

SPECIAL EDUCATIONAL NEEDS AND DISABILITY ACT 2001

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Special Educational Needs

Sections 1 to 10 and Schedules 1 & 8

Section 1: Education in mainstream schools of children with special educational needs

45. The section replaces the existing section 316 EA and strengthens the right to a mainstream place for children with SEN. This seeks to enable greater inclusion and safeguard the efficient education of all pupils.
46. *Section 316(2)* ensures that pupils with SEN but without a statement are educated in mainstream schools. *Section 316(3)* ensures that pupils with SEN and a statement are educated in mainstream schools unless this would be incompatible with parental choice or with the provision of efficient education for other children. This means an LEA does not have to provide a mainstream 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. *Section 316(4)* defines what constitutes a mainstream school. For the purposes of this section, City Technology Colleges (CTCs), City Colleges for the Technology of the Arts (CCTAs) and City Academies (CAs) (which are independent schools) are mainstream schools.
47. The section also inserts a new section 316A in the EA which ensures that the new provisions work alongside the existing provisions of the EA. *Section 316A(1)* allows a child with SEN to be educated at an independent school (whether or not it is a mainstream school), or a non-maintained special school where the LEA are not funding the placement. Without this sub-section parents of children with SEN but without statements would not be able to choose to send their child with SEN to an independent or non-maintained school special school at their own expense. This would be incompatible with the Human Rights Act 1998. *Section 316A(2)* sets out the exceptional circumstances in which a child with SEN but without a statement can be educated at a special school. The section reflects existing arrangements for maintained special schools i.e. children without statements can be placed in special schools if they are being assessed for a statement, or their circumstances have changed suddenly and the head teacher (or governing body in Wales), parents, LEA and (when the child is admitted for an assessment) those providing advice agree, or if a child is in hospital and so is attending a hospital special school. *Section 316A(2)(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. It is envisaged that these regulations will deal with the child's position in the period after the assessment

is carried out but before any decision is taken about whether a statement is necessary, and once any decision about a statement is made.

48. *Sections 316A(3) and (4)* explain how the new section 316 interacts with Schedule 27 to the EA (making and maintenance of statements). *Section 316A(3)* ensures that section 316 does not affect the operation of paragraph 3 of Schedule 27 (parent's right to express a preference for a maintained school) or section 348 (provision of special education at non-maintained schools). LEAs will not be prevented from naming independent or non-maintained special schools in statements by the requirement to educate children with SEN in mainstream schools. Parents continue to have the right to make representations for a non-maintained school to be named in their child's statement and, where the LEA agree, they must fund the placement in a non-maintained school. *Section 316A(4)* makes it clear that if an LEA do not name the parent's choice of maintained school in a statement their choice of school is governed by the provisions of section 316. *Sections 316A(5) and (6)* further strengthen the right to a mainstream place by requiring schools and LEAs, when seeking 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. *Section 316A(7)* means that if an LEA have named a maintained school in a statement (and so the child must be admitted in accordance with section 324) the school cannot subsequently rely on the exception in section 316(3), i.e. that the child's inclusion would be incompatible with the efficient education of other children. *Section 316A(8)* requires schools and LEAs to heed guidance about section 316 and section 316A to be provided by the Secretary of State in England and, in Wales, the NAW. *Section 316A(9)* provides that the guidance must in particular include advice on reasonable steps maintained schools and LEAs should consider to prevent inclusion being incompatible with the efficient education of other pupils. The effect of *Section 316A(10)* is that regulations for Wales made under section 316A will be made by the NAW. *Section 316A(11)* explains what "authority" means in the section.

Section 2: Advice and information for parents

49. This section amends the EA by inserting a new section 332A to place a duty on LEAs to make arrangements for providing information on SEN matters to parents of children in their area who have SEN. These are normally known as parent partnership services. Most LEAs already provide such services but there is no legal requirement on them to do so. The new duty does not mean that LEAs will have to provide the services themselves; they might, for example, decide to contract with a provider from the voluntary sector.
50. In making these arrangements LEAs must heed guidance issued by the Secretary of State or, in Wales, the NAW. The revised SEN Code of Practice will give guidance on parent partnership services. LEAs must publicise to parents and schools, in their area, the fact that the services are available and must inform other interested parties.

