Guidance

Schools in Scotland: Technical guidance

Contents

Chapter 1: Introduction and Background 8

Scope of the technical guidance..... 9

Who can use this technical guidance 9

What this guidance covers..... 9

Other relevant guidance..... 10

Status of the technical guidance..... 11

Role of the EHRC..... 11

Human rights..... 12

How to use this guidance..... 13

Definitions..... 14

Compulsory school age and remaining in education..... 16

Chapter 2: Overview of the schools provisions of the Act 17

Who has legal obligations..... 17

Who is responsible for ensuring a school does not breach the Act..... 20

Who is protected..... 21

School obligations to parents under the Act..... 22

School obligations to pupils from outside Great Britain under the Act..... 23

Education or school activities that take place outside Great Britain..... 23

What is unlawful..... 23

Discrimination..... 24

Harassment..... 25

Victimisation..... 26

The Public Sector Equality Duty..... 27

Specific duties..... 30

Exceptions to the schools provisions..... 31

Positive action..... 32

Interaction with other legislation and responsibilities..... 33

Chapter 3: Important concepts 40

What discrimination is..... 40

Direct discrimination..... 40

Discrimination based on association..... 46

Discrimination based on perception..... 47
Discrimination because of pregnancy and maternity..... 48
Advertising an intention to discriminate.....50
Direct discrimination on the grounds of religion or belief..... 51
Indirect discrimination..... 53
What is a legitimate aim..... 60
What is proportionate..... 61
Discrimination arising from disability..... 66
Harassment..... 75
Harassment related to a protected characteristic.....78
Sexual harassment..... 84
Less favourable treatment for rejecting or submitting to unwanted conduct.. 85
Victimisation..... 86
Victimisation for actions of parents or siblings..... 89
Obligations to former pupils..... 91
Liability for employees, agents and others.....92
Personal liability of employees and agents..... 94
Aiding unlawful acts..... 96
Instructing, causing or inducing discrimination.....97
Protected characteristics..... 99
Disability..... 100
Interaction with the Education (Additional Support for Learning) (Scotland) Act 2004 110
Gender reassignment..... 111
Pregnancy and maternity..... 113
Race..... 113
Religion or belief..... 114
Sex..... 117
Sexual orientation..... 118
Restrictions on protection under the Act..... 119
Chapter 4 | Admissions 120
Equality Act 2010 provisions and admissions requirements..... 120
Examples and terminology in this chapter..... 121

The responsible body in relation to admissions..... 121
What the Act says about admissions..... 121
Arrangements for deciding who is offered admission..... 123
Information schools provide..... 123
Information schools collect..... 125
Open events and school visits..... 126
Admissions criteria..... 127
Terms of admission..... 130
Refusing admission..... 131
Selection by ability or aptitude in schools..... 133
Schools conducted in the interest of a denominational body..... 136
Single-sex schools..... 137
Single-sex boarding at mixed-sex schools..... 141
Chapter 5: Providing education and access to benefits, facilities and services for pupils 142
What does the Act say..... 142
What is covered by the Act..... 143
Policies, procedures and practices..... 144
School uniform policies..... 146
Behaviour and discipline..... 148
Reduced and part-time timetables..... 151
Curriculum, methods of teaching and options..... 153
Curriculum choices..... 153
Curriculum delivery..... 154
School trips (educational and non-educational)..... 155
Tests, assessments and exams..... 157
Careers education and information..... 159
Work experience and work placements..... 160
After-school clubs and extracurricular, leisure and sporting activities..... 161
School facilities..... 164
Subjecting a pupil to any other detriment..... 167
Restraint..... 168
Isolation..... 169

What is not covered by the Act..... 172
Content of the curriculum..... 172
Acts of worship or other religious observance..... 173
Schools conducted in the interest of a denominational body..... 175
Pregnancy and maternity discrimination..... 178
Chapter 6: Exclusions from school 181
How the Equality Act 2010 works with exclusions legislation..... 181
Examples and terminology in this chapter..... 183
What the Act says about exclusions..... 183
What is unlawful under the Act..... 183
Disabled pupils..... 186
Pregnancy and maternity discrimination..... 190
Excluded pupils..... 190
Chapter 7 | Reasonable adjustments for disabled pupils 192
The reasonable adjustments duty..... 192
Who the duty applies to and when it applies..... 194
What is meant by 'substantial disadvantage'..... 198
What the duty covers..... 200
Provision, criterion or practice..... 200
Auxiliary aids or services 203
Physical features..... 205
What 'reasonable steps' means..... 208
Factors that affect what is reasonable..... 210
The effectiveness of the adjustment in avoiding the disadvantage..... 214
The practicability of the adjustment..... 217
The effect of the disability on the individual..... 218
Health and safety requirements..... 219
The need to maintain academic, musical, sporting and other standards..... 222
The interests of other pupils and prospective pupils..... 223
Additional support for learning for disabled pupils under the Education (Additional Support for Learning) (Scotland) Act 2004..... 226
The reasonable adjustments duty and additional support for learning 229
Charging for providing reasonable adjustments..... 233

Case studies..... 234
Adjusting a provision, criteria or practice..... 236
Avoiding disadvantage while waiting for an additional support needs assessment and CSP..... 238
School transport..... 241
Avoiding substantial disadvantage when organising school trips..... 243
Chapter 8: Positive action 246
What 'positive action' is..... 246
What the Act says..... 249
Basic requirements for taking positive action..... 250
The stated aims in more detail..... 256
Taking action to overcome or minimise disadvantage..... 256
Taking action to meet different needs..... 257
Taking action to encourage participation..... 259
Implementing and monitoring positive action..... 261
Positive action and the Public Sector Equality Duty..... 264
Chapter 9: Dispute resolution and enforcement 267
Resolving disputes..... 267
Complaints procedure..... 267
Obtaining information ('the questions procedure')..... 270
Time limits..... 271
Where claims are made..... 272
Sheriff court..... 272
Additional Support Needs Tribunal..... 273
The United Nations Convention on the Rights of the Child (UNCRC)..... 273
Claims made in the sheriff court..... 274
Claims that can be heard by the sheriff court..... 274
Who can make a claim..... 274
Remedies in sheriff court claims..... 275
Additional Support Needs Tribunal claims..... 276
Claims the Additional Support Needs Tribunal can hear..... 276
Who can make a claim..... 277
Remedies in the Additional Support Needs Tribunal..... 277

The role of the Equality and Human Rights Commission (EHRC)..... 279

Chapter 10: Exceptions 281

Statutory authority..... 282

Nationality discrimination authorised by statute or the executive.....284

National security.....285

Schools that are charities..... 286

Activity to support a charity..... 287

Boarding and other communal accommodation.....287

Boarding and trans pupils..... 289

Competitive sport..... 290

Sex and gender reassignment..... 290

Single-sex schools..... 293

Nationality, birthplace or residency..... 293

Selection by ability or aptitude..... 293

Schools conducted in the interest of a denominational body..... 294

Collective worship or other religious observance.....295

Content of the curriculum..... 295

Chapter 1: Introduction and Background

1.1 The Equality Act 2010 (the Act) protects people from discrimination based on nine protected characteristics. These are:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

1.2 Schools have duties under more than one part of the Act. For example, different parts of the Act relate to a school's employment of people, provision of services, and education of pupils. Discrimination in most areas of activity is unlawful. However, there are some differences and exceptions in how the Act operates in relation to pupils, compared to how it works to protect employees, for example.

1.3 This guidance explains the obligations that the Act places on schools in relation to pupils and the provision of education. This provision is referred to throughout the guidance as the 'schools provisions'. The guidance includes examples that explain the Act's application in contexts that are familiar to schools.

Scope of the technical guidance

Who can use this technical guidance

1.4 This technical guidance can be used by:

- education authorities
- head teachers
- staff at all schools (including public schools managed by an education authority, grant-aided schools, independent schools, special schools and nursery schools)
- advisers
- parents

1.5 The guidance explains schools' obligations under the Act. It suggests steps that schools may wish to take to comply and provides information for others who work to resolve any issues arising under the Act, such as parents, advisers, lawyers, courts and tribunals.

What this guidance covers

1.6 This technical guidance covers schools' legal obligations not to discriminate against, harass or victimise pupils, as set out in chapter 1 of Part 6 of the Act. The obligations in chapter 1 relate to the access to benefits, facilities or services, both educational and non-educational, that the school provides or offers to pupils.

1.7 Chapter 1 of Part 6 of the Act explains that people should not be discriminated against in schools' provision, based on the relevant protected characteristics:

- when seeking admission to schools
- when accessing the education and benefits provided
- by being excluded from school

1.8 The provisions in chapter 1 apply to all schools in Scotland, regardless of how they are managed or funded.

1.9 A school may need to deliver education in a range of ways to meet the differing needs of pupils, so everyone receives the same standard of education where possible. This technical guidance explains the steps that schools should take to ensure they do not act in a discriminatory way.

1.10 This technical guidance applies to Scotland. There is separate technical guidance that applies to schools in England and Wales. Read the:

- Technical guidance for schools in England
- Technical guidance for schools in Wales

1.11 Education provided outside Britain may also be covered by the Act (read chapter 2, paragraphs 2.22 to 2.24).

Other relevant guidance

1.12 Read our guidance on the Public Sector Equality Duty (PSED):

- Technical guidance on the Public Sector Equality Duty: Scotland
- further non-statutory guidance on the Public Sector Equality Duty available on our website

1.13 The duties of schools as employers, bodies that carry out public functions and as service providers are not covered by Part 6 of the Act. They are set out in our separate Employment Code of Practice, Sexual Harassment Technical Guidance and our Services, public functions and associations: Code of Practice.

Status of the technical guidance

1.14 We have produced this technical guidance using our powers to provide information and advice under section 13 of the Equality Act 2006 (EA 2006).

1.15 This guidance is not a statutory code issued under section 14 of the EA 2006, but it may be used as evidence in legal proceedings. Following this guidance will help schools to comply with the law and may provide evidence that they have followed best practice in the event that they face legal

proceedings. If a school chooses not to follow this guidance, they will need to provide reasons why they have not done so.[1]

Role of the EHRC

1.16 The Equality and Human Rights Commission (EHRC) was set up under the EA 2006 to work towards the elimination of unlawful discrimination, and to promote equality and human rights.

1.17 We have duties to promote human rights and equality, and to provide advice about the law, so that discrimination is avoided. We also have powers to enforce discrimination law in some circumstances.

Human rights

1.18 The EHRC's human rights powers in Scotland extend to matters reserved to the Westminster Parliament. The Scottish Human Rights Commission has a mandate to promote and protect human rights in Scotland that fall within the competence of the Scottish Parliament.

1.19 The United Nations Convention on the Rights of the Child (UNCRC) is an international treaty which sets out the civil,

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[1] paragraphs 127 to 132: DXK, R (On the Application Of) v Secretary of State for the Home Department (Rev1) [2024] EWHC 579 (Admin) (15 March 2024) (bailii.org)

political, economic, social and cultural rights of children. All children up to the age of 18 years have these rights, regardless of their circumstances.

1.20 The UNCRC was incorporated into Scottish law to the maximum extent of the Scottish Parliament's powers in 2024. Public authorities, and other organisations when carrying out 'functions of a public nature', have a duty not to act incompatibly with the UNCRC requirements as set out in the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

1.21 Courts and tribunals have a duty to interpret primary legislation (including the Equality Act 2010) and secondary legislation in a way that is compatible with the Convention rights and UNCRC, unless it is impossible to do so. This duty applies to courts and tribunals whether or not a public authority is involved in the case. This means in any discrimination claim or any claim relating to the PSED arising under the Act, the court or tribunal must ensure that it interprets the Act compatibly with the Convention rights and UNCRC, where it can.

1.22 Because of the close relationship between human rights and equality, it is good practice for those exercising public functions to consider equality and human rights together when making equality or human rights policies.

How to use this guidance

1.23 Chapter 1 is this introduction chapter.

Chapter 2 gives an overview of the schools provisions of the Act.

Chapter 3 explains the main concepts in the Act, including different forms of discrimination, harassment and victimisation.

Chapter 4 explains the Act's provisions in relation to schools admissions.

Chapter 5 explains the Act's provisions in relation to schools providing education and access to benefits, facilities and services for pupils.

Chapter 6 explains the Act's provisions in relation to exclusions from school.

Chapter 7 explains the duty to make reasonable adjustments for disabled pupils.

Chapter 8 explains the positive action provisions of the Act.

Chapter 9 deals with dispute resolution and enforcement of the Act.

Chapter 10 explains exceptions that apply generally across the Act and how they apply specifically to schools.

Definitions

1.24 In this guidance, we use the following terms.

should: for guidance on good practice that is not a formal legal requirement.

must: for guidance or actions that the school is legally required to follow.

parents: to refer to any person who has parental responsibility for, or cares for, a pupil, including grandparents, aunts and uncles, step-parents and any other carers.

pupil: to describe a person of any age for whom education is being or must be provided unless otherwise stated in this guidance.

school: to refer to any school that has duties under the schools provisions of the Act, including:

- public schools managed by an education authority
- grant-aided schools
- independent schools
- special schools
- nursery schools

schools conducted in the interest of a denominational body: to refer to all schools covered by schedule 11, paragraph 5 of the Act and the religion or belief exceptions. Schedule 11, paragraph 5 (c) to (g) lists the different types of schools covered by these exceptions in Scotland.

trans: the Act uses the term ‘transsexual’ for individuals who have the protected characteristic of gender reassignment. We recognise that people consider this term outdated, so we have used the term ‘trans’ to refer to a person with the protected characteristic of gender reassignment. This refers only to people who fall within the Act’s definition of gender reassignment. It does not include people who may identify as trans or transgender but who do not fall within that definition.

ASN: additional support needs.

co-ordinated support plan (CSP): a legal document setting out the pupil’s additional support needs and the support to be provided by the education authority and other departments or agencies, among other things.

We use the Equality Act 2010 definition of disability. Under section 6 of the Equality Act 2010, a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. Read chapter 3 for more information. We use the Act’s definition of disability, so we refer to ‘impairments’ and ‘impairment types’ because this reflects the language of the Act.

Compulsory school age and remaining in education

1.25 The compulsory school age is the date from which children must start full-time education. In Scotland, this is from a child’s 5th birthday. Children born between March and the first day of term in August start in the August of, or following, their 5th

birthday. Those born between September and February start in the August prior to their 5th birthday, unless deferred.

1.26 It is compulsory to remain in education until their 16th birthday. If their 16th birthday is between 1 March and 30 September, they can leave school after 31 May of that year. If their 16th birthday is between 1 October and the end of February, they can leave at the start of the school Christmas holidays in that year.

Chapter 2: Overview of the schools provisions of the Act

Who has legal obligations

2.1 All schools in Scotland have obligations under the Equality Act 2010 (the Act) not to discriminate against, harass or victimise people. The obligations are set out in chapter 1 of Part 6 of the Act and apply regardless of how schools are funded or managed. They apply to:

- public schools managed by an education authority (public schools)
- grant-aided schools
- independent schools
- special schools
- nursery schools (section 85, paragraph 8 and section 89 of the Act)

2.2 Throughout this technical guidance, the term ‘school’ refers to anyone who has duties under the schools provisions of the Act.

2.3 Education authorities have obligations under the schools provisions (Part 6) where they are the responsible body for the school. Education authorities carry out many education-related functions. However, some of these are not covered by the schools provisions of the Act in Part 6, but by Part 3 of the Act.

2.4 Nursery schools, and nursery classes within a school, which provide early learning and childcare, have the same obligations as schools.

2.5 Other early learning and childcare providers, such as private nurseries and play groups, also have obligations as service providers under Part 3 of the Act.

2.6 Part 3 of the Act places obligations on service providers and those carrying out public functions.

2.7 Breakfast clubs and after-school clubs that are run independently from the school as a form of childcare provision (rather than to facilitate a pupil's interest in a specific activity, such as sports or music) are not schools for the purposes of the Act. They have obligations under Part 3 of the Act as service providers.

Example:

2.8 A football club run by a voluntary organisation uses a school premises for its sessions. Some of the school staff are volunteers at the football club. The football club is responsible for the actions of the football club and its volunteers, not the school. The football club would have duties as a service provider under Part 3 of the Act. It does not matter that the school staff are volunteers rather than paid by the club. What is relevant is that the football club is providing the service, not the school.

Example:

2.9 A private childcare provider runs a breakfast club and after-school club in a building it leases from the school. The private provider is responsible for the actions of the breakfast club and the after-school club, not the school. The private provider has duties under the service provisions in Part 3 of the Act.

This would likely be the case even if the private childcare provider employed members of school staff to work at the clubs because the private provider is their employer during that time and so is responsible for their actions.

