NCN [2026] UKUT 53 (AAC)
Appeal No. UA-2025-001000-HS

RULE 14 Order:

The Upper Tribunal orders that, save with the permission of this Tribunal, no one shall publish or disclose the name or address of any of the following:
(a) C, who is the child involved in these proceedings;
(b) UW, who is the appellant;
or any information that would be likely to lead to the identification of either of them in connection with these proceedings.

Breach of this order may be treated as contempt of court.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

UW

Appellant

- v -

CHEAM ACADEMIES NETWORK

Respondent

Before:	**Upper Tribunal Judge Stout**
Hearing date(s):	**16 December 2025**
Mode of hearing:	**In person**

Representation:	
Appellant:	In person
Respondent:	Mr Naudi (Headteacher)

On appeal from:

Tribunal:	First-Tier Tribunal (Health Education and Social Care) (Special Educational Needs and Disability)
Tribunal Case No:	EH319/24/00015 and EH319/24/00031
Judge/Panel:	Tribunal Judge J Holmes, Specialist Members Ms J Johnson and Ms S Kinsella
Decision Date:	15 April 2025

SUMMARY OF DECISION
DISABILITY DISCRIMINATION IN SCHOOLS (89)

The appellant's claims before the First-tier Tribunal were dealt with as claims of discrimination arising from disability under section 15 of the Equality Act 2010 (EA 2010) in relation to a series of detentions, fixed-term exclusions and then permanent exclusion of the appellant's child, C. A First-tier Tribunal judge (the first judge) had at the outset of proceedings refused to admit a claim of failure to make reasonable adjustments in relation to the school's behaviour policy on the basis that the Tribunal did not have jurisdiction to hear such a claim. The First-tier Tribunal panel (the panel) at the final hearing revisited but confirmed that prior decision. On the appellant seeking permission to appeal the final decision of the panel, a different judge of the First-tier Tribunal set aside the panel's decision in relation to permanent exclusion, but stayed the re-hearing of that part of the case pending this appeal to the Upper Tribunal. The Upper Tribunal decides:

(1) There was no material error of law in the governing body of C's school having been identified as the respondent to the claim at the time of the First-tier Tribunal's hearing and decision, when in fact the 'responsible body' against whom the claim should have been brought under section 85 of the EA 2010 was the proprietor of the multi-academy trust of which the school was part. The retrospective substitution of the multi-academy trust as respondent under rule 9(1)(a) of The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the FTT Procedure Rules) meant that First-tier Tribunal's decision was now binding and effective as against the trust. The trust had also retrospectively confirmed that the school's headteacher was authorised to act on its behalf and accepted the First-tier Tribunal's decision. The error did not materially affect the fairness of the hearing for either party.

(2) Under rule 11(1) of the FTT Procedure Rules, a party is entitled to appoint a representative of their choice. Where a party has failed to notify the name and address of its representative to the Tribunal as required by rule 11(2), the Tribunal has a discretion as to whether it permits the party to be represented by that representative at the hearing. That discretion must be exercised in accordance with the overriding objective and having regard to the general principle that (subject only to compliance with notification requirements) a party is entitled to be represented by whomsoever they choose. It had been open to the First-tier Tribunal to proceed with the hearing pending receipt of written notification that the headteacher was duly authorised as the governing body's representative.

(3) By paragraph 2(4) of Schedule 13 to the EA 2010, the duty to make reasonable adjustments under section 20 of the EA 2010 applies to schools in relation to: (a) deciding who is offered admission as a pupil; and (b) provision of education or access to a benefit, facility or service. The latter encompasses the operation and application of a school's behaviour policy, including in relation to sanctions and exclusions. The First-tier Tribunal erred in holding it had no jurisdiction to

consider a claim of reasonable adjustments in relation to the behaviour policy, including in relation to detentions and exclusions.

(4) However, the decision not to admit that claim had been finally determined by the first judge at the outset of the proceedings and that decision had not been appealed. The panel at the final hearing had no power to revisit that decision unless satisfied that there were grounds for doing so under rules 45 to 49, which are the only rules that permit the First-tier Tribunal to re-open a decision finally disposing of part of proceedings. Accordingly, there was no material error in the decision of the panel that had been raised as a ground of appeal to the Upper Tribunal and it could not be set aside. Nor could the decision of the first judge be set aside because that decision had not (yet) been the subject of any application for permission to appeal, although it was open to the appellant now to make a late application to the First-tier Tribunal for permission to appeal that decision. The Upper Tribunal gave guidance as to how that late application may be approached.

The Upper Tribunal further notes that:

(5) In purporting to "not admit" the reasonable adjustments claim on jurisdictional grounds, the first judge failed to follow the *Practice Direction: First-tier Tribunal Health Education and Social Care Chamber: Special Educational Needs or Disability Discrimination in Schools Cases* (20 April 2021) (the 2021 Practice Direction). Nor was there any power in the FTT Procedure Rules to "not admit" a claim on jurisdictional grounds. Where the Tribunal lacks jurisdiction, the relevant provision of the Rules is the duty to strike out under rule 8(3).

(6) The First-tier Tribunal failed to inform the appellant of her right to appeal the first judge's decision as required by rule 41(2)(c) of the FTT Procedure Rules. Alternatively, the First-tier Tribunal should have considered exercising the power in rule 46(2A) to direct that the 28-day time limit for appealing the first judge's decision run from the date of the final decision that disposes of all issues in the proceedings.

The Upper Tribunal also gives further guidance on case management of disability discrimination claims under the EA 2010.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal under section 12(1) and (2)(a) of the Tribunals, Courts and Enforcement Act 2007 is that the decision of the First-tier Tribunal of 15 April 2025 involved the making of an error on a point of law as identified in ground (2), but the error was not material to the decision and so its decision is not set aside. (For the avoidance of doubt, this does not affect the order

of Judge Bradley of 23 June 2025 which previously set aside part of the First-tier Tribunal's decision of 15 April 2025.)

REASONS FOR DECISION

Introduction

1. The appellant brought disability discrimination claims under the Equality Act 2010 (EA 2010) to the First-tier Tribunal in relation to the treatment of her child, C, by the secondary school that he attended ("the School"). The claims were brought against the governing body (GB) of the School and concerned (among other things) detentions, fixed-term exclusions and, finally, a permanent exclusion by the School. Some claims were "not admitted" by the First-tier Tribunal on jurisdictional grounds prior to the final hearing; those that were admitted were dismissed at the final hearing. On the appellant seeking permission to appeal the final decision, a judge of the First-tier Tribunal identified a number of issues with the decision, set aside the decision in relation to the permanent exclusion, substituted the School's multi-academy trust proprietor, Cheam Academies Network (CAN) as the respondent to the claims, and granted permission to appeal to the Upper Tribunal on the following two issues:

   (1) whether the fact that the wrong respondent had been named at the time of the First-tier Tribunal's hearing and decision was a material legal error, in particular in the light of an issue as to the authority of the Headteacher to represent either the GB or CAN at the hearing; and

   (2) whether the First-tier Tribunal erred in law in concluding that it did not have jurisdiction to hear claims for failure to make reasonable adjustments in relation to the School's behaviour policy.

2. The appeal before the Upper Tribunal was heard in person. Neither party was legally represented. The parties each made written and oral submissions, and I am grateful to them for their conscientious presentation of their respective cases.

3. I apologise to the parties for the delay in preparing this decision. This was in part a result of annual leave over the Christmas period, and in part a result of certain inquiries I have had to make with the First-tier Tribunal as to current practice and procedure, including a difficulty I encountered in locating the *Practice Direction: First-tier Tribunal Health Education and Social Care Chamber: Special Educational Needs or Disability Discrimination in Schools Cases* (20 April 2021) (the 2021 Practice Direction). Apparently through oversight, the 2021 Practice Direction has not in recent times been readily accessible on www.gov.uk or www.judiciary.uk (although it can be found by a keyword search on www.judiciary.uk). I return to the relevance of this Practice Direction below. I have not further delayed this decision by drawing the Practice Direction to the attention of the parties, for the reasons that I also explain below.

4. The structure of this decision is as follows:

The proceedings before the First-tier Tribunal and the Upper Tribunal

The commencement of the claims

5. C was at the material time a 13-year-old boy with diagnoses of Autism and Attention Deficit Hyperactivity Disorder (ADHD). He had an EHC Plan prior to his transfer to secondary school and his needs were such that the School had initially refused him a place, but (according to the findings of the First-tier Tribunal), after being named by the local authority in Section I of the EHC Plan, the School committed to doing what it could to make the placement successful.

6. In June and July 2024, the appellant commenced two claims against the School for disability discrimination and failure to make reasonable adjustments under the EA 2010 (claim numbers EH319/24/00015 and EH319/24/00031, respectively the "first application" and the "second application"). The School's GB was named as respondent to the applications, although the School had in fact been an academy since 2011 and part of the multi-academy trust of which CAN is the proprietor.

7. The factual matters identified in the applications forms as the subject matter of the claims included 41 detentions, a series of fixed-term exclusions and (in the second application form) permanent exclusion. In addition, there were certain other matters identified as incidents of less favourable treatment or failures to make reasonable adjustments.

