

<b>Title:</b> Commencement Order for auxiliary aids requirement on schools and local authorities <b>IA No:</b> 0030  <b>Lead department or agency:</b> Department for Education <b>Other departments or agencies:</b>	<b>Impact Assessment (IA)</b>			
	<b>Date:</b> 30/7/12			
	<b>Stage:</b> Final			
	<b>Source of intervention:</b> Domestic			
	<b>Type of measure:</b> Secondary			
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<b>Summary: Intervention and Options</b>			<b>RPC Opinion:</b> Fit for purpose Amber	

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£-4.4m	£m	£0m	Yes
			Zero Net Cost

**What is the problem under consideration? Why is government intervention necessary?**

Some disabled children are missing out on the auxiliary aids and services they need in order to prevent them from being put at a substantial disadvantage in their education as compared with their non-disabled peers. Research has suggested that a quarter of disabled children do not have special educational needs and therefore are not able to get the auxiliary aids they need through SEN statements, the number of which is declining anyway. The Government needs to intervene on equity grounds to ensure equality of access to the right support for all disabled children by ensuring that no disabled child is prevented from being supplied with the auxiliary aids and services which they need to help them make progress in their education.

**What are the policy objectives and the intended effects?**

The policy objective is to ensure equality of opportunity for all disabled pupils by requiring schools and local authorities to provide, where it is reasonable to do so, disabled pupils with the auxiliary aids and services they need to prevent them being put at a substantial disadvantage, where those auxiliary aids and services are not being provided through other routes.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Option 1 (do nothing): Leave current arrangements as they are.

Option 2 (preferred option): Commence the duty in September 2012, so that schools and local authorities are required, as part of their duty under the Equality Act 2010 to make "reasonable adjustments", to provide auxiliary aids and services to disabled children to prevent those children being put at a substantial disadvantage as compared with non disabled children.

<b>Will the policy be reviewed?</b> It will be reviewed. <b>If applicable, set review date:</b> Month/Year					
Does implementation go beyond minimum EU requirements?				N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)				<b>Traded:</b>	
				<b>Non-traded:</b>	

***I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.***

Signed by the responsible SELECT SIGNATORY: \_\_\_\_\_ Date: \_\_\_\_\_

# Summary: Analysis & Evidence

Policy Option 1

Description: Do nothing - leave current arrangements as they are

## FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised costs by 'main affected groups'

The costs of the other options are expressed relative to this do nothing case.

### Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

The benefits of the other options are expressed relative to this do nothing case.

### Other key non-monetised benefits by 'main affected groups'

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
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## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OIOO?	Measure qualifies as
Costs:	Yes	Zero net cost
Benefits:		
Net: 0		

# Summary: Analysis & Evidence

# Policy Option 2

**Description:** (Preferred option) Commence the duty in September 2012

## FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low		0.3	2.8
High		0.7	6.1
Best Estimate		0.5	4.4

### Description and scale of key monetised costs by 'main affected groups'

Cost of providing auxiliary aids to a small number of disabled children, and additional disability discrimination claims to the Tribunal.

### Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate			

### Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to quantify the benefits of this option.

### Other key non-monetised benefits by 'main affected groups'

There may be a benefit to children's outcomes if a greater number of auxiliary aids are provided, and to local authorities and parents through a reduced number of statements. However, the numbers of children affected by this change is expected to be small and it has not been possible to quantify the benefits.

### Key assumptions/sensitivities/risks

Discount rate (%) 3.5

The analysis assumes that only a relatively small number of disabled children do not currently receive the auxiliary aids they require; that the new requirement will not have a disproportionate impact on particular types of schools; and that the change will not generate severe financial pressure for individual schools.

## BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs:	Benefits:	Net: 0	Yes	Zero net cost

# Evidence Base (for summary sheets)

## Background

The duty to make reasonable adjustments consists of three requirements which apply where a disabled person is placed at a substantial disadvantage in comparison to a non-disabled person. The first requirement is concerned with the way things are done (provision, criteria and practices), the second covers changes to the built environment and the third covers the provision of auxiliary aids and services. The duty was originally found in the Disability Discrimination Act 1995 (DDA) and now subsequently in the Equality Act 2010. (There is no definition of “auxiliary aids” but Lord Justice Wall has described auxiliary aids as “things or persons which help”<sup>1</sup>. The Equality Act states that a reference to auxiliary aids includes auxiliary services and so it covers not only things like specialised computer equipment and adapted desks but also services such as speech and language therapy.) The third requirement has applied to some providers of education such as private early years education providers since 1999 and further education colleges since 2002. However, the DDA, as amended by the Special Educational Needs and Disability Act 2001 (SENDA), provided an exemption for schools and local authorities from the auxiliary aids requirement. The exemption was on the basis that children who needed auxiliary aids would receive them through other routes – chiefly the SEN “statementing” system but also schools’ and local authorities’ duties under the DDA, as amended by SENDA, to plan to increase access for disabled children to schools and the curriculum.

The disability lobby became increasingly unhappy about the exemption pointing out that not all disabled children have SEN and therefore cannot be statemented and that the number of children with statements was declining. Porter et al (2008) found that a quarter of children identified as DDA disabled did not have an identified SEN<sup>2</sup>. At January 2011 224,210 pupils had SEN statements as compared with 232,760 in 2007<sup>3</sup>. There are some disabled children who are missing out on the provision of auxiliary aids but the large majority of disabled children will be receiving the auxiliary aids they need through other routes, such as the first requirement of the duty.

The previous administration established an inquiry, the Lamb Inquiry, to investigate parental confidence in the SEN and disability system. That inquiry recommended, in December 2009, that the exemption on schools and local authorities should be removed to ensure that all disabled children are provided with the auxiliary aids they need to prevent them being put at a substantial disadvantage and the previous administration introduced an amendment to the Equality Bill in order to achieve this.

The auxiliary aids requirement was not commenced at the same time as most of the rest of the Equality Act 2010 in October 2010. The Department wanted to consult on the requirement, following publication of the SEND Green Paper in March 2011, in order to see if and when people felt it was reasonable to commence the requirement and how many, and in what circumstances, disabled children were missing out on the provision of auxiliary aids. Consultation was delayed as the Department understood that it would be called before the Red Tape Challenge Star Chamber to justify commencement of the requirement but in the end that did not happen.

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<sup>1</sup> K v The School and the Special Educational Needs and Disability Tribunal (2007) EWCA Civ 165

<sup>2</sup> Porter, J., Daniels, H., Georgeson, J., Hacker, J., Gallop, V., Feiler, A., Tarleton, B., Watson, D. *Disability data collection for children's services*, 2008

<sup>3</sup> DfE Statistical First Release Special Educational Needs in England, January 2011 SFR 14/2011, 2011

The Equality Act 2010 is reserved legislation and applies in Scotland and Wales as well as England. All three jurisdictions consulted on commencing the requirement in the latter half of 2011/early 2012. Responses to all three consultations showed a majority of respondents wanted the requirement commenced in September 2012 and that there was no need to draw up regulations to support the commencement of the requirement. In England there was a campaign by the National Deaf Children's Society (NDCS) supporting commencement in September 2012 but when the campaign responses were excluded 66% wanted the requirement commenced (18% against and 17% not sure) and 54% wanted it commenced in September 2012 (36% against and 9% were not sure). Unfortunately the question on how many disabled children were missing out on the provision of auxiliary aids and in what circumstances did not elicit any clear answers<sup>4</sup>. Further details of the consultations in Scotland and Wales are available at <http://tinyurl.com/c8u82z8> and <http://tinyurl.com/cfoblnc> respectively.

The auxiliary aids requirement is one of the requirements under the Equality Act 2010 duty on providers to make reasonable adjustments to prevent disabled people being put at a substantial disadvantage. If commenced on schools and local authorities, it would apply to local authorities exercising their functions under the Education Acts and all schools, including local authority maintained schools, local authority maintained nursery schools, independent schools, Academies and non-maintained special schools. Each case has to be taken on its merits, but the requirement will only apply if:

the child is disabled within the terms of the Equality Act 2010;

non provision of the auxiliary aid would put the child at a substantial disadvantage, that is, an auxiliary aid does not have to be provided just because it might benefit the child but only where it would put the child at a substantial disadvantage; and

it must be reasonable for schools and local authorities to take steps to avoid that disadvantage by providing the auxiliary aid.

