

## Legal developments on the exclusion of pupils with disabilities

This briefing summarises important legal developments concerning the exclusion of pupils with disabilities. It sets out the potential implications of these developments for policy and practice in schools.

### Background

In August 2018, a 13-year-old child with autism and other disabilities appealed successfully to the Upper Tribunal against his exclusion from school.<sup>1</sup> The Upper Tribunal is a specialist appeals court that hears matters related to disability discrimination.

This case highlights critical issues about the ways in which schools manage the exclusion of pupils who have a disability that falls within the scope of the Equality Act 2010. The general position is that all schools are subject to the provisions of this Act regarding their treatment of pupils with disabilities. Specifically, schools are under a requirement to make reasonable adjustments for these pupils to protect them from discrimination.

Nevertheless, the Equality Act is accompanied by Regulations that qualify the application of the requirement to make reasonable adjustments in some instances.<sup>2</sup> In the context of the exclusion of disabled pupils, the effect of these Regulations has been, to date, to limit their ability to challenge exclusion because no reasonable adjustments have been made. In practice, if pupils' disabilities resulted in them demonstrating a 'tendency to physical violence towards other persons', they would not be able to rely on any failure by their schools to make reasonable adjustments as grounds for challenging the legality of their exclusions.

However, this position was not accepted by the Upper Tribunal in the case referred to above. The Tribunal ruled that the Regulations are not compatible with the prohibition in the Human Rights Act 1998 on 'degrading and inhuman treatment'. The Tribunal found that while schools are not prohibited from excluding pupils with disabilities with a tendency to physical violence, they may only do so if they first sought to make reasonable adjustments, nullifying the effect of the Regulations in such cases.

The Secretary of State for Education intervened in this hearing in an unsuccessful attempt to maintain the effect of the Regulations in cases of exclusion. At present, it is not clear if the Department for Education (DfE) or the particular school involved will attempt to overturn the Tribunal's decision in the higher courts.

*Continued overleaf*

<sup>1</sup> Rayes, E. (2018). 'Education secretary loses disability test case appeal'. Law Society Gazette. (14 August). Available at: (<https://www.lawgazette.co.uk/news/education-secretary-loses-disability-test-case-appeal/5067243.article>), accessed on 24.09.18.

<sup>2</sup> The Equality Act 2010 (Disability) Regulations 2010. 2010 No. 2128. Available at: ([http://www.legislation.gov.uk/uksi/2010/2128/pdfs/ukxi\\_20102128\\_en.pdf](http://www.legislation.gov.uk/uksi/2010/2128/pdfs/ukxi_20102128_en.pdf)), accessed on 24.09.18.

## Implications

It is essential to recognise the implications of the Tribunal's ruling for policy and practice in schools for the support of pupils with disabilities, particularly in cases where these pupils may be at risk of exclusion.

The ruling emphasises the NASUWT's longstanding view that schools must take their responsibilities seriously to make reasonable adjustments for disabled pupils in respect of their educational needs and their participation in school life. The importance of the duty to consider reasonable adjustments has been highlighted consistently by the Union in its advice for members on this issue as well as in its wider policy work.

Schools that have adhered to the NASUWT's advice will have no need to amend their current approach to exclusion as a result of the Tribunal's ruling.

This guidance can be accessed at [www.nasuwt.org.uk/specialneeds](http://www.nasuwt.org.uk/specialneeds) and will be of direct benefit to teachers and headteachers in promoting and implementing effective practice on reasonable adjustments and supporting pupils with disabilities.

It is also critical to note that the ruling has no impact on the NASUWT's ability to implement and sustain refusal to teach action in cases where the behaviour of pupils poses an unacceptable risk to the health, safety and welfare of members. The purpose of this action is always to protect members from such risks and to support the NASUWT in securing an acceptable and sustainable solution in the schools concerned. This action is never predicated on an insistence that schools must exclude pupils.

Headteacher members should be assured that the NASUWT will continue to provide support in respect of pupil behaviour issues.

## Next steps, feedback and further advice and guidance

The NASUWT will monitor developments in respect of this case and will provide further updates as appropriate. To support this monitoring, feedback from members on schools' responses to this case would be particularly welcome. Information can be shared with the Union in confidence at [education@mail.nasuwt.org.uk](mailto:education@mail.nasuwt.org.uk).

Members can obtain advice and guidance on any pupil behaviour-related issues from the NASUWT.



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