<u>The First-tier Tribunal's 'refusal to admit' the claims of failure to make reasonable adjustments in relation to the behaviour policy</u>

8. By a case management order of 17 June 2024 in the first application, Judge O'Neill sought to identify the claims raised in the application notice. So far as relevant to the present appeal, paragraph 2.29 of that order stated as follows:

> 2.29 The Claimant also refers to a failure to make reasonable adjustments in respect of the behaviour policy. I consider this is best dealt with as part of the claim relating to the exclusions. The duty to make reasonable adjustments extends only to deciding who is offered admission as a pupil, the way education is provided or the way a disabled pupil is afforded access to benefits, facilities or services. The duty to make reasonable adjustments does not apply to disciplinary decisions. A duty to make reasonable adjustments does not prohibit the Responsible Body from excluding disabled pupils and the Responsible Body is not under a duty to relax or disapply its behaviour policy. However, the Responsible Body must take reasonable steps to enable a disabled pupil to comply with its expectations in order to determine whether the sanction was proportionate. For these reasons, I do not admit the ground of claim which alleges that the Responsible Body failed to make reasonable adjustments for Blake in the way the behaviour and/or exclusion policy was applied to them.

9. By a case management order of 2 July 2024 in the second application, Judge O'Neill again refused to admit the claim of failure to make reasonable adjustments in relation to the behaviour policy (see paragraph 2.15 of that order).

10. By a case management order of 17 July 2024 in the first application Judge O'Neill noted that the appellant wished, notwithstanding his previous orders, to bring a claim against the responsible body for "discrimination by failure to make reasonable adjustments in respect of the behaviour policy". He noted that she had referred to a previous claim that she had made against C's primary school in 2019, where the First-tier Tribunal had accepted it had jurisdiction to consider a claim of failure to make reasonable adjustments in relation to a behaviour policy.

Judge O'Neill stated that it was fair and just to list the case for a telephone case management hearing at which the appellant would have the opportunity to make submissions on the issue.

11. The telephone case management hearing took place on 27 September 2024 and by order of 7 October 2024, Judge O'Neill confirmed his decision refusing to admit the claim of failure to make reasonable adjustments in relation to the behaviour policy for reasons set out at paragraph 3.12 of his decision (the GB is referred to by the judge as the "Responsible Body" in line with the terminology in section 85 of the EA 2010):

> 3.12 The allegations that the Responsible Body failed to make reasonable adjustments in respect of its behaviour policy cannot be brought as a claim for a failure to make reasonable adjustments. The allegations can, subject to the issue of timeliness (as set out below), be brought as a claim for discrimination arising from disability. My reasons are as follows:
>
> (a) The Tribunal can only consider claims which relate to the duties listed in section 85 of the [EA 2010]. These are known as the relevant matters.
> (b) Section 85(2)(a) to (f) sets out a list of circumstances in which the responsible body of such a school must not discriminate against a pupil.
>
> (c) Sections 85(2)(a) to (d) provide that the Responsible Body must not discriminate against a pupil:
>
> > "(a) in the way it provides education for the pupil;
> > (b) in the way it affords the pupil access to a benefit, facility or service;
> > (c) by not providing education for the pupil;
> > (d) by not affording the pupil access to a benefit, facility or service;"
>
> (d) Sections 85(2)(e) and (f) provide that the Responsible Body must not discriminate against a pupil:
>
> > "(e) by excluding the pupil from the school;
> > (f) by subjecting the pupil to any other detriment."
>
> (e) A detention is a detriment and therefore falls with Section 85(2)(f) [EA 2010].
>
> (f) The duty to make reasonable adjustments is contained within section 20 [EA 2010]. For present purposes the relevant section is section 20(3), which provides:
>
> > "The first requirement is a requirement, where a provision, criterion or practice of A's 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"

(g) Section 20(3) [EA 2010] is qualified by Schedule 13, paragraph 2 [EA 2010]. Paragraph 2(4) provides:

> "In relation to each requirement, the relevant matters are—
> (a) deciding who is offered admission as a pupil;
> (b) provision of education or access to a benefit, facility or service."

(h) The relevant matters set out in Paragraph 2(4) do not include the exclusion of a pupil from the school or the subjecting of the pupil to any other detriment. These are not therefore relevant matters for the purposes of section 20 [EA 2010]. This means that where a school has applied its behaviour policy and as a consequence, a pupil has been given a detention, there can be no claim for a failure to make reasonable adjustments to that behaviour policy. The duty to make reasonable adjustments extends only to deciding who is offered admission as a pupil, the way education is provided or the way a disabled pupil is afforded access to benefits, facilities or services. The duty to make reasonable adjustments does not apply to disciplinary decisions. A duty to make reasonable adjustments does not prohibit the Responsible Body from issuing a disabled pupil with a detention and the Responsible Body is not under a duty to relax or disapply its behaviour policy.

(i) Without prejudice to the above, I am satisfied that the allegations relating to the detentions should, subject to the issue of timeliness, be considered as claims for discrimination arising from disability. The Tribunal must consider the following legal issues:

> (i) Has there been unfavourable treatment?
> (ii) What was the reason for the unfavourable treatment?
> (iii) Was the reason for the unfavourable treatment something arising from [C's] disability"?
> (iv) Is the unfavourable treatment in question a proportionate means of achieving a legitimate aim?

12. The appellant responded to other parts of that same order pointing out that the judge had overlooked certain material she had submitted. By order of 25 October 2024, Judge O'Neill varied his order slightly (but not in any way that is material to this appeal).

<u>The final hearing and the issue regarding the representation of the GB as the then respondent to the claims</u>

13. The claims that had been admitted were then listed together for hearing before a panel comprising Tribunal Judge Holmes and Specialist Members Ms Johnson

and Ms Kinsella (the Holmes Tribunal). The hearing took place over two days on 27 and 28 February 2025. The School's Headteacher, Mr Naudi, and two other witnesses attended for the School, and the appellant represented herself. There were no other witnesses.

14. At the start of the hearing an issue arose as to whether Mr Naudi was authorised to represent the GB. Mr Naudi was unable to provide written confirmation that the governors were aware of the hearing and had given him authority to represent them, but he assured the Tribunal verbally that he was properly so authorised and that the governors were aware of the hearing. The Tribunal agreed to proceed provided that subsequent written authorisation was given. By email of 27 February 2025, the Chair of Governors for the School confirmed that the GB was aware of the Tribunal hearing and had given Mr Naudi permission to act on its behalf.

The First-tier Tribunal's decision following the final hearing

15. The Tribunal then proceeded to hear the case and, following a further day of deliberations on 15 March 2025, the Tribunal, by decision sent to the parties on 15 April 2025, dismissed all of the claims.

16. The decision records at [38]-[41] that, during the course of the hearing, the appellant raised again her claim of failure to make reasonable adjustments in respect of the behaviour policy. The Tribunal noted that no appeal or application to vary the previous order by Judge O'Neill had been made, but nonetheless heard submissions on whether it should admit that claim despite it having been previously refused by Judge O'Neill. The Tribunal decided that it should not, adopting Judge O'Neill's reasoning. The Tribunal further added at [41] that, even if it had been wrong not to admit that claim, it would have found that, although "how the school adjusts their behaviour policy could have been clearer", they "would have found that they did apply reasonable adjustments to the behaviour policy".

17. By the time of the hearing, the appellant had successfully challenged C's permanent exclusion before the Independent Review Panel (IRP), which had quashed the governing body's refusal to reinstate C, although the governing body on reconsideration had decided not to reinstate him. Mr Naudi informed the Tribunal that the IRP's decision meant that the permanent exclusion was "not on C's record". The Tribunal accepted what Mr Naudi said about this, but decided that it should still consider the claim as a claim in respect of the decision not to re-admit C (see [150] of the decision), albeit that it went on to dismiss that claim.

The appellant's application to the First-tier Tribunal for permission to appeal and the substitution of CAN for the GB as respondent

18. The appellant made an application for permission to appeal, which was considered by District Tribunal Judge Sean Bradley. By order of 27 May 2025 Judge Bradley noted that the GB was not the proper respondent to the claim, that

CAN was the proper respondent and he was therefore concerned that the Tribunal had not had jurisdiction to make the decision it did against the GB. He further explained that he was minded to set aside the Holmes Tribunal's decision in relation to the permanent exclusion on the basis that the Tribunal had not applied the correct legal approach. The same legal error had potentially affected the other section 15 claims that the Tribunal had considered, but he was not minded to set them aside without hearing further from the parties. He noted that the question of whether the Holmes Tribunal and Judge O'Neill were right to conclude that the Tribunal could not consider a claim of reasonable adjustments in relation to a behaviour policy was a point of statutory interpretation that, so far as he was aware, had not been considered at the appellate level. He directed that CAN be named as the respondent to the claim in substitution for the GB.

19. Judge Bradley directed the parties to make further submissions and also listed a hearing, which took place on 17 June 2025. At that hearing, the judge discussed with the parties the application for permission to appeal and the possibility for set aside and review by the First-tier Tribunal. The appellant at that hearing clarified that she is not seeking an order that C be reinstated at the School. The appellant further applied for an order that the respondent be required to name a different representative as she believed there was a conflict of interest between Mr Naudi's role as representative and his role as Headteacher and decision-maker in respect of the permanent exclusion.

20. By decision of 23 June 2025, Judge Bradley granted the appellant permission to appeal to the Upper Tribunal on two points:

    a. The identification of the incorrect responsible body and respondent to the claim; and,
    b. Failure to make reasonable adjustments to the Behaviour Policy.

21. He also set aside the Holmes Tribunal's decision in relation to the permanent exclusion, but stayed the First-tier Tribunal proceedings pending the appeal. He included an Annex with his decision in which he set out helpful observations on the legal issues arising in relation to the behaviour policy and reasonable adjustments. As well as the point of statutory interpretation identified in Judge O'Neill's decision, Judge Bradley invited the Upper Tribunal to give guidance on how the First-tier Tribunal should deal with claims such as these where multiple allegations of discrimination were raised: could, for example, the 43 separate section 15 claims in respect of the detentions have been subsumed into one claim of failure to make reasonable adjustments to the behaviour policy? Is this a matter for the Tribunal or the appellant to decide? Are the Tribunal's resources a relevant factor? How would a claim of failure to make reasonable adjustments to a behaviour policy work if the policy already contained in-built flexibility for those with disabilities?

