

Disability Discrimination Act 1995 Part 4

Code of Practice for Schools

New duties (from 2002) not to discriminate against disabled pupils and prospective pupils in the provision of education and associated services in schools, and in respect of admissions and exclusions

London: TSO

© Disability Rights Commission 2002

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the permission of the publisher.

Applications for reproduction should be made in writing to the Disability Rights Commission, 2nd Floor, Arndale House, Arndale Centre, Manchester, M4 3AQ.

The information contained in this publication is believed to be correct at the time of manufacture. Whilst care has been taken to ensure that the information is accurate, the publisher can accept no responsibility for any errors or omissions or for changes to the details given.

First published 2002

Table of contents

Introduction	1	1
The purpose of the schools sections of the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001) (1.1)-(1.3)	1	
Purpose of the Code (1.4)-(1.6)	2	
Status of the Code (1.7)	3	
Territorial coverage (1.8)-(1.10)	3	
References in the Code (1.11)-(1.12)	4	
Pupils and children (1.13)	4	
How to use the Code (1.14)-(1.17)	4	
Examples in the Code (1.18)-(1.20)	6	
Timing and implementation of the duties (1.21)-(1.23)	7	
Further information (1.24)	7	
An overview of the legislation, Scotland	9	2
Introduction (2.1)-(2.2)	9	
The disability discrimination duties (2.3)-(2.8)	9	
Planning duties in Scotland (2.9)-(2.10)	11	
The SEN framework in Scotland (2.11)-(2.22)	12	
An overview of the legislation, England and Wales	17	3
Introduction (3.1)-(3.2)	17	
The disability discrimination duties (3.3)-(3.8)	17	
Planning duties in England and Wales (3.9)-(3.12)	19	
The SEN framework in England and Wales (3.13)-(3.24)	20	

4	The duties: who is covered, who is responsible, what activities are covered	25
	Who is covered by the duties? (4.1)–(4.7)	25
	Disabled pupils and special educational needs (4.8)–(4.10)	27
	What provision is covered? (4.11)–(4.13)	28
	Who is responsible for the schools' duties? (4.14)–(4.19)	29
	What activities are covered by the schools' duties? (4.20)–(4.21)	32
	Admissions (4.22)	32
	Education and associated services (4.23)–(4.26)	32
	Exclusions (4.27)	34
	5	What is discrimination? Less favourable treatment
This chapter in context (5.1)–(5.4)		35
Less favourable treatment (5.5)–(5.6)		36
Is the less favourable treatment for a reason that is related to the child's disability? (5.7)–(5.8)		37
Is it less favourable treatment than someone gets if the reason does not apply to him/her? (5.9)–(5.10)		39
Is it less favourable treatment that can be justified? (5.11)–(5.13)		41
Justification for a material and substantial reason (5.14)–(5.15)		41
Were there reasonable adjustments that could have been made? (5.16)		43
Some further examples considered (5.17)		44
Permitted forms of selection (5.18)		49
Permitted forms of selection in maintained schools in England and Wales (5.19)–(5.21)		49
Permitted forms of selection in Scotland (5.22)		50
Permitted forms of selection, some examples considered (5.23)		50

What is discrimination? A failure to make reasonable adjustments	53
This chapter in context (6.1)–(6.4)	53
Reasonable adjustments (6.5)–(6.8)	54
Substantial disadvantage (6.9)–(6.11)	55
An anticipatory duty (6.12)–(6.17)	56
A continuing responsibility (6.18)	61
Exceptions to the reasonable adjustments duty (6.19)	62
The provision of auxiliary aids or services (6.20)	63
The provision of auxiliary aids or services in independent schools (6.21)–(6.22)	63
Physical alterations to the buildings in schools in England and Wales (6.23)–(6.25)	64
Physical alterations to the buildings in schools in Scotland (6.26)–(6.27)	65
Considering whether it is reasonable to have to take a particular step (6.28)–(6.34)	65
Justification for a material and substantial reason (6.35)–(6.36)	70

Lack of knowledge defence and confidentiality	71
Introduction (7.1)–(7.3)	71
Lack of knowledge defence (7.4)–(7.12)	72
Confidentiality requests (7.13)–(7.17)	75

Redress and conciliation in Scotland	79
Introduction (8.1)–(8.2)	79
Claims of unlawful discrimination (8.3)–(8.4)	79
Who has the power to bring a case? (8.5)–(8.6)	80
Remedies (8.7)–(8.9)	80
Conciliation (8.10)–(8.12)	81
Complaints (8.13)	82
Where to go for information and advice (8.14)–(8.16)	82

9	Redress and conciliation in England and Wales	85
	Introduction (9.1)	85
	Claims of unlawful discrimination (9.2)–(9.3)	85
	The Special Educational Needs and Disability Tribunal (SENDIST) (9.4)–(9.6)	86
	Timescales for making a claim to SENDIST (9.7)–(9.8)	87
	Claims of unlawful discrimination and appeals under the SEN framework (9.9)–(9.10)	87
	Remedies (9.11)	88
	Information about SENDIST (9.12)	89
	Powers of the Secretary of State (9.13)	89
	Admission appeal panels (9.14)–(9.20)	90
	Independent appeal panels for exclusions (9.21)–(9.27)	91
	Conciliation (9.28)–(9.31)	92
	Complaints (9.32)–(9.33)	94

10	Other duties under the Disability Discrimination Act 1995	95
	The education authority's residual duties (10.1)–(10.6)	95
	Early years education that is not provided in a school (10.7)–(10.9)	98
	Victimisation (10.10)–(10.14)	99
	Liability for employees' and agents' actions (10.15)–(10.19)	102
	Terms of agreements (10.20)–(10.21)	105

11	Relationship with other legislation and responsibilities	107
	General approach (11.1)	107
	The Data Protection Act 1998 (11.2)–(11.4)	107
	The Health and Safety at Work Act 1974 and related regulations (11.5)–(11.6)	108

The Fire Precautions Act 1971 and related regulations (11.7)	110	
The Occupiers' Liability Act 1957 and the Occupiers' Liability (Scotland) Act 1960 (11.8)–(11.9)	110	
The Defective Premises Act 1972 (11.10)	111	
The Human Rights Act 1998 (11.11)	111	
The Race Relations Act 1976 and the Race Relations (Amendment) Act 2000 (11.12)–(11.13)	112	
The Sex Discrimination Act 1975 (11.14)–(11.15)	112	
The Welsh Language Act 1993 (11.16)	113	
Common law duties (11.17)	113	
Statutory responsibilities of other bodies (11.18)–(11.20)	113	
Other relevant legislation (11.21)	114	
Appendix One: The meaning of disability	117	
Appendix Two: Definitions of disability under other legislation	123	
Introduction (A2.1)	123	
Section 1: Scotland (A2.2)–(A2.17)	124	
Section 2: England and Wales (A2.18)–(A2.35)	128	
Appendix Three: Publications and useful addresses	133	

Introduction

1

The purpose of the schools sections of the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001)

- 1.1 New duties, which come into effect in September 2002, extend the Disability Discrimination Act 1995 to cover every aspect of education. The Special Educational Needs and Disability Act 2001 amends the Disability Discrimination Act Part 4 to prevent discrimination against disabled people in their access to education. Chapter 1 of the new Part 4 of the Disability Discrimination Act sets out the requirements on those providing school education. The duties make it unlawful to discriminate, without justification, against disabled pupils and prospective pupils, in all aspects of school life. The principle behind this legislation is that wherever possible disabled people should have the same opportunities as non-disabled people in their access to education.
- 1.2 This Code of Practice (Code) applies to all schools and local education authorities (LEA) in England and Wales, and to all schools and education authorities in Scotland (EA). It explains the new duties and it shows the responsible bodies how they might meet the duties that apply to them.

