

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.

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 26 and Schedule 4: Discrimination against disabled students and prospective students

100. This section amends the DDA by adding a new section 28R making it unlawful for institutions to discriminate against disabled students in their admission, exclusion or suspension arrangements and in the services they provide to students. This section should be read in conjunction with Schedule 4 which sets out the responsible bodies for the institutions covered by these duties.
101. Only services provided wholly or mainly for students (described as "student services" in the Act) are covered by these duties. These include the provision of education and services related to teaching and learning and also the wider services, such as accommodation and leisure facilities, that institutions offer mainly to students. In order to provide clarity about which services are covered by these duties, the Secretary of State has the power to make regulations to set out whether particular services are covered.
102. Institutions within the further education sector (i.e. those conducted by further education corporations and those designated for the purposes of Part 1 of the Further and Higher Education Act 1992) and institutions within the higher education sector (i.e. publicly-funded universities, institutions conducted by higher education corporations and those designated for the purposes of Part 2 of the Further and Higher Education Act 1992) will be covered by the new duties. In Scotland, the relevant institutions are colleges of further education having a board of management within the meaning of section 36 of the Further and Higher Education (Scotland) Act 1992, institutions within the higher education sector within the meaning of section 56(2) of the Further and Higher Education (Scotland) Act 1992, any central institution within the meaning of section 135(1) of the Education (Scotland) Act 1980 and colleges of further education maintained by an education authority in the exercise of their further education functions within the meaning of section 1(5)(b)(ii) of that Act.
103. Private institutions will generally be covered by Part 3 of the DDA. However, the Secretary of State will have a power to designate by order institutions in Great Britain

that receive some public funds. These institutions will, in that event, be covered by the duties in Part 4 of the DDA which is amended by this Act.

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.

Section 28: Disabled students not to be substantially disadvantaged

108. This section amends the DDA by inserting a new section 28T to place a duty on responsible bodies for further and higher education institutions to take reasonable steps to ensure that disabled students are not placed at a substantial disadvantage, in comparison to students who are not disabled, in their access to education and associated services to students.
109. The approach mirrors that in section 6 of the DDA, except that the duty under section 6 is owed to particular employees, and therefore involves no element of anticipation. The duty under this new section, in contrast, is owed at large to disabled students, and will therefore require educational institutions to consider the provision which they make for disabled students generally. The duty covers all aspects of a student's life, including academic activities and access to services which are available to him as a student.

Section 29 and Schedule 5: Further education etc. provided by local education authorities and schools

110. These provisions amend the DDA by inserting a new section 28U and a new Schedule 4C, which modify the effect of the rest of the Chapter as it applies, in England and Wales, to higher education secured by LEAs, further education for adults secured by LEAs, further education provided by the governing bodies of maintained schools, the activities of the statutory youth service and, in Scotland, to community education facilities provided by local authorities or voluntary organisations. Because of differences in arrangements, Schedule 5 makes separate provision for England and Wales on the one hand and for Scotland on the other.

111. The modifications from the formal further and higher education sector reflect the different nature of such education provision. The types of activities covered by this provision tend to be much more informal and are organised in a wide variety of community settings, rather than on an institutional model. The notion of an overall course being a programme of learning rests with the provider of this programme of learning not necessarily the individual. Learners will be covered by the duties whether they participate in a complete programme of learning or just an individual activity on which they would register.
112. *Part 1 of Schedule 4C* modifies the rest of the Chapter in relation to England and Wales, so that, where further and higher education secured by LEAs or the governing bodies of schools is concerned, it would be unlawful for them to discriminate against disabled persons enrolled on a course, rather than against disabled students. Similarly, it would be unlawful for them to discriminate in the provision of services provided wholly or mainly for persons enrolled on a course, rather than in the provision of "student services". The activities of the statutory youth service are covered by the duty in modified section 28R(4). *Part 2 of Schedule 4C* modifies the rest of the Chapter in the same way in relation to those community education facilities in Scotland which are broadly comparable to the services in England and Wales covered by *Part 1 of Schedule 4C*. Community education in Scotland ranges across youth work, adult education and informal education in a broad sense.

Section 30 and paragraph 2 of Schedule 3: Rights of Redress

113. These provisions amend the DDA by inserting a new section 28V and adding a new Part 4 to Schedule 3. A disabled student who has been discriminated against by an educational institution will have a right to sue that institution through civil proceedings. The alleged discrimination may be by the responsible body of the institution under section 28R of the DDA, or by employees or agents of the responsible body acting in the course of their employment or by the responsible body's authority as defined by sections 57 and 58 of the DDA. These sections of the DDA apply to the duties under Chapter 2 of the new Part 4 of the DDA.
114. Claims are brought in the same way as claims under Parts 2 and 3 of the DDA, except that there will be no provision to submit a certificate as conclusive evidence that an act was done to safeguard national security. County courts in England and Wales and sheriff courts in Scotland will hear cases brought under this Chapter. Where a disabled person is both a student at an institution and is also employed by that institution they will have rights under the employment provisions (Part 2) of the DDA, which are enforceable through an employment tribunal, as well as rights under this Chapter, enforceable through the courts.

