

Introduction

Education authorities have had legal duties under the Disability Discrimination Act 1995 (DDA) since 1996 concerning employment and the provision of goods, facilities and services to the public, even though the provision of education and related services was originally excluded.

For further information concerning these duties in Parts 2 and 3 of the DDA see “What the Disability Discrimination Act 1995 (DDA) means for Schools and LEAs: DfEE Circular 20/99” .

Education authorities will continue to have these duties. In addition, from September 2002, it will be unlawful for any school to discriminate against disabled pupils (current or prospective), under the Special Educational Needs and Disability Act 2001 (SENDA). This act amends Part 4 of the DDA.



The new law will work together with the special educational needs framework and new planning duties under the Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002 (See pages 14–17 for more information on this).

The first part of this booklet is a summary of schools' duties. The second part makes suggestions for implementing the new law.

Section One: The new duties

What does the new law cover?

From September 2002, it will be against the law for schools to discriminate in:

- admissions
- education and associated services
- exclusions.

Who is responsible for the new duties?

All schools are covered, including independent schools, local authority mainstream and special schools, nursery, primary and secondary schools, grant-aided schools and self-governing schools. The "responsible body" for a school is ultimately liable and responsible for the actions of all employees and any agents.

Responsible bodies

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

For ease, this document will refer to schools throughout but it is important to note that the responsible body is ultimately liable.

Admissions

Responsible bodies must not discriminate against a disabled pupil:

- in the way they decide who can get into the school. This includes any criteria when it is over-subscribed, and the way it operates those criteria
- in the terms for offering pupils a place at the school
- by refusing or deliberately not accepting an application from a disabled pupil for admission to the school.

Education and associated services

The Act covers all education and associated services for pupils and prospective pupils – in essence, all aspects of school life, including extra-curricular activities and school trips.

Exclusions

It is against the law to discriminate against a disabled pupil by excluding him or her from the school because of their disability. This applies to exclusions whether they are permanent or fixed-term.

How is discrimination defined under the new law?

A disabled pupil can be discriminated against in two ways: less favourable treatment or failing to make a “reasonable adjustment”.

Less favourable treatment

If a school treats a disabled pupil or prospective pupil less favourably than another because of his or her disability without justification, they may be breaking the law.

Example 1:

Parents who want their daughter with epilepsy admitted to a primary school are told that the school cannot take her unless she stops having fits. This may be deemed less favourable treatment for a reason related to the child’s disability and may be against the law.

Example 2:

A disabled boy is admitted to a secondary school. The school wants him to have all his lessons in a separate room in case other children are frightened by his muscle spasms and involuntary noises. This may be deemed less favourable treatment for a reason related to his disability and may be against the law.

Justification for less favourable treatment

In some cases, the school can treat a disabled pupil “less favourably” if it can provide justification that is both “material” and “substantial” to the particular case.

Example 1:

A pupil with cerebral palsy who uses a wheelchair is on a trip with her school to an outdoor centre. The teachers arrange for the school children to go on a 12-mile hike over difficult terrain, but having arranged for a detailed risk assessment to be carried out, it is clear from the assessment that, the disabled pupil should not go on the hike for health and safety reasons. In this case, the school may be able to justify the less favourable treatment.

Less favourable treatment can also be justified if it is the result of a permitted form of selection.

Failing to make a “reasonable adjustment”

Schools should also take “reasonable steps” to make sure that disabled pupils are not put at a “substantial disadvantage” compared to non-disabled pupils.

What is a “substantial disadvantage”?

The school needs to take account of a number of factors. These might include:

- the time and effort that the disabled child might need to expend;
- the inconvenience, indignity or discomfort a disabled child might suffer;
- the loss of opportunity or lack of progress that a disabled child may make compared to other non-disabled children.

Examples of failing to make a reasonable adjustment:

- a secondary school does not make special arrangements for disabled pupils who are taking public exams
- a deaf pupil who lip-reads is at a disadvantage because teachers continue speaking while facing away from him to write on a whiteboard
- a pupil with severe dyslexia is told she cannot have her teacher's lesson notes, and that she should be taking notes during lessons "like everyone else".

What is "reasonable"?

The Act does not define "reasonable" – this depends on individual cases and will be a matter for the court to decide. However schools can take account of the:

- need to maintain academic and other standards
- money available
- practicalities of making the particular adjustment
- health and safety of the disabled pupil and others
- interests of other pupils.

Justification for failing to take "reasonable steps"

Not taking "reasonable steps" to avoid putting pupils at a substantial disadvantage can only be justified if there is a reason which is both material and substantial to the particular case.

When do schools need to take action?