If the breakfast club and after-school club are run by the school, staffed by school staff members and managed by the school, then the school's responsible body is responsible for the actions of the breakfast club and the after-school club, under Part 3 of the Act. If the school has asked the private provider to run the clubs on its behalf and, when parents sign up to use the club, the contract is between the parent and the school, then the private provider may be the 'agent' of the school (working on the school's behalf). Read paragraphs 3.177 to 3.192 for more information on 'liability for employees, agents and others' and 'personal liability of employees and agents'. In this situation, the school's responsible body will be responsible for the actions of the clubs under Part 3 of the Act.

If the school is responsible for the breakfast and after-school clubs, the school has duties under the Act. If the private provider is responsible for the clubs, the private provider is

responsible and has duties under the Act. This includes the duty to make reasonable adjustments.

2.10 Other organisations and individuals may also have obligations, but these may be covered by other parts of the Act.

Example:

2.11 While on a work placement, a pupil is discriminated against by her placement provider. The work placement provider would be responsible for this, as they have duties under the 'work provisions' in Part 5 of the Act. The school is responsible only for finding and offering work placement opportunities, and for not discriminating when it finds and offers work placement opportunities. However, a school may be legally responsible for discrimination, harassment or victimisation by a placement provider where they could have taken steps to prevent it and have not done so. This is addressed in chapter 3.

For more information, read our Services, public functions and associations: Code of Practice.

Who is responsible for ensuring a school does not breach the Act

2.12 The responsible body of a school is liable for any breaches of the Act. The responsible body for a public school is the education authority. The responsible body for a grant-aided school are the school's managers. The responsible body for an independent school is the proprietor (section 85, paragraph 9).

2.13 The responsible body for a school is liable for the actions of employees and agents of the school, unless it can show that it took ‘all reasonable steps’ to prevent the discrimination, harassment or victimisation from taking place. An agent for the school is someone who undertakes tasks on the school’s behalf. In some circumstances, an employee or agent of the school may be personally liable for acts of discrimination, harassment or victimisation. This responsibility does not cover the actions of pupils beyond the responsibility that a school already has for the actions of its pupils.

2.14 This is explained in more detail in chapter 3.

Who is protected

2.15 The Act protects pupils from discrimination based on ‘protected characteristics’ (section 85 and section 89). The specific protected characteristics under the schools provisions are:

- disability
- gender reassignment
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

2.16 The schools provisions do not apply to the protected characteristics of age and marriage and civil partnership.

2.17 Protected characteristics are explained in more detail in chapter 3.

2.18 The Act protects a person applying for admission to a school, a pupil at a school and, in some circumstances, a former pupil of a school.

School obligations to parents under the Act

2.19 Services that a school provides to parents or members of the public are likely to be subject to the services provisions of Part 3 of the Act, and not Part 6 of the Act. Where a pupil uses the school's services as a member of the public, rather than as a pupil, that relationship would be covered by Part 3 of the Act.

Example:

2.20 A school with a swimming pool opens the pool to members of the public on a Saturday morning. A pupil of the school uses the pool with his parents on a Saturday morning. In this context, he would be covered by the services provisions of Part 3 of the Act rather than by the schools provisions of Part 6 of the Act. His parents would also be covered by Part 3 of the Act.

Where the service provided to parents is part of the pupil's education, the school must not discriminate against the parent, under Part 3 of the Act. This includes services such as providing reports or providing information at parents' evenings. In addition, under section 85, paragraph 6 in Part 6 of the Act,

the school would have to make any required reasonable adjustments for disabled parents.

Example:

2.21 A deaf parent who communicates through British Sign Language (BSL) attends a parents' evening. The school is under a duty to make reasonable adjustments to enable the parent to communicate with school staff and benefit from the parents' evening. This might include the school arranging and paying for a BSL interpreter.

School obligations to pupils from outside Great Britain under the Act

2.22 The Act places legal obligations on all schools in Scotland. It is not relevant where the pupils are from or how long they are at the school.

Education or school activities that take place outside Great Britain

2.23 If a school provides education or school activities for its pupils that take place abroad, such as a school trip, then this would be covered by the Act.

Example:

2.24 A pupil is discriminated against by a member of school staff while on a school trip to France. In this case, the Act is likely still to apply even though the discrimination took place in another country.

What is unlawful

2.25 It is unlawful for a school to discriminate against a pupil or someone who has applied for admission as a pupil (an applicant) in relation to:

- admissions (explained in chapter 4)
- the provision of education (explained in chapter 5)
- access to any benefit, facility or service (explained in chapter 5)
- exclusions (explained in chapter 6)
- any other detriment (explained in chapter 5)

It is also unlawful for a school to harass or victimise an applicant or pupil.

Discrimination

2.26 Under the Act, for all protected characteristics except pregnancy and maternity, 'discrimination' relating to schools means:

- direct discrimination
- indirect discrimination

2.27 For the protected characteristic of disability, under the Act 'discrimination' also means:

- discrimination arising from disability
- a failure to make a reasonable adjustment

2.28 Discrimination because of the protected characteristic of pregnancy and maternity is defined separately under the Act (section 17).

2.29 These forms of discrimination are discussed in chapter 3 and chapter 7.

Harassment

2.30 A school must not harass a pupil or applicant. There are three different types of harassment that are unlawful under the Act:

- harassment related to a 'relevant protected characteristic'
- sexual harassment
- less favourable treatment because of a submission to, or a rejection of, sexual harassment and harassment related to sex

2.31 The harassment provisions of the Act do not protect pupils from harassment by other pupils. However, the provisions on discrimination mean that schools have an obligation to ensure bullying by pupils that is related to a protected characteristic is treated with the same level of seriousness as any other form of bullying. If it is treated less seriously, this would amount to direct discrimination. Read paragraphs 5.26 to 5.28 for more information on schools' duties to prevent bullying. Read paragraphs 2.37 to 2.50 to learn more about their duties under the Public Sector Equality Duty (PSED) to eliminate

discrimination, advance equality of opportunity, and foster good relations.

2.32 The prohibition of harassment does not protect individuals who have the protected characteristics of gender reassignment, sexual orientation, or religion or belief in relation to schools. However, where unwanted conduct related to any of these protected characteristics results in a pupil suffering a detriment, that pupil may be able to bring a claim of direct discrimination (section 212, paragraph 5). Read chapter 3 for more information about protected characteristics and types of discrimination.

Harassment is explained in more detail in chapter 3.

Victimisation

2.33 A school must not victimise a pupil or applicant. It is victimisation for a school to subject a pupil, or someone who has applied for admission as a pupil, to a detriment because:

- they have done a 'protected act' (read paragraph 3.154), or
- the school believes they have done a protected act or may do so in the future (section 27)

'Detriment' in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the individual concerned might reasonably consider has changed their position for the worse or put them at a disadvantage compared to others.

2.34 It is also victimisation for a school to subject a parent, or other member of the public, to a detriment because they have done a protected act or the school believes that they may do so in the future. This is covered by Part 3, rather than Part 6, of the Act (section 27).

2.35 A school commits victimisation if it subjects a pupil to a detriment because their parent or sibling has done a 'protected act', or because the school believes that they may do so in the future (section 86).

2.36 A 'protected act' is any of the following:

- bringing proceedings under the Act
- giving evidence or information in connection with proceedings brought under the Act
- doing anything else for the purposes of, or in connection with, the Act
- making an explicit or implicit allegation that another person has done something in breach of the Act (whether or not the allegation is later dropped)

For an explanation of 'detriment', read paragraph 3.159.

The Public Sector Equality Duty

2.37 Section 149 of the Act imposes the Public Sector Equality Duty (PSED) on public authorities and other bodies. We refer to this as the general equality duty. In addition to the general equality duty, the Equality Act 2010 (Specific Duties)

(Scotland) Regulations 2012 as amended (the Specific Duties Regulations) impose specific duties on certain public authorities listed in the Specific Duties Regulations. We refer to these as the specific duties. In the context of school education, the general equality duty and specific duties apply to education authorities and the managers of grant-aided schools. The general equality duty and specific duties apply to the 'relevant protected characteristics' of:

- age
- disability
- gender reassignment
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

2.38 The general equality duty imposes three needs on public authorities and other bodies. In carrying out their functions, they are required to have due regard to the need to:

- eliminate discrimination, harassment and victimisation and other conduct that is prohibited by the Act
- advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it

- foster good relations between people who share a relevant protected characteristic and people who do not share it

2.39 Where schools are concerned, age will be a relevant characteristic in considering the duties in their role as an employer and a service provider, but not in relation to pupils. The protected characteristic of marriage and civil partnership also applies to schools in their role as an employer. However, this is only in relation to the first need of the general equality duty.

2.40 The general equality duty applies to decision makers personally. Decision makers are those exercising functions subject to the duty at any level. These functions include all types of decisions and actions. This could include, for example, an education authority developing a new behaviour policy or a teacher making a decision about the application of a school uniform policy.

2.41 Schools must have due regard to the three needs of the general equality duty. What having ‘due regard’ means in practice has been defined in case law. It means giving relevant and proportionate consideration to the general equality duty.

2.42 For schools, this means that decision makers must be aware of the duty to have ‘due regard’ to the PSED when making a decision or taking an action. They must assess whether the decision or action may have particular implications for people

with particular protected characteristics, and this should inform their decision making.

2.43 Decision makers have a ‘duty of inquiry’ to make sure they have an evidence base about the needs and experiences of pupils and parents with different protected characteristics. This is to help decision makers understand the impact of their decisions on pupils and parents.

2.44 From this evidence base, decision makers can understand:

- what the needs of their pupils and parents are
- whether the decision they are making might give rise to any disadvantage, and
- whether it results in barriers or adverse impacts on pupils or parents with protected characteristics

2.45 Decision makers can then consider ways to mitigate any disadvantages.

2.46 Schools must also consider ways to positively advance equality of opportunity and foster good relations. They must consider equality implications before and at the time that they develop policy and take decisions, and not as an afterthought. Schools must also review policy and decisions on a continuing basis. This can include taking decisions in relation to individual pupils.

2.47 The general equality duty must be integrated into the implementation of the school’s functions. The analysis needed to comply with the duty also has to be conducted seriously and rigorously. Schools must be committed to analysing and

exploring as much information as needed to fully comply with the duty. The analysis must be considered a genuine assessment, rather than merely a procedural formality.

2.48 Schools cannot delegate responsibility for the duty to anyone else, such as to an external provider contracted to provide a service for the school.

Specific duties

2.49 The specific duties apply to education authorities and the managers of grant-aided schools. The purpose of the specific duties is to help listed public authorities improve their performance of the general equality duty.

2.50 Listed authorities are required to:

- report progress on mainstreaming the general equality duty
- publish equality outcomes and report progress
- assess and review the equality impact of new and existing policies and practices (equality impact assessments (EIAs))
- gather, use and publish employee information
- publish gender pay gap information
- publish equal pay statements
- consider award criteria and contract conditions in relation to public procurement
- publish in a manner that is accessible

- consider such matters as may be specified from time to time by the Scottish ministers

For more information, read our guidance on the PSED:

- Technical guidance on the Public Sector Equality Duty: Scotland
- further non-statutory guidance on the PSED available on our website

Exceptions to the schools provisions

2.51 The Act contains exceptions that apply across the Act. Some of these exceptions also apply to schools, some apply only to schools and some apply only to certain types of school. Exceptions that apply across the Act and are not specific to schools are explained in chapter 10.

2.52 Exceptions that apply only to schools are explained in chapter 5. These relate to curriculum content and acts of worship or other religious observance.

2.53 Exceptions that apply to certain types of school can be summarised as follows:

- single-sex schools are allowed to admit pupils of only one sex (read chapter 3)
- mixed-sex schools with single-sex boarding accommodation are allowed to offer boarding to only one sex (read chapter 3)

- schools conducted in the interest of a denominational body are allowed to discriminate on the grounds of religion or belief in admissions, and in the provision of education or access to any benefit, facility or service (read chapter 4 and chapter 5)
- selective schools are permitted to refuse admission to disabled applicants who fail the admissions process even if the failure is as a consequence of something arising from their disability (read chapter 4)
- boarding schools are permitted, in some circumstances, to restrict access to communal accommodation based on sex or gender reassignment (read chapter 10)
- schools that are charities are permitted to provide benefits only to people with a particular protected characteristic if this is in line with their charitable purposes (read chapter 10)

Positive action

2.54 The Act defines the circumstances in which a school may take positive action to overcome disadvantage, to meet different needs or to increase participation of people with a particular protected characteristic (section 158).

2.55 Where this results in more favourable treatment of pupils with a particular protected characteristic, this is lawful provided that the requirements of the positive action provisions are met. Positive action is explained in detail in chapter 8.

2.56 The Act allows for the more favourable treatment of disabled people in relation to direct discrimination. This includes disabled pupils in schools. Therefore, it is not direct discrimination for schools to treat a disabled person more favourably than a non-disabled person. More favourable treatment of disabled pupils does not amount to discrimination against those who do not have a disability (section 13, paragraph 3).

Interaction with other legislation and responsibilities

2.57 Nothing in the Act takes priority over any other statutory duties that schools may have. When meeting their obligations under the Act, schools must ensure that they comply with all other legal requirements placed on them. Schools must comply with legal duties relating to:

- governance, administration and finance
- admissions
- behaviour
- the curriculum
- additional support needs
- employment of staff
- vulnerable pupils
- safeguarding

2.58 However, other legislative provisions and responsibilities do not necessarily provide a defence to a claim under the Act. Schools are expected to take whatever action is necessary to ensure they fulfil their responsibilities, both under the Act and under any other legislation that applies to them.

2.59 Education authorities have various other duties arising from the Education (Additional Support for Learning) (Scotland) Act 2004, as amended. The duties apply to the provision of school education to pupils with additional support needs within their area.

Education (Additional Support for Learning) (Scotland) Act 2004

2.60 Education authorities have duties under the Education (Additional Support for Learning) (Scotland) Act 2004 (ASL 2004 Act).

2.61 Under the ASL 2004 Act, a child is a person who is not over compulsory school age. A young person under the ASL 2004 Act:

- is aged 16 years or over
- is a pupil at a school, and
- has, since turning 16 years old, remained a pupil at that or another school

2.62 These definitions only apply to the ASL 2004 Act and we refer to them where relevant. We refer to pupils elsewhere in this guidance, as defined in chapter 1.

2.63 The definition of additional support needs is set out in the ASL 2004 Act. The definition of additional support needs is broad, and pupils may have additional support needs for many reasons, including if they are disabled.

2.64 Under section 1 of the ASL 2004 Act, ‘a child or young person has additional support needs where, for whatever reason, they are, or are likely to be, unable without the provision of additional support to benefit from school education provided, or to be provided’.

2.65 All looked after children and young persons are automatically deemed to have additional support needs, unless the education authority determines that they do not require additional support to benefit from school education. A looked after child or young person generally means a child or young person who is in the care of the local authority. This includes those looked after at home and away from home.

2.66 Additional support needs can arise, in the short or long-term, and from a variety of circumstances including:

- the learning environment
- family circumstances
- health or disability needs
- social and emotional factors

2.67 The support provided to pupils with additional support needs is usually called additional support for learning. Every pupil’s situation is different and will depend on their own needs. It can be provided in many ways including:

- changes to the curriculum or the way a pupil is taught
- support from a learning assistant
- use of technology or changes to learning materials
- input from specialist teachers or health professionals

The duties of education authorities under the Education (Additional Support for Learning) (Scotland) Act 2004

2.68 Each education authority must make appropriate arrangements for identifying:

- which children and young persons (as defined in paragraphs 2.61 to 2.62) have additional support needs
- which of those children and young persons require a co-ordinated support plan (CSP) (read paragraphs 2.75 to 2.80 for requirements of a CSP)
- the particular additional support needs of those children and young persons (section 6, paragraph 1, ASL 2004 Act)

2.69 A parent, child aged 12 to 15 years old or a young person can ask an education authority to establish whether a child or young person has additional support needs or requires a CSP. The education authority must be satisfied that the requester has capacity to make the request. The education authority must then comply with that request unless it is unreasonable (section 6, paragraph 2, ASL 2004 Act).

2.70 If an education authority discovers that a child or young person may have additional support needs or may require a CSP, the authority must then establish whether this is the case (section 6, paragraph 5, ASL 2004 Act). Additional support needs can be identified at any time.

2.71 Education authorities must identify and make adequate and efficient provision for the additional support needs of children and young persons whose school education the authority is responsible for. This includes:

- a public school or nursery
- a nursery contracted by an education authority to provide free hours of early learning and childcare
- a grant-aided or independent special school or nursery, where an education authority has arranged a pupil's placement

2.72 Education authorities may also help children and young people belonging to their area who have or may have additional support needs, but whose school education the authority is not responsible for. For example, this includes pupils attending independent or grant-aided schools or home educated pupils.

2.73 Education authorities must make appropriate arrangements for continuing to consider both the additional support needs of children and young persons, and the adequacy of the additional support for learning provided (section 4, paragraph 1 and section 6, ASL 2004 Act).