- 1.3 This Code covers young people over the age of sixteen when in school. The Disability Rights Commission (DRC) is issuing a separate Code of Practice to explain how the duties apply in further and higher education and to give practical guidance to providers of 'post-16' education that are not schools.

Purpose of the Code

s 53A

- 1.4 The Disability Rights Commission has powers to issue codes of practice to explain duties under the Disability Discrimination Act. This Code is issued under these powers and at the request of the Secretary of State for Education and Skills.
- 1.5 This Code gives practical guidance on how to avoid discrimination against disabled pupils and prospective pupils in the school stages of education. It describes the duties on the bodies responsible for this provision. It will help disabled children and young people and their parents to understand the law and what they can do if they feel that the child or young person has been discriminated against.
- 1.6 This Code deals only with how to avoid unlawful discrimination against disabled pupils and prospective pupils in education and associated services. Those who work with disabled pupils in schools are encouraged to go beyond mere compliance with the law and work towards eliminating discrimination in education and associated services altogether. Further information on good practice in the school stages of this legislation is available, see **Appendix Three**.

Status of the Code

- 1.7 The Code does not impose legal obligations nor is it an authoritative statement of the law – that is a matter for the courts. However, the Code can be referred to in legal proceedings under the Disability Discrimination Act. A tribunal, appeal panel or court must take into account any part of the Code that appears to it to be relevant to any question arising in those proceedings. If those with responsibility for the provision of education in schools follow the guidance in the Code, it may help to avoid an adverse judgement by a tribunal, appeal panel or court.

Territorial coverage

- 1.8 The new disability discrimination duties in education apply across England and Wales and Scotland. The Disability Discrimination Act does not apply in Northern Ireland.
- 1.9 New planning duties in the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001) relate to devolved matters and only apply in England and Wales. Planning duties in Scotland are subject to separate legislation.
- 1.10 The disability duties apply to education throughout Great Britain, but to education systems that work differently in England and Wales and Scotland. The Code takes account of these differences and uses separate chapters or sections of chapters where appropriate so that the application of the new duties is clear in the context of the different education systems. The underlying disability discrimination duties remain the same.

References in the Code

- 1.11 The duties explained in this Code are brought in by the Special Educational Needs and Disability Act 2001. The changes in the legislation are incorporated into the Disability Discrimination Act 1995. The Disability Discrimination Act is the principal Act and throughout this Code it is referred to as 'the Act'. The new schools' duties are referred to as 'the duties'.
- 1.12 The references in the margins of the Code are references to the relevant sections of the Act. So, for example, a reference in the margin to s 28A is a reference to section 28A of the Disability Discrimination Act 1995. A reference to Sch 4A is to Schedule 4A of the Act. Where there is a reference to legislation other than the Disability Discrimination Act 1995, the reference in the margin names that other Act as well as the section that is referred to.

Pupils and children

- 1.13 The definition in the Act refers to a disabled person. In general the Part 4 duties and this Code refer to 'pupils' in the context of their school. However, the duties also cover those who may be admitted to the school as pupils. In this context the Code refers to 'children' or to a 'child' rather than to 'people' or a 'person' as the Act does. Where the Code refers to 'children' and 'child' these terms include young people over the age of sixteen where they are pupils at a school or prospective pupils at a school.

How to use the Code

- 1.14 This chapter gives a general introduction to the Code. The next two chapters set the schools' duties in the wider context of disability and SEN

legislation. **Chapter 2** covers the arrangements in Scotland, and **Chapter 3** the arrangements in England and Wales. **Chapter 4** sets out the detail of how the duties apply in schools: who has responsibilities under the Act, what activities are covered, who is protected. **Chapters 5 and 6** set out the two main disability discrimination duties: the duty not to treat people less favourably, and the duty to make reasonable adjustments for disabled pupils. **Chapter 7** explains duties and rights relating to information and confidentiality. **Chapters 8 and 9** explain rights of redress in Scotland and in England and Wales, respectively. **Chapter 10** explains the relationship of the new duties to other duties under the Act. **Chapter 11** explains the relationship of the new duties to duties under other legislation. **Appendices** to the Code supplement the content of the Code itself, including further information on the statutory definition of a disabled person.

- 1.15 It is important to a proper understanding of the schools' duties that this Code of Practice is read as a whole. Individual sections should not be taken out of the context of the whole Code or read in isolation from each other. To remind the reader of this, there is some repetition in the text and some signposting to related duties.
- 1.16 Many of the terms used in this Code have a particular meaning and are drawn from the legislation. It is for the courts to determine precisely how these terms are interpreted and in which circumstances they apply.
- 1.17 The Code should not be read too narrowly or literally. It is intended to explain the principles of the law and to illustrate how the law might operate in certain situations. There are some questions which the Code cannot resolve and which must

await the authoritative interpretation of the courts. The Code is not intended to be a substitute for taking appropriate advice on the legal implications of particular situations.

Examples in the Code

- 1.18 The Code uses examples in the text to support an understanding of the legislation and to illustrate how the duties might be met or breached. All the examples are drawn from real situations and from what is already happening in schools and in the lives of disabled pupils. All the examples used in the Code relate to children who have a disability as defined in the Act.
- 1.19 All the examples in this Code relate to the aspects of school education that are covered by Part 4 of the Act, namely: admissions, education and associated services, and exclusions. The examples do not cover the provision by schools of services to the public, which are covered by Part 3 of the Act. These duties are explained in a separate code of practice published by the Stationery Office on the duties in Part 3 of the Act, *Rights of Access to Goods, Facilities, Services and Premises*.
- 1.20 The examples illustrate a range of different aspects of school life, different types of school and different disabilities. The examples refer to particular situations but should be understood more widely. They can often be used to suggest how the law might work in analogous situations. However, the examples are illustrative, not comprehensive, and they do not constitute an authoritative interpretation of the legislation.

Timing and implementation of the duties

- 1.21 The duties explained in this Code come into effect in September 2002.
- 1.22 This Code refers to the Disability Discrimination Act as at January 2002. There may be changes to the Act or to other legislation, for example, to the range of people who are considered to have a disability under the law. These changes may have an effect on the duties explained in this Code.
- 1.23 Those with responsibilities under the Act will need to keep up to date with any developments that may affect the provisions of the Act. More information is available from the Disability Rights Commission (contact details, see below).

Further information

- 1.24 Copies of the Act and regulations made under it can be purchased from the The Stationery Office (see **Appendix Three**).

Free information about the Act can be obtained by contacting the DRC Helpline:

Telephone: 08457 622 633

Textphone: 08457 622 644

Fax: 08457 778 878

Email: enquiry@drc-gb.org

Post: DRC Helpline
FREEPOST
MID 02164
Stratford upon Avon
CV37 9BR

Information about the Act is also available in alternative formats or via the Internet:
<http://www.drc-gb.org>

An overview of the legislation, Scotland

2

This chapter explains the relationships between different parts of the legislation in Scotland:

- the disability discrimination duties;
- the planning duties; and
- the Special Educational Needs (SEN) framework.

