

Disability Law Service

Offering free, confidential legal advice and
representation for disabled people

**Support for Disabled Children and
Children with Special
Educational Needs**

Disability Discrimination in Schools

Support for Disabled Children and Children with Special Educational Needs

Disability Discrimination in Schools

Background

Since 1 September 2002 it has been unlawful for all schools in England, Wales, Scotland and Northern Ireland to discriminate, without justification, against disabled pupils and prospective pupils. Any sixth-form provision that is not made at a school is covered by separate 'post-16' duties. For more information, please see our factsheet entitled 'Disability Discrimination in Further and Higher Education'.

The provision of educational aids and services for children with special educational needs continues to be made within the Special Educational Needs Framework, through support offered to a child at School Action and School Action Plus or set out in a Statement of Special Educational Needs. For more information about the Special Educational Needs Framework, please see our separate factsheet entitled 'Special Educational Needs and your Child – An Introduction'.

Which pupils count as disabled?

- those who have '*a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities*'. (section 1(1) Disability Discrimination Act 1995).

physical impairments include sensory impairments, medical conditions and severe disfigurements.

mental impairments include learning difficulties

substantial means more than minor or trivial.

long-term means the impairment must have lasted or be expected to last for at least 12 months or for the rest of the life of the person affected. Recurring conditions are covered if the impairment remains and its substantial adverse effect recurs at least once in 12 months or more after the initial occurrence.

Those whose impairment consists of a severe disfigurement are treated as having a substantial effect on their ability to carry out day-to-day activities.

Cancer, Multiple Sclerosis and HIV infection are deemed to be disabilities from the date of diagnosis, irrespective of whether they have started to have an effect.

For those with other progressive conditions, e.g. muscular dystrophy, they will be considered to have an impairment for the purposes of the Disability Discrimination Act if, as a result of that condition, they have an impairment which has an effect on their ability to carry out day-to-day activities (even where that effect is not substantively adverse), if the condition is likely to result in the impairment having a substantial adverse effect in the future.

When considering the effect an impairment has on a person's ability to carry out day-to-day activities any medication or equipment that a person uses is disregarded, so that the effects of the impairment are considered if that person did not have their medication or use their equipment.

Those who are registered blind or partially sighted are automatically considered disabled for the purposes of the Disability Discrimination Act.

There will therefore be some pupils who have special educational needs but are not disabled for the purposes of this legislation and vice versa.

What activities are covered by the school duties?

admissions – selection criteria, the terms on which a placement is offered and the refusal or deliberate omission of acceptance of a disabled prospective pupil's application.

education and associated services – essentially all aspects of school life, including the curriculum, assessment and exam arrangements, school clubs and trips.

exclusions – permanent or temporary, for a reason related to the pupil's disability.

When does disability discrimination occur?

It can occur in two possible ways:

- if a school treats a disabled pupil less favourably for a reason relating to their disability than a pupil to whom that reason does not apply, without justification. This protection has been severely curtailed by the Courts who

have decided that the child with whom the disabled child should be compared when determining whether or not they have been treated less favourably, is to have all of the attributes of the disabled child, including the needs of the disabled child, but is not to be considered disabled. This reasoning has received much criticism, although it does now reflect the current law.

- if the school fails to take reasonable steps to ensure that a disabled pupil is not placed at a substantial disadvantage compared with those pupils who are not disabled, without justification.

When can less favourable treatment be justified?

- if it is the result of a permitted form of selection, e.g. grammar schools may select their intake and 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.
- if it is for a reason which is both material to the particular circumstances of the case and substantial.

It may not be possible to justify less favourable treatment if there are reasonable steps which the school should have taken but did not.

How should the responsible body of a school approach the duty to take reasonable steps to prevent disabled pupils and prospective pupils being placed at a substantial disadvantage in comparison with those who are not disabled?

- It is an anticipatory duty and responsible bodies should therefore consider on an general basis what reasonable adjustments they can make for disabled pupils generally.
- It is a continuing duty and schools therefore have to keep their policies, practices and procedures under continuous review.
- Discrimination only occurs if the failure to make reasonable adjustments leads to the detriment of an individual child.
- Whether it is reasonable for the school's responsible body to have to take a particular step will depend on a number of factors, including the need to maintain academic and other standards, the school's available financial resources, the cost of taking a particular step and the extent to which it would be practicable to do so.
- A failure to take a reasonable step can only be justified if it is for a reason that is both material to the circumstances of the particular case and substantial. Under this duty, schools (unlike further and higher education institutions) are not required to provide 'auxiliary aids or services' (as these will usually be provided under the Special Educational Needs framework), nor are they required to remove or alter physical features of premises. Instead, both schools and LEAs are now required to draw up accessibility plans and strategies (respectively).

What if the school does not know that a pupil is disabled?

- A school's responsible body may have a defence to a claim of unlawful discrimination if, at the time it discriminated against a disabled pupil or prospective pupil, it did not know, and could not reasonably have been expected to know, that the pupil was disabled.
- If any member of staff has been told that a pupil is disabled, then the school may not be able to rely on this lack of knowledge defence.
- Because of the anticipatory nature of the duty to make reasonable adjustments, many changes will be made without taking into account the needs of individual pupils.
- Schools need to be proactive in seeking out information about their pupils and prospective pupils, in order to avoid being open to the claim that they could reasonably have been expected to know about the child's disability.
- If a parent or a child requests that the nature/existence of the disability be kept confidential, this may limit what the school can do by way of reasonable adjustments and may be a defence to a claim of discrimination.