Section 31 and Schedule 6: Occupation of premises by educational institutions

115. These provisions amend the DDA by inserting a new section 28W and adding a new Part 3 to Schedule 4. They set out how further and higher education institutions should comply with the duty to make reasonable adjustments to physical features of premises which place disabled students at a substantial disadvantage where they occupy premises under a lease. These provisions mirror those in sections 16 and 27 of the DDA. Section 31 should be read with Schedule 6 to the Act.
116. The effect is that, where the lease of a property occupied by a further and higher education institution forbids an occupier from making the alterations needed to comply with section 28T or puts conditions on those alterations, the occupier can nonetheless make the alterations required under this Act, if he has the written consent of the owner/lessor; but he must apply to the landlord in writing if he wants to make the alteration. If the occupier does apply in writing, the landlord cannot refuse consent unreasonably, although he can attach reasonable conditions to the consent.

117. Regulations will outline what will be regarded as withholding consent and when it is reasonable or unreasonable to do so.
118. **Schedule 6** inserts a provision for circumstances when parties fail to obtain consent and there is a breach of the duty under section 28T. It provides for the owner/lessor to be joined in any action against an educational institution.

Section 32: Validity and revision of agreements

119. This section amends the DDA by inserting a new section 28X, to provide for new section 28P to apply to contracts and agreements with further and higher education providers, so that discriminatory terms are made void. The section will apply with amendments to reflect the fact that the further and higher education duties are enforced through the county or sheriff courts rather than through the SENT and admission and exclusion appeals panels.

Section 33: Interpretation

120. This section defines terms used within Chapter 2 to assist interpretation of that Chapter.
121. Specifically, section 31A(3) defines the term “student” as meaning a person who is attending, or undertaking a course of study at, an educational institution.

Section 34: Removal of certain duties of funding bodies

122. This section removes the power from the LSC in England, the CETW in Wales and the duty from the Higher Education Funding Councils in England, Scotland and Wales to require providers of learning to publish disability statements by imposing a condition of grant. It also removes from LEAs in England the existing statutory duty to publish disability statements. It also removes the power of the LSC to make conditions of grant which impose duties on institutions in relation to the provision that they make for disabled students. This is because these duties will be superseded by the new anti-discrimination duties introduced by the Act.

Chapter 3 – Miscellaneous

Sections 35 to 40 and Schedule 7

Section 35 and Schedule 7: Extension of Role of Disability Rights Commission

123. This section extends the role of the DRC in respect of the provisions of this Act to the extent provided for in Schedule 7, including, for example, allowing the DRC to: issue non-discrimination notices and make agreements in lieu of enforcement action; apply for an injunction or interdict in respect of persistent discrimination; and, give assistance in relation to proceedings under this Act, at SENDIST, the county court or the sheriff court. The DRC has similar powers and duties in respect of the provisions of Parts 2 & 3 DDA, conferred by sections 2 to 8 of the DRCA.

Section 36: Codes of Practice

124. This section amends section 53A of the DDA to allow the DRC to prepare Codes of Practice in respect of the new duties in Part 4 of the DDA, apart from those duties inserted into the DDA by sections 14 & 15 of this Act which place LEAs and schools under a duty to plan. It is intended that there will be two Codes of Practice - one for schools (Chapter 1) and one for further and higher education (Chapter 2), which will be modelled on the DDA Part 3 Code in that they will explain and illustrate how the legislation aims to stop disability discrimination and how service providers can comply with the duties. The DRC already has the power, by virtue of section 9 of the DRCA, to prepare Codes in respect of Parts 2 & 3 DDA.

Section 37: Conciliation for Disputes under Part 4 of the 1995 Act

125. This amends the DDA by inserting a new section 31B to extend the DRC's power to make arrangements for the provision of conciliation services. The DRC already has power to make these arrangements in respect of disputes under Part 3 of the DDA. Disputes under Part 2 of the DDA are dealt with by ACAS.

Section 38: Relationship with other Parts of the 1995 Act

126. This section amends the DDA to establish the relationship of the new Part 4 duties with other sections of the DDA.
127. Subsections (5) and (6) remove the exemption of education from Part 3 of the DDA and provide that nothing in Part 3 applies to services that are now covered by Part 4.

Section 39: Application to the Isles of Scilly

128. This section inserts a new section 31C in the DDA. This modifies the application of Part 4 of the DDA (as amended by the Act) to the Isles of Scilly. Under section 581 of the EA the Isles are treated, for the purposes of that Act, as a separate non-metropolitan council, and the Council of the Isles of Scilly is treated as a County Council. This allows the Council of the Isles of Scilly to be treated as an LEA for the purposes of the EA. An equivalent provision is needed to allow the Council of the Isles of Scilly to be caught by the disability duties imposed on LEAs by the Act.

Section 40: Duty of Teacher Training Agency

129. This section makes no substantive changes to the law, but re-enacts the duty on the Teacher Training Agency since that duty has no place in the restructured Part 4.