** should be reinstated as a pupil at the School (Guidance, para 61). In reaching its decision, it was also required to follow the Guidance unless there was a good reason not to (Guidance, p. 3).
2. Before the Governing Body meeting held on **[insert date]**, the Appellant**[s]** argued that: **[insert summary of arguments in a numbered list.]**
3. In a letter dated **[insert date]**, the Governing Body declined to reinstate **[insert pupil name]**. In respect of breaches of the EA 2010, the Governing Body found that: **[insert summary of the Governing Body's decision / reasoning]**.

## Submissions

[Delete or complete any of the following as relevant. Move completed subsections around as desired.]

### Disputes of fact

1. There is a dispute between the parties as to the following matters of fact arising from the summary above. In the **[Appellant’s / Appellants’]** submission, their position should be preferred because **[insert reasons]**.

### Disability

Legal principles

1. Section 6 of the EA 2010 states that a person (P) is disabled if:
	* + 1. P has a physical or mental impairment, and
			2. the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.
2. ‘Substantial’ means simply ‘more than minor or trivial’ (EA 2010, section 212), and a ‘long-term’ effect is one which has lasted for at least 12 months, is likely to last for at least 12 months, or is likely to last the rest of the life of the person affected (EA 2010, Schedule 1, para 2). The adverse effect is to be considered without regard to any treatment or correction (EA 2010, Schedule 1, para 5).

Application to this case

1. In this case, **[insert pupil name]** has a **[physical / mental]** impairment, **[insert explanation / summary / diagnosis].**
2. This has a substantial impact on theirability to carry out normal day-to-day activities. **[insert details].**
3. This impact is long-term, in the sense that **[insert explanation].**
4. **[insert pupil name]** is therefore disabled for the purposes of the EA 2010.

### Section 13 of the EA 2010: Direct discrimination

Legal principles

1. Note: the legal principles should be included only once at the start of each relevant section you have grounds under.By section 85(2) of the EA 2010, the responsible body of a school must not discriminate against a pupil:
	* in the way it provides education for the pupil (subsection (a))
	* in the way it affords (or by not affording) the pupil access to a benefit, facility or service (subsections (b) and (d))
	* or by excluding the pupil from the school (subsection (e)).
2. Section 13(1) of the EA 2010 provides that ‘a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others’. Direct discrimination cannot be justified.
3. Direct discrimination can occur irrespective of motive or intention, and regardless of whether the less favourable treatment is conscious or unconscious: see, for example, R (E) v. Governing Body of JFS [2010] 2 AC 728.

### Application in this case

1. In this case, **[insert pupil name]** was treated less favourably by being permanently excluded. The relevant comparator is a pupil in **[insert pupil name]**’s position who did not suffer from **[insert]**. In the **[Appellant’s / Appellants’]** submission, such a pupil would not have been permanently excluded because **[insert explanation and / or evidence].**

### Section 15 of the EA 2010: Discrimination arising from disability

Legal principles

1. Under section 15 of the EA 2010, a school will be liable to a person (P) for discrimination arising from disability, if:
	1. the school treated P unfavourably
	2. this treatment was because of something arising in consequence of his or her disability
	3. the school cannot show that this treatment was a proportionate means of achieving a legitimate aim, and
	4. the school cannot show that it did not know and could not reasonably have been expected to know that P had the disability.
2. To be legitimate, the aim of the unfavourable treatment must be legal and non-discriminatory, and must represent a real objective consideration. As defined in the Equality and Human Rights Commission’s guidance, Technical Guidance for Schools in England, ‘Proportionate’ means appropriate and necessary (Technical Guidance, paras 5.33 and 5.35).
3. An exclusion is unlikely to be justified in circumstances in which the school has not complied with its duty to make reasonable adjustments for that pupil (Technical Guidance, para 4.11).
4. [If not relevant, delete this paragraph]: The EHRC Technical Guidance, para 4.11, provides the following example of an exclusion which amounts to discrimination arising from disability:

‘A pupil with autism is excluded for flapping his arms at a supply teacher. The supply teacher was alarmed by what she perceived to be threatening behaviour. The reason why the pupil flapped his arms was that the supply teacher had told him that he could not sit in his normal seat, because it was not appropriate for the activity that they were doing. This upset the pupil and caused him to flap his arms in an agitated fashion. The pupil always sat in the same seat in the classroom and this was recognised as a reasonable adjustment for his autism by his class teacher. Since the pupil’s reaction of flapping his arms was connected to his disability, the exclusion would be discrimination arising from disability. Because the school had not advised the supply teacher of the reasonable adjustment, the school would be unlikely to be able to justify the discrimination and therefore it would be unlawful.’