<u>The proceedings before the Upper Tribunal</u>

22. The appellant then applied to the Upper Tribunal. She confirmed that she did not seek permission to appeal on grounds other than those on which the First-tier Tribunal had given permission. Judge Wikeley made directions for the respondent to respond to the appeal and for the hearing of the appeal. He also made a rule 14 order anonymising the appellant and her child. I agree with Judge Wikeley that this departure from the open justice principle is necessary in this case in order to protect the interests of C. I initially interpreted the order as requiring the anonymity of the respondent as well, but the appellant clarified that was not required, and there was no objection from the respondent. I was satisfied, given the size of the respondent trust, that naming the respondent was not likely to identify the appellant or her child.

23. By letter of 29 August 2025, Ms R Allott, CEO of CAN, wrote to the appellant. Ms Allott noted that the appellant still had doubts as to whether Mr Naudi was authorised to represent CAN and stated that CAN "wishes to remove any doubt" about Mr Naudi's authority. She stated that she had previously written to the Tribunal authorising Mr Naudi as CAN's representative and informed her that CAN had on 28 August 2025 made a formal resolution at its Board meeting confirming that Mr Naudi is CAN's representative for matters relating to "any SENDIST" and C and authorising Mr Naudi as necessary to commission legal advice.

The nature of the Upper Tribunal's jurisdiction on appeal

24. The Upper Tribunal may only allow an appeal under section 12(1) of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) if it finds that the making of the decision by the First-tier Tribunal involved the making of an error on a point of law. Errors of law include misunderstanding or misapplying the law, reaching a perverse conclusion on the facts, taking into account irrelevant factors or failing to take into account relevant factors, procedural unfairness or failing to give adequate reasons for a decision. An appeal will not normally be allowed unless the error of law is one that was material to the decision. These principles are set out in many cases, including *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[13].

Ground (1): The issue as to the respondent's identity and representation

<u>The factual situation in this case and the parties' arguments</u>

25. As described above at paragraphs 14-15, at the time of the hearing before the First-tier Tribunal, the GB of the School was named as the respondent, and the GB provided written confirmation to the First-tier Tribunal during the hearing that Mr Naudi was duly authorised to represent the School at the hearing. However, the difficulty is that the GB was not the proper respondent to the claim. By section 85(9)(b) of the EA 2010 the proprietor of an academy is the "responsible body" against whom a claim may be brought under that Act, and the proprietor of the School is CAN. Judge Bradley accordingly substituted CAN as a respondent on

27 May 2025, and CAN is therefore the respondent to these proceedings in the Upper Tribunal.

26. CAN sought by its letter of 29 August 2025 (above, paragraph 23) to put "beyond doubt" that Mr Naudi was duly authorised to represent it in all matters relating to these proceedings and C. That letter did not state specifically that CAN accepts that it is bound by the final decision of the First-tier Tribunal in this matter, although it seemed plain to me that that was CAN's intent. At this hearing, Mr Naudi confirmed on behalf of CAN that it accepts it is bound by the First-tier Tribunal's decision, and it seems to me that that must be the effect in law in any event of CAN having been substituted as the respondent, even though that was after the date of the decision (although I have not heard legal argument on this point).

27. The appellant, however, argues that the fact that the GB was wrongly identified as the respondent at the time of the hearing before the First-tier Tribunal was a material error of law; that Mr Naudi was not properly authorised to represent the GB because written authorisation was not given until after the hearing; and that these were material errors because they prevented her testing the evidence about the off-site direction that had been proposed for C. The appellant submits that, as only the GB was able in law to make an off-site direction under section 29A of the Education Act 2002, there was no one at the hearing who she could question about that. She referred to a letter from the government's School Complaints Compliance Unit (SCCU) of 13 November 2025, which upheld her complaint about the school's off-site direction on the basis that it was in breach of the Department for Education guidance on permanent exclusion. The appellant is also concerned that Mr Naudi as the decision-maker in relation to the exclusions had a conflict of interest and should not have been representing the respondent at the hearing.

28. I have carefully considered the appellant's concerns, but I am afraid that there is no legal merit in them for the following reasons.

<u>The effect of the First-tier Tribunal's retrospective substitution of the multi-academy trust as the respondent</u>

29. First, rule 9(1)(a) of The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the FTT Procedure Rules) permits the Tribunal to give a direction substituting a party if "the wrong person has been named as a party". That is this case. There is no limit as to when the Tribunal may make such a direction. If it does so after the hearing as in this case, whether or not that undermines the decision will depend on whether the substitution has affected the fairness of the proceedings. In this case, the substituted party has not argued that it does: CAN fully accepts the Tribunal's decision and has confirmed that it regards Mr Naudi as having been at all times properly authorised to act on its behalf in relation to these proceedings. It is clear that, so far as CAN is concerned, there would have been no difference at all in its

representation, or in its conduct of the proceedings, if CAN had been duly named as respondent at the outset.

30. I understand that the appellant feels (for the reasons summarised above) that the identity of the respondent has affected the fairness of the proceedings, but in my judgment it has not had any material effect. The appellant's concerns about Mr Naudi's representation and how that affected her questioning stem from a misunderstanding of the rules and legal principles, as I shall explain.

The legal principles governing representation before the First-tier Tribunal

31. Rule 11 of the FTT Procedure Rules is headed "Representatives" and, so far as relevant to special educational needs and disability discrimination cases, it provides as follows:

> **Representatives**
> 11.—(1) A party may appoint a representative (whether a legal representative or not) to represent that party in the proceedings.
>
> (1A) Where a child or young person is a party to proceedings, that child or young person may appoint a representative under paragraph (1).
>
> (2) If a party appoints a representative, that party (or the representative if the representative is a legal representative) must send or deliver to the Tribunal and to each other party written notice of the representative's name and address.
>
> (3) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except—
> (a) signing a witness statement; or
> (b) signing an application notice under rule 20 (the application notice) if the representative is not a legal representative.
>
> (4) A person who receives due notice of the appointment of a representative—
> (a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party; and
> (b) may assume that the representative is and remains authorised as such until they receive written notification that this is not so from the representative or the represented party.
>
> (5) At a hearing a party may be accompanied by another person whose name and address has not been notified under paragraph (2) but who,

> … with the permission of the Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.
>
> (6) Paragraphs (2) to (4) do not apply to a person who accompanies a party under paragraph (5).

32. Under rule 11(1) of the FTT Procedure Rules, a party is thus entitled to appoint a representative of their choice. Save for the requirements about notification (to which I turn next), there is no express power in the Rules that would permit the First-tier Tribunal to require a party to change representative, or to act without a representative. I would be doubtful as to whether any power could be implied either, bearing in mind the Court of Appeal's decision that no such power can be implied into the similar provision governing representation in the Employment Tribunals (see *Bache v Essex County Council* [2000] ICR 313), although the fact that the equivalent provision in relation to Employment Tribunals is in primary legislation rather than secondary legislation may make a difference. However, as will become apparent, I do not need on this appeal to decide whether the First-tier Tribunal would have power to prevent a party from being represented by a (duly notified) representative of their choice.

33. Although rule 11(2) requires a party who wishes to be represented by someone who is not a legal representative to notify the Tribunal in writing of that representative's name and address, it is apparent from rule 11(4) that the primary purpose of this requirement is so that the other party and the Tribunal know that they can send documents to that representative and that by doing so they will have properly served the party for the purposes of the rules. (The same goes for the appointment of a legal representative, who is by rule 11(2) permitted to undertake the task of notifying the First-tier Tribunal themselves.)

34. There is no requirement in the rules or otherwise that there must be written authorisation in place before a person can act as a party's representative in terms of conducting the litigation through correspondence with the Tribunal and the other party. The actual appointment of the representative, and the actions that a party may permit that representative to take on their behalf, is a matter between the party and the representative. Outside of Tribunal hearings, the notification requirements merely affect the representative's status so far as the First-tier Tribunal and the other party is concerned.

35. So far as hearings are concerned, provided that the name and address of the representative has been notified as required under rule 11(2), there is no express power in the rules that would allow the Tribunal to prevent a party's chosen representative representing them at a hearing. Rules 11(5) and (6) further make express provision enabling the Tribunal to permit a party to be accompanied at a hearing by a person whose name and address has <u>not</u> been notified under rule 11(2), and for the party to be represented by that person at the hearing. The Tribunal does, therefore, have a discretion to refuse to permit someone to be represented at a hearing where their name and address has not been notified under rule 11(2).

36. Rules 11(5) and (6) do not apply in terms to a corporate party such as the GB or CAN because a corporate party cannot itself attend the hearing and cannot therefore be "accompanied by another person", it can only ever be "represented" by a person. However, there is also no requirement in rule 11(2) as to the time by which a party must have given written notice of their representative's name and address (although the Tribunal by standard directions will in most cases have set a date by which any representative's name and address should be notified).

37. Accordingly, for both corporate and non-corporate parties, the rules give the Tribunal a discretion to permit the party to be represented at the hearing by a representative whose name and address has not previously been notified in writing, albeit that in the case of corporate parties there is on the face of the rules a requirement for the party (or the representative themselves if they are a legal representative) to give written notice of the representative's name and address at some point. The First-tier Tribunal may exercise its discretion (as it did in this case) to permit that notification to be given during or after the hearing. The Tribunal also has discretion under rule 7(2) to waive the requirement for written notification.

