

SPECIAL EDUCATIONAL NEEDS AND DISABILITY (NORTHERN IRELAND) ORDER 2005

S.I. 2005 1117

EXPLANATORY MEMORANDUM

INTRODUCTION

1. The Special Educational Needs and Disability (Northern Ireland) Order (“the Order”) was made on 6 April 2005.
2. This Explanatory Memorandum has been prepared by the Departments of Education (DE) and Employment and Learning (DEL) in order to assist the reader in understanding the Order. It does not form part of the Order.

BACKGROUND AND POLICY OBJECTIVES

3. This Order is intended to enact provisions for Northern Ireland similar to those already in existence in England, Scotland and Wales under the Special Educational Needs and Disability Act 2001.
4. This Order will strengthen the right to an ordinary education place for children with Special Educational Needs (SEN) and extend similar provisions to those contained in the Disability Discrimination Act 1995 (DDA) to educational institutions in Northern Ireland for the first time. It will also make it unlawful for general qualifications bodies to discriminate against people with disabilities.

CONSULTATION

5. The Department of Education and the Department for Employment and Learning issued the SEND Bill Consultation Document jointly during 2002-2003. A consultation on this Order was held from 1 April to 28 June 2004. Documentation and further information about the consultations is available at http://www.deni.gov.uk/about/consultation/past_consultation.htm, in hard copy or in alternative formats upon request from the Departments.
6. [Articles 34 to 39](#) were not included in either consultation. These provisions were due to be included in the Disability Discrimination Order. For drafting reasons the provisions have been included in this Order instead. A short consultation was held in January 2005.

MAIN ELEMENTS OF THE ORDER

Part II: Special Educational Needs

7. Part II of the Order makes changes to the existing legislation, in the Education (Northern Ireland) Order 1996 for children with SEN. In summary, Part II:
 - Strengthens the rights of children with SEN to be educated in ordinary schools where parents want this and the interests of other children can be protected;

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- Requires Education and Library Boards (Boards) to make arrangements for services to provide parents of children with SEN with advice and information, and a means of resolving disputes with schools and Boards;
 - Requires Boards to comply, within prescribed periods, with orders of the Special Educational Needs Tribunal for Northern Ireland (SENT) and makes other technical changes in support of the SENT appeals process and the statementing process; and
 - Requires schools to inform parents where they are making special educational provision for their child and allow schools to request a statutory assessment of a pupil's SEN.
8. The SENT, by virtue of the amendments made in Part III of this Order, becomes the Special Educational Needs and Disability Tribunal for Northern Ireland (SENDIST).

Chapter I of Part III: Schools.

9. This Chapter places new duties on Boards and schools (including independent schools) in Northern Ireland. The new duties are explained in the commentary on Articles 13 - 26. What follows is an overview of the new provisions:
- A duty not to treat pupils who have a disability less favourably, without justification, for a reason which relates to their disability;
 - A duty to make reasonable adjustments so that pupils who have a disability are not put at a substantial disadvantage compared to pupils who do not have a disability; and
 - A duty to plan and make progress in increasing accessibility to schools' premises and the curriculum, and in improving ways in which information provided in writing to pupils who do not have a disability is provided to pupils who have a disability.

Chapter II of Part III: Further & Higher Education

10. This Chapter places new duties on further education and higher education institutions. The new duties are explained in the commentary on Articles 27 - 33. What follows is an overview of these new provisions:
- A duty not to treat students with disabilities less favourably, without justification, for a reason which relates to their disability; and
 - A duty to make reasonable adjustments to ensure that people who have disabilities are not put at a substantial disadvantage compared to people who do not have a disability in accessing further and higher education.

Chapter III of Part III: General Qualifications Bodies

11. This Chapter makes it unlawful for general qualification bodies to discriminate against disabled persons in relation to the award of prescribed qualifications.

Chapter IV of Part III: Miscellaneous

12. The powers of the Equality Commission will be extended in relation to the provisions made under this Order.

COMMENTARY ON ARTICLES

13. The Order is in 4 Parts and has 50 Articles and 6 Schedules. A summary follows. Where an Article or part of an Article does not seem to require any explanation or comment, none is given.