2.74 Further, when deciding what provision is to be made for a child or young person with additional support needs, an education authority must:

- seek and take account of relevant advice and information from appropriate agencies and others
- seek and take account of the views of the child, young person and / or parents, as appropriate
- take account of any relevant advice or information provided to the authority
- take account of any relevant advice or information already in the authority's possession (section 12, paragraph 1 and 2, ASL 2004 Act)

Co-ordinated support plans

2.75 CSPs are the only statutory additional support plan in Scotland and if the criteria set out in section 2, paragraph 1 of the ASL 2004 Act are met, an education authority must provide an adequate CSP. CSPs are different to non-statutory additional support plans, such as an individualised educational programme (IEP).

2.76 Under the ASL 2004 Act, a child or young person is said to require a CSP if:

- an education authority is responsible for their school education
- their additional support needs arise from one or more complex factors, or from multiple factors

- their needs are likely to continue for more than a year
- their needs require ‘significant’ additional support to be provided by the education authority and either another department of the education authority (such as social work) or by another agency (or agencies)

2.77 Agencies are defined in section 23, paragraph 2 of the ASL Act 2004 and could include an NHS board or another education authority.

2.78 Where a CSP is in place, the authority has a duty to ensure that they provide additional support for learning in accordance with the plan. They also have a duty to seek to ensure that additional support for learning is provided in accordance with the plan by others who are named in the CSP (section 11, paragraph 5(b) and (c) of the ASL 2004 Act).

2.79 There are review requirements for CSPs. The education authority responsible for the education of the child or young person must continue to consider the adequacy of each CSP. They must formally review each plan at least every 12 months and make appropriate amendments as necessary (section 10, ASL 2004 Act).

2.80 Read the Scottish Government’s statutory guidance on the ASL 2004 Act and CSPs for further information.

Additional support needs and disability

2.81 The definition of additional support needs is different to the Equality Act 2010’s definition of disability.

2.82 There will be some pupils who have a disability as defined in the Equality Act 2010 but do not have additional support needs. Likewise, some pupils will have additional support needs but do not have a disability. However, a significant number of pupils will be in both categories.

2.83 Some disabled pupils have additional support needs and may be receiving additional support for learning or have a CSP under the ASL 2004 Act.

Chapter 3: Important concepts

What discrimination is

3.1 This section describes types of discrimination and other prohibited conduct, and how they apply to the schools provisions.

Direct discrimination

3.2 Direct discrimination occurs when a school treats, or would treat, a pupil (or a prospective pupil, in respect of admissions) less favourably because of a protected characteristic. An example of this would be refusing to admit a prospective pupil to a school because of their race (section 13).

3.3 It is not possible to justify direct discrimination, so it will almost always be unlawful. However, in relation to schools, it may be lawful where:

- a disabled pupil is treated more favourably than a non-disabled pupil (read paragraphs 3.21 to 3.22)
- the Equality Act 2010 (the Act) provides an express exception permitting directly discriminatory treatment that would otherwise be unlawful, for example, single-sex schools can admit pupils of only one sex without this being unlawful direct discrimination

3.4 These exceptions are explained in chapter 10.

Less favourable treatment

3.5 In considering whether a school has directly discriminated against them, a pupil must compare what has happened to them to the treatment that a pupil in similar circumstances without their protected characteristic is receiving, or would receive. They must be able to show that they have been treated less favourably. Less favourable treatment can include being treated in a way which puts them at a disadvantage compared with other pupils. For example, a gay pupil cannot claim that excluding him for fighting is direct discrimination because of sexual orientation unless he can show that a heterosexual pupil would not be excluded for fighting.

Example:

3.6 A group of Black Caribbean boys are talking loudly and being boisterous in a science class. The teacher sends them to isolation for their behaviour but does not isolate an Asian boy who was also participating in the behaviour. The teacher cannot provide a reason why the Black Caribbean boys have been punished when the Asian boy has not. In these circumstances, the treatment of the isolated boys is likely to amount to direct race discrimination.

3.7 Less favourable treatment could also include depriving a pupil of a choice, excluding them from an opportunity or offering them a provision that is comparatively poorer. Less favourable treatment includes single acts or omissions as well as the application of rules and practices in a particular case. To amount to less favourable treatment, it is enough for a pupil to

say they would have preferred to not have been treated differently.

3.8 For direct discrimination because of pregnancy and maternity, the test is whether the treatment is ‘unfavourable’ rather than ‘less favourable’ (section 17). As a result, there is no need for a pupil who is a mother to compare her treatment with that of other pupils. Read paragraphs 3.28 to 3.35 for further detail about pregnancy and maternity discrimination.

Comparators

3.9 In most cases, when seeking to establish direct discrimination a pupil must show that they have been treated less favourably than another pupil who does not have their protected characteristic. This is their comparator. There are exceptions to this in relation to racial segregation (read paragraphs 3.18 to 3.19) and pregnancy and maternity (read paragraphs 3.28 to 3.35).

3.10 The Act says that there must be no material difference between the circumstances of the pupil and those of their comparator (section 23, paragraph 1). However, the circumstances do not need to be identical in every way. A material difference is one that is significant and relevant.

3.11 A pupil does not need to find an actual person to compare their treatment with as this may not always be possible. They can rely on a ‘hypothetical comparator’ if they can show that such a person would be treated differently. Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are

similar to those of the pupil, but not the same. Looking at these elements together, a court may conclude that the pupil was treated less favourably than a hypothetical comparator would have been treated.

Example:

3.12 A disabled autistic pupil attends a specialist school for autistic and learning disabled pupils. All of the pupils at the school are disabled. The pupil says that he was placed at a disadvantage because he was not given an individual plan to manage his transition from year 9 to year 10. The school argues that he was not at a disadvantage when compared to a non-disabled pupil at the school, because there are no non-disabled pupils at the school. Therefore, for the purposes of comparison, a hypothetical non-disabled pupil at the school may be constructed. The hypothetical comparator would be a non-disabled pupil or a disabled pupil who has a different impairment at the specialist school and who was moving from year 9 to year 10.

Example:

3.13 A Black Caribbean pupil arrives late for the first three classes of term. The teacher tells him that his late arrival disturbed the concentration of the other pupils and he is given a detention. In the absence of an actual comparator (that is, another pupil who had also arrived late three times, but been treated differently), the Black Caribbean pupil could compare his treatment to that given to two White pupils in slightly different circumstances:

- one White pupil had refused to return to his desk on three occasions and had disrupted the class, but he was not punished
- the other White pupil played music on his mobile phone during class on three occasions, which distracted the teacher and the pupils, but he was not punished either

Elements of the treatment of these two comparators could allow a court to construct a hypothetical comparator showing that the Black Caribbean pupil had been treated less favourably because of race.

Relevance of intention or motive

3.14 Direct discrimination is unlawful, irrespective of the school's motive or intention and whether the less favourable treatment of the pupil is conscious or unconscious. School staff may have prejudices that they are not aware of having, sometimes called unconscious biases. They may also be acting with good intentions, or be unaware that they are treating the pupil differently because of a protected characteristic.

3.15 Even if a teacher believes that they are acting in the best interests of a pupil, they can still be found to have discriminated. If the less favourable treatment is because of the protected characteristic, then it will be discrimination, regardless of intention. This is why it is important for there to be training on equality and on the provisions of the Act for all members of school staff who have contact with pupils or make decisions about them.

Example:

3.16 A teacher decides to refuse a pupil with a facial disfigurement a place on the school debating team. He does this because he believes that other pupils taking part in the debates will make fun of the pupil and cause him distress. Although the teacher may think that he has good intentions, refusing the pupil a chance to be on the team is likely to be direct disability discrimination.

Example:

3.17 A school organises a trip to the theatre to see a Shakespeare play. The school decides that a pupil with a hearing impairment would receive greater benefit from watching a subtitled film version of the play. As a result, it arranges for her to stay behind at school to watch the film in the audiovisual suite. Although the school may consider its intentions to be good, preventing the pupil from seeing the play at the theatre is likely to be direct disability discrimination. The school could have organised a trip to see a British Sign Language interpreted assisted performance, which all of the pupils could enjoy as an alternative.

Segregation

3.18 There is no need for someone claiming direct discrimination because of racial segregation to find a person to compare themselves with.

3.19 Racial segregation is deliberately separating people by race, or colour, or ethnic or national origin, and will always be

unlawful direct discrimination (section 13, paragraph 5). However, positive action, for example a mentoring scheme for Black girls, would not be racial segregation if a need for such a scheme had been identified. Read chapter 8 for more information about positive action.

More favourable treatment

3.20 It is not direct discrimination against a male pupil to offer a female pupil special treatment in connection with her pregnancy or childbirth (section 13, paragraph 6(b)).

3.21 In relation to direct disability discrimination, the Act only protects disabled pupils. It is therefore not direct discrimination against non-disabled pupils to treat a disabled pupil more favourably.

Example:

3.22 An autistic pupil can sometimes act in a disruptive manner in class. The school does not take disciplinary action, but uses agreed strategies to manage his behaviour. A non-disabled pupil who is also disruptive in class is punished for his behaviour. This difference in treatment would not be direct discrimination against the non-disabled pupil.

Discrimination based on association

3.23 It is direct discrimination if a school treats a pupil less favourably because of the pupil's association with another person (for example, their sibling, parent, carer or friend) who has a protected characteristic. This does not apply to pregnancy and maternity. However, if a pupil is discriminated

against because they are associated with a pregnant woman, this may be sex discrimination by association. The main consideration is whether the protected characteristic of the other individual was the cause of the less favourable treatment. The association with the other person does not have to be permanent, although case law suggests it is usually long-term, for example a married couple, a parent's association with a child or a child's association with a parent.

Example:

3.24 A pupil is refused a place at a faith-based primary school because his parents are a lesbian couple. This is direct sexual orientation discrimination by association because of the boy's association with his parents.

Discrimination based on perception

3.25 It is also direct discrimination if a school treats a pupil less favourably because the school mistakenly thinks that the pupil has a protected characteristic. This does not apply to the protected characteristic of pregnancy and maternity. However, if a pupil is discriminated against because they are perceived to be pregnant, this may be sex discrimination by perception.

Example:

3.26 A straight male pupil at a secondary school, who has long hair and wears eyeliner, is not allowed to take part in rugby trials because the sports teacher says words to the effect of 'gay people cannot play rugby'. This is likely to be direct

discrimination, because of perceived sexual orientation, even though the pupil is not gay.

Example:

3.27 An independent school has a rapidly growing number of Polish pupils. Some parents complain about this. A pupil is then refused admission to the school because the school assumes from his name that he is Polish, even though he is not. This is likely to be direct race discrimination.

Discrimination because of pregnancy and maternity

3.28 Pupils are protected from pregnancy and maternity discrimination if:

- they are pregnant
- they have given birth in the previous 26 weeks, or
- they are breastfeeding a baby that is not more than 26 weeks old

3.29 Any unfavourable treatment will be pregnancy and maternity discrimination if the treatment would not have taken place if not for the pregnancy, birth or breastfeeding (section 17).

3.30 Mothers are protected if their baby is stillborn if the pregnancy lasted for at least 24 weeks before they gave birth (section 17).

3.31 Outside the 26-week period, a mother may be protected by the sex discrimination provisions (section 13, paragraph 6).

Example:

3.32 A school reduces the number of National 5s a pupil, who is pregnant, is studying. This is because it believes that she will not be able to cope with as many subjects because she is pregnant. The pupil does not receive the subject choices that would otherwise have been available to her, and therefore this is likely to be pregnancy and maternity discrimination.

3.33 Pregnancy and maternity needs to be a cause of the unfavourable treatment but does not need to be the only cause. It is sufficient if pregnancy and maternity has a significant influence on the unfavourable treatment.[2]

3.34 Pregnancy and maternity discrimination includes unfavourable treatment based on an assumption or stereotype about pregnancy or maternity, whether or not it is accurate.

Example:

3.35 A pupil who has recently given birth is not given the opportunity to attend a careers session on the basis of the stereotypical assumption that she will want to focus on raising her baby, rather than make decisions about her education and career. This decision, resulting in unfavourable treatment based on an assumption, is likely to be pregnancy and maternity discrimination.

[2] Nagarajan v London Regional Transport [2001] 1 AC 501

Advertising an intention to discriminate

3.36 If a school advertises that it will treat applicants less favourably because of a protected characteristic when offering education, benefits, facilities or services, this will amount to direct discrimination. The question of whether an advertisement is discriminatory depends on whether a reasonable person would consider it to be so. A reasonable person is a person of average intelligence with no specialist knowledge. An advertisement can include a notice or circular, whether distributed to the public or not, in any publication, on radio, on television or in cinemas, via the internet (including via email or on social media) or at an exhibition.

Example:

3.37 A school sends prospective pupils and parents copies of what it thinks are its most important policies as part of its application process, including its 'zero tolerance' behaviour policy. This policy states that no exceptions are made to the rule that pupils must not make any noise in lessons or they will be penalised. This is likely to discourage applications from pupils who make involuntary noises as a result of a disability, and it may amount to direct disability discrimination.

Direct discrimination on the grounds of religion or belief

3.38 Less favourable treatment which is either because a pupil holds a religious or other protected belief, or because they have expressed such a belief, will normally be unlawful direct

discrimination. This is the case even if the school objects to the belief or expression of the belief.

3.39 However, a Court of Appeal judgment in the employment law case of Higgs v Farmor's School[3] may affect how the courts address direct discrimination on the grounds of religion or belief. The Higgs case held that where an employer dismisses an employee due to something objectionable in the way the employee expresses their belief, then the dismissal is lawful provided the employer can prove that it was a proportionate response to the objectionable conduct.

3.40 If this approach is applied to the schools provisions within the Act, less favourable treatment because of something that is objectionable or inappropriate in the way a protected religious or other belief is expressed may be lawful. This is only the case if the school can show that the treatment was a proportionate response to the objectionable conduct, and that it was not because of the belief itself or the fact that it was expressed.

3.41 'Objectionable' or 'inappropriate' must be something 'to which objection could justifiably be taken'. This must be determined objectively, considering the forum, context, manner and content of the expression.

Example:

3.42 A school runs a youth club to help vulnerable young people, including gay young people, with pastoral and practical needs.

[3] Higgs v Farmor's School [2025] EWCA Civ 109

The youth club organises events and runs a closed online forum for young people to use.

One member of the club is a pupil with strong religious beliefs and he regularly shares posts and petitions on the forum from elsewhere, expressing his religious views. In one post, the pupil shared a social media post and petition criticising the funding of youth groups designed for gay people. The pupil included his own message that in the eyes of his faith gay people are 'evil' and their relationships are 'disgusting'.

The school becomes aware of the post through its monitoring processes. The school has an online conduct policy for use of its forum which includes that it does not allow pupils to post content that promotes violence, hatred or prejudice against individuals or groups based on any protected characteristic under the Equality Act 2010.

In accordance with its policy, the school removes the post and prevents the pupil from attending the youth club for a month while it considers what steps to take and discusses future conduct with the pupil. The school determined that this was necessary given the pupil breached its online conduct policy. Assuming that a court accepted that the pupil's conduct was a manifestation of a protected religious or other belief, it would be likely to find that this less favourable treatment was a proportionate response. This is because of the objectionable way the pupil shared his beliefs in a online forum which was designed to assist vulnerable young people, including gay pupils, within the club.

3.43 For further detail, read the Services, public functions and associations: Code of Practice.

Indirect discrimination

3.44 Indirect discrimination may occur when a school applies an apparently neutral provision, criterion or practice in the same way for all pupils (or a particular pupil group, such as Higher physics pupils) which has the effect of putting pupils sharing a protected characteristic at a particular disadvantage compared to other pupils. This would be indirect discrimination even if the school did not intend to disadvantage the pupils with a particular protected characteristic in this way (section 19).

3.45 For indirect discrimination to take place, the following four conditions must be met (section 19, paragraph 2):

1) A provision, criterion or practice is applied equally: the school applies, or would apply, the provision, criterion or practice equally to all pupils within the relevant group, including a particular pupil.

2) A comparative approach shows there is disadvantage (often referred to as the requirement to show ‘group disadvantage’): the provision, criterion or practice puts, or would put, pupils who share the individual’s relevant protected characteristic at a particular disadvantage when compared with pupils who do not have that characteristic.

3) There is individual disadvantage: the provision, criterion or practice puts, or would put, the individual pupil at that disadvantage.

4) The provision, criterion or practice cannot be justified: the school cannot show that the provision, criterion or practice is justified as a proportionate means of achieving a legitimate aim.

Provision, criterion or practice

3.46 The first step in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined in the Act, but it should be interpreted widely to include, for example:

- arrangements (for example, for deciding who to admit)
- the way in which education, or access to any benefit, service or facility is offered or provided
- one-off decisions
- proposals or directions to do something in a particular way
- formal or informal policies, rules
- arrangements, conditions, prerequisites and qualifications

3.47 The provision, criterion or practice may be written out formally or may simply have developed as the school decided the best way of achieving its aims.