38. The discretion to permit the hearing to proceed with a representative who has not previously been notified as required by rule 11(2), whether requiring late written notification or waiving that requirement, is a discretion to be exercised in accordance with the overriding objective, and having regard to: (i) the general principle under rule 11 that (subject only to compliance with notification requirements) a party is entitled to be represented at a hearing by whomsoever they choose; and, (ii) the interest of the parties and the Tribunal in ensuring that any representative is as a matter of fact properly authorised by the party. The latter is important because, if a representative is not duly authorised that might, depending on the circumstances, constitute a material error of law as a result of which the outcome of the hearing may be set aside.

<u>Why it was open to the First-tier Tribunal to allow the headteacher to represent the respondent at the hearing</u>

39. In this case, in my judgment the First-tier Tribunal properly exercised its discretion to allow the GB to be represented by Mr Naudi, subject to requiring written notification to be provided. There was no error of law in that decision. It was for the Tribunal to assess the likelihood of Mr Naudi turning out to be properly authorised or not and to decide in accordance with the overriding objective whether to proceed with the hearing and risk having wasted the parties and Tribunal's time, or not proceed with the hearing and thus have wasted the parties and Tribunal's time if it was confirmed that Mr Naudi was properly authorised. As it was, Mr Naudi was properly authorised to represent the GB, which was the named respondent to the proceedings at that point, so no difficulty arose as a result of the First-tier Tribunal's decision to proceed.

Why there was no material unfairness arising out of the issues as to the identity of the respondent or its representation at the hearing

40. Further, there is no "conflict of interest" here for Mr Naudi. His interests and that of the GB and CAN are all aligned: their collective interests are to defend the decisions and actions of Mr Naudi and others at the School, and the decisions and actions of the GB and CAN (if and insofar as the latter had any substantive involvement with C). A conflict of interest between a representative and the party they are representing could only have arisen in the circumstances of this case if the representative was a professional legal representative whose duties to the tribunal under the Bar or Solicitors' Codes of Conduct might come into conflict with those of their client, or if some question of unreasonable conduct gave rise to a risk of costs in which a representative's interests in avoiding a wasted costs order against them personally might conflict with the interests of the party. Neither situation arises in this case.

41. Nor is there anything in the appellant's concerns about the evidence regarding the off-site direction. As a matter of fact, since the school is an academy, the power to make an off-site direction under section 29A of the Education Act 2002 does not apply; rather, as an academy, it has general powers as an independent school in law to make off-site directions, albeit that it is obliged by its funding agreement to comply with the Department for Education guidance if it does so.

42. It does not appear that the appellant specifically raised at the hearing any concern about not being able to deal with any topic that she wished to deal with. She was free, subject to any case management direction by the Tribunal, to question Mr Naudi and the other school witnesses on any matter relevant to the claims. As I understand it, it was Mr Naudi who in practice took the main decisions in this case about C, and so he was the right person to answer any questions the appellant may have. The appellant was free to make submissions about who else ought to have been involved in those decisions. If she considered another witness really needed to have been present, she could have raised that with the Tribunal which would have been able to consider whether or not to make a witness summons under rule 16.

43. As it is, while I do not doubt what the appellant says about having felt that she could not ask about certain matters as a result of what she perceived to be a problem with the respondent's representation, there was no reasonable basis for her concern in this respect and, even as a litigant in person, she could and should have raised any issues that she considered relevant to the off-site direction at the hearing even if she did think that the respondent was being represented by the wrong person.

44. Viewing the matter objectively, I am satisfied that the appellant was not materially disadvantaged by the wrong respondent being named at the time of the hearing, or by the issue as to Mr Naudi acting as representative. I cannot identify any respect in which there would have been any material difference in the way the hearing proceeded or its outcome if the correct respondent had been named at

the time of the First-tier Tribunal hearing, or written notification that Mr Naudi would be representing the respondent had been received prior to the hearing. Further, the First-tier Tribunal's decision in relation to the permanent exclusion has already been set aside and will be reheard, so any issues in relation to the off-site direction are likely to be swept up in that hearing.

45. Ground (1) therefore fails.

Ground (2): The Tribunal's jurisdiction in respect of claims of failure to make reasonable adjustments in relation to the behaviour policy

The 2021 Practice Direction and the First-tier Tribunal's decision to "not admit" the claim

46. An important preliminary issue arises in relation to this ground of appeal. The present appeal is concerned with the decision of the Holmes Tribunal of 15 April 2025. However, the decision not to admit the claimant's claim of failure to make reasonable adjustments in relation to the behaviour policy was in fact first taken by Judge O'Neill in his much earlier decisions of June/July and October 2024. I raised this issue with the parties at the hearing. I asked the appellant why she had not appealed Judge O'Neill's decision and she responded that she did not know she could or should. This preliminary issue is, however, of some importance to the scope of what the Upper Tribunal is able to do on this appeal, and I have had to carry out certain investigations of my own as to current practice and procedure within the First-tier Tribunal in order to deal with it. This has led me to the 2021 Practice Direction and delayed my writing of this judgment as I mentioned at paragraph 2 above. I have not reverted to the parties to obtain their further comments on the matters that I deal with below because it seems to me that both parties said all that they (as non-lawyers) could say at the hearing about the substance of this preliminary issue and, in any event, much of what follows concerns the general practice and procedure of the First-tier Tribunal rather than the parties personally in this case, as will become apparent.

47. The starting point is that the First-tier Tribunal does not have any specific power under the FTT Procedure Rules to "not admit" a claim. There is no registration or admission process in its rules. Judge Ward in *F v The Responsible Body for W School* [2020] UKUT 112 (AAC) (*F v W*), followed by Judge Lane in *RD and GD v The Proprietor of Horizon Primary (Responsible Body) (SEN)* [2020] UKUT 278 (AAC) (*Horizon*), addressed this issue. They agreed (in summary) that, although it is in principle permissible for the First-tier Tribunal to operate a registration process for claims as part of the exercise of its general case management powers under rule 5, that should: (a) be limited to providing indicative guidance as to the judge's views of the issues in the case; and, (b) only operate the strike-out provision in rule 8 in accordance with its terms. They held that, if a registration system is to be operated that may have the effect of screening out some cases, or parts of them, that "should operate according to defined principles, and with appropriate procedural safeguards".

48. Subsequent to those decisions, on 20 April 2021, the President of the Health, Education and Social Care Chamber issued the 2021 Practice Direction. As I mentioned in paragraph 2 above, this Practice Direction has not in recent times been readily accessible on either the www.gov.uk or the www.judiciary.uk websites as it is not published on those sites on the pages that include other practice directions and guidance of the First-tier Tribunal. My inquiries indicate that there are standard notes that are intended to accompany the First-tier Tribunal's case management directions that provide a link to the 2021 Practice Direction, but those standard notes do not appear in the First-tier Tribunal bundle in this case. Judge O'Neill's case management directions in this case do make reference to the 2021 Practice Direction at a number of points, but only to mention that it requires "a claim to set out details of the alleged discrimination including date or dates and details of any decision, act or failure to decide or act by the Responsible Body". In fact, the Practice Direction also makes provision of the sort envisaged by Judge Ward and Judge Lane in *F v W* and *Horizon* as follows:

> 7. In a disability discrimination in schools case:
> a. Every claim is considered by the Tribunal on receipt to determine whether the application meets with the requirements of Rule 20 and this Practice Direction.
> b. Since the Tribunal's form does not require the claimant to set out numbered grounds of claim nor require them to identify with precision how each act complained of amounts to discrimination, the Tribunal will identify from the information provided by the claimant the general grounds of claim to which the Respondent must respond.
> c. If the Tribunal forms the provisional view, based on the information provided with the claim form that there is no reasonable prospect of the claimant's case, or part of it, succeeding, then the Tribunal may, in its discretion under Rule 8(4)(c), warn that the claim, or part of it, may be struck out and require the claimant to provide additional information before deciding whether to strike out the claim, or part of it.
> d. If the claimant avers that the grounds admitted by the Tribunal do not adequately reflect their complaint, they may apply to the Tribunal for a variation of the Registration Directions Order in accordance with the timetable set out in the Order, setting out reasons why the allegations should be admitted.
>
> 8. If the Tribunal forms the provisional view that a claim (or part of it) does not form part of a course of conduct extending over a period which ends within the time limit, or is otherwise made out of time, they may either:
> a. Exercise discretion to admit the parts of the claim that are made out of time. In such cases, questions of timeliness will be a matter for the Tribunal determining the claim, having heard all the evidence; or
> b. Refuse to admit those parts of the claim which are, in their provisional

> view, out of time, and direct the parties to participate in a preliminary hearing to determine whether those parts of the claim should be admitted.
>
> In a disability discrimination in schools case, the Tribunal's provisional views about timeliness when considering the claim on receipt shall not be a 'decision' of the Tribunal within the meaning of Paragraph 4(4) of Schedule 17 of the Equality Act 2010.
>
> …
>
> 10. Under Rule 8(3) of the 2008 Rules, the Tribunal must strike out the whole or a part of the proceedings if the Tribunal does not have jurisdiction in relation to the proceedings or that part of them and it does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them. In such circumstances, the respondent may not be sent a copy of the application notice unless that respondent is an LA which has requested that they be sent such application notices. If, on the information provided with the claim form, the Tribunal requires information from one or both parties before deciding whether the Tribunal has jurisdiction to decide the claim, the Tribunal, having identified any point which it is required to decide may either:
> a. Require the parties to provide further information and direct them to participate in a preliminary hearing to decide the point(s); or
> b. Direct the parties to address the Tribunal on any jurisdictional point at the final hearing.