Section 3: Resolution of disputes

51. This section amends the EA by inserting a new section 332B and provides an additional means of resolving disagreements between parents and the LEA and/or schools. It also introduces a new mechanism to seek to prevent such disputes. The new arrangements are intended to provide an informal forum for exploring differences, identifying points of agreement and disagreement and to find a way forward that all parties accept. *Section 332B(3)* requires LEAs to appoint an independent person (not part of the school or LEA decision-making process) to facilitate the avoidance or resolution of disputes. In practice, this will often be someone from the voluntary sector. *Section 332B(4)* requires LEAs to take heed of any guidance issued by the Secretary of State or, in Wales, the NAW when making the arrangements. It is intended that Chapter 2 of the revised SEN Code of Practice will provide this guidance.

52. *Section 332B(5)* requires LEAs to ensure that parents and schools in their area are made aware of dispute prevention and resolution arrangements. LEAs must also inform such other interested parties as they deem appropriate. *Section 332B(6)* provides that parents who take advantage of these new arrangements will not lose any existing legal rights to lodge an appeal with the SENT.

Section 4: Compliance with orders

53. This section provides for regulations to be made to prescribe the period within which an LEA must comply with orders of the SENT.

Section 5: Unopposed appeals

54. This section amends the EA by inserting a new section 326A and applies where an LEA decide to concede to a parent who has appealed to the SENT.
55. Certain types of appeals are to be treated as determined in favour of the parent where the LEA has notified the SENT that they are conceding. Where an appeal is treated as determined in favour of the parent, the Tribunal need not make an order. LEAs will be required to meet the parents' wishes within a period to be set out in regulations. The appeals are those against a decision by an LEA:
- not to make a statement of SEN (under s.325 EA); or
 - not to make a reassessment of SEN where the child already has a statement (under s.328 EA); or
 - not to make an assessment of SEN (under s.329 or s.329A EA); or
 - not to substitute a school named in a statement for a different school named by the parents (under paragraph 8(3) of Schedule 27 EA).
56. Appeals against the contents of statements (under s.326 EA) and appeals against a decision to cease to maintain a statement (under paragraph 11 of Schedule 27 to the EA) 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, even if the LEA does not contest them, will go to a hearing at which the parent, but not the LEA, will be able to be present.

Section 6: Maintenance of statement during appeal

57. One of the grounds on which parents can appeal to the SENT is where an LEA proposes to cease maintaining a statement of the child's SEN. This section amends the EA by adding a new sub-paragraph (5) to paragraph 11 of Schedule 27 obliging the LEA to continue to maintain the child's statement until the outcome of this type of appeal is known.

Section 7: Duty to inform parents where special educational provision made

58. This section amends the EA by inserting a new section 317A. This requires governing bodies in respect of community, foundation and voluntary schools, and the LEA (through the head teacher) in respect of Pupil Referral Units (PRUs), 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.
59. The section also amends section 123 of the SSFA so that providers of relevant nursery education are under the same duty. Relevant nursery education is defined in section 123(4) of the SSFA so as to include nursery education provided by the LEA or by any other person who receives financial assistance from an LEA and whose nursery education is taken into account in the LEA's Early Years Development Plan.

60. Although they are not covered by this section, the Government intends that CAs will be required under their funding agreements to inform parents when they are making special educational provision for a child.

Section 8: Review or assessment of special educational needs at request of responsible body

61. This section amends the EA by inserting a new section 329A. This gives maintained schools, maintained nursery schools, nursery education providers (in receipt of financial assistance from LEAs and included in the proposals for providing nursery education in accordance with section 118 of the SSFA in Early Years Development Plans), PRUs, independent schools (including CAs, CTCs and CCTAs) and non-maintained special schools the formal right to ask the LEA to carry out a statutory assessment or re-assessment of a registered pupil at the school to determine whether that child needs a statement of SEN, in cases where no such assessment or re-assessment has taken place within the previous six months. At present only parents have that right.
62. It places a duty on the LEA to decide whether to make an assessment or re-assessment in response to a request from a school and it places a duty on the LEA, before deciding whether to comply with the request, 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 at the LEA who can provide further information, and, of their right to make representations and provide written comments within a minimum of 29 days.
63. Should the LEA decide to assess the child's educational needs, section 329A 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. They also have to inform the parent of his right to appeal to the SENT, and give him any further information required by regulations (which might include details of the conciliation service available under section 332B).