A number of factors, including the cost of the aid, effectiveness and impact on the disability, would all have to be considered when deciding whether or not it would be reasonable to provide the aid. The cost factor would be contingent, not absolute. For example, an auxiliary aid which it may be reasonable for a large school with a substantial budget to provide may not be reasonable for a small school with a small budget to provide. It would be very unlikely that it would be held to be reasonable for the education service to provide auxiliary aids which, for example, are normally provided by the health service, a concern which was raised by a number of respondents to the consultation.

Local authorities, where necessary, are under a duty to assess and draw up SEN statements for children from their areas and then to ensure the special educational provision set out in the statement. Regulations (The Education (Special Educational Needs) (England) (Consultation) Regulations 2001, Schedule 2) say that local authorities must specify in the statement "any appropriate facilities, and equipment, staffing arrangements and curriculum" that are required. The Queen's Speech on 9 May announced that, in England, legislation would be brought in to implement the proposals set out in the March 2011 SEND Green Paper, including the replacement of statements by Education, Health and Care Plans. The Department envisages that the same children who have statements currently would have Education, Health and Care Plans.

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<sup>4</sup> DfE Auxiliary Aids for Children with Disabilities: Summary of Consultation Responses, <http://tinyurl.com/8x5a35b>

## **The problem under consideration**

The current routes for providing children with auxiliary aids, through SEN statements, schools' and local authorities' duties to plan to increase access to schools and the curriculum and reasonable adjustments schools may be making in the normal course of events, are missing a small number of disabled children. This means that these children are being put at a substantial disadvantage as compared with their non-disabled peers (and disabled children who are being provided with auxiliary aids).

## **Rationale for intervention**

Currently, a small number of disabled children may not be receiving the auxiliary aids they require. Commencing this duty will introduce equity for all disabled children, ensuring that all children are given the chance to fulfil their potential while at school. It should also improve efficiency through the benefit of improved outcomes for children.

## **Description of the options considered**

The previous administration commissioned Brian Lamb, the then Chair of the Special Educational Consortium, to conduct an inquiry into parental confidence in the SEN system. One of the Lamb Inquiry's recommendations was that the exemption on schools and local authorities from the requirement to provide auxiliary aids be removed. The Department believes that relatively few children are missing out on the provision of auxiliary aids and services and this view is supported by Brian Lamb, by the Equality and Human Rights Commission (EHRC) and by local authorities the Department contacted at the time the Equality Bill was going through Parliament. The question in the consultation in England on how many disabled children were missing out on the auxiliary aids they needed and in what circumstances did not elicit any clear responses. Some consultation responses suggested that there could be significant numbers of certain groups of children who may be missing out, such as those with dyslexia or with medical needs. However, it was not clear that all these children would come within the Equality Act's definition of disability, whether they were being put at a substantial disadvantage by not being provided with the auxiliary aids that were being suggested as relevant to their condition, the circumstances in which it would be reasonable to provide the auxiliary aids to them and whether it would be the education service's responsibility to provide them with the aids.

### Option 1: Do nothing –do not commence the requirement

Not commencing the requirement means that a small number of disabled children will continue to not receive the auxiliary aids they require, and will continue to be at a disadvantage in relation to their peers.

### Option 2: Commence the duty in England, Scotland and Wales in September 2012

Particularly in view of the Department's belief that the cost to schools and local authorities will be small and that it is now two years since the Equality Act was given Royal Assent in April 2010, there appears to the Department to be no good reason to delay commencement any further. The costs and benefits of this option are set out below.

## **Monetised and non-monetised benefits and costs (including administrative burden)**

### Option 1: Do nothing – do not commence the requirement

Continuing with the current arrangements and not commencing the requirement means that a small number of disabled children will continue to be disadvantaged relative to their peers

because they haven't received auxiliary aids. The costs and benefits of the other options are expressed relative to this do nothing case.

