Dear [INSERT HEAD TEACHER],

**Re:**

**Student:**

**Year Group:**

**Your School:**

We are[INSERT CHILD NAME]’s parents, [INSERT PARENT NAMES] of [INSERT ADDRESS]. We write to you in connection with the special educational needs and disabilities of our son/daughter and his/her education at [INSERT SCHOOL].

This letter seeks to address actions taken by [INSERT SCHOOL] that amounts to disability discrimination which in turn raises issues over whether [INSERT CHILD NAME]’s education is being provided with reasonable care and skill. The aim of this letter, in the first instance, is an attempt to resolve matters, work together and ensure [INSERT CHILD NAME]’s continued education at the school will lead to him/her being able to achieve to his/her potential.

Below, we outline our main issues, supported, where necessary, by the relevant legal position. Whilst this is a formal letter, outlining what actions we will take if necessary, it is still our hope that through open and constructive discussions the below actions will not be required. If we cannot resolve matters to ensure that [INSERT CHILD NAME] is able to achieve in line with his/her potential and is not unduly discriminated against due to his/her disabilities, we will have no alternative other than to take this matter to the SEND Tribunal by way of a disability discrimination claim. We must emphasise that this is only being considered as the very last recourse of action, which we hope will not be required.

**Relevant background information**

[Insert here when the child joined the school and in what year group, whether they have an EHC plan and the child’s diagnoses, as well as any other background information you feel is appropriate]

We note that, currently, [INSERT CHILD NAME] receives the following support:

* [Outline here any support that the child in question is currently receiving].

[If the child in question has any medical difficulties, and if they receive any medication for this, outline it here]

**Chronology**

[Outline here a bullet pointed chronology of events that relate to the child’s diagnoses, for example events of a seizure, referrals to a clinic, being kept home as a precautionary measure, missing school, clinical visits, or correspondence/meetings with the school]

**Relevant legal principles, legislation, caselaw and guidance**

If independent school:

We entered into a contract with [INSERT SCHOOL] by which, in exchange for the payment of school fees, the school committed to a responsibility to perform its obligations properly and fairly, and in all circumstances lawfully. These include implied obligations:

* To teach and support [INSERT PARENT NAMES]’s son/daughter [INSERT CHILD NAME] with reasonable care and skill – **Section 49** of the **Consumer Rights Act 2015.**
* To act lawfully and fairly and within its duty of care to [INSERT PARENT NAMES] and their son/daughter [INSERT CHILD NAME]. The principles of fairness underpin all areas of the UK legal system and must be followed.

In **Gray v Marlborough College [2006] EWCA Civ 1262** the Court of Appeal, the Court analysed the impact of an implied contractual duty, imposed on the proprietor of an independent school, to act fairly when excluding a pupil from the school. As Auld LJ put it (para 56):

*“Where fairness arises for consideration as an incident of a contractual obligation, as here, the nature of the bargain is relevant. Parents have a choice whether to commit their children to the particular regime and ethos of an independent school. They do so in the light of their expectations of what the school will provide and their understanding of what it requires from its pupils and their parents. That is what they pay for and the commitment they give. These are circumstances for which allowance may have to be made in applying notions of fairness and of what is required by consultation in the independent sector, which may or may not, depending on the circumstances, militate against reading across too readily the more prescriptive* ***aspects of statutory provisions*** *governing exclusion of pupils in the state sector.”*

Applicable to [INSERT CHILD NAME]’s education is the **Exclusion from maintained schools, academies and pupil referral units in England Statutory guidance for those with legal responsibilities in relation to exclusion** September 2017. Under “**2. Key points**” bullet point 4:

*“The decision to exclude a pupil must be* ***lawful, reasonable and fair****. Schools have a statutory* ***duty not to discriminate against pupils*** *on the basis of protected characteristics,* ***such as disability*** *…. Schools should give particular consideration to the fair treatment of pupils from groups who are vulnerable to exclusion.”*

Under “*3. The head teacher’s power to exclude - A guide to the law*”:

*1. Only the head teacher of a school can excludes a pupil, and this* ***must be*** *on* ***disciplinary grounds****…*

*2. … The legal requirements relating to exclusion, such as the head teacher’s* ***duty to notify parents****, apply in all cases…*

*6. Any decision of a school, including exclusion, must be made in line with the principles of administrative law, i.e. that it is****: lawful (with respect to the legislation relating directly to exclusions and a school’s wider legal duties, including the European Convention on Human Rights and the Equality Act 2010)****; rational; reasonable; fair; and proportionate.*

*7. The head teacher must take account of their legal duty of care when sending a pupil home following an exclusion…*

*9. Under the Equality Act 2010 (the Equality Act), schools* ***must not discriminate*** *against, harass or victimise pupils because of: … disability…. For disabled children, this includes a duty to make reasonable adjustments to policies and practices and the provision of auxiliary aids.*