Section 9: Duty to specify named school

64. This section amends the EA by inserting a new section 324(4A) to allow an LEA not to name a particular 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). It avoids, in those circumstances, the LEA naming a school in the child's statement and having to keep open a place for him at that school, where they know that the child will not be attending that school, potentially allowing that place to be taken up by another child.

Section 10 & Schedule 1: Amendment of statement of special educational needs

65. This section amends schedule 27 to the EA to revise the procedures which must be followed by LEAs when making, maintaining and amending statements of special educational needs. It gives parents new rights to a meeting with the LEA when the LEA propose to amend their child's statement; and to express a preference for a maintained school when the LEA propose to amend their child's statement following a reassessment or when changes are proposed relating to the type or name of the school or non-school provision in the statement. It requires LEAs to send copies of proposed statements, proposed amended statements and proposed changes to statements to maintained schools which LEAs are considering naming in a child's statement, and to other LEAs if those schools are in their areas.

Schedule 8: Minor and consequential amendments

66. This Schedule makes a number of amendments to the EA which are minor or consequential, arising from this Act.

67. Paragraphs 6, 7 and 8 amend sections 325, 328 and 329 respectively to provide for regulations to prescribe what information is to be included by the LEA in notices to parents informing them of their right of appeal against a decision:
- not to make a statement of SEN for their child (s.325);
 - not to comply with a request from a parent to make an assessment or re-assessment of a child with a statement (s.328); and
 - not to comply with a request from a parent to make an assessment of a child without a statement (s.329).

They also allow regulations to make provisions about time limits for serving notices under sections 325 and 328; time limits in relation to service of notices under section 329 will be dealt with by regulations under paragraph 3 of Schedule 26 to the EA as amended by paragraph 14 of Schedule 8.

68. Paragraphs 9 and 10 amend paragraphs 8 and 11 respectively of Schedule 27 to the EA to provide for regulations to be made prescribing the information to be provided by the LEA in notices to a parent when:
- informing a parent of his right to appeal against the refusal to substitute a maintained school named in a statement (paragraph 8); and
 - informing a parent of his right to appeal against a decision to cease to maintain a statement (paragraph 11).
69. Paragraph 11 amends section 323(1)(a) and paragraph 4(1) of Schedule 26 to the EA to require an LEA to inform parents when it is considering whether to make an assessment. LEAs are currently required to do this when they are proposing to make an assessment. Parents often assume this to mean that the LEA is definitely going ahead with an assessment when this may not be the case. The new wording clarifies the situation.
70. Paragraph 12 makes a technical change to clarify the law. It makes it clear that under section 347 of the EA an LEA does not have to obtain the Secretary of State's consent to a child being educated in an independent school, if the child's parents are themselves making the arrangements to send their child to that school.
71. Paragraph 13 makes a number of changes to section 336 of the EA, ensuring that the power to regulate SENDIST procedure for SEN appeals is the same as that in respect of DDA claims. In particular it provides for hearings before the Tribunal to be in private except in prescribed circumstances, and for an SEN appeal to be heard with a DDA claim.
72. Paragraph 14(2) makes changes to paragraph 3 of Schedule 26 to the EA as a result of the changes made to Schedule 27 by section 10 of and Schedule 1 to the Act.
73. Paragraph 14(3) replaces paragraphs 3(3) and (4) of Schedule 26 to the EA to provide for regulations to be made prescribing time limits within which an LEA must:
- inform parents that it is considering whether to make an assessment or re-assessment, whether in response to a request from a parent or school, or otherwise;
 - reach its decision on whether or not to make such an assessment; and
 - carry out an assessment or re-assessment where it has decided to do so.
- At present, regulations on time limits only become effective when an LEA has made a decision to make an assessment or re-assessment.
74. Paragraph 15 amends section 441 of the EA so that an amendment to a statement required as a result of a school attendance order will be made following the new

procedures for amendments made after periodic reviews set out in Schedule 27 to the EA as amended by section 10 of and Schedule 1 to the Act.

Part 2 – Disability Discrimination in Education

Chapter 1 – Schools

Sections 11 to 25 with Schedule 2 and paragraph 1 of Schedule 3

Section 11: Discrimination against disabled pupils and prospective pupils

75. **Section 11** should be read in conjunction with Schedule 2. It amends the DDA by adding a new section 28A prohibiting all schools from discriminating against disabled children in their admissions arrangements, in the education and associated services provided by the school or in relation to exclusions from the school.
76. The section also enables the Secretary of State to prescribe in regulations the education and services which should and should not be subject to these duties. It is intended that all teaching during school hours, other teaching, and activities such as after school clubs, school trips, and school orchestras are covered by the duties. The following are not intended to be covered by these duties: adult education provided by schools (which is covered by Chapter 2 of Part 4 of the DDA) and services to parents (which is covered by Part 3 of the DDA).