Disadvantage

3.48 The second condition in paragraph 3.45 establishes whether the provision, criterion or practice puts, or would put, a pupil at a particular disadvantage when compared with others who do not share the pupil's protected characteristic.

3.49 'Disadvantage' is not defined in the Act. It could include denial of an opportunity or choice, or a deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about. An unjustified sense of grievance would not qualify.

3.50 A disadvantage does not have to be quantifiable. It does not have to involve actual loss (economic or otherwise). It is enough that a pupil can reasonably say that they would have preferred to be treated differently.

3.51 There is no requirement to show why a provision, criterion or practice puts one group sharing a particular protected characteristic at a disadvantage when compared with others. However, it is necessary to demonstrate a causal link between the provision, criterion or practice and the particular disadvantage experienced. The essential question is whether the disadvantage is caused by the provision, criterion or practice.

3.52 In some situations, the link between the protected characteristic and the disadvantage might be obvious. For example, a uniform policy may create a disadvantage for pupils with particular religious beliefs.

3.53 In other situations, it will be less obvious how the provision, criterion or practice would put pupils sharing a protected characteristic at a disadvantage. In this case, statistical data, expert evidence or personal testimony may help to explain the nature of the protected characteristic or the behaviour of the group sharing the characteristic. The evidence might take the form, for example, of evidence about the principles of a particular religious belief (section 19, paragraph 2).

Example:

3.54 A pupil has a belief that handling pork renders him ritually unclean for the purposes of his religion. He takes part in a school cookery class in which pupils make jelly containing pork gelatine. The pupil's parents claim that the school is indirectly discriminating against him by not providing cooking ingredients that do not contain pork gelatine. Evidence of the importance of this belief in the pupil's religion may help the school to establish whether it amounts to a disadvantage.

Example:

3.55 A school requires male pupils to wear a cap as part of the school uniform. Although this requirement is applied equally to all pupils, it has the effect of excluding Sikh boys, whose religion requires them to wear a turban. This would be indirect discrimination based on religion or belief, because it is unlikely that the school would be able to justify this action.

Example:

3.56 A school requires all pupils to wear shirts and ties as part of the school uniform. An autistic pupil with sensory issues finds wearing items of tight clothing around his neck very distressing, which can cause him to become dysregulated. Unless the uniform policy is adjusted for disabled pupils, this could be indirect discrimination based on disability.

The comparative approach

3.57 If it is clear that there is a provision, criterion or practice that puts, or would put, pupils sharing a protected characteristic at a particular disadvantage, the next stage is to consider a comparison between pupils with that protected characteristic and those without. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances (section 23, paragraph 1).

3.58 It is important to be clear which protected characteristic is relevant. For race, the comparison group could be all Africans or only Somalis, for example. For disability, this would not be all disabled pupils, but disabled pupils with the same impairment, for example, an equivalent visual impairment.

Example:

3.59 A secondary school provides a severely dyslexic pupil with coloured overlays for reading. The same school does not provide a pupil who is blind with coloured overlays for reading. Although both pupils share the protected characteristic of disability, they do not have the same impairment type, so they

would not be in the same group for the purposes of comparison.

Example:

3.60 A secondary school makes plans for a series of meetings for pupils to discuss their career options. These meetings are planned for Friday evenings. Planning the meetings for a Friday night is a neutral practice applied equally to all. A Jewish pupil points out that this would prevent him from attending, because he observes Shabbat from dusk on a Friday evening. The pool for comparison could be all pupils in the year group involved. Assuming that it affects or would affect a significant enough number of Jewish pupils, it is reasonable to assume that they would be placed at a particular disadvantage, so the school must either justify its practice or change it to avoid acting unlawfully.

Making the comparison

3.61 Looking at the comparator pool, a comparison must then be made between the impact the provision, criterion or practice has or would have on pupils without the relevant protected characteristic, and its impact on pupils with the protected characteristic.

3.62 The way that the comparison is carried out will depend on the circumstances, including the protected characteristic concerned. It may, in some circumstances, be necessary to carry out a formal comparative exercise using statistical evidence.

Carrying out a formal comparative exercise

3.63 Statistics can provide an insight into the link between the provision, criterion or practice and the disadvantage that it causes. Schools may use their own data, but may also use national or local statistics to demonstrate the nature and extent of the particular disadvantage.

3.64 However, a statistical analysis may not be appropriate or practicable, especially when there is inadequate or unreliable information, or the numbers of pupils are too small to allow for a statistically significant comparison. In this situation, it may be helpful for an expert to provide evidence on whether there is any disadvantage and, if so, the nature of it.

3.65 There are other instances where it may be useful to have evidence (including, if appropriate, from an expert) to help understand the nature of the protected characteristic or the behaviour of the group sharing the characteristic. For example, a school may wish to have evidence about the principles of a particular religious belief.

3.66 Primarily, it needs to be established that the provision, criterion or practice puts, or would put, a greater proportion of those with the relevant protected characteristic at a disadvantage, compared to the proportion of those without the protected characteristic. It needs to be shown that the group with the protected characteristic experiences a ‘particular disadvantage’ in comparison with others. Whether a difference between the groups is sufficiently significant will depend on the context, such as the size of the pool and the actual

numbers behind any relative proportions. It is not necessary to show that all, or a majority, of those within the pool who share the protected characteristic are placed at a disadvantage. A court will take account of the evidence and statistics relating to disadvantage, if a challenge leads to legal proceedings.

Proportionate means of achieving a legitimate aim

3.67 If the school can show that applying the provision, criterion or practice is ‘a proportionate means of achieving a legitimate aim’, then it will not amount to indirect discrimination (section 19, paragraph 2(d)). This is often known as the ‘objective justification’ test.

What is a legitimate aim

3.68 For the provision, criterion or practice to be a proportionate means of achieving a legitimate aim, the school would need to prove first that it has a 'legitimate aim'.

3.69 To be legitimate, the aim of the provision, criterion or practice should be legal, should not be discriminatory in itself and must represent a real, objective consideration. This has been established by case law.

3.70 In the context of schools, examples of legitimate aims might include:

- ensuring that education, benefits, facilities and services are targeted at those who most need them
- the fair exercise of powers, for example, non-discriminatory exercise of sanctions

- ensuring the health and safety of pupils and staff
- maintaining academic and behaviour standards
- ensuring the wellbeing and dignity of pupils

3.71 Though proper use of resources may be a legitimate aim, a school solely aiming to reduce costs cannot expect to satisfy the test.[4] For example, they cannot simply argue that to discriminate is cheaper than not to discriminate.

What is proportionate

3.72 Even if the aim is a legitimate one, a school must prove that the means of achieving it are proportionate. Proportionality requires balancing the aim sought to be achieved and the discriminatory effect it may have. The disadvantages caused must not be disproportionate to the aims pursued.

3.73 The courts have broken this down into a four-stage test. For a measure to be proportionate:[5]

1) The aim must be sufficiently important to justify limiting a protected right.
2) The measure must be rationally connected to the aim being pursued: this means its implementation can reasonably be expected to contribute towards the achievement of that aim.

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[4] Heskett v Secretary of State for Justice [2020] EWCA Civ 1487, Hill v Revenue Comrs [1999] ICR 48

[5] Bank Mellat [2013] UKSC 39; Akerman-Livingstone v Aster Communities Ltd [2015] 3 All ER 725)

3) The means chosen must be no more than necessary to accomplish the aim: the court will consider whether a less intrusive measure could have been used without unacceptably compromising the achievement of the aim.

4) The impact of the rights infringement must be proportionate to the likely benefit of the measure.

3.74 If a school can show that the provision, criterion or practice is ‘a proportionate means of achieving a legitimate aim’ then it will not amount to indirect discrimination. This justification test also applies to other types of discrimination, for example, discrimination arising from disability.

3.75 If challenged in the courts, it is for the school to justify the provision, criterion or practice and to produce evidence to support their assertion that it is justified. Generalisations, for example stating that a strict behaviour policy is necessary to prevent poor behaviour, will not be sufficient to provide justification. It is not necessary for the justification to have been fully set out at the time the provision, criterion or practice was applied. If challenged, the school can set out the justification to the court.

3.76 The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages:

1) Is the aim of the provision, criterion or practice legal and non-discriminatory, and one that represents a real, objective consideration?

2) If the aim is legitimate, is the means of achieving it proportionate?

3.77 The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Cost can only be considered as part of the school's justification if there are other good reasons for adopting the chosen practice.

3.78 The more serious the disadvantage caused by the discriminatory provision, criterion or practice, the more compelling the justification must be.

Example:

3.79 A school bans 'cornrow' hairstyles as part of its policies on pupil appearance. These hairstyles are more likely to be adopted by specific racial groups. A ban without the possibility of exceptions on, for example, racial grounds, is likely to constitute indirect race discrimination. This is because it is unlikely to be objectively justified.

Example:

3.80 A school has a policy that no bladed items are allowed on site without special permission from the head teacher. A Sikh pupil asks if he can carry his Sikh kirpan blade in line with this policy. The pupil explains that he is required by his religion to carry the blade. The head teacher speaks to the pupil and his parents, hears that the pupil has been through the Amrit ceremony of initiation and explains the health and safety implications of the issue. It is agreed that the pupil can carry

his kirpan, securely sewn into a pouch, apart from in physical education lessons or other physical activities. This is unlikely to be indirect discrimination because the health and safety reasons for the decision are likely to amount to a proportionate means of achieving a legitimate aim.

3.81 In a case involving disability, if a school has not complied with its duty to make reasonable adjustments, it will be difficult for it to show that the treatment was proportionate.

Public authorities and justification of indirect discrimination

3.82 All public schools managed by an education authority and grant-aided schools are public authorities. Evidence of how these schools have complied with the PSED and specific duties may be relevant when seeking to justify indirect discrimination. This includes evidence on how they have assessed any potential discrimination and tried to prevent or limit it. Read our guidance on the PSED:

- Technical guidance on the Public Sector Equality Duty: Scotland
- further non-statutory guidance on the PSED available on our website

Example:

3.83 In the example about pupil appearance policies (paragraph 3.79), the school should also show that it had given due regard to the needs to eliminate race discrimination, and to advance equality of opportunity and good race relations, under

the PSED. If the school has not properly complied with its PSED obligations, and the specific duty to assess and review the equality impact of new and existing policies and practices, it is likely to be more difficult for it to justify the criteria objectively in relation to the application of a specific policy.

Indirect discrimination and the duty to make reasonable adjustments for disabled pupils

3.84 As well as having an obligation not to indirectly discriminate against disabled pupils, schools also have an anticipatory duty to make reasonable adjustments for disabled pupils. More detail about this is given in chapter 7. These two duties frequently overlap, and it is sensible to consider them together.

3.85 When planning, schools will need to consider whether their practices indirectly discriminate against disabled pupils. If a practice indirectly discriminates against disabled pupils, then the school must consider whether the practice can be justified.

Example:

3.86 A school has an attendance policy that, if a sixth year pupil has less than 90% attendance for the entire school year, then they are not allowed to attend their school prom. A sixth year pupil with severe anxiety amounting to a disability has only attended 60% of lessons for the school year. If the school refuses to allow the pupil to go to prom because of her school attendance, it may be found to have indirectly discriminated against her because of something arising in consequence of her disability, and to have failed to make a reasonable adjustment for her.

3.87 If a school plans to make reasonable adjustments for disabled pupils and makes those adjustments, then it will not have to change the practice for non-disabled pupils. This is the case unless the provision, criterion or practice has a discriminatory impact related to another protected characteristic.

Discrimination arising from disability

3.88 The Act says that the treatment of a disabled pupil amounts to discrimination arising from disability if the following conditions are met:

1) A school treats a pupil unfavourably (puts them at a disadvantage) even if this was not the school's intention.

2) This treatment is because of something arising in consequence of a disabled pupil's disability.

3) It cannot be shown that this treatment is a proportionate means of achieving a legitimate aim (section 15).

3.89 Treatment does not amount to discrimination arising from disability if the school does not know, and could not reasonably be expected to know, that a pupil has a disability.

3.90 Discrimination arising from disability is different from direct discrimination. Direct discrimination occurs where a school treats someone less favourably because of disability itself. Discrimination arising from disability occurs when a disabled pupil has been treated unfavourably because of something

arising in consequence of their disability. The motive for the treatment does not matter.

3.91 Discrimination arising from disability is also different from indirect discrimination. Indirect discrimination occurs when a provision, criterion or practice, applied equally to all pupils, puts or would put a disabled pupil at a disadvantage when compared to others who do not share that disability.

3.92 Discrimination arising from disability requires a disabled pupil to show they have experienced unfavourable treatment because of something connected with their disability. There is no need to show that other people have been affected alongside the individual disabled pupil or for the disabled pupil to compare himself or herself with anyone else.

Unfavourable treatment

3.93 For discrimination arising from disability to occur, a disabled pupil must have been treated 'unfavourably' (section 15, paragraph 1(a)), even if this was not the school's intention.[6] This means that they must be put at a disadvantage. Often, the disadvantage will be obvious, and it will be clear that the treatment has been unfavourable. For example, a pupil may have been excluded from the school. Being denied a choice or excluded from an opportunity is also likely to be unfavourable treatment.

3.94 Sometimes, the unfavourable treatment may be less obvious. Even if a school thinks that it is acting in the best interests of a

[6] City of Edinburgh Council v R 2018 CSIH 20

disabled pupil, it may still be treating that pupil unfavourably. Case law states that, where a disabled pupil has additional support needs and requires a co-ordinated support plan (CSP), failure to provide an adequate plan or to provide a plan in a timely way is unfavourable treatment, and can amount to discrimination arising from disability. A CSP is a legal document setting out the pupil's additional support needs and the support to be provided by the education authority and other departments or agencies, among other things.

Example:

3.95 A National 5 pupil is being treated for cancer and has missed a lot of school as a result of his illness. His school decides to enter him for only three National 4 subjects, without discussing this with him. The school does this because it believes he will be unable to catch up on the work, given the amount of lesson time he has missed. This is likely to be unfavourable treatment for the purposes of discrimination arising from disability.

Arising in consequence of disability

3.96 The unfavourable treatment must be because of something that arises in consequence of a disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability. The reason for the unfavourable treatment can be because of something connected to the pupil's disability.

3.97 The consequences of a disability include anything which is the result, effect or outcome of a disabled pupil's disability. The

consequences will be varied and will depend on the individual effect of a disability upon a disabled pupil. Some consequences may be obvious, such as an inability to walk unaided or disability-related behaviour. Others may not be obvious, such as an inability to concentrate for long periods of time, or the need for regular rest breaks or toilet breaks. Whether the school knew or could reasonably have been expected to know that a pupil was disabled will be important (read paragraphs 3.105 to 3.113).

3.98 To determine whether unfavourable treatment is because of something that arises in consequence of disability, it is important to consider the issue in two stages:[7]

1) Whether the pupil's disability causes, or results in, 'something'.

2) Whether the pupil was treated unfavourably because of that 'something': the 'something' does not need to be the sole reason, but it must be a significant, or at least more than trivial, reason for the unfavourable treatment.

Example:

3.99 A pupil with severe learning difficulties amounting to a disability is not allowed to have a school meal because she has become agitated and upset while queuing on several occasions. She is asked instead to bring in a packed lunch and told to eat it outside the canteen, away from her friends,

[7] Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305; York City Council v Grosset [2018] EWCA Civ 1105

because pupils are not allowed to eat food from home in the canteen. Her behaviour in the queue is a result of her learning difficulties. The refusal to allow the pupil to have a school meal is unfavourable treatment that is because of something that arises as a consequence of her disability.

This is also an example of a situation where reasonable adjustments may have avoided the discrimination arising from the pupil's disability. Here, if the pupil were allowed to go to the front of the queue on her arrival at the dinner hall, she would not become agitated and upset whilst queueing, and so her behaviour would not have become dysregulated.

When discrimination arising from disability can be justified

3.100 Unfavourable treatment will not amount to discrimination arising from disability if the school can show that the treatment is a 'proportionate means of achieving a legitimate aim'. This 'objective justification' test is explained in detail in paragraphs 3.67 to 3.81.

3.101 As in the previous example (in paragraph 3.99), if the school has not made a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult to show that the treatment was objectively justified for the purposes of a discrimination arising from disability claim.

3.102 It is for the school to justify the treatment. It must produce evidence to support its assertion that it is justified and not rely on generalisations.