Application to this case

1. **[Insert pupil name]** has been subjected to unfavourable treatment by being permanently excluded. As is clear from the factual summary above, this treatment was ‘because of’ **[insert relevant factor(s) / feature(s), for example, disruptive behaviour, violence, etc]**. **[Insert any further reasoning to explain the link between the factor(s) / feature(s) and the exclusion decision.]**
2. **[This / these]** constitute**[s]** ‘something arising in consequence of’ **[insert pupil name]**’s disability, **[insert explanation of link between disability and relevant factor / feature].**

[Retain the sentence below that applies to this case, and delete the one that does not apply:]

1. The Respondent cannot show that permanently excluding **[insert pupil name]** constituted a proportionate means of achieving a legitimate aim.

[Or:]

The Appellant**[s]** accept**[s]** that (insert, for example, protecting other pupils from harm) is a legitimate aim. However, . . .

In this case, the Respondent has not identified any legitimate aim. In addition,

* 1. **[Insert any explanation as to why the conduct resulting in exclusion was not as serious as the Respondent considered it to be.]**
	2. **[Insert any explanation as to why the relevant objective will not be well served by exclusion, for example, how the Respondent over-estimated the risks of the pupil remaining in school.]**
	3. **[Identify and explain any less drastic (less discriminatory) steps the Respondent could and should have taken before resorting to permanent exclusion.]**

* 1. **[If a failure to make reasonable adjustments is argued, insert ‘In this case, the School did not make reasonable adjustments for the reasons set out below. Therefore, the unfavourable treatment of [Insert pupil name] in permanently excluding them cannot be justified.’]**
1. In this case, the School **Choose an item.** **[Insert pupil name]**’s disability. In particular, **[insert details of information provided to the School].**

### Section 19 of the EA 2010: Indirect discrimination

### Legal principles

1. Under section 19 of the EA 2010, for a claim of indirect discrimination to succeed against a disabled person (P), four requirements must be met:
	1. The school applies (or would apply) a provision, criterion or practice (PCP) equally to all children within a relevant group, including P.
	2. The PCP puts (or would put) people who share P’s disability at a particular disadvantage when compared with non-disabled children.
	3. The PCP puts (or would put) P at that disadvantage.
	4. The school cannot show that the PCP is justified as a proportionate means of achieving a legitimate aim.

### Application to this case

[Repeat the analysis below for each PCP.]

1. In this case, the relevant PCP **[insert, for example, provision of behaviour policy]**
2. This PCP is, or would be, applied to all pupils at the School including non-disabled pupils. However, it puts pupils with **[insert general or specific disability or condition, as relevant]** at a ‘particular disadvantage’ compared with other pupils because **[insert explanation].**
3. In this case, the application of the PCP has put **[insert pupil name]** at that disadvantage, resulting in their permanent exclusion. **[insert any further explanation or discussion.]**
4. The Respondent cannot show that this was (or is) a proportionate means of achieving a legitimate aim. Select the relevant phrase and add the required detail. Delete the other phrase.
5. The Appellant accepts that **[insert name or purpose of the PCP, for example, protecting other pupils from harm]** is a legitimate aim. However the application of the PCP to pupils with **[insert description of impairment or condition]** is certainly not proportionate.
6. In this case, the Respondent has not identified any legitimate aim. In addition the application of the PCP to pupils with **[insert description of impairment or condition]** is certainly not proportionate.
7. In particular, **[insert any explanation as to how the relevant PCP could reasonably be waived or modified in relation to pupils in similar circumstances to this case]**. Sections 20-21 of the EA 2010: Failure to make reasonable adjustments

### Legal principles

1. The duty to make reasonable adjustments is set out in section 20 of the EA 2010. The duty is an anticipatory or prospective one. It includes a requirement to:
2. where a PCP applied by the School puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage;
3. where a disabled person would, but for the provision of an auxiliary aid or service, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, take such steps as it is reasonable to have to take to provide the auxiliary aid or service.
4. The duty to make reasonable adjustments applies to the Respondent by virtue of section 85(6) of the EA 2010. A ‘substantial’ disadvantage is one which is ‘not merely minor or trivial’ (section 212, EA 2010).
5. [Delete if not relevant to this case:] The requirement to provide an auxiliary aid or an auxiliary service ‘generally means anything that constitutes additional support or assistance for a disabled pupil, such as a piece of equipment or support from a member of staff’ (EHRC Technical Guidance, para 6.18).
6. [Delete if not relevant to this case:] Where a school has concerns about the behaviour of a pupil with an EHC plan or with additional needs, the Guidance provides examples of what amount to reasonable adjustments. The Guidance states that schools should:
	1. engage proactively with the pupil’s parents to support their behaviour (Guidance, para 23)
	2. engage in partnership with others (including the local authority as necessary) and consider what additional support or alternative placement may be required, including assessing the suitability of provision for a pupil’s SEN (Guidance, para 25), and
	3. consider requesting an early annual review or interim / emergency review (Guidance, para 25).
7. Schools are required to make reasonable adjustments for disabled pupils both to the exclusions process and to the disciplinary sanctions imposed. This might mean applying different sanctions, or applying them in a different way, to avoid putting a disabled pupil at a substantial disadvantage in relation to non-disabled pupils (EHRC Technical Guidance, para 4.12).
8. [Delete if not relevant to this case:] The EHRC Technical Guidance, para 4.12, provides the following example of a school making reasonable adjustments:

‘A pupil with learning difficulties is excluded for repeatedly getting up from his seat during lessons and disrupting other pupils. It is the school’s policy that repeated disruptive behaviour is punished by exclusion. The school is under a duty to make reasonable adjustments to its policy, which might mean disregarding some of the disruptive behaviour and working with the pupil to find a way in which to help him to remain in his seat during lessons.’