## Option 2 – commencing the requirement in September 2012

The Department believes that a large majority of disabled children who need auxiliary aids and services are receiving them already through the SEN statementing system and other routes. At January 2011 there were 224,210 children with statements, including 25,425 statements newly made during the 2010 calendar year. The Audit Commission in 2002 estimated that it costs local authorities £2,500 on average to draw up SEN statements<sup>5</sup> and local authorities in England in 2011 planned to spend £2.6 bn on SEN provision not in special schools and a further £1.932 bn in special schools<sup>6</sup>. We do not know how much local authorities planned to spend on children with statements or what proportion of spending would be on auxiliary aids.

There is very little data available on which to base an estimate of the costs because there is no record of the number of children who should be receiving auxiliary aids but are not already doing so through SEN statements, school provision or through schools' and local authorities' planning duties under the Equality Act 2010. Porter et al found that a quarter of children identified as DDA/Equality Act disabled did not have SEN. National estimates of disability prevalence range between 5% and 18% (Read 2007). We do not know the exact number of children who are identified as DDA/Equality Act disabled or how many of the quarter identified by Porter will already be receiving auxiliary aids through other duties.

The EHRC have supplied figures from the former Disability Rights Commission's casework service, which covered England, Wales and Scotland. These show that between January 2004 and March 2005 130 schools' cases out of a total of 243 cases were unable to be supported by the DRC as they were out of scope of the DDA. The largest proportion of these was not able to be supported because the issue related to the provision of auxiliary aids. In the absence of stronger evidence about the number of children currently denied access to auxiliary aids, these figures have been used to generate a high and low estimate.

Based on these figures, it can be estimated that there would be 100 cases a year across all schools and local authorities in England, Wales and Scotland. It is not known how many of the cases from the DRC's casework service would have resulted in schools or local authorities having to provide auxiliary aids and services had the exemptions not been in place at the time so 100 could be considered to be a generous figure; however, in the absence of other information we have used this for our low estimate.

Conversely, it may be that only a proportion of parents whose children were denied access to auxiliary aids contacted the DRC's casework service. While DfE continues to believe that most pupils who currently need auxiliary aids are getting them, to take account of this possibility for a high estimate we have assumed that only a third of parents in this situation contacted the DRC, so there would be 300 cases a year.

There are no figures that the Department can find which show what is the average auxiliary aids cost for disabled pupils. A local authority has estimated that the average cost would be in the region of £500, so we have used this as our estimate of the costs of providing auxiliary aids, for 100 and 300 cases a year.

100 cases a year at £500 = £50,000 p.a.

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<sup>5</sup> The Audit Commission *Statutory Assessment and Statements of SEN: In need of review?* (2002)

<sup>6</sup> Section 251 Budget 2011-12

<http://www.education.gov.uk/childrenandyoungpeople/strategy/financeandfunding/section251/archive/b0068383/section-251-data-archive/budget-data---summary-level>

300 cases a year at £500 = £150,000 p.a.

### **Additional costs**

Parents whose requests that schools or local authorities provide auxiliary aids and services for their children were denied could ask for a statutory assessment of their child's SEN with a view to the child being given an SEN statement. Conversely, parents who might have pursued getting a statement for their child just in order to have access to auxiliary aids would no longer need to do so. If there was any net increase in the number of requests for statements this would involve local authorities in England in the costs of assessing children and drawing up statements (Audit Commission's estimate of £2,500 in 2002 prices) but given that the assessment and statementing process takes six months and there is no certainty that the parent will get the provision they want at the end, it seems unlikely that many parents will take that route. More likely is that they would make a disability discrimination claim to the First-tier Tribunal (SEND) in England, the SEN and Disability Tribunal in Wales and the Additional Support Needs Tribunal in Scotland.