It explains what each set of duties provides for disabled pupils.

Introduction

- 2.1 There are three main sources of support available to disabled pupils in school. These come from different parts of the legislation. Support is available through:
- the disability discrimination duties;
 - the planning duties;
 - the Special Educational Needs (SEN) framework.
- 2.2 The relationships between these different duties are important. This chapter outlines the disability discrimination duties and sets them in the context of these other duties in Scotland. **Chapter 3** outlines the disability discrimination duties and sets them in the context of these other duties in England and Wales.

The disability discrimination duties

- 2.3 The disability discrimination duties provide protection for disabled pupils by preventing discrimination against them at school on the grounds of disability.

- 2.4 Education authorities and independent and grant aided schools are already familiar with disability discrimination duties under the Act. Parts 2 and 3 of the Act have applied to independent and grant aided schools and education authorities in stages from 1996. These duties affect schools and education authorities in two main areas: employing staff and providing non-educational services to the public.
- 2.5 The definition of disability which is the basis for all the duties is set out in the Disability Discrimination Act. This definition is explained in greater length in **Appendix One**.
- 2.6 There are two key duties involved in ensuring that education authorities and independent and grant aided schools do not discriminate against disabled pupils. These are:
- not to treat disabled pupils less favourably; and
 - to take reasonable steps to avoid putting disabled pupils at a substantial disadvantage. This is known as the reasonable adjustments duty.
- 2.7 The reasonable adjustment duty is limited by a number of considerations. These are examined in more detail in **Chapter 6**, but for the purposes of considering how the statutory duties link with each other, it is important to look briefly at two aspects of the reasonable adjustments duty here:
- the reasonable adjustments duty does not require the responsible body to provide auxiliary aids and services;
 - the reasonable adjustments duty does not require the responsible body to make alterations to the physical features of the school.

2.8 The reasonable adjustments duty does not apply to auxiliary aids and services because it is anticipated that in schools in the publicly-funded sector such provision will be made through the SEN framework. Physical alterations to schools are not required under the reasonable adjustments duty as it is anticipated that these will be achieved through a longer term and more strategic approach to improving access for disabled pupils.

Planning duties in Scotland

2.9 Scottish local authorities are obliged to produce Children's Services Plans every three years. Also, under the Standards in Scotland's Schools etc. Act 2000, educational authorities must produce annual statements of improvement objectives (Improvement Plans) as part of the National Priorities for Education Improvement. Plans should deal with how the authorities intend to improve education and support services in order to provide equal opportunities for disabled children.

2.10 In addition, the Scottish Executive has brought forward draft legislation, the Education (Disability Strategies and Pupils' Records) (Scotland) Bill, which will introduce in Scotland a duty on all those responsible for schools to prepare accessibility strategies to address three distinct elements of planned improvements in access for disabled pupils:

- improvements in access to the curriculum;
- improvement to the physical environment to increase access to education and associated services; and
- improvements in the provision of information for disabled pupils.

The SEN framework in Scotland

- 2.11 The duties in the Disability Discrimination Act are designed to dovetail with existing duties under the SEN framework. The main purpose of the SEN duties is to make provision to meet the special educational needs of individual children. To the extent that disabled children rely on special educational provision to have their needs met, equal opportunities for disabled children are dependent on the quality of the provision made through the SEN framework.
- 2.12 The SEN framework sits within the general duties of education authorities to secure the 'adequate and efficient provision of school education for their area'. Every child of school age has a right to school education directed to developing 'the personality, talents and the mental and physical abilities of the child or young person to their fullest potential'. In his or her education a child or young person's views must be given due regard in decisions that significantly affect him or her, so far as is reasonably practicable. This requirement does not apply in other situations, where education is being provided by someone other than the education authority.
- 2.13 Schools and education authorities are already familiar with the SEN framework. The duties in the SEN framework are based on the definition of special educational needs. Children and young persons have special educational needs if they have a learning difficulty which calls for special educational provision to be made for them.
- 2.14 A learning difficulty is said to be present if a child or young person:
- a) has a significantly greater difficulty in learning than the majority of those of his age; or

- b) has a disability which either prevents or hinders him from making effective use of educational facilities of a kind generally provided in schools managed by his education authority; or
- c) is under the age of five years and is, or would be if special provision were not made for him, be likely, when over that age, to have a learning difficulty as defined above.

2.15 The definition does not, however, cover children or young people who have problems with learning because they are taught in a language which is not the language they speak at home.

2.16 Provision for special educational needs means, in relation to a child of school age or a young person receiving school education, educational provision which is additional to or otherwise different from that generally made for children of the same age in schools managed by the education authority for the area concerned. In relation to children who have not yet attained school age, it means educational provision as appropriate to their needs.

Children with a disability

2.17 The definition of SEN is widely understood as being primarily about children with learning difficulties, because of the wording in the legislation. It is important to recognise that the definition of children with learning difficulties includes children with a disability where any special educational provision needs to be made. It means that children with a disability have special educational needs if they have any difficulty in accessing education and if they need any special educational provision to be made for them, that is, anything that is *additional to* or *different from* what is normally available in schools in the area.

What is the SEN framework?

- 2.18 The SEN framework consists of the primary legislation, the regulations, and the guidance. In Scotland the SEN framework consists of the provisions in the Education (Scotland) Act 1980, as amended, the Standards in Scotland's Schools etc. Act 2000, guidance from the Scottish Office Education and Industry Department, *Circular 4/96, Children and Young Persons with Special Educational Needs: Assessment and Recording* (SOEID, 1996) and guidance in *A Manual of Good Practice* (SOEID, 1998).
- 2.19 *Circular 4/96* and *A Manual of Good Practice* in Scotland support education authorities in interpreting their duties under the SEN framework. The Standards in Scotland's Schools etc. Act 2000 will establish a presumption that all children will be educated in mainstream schools. Exceptionally, children may be educated elsewhere if one or more of these circumstances apply to education in a mainstream school:
- it would not be suited to the child's ability or aptitude;
 - it would not be compatible with the provision of efficient education for other children;
 - it would result in unreasonable public expenditure that would not ordinarily occur.
- 2.20 A child could still be educated in a mainstream school, even if such exceptional circumstances occur, but the wishes of the child and the parents must be taken into account.
- 2.21 The disability duties in Part 4 of the Disability Discrimination Act are designed to dovetail with existing duties under the SEN framework. This Code of Practice does not focus on the SEN

framework, but refers across to it. It takes account of the guidance on the SEN duties and complements it by providing guidance on the disability discrimination duties in education. It should be noted that the SEN framework in Scotland is under review following consultation on the arrangements for assessing and recording children with special educational needs.

Complaints and appeals

- 2.22 If parents are not satisfied with the provision that an education authority makes to meet their child's special educational needs, they can complain to the education authority. In certain circumstances, they can complain to Scottish Ministers about any aspect of school education, including provision for special educational needs. If parents do not agree with decisions made by the education authority about the nature of their child's needs as set out in the Record of Needs, or about a decision on whether to open or discontinue a Record of Needs, they have a right of appeal to an Education Appeal Committee and, in some circumstances, to Scottish Ministers. If they disagree with the school proposed by the education authority on the Record of Needs, they may appeal to the education authority's Education Appeal Committee, and from there to the Sheriff Court. Scottish Ministers may be asked for their views.

s 70 Education
(Scotland) Act 1980

3

An overview of the legislation, England and Wales

This chapter explains the relationships between different parts of the legislation in England and Wales:

- the disability discrimination duties;
- the planning duties; and
- the Special Educational Needs (SEN) framework.