49. As can be seen, the Practice Direction provides, at paragraph 7c, for a party to be warned if a claim may be struck out under rule 8(4)(c) as standing no reasonable prospect of success or, at paragraph 8(3), for the Tribunal to strike out a claim that the First-tier Tribunal does not have jurisdiction to deal with under rule 8(3). Paragraph 10 provides that the question of strike out under rule 8(3) on jurisdictional grounds should be determined either at a preliminary hearing or, if the Tribunal so directs, at a final hearing. In accordance with *F v W* and *Horizon*, the Practice Direction does not therefore amend or vary what the FTT Procedure Rules provide in rule 8 in relation to the circumstances in which a party's case must or may be struck out. Rather, it makes provision as to how and when those strike-out rules may be operated in disability discrimination cases.

50. The 2021 Practice Direction does, however, make provision for "not admitting" claims in two circumstances. First, implicit in paragraph 7d is that the Tribunal may, as a result of exercising its case management powers to identify the claims that are being made, and only "admitting" those that it identifies, implicitly have "not admitted" other claims that it has failed to identify. Paragraph 7d envisages that a decision of this sort "not admitting" claims will be a case management decision, that may be the subject of an application to vary, rather than a final

decision disposing of those claims that would need to be the subject of an application for permission to appeal.

51. Secondly, the Practice Direction provides at paragraph 8 for parts of claims that appear on receipt to be out of time to be "not admitted" on the basis of a "provisional view" by a judge. Paragraph 8b then provides that in such cases the Tribunal will direct the parties to participate in a preliminary hearing to "determine" whether those parts of the claim should be admitted. The alternative to this course is set out in paragraph 8a: it is for the judge to admit the parts of the claim that are made out of time, but noting that the question of whether or not the claim is in time will be a matter for the Tribunal to determine "having heard all the evidence" (and thus, implicitly, at the final hearing). Paragraph 8 makes clear that the Tribunal's "provisional views about timeliness when considering the claim on receipt shall not be a 'decision' of the Tribunal within the meaning of Paragraph 4(4) of Schedule 17 of the Equality Act 2010", i.e. the judge's preliminary views that a claim is out of time will not prevent the Tribunal from considering that claim.

52. In this case, Judge O'Neill's case management decisions are expressed in terms of 'not admitting' the claims of failure to make reasonable adjustments in relation to the behaviour policy because he considered the Tribunal did not have jurisdiction to determine it, and instead determining that the claim should (if in time) be considered as claims of discrimination arising from disability contrary to section 15 of the EA 2010. He first of all refused to admit the claim on the papers, then listed a hearing to determine the issue following which he again refused to 'admit' the claims otherwise than as section 15 claims because he considered that the First-tier Tribunal did not have jurisdiction to consider the claims as failures to make reasonable adjustments.

53. What Judge O'Neill purported to do was not therefore something that is provided for either in the FTT Procedure Rules or in the 2021 Practice Direction. However, it seems to me that it would be wrong to regard his decisions as being legal nullities because his procedural error is in choice of language rather than substance. If he had described what he was doing as being, (a), at the paper decision stage, warning the appellant that the claims may be struck out for lack of jurisdiction under rule 8(3); and, (b), following the preliminary hearing, making an order striking out under rule 8(3), that would have been permissible from a procedural perspective (albeit still wrong on the jurisdictional issue for reasons I come on to below). In any event, as a matter of general principle a decision of a tribunal is not to be regarded as a nullity unless and until it has been set aside or quashed on appeal. Until then, "it will remain as effective for its ostensible purpose as the most impeccable of orders": *Smith v East Elloe Rural District Council* [1956] AC 736 at 767-770 *per* Lord Radcliffe (and see the discussion of this principle at [27]-[33] of the Supreme Court's judgment in *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46, [2022] AC 461 and *Information Commissioner v Malnick and the Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC) at [100]).

54. Judge O'Neill's decisions must therefore be regarded as having taken effect in accordance with their terms, notwithstanding his failure to follow the 2021 Practice Direction or to use the language of the FTT Procedure Rules. Construed objectively, it seems to me that Judge O'Neill's decision following the October 2024 preliminary hearing was a decision that finally dismissed the appellant's claim of failure to make reasonable adjustments in relation to the behaviour policy. There is some doubt about this because Judge O'Neill's decision of 7 October 2024 does not in the "It is ordered…" section actually state, as it does in relation to some other allegations, that the claim of failure to make reasonable adjustments in relation to the behaviour policy is "not admitted and will not be considered further by the Tribunal". However, it seems to me this may be because Judge O'Neill regarded his reasoning in the October 2024 decision as simply confirming the decision he had made previously in June/July 2024 orders refusing to admit those claims. In any event, I do not consider that his decision can reasonably be read as leaving the issue open for further consideration at the final hearing (although I acknowledge that the both the appellant and the Holmes Tribunal did not regard it in that light). Having concluded that the Tribunal did not have jurisdiction to hear the claim, it was under rule 8(3) his "duty" to strike it out and, in substance, that is what he did by refusing to admit it. Further, Judge O'Neill had by this time determined the issue twice, once on the papers and once following a hearing. The principle of finality in litigation is important and it seems to me that, as a matter of law, his decision brought an end to this claim before the First-tier Tribunal.

55. Rule 1(2) of the FTT Procedure Rules provides that the words "dispose of proceedings" where used in the Rules include "unless indicated otherwise, disposing of a part of the proceedings". As such, under the FTT Procedure Rules, Judge O'Neill's decision:

    a. Could be the subject of an appeal to the Upper Tribunal: see *F v W* and *Horizon* and cf *LS v London Borough of Lambeth* [2010] UKUT 461 (AAC) for the general principles regarding appeals against interlocutory decisions under section 11 of the TCEA 2007; but,

    b. Could not be varied or revisited by the First-tier Tribunal otherwise than:

        i. In accordance with rule 45, which in summary requires one of four conditions in rule 45(2) to be met (all concerned with procedural irregularities) and for it to be in the interests of justice to set the decision aside; or
        ii. Pursuant to rule 48, which permits a review of the decision "if circumstances relevant to the decision have changed since the decision was made" (rule 48(2)); or
        iii. In response to an application for permission to appeal under rule 46, in which case rule 47(1) requires the Tribunal first to consider, taking into account the overriding objective in rule 2, whether to review the decision in accordance with rule 49(1), which permits

> a review of a decision (a) where there is an error of law in the decision or (b) pursuant to rule 48.

56. The preceding points are in principle as true of Judge O'Neill's first decisions of June/July 2024 in which he disposed of this part of the appellant's case on the papers as they are of his decision of October 2024 when he made that decision again following a hearing. His decisions of June/July 2024 could have been expressed as "provisional views" so as to avoid this difficulty, but as they were not expressed in provisional terms, I draw attention to Judge Church's recent decision in *JTC v Secretary of State for Defence* [2025] UKUT 355 (AAC) (*JTC*). Although rule 45(2)(c) provides that one of the conditions for set aside in that provision is that "a party, or a party's representative, was not present at a hearing related to the proceedings", Judge Church in *JTC* has recently held that this condition is not satisfied just because a decision is made on the papers. The failure to hold a hearing before making the decision would therefore have to constitute some "other procedural irregularity" under rule 45(2)(d) before the power to set aside under that rule would arise. I note that Judge O'Neill did not consider this when listing the jurisdictional issue he had decided on the papers for reconsideration at a hearing in October 2024. I acknowledge that this may be because he was regarding his decision 'not admitting' the claims on jurisdictional grounds as being a decision under paragraph 7(d) of the 2021 Practice Direction, and in practice I accept that paragraph 7(d) does provide a pragmatic way of disposing of a claim that the Tribunal does not have jurisdiction to determine, but only if the claimant accepts that decision. If the claimant disputes the Tribunal's decision then it is plain from rule 8(3) of the FTT Procedure Rules and paragraph 10 of the 2021 Practice Direction that if the First-tier Tribunal considers it does not have jurisdiction to deal with a claim or part of it, its duty is to strike it out: 'not admitting' is not, in my judgment, an option.

57. The effect of Judge O'Neill's decisions under the FTT Procedure Rules was thus in my judgment that he had dealt with this part of the appellant's case as a preliminary issue under rule 5(3)(e). Accordingly, the appellant should, as required by rule 41(2)(c) have been provided with the decision "notification of any right of appeal against the decision and the time within which, and the manner in which, such right of appeal may be exercised". (To the extent that there is any doubt about what rule 41(2)(c) requires in this situation, it seems to me that it must be resolved in favour of ensuring that the First-tier Tribunal is under a duty to ensure that parties are notified of the appeal rights that there is no doubt they have.) So far as I have been able to ascertain, the appellant in this case was not notified of her right to appeal Judge O'Neill's decision(s). I understand that it is not currently the practice of the First-tier Tribunal administration to send notification of appeal rights with interlocutory decisions such as this, the First-tier Tribunal's standard letter notifying appeal rights is only sent out with the decision made following a final hearing. That does not prevent an individual judge including notification in their order, but Judge O'Neill's order contains no such notification.

58. Nor did Judge O'Neill exercise the power in rule 46(2A) to direct that the 28-day time limit for appealing the decision should run from the date of the final decision that disposes of all issues in the proceedings.