Example:

3.103 A disabled autistic pupil at a primary school has an agreed reasonable adjustment to sit in the same allocated seat every class. The pupil becomes dysregulated when her usual class teacher is unavailable, and the supply teacher allows another pupil to sit at the front of the class. This is where the pupil's allocated seat is. The pupil reacts aggressively and is placed in seclusion. She has been treated unfavourably because she has been placed in seclusion, away from her peers and not receiving the same teaching as them. The seclusion has arisen in consequence of her disability, because she became dysregulated and reacted aggressively as a result of her autism. The school is aware of the pupil's disability, although the supply teacher may not have been. Because the school was aware of the pupil's disability, it may have discriminated against the pupil as a result of something arising in consequence of her disability unless it can show that it acted proportionately.

Example:

3.104 A school refuses to allow a pupil with a colostomy bag to take part in swimming lessons, because it assumes that the colostomy bag presents a health and safety risk. Because the reason for the treatment is based on general assumptions rather than a specific risk assessment, the school is unlikely to be able to justify the treatment. Had the school relied on a specific risk assessment rather than general assumptions it

would have been in a better position to be able to justify the treatment.

Knowledge of disability

3.105 If a school can show that it did not know that a disabled pupil had a disability, and could not reasonably have been expected to know, then unfavourable treatment does not amount to discrimination arising from disability (section 15, paragraph 2).

3.106 A school only needs to know about the facts of the pupil's impairment to be liable for discrimination arising from disability. The school does not need to realise that those particular facts meet the legal definition of disability. For the legal definition of disability, read paragraphs 3.212 to 3.243. The school also does not need to know that the 'something' which led to the unfavourable treatment was a consequence of the disability.

3.107 It is not enough for the school to show that it did not know that the disabled pupil had the disability. It must also show that it could not reasonably have been expected to know about it. A school must do all it can reasonably be expected to do to determine whether a pupil has a disability. When making enquiries about disability, issues of dignity and privacy should be considered, and personal information must be dealt with confidentially. What is reasonable will depend on the circumstances. This is an objective assessment.

3.108 When deciding if a pupil is likely to be considered to be disabled, a school must form its own judgement. It should take all relevant circumstances into account, which may include:

- a CSP or a non-statutory additional support plan, such as an individualised educational programme (IEP)
- a medical adviser's opinion
- advice from educational psychologists and additional support for learning teachers

3.109 However, it should not unquestioningly accept a medical adviser's opinion as determinative of whether a pupil is disabled.

3.110 A school may become aware that a pupil is likely to be disabled in a number of ways. For example, through information from the pupil's previous school, information from the pupil's parents and observation of the pupil's progress and behaviour. Pupils and their parents are often the best source of information about a pupil's disability. However, they do not need to disclose a disability and may not think of themselves or their child as being disabled.

3.111 Where a school becomes aware of a pupil with a disability, it should consider its duties under the Equality Act 2010, including the duty to make reasonable adjustments. Read chapter 7 for more information about reasonable adjustments.

3.112 If the school's employee or agent (someone who undertakes tasks on the school's behalf) knows of a pupil's disability, the school will not be able to claim that it does not know of the disability. Read chapter 7.

Example:

3.113 A pupil tells the school secretary that she has diabetes and that she needs to carry biscuits to eat when her blood sugar levels fall. A teacher has no information about her disability and refuses to allow the pupil to bring food into the classroom. When the teacher sees the pupil eating, he disciplines her. In this case, the school is unlikely to be able to argue that it did not know about her condition.

Relevance of reasonable adjustments

3.114 Schools can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments.

3.115 Where a school has made reasonable adjustments for a disabled pupil, they may still subject a disabled pupil to discrimination arising from disability. This is likely to arise where, for example, the adjustment is unrelated to the particular treatment complained of. However, it will be very difficult to show treatment was objectively justified where there is a failure to make a reasonable adjustment. Reasonable adjustments are explained in detail in chapter 7.

Harassment

3.116 The Act prohibits three types of harassment by one person against another (section 26). These are:

- harassment, meaning unwanted conduct related to a relevant protected characteristic (read paragraph 3.126)

which has the purpose or effect of violating the dignity of or creating an intimidating, hostile, degrading, humiliating or offensive environment for the pupil

- sexual harassment
- less favourable treatment of a pupil because they submit to or reject sexual harassment, or because they submit to or reject harassment related to sex or gender reassignment

3.117 These types of harassment can also apply to prospective pupils.

3.118 The Act provides that the responsible body for a school is prohibited from certain forms of harassment against pupils and prospective pupils (section 85, paragraph 2). The relevant protected characteristics for these provisions are:

- disability
- race
- sex

Read chapter 2 for information about responsible bodies.

3.119 Pregnancy and maternity are not protected directly under the harassment provisions. However, pregnancy and maternity harassment would amount to harassment related to sex.

3.120 The prohibition of harassment does not protect individuals who have the protected characteristics of gender reassignment, sexual orientation or religion or belief in relation to schools. However, where unwanted conduct related to any of these

protected characteristics results in a pupil suffering a detriment, that pupil may be able to bring a claim of direct discrimination (section 212, paragraph 5).

Example:

3.121 A disabled pupil is mocked by her teacher because of her disability. The pupil can bring a court case alleging harassment. A gay pupil is mocked by his teacher because of his sexual orientation. This pupil can bring a court case alleging direct discrimination. In both cases, the schools face the same penalties.

Example:

3.122 A member of school staff repeatedly tells a trans pupil that 'he' should not dress like a girl and that 'he' looks silly, which causes the pupil great distress. This would not be covered by the harassment provisions, because it is related to gender reassignment. However, it could constitute discrimination on the grounds of gender reassignment, as well as potentially being a disciplinary matter for the teacher.

3.123 Schools should consider adopting a policy to make clear to both staff and pupils how to address a trans pupil. The policy should respect the rights of both trans pupils and others, including staff members and pupils whose beliefs either align or conflict with adopting the preferred pronoun of a trans pupil.

3.124 It is likely such a policy will provide that, where a decision has been taken by the school to permit a pupil to adopt a preferred pronoun, teachers and others will be expected not to act

contrary to that decision. Where beliefs are affected, practical solutions may often be available to respect the rights of all, while following the policy, such as avoiding the direct use of a pronoun.

Example:

3.125 During a religious and moral education lesson, a teacher describes homosexuality as ‘unnatural’ and states that he will be covering only straight relationships in the lesson. A bisexual pupil in the class is upset and offended by these comments. This may be direct discrimination on the grounds of sexual orientation.

Harassment related to a protected characteristic

3.126 This type of harassment occurs when a school, through its staff and / or agents, engages in unwanted conduct which is related to a relevant protected characteristic, and which has the purpose or effect of:

- violating a pupil’s dignity
- creating an intimidating, hostile, degrading, humiliating or offensive environment for the pupil (section 26, paragraph 1)

3.127 Conduct could be face-to-face, on the phone, in text messages or online, for example through social media or online chat. It does not need to take place in school. Unwanted conduct also includes inaction by a school, if that inaction is related to a protected characteristic. Conduct that

has one of the effects set out can be harassment even if the effect was not intended.

3.128 The word ‘unwanted’ means essentially the same as ‘unwelcome’ or ‘uninvited’ and means ‘unwanted by the recipient’. It should be considered from their subjective point of view. However, external factors may be considered by a court in deciding whether it accepts that, subjectively, the conduct was unwanted. It is not necessary for any objection to be made to the conduct for it to be ‘unwanted’. However, when determining whether conduct was unwanted a court may take account of whether there was an objection, among other things. A serious one-off incident can amount to harassment.

3.129 Unwanted conduct ‘related to’ a relevant protected characteristic has a broad meaning. It can include situations in which:

- the pupil has the protected characteristic
- a person is generally abusive, but in relation to a particular pupil, the form of the unwanted conduct relates to that pupil's protected characteristic
- the pupil is associated with someone who has a protected characteristic
- the pupil may be wrongly perceived as having a particular protected characteristic
- the pupil may be known not to have a particular protected characteristic but is still subjected to harassment related to that characteristic

- the pupil does not have the protected characteristic, and the unwanted conduct is not directed at that pupil, but the pupil witnesses it and is offended

Example:

3.130 Care staff in a special school deliberately make racist remarks on a regular basis in the presence of a pupil of Indian heritage. Their purpose is to create an intimidating environment for him. In these circumstances, it is unnecessary to inquire into the effect of their conduct upon him, because the purpose of their behaviour is to create an intimidating environment.

Purpose or effect

3.131 For all three types of harassment, if the harasser's purpose is to violate the pupil's dignity, or to create an intimidating, hostile, degrading, humiliating or offensive environment for them, this will be sufficient to establish unlawful harassment. It will not be necessary to look at the effect the conduct has had on the pupil.

3.132 In deciding whether conduct has the effect of creating any of the circumstances defined in paragraph 3.126, the following points must be considered:

- the perception of the pupil (section 26, paragraph 4(a))
- the other circumstances of the case (section 26, paragraph 4(b))
- whether it is reasonable for the conduct to have that effect (section 26, paragraph 4(c))

These points are explained further in this section.

The perception of the pupil

3.133 The perception of the pupil is important. For example, did they regard the conduct as violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them?

3.134 This point is a subjective question and depends on how the pupil regards the conduct. If the pupil does not perceive their dignity to have been violated, or such an environment created, then the conduct should not be found to amount to harassment.

3.135 It is important to be mindful that, due to their age, disabilities or other matters, some pupils may have difficulty explaining how they regard the conduct. In such situations, there may need to be care given to discussions with the pupil.

The other circumstances of the case

3.136 Circumstances that may be relevant and need to be considered can include:

- the personal circumstances of the pupil experiencing the conduct, for example, their health (including mental health and mental capacity), cultural background, race or ethnicity, religion, belief or previous experience of harassment
- the social or emotional environment where the conduct took place, for example, whether the person alleged to have harassed the pupil is in a position of trust (this is

likely to be the case for any harassment in a schools context)

- the physical environment where the conduct took place, for example, if the pupil was in a more vulnerable or embarrassing situation, such as in an isolation room, on a school trip, or in front of a large group of peers
- whether the conduct was intended to cause offence – conduct that is obviously intended to cause offence is much more likely to be found to have the effect described in paragraph 3.126
- whether the conduct is repeat behaviour – conduct that is repeated is more likely to be found to have the effect described in paragraph 3.126

Example:

3.137 A teacher regularly makes comments in class that female pupils do not really need to worry about doing well in their National Qualification exams, because they do not need exam results for family life. It might not be the teacher's purpose to offend or humiliate any of the pupils in this classroom. However, this is likely to amount to harassment where it is determined that the effect of the comments and language creates a humiliating or offensive environment for any of the pupils present.

Whether it is reasonable for the conduct to have the effect of harassment

3.138 The perception of the pupil is important in determining whether the unwanted conduct has the effect of, for example, offending a pupil (read paragraph 3.133). This is an objective test. However, courts will also consider whether another pupil of the same age and with the same characteristics would not have been offended by the same conduct. Case law currently refers to whether the recipient of the conduct is 'hypersensitive' to the extent that any other reasonable person subjected to the same conduct would not have been offended. Courts may be less likely to find that a pupil is hypersensitive in this way when taking into account the age of the pupil (for example, if they are younger), together with possible power disparities (such as that between teacher and pupil).

3.139 If the conduct was intended to create any of the circumstances in paragraph 3.126, it is not necessary to examine the pupil's perception, the other circumstances, or whether it was reasonable for that conduct to have the intended purpose. This is different from a claim based on effect. A pupil can succeed in a harassment claim if they can prove the purpose of the conduct was to create any of the circumstances defined in paragraph 3.126, even if they cannot prove that would have been the effect of the conduct.

3.140 It is relevant to consider whether the alleged harasser is exercising any other rights. For example, if they are expressing an opinion related to a religious or philosophical belief, they may be protected from a claim of discrimination

and harassment because of or related to that belief, depending on how their right was exercised.[8]

3.141 It is also relevant to consider whether the alleged harasser was exercising any of their convention rights protected under the Human Rights Act 1998, and the nature of that right. For example, the right to freedom of thought, conscience, and religion or the right to freedom of speech of the alleged harasser will need to be taken into account when considering all relevant circumstances of the case.

Sexual harassment

3.142 Sexual harassment of a pupil by staff is a serious incident. It is likely to result in criminal proceedings and raise safeguarding issues for the school and potential disciplinary action for the staff member. Such proceedings are beyond the scope of this guidance. The guidance covers sexual harassment under the Act only. This is because other sanctions, possibly including criminal proceedings, will also be relevant.

3.143 Sexual harassment by pupils to other pupils is not specifically covered under the Act. However, schools should refer to the Preventing and Responding to Gender Based Violence: A Whole School framework for guidance on pupil-on-pupil sexual violence and harassment.

3.144 Sexual harassment occurs when a school, through its staff and / or agents, engages in unwanted conduct of a sexual

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[8] Sutcliffe v Secretary of State for Education [2024] EWHC 1878 (Admin)

nature, which has either the purpose or effect described in paragraph 3.126 (section 26, paragraph 2).

3.145 Conduct ‘of a sexual nature’ can cover verbal, non-verbal or physical conduct, including:

- unwelcome sexual comments or questions
- sexual advances
- staring or leering
- touching
- gestures
- sexual assault
- sexual jokes
- displaying sexual or erotic videos, photographs, drawings or images

Example:

3.146 A female pupil in sixth year is asked intimate questions about her personal life and subjected to sexual innuendos by her teacher in class. This would constitute conduct of a sexual nature.

Less favourable treatment for rejecting or submitting to unwanted conduct

3.147 The third type of harassment occurs when a pupil is treated less favourably by a school because:

- the pupil submitted to or rejected unwanted conduct of a sexual nature, or unwanted conduct related to sex (section 26, paragraph 3), and
- the conduct creates any of the circumstances defined in paragraph 3.126

3.148 Under this type of harassment, it may be the same person who is responsible for the initial unwanted conduct and any subsequent unfavourable treatment, or it may be a different person (section 26, paragraph 3).

Example:

3.149 A student teacher on a placement asks a pupil in sixth year to go on a date with her and flirts openly with him in class. The pupil rejects her advances and assumes that is the end of it. That evening, the student teacher marks the pupil's work very harshly. This would be less favourable treatment for rejecting unwanted conduct of a sexual nature, meaning it would be harassment. It may also be a disciplinary matter for the student teacher.

Victimisation

3.150 Victimisation does not cover treatment connected to a pupil's protected characteristics but is intended to protect those who use their rights under the Act or help others to use their rights.

3.151 The Act prohibits victimisation. It is victimisation for a school to subject a person to a detriment because the person has done

a ‘protected act’ (explained in paragraph 3.154), or because the school believes that the person has done, or may do, a protected act in the future.

3.152 An individual does not need to have a particular protected characteristic to be protected against victimisation under the Act. To be unlawful, victimisation must be linked to a protected act (section 27, paragraph 1).

3.153 There are additional victimisation provisions relating to schools that extend the protection to pupils who are victimised because their parent or sibling has carried out a protected act. ‘Parent’ includes someone who is not a parent but has parental responsibility or cares for a pupil. ‘Sibling’ includes brothers, sisters, half-brothers and sisters, and stepbrothers and sisters (section 86, paragraph 2).

3.154 A ‘protected act’ is any of the following (section 27, paragraph 2):

- bringing proceedings under the Act
- giving evidence or information in connection with proceedings brought under the Act
- doing anything which is related to the provisions of the Act
- making an allegation (whether express or not) that another person has done something in breach of the Act

3.155 If a school subjects someone to a detriment because they have carried out a protected act, then this will be unlawful

victimisation. There must be a link between what the pupil (or their parent or sibling) did and the school's treatment of them.

3.156 Protected acts can occur in any area of life covered by the Act and in relation to any part of the Act. Therefore, a school must not victimise a pupil who has done a protected act in school-related activities taking place outside school.

3.157 Making an allegation or doing something related to the Act does not have to involve an explicit reference to the legislation.

Example:

3.158 A pupil says she is going to make a statement in support of a fellow pupil's sexual harassment claim. A teacher gives the pupil a detention because he thinks that she intends to support the claim. This would amount to victimisation.

3.159 'Detriment' in the context of victimisation is not defined by the Act and could take many forms. Generally, a detriment is anything which the pupil or person concerned might reasonably consider has changed their position for the worse or put them at a disadvantage compared to others.

3.160 Victimisation does not require a comparator. The pupil or person need only show that the school subjected them to a detriment because they have done a protected act or because the school believes (rightly or wrongly) that they have done or intend to do a protected act.

3.161 A protected act needs to be a reason, conscious or unconscious, for the detrimental treatment but it does not

need to be the only reason. There is no time limit within which victimisation must occur after a pupil or person has done a protected act. However, they must be able to show that the detriment was because of the protected act.

3.162 A pupil cannot claim victimisation where they have acted in bad faith, such as maliciously giving false information or evidence or making a false allegation. Any such action would not be a protected act (section 27, paragraph 3).

Example:

3.163 A pupil who has posted on social media that he has a grudge against his teacher gives false evidence in another pupil's discrimination claim against the school. His evidence is proven to be false following an investigation. He is subsequently excluded from the school for falsely supporting the claim. This treatment could not amount to victimisation because his evidence was untrue and given in bad faith.