It explains what each set of duties provides for disabled pupils.

Introduction

- 3.1 There are three main sources of support available to disabled pupils in school. These come from different parts of the legislation. Support is available through:
- the disability discrimination duties;
 - the planning duties; and
 - the Special Educational Needs (SEN) framework.
- 3.2 The relationships between these different duties are important. This chapter outlines the disability discrimination duties and sets them in the context of these other duties in England and Wales. **Chapter 2** outlines the disability discrimination duties and sets them in the context of these other duties in Scotland.

The disability discrimination duties

- 3.3 The disability discrimination duties provide protection for disabled pupils by preventing discrimination against them at school on the grounds of disability.

- 3.4 Schools and local education authorities are already familiar with disability discrimination duties under the Act. Parts 2, 3 and 4 of the Act have applied to schools in stages from 1996. These duties affect governing bodies and local education authorities in three main areas: employing staff, providing non-educational services to the public and publishing information about arrangements for disabled pupils.
- 3.5 The definition of disability which is the basis for all the duties is set out in the Disability Discrimination Act. This definition is explained in greater length in **Appendix One**.
- 3.6 There are two key duties involved in ensuring that schools do not discriminate against disabled pupils. These are:
- not to treat disabled pupils less favourably; and
 - to take reasonable steps to avoid putting disabled pupils at a substantial disadvantage. This is known as the reasonable adjustments duty.
- 3.7 The reasonable adjustments duty is limited by a number of considerations. These are examined in more detail in Chapter 6, but for the purposes of considering how the statutory duties link with each other, it is important to look briefly at two aspects of the reasonable adjustments duty here:
- the reasonable adjustments duty does not require the responsible body to provide auxiliary aids and services;
 - the reasonable adjustments duty does not require the responsible body to make alterations to the physical features of the school.

3.8 The reasonable adjustments duty does not apply to auxiliary aids and services because it is anticipated that in schools in the maintained sector such provision will be made through the SEN framework. Physical alterations to schools are not required under the reasonable adjustments duty as it is anticipated that these will be achieved through a longer term and more strategic approach to improving access to school buildings through the planning duties.

Planning duties in England and Wales

3.9 Support for disabled pupils comes from the planning duties in Sections 28D and 28E of the Act. These Sections set out requirements on local education authorities and schools in England and Wales to draw up accessibility strategies (LEAs) and accessibility plans (schools) to improve access to education at schools over time. The strategies and plans have to address three distinct elements of planned improvements in access for disabled pupils:

- improvements in access to the curriculum;
- physical improvements to increase access to education and associated services;
- improvements in the provision of information in a range of formats for disabled pupils.

3.10 In Wales, the National Assembly for Wales provides guidance for LEAs and schools on how they should implement the planning duties. ESTYN (HM Inspectorate for Education and Training in Wales) inspects LEA accessibility strategies and school accessibility plans. The National Assembly for Wales has powers to direct schools and LEAs if it thinks that either a school or an LEA has not complied with the planning duties, or has acted unreasonably in carrying out the duties.

s 28M

3.11 In England, the Secretary of State for Education and Skills provides guidance for LEAs and schools on how they should implement the planning duties. The Office for Standards in Education (Ofsted) inspects LEA accessibility strategies and school accessibility plans. The Secretary of State for Education and Skills has powers to direct schools and LEAs if it is thought that either a school or an LEA has not complied with the planning duties, or has acted unreasonably in carrying out the duties.

3.12 The planning duties also update the requirements on governing bodies to provide information in their annual report about arrangements for disabled pupils at the school. The governing body of a maintained school, in its annual report to parents, must explain the admission arrangements for disabled pupils, how the governing body helps disabled pupils gain access and what it will do to make sure they are treated fairly. The new Part 4 of the Disability Discrimination Act extends these duties. From September 2002 maintained schools are required to publish information about their accessibility plan in their governors' annual report to parents. Guidance on accessible schools *Accessible Schools: Planning to increase access to schools for disabled pupils*, recommends that schools should reproduce the full accessibility plan in their governors' report to parents. By making their accessibility plans publicly available, schools will encourage contributions to the plan and a sense of ownership amongst staff, governors, pupils and parents.

The SEN framework in England and Wales

3.13 The duties in the Disability Discrimination Act are designed to dovetail with existing duties under the SEN framework. The main purpose of the SEN duties is to make provision to meet the special

educational needs of individual children. To the extent that disabled children rely on special educational provision to have their needs met, equal opportunities for disabled children are dependent on the quality of the provision made through the SEN framework.

- 3.14 Schools and local education authorities are already familiar with the SEN framework. The duties in the SEN framework are based on the definition of special educational needs. A child has special educational needs if he or she has a learning difficulty which calls for special educational provision.
- 3.15 A child has a learning difficulty if he or she:
- a) has a significantly greater difficulty in learning than the majority of children of the same age; or
 - b) has a disability which prevents or hinders the child from making use of educational facilities of a kind generally provided for children of the same age in schools within the area of the LEA;
 - c) is under five and falls within the definition at (a) or (b) above or would do so if SEN provision was not made for the child.
- 3.16 Special education provision means:
- a) for a child of two or over, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of the child's age in maintained schools (other than special schools) in the area;
 - b) for a child under two, educational provision of any kind.

Children with a disability

- 3.17 The definition of SEN is widely understood as being primarily about children with learning difficulties, because of the wording in the legislation. It is important to recognise that the definition of children with learning difficulties includes children with a disability where any special educational provision needs to be made. It means that children with a disability have special educational needs if they have any difficulty in accessing education and if they need any special educational provision to be made for them, that is, anything that is *additional to* or *different from* what is normally available in schools in the area.

What is the SEN framework?

- 3.18 The SEN framework consists of the primary legislation, the regulations, and the guidance. The statutory duties that form the core of the SEN framework in England and Wales are set out in Part 4 of the Education Act 1996, as amended by the SEN and Disability Act 2001. The rest of the framework is provided by the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001, the Education (Special Educational Needs) (Wales) Regulations 2002, the Education (Special Educational Needs) (Information) (England) Regulations 1999, the Education (Special Educational Needs) (Information) (Wales) Regulations 1999, the Special Educational Needs (Provision of Information by Local Education Authorities) (England) Regulations 2001, the Special Educational Needs (Provision of Information by Local Education Authorities) (Wales) Regulations 2002, and guidance, including the Special Educational Needs Code of Practice and Inclusive Schooling – Children with Special Educational Needs 2001. In Wales regulations and guidance,

including the SEN Code of Practice for Wales, are provided separately by the National Assembly for Wales.

