

SPECIAL EDUCATIONAL NEEDS AND DISABILITY ACT 2001

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Disability Discrimination in Education

Chapter 1 – Schools

Sections 11 to 25 with Schedule 2 and paragraph 1 of Schedule 3

Section 11: Discrimination against disabled pupils and prospective pupils

75. **Section 11** should be read in conjunction with Schedule 2. It amends the DDA by adding a new section 28A prohibiting all schools from discriminating against disabled children in their admissions arrangements, in the education and associated services provided by the school or in relation to exclusions from the school.
76. The section also enables the Secretary of State to prescribe in regulations the education and services which should and should not be subject to these duties. It is intended that all teaching during school hours, other teaching, and activities such as after school clubs, school trips, and school orchestras are covered by the duties. The following are not intended to be covered by these duties: adult education provided by schools (which is covered by Chapter 2 of Part 4 of the DDA) and services to parents (which is covered by Part 3 of the DDA).

Section 12: Meaning of “discrimination”

77. This section amends the DDA by inserting a new section 28B defining the meaning of discrimination. It works in the same way as the definition in section 5 of the DDA, except in the respects set out below. An explanation of section 5 of the DDA is set out in paragraph 30 of these Explanatory Notes.
78. The reasonable adjustments duty under section 13 is owed to pupils at large, unlike the duty owed to employees under section 6 of the DDA. For the parents of a pupil to bring proceedings, therefore, it is necessary for them to show not only that the general duty is breached but also that this breach was to the pupil's detriment. Provision is also made for responsible bodies not to be liable where they do not know (and could not reasonably be expected to know) of a pupil's or prospective pupil's disability, both in relation to the less favourable treatment duty and the reasonable adjustment duty. Although the anticipatory nature of the latter duty means that a responsible body would have to consider what reasonable adjustments it might make generally to meet the needs of disabled pupils whether or not it knew of an individual pupil's needs, it may need to know that a particular pupil was disabled, for example, in order to apply a policy to him. In those circumstances, a responsible body would not be liable for failure to take a particular step where it did not know of the disability.

Section 13: Disabled pupils not to be substantially disadvantaged

79. This section amends the DDA by adding a new section 28C placing a duty on schools to take reasonable steps to ensure disabled pupils are not placed at a substantial disadvantage, in comparison to pupils who are not disabled, in relation to education and associated services provided to pupils, and to ensure disabled prospective pupils are not placed at a substantial disadvantage, compared to prospective pupils who are not disabled, in relation to the admission arrangements for the school. This mirrors the general approach in section 6 of the DDA, but, unlike section 6, this section is anticipatory. This section also provides exceptions to the duty. Schools will not be required to make physical alterations to premises (including removing a physical feature) or to provide auxiliary aids. The statement of SEN (in Scotland, the Record of Needs) already provides for the identification and provision of educational auxiliary aids and adaptations for pupils in school.

Section 14: Accessibility strategies and plans

80. This section amends the DDA by inserting a new section 28D to place a duty on LEAs and schools in England and Wales to plan, over time, to:
- increase the extent to which disabled pupils can participate in the curriculum;
 - increase the physical accessibility of school premises for disabled pupils; and
 - improve the delivery to disabled pupils of information which is provided in writing for pupils who are not disabled, within a reasonable time, and in ways which are determined after taking account of their disabilities and any preferences expressed by them or their parents.
81. The LEA's accessibility strategy will set out its plans in respect of the maintained schools in the area. The LEA does not have to produce a self-standing strategy, it can choose the format it feels most appropriate to record its strategy, for example by dovetailing it with another of its plans.
82. A school's accessibility plan will be on a far smaller scale than that of the LEA. Maintained schools are already under a duty to include certain information about their arrangements and facilities for disabled pupils in their governors' annual report. This section places an additional duty to include their accessibility plans in that report. The Government intends that CAs will be required, through their funding agreements, to include information on their accessibility plans in their annual report to parents. LEAs and schools will be under a duty to implement their strategies and plans. The normal inspection frameworks for LEAs and schools may include inspection of their strategies and plans.
83. Regulations will prescribe the period to be covered by the strategy or the plan as well as when LEAs and schools should produce new strategies and plans. LEAs and schools will have to keep their strategies and plans under review, and revise them if necessary in light of that review.

Section 15: Accessibility strategies and plans: procedure

84. This section amends the DDA by inserting a new section 28E which sets out what LEAs and schools will have to consider when preparing their strategies and plans, and the duties they must comply with once the strategies and plans are in place. LEAs and schools will be required to allocate adequate resources to implement their strategies and plans. LEAs will be under a duty to have regard to guidance issued by the Secretary of State and, for Wales, the NAW, about reviewing and revising their strategies. It is envisaged that the guidance will specify when LEAs should review their strategies.
85. Independent schools, other than CAs, will be required by the Act to make a copy of their plans available for inspection to anyone who asks to see it at a reasonable time.

Maintained schools and CAs will not be covered by this duty in the Act as they will have to publish their plans in their annual governors' report to parents.

Section 16: Residual duty of education authorities

86. This section amends the DDA by inserting new sections 28F & 28G. This makes it unlawful for an LEA in England and Wales, or an education authority in Scotland, to discriminate against a disabled pupil or disabled prospective pupil in the discharge of its functions under various Acts relating to education. These are intended to cover the general education related functions of authorities that affect pupils or prospective pupils generally. An authority will already be under certain duties in Part 4 (where it is the responsible body for a school). When considering which anti-discrimination duties apply to its schools functions, an authority should first look at whether the duties not to discriminate under section 28A apply. If they do not, then the duty under this section - known as the “residual duty” - will apply.