3.164 If a pupil gives evidence, provides information or makes an allegation in good faith, but it turns out that it was factually wrong or provided in relation to proceedings which are unsuccessful, the pupil will still be protected from victimisation.

Victimisation for actions of parents or siblings

3.165 A school must not subject a pupil to a detriment because of a protected act that their parent or sibling has done (section 86, paragraph 2).

Example:

3.166 A pupil is a wheelchair user. The pupil's father complains to the school about the school not fulfilling its duty to improve the physical environment of the school for physically disabled pupils. As a result of this complaint, the non-disabled sister of the pupil is not given the opportunity to complete the Duke of Edinburgh's Award at the school. This would amount to unlawful victimisation.

3.167 These victimisation provisions apply to a pupil in relation to whom the parent was making a complaint, and to any full siblings, half-siblings or stepsiblings of the pupil. This also applies if a parent supports a teacher's complaint against the school under the employment provisions of the Act.

3.168 If the information or evidence was false and given in bad faith (that is, if the parent or sibling knew it to be false), or the allegation was false and given in bad faith, then this protection for the pupil will still apply, provided that the pupil did not act in bad faith.

Example:

3.169 A pupil makes a complaint against his school, claiming that he has suffered discrimination by a member of staff because of his sexual orientation. The pupil's younger brother, who attends the same school and is not involved in the complaint, is protected against any detrimental treatment by the school because of this complaint. This is the case even if it is later found out that the older brother was not acting in good faith.

3.170 There must be a link between what the parent or the pupil has done and the school's detrimental treatment of the pupil or sibling.

3.171 The pupil or sibling who is being treated badly does not need to have any of the relevant protected characteristics.

3.172 The fact that a complaint or claim is not upheld does not mean that it was made in bad faith.

Obligations to former pupils

3.173 Even after a person has left a school, the school must not discriminate against them, harass or victimise them. This applies only if the discrimination, harassment or victimisation arises out of, and is closely connected with, the former pupil's previous relationship with the school and would have been unlawful if they were still a pupil (section 108).

Example:

3.174 An ex-pupil asks for a reference from the school. It would be unlawful for the reference to be unflattering because of a protected characteristic of the ex-pupil, or because he previously supported a discrimination complaint against the school.

3.175 This obligation to former pupils would include the duty to make reasonable adjustments for disabled former pupils if they were to continue to be at a substantial disadvantage in comparison to former pupils without a disability. This obligation applies

only if the substantial disadvantage arises out of and is closely connected with the fact that the person was previously a pupil.

Example:

3.176 A school librarian sends an annual newsletter to former pupils. One former pupil, who has a visual impairment, requests that it is sent to him by email rather than in hard copy. The librarian does not provide him with an electronic copy. This is likely to be a failure to make a reasonable adjustment.

Liability for employees, agents and others

3.177 As an employer, a school is legally responsible for acts of discrimination, harassment and victimisation carried out by its staff in the course of employment or by people who act on its behalf (agents) (section 109).

3.178 It does not matter whether the school knew about or approved of those acts.

3.179 However, a school can avoid liability for acts of discrimination, harassment and victimisation carried out by its staff or agents if it takes all reasonable steps to prevent discrimination, harassment and victimisation occurring.

3.180 It is important that schools take steps to make sure that their staff and agents understand that they must not discriminate against pupils, or harass or victimise them, and that their staff

and agents understand their duties in relation to making reasonable adjustments for disabled pupils.

3.181 Usually a school will not be responsible for discrimination, harassment or victimisation by someone other than their staff or agents. However, case law indicates that schools could be found to be legally responsible for failing to take action where they have some control over a situation where:

- there is a continuing course of offensive conduct, but they do not take action to prevent its recurrence, and
- the inaction relates to a protected characteristic[9]

Example:

3.182 An MOT garage offers work experience placements to pupils in fourth year at a local school each year. One year, a pupil reports that she has been harassed as a result of her sex, because offensive comments were made to her about mechanics who are women. The pupil's teacher tells her that she should expect that kind of comment from that kind of workplace, and as a girl, she needs to toughen up if she wants to be a mechanic. The school could be jointly responsible for harassment if the pupil continues to attend the garage for work experience and it takes no action to address the problem. The teacher's comments indicate that the lack of action is motivated by the pupil's protected characteristic of sex. This

[9] Unite the Union v Nailard [2018] EWCA Civ 1203, Sheffield City Council v Norouzi [2011] IRLR 897 and Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] IRLR 327

makes it likely that the school would be jointly liable for the harassment.

3.183 Taking reasonable steps to protect pupils against discrimination, harassment or victimisation in such circumstances is likely to ensure that a school will not be held legally responsible.

Personal liability of employees and agents

3.184 Individual employees (of a school) may be held personally liable under the Act for unlawful acts which they commit in the course of employment, where their employer would also be liable. This is the case whether or not the employer has the defence against liability of having taken all reasonable steps to prevent their employee from acting unlawfully.

3.185 In addition where someone has authority to act on behalf of the school as the school's agent, the agent can be personally responsible in the same way as an employee whether or not the school condoned the unlawful act (section 110).

3.186 However, an employee or agent will not be liable if he or she has been told by the school that the act is lawful and he or she reasonably believes this to be true.

3.187 This does not apply to the protected characteristic of disability, because claims for disability discrimination in schools cannot be enforced against individuals (under section 110, paragraph 7 of the Act).

Example:

3.188 A football coach offers weekly coaching sessions to pupils at a local primary school for the whole Autumn term. The school pays a fee to the local football team, which employs the coach, and he acts as an agent for the school. The school checks that the coach has had training on the Equality Act 2010 and is told that he has. The football coach does not select any girls to play for the school team. The school can show that it took all reasonable steps to prevent discrimination and so would not be liable. The coach may be personally liable if a female pupil were to make a claim for direct sex discrimination.

Example:

3.189 A teaching assistant, who is an employee of the school, racially discriminated against a pupil. The school was able to show that it took all reasonable steps to prevent the discrimination and therefore was not liable. The pupil can still make a claim of discrimination against the teaching assistant. If this were a case of discrimination because of disability, the school could still be liable for the acts of the teaching assistant, but because of the statutory provisions a claim could not be brought against the teaching assistant personally.

3.190 It is not necessary for the employee or agent to know that they are acting unlawfully to be liable for their actions (section 110, paragraph 4).

3.191 However, if the employee or agent relies upon a statement made by the employer or principal that an act is not unlawful,

then the employee or agent will not be liable for the unlawful act, provided it is reasonable for the employee or agent to rely on the statement made to them (section 110, paragraph 3).

3.192 It is an offence punishable by a fine for an employer or principal to knowingly or recklessly make a false or misleading statement that the employee or agent relies on to carry out an unlawful act.

Aiding unlawful acts

3.193 The Act makes it unlawful for a school to knowingly help someone discriminate against, harass or victimise another person (section 112).

Example:

3.194 A gay pupil attends a Roman Catholic School. The priest at the associated Roman Catholic Church expresses his displeasure that the pupil is gay and says the pupil should be disciplined because of his sexuality. If the school withdrew the pupil from class to ask him questions about his sexuality, it would be helping the priest to discriminate against the pupil and therefore acting unlawfully.

3.195 It is also unlawful to help a person to discriminate against or harass another person after a relationship covered by the Act has ended, where the discrimination or harassment arises from and is closely connected to the relationship.

Example:

3.196 A former pupil asks his former teacher to provide a reference about him to a prospective employer, to enable him to take up a new job. He is not offered the job and finds out from feedback it was due to a poor reference about his behaviour at school. The former pupil was unaware of any behaviour issues at school. On exploring this issue with his former teacher, he finds out they consider being gay a matter of immoral behaviour. This would be unlawful because the former teacher may cause the prospective employer to discriminate against the former pupil, even though the relationship between the pupil and his old school has ended.

3.197 The Act makes it unlawful to help with an instruction to discriminate against, harass or victimise another person. It also makes it unlawful to help with causing or inducing discrimination, harassment or victimisation.

3.198 If the person helping is told that they are assisting with a lawful act, and it is reasonable for them to rely on this statement, then the help they give will not be unlawful, even if it transpires that it assisted with a contravention of the Act. However, it is a criminal offence to knowingly or recklessly make a false or misleading statement as to the lawfulness of such an act.

Instructing, causing or inducing discrimination

3.199 It is unlawful to instruct someone to discriminate against, harass or victimise another person, or to instruct a person to

help another person to do an unlawful act, in circumstances where the relationship between the person giving the instruction and the recipient is one in which discrimination, harassment or victimisation is prohibited (section 111, paragraph 7). Such an instruction would be unlawful, even if it is not acted on (section 111).

3.200 The Act also makes it unlawful to cause (section 111, paragraph 2), induce (section 111, paragraph 3) or attempt to cause or induce (section 111, paragraph 8) someone to discriminate against, harass or victimise a third person.

3.201 'Causing' discrimination can cover an act that has unintended consequences, though a claim about a deliberate act is more likely to succeed.

3.202 'Inducement' may involve the offer of some benefit or the threat of some detriment, but that is not necessarily required. The term 'inducement' should not be interpreted restrictively to have the most limited possible meaning and is equivalent to the word 'persuade'. The instructor or inducer must intend to persuade someone to discriminate against the third person. However, when causing someone to discriminate, there is no need for the causer to intend for someone to discriminate against the third person. Nor does the inducement have to be applied directly: it may be indirect.

3.203 For the purposes of this section of the Act, it does not matter whether the person who is instructed, caused or induced to commit an unlawful act actually carries it out or not. This is

because instructing, causing or inducing an unlawful act is unlawful in itself.

3.204 In the example about the Roman Catholic priest, in paragraph 3.194, the priest is attempting to cause discrimination against the gay pupil. This would be unlawful under section 111.

3.205 For the Act to apply, the relationship between the person giving the instruction or causing or inducing the unlawful act and the recipient of the instruction or inducement must be one in which discrimination, harassment or victimisation is prohibited. This will include employment relationships.

3.206 Whether or not the instruction is carried out, provided that they experience a detriment as a result, the Act provides a remedy for:

a. the person who is the recipient of the instruction, causing or inducement

b. the intended subject of the discrimination, harassment or victimisation

3.207 In addition, the Equality and Human Rights Commission has the power to bring proceedings, regardless of whether anyone has actually experienced a detriment.

Protected characteristics

3.208 The Act protects people from discrimination and harassment based on protected characteristics.

3.209 The protected characteristics for the schools provisions in relation to discrimination are:

- disability
- gender reassignment
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

3.210 Age and marriage and civil partnership are not protected characteristics for pupils under the schools provisions. However, they are relevant where a school is acting as an employer.

3.211 For schools, only pupils with the protected characteristics of disability, race and sex (including pregnancy or maternity) are protected from harassment (section 85, paragraph 10). Read paragraphs 3.118 to 3.122.

Disability

3.212 A person has a disability if they 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 6 and schedule 1). Read paragraphs 3.105 to 3.113 about when a school has knowledge of a pupil’s disability.

Physical or mental impairment

3.213 Physical impairments can include:

- sensory impairments, such as those affecting sight or hearing
- illnesses, such as cystic fibrosis or diabetes
- conditions which impact appearance, including facial disfigurement

3.214 The term ‘mental impairment’ is intended to cover impairments relating to mental functioning. This includes mental health conditions (such as depression, schizophrenia or anxiety), autism and learning disabilities including Down’s syndrome. However, whether a person is disabled for the purposes of the Act depends on the degree of the impairment.

Example:

3.215 A pupil has mild dyslexia which does not substantially adversely affect her ability to carry out her day-to-day studies. The pupil is unlikely to be considered disabled.

3.216 Specific rules apply to people with some conditions, such as progressive conditions, and some people are automatically deemed disabled for the purposes of the Act. Read paragraphs 3.239 to 3.243.

Example:

3.217 A pupil with a large facial birthmark does not consider herself to be disfigured or disabled. She is still protected by the Act because her birthmark is identified as a disfigurement, which

is specified in the Act as a disability. Therefore, she is protected by the disability discrimination provisions.

Example:

3.218 An autistic pupil does not consider themselves to be disabled. However, if their condition has a substantial adverse effect on their ability to do their normal day-to-day activities, then they are likely to meet the definition of a disabled pupil for the purposes of the Act.

3.219 When the Act talks about pupils who share the protected characteristic of disability, this means that they share the same kind of disability, also known as the same ‘impairment type’.

3.220 Pupils who have had a disability under the definition in the Act are protected from discrimination and harassment even if they have since recovered (section 6, paragraph 4).

3.221 There is no need for a pupil to establish a medically diagnosed cause for their impairment for the duty to make reasonable adjustments, or protection under the other provisions of the Act, to apply. Schools should consider the effect of the impairment, not the cause. It can sometimes be difficult for pupils to obtain a formal diagnosis of their condition, but they may still have a disability for the purposes of the Act. In the absence of a diagnosis, but where schools are aware of behaviours or difficulties encountered by a pupil, they should explore whether the pupil may have a disability.

Substantial adverse effect

3.222 A substantial adverse effect is something which has a more than minor or trivial effect on the abilities of a pupil, compared to the abilities they would have without the impairment.

3.223 When understanding whether an effect is more than minor or trivial, consider:

- the time taken to undertake an activity
- the overall effect of an impairment if the condition impacts more than one activity
- the effect of more than one impairment
- whether a pupil avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or because of a loss of energy and motivation, as a result of their impairment

3.224 Not all impairments are obvious. Some pupils may have an impairment amounting to a disability that is not immediately apparent. This could include mental health conditions and learning disabilities, and physical impairments such as diabetes and epilepsy. These are referred to as ‘hidden’ or ‘non-visible’ disabilities or impairments. People with non-visible disabilities will be protected where they meet the definition in the Act.

3.225 Impairments may not always directly prevent a pupil carrying out one or more normal day-to-day activities. However, the impairment may still have a substantial adverse long-term effect on how a pupil carries out those activities. For example,

where an impairment causes pain or fatigue in performing normal day-to-day activities, the pupil may have the capacity to do something but suffer pain in doing so, or the impairment might make the activity more than usually fatiguing so that the pupil might not be able to repeat the task over a sustained period of time.

3.226 The effect of an impairment may be direct or indirect. As long as there is a causal link between the impairment and its effect, it does not matter if there is an intermediate step between the two.

Example:

3.227 A pupil has an immunodeficiency disorder, which does not in itself have any effect on her ability to carry out her normal day-to-day activities. However, it does make her susceptible to recurrent infections. The recurrent infections have a substantial adverse effect on her ability to carry out normal day-to-day activities. Because there is a causal link between the immunodeficiency and the infections, the immunodeficiency has a substantial adverse effect.

Long-term effect

3.228 The effect of an impairment is 'long-term' if:

- it has lasted at least 12 months, or
- it is likely to last for at least 12 months, or
- the total period for which it lasts is 12 months or more, or

- it is likely to last for the rest of the life of the pupil affected

Effects which are not long-term would therefore include loss of mobility due to a broken limb which is likely to heal within 12 months, or the effects of temporary infections which a pupil would be likely to recover from within 12 months.

3.229 The effect of an impairment is treated as continuing if:

- it is likely to recur, even if it ceases for a period of time, and
- it has had a substantial adverse effect

3.230 If an adverse effect recurs episodically, this indicates that a further episode could happen, although that will not always be the case. In such circumstances, the substantial adverse effect is treated as continuing.

3.231 Where a particular event causes an adverse effect, but that event is unlikely to continue or recur, the adverse effect may also be unlikely to recur. In this case, the substantial adverse effect will not be treated as continuing.

Normal day-to-day activities

3.232 In a schools context, 'normal day-to-day activities' are activities which are carried out by most pupils on a regular and frequent basis. This would include activities such as:

- attending school
- walking
- typing and writing (and taking exams)

- going to the toilet
- talking
- listening
- reading
- taking part in normal social interaction or forming social relationships
- a pupil meeting their own needs, for example feeding themselves

3.233 Pupils under six years old will be regarded as having a different level of ability to carry out normal day-to-day activities to that of an older pupil or an adult, because of their age. Where a pupil is under six years old, an impairment is considered to have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities if it would normally have that effect on the ability of a person aged six years or over (Equality Act 2010 (Disability) Regulations 2010, regulation 6).

The impact of treatment or other measures on the definition of disability

3.234 Someone with an impairment may be receiving medical treatment or taking other measures which alleviate or remove the effects, but not the impairment itself. In such cases, the treatment or other measures are ignored and the impairment is taken to have the effect it would have without such treatment or other measures being in place. However, this does not apply if substantial adverse effects are not likely to

recur when the treatment or other measures stop. That is, the impairment has been cured following treatment.