Part I – Special Educational Needs

Articles 3 to 12 and Schedules 1 and 2

Article 3: Education in ordinary schools of children with special educational needs

14. This Article replaces the existing Article 7 of the 1996 Education Order and strengthens the right to an ordinary school place for children with SEN. This seeks to enable greater inclusion and safeguard the efficient education of all pupils.
15. The new Article 7(2) ensures that pupils with SEN but without a statement are educated in ordinary schools. The new Article 7(3) ensures that pupils with SEN and a statement are educated in ordinary schools unless this would be incompatible with parental choice or with the provision of efficient education for other children. This means a Board does not have to provide an ordinary place where parents do not want one. In practice, incompatibility with the efficient education of others is likely to be where pupils present severe challenging behaviour that would significantly disrupt the learning of other pupils or place their safety at risk.
16. New Article 7A(1) sets out the exceptional circumstances in which a child with SEN but without a statement can be educated at a special school. This is if they are being assessed for a statement, or their circumstances have changed suddenly and the Board of Governors, parents, the Board and (when the child is admitted for an assessment) those providing advice agree.
17. [Article 7A\(1\)\(b\)](#) provides that regulations can prescribe circumstances in which a child admitted for the purpose of assessment can remain in a special school after the assessment is carried out.
18. [Article 7A\(2\)](#) ensures that the requirement to educate children with SEN in ordinary schools in Article 7 does not affect the parent's right to express a preference for a grant-aided school (paragraph 5 of Schedule 2) or the provision of special education otherwise than in a grant-aided school (Article 10) in the statement.
19. [Article 7A\(3\)](#) makes it clear that if the Board do not name the parent's choice of grant-aided school in a statement their choice of school is governed by the provision of Article 7(3).
20. [Articles 7A\(4\)](#) and [\(5\)](#) further strengthen the right to an ordinary place by requiring a school, in order to demonstrate that inclusion would be incompatible with the efficient education of other children, to show that there are no reasonable steps they could take to prevent the inclusion of a child with a statement from having that effect.
21. [Article 7A\(6\)](#) means that if the Board has named a grant-aided school in a statement the school cannot subsequently rely on the exception in Article 7(3)(b).
22. [Article 7A\(7\)](#) requires Boards of Governors of schools and Boards to heed guidance about Article 7 and Article 7A provided by the Department of Education.

Article 4: Advice and information for parents

23. This Article amends the Education (Northern Ireland) Order 1996 by inserting a new Article 21A to place a duty on Boards to make arrangements for providing information on SEN matters to parents of children in their area who have SEN. The new duty does not mean that Boards will have to provide the services themselves they might decide to contract with a provider from the voluntary sector. In making these arrangements Boards must heed guidance issued by the Department of Education.
24. The revised SEN Code of Practice will give guidance on this service. Boards must publicise to parents and schools in their area the fact that the services are available and must inform other interested parties.

Article 5: Resolution of disputes

25. This Article amends the 1996 Order by inserting a new Article 21B and provides an additional means of resolving disagreements between parents and Boards and/or Boards of Governors of grant-aided schools.
26. Boards are required to appoint an independent person (who is not part of the school or Board decision-making process) to facilitate the avoidance or resolution of disputes. Boards must take heed of any guidance issued by the Department of Education when making these arrangements.
27. Boards must ensure that parents and schools in their area are made aware of the dispute prevention and resolution arrangements. Boards must also inform such other interested parties as they deem appropriate. Parents who take advantage of these new arrangements will not lose any existing legal rights to lodge an appeal with the SENDIST.

Article 7: Appeal against content of statement

28. This Article amends Article 18 of the 1996 Order, giving parents a right of appeal to the Tribunal when a statement of SEN is made, amended, or when a Board determines not to amend the statement following an assessment. This appeal can be against the Board's description of the child's SEN, the SEN provision specified in the statement (including the school named; or if no school is named, that fact).

Article 8: Unopposed appeals

29. This Article amends the 1996 Order by inserting a new Article 18A which applies where a Board decides to concede to a parent who has appealed to the SENDIST.
30. Certain types of appeals are to be treated as determined in favour of the parent where the Board has notified the SENDIST that they are conceding. Where an appeal is treated as determined in favour of the parent, Boards will be required to meet the parents' wishes within a period to be set out in regulations. This applies to appeals against a decision by the Board:
 - Not to make a statement of SEN (under Article 17 of the 1996 Order); or
 - Not to make a reassessment of SEN where the child already has a statement (under Article 20 or 20A of the 1996 Order); or
 - Not to substitute a school named in a statement for a different school named by the parents (under paragraph 11(3) of Schedule 2 of the 1996 Order).
31. Appeals against the contents of statements (under Article 18 of the 1996 Order) and appeals against a decision to cease to maintain a statement (under Schedule 2 of the 1996 Order) have been excluded. This is because in these types of appeal, where the statement could be amended in a number of ways, deciding the appeal without a hearing is not always suitable. These types of appeal, where the Board does not contest them, will go to a hearing at which the parent, but not the Board, will be able to attend.