- 3.19 The SEN framework makes an increasing assumption that children with special educational needs will be educated in mainstream schools. Amendments to section 316 of the Education Act 1996 strengthen the general duty to provide a mainstream school place for a child with special educational needs, where their parents want that, and so long as that is compatible with the efficient education of other children. The Secretary of State, in England, and the National Assembly for Wales, provide guidance on the operation of the amended section 316 and new section 316A.
- 3.20 Other parts of the educational framework in England support the increased inclusion of children with SEN: the statutory inclusion statement in the National Curriculum (DfES/QCA, 1999) and the inspection of educational inclusion by Ofsted (Ofsted, 2000). Further support to the development of inclusion in England has been provided by the circulation, by the Department for Education and Skills, of copies of the *Index for Inclusion* (CSIE, 2000) to every maintained school. The Index supports schools in reviewing their policies, practices and procedures and developing an inclusive approach.
- 3.21 Other changes to the SEN framework increase parents' access to information from the school and to information and advice through parent partnership services arranged by the local education authority. These arrangements are designed to support parents in working in partnership with schools and local education authorities to determine how their child's SEN should be met.

s 1 SEN and
Disability
Act 2001

3

s 317A
Education Act
1996

s 332A
Education Act
1996

- 3.22 Within this framework, which increasingly emphasises inclusion and parental participation, the SEN duties require local education authorities, maintained schools and others to identify, assess and make provision for children's special educational needs. The SEN Codes of Practice in England and the SEN Code of Practice for Wales support schools and local education authorities in interpreting their duties under the SEN framework.
- 3.23 The disability duties in Part 4 of the Disability Discrimination Act are designed to dovetail with existing duties under the SEN framework. This Code of Practice does not focus on the SEN framework, but refers across to it. It takes account of the guidance on the SEN duties and complements it by providing guidance on the disability discrimination duties in education.

Complaints and appeals

- 3.24 If parents are not satisfied with the provision that a school makes to meet their child's special educational needs, parents can complain to the school. If parents do not agree with decisions made by the local education authority about the nature of their child's needs or about how their child's needs should be met, parents have a right of appeal to the SEN and Disability Tribunal. See **Appendix Three** for useful publications.

4

The duties: who is covered, who is responsible, what activities are covered

This chapter sets out the practicalities of the disability discrimination duties as they apply to schools. It explains:

- who is covered;
- who has responsibility for the duties;
- what provision is covered; and
- what activities are covered.

Who is covered by the duties?

- 4.1 Disabled pupils and disabled prospective pupils are covered by the duties in the Disability Discrimination Act. Education legislation defines who is a pupil and the Disability Discrimination Act 1995, the Act, defines who is a disabled person.
- 4.2 Section 1 of the Act provides the definition of a disabled person that applies to all the duties in the Act. A disabled person is defined as someone who has a physical or mental impairment which has an effect on his or her ability to carry out normal day-to-day activities. The effect must be:
- substantial (that is more than minor or trivial); and
 - long-term (that is, has lasted or is likely to last for at least a year or for the rest of the life of the person affected); and
 - adverse.

s 135(1) Education (Scotland) Act 1980, and s 3(1) Education Act 1996
s 1

4.3 Physical or mental impairment includes sensory impairments and also hidden impairments (for example, mental illness or mental health problems, learning difficulties, dyslexia and conditions such as diabetes or epilepsy). People who have had a disability within the terms of the Act in the past continue to be protected from discrimination even if they no longer have the disability. People with severe disfigurements are also covered.

4.4 For a fuller understanding of the concept of disability under the Act, see **Appendix One**. A publication available from The Stationery Office, *Guidance on matters to be taken into account in determining questions relating to the definition of disability*, provides additional help in understanding the concept of disability and in identifying disabled persons. Where relevant, the *Guidance* will be taken into account in any legal proceedings. (**Appendix Three** gives details of where to get copies of publications.)

4.5 It is only disabled pupils and disabled potential pupils who are covered by the duties in the Act. It will be for the SEN and Disability Tribunal and admissions and exclusions appeals panels, in England and Wales, and for the Sheriff Court, in Scotland, to determine whether or not a child has a disability for the purposes of the Act.

4.6 The early experience of the introduction of Parts 2 and 3 of the Act, relating to employment and to the provision of goods and services, respectively, was that many of the cases brought turned on the question of definition. This Code cannot determine which pupils have or do not have a disability but the following considerations may be relevant:

- a child may have significant behaviour difficulties and these may relate to an underlying physical

or mental impairment which amounts to a disability as defined by the Act. If they do, the child will be covered by the Act by reason of the underlying impairment. The importance of schools seeking to identify any underlying impairment is highlighted in **Chapter 7** of this Code;

- in addition, a behaviour difficulty may arise from a mental illness. The Act says that mental impairments resulting from or consisting of a mental illness are not covered by the legislation unless that illness is clinically well-recognised, that is, 'recognised by a respected body of medical opinion.' It is therefore likely that, in respect of such illnesses, the extent to which a condition is well-recognised will determine whether or not a child has a disability, for the purposes of the Act;
- where a child has a behaviour difficulty for a reason other than a disability, for example arising from social or domestic circumstances, it is likely that such a difficulty is not covered by the legislation.

4.7 The examples used in the Code all assume a disability that would come under the definition of disability in the Act.

Disabled pupils and special educational needs

4.8 Disabled pupils may also have special educational needs as defined by:

- the Education (Scotland) Act 1980; or
- Part 4 of the Education Act 1996.

4.9 This issue was considered briefly in **Chapters 2 and 3** where the SEN framework was discussed. It should be borne in mind that a pupil with a

disability has a special educational need if they need any special educational provision to be made for them to enable them to access school education. In the light of the discussion above, it is important to recognise that a pupil may have a behaviour difficulty that amounts to a special educational need, but may not have a disability as defined by the Disability Discrimination Act.

- 4.10 Pupils may have either a disability or special educational needs or both. The SEN framework is designed to make the provision to meet special educational needs. The disability discrimination duties, as they relate to schools, are designed to prevent discrimination against disabled children in their access to education.

What provision is covered?

- 4.11 Education provided at all schools in Scotland, Wales and England is covered by the duties in Part 4 of the Act. This includes independent and publicly-funded schools, mainstream and special schools. It includes primary and secondary schools, non-maintained special schools and pupil referral units.
- 4.12 All local education authority and education authority maintained nursery schools and nursery classes and nursery provision at independent schools and grant aided schools are covered by Part IV. There are many private, voluntary and statutory providers of nursery education that are not constituted as schools. From September 2002, education provided in these settings is covered by duties in Part 3 of the Act. Childcare in these

settings is already covered by Part 3 of the Act. More information is provided on these duties in **Chapter 10** of this Code.

- 4.13 Further and higher education are covered by separate duties. The 'post-16' duties include any sixth-form (sixth year in Scotland) provision that is not made at a school. Information and guidance on the 'post-16' duties is provided in a separate Code of Practice.

Who is responsible for the schools' duties?

- 4.14 Those responsible for the duty not to discriminate in school education vary depending on:

- whether the school is in Scotland, or England and Wales;
- the type of school.

- 4.15 For any school, the body that has responsibility under the duties is called the 'responsible body.' In general, the term 'responsible body' is used throughout the Code. However, much of the Code is illustrated with examples of what might and might not constitute disability discrimination in school education. In the examples and in the discussion of the examples the terms 'school' and 'schools' duties' are used because school is where pupils are and that is where the examples arise. Responsibility lies with the responsible body.

