

# SPECIAL EDUCATIONAL NEEDS AND DISABILITY (NORTHERN IRELAND) ORDER 2005

S.I. 2005 1117

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## EXPLANATORY MEMORANDUM

### COMMENTARY ON ARTICLES

#### 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 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 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

*This Explanatory Memorandum refers to the Special Educational  
Needs and Disability (Northern Ireland) Order 20051117*

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.