Article 9: Duty to inform parents where special educational provision made

32. This Article requires the Board of Governors of grant-aided schools (including nursery schools) to inform parents of children without statements of SEN that special educational provision is being made for their child because it is considered that he has SEN.

Article 10: Review or assessment of special educational needs at request of responsible body

33. This Article gives grant-aided schools, (including nursery schools) and independent schools the formal right to ask the Board to carry out a statutory assessment or re-

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assessment of a registered pupil at the school, in cases where no such assessment or re-assessment has taken place within the previous six months.

34. It places a duty on the Board to decide whether to make an assessment or re-assessment in response to a request from a school and to send a notice to the parent informing them that a request from the school has been made; of the procedure to be followed when making an assessment; the name of an officer of the Board who can provide further information, and of their right to make representations and provide written comments within a specified period.
35. Should the Board decide to assess the child's educational needs, Article 20A(7) requires them to notify the child's parent and the school which made the request. If they decide not to make an assessment, they are required to notify the parent and school of that decision, and the reasons for it under Article 20A(8). They also have to inform the parent of his right to appeal to the SENDIST, and give him any further information as required by regulations.

Article 11: Duty to specify named school in statement

36. This Article means the Board does not have to name a school in a child's statement of SEN where the child's parents have made suitable arrangements (typically by paying for a place at an independent school). This potentially frees that place to be taken up by another child.

Article 12: Statements of Special Educational Needs and Schedule 1: Schedule substituted for Schedule 2 to the 1996 Order

37. This Article give parents the right to a meeting with the Board when it proposes to amend their child's statement; and to express a preference for a grant-aided school. It requires Boards to send copies of the proposed statement to grant-aided schools that the Board is considering naming in a child's statement, and to other Boards if those schools are in their areas.
38. Paragraph 11 provides for regulations to be made prescribing the time within which the Board must inform a parent of his right to appeal against the refusal to substitute a grant-aided school named in a statement.
39. Paragraphs 12 and 13 of the new Schedule 2 oblige the Board to continue to maintain a child's statement until the outcome of any appeal against its proposal to cease to maintain that statement is known.

Article 44 and Schedule 5: Minor and consequential amendments

40. This Schedule allows the department to make regulations to prescribe the period within which Boards must provide parents with information about their right of appeal against a decision not to make a statement of SEN for their child (Article 17) or not to comply with a request from a parent to make an assessment or re-assessment (Article 20); and about time limits for serving notices under Articles 17 and 20.

Part Iii – Disability Discrimination in Education

Chapter 1 – Schools

Articles 13 to 26 with Schedule 2

Article 14: Discrimination against disabled pupils and prospective pupils

41. This Article prohibits all schools from discriminating against children who have disabilities in their admissions arrangements, in the education and associated services provided by the school or in relation to expulsions and suspensions from the school.

Article 15: Meaning of “discrimination”

42. This Article defines discrimination. It works in the same way as the definition in Section 5 of the DDA, except in the respects set out below.
43. The reasonable adjustments duty under Article 16 is owed to pupils at large. For the parents of a pupil to bring proceedings it is necessary for them to show that the general duty is breached and that this breach was to the pupil’s detriment. Responsible bodies will not be liable where they do not know (and could not reasonably be expected to know) of a pupil’s or prospective pupil’s disability, in relation to the less favourable treatment duty and the reasonable adjustment duty.
44. Responsible bodies must consider what reasonable adjustments it should make to meet the needs of pupils who have disabilities but it may need to know that a particular pupil had a disability in order to apply a policy to him. A responsible body would not be liable for failure to take a particular step where it did not know and could not reasonably have been expected to know of the disability.

Article 16: Pupils with a disability not to be substantially disadvantaged

45. This Article places an anticipatory duty on schools to take reasonable steps to ensure pupils who have a disability are not placed at substantial disadvantage in comparison to pupils who do not have a disability, in relation to education and associated services provided, and to ensure that prospective pupils who have disabilities are not placed at a substantial disadvantage in relation to admission arrangements. Schools will not be required to make physical alterations or to provide auxiliary aids under this Article.