Example:

3.235 A pupil with attention deficit hyperactivity disorder (ADHD) might be considered to have a disability even if their medication controls the condition so well that they rarely experience any symptoms if, without the medication, the ADHD would have long-term adverse effects.

3.236 The only exception to the rule of ignoring the effects of treatment or other measures is the wearing of spectacles or contact lenses. In this case, the effect of the impairment while the person is wearing spectacles or contact lenses should be considered (schedule 1, paragraph 6).

Specific conditions

3.237 People with severe disfigurement (such as scarring) are covered by the Act. They do not need to demonstrate that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities. However, they do need to meet the requirement of the impairment being a long-term effect (schedule 1 paragraph 3).

3.238 Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act. In some circumstances, people who have a sight impairment are automatically treated as disabled under regulations made under the Act (Disability Regulations 2010, SI 2010/212, Rr regulation 7).

Conditions that are going to get worse over time

3.239 Progressive conditions are conditions which are likely to change and develop over time. People with progressive conditions will be considered to have an impairment which has a substantial adverse effect, before it actually has that effect, if:

- they have a progressive condition
- their condition results in an impairment which has (or had) an effect on their ability to carry out normal day-to-day activities
- the effect is not (or was not) yet a substantial adverse effect, and
- the condition is likely to result in them having an impairment which has a substantial adverse effect

3.240 Individuals will be covered by the Act in these circumstances, provided that the effect meets the long-term requirement of the definition.

3.241 Certain conditions are not regarded as disabilities under the Equality Act 2010 (Disability) Regulations 2010 / 2128, regulation 3 and 4. These are:

- an addiction to, or dependency on, alcohol, nicotine, or any other substance, except where addiction followed medical prescription or treatment
- seasonal allergic rhinitis, such as hay fever, unless it aggravates another condition

- a tendency to set fires
- a tendency to steal
- a tendency to physically or sexually abuse other people
- exhibitionism
- voyeurism

3.242 A tendency to physically abuse other persons does not amount to an impairment for the purposes of disability (Equality Act 2010 (Disability) Regulations 2010, regulation 4 (c)). However, in 2018, the Upper Tribunal in England decided that pupils[10] who have a tendency to physically abuse others as part of their impairment are considered to be disabled for the purpose of the Act. As a consequence, they are protected by the provisions of the Act in the same way as pupils with other impairments amounting to a disability. The other steps for determining whether there is discrimination still apply. Read paragraph 3.67 on objective justification for indirect discrimination, and chapter 7 in relation to whether an adjustment is reasonable. The decision relates to schools cases only.

Example:

3.243 An autistic pupil has a tendency to act aggressively when he becomes dysregulated as a consequence of his autism. He is disabled because he is severely autistic, and his tendency to physical aggression is not a choice. A school excludes the

[10] C&C v The Governing Body of a School [2018] UKUT 269 (AAC)

pupil for physical aggression towards a fellow pupil while he is having an autistic meltdown. The exclusion may amount to discrimination, if it is not objectively justifiable.

Interaction with the Education (Additional Support for Learning) (Scotland) Act 2004

3.244 The definition of additional support needs is set out in the Education (Additional Support for Learning) (Scotland) Act 2004 (ASL 2004 Act) and is different to the Act's definition of disability. Read paragraphs 2.60 to 2.67 for more information. There will be some pupils who have a disability as defined in the Equality Act 2010 but do not have additional support needs. Likewise, some pupils will have additional support needs but do not have a disability. However, a significant number of pupils will be in both categories. Therefore, even if a pupil receives additional support for learning and may have a CSP or a non-statutory additional support plan, a school has a duty to actively consider the needs of the pupil and whether there are other steps that should be taken. For more information, read chapter 7.

Gender reassignment

3.245 Gender reassignment is a protected characteristic (section 7). People who are proposing to undergo, are undergoing or have undergone a process to reassign their sex by changing physiological or other attributes of sex have the protected characteristic of gender reassignment.

3.246 The Act uses the term ‘transsexual’ for individuals who have the protected characteristic of gender reassignment. We recognise that many people consider this term outdated, so we have used the term ‘trans’ to refer to a person with the protected characteristic of gender reassignment. This refers only to people who fall within the Act’s specific definition of gender reassignment. It does not include people who may identify as trans or transgender but are outside of this definition

3.247 A trans person is protected against gender reassignment discrimination at any stage in their transition process.

3.248 A pupil can have the protected characteristic of gender reassignment. There is no minimum age for the protected characteristic of gender reassignment. This means that pupils under 18 are protected if they are proposing to undergo, are undergoing, or have undergone a process of gender reassignment.

3.249 Pupils with the protected characteristic of gender reassignment may also be protected against discrimination by perception. Read paragraphs 3.25 to 3.27 for more information on discrimination by perception.

3.250 A person who dresses and presents in ways which are commonly associated with the opposite sex will be protected where they do so as part of a process of reassigning their sex. The Act does not define what is meant by reassigning sex. It does not have to be a medical process, but it is likely to at least involve more permanent changes, such as changing

one's pronouns and consistently dressing and presenting as the opposite sex. A person presenting as the opposite sex for some other reason does not have the protected characteristic of gender reassignment. However, they may be protected against harassment, and discrimination based on perception. For more information, read chapter 2 of our Services, public functions and associations: Code of Practice. For information on school uniforms, read paragraphs 5.14 to 5.20.

Example:

3.251 A male pupil attends school wearing a female pupil's school uniform. If this is part of the process of reassigning their sex, then they will be protected from direct or indirect gender reassignment discrimination. If they are not proposing to undergo, or undergoing, the process of reassigning their sex, then they will not be protected in this way.

However, they would be protected under the Act from discrimination by perception, if, for example, they are perceived to be trans and experience less favourable treatment because of it. Further, the school has a duty to have measures in place which aim to prevent bullying and the pupil is likely to be able to rely on these.

Pregnancy and maternity

3.252 Pregnancy and maternity is a protected characteristic (section 4). To learn about pregnancy and maternity discrimination, read paragraphs 3.28 to 3.35.

Race

3.253 The Act defines ‘race’ as including:

- colour
- nationality (including citizenship)
- ethnic or national origin

3.254 A person has the protected characteristic of race if they fall within a particular racial group (section 9, paragraph 2). A racial group is a group of people who have or share a colour, nationality or ethnic or national origin (section 9, paragraph 3). For more information, read our Services, public functions and associations: Code of Practice.

3.255 A person has the protected characteristic of race if they belong to a particular racial group, such as ‘British people’.

3.256 A person may fall into more than one racial group. For example, a Nigerian person may be defined by colour, nationality or ethnic or national origins.

3.257 A racial group can be made up of two or more distinct racial groups. For example, a racial group could be ‘Black Britons’ which would encompass those people who are both Black and who are British citizens. Racial groups can also be defined by exclusion. For example, the courts have accepted that non-UK nationals constituted a class of people sharing a racial characteristic.

Religion or belief

3.258 The protected characteristic of religion or belief includes any religion and any religious or philosophical belief (section 10). It also includes a lack of any such religion or belief. For more information, read our Services, public functions and associations: Code of Practice.

Meaning of religion

3.259 The term 'religion' includes the more commonly recognised religions in the UK, such as the Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism. It is for the courts to determine what constitutes a religion.

3.260 A religion does not need to be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system. Denominations or sects within religions, such as Methodists within Christianity or Sunnis within Islam, may be considered a religion for the purposes of the Act.

3.261 'Religious belief' goes beyond beliefs about and adherence to a religion or its central articles of faith. It may vary from person to person within the same religion.

Meaning of belief

3.262 A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include Atheism, Humanism and Ethical Veganism.

3.263 A belief does not need to include faith or worship of a God or gods, but it must affect how a person lives their life or perceives the world.

3.264 A philosophical belief is protected under the Act if:

- it is genuinely held
- it is a belief, and not an opinion or viewpoint based on the present state of information available
- it is a belief as to a weighty and substantial aspect of human life and behaviour
- it attains a certain level of cogency, seriousness, cohesion and importance
- it is worthy of respect in a democratic society, is not incompatible with human dignity and is not in conflict with the fundamental rights of others

3.265 The threshold for a belief to be considered worthy of respect in a democratic society is relatively low. The belief would only not be protected under the Act if it involved a very significant violation of the rights of others, equalling the destruction of those rights.

Manifestation of religion or beliefs

3.266 The protected characteristic of religion or belief includes protection for the manifestation of a religion or belief. This protection is consistent with Article 9 of the European Convention on Human Rights, which guarantees freedom of thought, conscience and religion.

3.267 Manifestations of a religion or belief could include:

- treating certain days as days for worship or rest
- following a certain dress code
- following a particular diet
- expressing religious or philosophical views online
- carrying out or avoiding certain practices

3.268 Placing limitations on a person's right to manifest their religion or belief may amount to unlawful discrimination.

3.269 A person does not have to prove that the manifestation of their religion or belief is a main component of the religion or philosophical belief they follow. The manifestation may be a means by which they choose to express their adherence to their religious belief.[11] However, there must be sufficiently close and direct connection between the manifestation and the underlying belief.

Example:

3.270 A school has a uniform policy which requires all pupils to wear the same uniform irrespective of their religion and / or belief. The policy effectively bans the wearing of any religious items such as burkas, turbans and hijabs. Pupils at the school object to the school uniform policy because it conflicts with their religion. The school uniform policy may be considered

[11] Mba v Mayor & Burgesses of the London Borough of Merton [2013] EWCA Civ 1562 and Eweida, Chaplin, Ladele & McFarlane v the United Kingdom (2013) application numbers 48420/10, 59842/10, 51671/10 and 36516/1.

indirectly discriminatory, unless it can be justified as being a proportionate means of achieving a legitimate aim, such as the health and safety of pupils.

It is important with any school uniform policy to try to reach agreement with the school community before it is implemented. In particular, schools will need to be able to justify any negative impact that it will have on pupils with a variety of protected characteristics, including religion, disability and sex.

In this example, because it is a ban on all religious items of uniform, it is unlikely to be justified and it therefore amounts to discrimination.

For more information about hair discrimination, read our guidance on preventing hair discrimination in schools.

Sex

3.271 Sex is a protected characteristic (section 11) and refers to a male or a female of any age. In relation to a group of people it refers to either men and / or boys, or women and / or girls (section 11(a) and (b) and section 212, paragraph 1).

3.272 The Supreme Court in the case of For Women Scotland v The Scottish Ministers[12] ruled that 'sex' under the Act means the sex of a person at birth, which the judgment referred to as

[12] For Women Scotland Ltd v The Scottish Ministers (For Women Scotland) [2025] UKSC 16

'biological sex'. Earlier case law[13] has set out what are indicators of biological sex.

3.273 A comparator for the purposes of showing sex discrimination will be a person of the opposite sex.

3.274 Sex is distinct from gender reassignment (read paragraphs 3.245 to 3.251) or sexual orientation (read paragraphs 3.276 to 3.279).

3.275 There are specific provisions which apply where the treatment of a woman (or a girl) is because or her pregnancy and maternity, or because she is breastfeeding (read paragraphs 3.28 to 3.35).

Sexual orientation

3.276 Sexual orientation is a protected characteristic (section 12). It means a person's sexual orientation towards:

- persons of the same sex (for example, the person is a gay pupil)
- persons of the opposite sex (that is, the person is heterosexual), or
- persons of either sex (for example, the person is bisexual)

3.277 Sexual orientation relates to how people feel, as well as their actions.

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[13] Read, for example, Bellinger v Bellinger [2003] UKHL 21 at paragraph 5

3.278 Sexual orientation discrimination includes discrimination because someone is of a particular sexual orientation, and it also covers discrimination connected with manifestations of that sexual orientation. These may include someone's appearance, the places they visit or the people they associate with.

3.279 Gender reassignment is a separate protected characteristic from sexual orientation, despite often being grouped together (for example under the acronym 'LGBTQ+' people).

Restrictions on protection under the Act

3.280 The Act contains several exceptions to the protection it provides against discrimination, harassment and victimisation in schools. These are covered in chapter 10 of this technical guidance.

Chapter 4: Admissions

Equality Act 2010 provisions and admissions requirements

4.1 Schools must comply with the Equality Act 2010 (the Act) in relation to admissions.

4.2 Public schools managed by education authorities are subject to the Education (Scotland) Act 1980, which sets out a statutory regime for placing children in schools.

4.3 The Education (Scotland) Act 1980 provides that the parents of a child can make a written request for their child to be placed at a specified school (a placing request). This act also provides that the education authority may refuse a placing request only on certain prescribed grounds.

4.4 Independent and grant-aided schools are not subject to the Education (Scotland) Act 1980 in relation to placing requests, but they must still comply with the Equality Act 2010.

4.5 The Equality Act 2010 does not prohibit any school from setting and applying admissions criteria. However, admissions criteria must not discriminate against those who have applied for admission to a school (applicants). If necessary, reasonable adjustments should also be made for disabled applicants.

Examples and terminology in this chapter

4.6 The examples in this chapter explain how the Act applies in relation to admissions.

4.7 The term ‘pupil’ includes applicants for admission to a school.

The responsible body in relation to admissions

4.8 The responsible body in relation to admissions varies depending on the type of school (section 85, paragraph 9).

4.9 The responsible body for admissions decisions and allocating pupil places in public schools is the education authority that manages the school.

4.10 The responsible body for admissions in relation to an independent school is the proprietor. The responsible body for admissions in relation to a grant-aided school are the school’s managers.

What the Act says about admissions

4.11 The Act says that it is unlawful for the responsible body of a school to discriminate against or victimise a person:

- in the arrangements it makes for deciding who is offered admission as a pupil (section 85, paragraph 1(a) and section 85, paragraph 4(a))

- in the terms on which it offers to admit the person as a pupil (section 85, paragraph 1(b) and section 85, paragraph 4(b)), or
- by not admitting the person as a pupil (section 85, paragraph 1(c) and section 85, paragraph 4(c))

4.12 It is unlawful for a school to harass a person who has applied for admission as a pupil (section 85, paragraph 3(b)). However, this prohibition on harassment does not cover gender reassignment, sexual orientation or religion or belief. Read paragraph 3.120.

4.13 For single-sex schools, there are exceptions for admissions that allow them to restrict admission to pupils of only one sex. Sex refers to a male or female of any age (including children). In the case of For Women Scotland v The Scottish Ministers, the Supreme Court ruled that 'sex' means the sex of a person at birth (which they refer to as 'biological sex') for the purposes of the Act. It is not sex discrimination for a single-sex school to refuse to admit a pupil of the opposite sex (schedule 11, paragraph 1).

4.14 There is an exception for admission for schools conducted in the interest of a denominational body. As defined in chapter 1, these are schools covered by schedule 11, paragraph 5 of the Act. This exception allows them to discriminate in relation to religion or belief (schedule 11, paragraph 5). As explained further in paragraphs 4.55 to 4.59, this exception is limited in practice, and generally applies to independent schools. This is because public schools and grant-aided schools are subject to

the terms of section 9 of the Education (Scotland) Act 1980, which requires all such schools to be open to pupils of all denominations and faiths, and pupils of no denomination or faith.

Arrangements for deciding who is offered admission

4.15 'Arrangements' in this context mean all the policies, criteria and practices used in all the stages of the admissions process and all admissions decisions.

4.16 Arrangements include:

- admissions policies
- drawing up of admissions criteria
- application of admissions criteria
- information provided about the school, including marketing material
- delineating catchment areas
- considering placing requests
- preparing guidelines for deciding placing requests where a school has only a limited number of places available
- open events and school visits
- application forms
- decision-making processes

- interviews (where permitted)
- tests (where permitted)

Information schools provide

4.17 The information that a school provides to pupils or prospective pupils must be accessible. This includes advertisements, prospectuses, emails and information on notice boards and websites. It must not suggest that a school might discriminate or that applications from people with certain protected characteristics would not be welcome. A suggestion of this type would be direct discrimination.

Example:

4.18 An independent religious school has information on its website that indicates it does not tolerate homosexuality. This is direct sexual orientation discrimination.

4.19 In relation to disabled people, schools must ensure that the information provided and the application process is accessible. They must also make reasonable adjustments as necessary.

Example:

4.20 A prospective pupil visits an independent secondary school on its open day. She has attention deficit hyperactivity disorder (ADHD). This means she sometimes finds it difficult to concentrate on tasks and exhibits hyperactive and impulsive behaviour. A member of staff tells the pupil's parents that the school has a zero-tolerance policy towards disruptive behaviour in class and will remove disruptive pupils. This

zero-tolerance policy may amount to unlawful discrimination if the school does not make suitable reasonable adjustments.

Information schools collect

4.21 Collecting information about prospective pupils that is not relevant to the admissions application (for example, information about an applicant's background and family) could lead to collecting irrelevant information. This may cause discrimination if the information is used to decide who to admit as a pupil.

Example:

4.22 A school asks a Black applicant when his family moved to Britain. This is not a relevant question and, if the information is used in the decision-making process for his admission, this could be race discrimination.