The parents of disabled children have the right to make disability discrimination claims to the First-tier Tribunal (SEN and Disability) (in England) in the matters of admissions to independent (including Academies) and non-maintained special schools (NMSSs), permanent exclusions from independent and NMSSs (and from local authority maintained schools from this September), fixed term exclusions from all types of schools and the provision of education and related services in all types of schools. 110 claims were registered in the 2010/11 academic year with 55 being decided and 25 withdrawn in the same period<sup>7</sup>. The costs of a hearing [in 2010 prices] are as follows: £1,656 (fees payable to the three tribunal panel members £1,182, Earnings Related National Insurance Contributions £124 and T&S and other expenses £350). The average Tribunals Service staffing costs per appeal amounts to £284 and other administrative overheads average £80. These and costs to schools and local authorities and the Legal Services Commission, see below, would continue if the auxiliary aids requirement was not commenced.

Costs for hearings at the SEN Tribunal in Wales tend to be higher – more in the region of £3,000. However, the number of disability discrimination claims in Wales is very small – only 4 last year – and Wales does not expect any significant uplift in claims. The situation is similar in Scotland. The costs of hearings at the Additional Support Needs Tribunal for Scotland tend to be yet higher, some £4725 per hearing. Again Scotland does not see a significant rise in cases and with most or any extra cases following on from the commencement of the auxiliary aids requirement falling to England we have not taken account of the extra costs of hearings in Wales and Scotland.

An estimated typical cost for a local authority or school to defend a case at the Tribunal is £5,000.

Parents have access to means tested legal help for preparing disability discrimination cases. The Legal Services Commission's estimated costs for helping parents prepare for a Tribunal hearing are £1,800. Although in many cases parents do not take up the offer of Legal Help or do not qualify for this means tested support to prepare a case for a hearing we have assumed that they will do so in each case where the claim goes through to a hearing, to give an upper estimate of the possible costs.

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<sup>7</sup> Ministry of Justice and Her Majesty's Courts and Tribunals Service, *Quarterly Tribunals Statistics 1 July to 30 September 2011*. See pages 21 and 45 onwards for the SEND Tribunal's annual statistics for 2010-11. <http://www.justice.gov.uk/downloads/statistics/tribs-stats/quarterly-tribs-stats-q2-11-12.pdf>



<u>Costs</u>	<u>£</u> <i>Uplifted to 2012 prices</i>
Court costs:	
- Hearing costs	1,737
- Tribunal Service staffing costs	298
- Administrative overheads	84
Local authority / school	5,244
Legal Services Commission costs	1,888
<b>Total costs</b>	<b>9,251</b>

The number of disability discrimination claims made to the Tribunal is relatively small (see above). We would not expect many claims being made to the Tribunal on the basis of schools' and local authorities' new auxiliary aids requirement, but there may be more in the first year or so as parents get used to the limits on the requirement – that the child has to be disabled under the Equality Act, that it must be reasonable to supply the auxiliary aid and that non-provision of the aid would put the child at a substantial disadvantage. In the absence of hard evidence about the number of claims that will make it to the Tribunal, we have assumed a low estimate of 30 cases and a high estimate of 60 cases.

On the basis of 100 auxiliary aids and services cases a year and the assumption that 30 of them will result in claims to the Tribunal and all those claims being taken through to a hearing then the additional cost would be: £9,251 x 30 = £278,000.

On the basis of 300 cases a year and 60 going through to a disability discrimination claim at the Tribunal the costs would be: £9,251 x 60 = £555,000. Again, considering that the Tribunal only registered 110 claims in 2010/11 this is likely to be a generous figure.

The Department, the Welsh and the Scottish Governments, the Tribunals and the EHRC would also need to publicise the new requirement and the right to appeal about non-provision of auxiliary aids to schools, local authorities and parents. However, given that the dissemination of information is likely to be through the internet and amendments to guidance documents on the internet the costs would be minimal. There will also be some judicial training costs and possibly some costs from making necessary changes to IT systems. Again these costs would be minimal.

### **Range of costs for option 2**

The range of costs for option 2 is as follows:

Lower, and more likely, figure: 100 cases at £500 = £50,000, plus 30 cases going to the Tribunal at £278,000 = £328,000.

Higher figure: 300 cases at £500 = £150,000, plus 60 cases going to the Tribunal at £555,000 = £705,000.

Best estimate (mid-point between the two): £516,500.

To calculate the present value below, it has been assumed that these annual costs will continue at this level for 10 years, as is standard practice.