Article 17: Accessibility strategies of Boards

46. This Article places a duty on Boards to plan to increase accessibility of the curriculum and school premises and to improve the delivery of information which is provided in writing for pupils who do not have a disability, to pupils who have a disability in ways which are determined after taking account of the effects of the disabilities and any preferences expressed by the pupil or their parents.
47. The Board’s accessibility strategy will set out its plans in respect of the controlled schools under its management. The Board can choose the format it feels most appropriate to record its strategy but must have regard to any guidance issued by the Department of Education.

Article 18: Accessibility plans for Schools

48. Independent schools will be required to make a copy of their plans available on request within a reasonable time. Grant-aided schools will have to publish information about their plans in their annual governors’ report.
49. All schools will have to keep their plans under review, and revise them if necessary in light of that review and must allocate adequate resources to implement their plans. Regulations may prescribe the period to be covered by the plan as well as when schools should produce new plans.

Article 19: Duty of Boards not to discriminate

50. This Article makes it unlawful for a Board to discriminate against a pupil or prospective pupil who has a disability in the discharge of its functions.

Article 20: Residual duty: Supplementary provisions

51. This Article imposes duties upon Boards to take reasonable steps to ensure that they do not place pupils (or prospective pupils) with disabilities at a substantial disadvantage

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compared to those without a disability in the discharge of any of their functions under Article 19.

Article 21: Special Educational Needs and Disability Tribunal

52. This Article changes the name of the SENT to the SENDIST and extends its jurisdiction to hear cases of disability discrimination in schools.

Article 22: Jurisdiction and powers of the Tribunal

53. This Article sets out the circumstances in which a parent can make a claim to SENDIST and the powers that SENDIST will have if it finds that there has been unlawful discrimination. The alleged discrimination may be treated as having been done by the responsible body if committed by its employees or agents.
54. Claims of discrimination in relation to expulsions from grant-aided schools will not be made to SENDIST these will be made through expulsion appeals panels. SENDIST will hear claims of discrimination in relation to expulsions from independent schools and claims of discrimination in relation to suspensions from all schools.
55. SENDIST can order any remedy it thinks appropriate with the exception of financial compensation. It will be able to order schools and Boards to take compensatory action to take account of past discrimination. SENDIST will be able to set deadlines when directing action by schools and Boards. If a responsible body fails to comply within the deadlines, the parent can ask the Department of Education to make a direction to require compliance.

Article 25: Role of the Department of Education

56. This Article gives the Department of Education the power to direct a Board or a school if satisfied that they have not complied with; or have acted unreasonably in carrying out, their duties to plan under Articles 17 and 18. It also gives the Department the power to direct Boards and schools if satisfied that they have not complied with, or have acted unreasonably in complying with an order made by SENDIST.

Article 26: Validity and revision of agreements of responsible bodies

57. This Article applies to contracts and agreements with schools, so that any discriminatory terms are made void.

Chapter II – Further and Higher Education Institutions

Articles 27 to 33 with Part II of Schedule 2 and Schedule 3

Article 27: Interpretation

58. This Article defines terms used within Chapter 2. Paragraph 3 defines an "educational institution". The Department for Employment and Learning will have the power to designate additional institutions in Northern Ireland to be covered by this Chapter.

Article 28 Discrimination against disabled students and prospective students

59. This Article makes it unlawful for institutions to discriminate against students who have disabilities in their admission, expulsion or suspension arrangements and in the services they provide to students.
60. Only services provided wholly or mainly for students (described as "student services") are covered by these duties. The Department for Employment and Learning has the power to make regulations to set out which services are covered. (Article 27(2)).

Article 29: Meaning of “discrimination”

61. This Article defines discrimination. Less favourable treatment will be justified if it is necessary to maintain academic standards or other prescribed standards. It may also be justified in certain cases that can be set out in regulations.
62. Responsible bodies will not to be liable where they do not know (and could not reasonably be expected to know) of a person’s disability, both in relation to the less favourable treatment duty and the reasonable adjustment duty. Although the anticipatory nature of the latter duty means that an institution would have to consider what reasonable adjustments it might make generally; it may need to know that a particular student had a disability in order to apply the policy to him.
63. The reasonable adjustment duty under Article 30 is owed to students at large. For a student to bring an action it is necessary for them to show that the general duty was breached and that this breach was to their detriment.