59. It follows from the foregoing that:

    a. Ground (2) of the present appeal should have been launched against Judge O'Neill's decisions (strictly speaking, against his June/July 2024 decisions, but certainly against his October 2024 decision) and not against the Holmes Tribunal decision; and,

    b. The Holmes Tribunal should not have sought to reconsider Judge O'Neill's decision unless it was satisfied that one of the circumstances in rules 45-49 applied so as to permit it to revisit a decision that has disposed of part of the proceedings. The Holmes Tribunal was in error of law in failing to approach the matter on that basis, but unless the Holmes Tribunal would have been bound, if it had considered rules 45-49, to conclude that it did have power to revisit Judge O'Neill's decision, then the error raised in Ground (2) of the present appeal cannot be a material error. As it is, it is plain that the Holmes Tribunal would not have been bound to conclude that it should revisit Judge O'Neill's decision. There had been no application for permission to appeal so as to open up the power of review under rule 49. There had been no material change of circumstances so as to permit a rule under 48 (indeed, the appellant even relied on the same legal arguments, as she had drawn the decision of the previous Tribunal on the point to Judge O'Neill as well). I can see that it would have been open to the First-tier Tribunal to conclude that Judge O'Neill's errors in 'not admitting' rather than striking out the claim, and the failure to notify the appellant of her appeal rights, could constitute a "procedural irregularity" within rule 45(2)(d), but the question of whether it would have been "in the interests of justice" to re-open his decision under rule 45(1)(a) is not a question that the First-tier Tribunal would have been bound to answer in the appellant's favour. The principle of finality in litigation is, as I have said, important and it would have been open to the First-tier Tribunal to conclude that it was not in the interests of justice to allow Judge O'Neill's decision to be revisited.

60. As already mentioned above, at the Upper Tribunal hearing I asked the appellant why she had not appealed Judge O'Neill's decision and she responded that she did not know she could or should. Given that the First-tier Tribunal judges dealing with this case also seem to have been unaware of the relevant legal principles, and had failed to give her notice of her appeal rights as required by rule 41(2)(c), it is difficult to criticise the appellant for failing to recognise or exercise her appeal right at the appropriate stage. In this case, I have decided that it is in the interests of justice to decide the substantive point of law raised in Ground (2) of the appeal in any event because it will have a direct bearing on the part of the Holmes Tribunal's decision relating to the permanent exclusion which has already been

set aside and will be reheard. In other cases, however, there would be a risk of an appellant losing their right of appeal in this situation.

Further guidance on the First-tier Tribunal's obligations to identify and determine claims in disability discrimination cases

61. In light of Judge Bradley's observations when granting permission to appeal about the difficulty for the First-tier Tribunal of dealing with a case such as this which contains so many different claims (see above paragraph 21), I add the following, both by way of guidance for future cases and to assist the First-tier Tribunal in this case in its re-determination of the claim in relation to the permanent exclusion.

62. It is a matter for the First-tier Tribunal whether or not it considers it appropriate in the particular case to determine a jurisdictional issue such as this as a preliminary issue either on 'registration' of the claim or otherwise prior to the final hearing. The 2021 Practice Direction and the FTT Procedure Rules must, however, be followed and the overriding objective needs to be considered. Because such decisions generate appeal rights, there is no point disposing of part of the proceedings at an interlocutory stage unless doing so will materially benefit the parties or the Tribunal in their preparation for the final hearing. The present case was a particularly large and complex one, so it was appropriate in principle for it to be subject to robust case management of the sort that Judge O'Neill endeavoured to carry out so as to reduce the issues, and thus the scope of the evidence and legal argument, that would be required at the final hearing. However, if that approach is taken, consideration needs also to be given to the parties' rights of appeal and a decision taken as to whether, if a party wishes to appeal, they should be allowed immediately to appeal that decision (and informed of their right to do so as required by rule 41(2)(c)), or whether the power under rule 46(2A) should be exercised so that any appeal must await the outcome of the final hearing disposing of all the issues.

63. In other cases, it may be more appropriate for the judge at the case management stage just to identify the issues in the case without finally disposing of any part of the case, as paragraph 8a of the 2021 Practice Direction envisages may be done in relation to time points. The Court of Appeal's guidance to Employment Tribunals on the identification of claims, the use of a list of issues as a case management tool, and the duty of the tribunal to determine claims that have been properly brought before it, is, in my judgment, in principle equally applicable to the First-tier Tribunal when dealing with claims under the EA 2010: see *Moustache v Chelsea and Westminster Hospital Foundation Trust* [2025] EWCA Civ 185, [2025] ICR 1231 (*Moustache*) at [33]-[47]. See also *Mr Paul Thompson v Devon and Somerset Fire and Rescue Service* [2025] EAT 59 (*Thompson*) at [1]-[3] for further guidance as to identification of claims in cases where no lawyers are involved. It can be applied with only minor adjustments to reflect the provisions of the 2021 Practice Statement.

64. The Court of Appeal in *Moustache* at [36] held that "where a party seeks the ET's ruling on an issue that emerges from an objective analysis of the statements of case (and falls within its jurisdiction) the ET has a duty to address that issue … the ET does not have a discretion not to consider and determine a claim that has been brought before it". Subject to the First-tier Tribunal's powers to strike out claims as provided for in the FTT Procedure Rules, and the procedure for admitting or not admitting claims provided for in the 2021 Practice Direction, the same principle must in my judgment apply in this jurisdiction. The task for a tribunal is to determine what claim(s) have in fact been made in the claim form (or 'application notice' as it is called in the FTT Procedure Rules).

65. In the First-tier Tribunal the process of identifying the claims is the exercise that the 2021 Practice Direction envisages the Tribunal undertaking at the registration stage. If the application notice is unclear, but in the course of correspondence or discussion at a hearing it becomes apparent what claims the claimant wishes to make, then the Tribunal can consider whether it is necessary to permit an amendment to the application notice or, if the claim is in fact already in the application notice, whether to vary the order setting out the claims that have been admitted in accordance with paragraph 7d of the 2021 Practice Direction.

66. The Tribunal cannot, however, refuse to admit a claim that is included in the application notice (objectively construed) just because the Tribunal considers that the application notice contains 'too many' claims or the case is otherwise unwieldy or disproportionate. The Tribunal may try to reduce the number of claims that fall to be decided by initially admitting only certain claims as provided for in paragraph 7d. If the claimant fails to seek a variation to that order in accordance with the timetable set out in the order, then the Tribunal need only determine the claims that have been admitted. However, if the claimant does seek a variation in accordance with the timetable, then (applying *Moustache*) any claim that has been properly identified in the application notice will need to be admitted and determined, unless there is a basis for strike out under rule 8. A late application to vary the order admitting the claims will need to be considered in accordance with the overriding objective, even if it is raised as late as the final hearing. Given the terms of paragraph 7d, it seems to me that (unlike the general position in the Employment Tribunals), it would be open to the First-tier Tribunal in principle to refuse to consider a claim that was properly identified in the application notice if the claimant had failed to apply in time to vary the order admitting the claims, provided of course that in considering the application the First-tier Tribunal sought to give due effect to the overriding objective in rule 2.

67. I turn now to deal with the substantive legal issue raised by Ground (2) of the appeal.

<u>Does the duty to make reasonable adjustments apply in relation to a school's behaviour policy?</u>

The First-tier Tribunal's reasoning

68. As can be seen from the extract from Judge O'Neill's decision set out above at paragraph 11, the reason why Judge O'Neill decided that the duty to make reasonable adjustments in section 20 of the EA 2010 does not apply in relation to school behaviour policies or in relation to detentions or exclusions, is because of the difference in wording between section 85(2) of the EA 2010 and paragraph 2(4) of Schedule 13 to that Act.

69. He noted that section 85(2) sets out the circumstances in which the responsible body of a school must not "discriminate" against a pupil. Section 85(2) prohibits the responsible body from discriminating:

> (a) in the way it provides education for the pupil;
> (b) in the way it affords the pupil access to a benefit, facility or service;
> (c) by not providing education for the pupil;
> (d) by not affording the pupil access to a benefit, facility or service;
> (e) by excluding the pupil from the school;
> (f) by subjecting the pupil to any other detriment.

70. Judge O'Neill considered that a detention would fall within the scope of this provision only by dint of being "any other detriment". He contrasted section 85(2) with paragraph 2(4) of Schedule 13, which sets out the "relevant matters" in respect of which the first and third requirements of the duty to make reasonable adjustments in section 20(3) and (5) of the EA 2010 will apply in relation to schools as follows:-

> (4) In relation to each requirement, the relevant matters are—
> (a) deciding who is offered admission as a pupil;
> (b) provision of education or access to a benefit, facility or service.

71. Judge O'Neill decided that exclusions and detentions, and thus the behaviour policy itself, were not included within paragraph 2(4) because it does not expressly refer to exclusions or other detriments as section 85(2) does.

The parties' submissions, the School's policy and relevant guidance

72. Before me, neither party was legally represented and neither party was able to make any submission about the point of statutory interpretation that led Judge O'Neill and the Holmes Tribunal to their conclusion and persuaded Judge Bradley to grant permission to appeal to the Upper Tribunal.