Section 12: Meaning of “discrimination”

77. This section amends the DDA by inserting a new section 28B defining the meaning of discrimination. It works in the same way as the definition in section 5 of the DDA, except in the respects set out below. An explanation of section 5 of the DDA is set out in paragraph 30 of these Explanatory Notes.
78. The reasonable adjustments duty under section 13 is owed to pupils at large, unlike the duty owed to employees under section 6 of the DDA. For the parents of a pupil to bring proceedings, therefore, it is necessary for them to show not only that the general duty is breached but also that this breach was to the pupil's detriment. Provision is also made for responsible bodies not to be liable where they do not know (and could not reasonably be expected to know) of a pupil's or prospective pupil'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 a responsible body would have to consider what reasonable adjustments it might make generally to meet the needs of disabled pupils whether or not it knew of an individual pupil's needs, it may need to know that a particular pupil was disabled, for example, in order to apply a policy to him. In those circumstances, a responsible body would not be liable for failure to take a particular step where it did not know of the disability.

Section 13: Disabled pupils not to be substantially disadvantaged

79. This section amends the DDA by adding a new section 28C placing a duty on schools to take reasonable steps to ensure disabled pupils are not placed at a substantial disadvantage, in comparison to pupils who are not disabled, in relation to education and associated services provided to pupils, and to ensure disabled prospective pupils are not placed at a substantial disadvantage, compared to prospective pupils who are not disabled, in relation to the admission arrangements for the school. This mirrors the general approach in section 6 of the DDA, but, unlike section 6, this section is anticipatory. This section also provides exceptions to the duty. Schools will not be required to make physical alterations to premises (including removing a physical feature) or to provide auxiliary aids. The statement of SEN (in Scotland, the Record of Needs) already provides for the identification and provision of educational auxiliary aids and adaptations for pupils in school.

Section 14: Accessibility strategies and plans

80. This section amends the DDA by inserting a new section 28D to place a duty on LEAs and schools in England and Wales to plan, over time, to:
- increase the extent to which disabled pupils can participate in the curriculum;
 - increase the physical accessibility of school premises for disabled pupils; and
 - improve the delivery to disabled pupils of information which is provided in writing for pupils who are not disabled, within a reasonable time, and in ways which are determined after taking account of their disabilities and any preferences expressed by them or their parents.
81. The LEA's accessibility strategy will set out its plans in respect of the maintained schools in the area. The LEA does not have to produce a self-standing strategy, it can choose the format it feels most appropriate to record its strategy, for example by dovetailing it with another of its plans.
82. A school's accessibility plan will be on a far smaller scale than that of the LEA. Maintained schools are already under a duty to include certain information about their arrangements and facilities for disabled pupils in their governors' annual report. This section places an additional duty to include their accessibility plans in that report. The Government intends that CAs will be required, through their funding agreements, to include information on their accessibility plans in their annual report to parents. LEAs and schools will be under a duty to implement their strategies and plans. The normal inspection frameworks for LEAs and schools may include inspection of their strategies and plans.
83. Regulations will prescribe the period to be covered by the strategy or the plan as well as when LEAs and schools should produce new strategies and plans. LEAs and schools will have to keep their strategies and plans under review, and revise them if necessary in light of that review.

Section 15: Accessibility strategies and plans: procedure

84. This section amends the DDA by inserting a new section 28E which sets out what LEAs and schools will have to consider when preparing their strategies and plans, and the duties they must comply with once the strategies and plans are in place. LEAs and schools will be required to allocate adequate resources to implement their strategies and plans. LEAs will be under a duty to have regard to guidance issued by the Secretary of State and, for Wales, the NAW, about reviewing and revising their strategies. It is envisaged that the guidance will specify when LEAs should review their strategies.
85. Independent schools, other than CAs, will be required by the Act to make a copy of their plans available for inspection to anyone who asks to see it at a reasonable time. Maintained schools and CAs will not be covered by this duty in the Act as they will have to publish their plans in their annual governors' report to parents.

