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## STATUTORY INSTRUMENTS

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# 2005 No. 1117

## The Special Educational Needs and Disability (Northern Ireland) Order 2005

### PART III

#### DISABILITY DISCRIMINATION IN EDUCATION

##### CHAPTER I

##### SCHOOLS

##### *Interpretation of this Chapter*

##### **Interpretation of this Chapter**

13.—(1) In this Chapter—

“accessibility strategy” has the meaning given in Article 17;

“accessibility plan” has the meanings given in Article 18;

“the Department” means the Department of Education;

“disabled pupil” means a pupil who is a disabled person;

“prescribed” means prescribed by regulations;

“regulations” means regulations made by the Department;

“responsible body” has (subject to Article 20(5)) the meaning given in Article 14(5);

“the Tribunal” has the meaning given in Article 21(2).

(2) In this Chapter the following have the meaning given in Article 2(2) of the 1986 Order—

“board”;

“Board of Governors”;

“grant-aided school”;

“independent school”;

“parent”;

“proprietor”;

“pupil”; and

“school”.

(3) The Department may by regulations prescribe services which are, or services which are not, to be regarded for the purposes of Articles 14(2), 17 and 18 as being—

(a) education; or

(b) an associated service.

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### *Duties of responsible bodies*

#### **Discrimination against disabled pupils and prospective pupils**

**14.—(1)** It is unlawful for the body responsible for a school to discriminate against a disabled person—

- (a) in the arrangements it makes for determining admission to the school as a pupil;
- (b) in the terms on which it offers to admit him to the school as a pupil; or
- (c) by refusing or deliberately omitting to accept an application for his admission to the school as a pupil.

(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) It is unlawful for the body responsible for a school to discriminate against a disabled pupil by suspending or expelling him from the school.

(4) In the case of an act which constitutes discrimination by virtue of Article 43, this Article also applies to discrimination against a person who is not disabled.

(5) For the purposes of this Chapter the body responsible for a school is—

- (a) in the case of a grant-aided school, the board for the area in which the school is situated or the Board of Governors, according to which has the function in question;
- (b) in relation to an independent school, the proprietor;

and in this Chapter that body is referred to as the “responsible body”.

#### **Meaning of “discrimination”**

**15.—(1)** For the purposes of Article 14, a responsible body discriminates against a disabled person if—

- (a) for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and
- (b) it cannot show that the treatment in question is justified.

(2) For the purposes of Article 14, a responsible body also discriminates against a disabled person if—

- (a) it fails, to his detriment, to comply with Article 16; and
- (b) it cannot show that its failure to comply is justified.

(3) In relation to a failure to take a particular step, a responsible body does not discriminate against a person if it shows—

- (a) that, at the time in question, it did not know and could not reasonably have been expected to know, that he was disabled; and
- (b) that its failure to take the step was attributable to that lack of knowledge.

(4) The taking of a particular step by a responsible body in relation to a person does not amount to less favourable treatment if it shows that at the time in question it did not know, and could not reasonably have been expected to know, that he was disabled.

(5) Paragraphs (6) to (8) apply in determining whether, for the purposes of this Article—

- (a) less favourable treatment of a person, or
- (b) failure to comply with Article 16,

is justified.

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- (6) Less favourable treatment of a person is justified if it is the result of—
- (a) the application of the admission criteria drawn up for a grant-aided school under Article 16(1) of the Education (Northern Ireland) Order 1997 (NI 5) or Article 32(1) of the Education (Northern Ireland) Order 1998 (NI 13); or
  - (b) any arrangements which make provision for any or all of the pupils of an independent school to be selected by reference to general or special ability or aptitude, with a view to admitting only pupils of high ability or aptitude.
- (7) Otherwise, less favourable treatment, or a failure to comply with Article 16, is justified only if the reason for it is both material to the circumstances of the particular case and substantial.
- (8) If, in a case falling within paragraph (1)—
- (a) the responsible body is under a duty imposed by Article 16 in relation to the disabled person, but
  - (b) it fails without justification to comply with that duty,
- its treatment of that person cannot be justified under paragraph (7) unless that treatment would have been justified even if it had complied with that duty.