 *10. In carrying out their functions, the public sector equality duty means schools must also have due regard to the need to:*

 *• eliminate discrimination, harassment, victimisation, and other conduct that is prohibited by the Equality Act;*

 *• advance equality of opportunity between people who share a protected characteristic and people who do not; and*

*• foster good relations between people who share a protected characteristic and people who do not share it.*

*11. These duties need to be complied with when deciding whether to exclude a pupil. Schools must also ensure that their policies and practices do not discriminate against pupils by unfairly increasing their risk of exclusion. Provisions within the Equality Act allow schools to take positive action to deal with particular disadvantages, needs, or low participation affecting one group, where this can be shown to be a proportionate way of dealing with such issues.*

*12. The head teacher and governing board must comply with their statutory duties in relation to SEN when administering the exclusion process. This includes having regard to the SEND Code of Practice.*

*13. It is* ***unlawful to exclude for a non-disciplinary reason****. For example, it would be unlawful to exclude a pupil simply because they have additional needs or a disability that the school feels it is unable to meet…*

*14. ‘**Informal’ or ‘unofficial’ exclusions, such as sending a pupil home ‘to cool off’, are* ***unlawful****, regardless of whether they occur with the agreement of parents or carers. Any exclusion of a pupil, even for short periods of time, must be formally recorded.”*

Under “Statutory guidance on factors that a head teacher should take into account before taking the decision to exclude” it states:

*16. A decision to exclude a pupil permanently should only be taken:*

*• in response to a serious breach or persistent breaches of the school's behaviour policy; and*

*• where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school.*

*17. The decision on whether to exclude is for the head teacher to take…*

*18. Whilst an exclusion may still be an appropriate sanction, the head teacher should take account of any contributing factors that are identified after an incident of poor behaviour has occurred. For example, where it comes to light that the pupil has suffered bereavement, has mental health issues or has been subject to bullying.*

*19.* *Early intervention to address underlying causes of disruptive behaviour should include an assessment of whether appropriate provision is in place to support any SEN or disability that a pupil may have. The head teacher should also consider the use of a multi-agency assessment for a pupil who demonstrates persistent disruptive behaviour. Such assessments may pick up unidentified SEN but the scope of the assessment could go further, for example, by seeking to identify mental health or family problems.*

Under “**Statutory guidance to the head teacher on the exclusion of pupils from groups with disproportionately high rates of exclusion**”:

*“21. The exclusion rates for certain groups of pupils are consistently higher than average. This includes: pupils with SEN; …”*

*22. In addition to the approaches on early intervention set out above, the head teacher should consider what extra support might be needed to identify and address the needs of pupils from these groups in order to reduce their risk of exclusion. … Statutory guidance to the head teacher on the exclusion of pupils with Education, Health and Care plans (EHC plans)..*

*23. As well as having disproportionately high rates of exclusion, there are certain groups of pupils with additional needs who are particularly vulnerable to the impacts of exclusion. This includes pupils with EHC plans …. The head teacher should, as far as possible, avoid permanently excluding any pupil with an EHC plan ….*

*24. Schools should engage proactively with parents in supporting the behaviour of pupils with additional needs. ….*

*25. Where a school has concerns about the behaviour, or risk of exclusion, of a child with additional needs, a pupil with an EHC plan or a looked after child, it should, in partnership with others (including the local authority as necessary), consider what additional support or alternative placement may be required. This should involve assessing the suitability of provision for a pupil’s SEN. Where a pupil has an EHC plan, schools should consider requesting an early annual review or interim/emergency review.*

The **SEN Code of Practice 2015**:

*“Disability discrimination claims*

 *11.53 The parents of disabled children and disabled young people in school have the right to make disability discrimination claims to the Tribunal if they believe that their children or the young people themselves have been discriminated against by …. Claims must be made within six months of the alleged instance of discrimination.*

*The parents of disabled children, on behalf of their children, and disabled young people in school can make a claim against any school about alleged discrimination in the matters of exclusions, the provision of education and associated services and the making of reasonable adjustments…”*

To reiterate the above, the **Equality Act 2010** provides that [INSERT SCHOOL] is also under a statutory duty to ensure that those with disabilities (here [INSERT CHILD NAME]) are not discriminated against.

Under **S6 (1)** of the **Equality Act 2010** a person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

**What are the school's duties?**

Under **Section 85 (1)** schools must not discriminate against a pupil because of disability in relation to:

* admissions;
* the **provision of education** and access to any benefit, facility or service; or
* **exclusions**
* It is also unlawful for a school to harass or victimise an applicant or pupil because of
disability.

A parent of a former pupil may also claim for discrimination.

**Provision of education and access to a benefit, facility or service (expanded)**

Under **section 85 (2),** a school must not discriminate in the education and services it provides for disabled pupils. This covers all aspects of school life and the teaching provided to pupils.