Schools have a duty to all disabled pupils and potential pupils, not just individuals. Schools cannot wait until a disabled pupil has arrived before making adjustments as they may find themselves already in breach of the law. They need to think ahead to what they might need to do, and should keep policies under review to ensure that they do not discriminate against disabled children. Initial action is needed in advance of the duties taking effect in September 2002.

Two key tests to consider might be to ensure that:

- a) policies, procedures and practices are not in themselves discriminatory

- b) that they provide the school with the flexibility required to respond to individual needs.

Schools are advised to take steps to find out whether children being admitted to their school or existing pupils have a disability.

Some practical suggestions for action are provided later in this booklet.

Do schools need to provide “auxiliary aids or services” under the DDA?

No. The special educational needs (SEN) framework is designed for this. Schools’ duties under the DDA are designed to sit alongside the SEN framework and are not an additional route of access to auxiliary aids and services. If a pupil requires auxiliary aids and services such as sign language interpreters or information in Braille this should be provided under the SEN framework.

Do schools need to make “reasonable adjustments” to buildings and the physical environment?

Schools do not have to remove or alter physical features under SENDA. However, the Education (Disability Strategies and Pupils’ Educational Records) (Scotland) Act 2002 places a duty on responsible bodies to prepare and implement accessibility strategies.

Accessibility strategies should plan proactively to improve over time access to education for disabled pupils in the following areas:

- improving access to the curriculum
- improving the physical environment of the school(s) to increase access to education and associated services
- improving communication with disabled pupils .

All strategies must be sent to the Scottish Executive, who may use this to look into complaints made to them by individuals or organisations that the responsible body is failing to comply with the legislation.

Guidance on this piece of legislation will be available from the Scottish Executive

Who has rights under the new law?

The Disability Discrimination Act 1995 (DDA) defines a disabled person as:

“someone who has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.”

This definition covers pupils with physical (including sensory) or mental impairments. The definition is broad and might include

children with a learning disability, sensory impairment, severe dyslexia, diabetes or epilepsy, pupils who are incontinent, or who have AIDS, severe disfigurements or progressive conditions like Muscular Dystrophy.



How is this different from special educational needs?

The Education (Scotland) Act 1980 (as amended) states that “special educational needs, in relation to a child or young person, are needs caused by a learning difficulty which he has which calls for provision for special educational needs to be made for him.” Section 1 (5)(d).

The SEN framework is there to identify and meet the special educational needs of children. The duties under the DDA are there to ensure that disabled pupils are not discriminated against and so seek to promote equality of opportunity between disabled and non-disabled pupils.

Many children who have SEN will also be defined as having a disability under the DDA. However, not all children who are defined as disabled under the DDA will

have SEN. For example, those with severe asthma, arthritis, or diabetes may not have SEN, but may have rights under the DDA. Likewise, not all those with SEN have a disability.

If a child has been discriminated against what can the parent or child do?

Children and/or parents can take a case to the sheriff court and/or, with the consent of the responsible body, use the DRC's conciliation service. Responsible bodies can also seek to utilise the DRC conciliation service, with the consent of the child or parents.

It is important that schools have adequate and accessible internal complaints procedures to avoid the need for further action.

Section Two: Implementing the new duties

What sort of action might schools take to prevent discrimination against disabled pupils or prospective pupils?

- Is the “responsible body” aware of its duties under the Disability Discrimination Act?
- Do senior members of staff take their responsibilities under the Act seriously?
- Are all staff aware of the new duties, including managers, teaching staff, learning support assistants, catering staff, caretakers and others involved in providing or supporting learning?
- Are you sure that the policies covering admissions, education and associated services, and exclusions might not put disabled children at a substantial disadvantage?

- Has the school begun auditing to ensure that it will not discriminate against disabled pupils or prospective pupils?
- Does the school have an action plan identifying the “reasonable adjustments” it plans to make to comply with the new law?
- Has the school held training on the new law and/or broader issues of disability equality?
- Are there enough procedures in place to ensure that discrimination by staff will be picked up on and dealt with properly?
- Do the school’s general plans take account of the need to make “reasonable adjustments”?
- Has the school an adequate and accessible internal complaints procedure?

Educating for Equality

The Disability Rights Commission is campaigning to improve choice and opportunities for disabled children and their parents in education.

For more information about the DRC Educating for Equality campaign or to become involved please contact our Helpline.

Further information and advice

For further information on disability and discrimination, including the Schools Code of Practice (which will be available from 2nd July 2002) contact the DRC Helpline (see back cover for contact details).

For further information on special educational needs contact:

✉ Enquire
The national independent information and advice service for special educational needs
Children in Scotland
Princes House
5 Shandwick Place
Edinburgh EH2 4RG

☎ Helpline 0131 222 2400
Textphone 0131 222 2439
Typetalk 0800 959 598
Fax 0131 228 9852

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