- 4.16 Tables 1 and 2, below, show who is the responsible body for different types of school in Scotland (Table 1) and England and Wales (Table 2):

TABLE 1: RESPONSIBLE BODIES IN SCHOOLS IN SCOTLAND

Type of school	Responsible body
School managed by an education authority	The education authority
Independent school	The proprietor*
Self-governing school	The board of management
Grant-aided school **	The managers of the school

* Those responsible for the management of the school depending on the type of school.

** A grant-aided school is one that is receiving grants under section 73(c) or (d) of the Education (Scotland) Act 1980.

TABLE 2: RESPONSIBLE BODIES IN SCHOOLS IN ENGLAND AND WALES

Type of school	Responsible body
Maintained school	The governing body, in general, but see below***
Pupil referral unit	The local education authority
Maintained nursery school	The local education authority
Independent school	The proprietor****
Special school that is not maintained by a local education authority	The proprietor****

*** The responsible body in maintained schools varies according to who has the general responsibility for that function in education, that is, admissions, 'education and associated services', or exclusions. The governing body will generally be the responsible body for a maintained school, except for governance of maintained nursery schools and pupil referral units and admissions to community schools, where the LEA has responsibility.

**** The Education Act 1996 says that the proprietor is the person or the group of people responsible for the management of the school. This will vary according to the type of school but would include the trustees, the governing body, the private owner or the management group of the school.

- 4.17 Generally, responsible bodies will not be those working in schools on a day-to-day basis. Responsible bodies will need to take steps to ensure that employees and those working with the school's authority:
- can support the responsible body in meeting their duties to disabled pupils; and
 - do not act in such a way as to render the responsible body liable to a claim of discrimination.
- 4.18 A claim of discrimination cannot be made against an individual working at the school or with the authority of the school. The responsible body is responsible for the actions of employees and for anyone working with the authority of the school, for example, volunteer helpers (including parents), teachers from support services, those providing school meals, after-school clubs, or any other service that is included in the broad definition of 'education and associated services' (see 4.23).
- 4.19 Where the school has a contract with someone to provide a service at the school, the responsible body will need to ensure that the service is provided with due regard to the duties of the responsible body under Part 4 of the Act. **Chapter 10** provides more detail on contracts and the duties under Part 4 of the Act.

What activities are covered by the schools' duties?

- 4.20 Every aspect of school life is covered by the duties. Responsible bodies must not discriminate:
- in relation to admissions;
 - in relation to education and associated services; or
 - by excluding a pupil.
- 4.21 This chapter considers what is covered by these three areas. This should be read with a full understanding of what discrimination is. **Chapters 5 and 6** set out what is meant by discrimination.

Admissions

- 4.22 Three distinct aspects of admission are covered by the duties. Responsible bodies must not discriminate against a disabled person:
- in the arrangements that they make for determining admission of pupils to the school. This includes any criteria for deciding who will be admitted to the school when it is over-subscribed, and it includes the operation of those criteria;
 - in the terms on which the responsible body offers pupils admission to the school;
 - by refusing or deliberately omitting to accept an application for admission to the school from someone who is disabled.

Education and associated services

- 4.23 'Education and associated services' is a broad term that covers all aspects of school life. This list exemplifies the range of activities that may be covered by the term 'education and associated services':

- preparation for entry to the school
- the curriculum
- teaching and learning
- classroom organisation
- timetabling
- grouping of pupils
- homework
- access to school facilities
- activities to supplement the curriculum, for example, a drama group visiting the school
- school sports
- school policies
- breaks and lunchtimes
- the serving of school meals
- interaction with peers
- assessment and exam arrangements
- school discipline and sanctions
- exclusion procedures
- school clubs and activities
- school trips
- the school's arrangements for working with other agencies
- preparation of pupils for the next phase of education.

4.24 This list is not exhaustive, nor is it intended to be. Part 4 covers all education and associated services that are for pupils and prospective pupils. It does not include other services that are provided to the public. These are covered by Part 3 of the Act. Where, for example, the school holds an open day, the parent teacher association holds a car boot sale, or the governing body holds a public meeting,

such activities are covered by Part 3. The Stationery Office has published a Code of Practice which explains the duties in Part 3 of the Act, *Rights of Access to Goods, Facilities, Services and Premises*.

s 28A (3)

- 4.25 The Secretary of State has powers under the Act to issue regulations about what is and is not education or an associated service. The Secretary of State would issue regulations if it were considered necessary to clarify the position of any service, to make it clear whether it was covered by Part 3 or Part 4 of the Act.
- 4.26 In some areas of school life the duties on responsible bodies will overlap with other duties on other bodies: for example, providers of health services, who have duties under Part 3 of the Act. Responsible bodies have to make sure that they fulfil their responsibilities, regardless of duties on other bodies.

Exclusions

- 4.27 The duties make it unlawful for a responsible body to discriminate against a disabled pupil by excluding him or her from the school for a reason related to the pupil's disability. This would be less favourable treatment, (**see Chapter 5**). The duties apply to exclusions whether they are:
- in Scotland, temporary exclusions or exclusion/removal from register;
 - in England and Wales, permanent or fixed-term exclusions.

5

What is discrimination? Less favourable treatment

This chapter explains what is meant by the duty not to treat disabled children less favourably. It sets out the three questions to be asked in determining whether less favourable treatment amounts to unlawful discrimination.

This chapter in context

5.1 Part 4 of the Disability Discrimination Act 1995, as amended, makes it unlawful for a responsible body for a school to discriminate against a disabled child:

- in relation to admissions;
- in relation to education and associated services;
or
- by excluding a pupil.

5.2 In summary, discrimination against a disabled child can occur in two possible ways. Discrimination is either:

- treating a disabled pupil or prospective pupil less favourably, for a reason relating to his or her disability, than someone to whom that reason does not apply, without justification; or
- failing to take reasonable steps to ensure that disabled pupils or prospective pupils are not placed at a substantial disadvantage in

comparison with their non-disabled peers without justification. This is known as the reasonable adjustments duty.

5.3 The duty not to treat a disabled pupil less favourably and the duty to make reasonable adjustments are the two core duties that lie at the heart of the disability discrimination provisions in education. This chapter explains the less favourable treatment duty in greater detail. *Chapter 6* explains the reasonable adjustments duty more fully. There are circumstances in which less favourable treatment or the failure to make reasonable adjustments may be justified. These circumstances are discussed in relation to each duty.

5.4 It is important that *Chapters 5 and 6*, which look at the core duties, are read in the context of the whole Code. In particular, these chapters need to be read alongside:

- ***Chapter 4* which explains which children and which activities are covered by the Part 4 duties and who has responsibility for these duties; and**
- ***Chapter 7* which explains the lack of knowledge defence and requests for confidentiality.**

Less favourable treatment

s 28B(1)

5.5 The Act says that the responsible body for a school discriminates against a disabled child if:

- **for a reason relating to the child's disability, it treats him less favourably than it treats, or would treat, others to whom that reason does not apply, or would not apply; and**
- **it cannot show that the particular treatment is justified.**

- 5.6 In effect this means that there are three questions to be asked in determining whether unlawful discrimination, in relation to less favourable treatment, has taken place:
- is the less favourable treatment for a reason that is related to the child's disability?
 - is it less favourable treatment than someone gets if the reason does not apply to him/her? and
 - is it less favourable treatment that can be justified?

Is the less favourable treatment for a reason that is related to the child's disability?