#### **Disabled pupils not to be substantially disadvantaged**

- 16.—**(1) The responsible body for a school shall take such steps as it is reasonable for it to have to take to ensure that—
- (a) in relation to the arrangements it makes for determining the admission of pupils to the school, disabled persons are not placed at a substantial disadvantage in comparison with persons who are not disabled; and
  - (b) in relation to education and associated services provided for, or offered to, pupils at the school by it, disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled.
- (2) That does not require the responsible body to—
- (a) remove or alter a physical feature (for example, one arising from the design or construction of the school premises or the location of resources); or
  - (b) provide auxiliary aids or services.
- (3) Regulations may make provision, for the purposes of this Article—
- (a) as to circumstances in which it is reasonable for a responsible body to have to take steps of a prescribed description;
  - (b) as to steps which it is always reasonable for a responsible body to have to take;
  - (c) as to circumstances in which it is not reasonable for a responsible body to have to take steps of a prescribed description;
  - (d) as to steps which it is never reasonable for a responsible body to have to take.
- (4) In considering whether it is reasonable for it to have to take a particular step in order to comply with its duty under paragraph (1), a responsible body shall have regard to any relevant provisions of a code of practice issued under section 54A of the 1995 Act.
- (5) Paragraph (6) applies if, in relation to a person, a confidentiality request has been made of which a responsible body is aware.
- (6) In determining whether it is reasonable for the responsible body to have to take a particular step in relation to that person in order to comply with its duty under paragraph (1), regard shall be had to the extent to which taking the step in question is consistent with compliance with that request.

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(7) “Confidentiality request” means a request which asks for the nature, or asks for the existence, of a disabled person's disability to be treated as confidential and which satisfies either of the following conditions—

- (a) it is made by that person's parent; or
- (b) it is made by that person himself and the responsible body reasonably believes that he has sufficient understanding of the nature of the request and of its effect.

(8) This Article imposes duties only for the purpose of determining whether a responsible body has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such.

### *Accessibility strategies and plans*

#### **Accessibility strategies of board**

- 17.—(1) Each board shall prepare, in relation to controlled schools under its management—
- (a) an accessibility strategy;
  - (b) further such strategies at such times as may be prescribed.
- (2) An accessibility strategy is a strategy for, over a prescribed period—
- (a) increasing the extent to which disabled pupils can participate in the schools' curriculums;
  - (b) improving the physical environment of the schools for the purpose of increasing the extent to which disabled pupils are able to take advantage of education and associated services provided or offered by the schools; and
  - (c) improving the delivery to disabled pupils—
    - (i) within a reasonable time, and
    - (ii) in ways which are determined after taking account of their disabilities and any preferences expressed by them or their parents,
 of information which is provided in writing for pupils who are not disabled.
- (3) In preparing its accessibility strategy, a board shall have regard to—
- (a) the need to allocate adequate resources for implementing the strategy; and
  - (b) any guidance issued by the Department as to—
    - (i) the content of an accessibility strategy;
    - (ii) the form in which it is to be produced; and
    - (iii) the persons to be consulted in its preparation.
- (4) An accessibility strategy shall be in writing.
- (5) Each board shall—
- (a) keep its accessibility strategy under review during the period to which it relates and, if necessary, revise it; and
  - (b) have regard to any guidance issued by the Department as to compliance with the requirements of sub-paragraph (a).
- (6) It is the duty of each board to implement its accessibility strategy.
- (7) A board shall—
- (a) if asked to do so by the Department, give to the Department a copy of its accessibility strategy;

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(b) if asked to do so by any other person, make a copy of its accessibility strategy available for inspection at such reasonable times as it may determine.

(8) In this Article “disabled pupil”, in relation to a school, includes a disabled person who may be admitted to the school as a pupil.

### **Accessibility plans for schools**

**18.**—(1) The Board of Governors of a grant-aided school and the proprietor of an independent school shall prepare—

- (a) an accessibility plan for the school;
- (b) further such plans at such times as may be prescribed.

(2) An accessibility plan for a school is a plan for, over a prescribed period—

- (a) increasing the extent to which disabled pupils can participate in the school's curriculum;
- (b) improving the physical environment of the school for the purpose of increasing the extent to which disabled pupils are able to take advantage of education and associated services provided or offered by the school; and

(c) improving the delivery to disabled pupils—

- (i) within a reasonable time, and
- (ii) in ways which are determined after taking account of their disabilities and any preferences expressed by them or their parents,

of information which is provided in writing for pupils who are not disabled.

(3) In preparing an accessibility plan, the Board of Governors or proprietor shall have regard to the need to allocate adequate resources for implementing the plan.

(4) An accessibility plan shall be in writing.

(5) During the period to which the plan relates, the Board of Governors or proprietor shall keep the accessibility plan under review and, if necessary, revise it.

(6) It is the duty of the Board of Governors or proprietor to implement the accessibility plan.

(7) An inspection of a school under Article 102 of the 1986 Order may extend to the performance by the Board of Governors or proprietor of functions in relation to the preparation, publication, review, revision and implementation of an accessibility plan for the school.