Section 16: Residual duty of education authorities

86. This section amends the DDA by inserting new sections 28F & 28G. This makes it unlawful for an LEA in England and Wales, or an education authority in Scotland, to discriminate against a disabled pupil or disabled prospective pupil in the discharge of its functions under various Acts relating to education. These are intended to cover the general education related functions of authorities that affect pupils or prospective pupils generally. An authority will already be under certain duties in Part 4 (where it is the responsible body for a school). When considering which anti-discrimination duties apply to its schools functions, an authority should first look at whether the duties not to discriminate under section 28A apply. If they do not, then the duty under this section - known as the "residual duty" - will apply.

Section 17: Special Educational Needs and Disability Tribunal

87. Subsection (1) of this section amends the DDA by inserting a new section 28H to change the name of the SENT to the SENDIST and extend the jurisdiction of the SENT to hear cases of disability discrimination in schools. The jurisdiction of the SENDIST will only extend to England and Wales (as does the jurisdiction of the SENT). Rights of redress in Scotland will be through the sheriff court. Cases of disability discrimination under Part 3 of the DDA are heard through the courts and cases under Chapter 2 (further and higher education) of the new Part 4 will also be heard through the courts.
88. Subsection (2) provides that there is no requirement to consult disability organisations on appointments to the lay panel. The lay panel is a panel of persons who may serve as the other two members of the Tribunal with the legally qualified chairman (subsection (3)).

Section 18: Jurisdiction and powers of the Tribunal

89. This section amends the DDA by inserting a new section 28I to set 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 have been committed by the responsible body of the institution in breach of section 28A of the DDA, or be treated under section 58 of the DDA as having been done by the responsible body if committed by its employees or agents.
90. Section 28I(2) prevents claims of discrimination being made to SENDIST in relation to admissions to, and permanent exclusions from, maintained schools and CAs. Arrangements for these schools will be through admissions appeals panels or exclusions appeals panels and are described under sections 20 and 21 respectively. SENDIST will hear claims of discrimination in relation to admissions to, and permanent exclusions from, all other schools. SENDIST will hear claims of discrimination in relation to temporary exclusions from all schools because temporary exclusions are not covered in the existing arrangements for exclusion appeals panels.
91. Sections 28I(3) & (4) gives SENDIST wide powers to order any remedy it thinks appropriate with the exception of financial compensation. Although SENDIST will not be able to award financial compensation it will be able to order schools and LEAs to take compensatory action to take account of past discrimination and shape the future prospects of the disabled child. Examples of the kind of orders that SENDIST might make are:
- that the LEA or school provide disability awareness training for some or all staff;
 - that the LEA or school prepare guidance on combating disability discrimination for issue to all staff;
 - that an LEA Equal Opportunities Officer arrange and attend, at specified times, meetings between the school and the child's parents to review what reasonable adjustments (short of adjustments to the physical premises or provision of auxiliary aids) might be required;
 - that the school/LEA change policies, for example, those that prevent visually impaired pupils going into the science laboratory, those that prevent disabled pupils going on certain school trips and anti-bullying policies so that they deal with bullying on the grounds of disability;
 - that additional tuition is provided to enable a child to catch up on things he has missed due to discrimination (such as science lessons in the example above);
 - that a library is relocated to the ground floor (short of requiring an adjustment to the physical premises), or if not possible, that the school provides a list of available

books and ensures that they are brought down to the child for him to read in a quiet room;

- that an independent school must admit a disabled pupil (where the school had previously refused) or must admit the pupil on the same terms as pupils who are not disabled (where, for example, the school had offered a place but at an increased fee); or
 - that a maintained school which has temporarily excluded a disabled pupil must provide additional tuition to enable the pupil to catch up on education missed due to discrimination.
92. SENDIST will be able to set rigorous deadlines when directing action by schools and LEAs. If a responsible body fails to comply within the deadlines, the parent can ask the Secretary of State to make a direction to require compliance.

Section 19 and paragraph 1 of Schedule 3: Procedure

93. Subsection (1) amends the DDA by inserting a new section 28J which enables procedural regulations to be made in relation to SENDIST which reflect the powers already in existence in relation to the SENT appeal procedure. The major difference is the new power to make regulations allowing the Tribunal to hear a disability claim with an SEN claim.
94. Subsection (2) and Schedule 3 insert a new Part 3 into Schedule 3 of the DDA. This sets out further procedural provisions, similar to those for claims under Parts 2 and 3 of the DDA, the major difference being that there is no provision to submit a certificate as conclusive evidence that an act was done to safeguard national security.