How to make a claim of unlawful disability discrimination

Special Educational Needs and Disability (SEND) section of the First Tier Tribunal (Health, Education and Social Care Chamber)

- parents have the right to bring a case, not the child.
- claims are made against the school's responsible body, not against an individual member of staff
- a claim of unlawful discrimination must be made to SEND within six months minus one day from the date of the alleged act of discrimination on which

you are seeking to rely.

- the time limit will be extended to eight months minus one day if the dispute is referred to the Commission for Equality and Human Rights' conciliation service (this requires both parties to agree to conciliation and for the Commission to accept the case) before the end of the sixth month period (see below).
- the appeal form is contained in a booklet entitled 'Disability Discrimination in Schools - How to make a claim' available free from SEND on 0870 241 2555.
- if a claim of unlawful discrimination is successful, SENDIST can:-
 - make a declaration that the child has been unlawfully discriminated against;
 - order any remedy it thinks reasonable, such as requiring the Governing Body to write a letter accepting that unlawful disability discrimination has occurred and apologising, requiring disability training for staff, requiring additional tuition for missed lessons, review of school policies etc, with the exception of financial compensation.
 - set deadlines for compliance. If these are not complied with, parents can apply to the Secretary of State for Education for a direction requiring compliance, which can be enforced through the courts if necessary.

Matters outside SEND's jurisdiction

Independent Appeal Panels for admission (AAP's) will hear claims of discrimination in relation to refusals to admit to maintained schools and City Academies.

Independent Appeal Panels for exclusions (IAP's) will hear claims of unlawful discrimination in relation to permanent exclusions from maintained schools and City Academies.

Conciliation

The Commission for Equality and Human Rights runs an independent conciliation service for disputes arising from the schools' duties under the DDA to promote settlement of claims without going to SEND or any other body.

Disputes will only be referred to conciliation if both sides agree.

Victimisation

- counts as unlawful discrimination if it occurs in relation to a school's duties under Part 4 of the DDA.
- discrimination occurs if a person treats the victim (who does not have to be a disabled person) less favourably than they would treat other people in the same circumstances, regardless of disability, because the victim has (or they suspect has or intends to):
 - brought proceedings under the DDA;
 - given evidence or information in connection with such proceedings;
 - done anything else under the Act;
 - alleged someone has contravened the Act.

Statutory Guidance

Code of Practice for Schools, reference COPSH, is available from the Commission for Equality and Human Rights (details at the end of this leaflet).

Other organisations which offer advice/representation on aspects of disability discrimination in schools

The Education Law Association

Executive Officer
33 College Road
Reading RG61QE

Telephone/Fax: **01189 669866**

E-mail: **secretary@educationlawassocation.org.uk**

Provides details of experienced solicitors across the country who are willing to take on legal aid and privately funded cases.

Commission for Equality and Human Rights

England

Equality and Human Rights Commission Helpline

Freepost RRLL-GHUX-CTRX
Arndale House
Arndale Centre
Manchester M4 3AQ

Telephone: **0845 604 6610**

Text: **0845 604 6620**

Fax: **0845 604 6630**

E-mail: **englandhelpline@equalityhumanrights**

Wales

Equality and Human Rights Commission Helpline Wales

Freepost RRLR-UEYB-UYZL

3rd Floor

3 Callaghan Square

Cardiff CF10 5BT

Telephone: **0845 604 8810**

Text: **0845 604 8820**

Fax: **0845 604 8830**

Scotland

Equality and Human Rights Commission Helpline Scotland

Freepost RSAB-YJEJ-EXUJ

Equality and Human Rights Commission

PO Box 26961

Glasgow G2 9DU

Telephone: **0845 604 5510**

Text: **0845 604 5520**

Fax: **0845 604 5530**

The Children's Legal Centre

University of Essex

Wivenhoe Park

Colchester

Essex CO4 3SQ

National Education Line via Community Legal Advice

Telephone: **0845 345 4345**

E-mail: **clc@essex.ac.uk**

IPSEA - Independent Panel for Special Education Advice

6, Carlow Mews
Woodbridge
Suffolk IP12 1EA

Telephone: **0800 018 4016**

Fax: **01394 380 518**

Website: **www.ipsea.org.uk**

Offers a helpline service offering advice on special educational needs and a SEND advice and representation service.

Levenes Solicitors

Education and Disability Department

Ashley House

235–239 High Road

Wood Green

London N22 8HF

Telephone: **0800 11 88 99**

Fax: **020 8889 6395**

E-mail: **info@levenes.co.uk**

Website: **www.levenes.co.uk**

A private firm of solicitors specialising in all areas of Education Law and Disability Discrimination.

Legal Disclaimer

Although great care has been taken in the compilation and preparation of this work to ensure accuracy, DLS cannot accept responsibility for any errors or omissions. All information provided is for education / informative purposes and is not a substitute for professional advice. Any organisations, telephone numbers and links to external web-sites have been carefully selected but are provided without any endorsement of the content of those sites.

This factsheet was updated by:



London and Birmingham based solicitors specialising in Personal Injury, Employment, Education & Disability and Crime.
<http://www.levenes.co.uk/>

Levenes Main Phone: **0800 11 88 99**

For further advice on these matters please contact:

Disability Law Service

Telephone: **020 7791 9800**

Minicom: **020 7791 9801**

Fax: **020 7791 9802**

Email: **advice@dls.org.uk**

Website: **www.dls.org.uk**

Or write to us at: 39 – 45 Cavell Street, London E1 2BP

Community
Legal Service



Registered Charity Number 280805, Company Registration
Number 1408520