- 5.7 There has to be a link between the reason and the disability. Some examples are set out below:

EXAMPLE 5.7A

A father seeks admission to a primary school for his son, who has epilepsy. The school tells him that they cannot take the boy unless he stops having fits.

In effect, the school is placing conditions on the boy's admission because he might have fits. Having fits is an intrinsic part of the boy's epilepsy. The reason for the less favourable treatment is one that relates to the boy's disability.

EXAMPLE 5.7B

An eleven-year-old girl is admitted to a secondary school. The school wants her to have all her lessons in a separate room in case she frightens other children with her muscle spasms and her involuntary noises.

The reasons for placing the girl in a separate room are the muscle spasms and the involuntary noises. These are an intrinsic part of her disability. The less favourable treatment proposed is for a reason that relates to the girl's disability.

EXAMPLE 5.7C

A pupil with Tourette's Syndrome is stopped from going on a school visit because he has used abusive language in class. The school has a policy of banning pupils from trips and after-school activities if they swear or are abusive to staff.

The reason for not allowing the pupil to go on the school visit is his use of abusive language. His involuntary swearing is a symptom of his Tourette's Syndrome. This is less favourable treatment for a reason that relates to the pupil's disability.

- 5.8 The 'less favourable treatment' duty does not mean that disabled pupils have an excuse for disruptive or anti-social behaviour. There has to be a direct relationship between the reason for the less favourable treatment and the child's disability.

EXAMPLE 5.8A

A school has received a number of complaints from local shopkeepers about the rowdy and disruptive behaviour of some of its pupils. It decides that the pupils in question should be banned from taking part in a school theatre visit because of their behaviour. One of the pupils has a hearing impairment.

The rowdy and disruptive behaviour is not directly related to the pupil's impairment. The ban from the visit may be less favourable treatment, but it is not for a reason related to the pupil's disability.

Is it less favourable treatment than someone gets if the reason does not apply to him/her?

- 5.9 To answer this question, a comparison has to be made between the disabled child, with the reason related to their disability, and other children to whom that reason does not apply. The comparison can be real or hypothetical.
- 5.10 The comparison to be made is probably more easily understood if the examples discussed above are re-examined:

EXAMPLE 5.10A

In the case of the example of the boy with epilepsy, whose admission to the school was going to be conditional on his stopping having fits, the comparison has to be made between the treatment that he got and the treatment someone else got, or would get, if they did not have fits. In this case, other children did not have this condition placed on their admission, nor would they have. So, for a reason that relates to his disability, this boy is being treated less favourably than another child to whom that reason does not apply.

EXAMPLE 5.10B

In the example of the eleven-year-old girl, whose lessons were going to be arranged in a separate room, the reason for the treatment was that her muscle spasms and the involuntary noises that she made might frighten the other pupils. The reason is directly linked to her disability. The treatment that she was to receive has to be compared with the treatment that other pupils would receive who did not have muscle spasms or make involuntary noises. This girl would be isolated from the curriculum and from her peers in a way that others would not. So, for a reason that relates to her disability, this girl is being treated less favourably than another child to whom that reason does not apply.

EXAMPLE 5.10C

In the example of the pupil with Tourette's Syndrome who was banned from a school visit because of abusive language, the reason was directly related to his disability. The comparison has to be made with others who had not used abusive language. In this case, the pupil who used abusive language, which is directly related to his disability, was treated less favourably than pupils who had not used abusive language. So, for a reason that relates to his disability, this boy is being treated less favourably than another child to whom that reason does not apply.

Is it less favourable treatment that can be justified?

- 5.11 Less favourable treatment may be justified. The Act says that less favourable treatment that is justified is not unlawful discrimination.
- 5.12 There are two ways in which less favourable treatment may be justified under the Act:
- it can be justified if it is the result of a permitted form of selection, see 5.18 to 5.23;
 - otherwise it can only be justified if there is a reason which is both material to the circumstances of the particular case and substantial.
- 5.13 It may not be possible to justify less favourable treatment if there are reasonable adjustments that should have been made but were not. Reasonable adjustments are considered in **Chapter 6**.

s 28B (6)

s 28B (7)

s 28B (8)

Justification for a material and substantial reason

- 5.14 For the reason to be material, there has to be a clear connection between the reason that the responsible body gives and the circumstances of the particular case. The reason also has to be substantial, that is, one that is more than minor or trivial.
- 5.15 The examples that were considered against the first two questions earlier in the chapter, paragraphs 5.7 to 5.10, are now considered against the third question, justification.

EXAMPLE 5.15A

In the first example the admission of a boy with epilepsy is made conditional on his stopping having fits. So, for a reason that relates to his disability, this boy is being treated less favourably than another child to whom that reason does not apply. The next question is whether this is justified. The responsible body does not seek to justify the less favourable treatment of the boy and it is likely that it is unlawful discrimination.

EXAMPLE 5.15B

In the example of the eleven-year-old, whose lessons were going to be arranged in a separate room because of her muscle spasms and involuntary noises, is the less favourable treatment justified? The responsible body seeks to justify the less favourable treatment on the basis that the girl might frighten the other pupils. In this case the reason is based on general assumptions about the girl and about the other pupils and is unlikely to constitute a material and substantial reason. This is likely to be unlawful discrimination.

EXAMPLE 5.15C

In the example of the pupil with Tourette's Syndrome who was banned from a school visit because of abusive language, is the less favourable treatment justified? In this case the responsible body might argue that the inclusion of the disabled pupil on the visit would make the maintenance of discipline impossible. This may constitute a material and substantial reason.

However, the responsible body would need to have considered the extent to which the disabled pupil's behaviour could have been managed. It would also need to have considered whether reasonable adjustments could have been made to its policies and procedures before it could attempt to justify less favourable treatment.

Were there reasonable adjustments that could have been made?

- 5.16 A further consideration in justification is whether there may be reasonable adjustments that the responsible body could have made. The Act says that a responsible body cannot justify less favourable treatment if there is a reasonable adjustment that should have been made but wasn't (unless the reasonable adjustment would have made no difference in the particular case). Reasonable adjustments are considered in more detail in **Chapter 6**.

EXAMPLE 5.16A

In the case of the pupil with Tourette's Syndrome there were reasonable adjustments that were normally in place; the introduction of new ideas was carefully managed, as were time pressures. Left unmanaged, both of these tended to exacerbate the effects of the pupil's impairment. In this case, a supply teacher was taking the class and failed to make the adjustments that were normally made. Reasonable adjustments might have been made but were not, and therefore the responsible body is unlikely to be able to justify the less favourable treatment.

Some further examples considered

- 5.17 Some further examples are set out below to illustrate the questions that need to be considered in determining whether a disabled pupil or potential pupil has been unlawfully discriminated against by being treated less favourably.

EXAMPLE 5.17A

A mother seeks admission to a nursery school for her son who has Hirschprung's disease. The school explains that they could not admit him until he is toilet trained. That is their policy for all children.

Is this less favourable treatment for a reason related to the pupil's disability?

The child has difficulty in establishing bowel control as a consequence of having Hirschprung's disease, so the reason given is related to the child's disability.

Is it less favourable treatment than someone gets if the reason does not apply to him or her?

The treatment he receives has to be compared with a child to whom that reason does not apply, that is, the comparison is with a child who is continent. A child who is continent is not asked to delay admission to the school. It is less favourable treatment than is given to a child who is continent.