Section 20: Admissions

95. This section amends the DDA by inserting a new section 28K providing for rights of redress for claims of disability discrimination in admission decisions, against a maintained school or CA, to be made through admission appeals panels - the arrangements set up to consider admission appeals.

Section 21: Exclusions

96. This section amends the DDA by inserting a new section 28L providing for rights of redress for claims of disability discrimination in permanent exclusion decisions, against a maintained school or CA, to be made through exclusion appeals panels – the arrangements set up to consider appeals against permanent exclusions.

Section 22: Roles of the Secretary of State and the National Assembly

97. This section amends the DDA by inserting a new section 28M, and gives the Secretary of State or, as appropriate, the NAW the power to direct an LEA or a school if satisfied that they have not complied with, or have acted unreasonably in carrying out, their duties to plan under sections 28D or 28E. It also gives the Secretary of State the power to direct LEAs and schools in England and Wales if satisfied that they have not complied with, or have acted unreasonably in complying with an order made by SENDIST. These are similar powers to those in sections 496 and 497 of the EA.

Section 23: Enforcement Procedure: Scotland

98. This section amends the DDA by inserting a new section 28N providing that all claims of disability discrimination under this chapter will, in Scotland, be heard in the sheriff court. The remedies available will not include financial compensation.

Section 24: Validity and revision of agreements of responsible bodies

99. This section amends the DDA by inserting a new section 28P, to apply to contracts and agreements with schools, so that discriminatory terms are made void. This works similarly to section 26 of the DDA.

Chapter 2 – Further and Higher Education Institutions

Sections 26 to 34 with paragraph 2 of Schedule 3, Schedule 4, Schedule 5 and Schedule 6

Section 26 and Schedule 4: Discrimination against disabled students and prospective students

100. This section amends the DDA by adding a new section 28R making it unlawful for institutions to discriminate against disabled students in their admission, exclusion or suspension arrangements and in the services they provide to students. This section should be read in conjunction with Schedule 4 which sets out the responsible bodies for the institutions covered by these duties.
101. Only services provided wholly or mainly for students (described as "student services" in the Act) are covered by these duties. These include the provision of education and services related to teaching and learning and also the wider services, such as accommodation and leisure facilities, that institutions offer mainly to students. In order to provide clarity about which services are covered by these duties, the Secretary of State has the power to make regulations to set out whether particular services are covered.
102. Institutions within the further education sector (i.e. those conducted by further education corporations and those designated for the purposes of Part 1 of the Further and Higher Education Act 1992) and institutions within the higher education sector (i.e. publicly-funded universities, institutions conducted by higher education corporations and those designated for the purposes of Part 2 of the Further and Higher Education Act 1992) will be covered by the new duties. In Scotland, the relevant institutions are colleges of further education having a board of management within the meaning of section 36 of the Further and Higher Education (Scotland) Act 1992, institutions within the higher education sector within the meaning of section 56(2) of the Further and Higher Education (Scotland) Act 1992, any central institution within the meaning of section 135(1) of the Education (Scotland) Act 1980 and colleges of further education maintained by an education authority in the exercise of their further education functions within the meaning of section 1(5)(b)(ii) of that Act.
103. Private institutions will generally be covered by Part 3 of the DDA. However, the Secretary of State will have a power to designate by order institutions in Great Britain that receive some public funds. These institutions will, in that event, be covered by the duties in Part 4 of the DDA which is amended by this Act.

Section 27: Meaning of "discrimination"

104. This section amends the DDA by adding a new section 28S defining the meaning of discrimination. It works in the same way as the definition in section 5 of the DDA, except in the respects set out below. An explanation of section 5 of the DDA is set out in paragraph 30 of these Explanatory Notes.
105. As well as the general justification there are two specific justifications relating to the less favourable treatment duty. Less favourable treatment will be justified if it is necessary to maintain academic standards or other prescribed standards. It will also be justified in certain cases which will be set out in regulations.