	Annual cost	Present value (over 10 years)
Low estimate	£328,000	£2.8m
High estimate	£705,000	£6.1m
Central estimate	£516,500	£4.4m

## **Benefits**

There could be a benefit to local authorities (in terms of resources) and to parents (potentially in terms of resources, but also reduced stress if they don't have to battle to get what their children need) if the number of statements falls because parents and children are getting the auxiliary aids they require without having to go through the statementing process, although we expect the numbers involved to be very small.

There should be an improvement in outcomes for those disabled children who are currently not receiving the auxiliary aids they require (although again, we think the numbers are small), as they will no longer be at a disadvantage compared to their peers. Evidence suggests that pupils with SEN are less likely to achieve 5 A\* - C GCSEs or equivalent by the age of 19 than pupils with no identified SEN, with some groups of children with SEN and disabilities much further behind. Evidence also shows that young people with SEN are more than twice as likely not to be in education employment and training as their peers. Improving educational outcomes for disabled children could result in higher productivity for themselves and the economy, as well as a smoother transition to adult life and greater independence and therefore a reduced call on public funding.

## **Funding state funded schools for a new auxiliary aids requirement**

As the number of children who will be provided with auxiliary aids through this new requirement will be small and the costs small the Department believes that it would be inefficient to try and distribute very small amounts of money to 152 local authorities in England with onward distribution to schools. And, given the projected minimal costs, and within the context of a schools budget of some £35 bn, the Department does not believe it is necessary to make special financial support available for commencement of this requirement. However, in light of the concerns that some respondents to the consultation expressed about the costs of compliance, the Department will keep this position under review and, if necessary, reflect any excessive additional cost consequent upon complying with the new requirement in the high needs pupil block of the Dedicated Schools Grant. The Dedicated Schools Grant is a DfE grant and so commencement of the auxiliary aids requirement would not bear upon the budgets of other Departments or on the council tax payer.

For the impact on independent schools, see below.

## **Risks and assumptions**

The Department's assumption is that there are indeed relatively few disabled children who are not currently receiving the auxiliary aids to prevent them being put at a substantial disadvantage, that the new requirement will not disproportionately impact on particular types of schools and that no schools will be put under severe financial pressure because of the new requirement. The risks are that these assumptions are wrong. In particular, there may be a risk for state-funded schools (local authority maintained and Academies) that there will be an increased call on their budgets before the funding arrangements set out in previous section are set in train. However, a number of people the Department has spoken to, including people who promoted removal of the exemption on schools and local authorities, believe that only a small number of disabled children are missing out. The Department in England has not seen any convincing evidence in the responses to the consultation that the impact will be greater on any particular type of school. And the experience of other providers does not suggest that individual schools will be unduly affected by the new requirement. For example, as mentioned earlier, the requirement has applied to private early years providers since 1999 and the Department is unaware of any of these providers who have been unduly affected by the requirement.

For the risks for independent schools, see below.

## **Direct costs and benefits to business calculations**

The auxiliary aids requirement, if commenced, would apply to independent and non-maintained special schools (NMSSs) as well as maintained schools. NMSSs are run by charities on a non-profit basis, and there are 72 NMSSs. There is no legal category of independent special schools – there are 529 independent schools which are wholly or mainly (over 50%) for children with SEN, and the requirement will apply equally to independent ‘mainstream’ schools. Under the Equality Act 2010 independent schools and NMSSs are prohibited from charging for the provision of auxiliary aids, as are all other schools.

The Department has held meetings with the Independent Schools Council (ISC) and both in those meetings and in the ISC’s response to the consultation concern was expressed about the financial impact of commencing the requirement on the independent sector. The ISC felt there was a risk that the new requirement could disproportionately impact on independent schools. They felt that the profile of parents who sent their children to independent schools meant that they would be more aware of their children’s rights to provision, more aware of the aids and services that could be provided and more likely to make disability discrimination claims if they are denied what they think should be provided. So they argued there could be a greater call on their budgets than there will be for local authority schools which, combined with the prohibition on charging, could put them in a difficult position. Independent schools cannot look to support from services like local authority equipment loan schemes and independent schools, like state-funded schools, range in size and the extent of their budgets, with some being very small on both counts. However, there are a number of reasons for expecting the cost to this sector to be negligible, in the same way as they are expected to be small for maintained schools.