Article 30: Disabled students not to be substantially disadvantaged

64. This Article places a duty on responsible bodies to take reasonable steps to ensure that students who have disabilities are not placed at a substantial disadvantage, in comparison to students who do not have a disability, in their access to education and associated services to students.
65. The duty under this Article is owed at large to students who have disabilities, and will require educational institutions to consider the provision that they make for students who have disabilities generally.

Article 31 and Part II of Schedule 2: Enforcement, remedies and procedures

66. A student who has a disability who has been discriminated against by an educational institution will have a right of redress through the County Court.
67. Where a person who has a disability is both a student at an institution and is also employed by that institution they will have rights under the employment provisions of the DDA, which are enforceable through an industrial tribunal, as well as rights under this Chapter, enforceable through the Courts.

Article 32 and Schedule 3: Occupation of premises by educational institutions

68. These provisions relate to how responsible bodies should comply with their duty to make reasonable adjustments to premises they occupy under a lease.
69. Where the lease of a property forbids an institution from making the alterations needed to comply, or puts conditions on these, it can nonetheless make the alterations if it has the written consent of the owner/lessor; but it must apply to the landlord in writing for consent. The landlord cannot refuse consent unreasonably, although he can attach reasonable conditions. Regulations may outline what will be regarded as withholding consent and when it is reasonable or unreasonable to do so.
70. **Schedule 3** provides for the owner/lessor to be joined in any action against an institution.

Article 33 Validity and revision of agreements of responsible bodies

71. This Article applies to contracts and agreements with further education and higher education providers, so that any discriminatory terms are made void.

Chapter 3 – General Qualification Bodies

Articles 34 to 39

Article 34: General qualifications bodies: discrimination and harassment

72. This Article outlines the circumstances in which it is unlawful for a qualification body to discriminate against a person with a disability when conferring a relevant qualification. A “general qualifications body” does not include responsible bodies within the meaning of Chapters 1 and 2, an Education and Library Board, or such authorities or bodies as may be prescribed in regulations to be made by the Department of Education.

Articles 35 and 36: Meanings of discrimination and harassment

73. These Articles define what is meant by unlawful discrimination and includes unlawful harassment. The application of a competence standard will not amount to less favourable treatment if it is applied equally to all persons and is a proportionate means of achieving a legitimate aim.

Article 37: General qualifications bodies: duty to make adjustments

74. General qualifications bodies must make reasonable adjustments where people with a disability suffer substantial disadvantage in comparison with others. There is no duty to make reasonable adjustments in relation to competence standards. This duty also applies in relation to the physical features of premises occupied by general qualifications bodies.

Article 38: Claims, leased premises and certain agreements

75. This Article provides that regulations may set out how a person with a disability can enforce a claim of unlawful discrimination under Chapter 3. Regulations may make provision about cases where leasehold premises are occupied by qualifications bodies and how the reasonable adjustment duty would impact in this context. Provision is made to prevent contracts or agreements seeking to oust, limit or contravene the substance of Chapter 2A.

Chapter 4 – Miscellaneous

Articles 40 to 48 and Schedule 4

Article 40 and Schedule 4: Extension of role of Equality Commission

76. This Article extends the role of the Equality Commission (EC) to issue non-discrimination notices, make agreements in lieu of enforcement action, apply for an injunction in respect of persistent discrimination and give assistance in relation to proceedings under this Order.

Article 41: Codes of practice

77. This Article allows the EC to prepare Codes of Practice in respect of the new duties in Part III of the Order, apart from those duties which place Boards and schools under a duty to plan.

Article 42: Conciliation for Disputes under this Part

78. This Article extends the EC’s power to make arrangements for the provision of conciliation services.

Article 43: Victimisation

79. This Article provides that a person discriminates against another (who need not be disabled) if he penalises them for bringing proceedings or for giving evidence or information in connection with proceedings under this Order or the DDA; or for doing anything under this Order or the DDA to them or another person or for alleging that they or someone else has contravened this Order or the DDA. Discrimination can still occur where there was only a belief or suspicion that one of the above was done or is intended.

Article 44: Aiding unlawful acts

80. This Article provides that a person who knowingly aids another to do an act, which is unlawful under this Order, will be himself treated as having committed the same kind of unlawful act.

COMMENCEMENT

81. [Articles 41](#) and [42](#) will commence immediately upon approval of the Order by Privy Council. The remainder of the Order will come into force on 1 September 2005.