

SPECIAL EDUCATIONAL NEEDS AND DISABILITY ACT 2001

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Disability Discrimination in Education

Chapter 2 – Further and Higher Education Institutions

Sections 26 to 34 with paragraph 2 of Schedule 3, Schedule 4, Schedule 5 and Schedule 6

Section 27: Meaning of “discrimination”

104. This section amends the DDA by adding a new section 28S 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.
105. As well as the general justification there are two specific justifications relating to the less favourable treatment duty. Less favourable treatment will be justified if it is necessary to maintain academic standards or other prescribed standards. It will also be justified in certain cases which will be set out in regulations.
106. 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 person’s disability (subsections (3) and (4)), both in relation to the less favourable treatment duty and the reasonable adjustment duty. Although the anticipatory nature of the latter duty means that an institution would have to consider what reasonable adjustments it might make generally to e.g. meet the needs of dyslexic students so that knowledge would not be relevant, it may need to know that a particular student was dyslexic in order to apply the policy to him. For example, if the policy was that dyslexic students would have extra time to finish their exams, the institution would need to know which students should benefit from that extra time. In those circumstances, an institution would not be liable for failure to provide the extra time where it did not know of the disability.
107. The reasonable adjustment duty under section 28 below is owed to students at large, unlike the duty owed to employees under section 6 of the DDA. For any particular student to bring an action, therefore, it is necessary for them to show not only that the general duty is breached but also that this breach was to their detriment.