A school must not discriminate against a pupil by excluding them from the school because of disability. This applies whether the exclusion is permanent or for a fixed term and it includes lunchtime exclusions. In addition, schools must not discriminate against a pupil by ‘informally excluding’ them because of a disability.

**Exclusion**

The recent case of **Proprietor of Ashdown House School v. (1) JKL (2) MNP: [2019] UKUT 259 (AAC)** reconfirmed the SEND Tribunal jurisdiction over hearing, making decisions and making orders against independent schools. This includes making findings of disability discrimination, ordering a written apology and reinstatement of a disabled student into an independent school after being wrongly excluded.

**Types of disability discrimination**

Under Sections 13, 14, 15, 19 -22, 26-27 of the **Equality Act 2010**, disability discrimination may be:

• discrimination arising from disability;

• failure to provide a reasonable adjustment for a disabled pupil;

• direct discrimination;

• indirect discrimination;

• harassment; or

• victimisation.

**Relevant to** [INSERT CHILD NAME]**’s education**

**Direct discrimination**

This occurs when a school treats a pupil less favourably than it treats or would treat others

because of a disability.

**Discrimination arising from disability**

This occurs when a school treats a disabled pupil unfavourably because of something connected with that pupil's disability.

**Failure to provide a reasonable adjustment for a disabled pupil**

A school has a duty to take reasonable steps to avoid disadvantages experienced by disabled pupils. Discrimination occurs when a school has not complied with its duty to take positive steps to ensure that a disabled pupil can fully participate in the education which the school provides.

This includes a requirement to provide auxiliary aids and services, such as alternative progress measures, specialized computer equipment, adapted desks or speech and language therapy. It does not require a school to remove or alter a physical feature.

**Indirect discrimination**

This occurs when a school puts in place a general requirement, such as a policy or rule,
which puts or would put a disabled pupil at a particular disadvantage compared with
others.

**Our position**

**Exclusions**

As outlined above, whilst an independent school does not have to follow the statutory guidance on school exclusions that a state mainstream school, free school or academy does, it is a good starting point for considering whether a school has used reasonable care and skill, acted fairly, discriminated against a student and in all circumstances acted lawfully.

The main points that we bring to your attention are:

* Only the head teacher of a state mainstream school, free school or academy can exclude a pupil, and this must be on disciplinary grounds
* It is unlawful for the head teacher of a state mainstream school, free school or academy to exclude for a non-disciplinary reason. An example given above, would be to exclude a pupil simply because they have additional needs or a disability that a school feels it is unable to meet.
* Informal’ or ‘unofficial’ exclusions, are considered unlawful for state mainstream school, free school or academy
* The decision to exclude a pupil must be lawful, reasonable and fair.
* Schools have a statutory duty not to discriminate against pupils on the basis of protected characteristicssuch as disability
* Before deciding to exclude, a headteacher should consider whether the provision in place to support any SEN or disability is appropriate.
* The head teacher should consider the use of a multi-agency assessment for a pupil. Such assessments may pick up unidentified SEN.

In [INSERT CHILD NAME]’s case:

* [Insert here relevant examples to the above]

Everyone wishes the best for [INSERT CHILD NAME], to ensure he/she is supported and that he/she is able to achieve the best for his/her education. However, we feel left out of the decision-making regarding the type of support put in place for him/her.

**The School Exclusions Guidance** and the **Equality Act** clearly show that an independent school that excludes a student for developing a medical condition is not acting fairly, in line with its implied contractual duties, and is discriminating against that student. There cannot be a continuation of the situation any further refusals to allow [INSERT CHILD NAME] to attend school, without legitimate medical reasons, will lead our clients to consider taking this matter to the SEND Tribunal.

In summary, the guidance and case law, as outlined above, is clear: independent schools have a legal duty to educate students with reasonable care and skill. In addition, an implied term of contract is that the school will act lawfully in its conduct towards a student. This means taking into account relevant statutory guidance, such as the exclusions guidance, and the SEN code of practice. The school also remains under a duty to act lawfully in line with the Equality Act 2010. At this stage, [INSERT CHILD NAME] has lost a number of school days, due to refusal to allow him/her back at the school. This goes against the medical advice regarding his/her fitness to attend.

**Actions we seek:**

* [Insert here the remedies you are seeking from the school]

If matters cannot be resolved, regrettably we will be left with no other solution other than to lodge a claim for disability discrimination at the SEND Tribunal/seek legal guidance, where we would seek, amongst other things, an apology from the school, for the school to be ordered to provide training to staff and for the school to be ordered to reinstate [INSERT CHILD NAME] as a student and an injunction to be provided by the tribunal against future unlawful exclusions. We would also seek to publicise any such decision.

We hope that none of these actions will be necessary, we would be grateful if you could acknowledge this letter when it is received and provide a full response by [INSERT DATE]. We would also ask that you confirm when acknowledging this letter that [INSERT CHILD NAME] will be able to return to school at the beginning of the school term, whilst the above is resolved.

Yours sincerely