### Application in this case

**[Insert PCP and / or auxiliary aid / service analysis as appropriate.]**

### Policy, criterion or practice

[Delete this section if not relevant to your case. If more than one PCP is being raised, repeat this analysis for each one.]

1. In this case, **[identify the relevant PCP or cross reference, for example, ‘The relevant PCP is identified above under ‘section 19 of the EA 2010: Indirect Discrimination’]**
2. This PCP puts pupils with **[insert general or specific disability or condition, as relevant]** at a ‘substantial disadvantage’ compared with other pupils **[insert explanation or cross-reference, e.g. ‘for the reasons given above’; if necessary, provide any additional explanation of why the disadvantage is ‘substantial’].**
3. The Respondent has failed to take such steps as it is reasonable to have to take to avoid the disadvantage.
4. Steps it would have been reasonable for the Respondent to take include: **[insert your step, explaining how it would have benefited the pupil; include any detail on how easy or difficult it would have been for the Respondent to take this step, with reference to its resources, for example, size, assets, experience, staff].**

### Auxiliary aid

[Delete this section if not relevant to your case. If more than one auxiliary aid or service is being raised, repeat this analysis for each aid or service.]

1. In this case, **[insert]** was an **[auxiliary aid / service].**
2. But for the provision of this **[auxiliary aid / service]**, a pupil with **[insert general or specific disability or condition, as relevant]** would be at a ‘substantial disadvantage’ compared with other pupils **[insert explanation or cross-reference, for example, ‘for the reasons given above’; if necessary, provide any additional explanation of why the disadvantage is ‘substantial’].**
3. The Respondent has failed to take such steps as it is reasonable to have to take to provide this **[auxiliary aid / service].**
4. Steps it would have been reasonable for the Respondent to take include: **[insert your step, explaining how it would have benefited the pupil; include any detail on how easy or difficult it would have been for the Respondent to take this step, with reference to its resources, for example, size, assets, experience, staff.]**

### Section 27 of the EA 2010: Victimisation

1. Under section 86(2) of the EA 2010, it is unlawful to victimise a pupil because their parent or sibling has carried out a protected act.
2. Under section 27 of the EA 2010, for a claim of victimisation against a person (P) to succeed, two requirements must be met:
	1. P, their parent, or their sibling has done a protected act; or the School believes that P, their parent, or their sibling has done, or may do, a protected act.
	2. Because of this, the School subjects P to a detriment.
3. Section 27(2) of the EA 2010 explains that each of the following is a protected act:
	1. bringing a claim for breach of the EA 2010
	2. giving evidence or information in connection with proceedings under the EA 2010
	3. doing ‘any other thing’ for the purposes of the EA 2010, or
	4. making an allegation (whether or not express) that someone has contravened the EA 2010. It is not necessary for the allegation to involve explicit reference to the EA 2010. It is not necessary for the allegation to be made to the same person who subjects P to the detriment. If the allegation is made in good faith, it does not matter if the allegation turns out to be factually wrong.

Application to this case

The name to be included here, is the name of the person who is believed to have done a protected act. It may be the pupil, their parent or their sibling. Please add the relevant name. Select the phrase that fits the situation and delete the others.

1. In this case, **[insert name] did a protected act OR the School believed that [insert name] had done a protected act OR the School believed that [insert name] would do a protected act]**, namely **[insert details and add any further explanation of why this was or would have been a ‘protected act’.]**
2. **[If relevant, explain why the allegation was made in good faith.]**
3. Because of this protected act, the School subjected **[Insert pupil name]** to a detriment, namely **[insert details and add any further explanation of the link between the protected act and the detriment.]**

## Conclusion

1. For all the reasons given above, the Respondent has **[discriminated against and / or victimised]** **[Insert pupil name]** contrary to the requirements of the EA 2010.
2. The Tribunal is invited to grant the following remedies:

[Below is a list of possible remedies. Delete those that are not relevant to this situation]

* 1. a declaration that the Respondent has discriminated against **[insert pupil name]**
	2. a declaration that the Respondent has victimised **[insert pupil name]**
	3. an order requiring the Respondent to reinstate **[Insert pupil name]** as a pupil at the School
	4. an order requiring the Respondent to apologise for its treatment of **[Insert pupil name]**
	5. an order requiring members of staff and / or the Governing Body to undertake training on the EA 2010
	6. an order requiring the Respondent to review or revise any relevant policy.

**[Insert representative name]**

**[Insert date]**