Section 17: Special Educational Needs and Disability Tribunal

87. Subsection (1) of this section amends the DDA by inserting a new section 28H to change the name of the SENT to the SENDIST and extend the jurisdiction of the SENT to hear cases of disability discrimination in schools. The jurisdiction of the SENDIST will only extend to England and Wales (as does the jurisdiction of the SENT). Rights of redress in Scotland will be through the sheriff court. Cases of disability discrimination under Part 3 of the DDA are heard through the courts and cases under Chapter 2 (further and higher education) of the new Part 4 will also be heard through the courts.
88. Subsection (2) provides that there is no requirement to consult disability organisations on appointments to the lay panel. The lay panel is a panel of persons who may serve as the other two members of the Tribunal with the legally qualified chairman (subsection (3)).

Section 18: Jurisdiction and powers of the Tribunal

89. This section amends the DDA by inserting a new section 28I to set out the circumstances in which a parent can make a claim to SENDIST and the powers that SENDIST will have if it finds that there has been unlawful discrimination. The alleged discrimination may have been committed by the responsible body of the institution in breach of section 28A of the DDA, or be treated under section 58 of the DDA as having been done by the responsible body if committed by its employees or agents.
90. *Section 28I(2)* prevents claims of discrimination being made to SENDIST in relation to admissions to, and permanent exclusions from, maintained schools and CAs. Arrangements for these schools will be through admissions appeals panels or exclusions appeals panels and are described under sections 20 and 21 respectively. SENDIST will hear claims of discrimination in relation to admissions to, and permanent exclusions from, all other schools. SENDIST will hear claims of discrimination in relation to temporary exclusions from all schools because temporary exclusions are not covered in the existing arrangements for exclusion appeals panels.
91. *Sections 28I(3) & (4)* gives SENDIST wide powers to order any remedy it thinks appropriate with the exception of financial compensation. Although SENDIST will not be able to award financial compensation it will be able to order schools and LEAs to take compensatory action to take account of past discrimination and shape the future prospects of the disabled child. Examples of the kind of orders that SENDIST might make are:
- that the LEA or school provide disability awareness training for some or all staff;
 - that the LEA or school prepare guidance on combating disability discrimination for issue to all staff;

These notes refer to the Special Educational Needs And Disability Act 2001 (c.10) which received Royal Assent on 11 May 2001

- that an LEA Equal Opportunities Officer arrange and attend, at specified times, meetings between the school and the child's parents to review what reasonable adjustments (short of adjustments to the physical premises or provision of auxiliary aids) might be required;
 - that the school/LEA change policies, for example, those that prevent visually impaired pupils going into the science laboratory, those that prevent disabled pupils going on certain school trips and anti-bullying policies so that they deal with bullying on the grounds of disability;
 - that additional tuition is provided to enable a child to catch up on things he has missed due to discrimination (such as science lessons in the example above);
 - that a library is relocated to the ground floor (short of requiring an adjustment to the physical premises), or if not possible, that the school provides a list of available books and ensures that they are brought down to the child for him to read in a quiet room;
 - that an independent school must admit a disabled pupil (where the school had previously refused) or must admit the pupil on the same terms as pupils who are not disabled (where, for example, the school had offered a place but at an increased fee); or
 - that a maintained school which has temporarily excluded a disabled pupil must provide additional tuition to enable the pupil to catch up on education missed due to discrimination.
92. SENDIST will be able to set rigorous deadlines when directing action by schools and LEAs. If a responsible body fails to comply within the deadlines, the parent can ask the Secretary of State to make a direction to require compliance.

Section 19 and paragraph 1 of Schedule 3: Procedure

93. Subsection (1) amends the DDA by inserting a new section 28J which enables procedural regulations to be made in relation to SENDIST which reflect the powers already in existence in relation to the SENT appeal procedure. The major difference is the new power to make regulations allowing the Tribunal to hear a disability claim with an SEN claim.
94. Subsection (2) and Schedule 3 insert a new Part 3 into Schedule 3 of the DDA. This sets out further procedural provisions, similar to those for claims under Parts 2 and 3 of the DDA, the major difference being that there is no provision to submit a certificate as conclusive evidence that an act was done to safeguard national security.

Section 20: Admissions

95. This section amends the DDA by inserting a new section 28K providing for rights of redress for claims of disability discrimination in admission decisions, against a maintained school or CA, to be made through admission appeals panels - the arrangements set up to consider admission appeals.

Section 21: Exclusions

96. This section amends the DDA by inserting a new section 28L providing for rights of redress for claims of disability discrimination in permanent exclusion decisions, against a maintained school or CA, to be made through exclusion appeals panels – the arrangements set up to consider appeals against permanent exclusions.

Section 22: Roles of the Secretary of State and the National Assembly

97. This section amends the DDA by inserting a new section 28M, and gives the Secretary of State or, as appropriate, the NAW the power to direct an LEA or a school if satisfied that they have not complied with, or have acted unreasonably in carrying out, their duties to plan under sections 28D or 28E. It also gives the Secretary of State the power to direct LEAs and schools in England and Wales if satisfied that they have not complied with, or have acted unreasonably in complying with an order made by SENDIST. These are similar powers to those in sections 496 and 497 of the EA.

Section 23: Enforcement Procedure: Scotland

98. This section amends the DDA by inserting a new section 28N providing that all claims of disability discrimination under this chapter will, in Scotland, be heard in the sheriff court. The remedies available will not include financial compensation.

Section 24: Validity and revision of agreements of responsible bodies

99. This section amends the DDA by inserting a new section 28P, to apply to contracts and agreements with schools, so that discriminatory terms are made void. This works similarly to section 26 of the DDA.