106. Provision is also made for responsible bodies not to be liable where they do not know (and could not reasonably be expected to know) of a person's disability (subsections (3) and (4)), 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 to e.g. meet the needs of dyslexic students so that knowledge would not be relevant, it may need to know that a particular student was dyslexic in order to apply the policy to him. For example, if the policy was that dyslexic students would have extra time to finish their exams, the institution would need to know which students should benefit from that extra time. In those circumstances, an institution would not be liable for failure to provide the extra time where it did not know of the disability.
107. The reasonable adjustment duty under section 28 below is owed to students at large, unlike the duty owed to employees under section 6 of the DDA. For any particular student to bring an action, therefore, it is necessary for them to show not only that the general duty is breached but also that this breach was to their detriment.

Section 28: Disabled students not to be substantially disadvantaged

108. This section amends the DDA by inserting a new section 28T to place a duty on responsible bodies for further and higher education institutions to take reasonable steps to ensure that disabled students are not placed at a substantial disadvantage, in comparison to students who are not disabled, in their access to education and associated services to students.
109. The approach mirrors that in section 6 of the DDA, except that the duty under section 6 is owed to particular employees, and therefore involves no element of anticipation. The duty under this new section, in contrast, is owed at large to disabled students, and will therefore require educational institutions to consider the provision which they make for disabled students generally. The duty covers all aspects of a student's life, including academic activities and access to services which are available to him as a student.

Section 29 and Schedule 5: Further education etc. provided by local education authorities and schools

110. These provisions amend the DDA by inserting a new section 28U and a new Schedule 4C, which modify the effect of the rest of the Chapter as it applies, in England and Wales, to higher education secured by LEAs, further education for adults secured by LEAs, further education provided by the governing bodies of maintained schools, the activities of the statutory youth service and, in Scotland, to community education facilities provided by local authorities or voluntary organisations. Because of differences in arrangements, Schedule 5 makes separate provision for England and Wales on the one hand and for Scotland on the other.
111. The modifications from the formal further and higher education sector reflect the different nature of such education provision. The types of activities covered by this provision tend to be much more informal and are organised in a wide variety of community settings, rather than on an institutional model. The notion of an overall course being a programme of learning rests with the provider of this programme of learning not necessarily the individual. Learners will be covered by the duties whether they participate in a complete programme of learning or just an individual activity on which they would register.
112. *Part 1 of Schedule 4C* modifies the rest of the Chapter in relation to England and Wales, so that, where further and higher education secured by LEAs or the governing bodies of schools is concerned, it would be unlawful for them to discriminate against disabled persons enrolled on a course, rather than against disabled students. Similarly, it would be unlawful for them to discriminate in the provision of services provided wholly or mainly for persons enrolled on a course, rather than in the provision of "student services". The activities of the statutory youth service are covered by the duty

in modified section 28R(4). *Part 2 of Schedule 4C* modifies the rest of the Chapter in the same way in relation to those community education facilities in Scotland which are broadly comparable to the services in England and Wales covered by *Part 1 of Schedule 4C*. Community education in Scotland ranges across youth work, adult education and informal education in a broad sense.

Section 30 and paragraph 2 of Schedule 3: Rights of Redress

113. These provisions amend the DDA by inserting a new section 28V and adding a new Part 4 to Schedule 3. A disabled student who has been discriminated against by an educational institution will have a right to sue that institution through civil proceedings. The alleged discrimination may be by the responsible body of the institution under section 28R of the DDA, or by employees or agents of the responsible body acting in the course of their employment or by the responsible body's authority as defined by sections 57 and 58 of the DDA. These sections of the DDA apply to the duties under Chapter 2 of the new Part 4 of the DDA.
114. Claims are brought in the same way as claims under Parts 2 and 3 of the DDA, except that there will be no provision to submit a certificate as conclusive evidence that an act was done to safeguard national security. County courts in England and Wales and sheriff courts in Scotland will hear cases brought under this Chapter. Where a disabled person is both a student at an institution and is also employed by that institution they will have rights under the employment provisions (Part 2) of the DDA, which are enforceable through an employment tribunal, as well as rights under this Chapter, enforceable through the courts.