(8) The annual report for a grant-aided school prepared under Article 125 of the Education Reform (Northern Ireland) Order 1989 (NI 20) shall include information as to—

- (a) the arrangements for the admission of disabled persons as pupils at the school,
- (b) the steps taken to prevent disabled pupils from being treated less favourably than other pupils,
- (c) the facilities provided to assist access to the school by disabled pupils, and
- (d) the accessibility plan for the school.

(9) The proprietor of an independent school shall—

- (a) if asked to do so by the Department, give a copy of his accessibility plan to the Department;
- (b) if asked to do so by any other person, make a copy of his accessibility plan available for inspection at such reasonable times as he may determine.

(10) In this Article “disabled pupil” includes a disabled person who may be admitted to the school as a pupil.

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### *Residual duty of boards*

#### **Duty of boards not to discriminate**

- 19.**—(1) This Article applies to the functions of a board under—
- (a) the 1986 Order (except Article 37 and Part VII);
  - (b) the Education Reform (Northern Ireland) Order 1989 (NI 20);
  - (c) the Education and Libraries (Northern Ireland) Order 1993 (NI 12);
  - (d) the 1996 Order;
  - (e) the Education (Northern Ireland) Order 1997 (NI 5);
  - (f) the Education (Northern Ireland) Order 1998 (NI 13);
  - (g) the Education and Libraries (Northern Ireland) Order 2003 (NI 12).
- (2) But it does not apply to any prescribed function.
- (3) In discharging a function to which this Article applies, it is unlawful for a board to discriminate against—
- (a) a disabled pupil; or
  - (b) a disabled person who may be admitted to a school as a pupil.
- (4) But an act done in the discharge of a function to which this Article applies is unlawful as a result of paragraph (3) only if no other provision of this Chapter makes that act unlawful.
- (5) In the case of an act which constitutes discrimination by virtue of Article 43, this Article also applies to discrimination against a person who is not disabled.

#### **Residual duty: supplementary provisions**

- 20.**—(1) Article 15 applies for the purposes of Article 19 as it applies for the purposes of Article 14 with the following modifications—
- (a) references to a responsible body are to be read as references to a board; and
  - (b) references to Article 16 are to be read as references to paragraphs (2) to (4).
- (2) Each board shall take such steps as it is reasonable for it to have to take to ensure that, in discharging any function to which Article 19 applies—
- (a) disabled persons who may be admitted to a school as pupils are not placed at a substantial disadvantage in comparison with persons who are not disabled; and
  - (b) disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled.
- (3) That does not require a board to—
- (a) remove or alter a physical feature; or
  - (b) provide auxiliary aids or services.
- (4) This Article imposes duties only for the purpose of determining whether a board has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such.
- (5) A reference in Article 22, 25(3) or 26 to a responsible body is to be read as including a reference to a board in relation to a function to which Article 19 applies.

## Enforcement

### Special Education Needs and Disability Tribunal for Northern Ireland

- 21.**—(1) The Special Educational Needs Tribunal for Northern Ireland—
- (a) shall continue to exist; but
  - (b) shall be known as the Special Educational Needs and Disability Tribunal for Northern Ireland.
- (2) It is referred to in this Chapter as “the Tribunal”.
- (3) In addition to its jurisdiction under Part II of the 1996 Order, the Tribunal is to exercise the jurisdiction conferred on it by this Chapter.

### Jurisdiction and powers of the Tribunal

- 22.**—(1) A claim that a responsible body—
- (a) has discriminated against a person (“A”) in a way which is made unlawful under this Chapter, or
  - (b) is by virtue of Article 45 to be treated as having discriminated against a person (“A”) in such a way,
- may be made to the Tribunal by A's parent.
- (2) But this Article does not apply to a claim to which Article 24 applies.
- (3) If the Tribunal considers that a claim under paragraph (1) is well founded—
- (a) it may declare that A has been unlawfully discriminated against; and
  - (b) if it does so, it may make such order as it considers reasonable in all the circumstances of the case.
- (4) The power conferred by paragraph (3)(b)—
- (a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person concerned of any matter to which the claim relates; but
  - (b) does not include power to order the payment of any sum by way of compensation.