Independent ‘special’ schools and NMSSs receive most of their income from local authorities placing children with SEN statements at the school. The children’s statements should set out the aids and services the children need and the predominant reason these children are placed in these schools is precisely because the schools have the expertise, equipment and services already in place to meet the child’s needs. There are a few children with SEN who are financed by their parents to attend these schools but again the parents’ choice will have been influenced by the equipment and services already available at these schools. It is unlikely that disabled children with statements of SEN would have been placed at these schools without receiving the auxiliary aids they need.

There will, of course, be some disabled children who do not have SEN statements at independent mainstream and special schools and they may use the auxiliary aids requirement to request a wide range of provision for their children. However, it is unlikely that parents will be paying to send their children to one of these schools if they are not already receiving the auxiliary aids their children require. Although these parents could seek to make more disability discrimination claims figures from 2010/11 show that the Tribunal did not receive any claims from the parents of children in independent schools and NMSSs about admissions and exclusions, suggesting this is not the case.

There are also limitations on the requirement that will protect the independent sector. For example, a school will only have to provide auxiliary aids if the child comes within the definition of disability under the Equality Act 2010, the lack of an auxiliary aid must be putting the child at a “substantial disadvantage” and it would have to be reasonable for the school to provide the auxiliary aid, and cost would be one of the factors to be taken into account to determine whether provision of the aid would be reasonable.

Given the overall small number of cases we expect across the UK and the small size of the independent sector in relation to the state sector the Department expects the number of cases in the independent sector to be small. The reasons listed above - provision from existing statements, parental choice of schools ensuring that their children already have the aids they require, and the limitations on the requirement – will help to ensure that within the relatively small independent sector, the number of auxiliary aids that will be issued following this change will be small and therefore the costs negligible. For these reasons, the policy has been assessed as being ‘zero net cost’ for the purposes of One In, One Out.

Academies are formally independent schools but they are state funded and if there is a need to give them extra financial support because of any unexpected additional cost consequent upon complying with a new auxiliary aids requirement then this will be reflected in their funding in line with the funding for maintained schools.

### **Summary and preferred option with description of implementation plan**

The Department believes that a relatively small number of disabled children are missing out on the provision of auxiliary aids because those aids are being provided through other routes where they are needed. However, because not all disabled children have SEN and because fewer children now have SEN statements, the main alternative route through which children are provided with auxiliary aids, there are some disabled children who are not being provided with the auxiliary aids which will prevent them from being put at a substantial disadvantage. We think therefore it is necessary to commence the auxiliary aids requirement and our preferred option is that it is commenced in September 2012.

A commencement order has been drafted in consultation with lawyers in the Scottish and Welsh Governments. Assuming approval from the various committees, the order will be signed and come into force in September of this year.

### **Post-implementation review**

- **Basis of the review:** The formal post legislative review will be required five years after commencement. Monitoring of the impact on schools will continue in the meantime to see whether that impact needs to be reflected in the high needs pupil block of the Dedicated Schools Grant.
- **Review objective:** To see how many children are accessing auxiliary aids through this requirement in the Equality Act and the number of appeals to the Tribunal related to the non-provision of auxiliary aids.
- **Review approach and rationale:** The main groups involved in the review would be the Department, the Department’s Service Working Group on Education and Children’s Services (SWGECs), the Local Government Association, the Independent Schools Council and the Ministry of Justice/Her Majesty’s Courts and Tribunals Service. We will be regularly in touch with these organisations to discuss and review the impact of these changes.
- **Baseline:** Is the number of children who are having auxiliary aids provided under the third, auxiliary aids, requirement currently (none) and the number of disability discrimination claims made to the First-tier Tribunal (SEN and Disability) about non-provision of auxiliary aids (none).

- Success criteria: That, as predicted by the Department, the requirement to provide auxiliary aids is the route through which a smallish number of disabled children get the auxiliary aids they need.
- Monitoring information arrangements: both formal and informal contact with the organisations listed in the third bullet.