73. The appellant for her part pointed out that the Department for Education's guidance *Behaviour in schools – advice for headteachers and school staff* (Feb 2024) is drafted on the assumption that the duty to make reasonable adjustments applies in relation to behaviour policies. I note it includes the following:

> "All headteachers should take responsibility for implementing measures to secure acceptable standards of behaviour. They should ensure the

> school's approach to behaviour meets the following national minimum expectation:
> …
> c) measures are in place and both general and targeted interventions are used to improve pupil behaviour and support is provided to all pupils to help them meet behaviour standards, making reasonable adjustments for pupils with a disability as required …" (p 6)
>
> "The law also requires schools to balance a number of duties which will have bearing on their behaviour policy and practice, particularly where a pupil has SEND that at times affects their behaviour. In particular: • schools have duties under the Equality Act 2010 to take such steps as is reasonable to avoid any substantial disadvantage to a disabled pupil caused by the school's policies or practices…" (p 14)

74. Similar references are to be found in the Department for Education's guidance *Suspension and permanent exclusion from maintained schools, academies and pupil referral units in England, including pupil movement* (August 2024). At [54] of that guidance, it states in terms that the duty to make reasonable adjustments:

> "can, in principle, apply both to the suspensions and permanent exclusions process and to the disciplinary sanctions imposed"

75. Likewise, the Equality and Human Rights Commission (EHRC) *Technical guidance for schools in England* (Sep 2023, amended July 2024) provides at [4.12]:

> "The Act requires schools 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."

76. Mr Naudi for the respondent acknowledged that the School sees the behaviour policy as being a necessary and integral part of the provision of education. The School's policy is in the bundle before me and it explains on its face that the philosophy underlying it is the provision of "an educationally inclusive environment within which all students can achieve their full potential, both academically and socially". The policy incorporates the School's Code of Conduct which is intended, among other things, to ensure that pupils "contribute to an orderly, productive and inquisitive learning environment", "act in a responsible manner" and "promote a positive image of the school". On the basis of my own experience, I can say that there is nothing unusual about this School's policy in terms of its aims and objectives.

77. The government and EHRC guidance documents show that the government and the EHRC believe that the duty to make reasonable adjustments applies to behaviour policies and sanctions, including exclusions. However, it is of course

the legislation that matters. If the legislation does not have the effect that the guidance thinks it has, then it is the guidance that is wrong.

The law as it was under the Disability Discrimination Act 1995

78. I am not aware of there having been a case on this point under the EA 2010, but there had been a number of decisions on the point in relation to the law as it stood under the Disability Discrimination Act 1995 (DDA 1995). The relevant provisions of that Act were worded somewhat differently. The equivalent provisions to section 85(2) of the EA 2010 were to be found in sections 28A(2)-(4) of the DDA 1995, which provided as follows:

> (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.

79. What constituted "discrimination" for the purposes of the DDA 1995 was different to the position under the EA 2010. By section 28B(1), "discrimination" for the purposes of section 28A meant, without justification, treating someone less favourably, for a reason which relates to his disability, than someone else to whom that reason does not or would not apply. That provision is now replaced by the three forms of "discrimination" in the EA 2010 (direct, indirect, and section 15). In addition, section 28B(2) of the DDA 1995 defined a failure without justification to comply with the duty to make reasonable adjustments to be "discrimination" for the purposes of that Act, just as section 21(2) of the EA 2010 provides that a failure to comply with the duty to make reasonable adjustments is "discrimination" for the purposes of that Act.

80. On the face of it, therefore, the combination of section 28B(2) and section 28A(4) (which expressly prohibits "discrimination" in relation to temporary and permanent exclusions), it might be thought that it was clear under the DDA 1995 that the duty to make reasonable adjustments applied to exclusions. (The same point could be made about section 85(2) of the EA 2010.)

81. However, section 28C(1), which was the sub-section that created the duty to make reasonable adjustments, provided (similarly to paragraph 2(4) of Schedule 13 to the EA 2010) that the duty applied (a) in relation to admissions and,

> "(b) in relation to education and associated services provided for, or offered to, pupils at the school …" [only].

82. In a Scottish case, *S v K School* [2009] SLT (Sh Ct) 86 (*S v K*), the Sheriff Court found itself considering a similar argument to the one before me, specifically that, as exclusions had not been mentioned in section 28C as a circumstance in which the duty to make reasonable adjustments applied, it did not apply, and that accordingly the duty to make reasonable adjustments did not cover exclusions which did not fall within the provision of "education and associated services" in section 28C(1)(b).

83. The Sheriff Court considered three authorities from the English courts, which it noted (at [15]) it would follow unless there was some real conflict with a principle of Scots law (which there was not). The Sheriff noted that in *R (T) v OL Primary School Governing Body* [2005] EWHC 753 (Admin) (*OL*), James Goudie QC (sitting as a Deputy High Court Judge) had made an observation suggesting that the duty to make reasonable adjustments may not apply to exclusions (although that case in fact proceeded by agreement on the basis that the duty did apply). The Sheriff noted that in *X v School Governing Body v SP* [2008] EWHC 389 (Admin) (*X v SP*), a different Deputy High Court Judge (Michael Supperstone QC, as he then was) had assumed that the duty to make reasonable adjustments did apply to exclusions. The third case was *Governing Body of Olchfa Comprehensive School Governors v E* [2006] ELR 503 (cited at [17] of *S v K*) in which Crane J had noted the "lack of symmetry" between section 28A and section 28B, but came "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". (Crane J had in this respect agreed with a further decision of James Goudie QC in a different case, *PPC v DS and ors* [2005] EWHC 1036 (Admin) (*PPC*).) Having considered these authorities, the Sheriff in *S v K* went on to hold at [19] and following:

> [19] 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 ss 28A to 28X in Pt IV of the Act. In addition, schools are required to have regard to the statutory code of practice promulgated in terms of s 53A of the Act and, furthermore, a court when considering any decision in proceedings under Pt IV of the Act as these proceedings are likewise bound to have regard to the code (s 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 ss 28A, 28B and 28C …

> [24] The English cases brought the provisions of ss 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 Chap 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[1].
>
> [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 s 28B(2) claim. There is nothing illogical in allowing such a decision to be reduced under s 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.
> …

84. The law as it applied under the DDA 1995 was accordingly, following *S v K* and the authorities discussed therein, reasonably clear: the duty to make reasonable adjustments applied to school discipline and sanctions and exclusion procedures.

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1 There is not in fact an Appendix 4 to the DDA 1995 Code of Practice. Rather, the full list to which the Sheriff refers appears in paragraph 4.23 itself.

(I return later to the point that the Sheriff made about it not applying to the exclusion decision itself.) It would follow that, under the DDA 1995, it was well established that references to 'the provision of education and associated services' included the application of a school's behaviour policy.

The position under the Equality Act 2010: the duty to make reasonable adjustments applies in relation to the application of a school's behaviour policy, including in relation to exclusion procedures, and imposes a duty to take reasonable adjustments to avoid exclusion

85. The next question is whether the EA 2010 was intended to effect any change to the position as it was understood to be under the DDA 1995. The Explanatory Notes suggest not. Paragraph 898 deals with the relevant part of Schedule 13. It states, quite simply:

> 898.These provisions are designed to mainly replicate the effect of provisions in the Disability Discrimination Act 1995.

86. Paragraph 295 confirms that was similarly the intent of the relevant part of section 85.

87. I have looked in vain for other parliamentary materials or Hansard extracts that might shed more light on the issue.

88. Turning to the legislation itself, it seems to me that the minor difference in wording between paragraph 2(4) of Schedule 13 to the EA 2010 and section 28C(1)(b) of the DDA 1995 cannot have been intended to effect any significant change so far as the issue raised in the present case is concerned. "Education and associated services provided for…" (in the DDA 1995) and "provision of education or access to a benefit, facility or service" (in the EA 2010) are two phrases that have no material difference in meaning in my judgment in the present context where what is at issue is whether the latter encompasses behaviour policy and sanctions in the same way as the former.

89. The only question therefore is whether the addition of "any other detriment" into section 85(2) of the EA 2010, or the restructuring of what was section 28A(2)-(4) of the DDA 1995, has changed the scope of the duty to make reasonable adjustments as it stood under the DDA 1995. It appears from the Explanatory Notes that there was no intention to effect any change. Further support for that conclusion may be drawn from the fact that government and EHRC guidance in relation to the DDA 1995 was very similar to the current guidance as the extract from the previous guidance quoted in the Sheriff's judgment above shows. It also seems to me that there has in fact been no change. Judge O'Neill considered there was because he took the view that disciplinary sanctions short of exclusion had to be "other detriments" within section 85(2)(e) and could not form part of the provision of education under section 85(2)(a) or access to a benefit, facility or service under section 85(2)(b). However, if the earlier cases are right that the provision of education is wide enough in meaning to cover management of

behaviour, up to and including exclusion, then the fact that paragraph 2(4) of Schedule 13 does not expressly refer to exclusion or detriments does not matter.

90. I acknowledge that the fact that section 85(2) breaks down the matters covered by the obligation not to discriminate into more categories than paragraph 2(4) of Schedule 13 does for the duty to make reasonable adjustments might indicate that the omission of those categories from the duty to make reasonable adjustments is significant. However, once the legislation is viewed as a whole in the context of the previous case law, the Explanatory Notes and guidance, it is apparent that the way that section 85(2) is drafted does not have the implication for the interpretation of Schedule 13 that Judge O'Neill and the Holmes Tribunal thought it did.

91. Whatever the driving force behind the drafting, interpreting paragraph 2(4) of Schedule 13 in the same way as the predecessor provision in the DDA 1995 does not involve giving two meanings to 'provision of education' for the purposes of different parts of the Act. On the contrary, the phrase should be given the same meaning in both sections. Behaviour policy and sanctions therefore fall within the scope of section 85(2)(a) or (c) as being aspects of "the way" in which the school provides, or does not provide, education.