### Procedure of the Tribunal

- 23.**—(1) Regulations may make provision about—
- (a) the proceedings of the Tribunal on a claim of unlawful discrimination under this Chapter; and
  - (b) the making of a claim.
- (2) The regulations may, in particular, include provision—
- (a) as to the manner in which a claim must be made;
  - (b) if the jurisdiction of the Tribunal is being exercised by more than one tribunal—
    - (i) for determining by which tribunal any claim is to be heard, and
    - (ii) for the transfer of proceedings from one tribunal to another;
  - (c) for enabling functions which relate to matters preliminary or incidental to a claim (including, in particular, decisions under paragraph 2(3) of Schedule 2) to be performed by the President, or by the chairman;
  - (d) enabling hearings to be conducted in the absence of any member other than the chairman;

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- (e) as to the persons who may appear on behalf of the parties;
  - (f) for granting any person such discovery or inspection of documents or right to further particulars as might be granted by a county court;
  - (g) requiring persons to attend to give evidence and produce documents;
  - (h) for authorising the administration of oaths to witnesses;
  - (i) for the determination of claims without a hearing in prescribed circumstances;
  - (j) as to the withdrawal of claims;
  - (k) for enabling the Tribunal to stay proceedings on a claim;
  - (l) for the award of costs or expenses;
  - (m) for taxing or otherwise settling costs or expenses (and, in particular, for enabling costs to be taxed in the county court);
  - (n) for the registration and proof of decisions and orders; and
  - (o) for enabling prescribed decisions to be reviewed, or prescribed orders to be varied or revoked, in such circumstances as may be determined in accordance with the regulations.
- (3) Proceedings before the Tribunal are to be held in private, except in prescribed circumstances.
- (4) The Department may pay such allowances for the purpose of or in connection with the attendance of persons at the Tribunal as it may, with the consent of the Department of Finance and Personnel, determine.
- (5) Part I of the Arbitration Act 1996 (c. 23) does not apply to proceedings before the Tribunal but regulations may make provision, in relation to such proceedings, corresponding to any provision of that Part.
- (6) The regulations may make provision for a claim under this Chapter to be heard, in prescribed circumstances, with an appeal under Part II of the 1996 Order.
- (7) A person who without reasonable excuse fails to comply with—
- (a) a requirement in respect of the discovery or inspection of documents imposed by the regulations by virtue of paragraph (2)(f), or
  - (b) a requirement imposed by the regulations by virtue of paragraph (2)(g),
- is guilty of an offence.
- (8) A person guilty of an offence under paragraph (7) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.
- (9) Part I of Schedule 2 makes further provision about enforcement of this Chapter and about procedure.

## **Expulsions**

- 24.**—(1) This Article applies to a claim that, in relation to a decision to expel a pupil from a grant-aided school in accordance with a scheme under Article 49 of the 1986 Order, a responsible body—
- (a) has discriminated against a person in a way which is made unlawful under this Chapter; or
  - (b) is by virtue of Article 45 to be treated as having discriminated against a person in such a way.
- (2) The claim shall be made under the appeal arrangements made under Article 49(6) of the 1986 Order.
- (3) The appeal tribunal hearing the claim has the powers which it has in relation to an appeal under Article 49 of that Order.



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## **Role of the Department of Education**

**25.**—(1) Article 101 of the 1986 Order (directions by Department as to performance by relevant authorities of duties imposed by or under any provision of the Education Orders) applies in relation to the performance by a responsible body of the duty imposed by or under Article 17 or 18 as it applies in relation to the performance by a relevant authority of any duty imposed by or under a provision of the Education Orders.

(2) Paragraph (3) applies if the Tribunal has made an order under Article 22(3).

(3) If the Department is satisfied (whether on a complaint or otherwise) that a responsible body—

(a) has acted, or is proposing to act, unreasonably in complying with the order, or

(b) has failed to comply with the order,

it may give that body such directions as to compliance with the order as appear to the Department to be expedient.

(4) Directions under paragraph (3) may be varied or revoked by the Department.

(5) Paragraphs (6) to (10) of Article 101 of the 1986 Order apply in relation to directions under paragraph (3) as they apply in relation to directions under paragraph (1) of that Article.

## *Agreements relating to enforcement*

### **Validity and revision of agreements**

**26.**—(1) Any term in a contract or other agreement made by or on behalf of a responsible body is void so far as it purports to—

(a) require a person to do anything which would contravene any provision of, or made under, this Chapter;

(b) exclude or limit the operation of any provision of, or made under, this Chapter; or

(c) prevent any person from making a claim under this Chapter.

(2) Sub-paragraphs (b) and (c) of paragraph (1) do not apply to an agreement settling a claim—

(a) under Article 22; or

(b) to which Article 24 applies.

(3) On the application of any person interested in an agreement to which paragraph (1) applies, a county court may make such order as it thinks just for modifying the agreement to take account of the effect of paragraph (1).

(4) No such order may be made unless all persons affected have been—

(a) given notice of the application; and

(b) afforded an opportunity to make representations to the court.

(5) Paragraph (4) applies subject to any county court rules providing for notice to be dispensed with.

(6) An order under paragraph (3) may include provision as respects any period before the making of the order.

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