Is it justified?

In this case the decision was not based on any assessment of the circumstances of the particular case but on a blanket policy and so there is unlikely to be a material and substantial reason. It is likely that this is unlawful discrimination.

EXAMPLE 5.17B

Some pupils from a special school are going to the theatre. The school does not offer the trip to a pupil with learning difficulties on the basis that he would not understand the play.

Is this less favourable treatment for a reason related to the pupil's disability?

The reason for not offering the boy the opportunity to go on the trip is his limited understanding which is directly related to his disability.

Is it less favourable treatment than someone gets if the reason does not apply to him or her?

The treatment that he was to receive has to be compared with the treatment that other pupils would receive who did not have limited understanding. They were being offered the trip.

Is it justified?

The reason for not offering the trip was an assumption that the boy would not understand the play. This was a general assumption and not a material reason. This is likely to be unlawful discrimination.

EXAMPLE 5.17C

A pupil with cerebral palsy who uses a wheelchair is on a trip with her class to an outdoor activity centre. The teachers arrange to take the class on a 12-mile hike over difficult terrain but, having carried out a risk assessment, they decide that the pupil who uses a wheelchair will be unable to accompany her class, for health and safety reasons.

Is the less favourable treatment for a reason that is related to the pupil's disability?

This is less favourable treatment for a reason that relates to the pupil's cerebral palsy, namely the use of a wheelchair.

Is it less favourable treatment than someone gets if the reason does not apply to him or her?

The treatment that she was to receive then has to be compared with the treatment that the others would receive who did not use a wheelchair. They were being offered the opportunity to go on the hike whereas this pupil was being denied it.

Is it justified?

The responsible body is likely to be able to justify the less favourable treatment for a material and substantial reason: a risk assessment, carried out in relation to this particular pupil in the particular setting in which she would have to travel, indicated that the health and safety of the pupil, and her classmates, could be jeopardised if she were to attempt the hike. This is likely to be lawful.

EXAMPLE 5.17D

At the end of a lesson, homework, is written on the board. A pupil with dyslexia is unable to copy it down in the time. He is given a detention for not doing his homework.

Is this less favourable treatment for a reason related to the pupil's disability?

The reason for the detention is the failure to do the homework. This relates to his inability to write it down in the time available, which is a part of his disability.

Is it less favourable treatment than someone gets if the reason does not apply to him or her?

The treatment that he received has to be compared with the treatment that other pupils received who had done their homework. They were not being given a detention.

Is it justified?

There was a general assumption on the part of the teacher that all the pupils would be able to write down the homework in the time at the end of the lesson. It is unlikely that there is a material and substantial reason to justify the less favourable treatment. In addition, it is likely that there are reasonable adjustments that could have been made, (see **Chapter 6**), for example, more time could have been provided. The detention is likely to amount to unlawful discrimination.

EXAMPLE 5.17E

A pupil with autism goes to the front of the dinner queue. A teacher standing nearby tells him not to 'barge in'. The pupil becomes anxious but does not move. The teacher insists that the pupil must not 'jump the queue'. The pupil becomes more anxious and agitated and hits the teacher. The pupil is excluded temporarily from the school.

Is the less favourable treatment for a reason related to the pupil's disability?

The reason for the exclusion, hitting the teacher, may be related to the pupil's disability. Particular features of his autism are that he has difficulty in managing social situations, he has difficulty in understanding the purpose of a queue, he has

difficulty in understanding figurative language, such as 'barge in' and 'jump the queue,' and he has difficulty in managing escalating levels of anxiety. If the hitting is related to these features of his autism, then the less favourable treatment, the exclusion, is for a reason related to the pupil's disability.

Is it less favourable treatment than someone gets if the reason does not apply to him or her?

It is less favourable treatment than someone would get if they had not hit the teacher.

Is it justified?

The less favourable treatment is likely to be justified in terms of the order and discipline in the school. Any assault is likely to constitute a material and substantial reason justifying exclusion. However, there may be reasonable steps that might have been taken to prevent the incident happening in the first place.

For staff there might have been training:

- about autism and how the disability manifests itself;
- on strategies to avoid difficulties, for example, avoiding negative instructions and symbolic language such as 'barging in' and 'jumping the queue', and
- on strategies to overcome difficulties if they do arise.

For the pupil there might have been:

- particular training for social situations, such as queuing;
- the development of strategies for communicating that he is upset or confused.

If reasonable steps of this type could have been taken but were not, it may not be possible for the school to justify the exclusion. If steps of this type were taken but the incident still happened, the school is likely to be able to justify the exclusion.

Permitted forms of selection

- 5.18 A school may be justified in treating a disabled child less favourably if it is as a result of a permitted form of selection. Permitted forms of selection provide justification for less favourable treatment for a reason related to the child's disability. However, the operation of the selection procedures themselves is covered by the duties. Permitted forms of selection vary depending on the type of school and whether the school is in England, Wales or Scotland.

Permitted forms of selection in maintained schools in England and Wales

- 5.19 The *Code of Practice on School Admissions (1999)* published by the Department for Education and Skills provides guidance to the admissions authorities for maintained schools in England. The Admissions Code of Practice sets out the circumstances in which the admissions authority for a school may operate selective criteria:
- grammar schools may select their intake;
 - specialist schools may give priority in their admissions criteria to a proportion of pupils who show a particular aptitude for the subject in which the school specialises.

- 5.20 *The School Admissions Welsh Office Code of Practice (April 1999)* provides equivalent guidance for admissions authorities for maintained schools in Wales. In practice there are no grammar schools in Wales and only one school remaining which selects some pupils on the basis of their ability (partial selection). There are also no specialist schools which select on the basis of aptitude.
- 5.21 Subject to the laws on sex and race discrimination, independent schools in England and Wales may decide on their own selection criteria. Independent schools may select on the grounds of ability and aptitude.

Permitted forms of selection in Scotland

- 5.22 In Scotland, education authority schools may only select pupils for admission if such arrangements have been approved by Scottish Ministers. Subject to the laws on sex and race discrimination, independent schools and self-governing schools may select on grounds of ability and aptitude.

Permitted forms of selection, some examples considered

- 5.23 Examples below illustrate justification and permitted forms of selection.

EXAMPLE 5.23A

An eleven-year old girl with learning difficulties applies to go to a school that selects its intake on the basis of academic ability. She fails the entrance test. She is refused admission.

The refusal to admit the girl is based on her performance in the test. Her performance in the test is related to her learning difficulties, so this is less favourable treatment for a reason that relates to the child's disability. The treatment that she received has to be compared with the treatment that other children received who have passed the test. The treatment was less favourable as she was refused admission. However, the school has operated its selective criteria objectively and the less favourable treatment is likely to be justified because it is the result of a permitted form of selection. This is likely to be lawful.

EXAMPLE 5.23B

The parents of a twelve-year-old boy apply for him to go to an independent school. He passes the entrance test, but when the school hears that he has learning and behaviour difficulties they refuse him admission.

This boy is turned down for admission because the school hears that he has learning difficulties and behaviour difficulties that are directly related to his disability. The reason is related to his disability. Because the treatment is less favourable than it is for someone who does not have learning and behaviour difficulties that are directly related to their disability, this is unlikely to be justified, as his treatment is not as a result of a permitted form of selection. The boy had already passed the entrance test.