Section 31 and Schedule 6: Occupation of premises by educational institutions

115. These provisions amend the DDA by inserting a new section 28W and adding a new Part 3 to Schedule 4. They set out how further and higher education institutions should comply with the duty to make reasonable adjustments to physical features of premises which place disabled students at a substantial disadvantage where they occupy premises under a lease. These provisions mirror those in sections 16 and 27 of the DDA. Section 31 should be read with Schedule 6 to the Act.
116. The effect is that, where the lease of a property occupied by a further and higher education institution forbids an occupier from making the alterations needed to comply with section 28T or puts conditions on those alterations, the occupier can nonetheless make the alterations required under this Act, if he has the written consent of the owner/lessor; but he must apply to the landlord in writing if he wants to make the alteration. If the occupier does apply in writing, the landlord cannot refuse consent unreasonably, although he can attach reasonable conditions to the consent.
117. Regulations will outline what will be regarded as withholding consent and when it is reasonable or unreasonable to do so.
118. *Schedule 6* inserts a provision for circumstances when parties fail to obtain consent and there is a breach of the duty under section 28T. It provides for the owner/lessor to be joined in any action against an educational institution.

Section 32: Validity and revision of agreements

119. This section amends the DDA by inserting a new section 28X, to provide for new section 28P to apply to contracts and agreements with further and higher education providers, so that discriminatory terms are made void. The section will apply with amendments to reflect the fact that the further and higher education duties are enforced through the county or sheriff courts rather than through the SENT and admission and exclusion appeals panels.

Section 33: Interpretation

120. This section defines terms used within Chapter 2 to assist interpretation of that Chapter.
121. Specifically, section 31A(3) defines the term “student” as meaning a person who is attending, or undertaking a course of study at, an educational institution.

Section 34: Removal of certain duties of funding bodies

122. This section removes the power from the LSC in England, the CETW in Wales and the duty from the Higher Education Funding Councils in England, Scotland and Wales to require providers of learning to publish disability statements by imposing a condition of grant. It also removes from LEAs in England the existing statutory duty to publish disability statements. It also removes the power of the LSC to make conditions of grant which impose duties on institutions in relation to the provision that they make for disabled students. This is because these duties will be superseded by the new anti-discrimination duties introduced by the Act.

Chapter 3 – Miscellaneous

Sections 35 to 40 and Schedule 7

Section 35 and Schedule 7: Extension of Role of Disability Rights Commission

123. This section extends the role of the DRC in respect of the provisions of this Act to the extent provided for in Schedule 7, including, for example, allowing the DRC to: issue non-discrimination notices and make agreements in lieu of enforcement action; apply for an injunction or interdict in respect of persistent discrimination; and, give assistance in relation to proceedings under this Act, at SENDIST, the county court or the sheriff court. The DRC has similar powers and duties in respect of the provisions of Parts 2 & 3 DDA, conferred by sections 2 to 8 of the DRCA.

Section 36: Codes of Practice

124. This section amends section 53A of the DDA to allow the DRC to prepare Codes of Practice in respect of the new duties in Part 4 of the DDA, apart from those duties inserted into the DDA by sections 14 & 15 of this Act which place LEAs and schools under a duty to plan. It is intended that there will be two Codes of Practice - one for schools (Chapter 1) and one for further and higher education (Chapter 2), which will be modelled on the DDA Part 3 Code in that they will explain and illustrate how the legislation aims to stop disability discrimination and how service providers can comply with the duties. The DRC already has the power, by virtue of section 9 of the DRCA, to prepare Codes in respect of Parts 2 & 3 DDA.

Section 37: Conciliation for Disputes under Part 4 of the 1995 Act

125. This amends the DDA by inserting a new section 31B to extend the DRC's power to make arrangements for the provision of conciliation services. The DRC already has power to make these arrangements in respect of disputes under Part 3 of the DDA. Disputes under Part 2 of the DDA are dealt with by ACAS.

Section 38: Relationship with other Parts of the 1995 Act

126. This section amends the DDA to establish the relationship of the new Part 4 duties with other sections of the DDA.
127. Subsections (5) and (6) remove the exemption of education from Part 3 of the DDA and provide that nothing in Part 3 applies to services that are now covered by Part 4.

Section 39: Application to the Isles of Scilly

128. This section inserts a new section 31C in the DDA. This modifies the application of Part 4 of the DDA (as amended by the Act) to the Isles of Scilly. Under section 581 of the EA the Isles are treated, for the purposes of that Act, as a separate non-metropolitan council, and the Council of the Isles of Scilly is treated as a County Council. This allows the Council of the Isles of Scilly to be treated as an LEA for the purposes of the EA. An equivalent provision is needed to allow the Council of the Isles of Scilly to be caught by the disability duties imposed on LEAs by the Act.

Section 40: Duty of Teacher Training Agency

129. This section makes no substantive changes to the law, but re-enacts the duty on the Teacher Training Agency since that duty has no place in the restructured Part 4.