92. That said, the separate specific identification of "excluding the pupil from the school" in section 85(2)(e) does maintain the drafting in section 28A(4) of the DDA 1995 and it may be that this is why it there appears to have been a general understanding under the DDA 1995 that the act of exclusion *per se* did not fall within the concept of 'education and associated services'. This is apparent from the drafting of the Part 4 of the DDA 1995 Code of Practice which throughout distinguishes between 'education and associated services' and 'exclusions', and also from the Sheriff's remark to this effect in *S v K*, which in turn appears to have been based on what James Goudie QC said at [29] of *PPC*.

93. However, even if it is right that the act of exclusion itself does not fall within the scope of 'education and associated services', that is a point without (it seems to me) any practical importance. It is apparent from [4.23] of the DDA 1995 Code of Practice, quoted by the Sheriff in *S v K* above, which specifically identifies the provision of education as including "school discipline and sanctions" and "exclusion procedures", and also from the legal authorities, that under the DDA 1995 it was understood that the duty to make reasonable adjustments applies to everything that might lead up to an exclusion, and encompasses the need to consider alternatives to exclusion. As James Goudie QC put it in *PPC*:

> 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.

94. As already noted above, it is apparent that there was no intention to change the law in this respect under the EA 2010, and nor is there in my judgment any aspect of the drafting that would compel a different conclusion. It thus seems clear that the duty to make reasonable adjustments applies to a school's behaviour policy and its application, including sanctions up to permanent exclusion, and may require a school to take reasonable steps to avoid exclusion, whether by making alternative provision or imposing a lesser sanction.

Applicability of the duty to make reasonable adjustments to the exclusion decision itself

95. I add this: I have struggled somewhat with what it means for the duty to make reasonable adjustments to apply to everything that leads up to an exclusion, including imposing a duty to make reasonable adjustments so as to avoid exclusion, while not applying to the act of exclusion itself. The DDA 1995 authorities do not explain why they make this distinction and nor does the guidance on the DDA 1995.

96. It seems to me that there may be conceptual confusion here because the DDA 1995 divided responsibility for determining disability discrimination claims between what is now the IRP (which had responsibility for exclusions) and the First-tier Tribunal (which was responsible for everything else): see section 28L of the DDA 1995. That division remains under the EA 2010 in relation to Wales: see paragraph 14 of Schedule 17 to the EA 2010. However, in relation to England, that was a jurisdictional division as to which body was responsible for determining which disability discrimination claims. It had no bearing on the scope of the duty to make reasonable adjustments.

97. Further, as I have already observed, once the full context is considered, it seems to me that the express provision in section 85(2)(e) prohibiting a responsible body from discriminating against a pupil by excluding them, may simply have no bearing on the interpretation of the meaning of "provision of education" in paragraph 2(4) of Schedule 13. It seems possible that section 85(2)(e) is drafted as it is because it was thought to be replicating section 28A(4) of the DDA 1995, and because it mirrors the drafting of the equivalent provision in relation to employment (section 39(2)), which specifies "dismissal" as a matter in respect of which an employer must not discriminate). It may also have been thought to be necessary because section 85(2)(a) and (c) do not simply prohibit discrimination in relation to the "provision of education" in general terms, but instead prohibit (perhaps slightly more narrowly) discrimination "in the way" that the school provides education or discrimination by "not providing" education. Whatever the explanation for the drafting, however, it seems to me that section 85(2)(e) does

not compel the conclusion that the duty to make reasonable adjustments does not apply to the act of exclusion, any more than it compels the conclusion (rejected by all the judges who considered the issue under the DDA 1995) that the duty to make reasonable adjustments does not apply to disciplinary policies and exclusion procedures.

98. In my judgment, the fact that the duty applies in relation to "the provision of education" and "access to a benefit, facility or service" is sufficient to encompass exclusion without more and without caveat. After all, exclusion is a decision not to provide education and to exclude the pupil from the benefit, facility or service of attending school.

Conclusion on Ground (2)

99. Whether I am right or wrong in going one step further than previous authorities, it follows that the First-tier Tribunal does have jurisdiction to consider a claim for reasonable adjustments in relation to the behaviour policy, and sanctions imposed thereunder - up to and including a duty to make reasonable adjustments to avoid exclusion. For the reasons I have given, I would also go further and hold that the duty to make reasonable adjustments applies to the act of exclusion itself.

<u>The consequences of my conclusion under Ground (2)</u>

100. It follows that Judge O'Neill and the Holmes Tribunal erred in law in this case in regarding the claim for reasonable adjustments in relation to the behaviour policy as falling outside the First-tier Tribunal's jurisdiction. However, for the reasons I have explained above at paragraph 59, the error in the case of the Holmes Tribunal was not material because that Tribunal had no power to revisit Judge O'Neill's decision unless it was satisfied that there were grounds for re-opening his decision under rules 45-49 of the FTT Procedure Rules, and if it had considered its powers in that respect, it would not have been bound to conclude that it should revisit Judge O'Neill's decision.

101. I have, however, concluded that the Holmes Tribunal erred in law in failing to consider its powers under rules 45-49. If that had been a ground of appeal to the Upper Tribunal, it would have succeeded, and I would then have been able to set aside the Holmes Tribunal's decision and re-make its decision by considering rules 45 to 49. I have considered whether I should delay issuing this decision yet further by reverting to the parties to give them an opportunity to make submissions on the possibility of amending this appeal in this way, but it seems to me that doing so would not be in accordance with the overriding objective as it would further delay resolution of these proceedings and there is an alternative way forward that in my judgment will better serve the interests of justice.

102. Given what has happened in this case, including in particular the failures of the First-tier Tribunal in not following the FTT Procedure Rules, or the 2021 Practice Direction, as I have identified at paragraphs 46-60 above, it seems to me that it is open to the appellant to make a late application to appeal Judge O'Neill's order

of October 2024 in the light of my decision in this case. That application will need first to be considered by the First-tier Tribunal which may, if it considers it appropriate, under rule 49 review and set aside part of Judge O'Neill's order so as to enable the appellant's claim of failure to make reasonable adjustments in relation to the behaviour policy to be considered. If, for some reason, the First-tier Tribunal decides not to review Judge O'Neill's decision and also refuses permission to appeal, the appellant will be able to renew her application to the Upper Tribunal in the usual way. I hope it will not come to that.

103. While this way forward may appear to be placing an undue burden on the appellant to take the further step of formally appealing Judge O'Neill's order, it has the advantage of giving both parties an opportunity to make submissions on any issues that they may consider arise from my judgment in these proceedings in relation to the reasonable adjustments claim.

104. It will also enable the First-tier Tribunal to consider at the same time whether there is a need to identify more precisely what the claim is. In *KTS v Governing Body of a Community Primary School* [2024] UKUT 139 (AAC) at [39]-[46] I gave general guidance as to the approach that First-tier Tribunals should take to identifying the claims in disability discrimination cases, including taking account of time limits, and at paragraphs 61-67 above I have given further guidance.

105. The First-tier Tribunal will need to consider whether the claim is that the policy itself did not (at the relevant time) contain specific provision in relation to making reasonable adjustments for those with disabilities? A claim in that form can in principle work if the mere fact of a school having an inflexible policy places a disabled pupil at a substantial disadvantage, although if the evidence is that in practice reasonable adjustments are made, then a poorly worded policy may not itself be disadvantageous to the disabled pupil. On the other hand, if it is a claim that, on one or more specific occasions, the school failed to make reasonable adjustments to its policy in C's case, then those specific occasions need to be identified and in principle each needs to be dealt with as a separate reasonable adjustments claim (although not insofar as such claim(s) have already been determined by the Holmes Tribunal in relation to the detentions and fixed-term exclusions). Depending on the way that the appellant puts her case, consideration may also need to be given to whether that case is (objectively viewed) set out in the original application notice or not and, if not, whether (or not) it is appropriate to permit an amendment at this stage in the proceedings in all the circumstances.

106. In light of the division that the First-tier Tribunal has already decided to make in this case between the claim in relation to the permanent exclusion, which is already set aside to be reheard, and the other claims, the appellant's late application for permission to appeal Judge O'Neill's order will also provide the First-tier Tribunal with the opportunity to consider whether the interests of justice favour following a similar division if the First-tier Tribunal decides to set aside Judge O'Neill's decision and direct that the claim for failure to make reasonable

adjustments in relation to the behaviour policy also be considered by a fresh panel alongside the claim in relation to the permanent exclusion.

Conclusion

107. This has been a very unusual appeal. Although the appeal on ground (2) has been successful as regards establishing that the First-tier Tribunal does have jurisdiction to consider a claim of failure to make reasonable adjustments in relation to the School's behaviour policy, it has not succeeded in formal terms because the ground (2) error was an error committed by Judge O'Neill, and was not a material error in the Holmes Tribunal decision which could not revisit Judge O'Neill's decision unless satisfied that one of the circumstances in rules 45-49 permitting set aside or review of a decision that finally disposed of part of the proceedings applied.

108. I consider that the order that appropriately reflects the result in this case is that the appeal is 'allowed' in the sense of recognising that the decision of the First-tier Tribunal involved an error of law in relation to Ground (2), albeit not a material error so that the decision of the Holmes Tribunal is not set aside (save to the extent that it has already been set aside by Judge Bradley). Nor (for the avoidance of doubt) am I re-making any part of the Holmes Tribunal's decision, or remitting any part of it for re-determination by the First-tier Tribunal. My judgment will, however, need to be applied by the First-tier Tribunal if the appellant applies late to appeal Judge O'Neill's decision(s). She may by that means be able to litigate her claim of failure to make reasonable adjustments in relation to the behaviour policy at the same time as re-litigating the claim in relation to the permanent exclusion.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 4 February 2026
Amended 23 February 2026 to secure compliance with rule 14 order