Example:

4.23 A school wants to know the religion of all its pupils, so it can ensure that it includes all relevant religious events and festivals in the school calendar. It considers asking prospective pupils about their religion in its application form but decides not to do this to ensure that its decision-making is objective. This is likely to help avoid discrimination.

4.24 Independent schools conducted in the interests of a denominational body are an exception to this rule. They can ask for information about a prospective pupil's religion or belief on an admission application form. This is because the Act

allows such schools to give preference to members of their own or other religions if they are oversubscribed (read paragraph 4). Education authorities can only ask for this information in relation to placing requests (read paragraphs 4.55 to 4.59).

Open events and school visits

4.25 When schools host open events and school visits, they should offer them to all potential applicants, regardless of any protected characteristics. If necessary, they should make reasonable adjustments for disabled applicants and disabled parents.

Example:

4.26 A school offers visits to parents interested in applying to the school. A parent who speaks English as an additional language and has a strong accent telephones the school, asking for an appointment for a school visit. He is told that school visits are not available because the school secretary has been asked to offer appointments only to British parents.

This would be direct race discrimination against the parent under Part 3 of the Act. If it were the prospective pupil who had been refused a visit because of his accent, this would be direct race discrimination under Part 6 of the Act.

Example:

4.27 A school offers school visits to all prospective pupils. To arrange a visit, parents are asked to telephone the school. A

deaf parent emails the school to request a visit, but the request is refused because the school will only arrange visits via telephone. This would be disability discrimination and a failure to make reasonable adjustments for the parent under Part 3 of the Act.

Admissions criteria

4.28 Although schools are permitted to use admissions criteria, they must not discriminate, either directly or indirectly, against anyone with a protected characteristic.

4.29 Direct discrimination may occur if a pupil or prospective pupil is treated less favourably because of a protected characteristic, for example, by refusing to admit a prospective pupil to a school because of their race. Direct discrimination is explained in more detail in chapter 3.

4.30 Indirect discrimination may occur if admissions criteria are more likely to disadvantage pupils with particular protected characteristics, unless the criteria can be shown to be a proportionate means of achieving a legitimate aim. Indirect discrimination is explained in chapter 3.

Example:

4.31 A selective school requires girls to achieve a higher pass grade than boys. This is direct sex discrimination.

Example:

4.32 A primary school gives preference to pupils who have an older sibling already at the school in its admissions criteria, unless

the pupil's family has moved more than a mile from the school since the older sibling started attending. The school community is made up of a population of predominantly White families and a significant number of ethnic minority families (excluding White minorities). Statistics show that these ethnic minority families have less secure housing arrangements than the White families. They are therefore more likely to have to move home and are more likely to have to move further away from the school when they do move. This is because they often have less choice about the location of the new accommodation they move to. This means that pupils from these ethnic minority backgrounds are more likely to have moved more than a mile away since their older siblings started school and so are more likely to be unable to attend the same school under the admissions criteria. This admissions criterion could therefore amount to indirect race discrimination, depending on whether it could be justified as a proportionate means of achieving a legitimate aim.

Example:

4.33 A school holds its admissions test on a Saturday in a local hall. It does not offer an alternative date for pupils who cannot take the exam then due to religious reasons. The school has acted unlawfully and indirectly discriminated on the grounds of religion.

4.34 Admissions criteria must not discriminate against disabled people because of something arising as a consequence of their disability, unless the criteria can be shown to be a

proportionate means of achieving a legitimate aim. This is explained further in chapter 3.

Example:

4.35 A selective school holds its admissions test in a local hall. They do not offer an alternative venue for pupils who have an additional support need. A pupil with ADHD has been given additional time to complete their exam. However, at the end of the exam, as pupils without additional time leave the venue, the pupil with ADHD is disrupted and cannot focus. The school may have acted unlawfully and indirectly discriminated against this pupil.

4.36 There is an exception, in relation to the protected characteristic of disability, for schools that apply a permitted form of selection by ability or aptitude. This is explained in paragraphs 4.45 to 4.54.

Terms of admission

4.37 The terms on which a school offers to admit someone as a pupil should not discriminate against a prospective pupil because of their protected characteristics. In general, a school should not offer admission to a person with a particular protected characteristic on terms that are less favourable than terms that are, or would be, offered to someone without that protected characteristic.

Example:

4.38 A disabled pupil is allowed to attend school only on a part-time basis because the school does not have the resources to provide the pupil with the support he requires on a full-time basis. This would be discrimination arising from disability, unless it can be justified (read paragraphs 3.88 to 3.92).

Refusing admission

4.39 Single-sex schools are allowed to restrict admission to pupils of only one sex (read paragraphs 4.60 to 4.70) and schools conducted in the interest of a denominational body are allowed to have admissions criteria that give preference to members of their own or other religions (read paragraph 4.55 for how this works in practice). Otherwise, it is unlawful for a school to reject an applicant because of a protected characteristic. It is also unlawful for a school to reject an applicant because of their parent's protected characteristic.

4.40 If a school refuses a place to a person because they do not meet the admissions criteria due to a protected characteristic, this could amount to indirect discrimination. For a disabled applicant who is not admitted on the basis that they do not meet the admissions criteria because of something arising as a consequence of their disability, this could amount to discrimination arising from disability. In both cases, the school would need to be able to justify the application of the criteria as a proportionate means of achieving a legitimate aim.

4.41 This is explained further in chapter 3 and in paragraph 4.34.

4.42 A school must also consider its duty to make reasonable adjustments for disabled applicants before rejecting a disabled applicant.

Example:

4.43 An independent secondary school requires applicants to demonstrate that they played sport for their primary school. An applicant who uses a wheelchair is not admitted to the school. The applicant's primary school did not provide facilities for them to play sport. The secondary school's requirement could amount to indirect discrimination unless the school can show:

- this is a proportionate means of achieving a legitimate aim, or
- they have reserved certain places for pupils with exceptional sporting ability, and the requirement to demonstrate that they have played sport for their primary school is only applied to such applicants (read paragraphs 4.45 to 4.54)

Example:

4.44 The admissions tutor for an independent school interviews an applicant who has cerebral palsy, which makes her speech unclear. The tutor assumes that the applicant also has learning difficulties and refuses to admit her, because he thinks she will not be able to cope with the highly academic environment of the school. This would be direct disability discrimination.

Selection by ability or aptitude in schools

4.45 Under the Act, independent schools are permitted to select some or all of their pupils because of general or special ability or aptitude, with the aim of only admitting pupils of high ability or aptitude, without this amounting to discrimination against disabled pupils (schedule 11, paragraph 8). In this context, 'ability' means how skilled a pupil is in a range of subjects, or at a particular subject or subjects. 'Aptitude' means ability for or potential to learn a particular subject that the school specialises in.

4.46 Schedule 11, paragraph 8 also provides for public schools to operate selective admissions arrangements if approved by the Scottish ministers. However, this provision is limited in practice as public schools offer comprehensive education.

4.47 It is unlawful under the Act for a school to assess ability or aptitude in a discriminatory way when using selective admissions processes.

4.48 The standard of academic ability or aptitude should be the same, regardless of any protected characteristic that the applicant may have. Assessment questions that assume pupils have the same cultural, linguistic, religious or lifestyle experiences could amount to unlawful indirect discrimination. This is because pupils with certain protected characteristics may be disproportionately disadvantaged by such questions.

4.49 For example, an autistic pupil may be disadvantaged by questions about lifestyle that assume they have the same experiences as other pupils, as their disability might impact their lifestyle. These could include questions about how or when they socialise, relax or practise their hobbies.

4.50 A school using a permitted form of selection is not discriminating by applying this to disabled prospective pupils who apply for admission, provided that it complies with its duty to make reasonable adjustments for disabled applicants during the assessment process. The reasonable adjustments duty does not require a school to offer a lower pass mark to applicants with learning difficulties (schedule 11, paragraph 8).

Example:

4.51 A mixed-sex selective school will not be able to insist on fixed proportions for boys and girls in its entrance exam to achieve a fixed proportion of boys and girls for admissions selection. For example, it could not insist on a 50:50 split of boys and girls in the exam or set different pass marks for boys and girls. Doing this could be indirect sex discrimination.

Example:

4.52 A selective school assesses applicants' academic ability by setting an exam. An applicant with a visual impairment requests the paper in a large font size. This is not provided and, as a consequence, the applicant fails the exam and is not offered a place at the school. This would be a failure to make

reasonable adjustments and would be indirect disability discrimination.

Example:

4.53 An applicant with learning difficulties applies to go to the same school. The applicant is provided with reasonable adjustments, including increased time to complete the exam and additional rest breaks. The applicant fails the entrance exam and is refused admission. Although the applicant's poor performance in the entrance exam was as a direct consequence of their disability, the refusal to admit the applicant may not be unlawful discrimination if all reasonable adjustments were made and the applicant was not placed at a substantial disadvantage due to their disability. This is because the refusal is a result of a permitted form of academic selection.

Example:

4.54 The parents of an applicant who is 11 years old apply for him to go to a selective school. The applicant passes the entrance exam, but when the school learns that the applicant has learning difficulties, it refuses him admission. This refusal is not based on a selection process or on ability or aptitude, but because of the applicant's disability. Therefore, this is likely to be direct disability discrimination. In addition, the school have failed to consider or make any reasonable adjustments to accommodate the applicant's disability before making the decision to refuse admission.

Schools conducted in the interest of a denominational body

4.55 The Act provides an exemption from discrimination for schools conducted in the interest of a denominational body on the grounds of religion or belief, in admissions and other areas. As explained in chapter 1, schedule 11, paragraph 5 (c) to (g) lists the different types of schools covered by this exception in Scotland. Such schools can use admissions criteria that would otherwise discriminate against pupils on the basis of religion or belief. For example, they can give preference to applicants from their own or other religions.

4.56 However, this exemption is limited in practice. Public schools and grant-aided schools are subject to the terms of section 9 of the Education (Scotland) Act 1980, which requires all such schools to be open to pupils of all denominations and faiths, and to pupils of no denomination or faith.

4.57 Education authorities can only discriminate on religious grounds in relation to pupil admission in their criteria for accepting placing requests. Education authorities can choose to give preference to children of a particular religious belief as part of their criteria for assessing whether to grant a placing request when the school is oversubscribed. If the school is not oversubscribed, the school must admit all pupils regardless of their faith (schedule 11, paragraph 5, and section 28B, paragraph 1(c) of the Education (Scotland) Act 1980).

4.58 Under schedule 11, paragraph 5, independent schools are allowed to discriminate on the grounds of religion or belief in admissions if:

- they admit only pupils who belong, or whose parents belong, to one or more denomination, or
- they are conducted in the interest of a church or denominational body

Example:

4.59 A Roman Catholic school has an oversubscription criterion. This criterion states that, when the school is oversubscribed, preference will be given in admissions to applicants who have been confirmed in the church. This is lawful under the Act.

Single-sex schools

4.60 Single-sex schools are allowed to restrict admission to pupils of only one sex and to make some exceptions to admit pupils of the opposite sex without this being unlawful sex discrimination.

4.61 In this context, a single-sex school is a school that admits pupils of only one sex, or admits pupils of the opposite sex if:

- the admission of those pupils is exceptional, or
- they are admitted in comparatively small numbers and only to particular courses or classes (schedule 11, paragraph 1)

4.62 This exception applies only to admissions. It does not apply, for example, to:

- the provision of education, or
- access to any benefit, facility or service, or
- exclusions

Example:

4.63 An independent boys' school does not admit girls at all. This is lawful under the Act.

Example:

4.64 A boys' school admits a trans boy pupil. The admission is in line with the school's policy for exceptional admissions. This is lawful under schedule 11, paragraph 1(3)(a) of the Act because the admission is exceptional and in line with the school's own policy. However, the school must ensure that appropriate facilities can be made available which are suitable for the pupil's sex.

The same school refuses to admit a female pupil who does not meet the criteria in the school's policy for exceptional admissions. This is lawful under the Act.

4.65 Where a single-sex school admits pupils of the opposite sex, it is permitted to admit those pupils only to particular courses or classes.

Example:

4.66 A girls' school admits a small number of boys to study some particular Higher subjects. The school is still regarded as a single-sex school.

In this example, it would be lawful for the school to only admit the boys to study certain Higher subjects.

4.67 This exception applies only to admissions and does not apply to the wider provision of education or access to any benefit, facility or service. It also does not apply to exclusions.

Example:

4.68 The school in the example in paragraph 4.66 would be acting unlawfully if it did not allow the male pupils access to the school library on the same terms as it did the female pupils.

4.69 If a single-sex school wishes to become co-educational (teaching both boys and girls), it must apply for a 'transitional exemption order'. A transitional exemption order authorises the school to discriminate on the basis of sex in the arrangements it makes for deciding who is offered or refused admission as a pupil. This is allowed for a defined period of time, until the transition from single-sex to mixed-sex is complete. If the school is a public school or grant-aided school, it may apply for a transitional exemption order from the Scottish ministers. If the school is independent, it may apply to the Equality and Human Rights Commission (schedule 11, paragraph 4).

Example:

4.70 A single-sex independent primary school for boys wants to begin admitting girls into its primary 1 class at the beginning of the academic year. It proposes that, at the beginning of the following academic year, it will admit boys and girls into Primary 1 only. A girl aged 9 applies to join primary 5 of the school. Unless the school has a transitional exemption order in place, the school may be discriminating on the basis of sex if it refuses to admit her.

Single-sex boarding at mixed-sex schools

4.71 Mixed-sex schools that offer boarding to some, but not all, pupils are allowed to restrict admission as a boarder to pupils of only one sex without this being unlawful sex discrimination. This exception also applies where only a small number of pupils of the other sex are allowed to board (schedule 11, paragraph 2). Boarding means when pupils regularly live at the school in its boarding accommodation during term time.

4.72 For guidance on considerations relating to offering boarding at single-sex schools or to trans pupils at either mixed or single-sex schools, read paragraphs 10.44 to 10.45. For guidance on communal accommodation more generally, read paragraphs 10.26 to 10.35.

Chapter 5: Providing education and access to benefits, facilities and services for pupils

What does the Act say

5.1 The Equality Act 2010 (the Act) (section 85, paragraph 2 and section 85, paragraph 5) says that it is unlawful for a school to discriminate against or victimise a pupil:

- in the way it provides education for the pupil
- in the way it affords the pupil access to a benefit, facility or service
- by not providing education for the pupil
- by not affording the pupil access to a benefit, facility or service
- by excluding the pupil (read chapter 6)
- by subjecting the pupil to any other detriment (read paragraphs 5.74 to 5.78)
- by not admitting a person as a pupil (read chapter 4)

5.2 The Act also prohibits certain forms of harassment of pupils (section 85, paragraph 3). Read chapter 3 for more information about discrimination, harassment and

victimisation. Read chapter 4 for more information about those who have applied for admission as a pupil.

5.3 There are exceptions to section 85, paragraph 2 and section 85, paragraph 3 that cover the content of the curriculum:

- acts of worship or other religious observance
- schools conducted in the interest of a denominational body

These are explained in paragraphs 5.91 to 5.94, 5.95 to 5.100 and 5.101 to 5.111.

What is covered by the Act

5.4 A school's obligation not to discriminate against, victimise or harass pupils relates to everything a school provides for pupils (section 85, paragraphs (2)(a), (b), (c), (d), (e) and (f)). It goes beyond just the formal education a school provides, covering all school activities, such as:

- school policies, procedures and practices, including school uniform, behaviour, discipline and reduced and part-time timetables
- curriculum, methods of teaching and options, including curriculum choices and delivery
- school trips
- tests, assessments and exams
- careers education

- work experience
- after-school clubs
- extra-curricular, leisure and sporting activities
- school facilities, including libraries and IT facilities

5.5 This obligation does not cover activities organised on the school site that are not run by the school. For example, it does not cover after-school clubs run by an external childcare provider. In these circumstances, the provider of the activity would be responsible and the activities would be covered by the services provisions of the Act. For more information, read chapter 2 of this guidance and the Services, public functions and associations: Code of Practice.

5.6 The following paragraphs discuss some of these activities, but they are not intended to be an exhaustive list.

Policies, procedures and practices

5.7 Most discrimination in schools is unintentional and may occur because of rigid policies, procedures or practices, or rigid application of policies. In this context, a policy is the statement of what a school wants, and a procedure is how the school applies it. A practice is the way things are usually done.

5.8 Schools must ensure that none of their policies, practices and procedures discriminate against pupils. Policies, procedures and practices that indirectly discriminate against pupils with a particular protected characteristic can only be justified if they

are a proportionate means of achieving a legitimate aim. This concept is explained in chapter 3.

5.9 Any policy, procedure or practice is capable of being discriminatory. For example, school uniform policies, behaviour and discipline procedures and standard practices relating to work experience could all be enforced in a discriminatory way. Being flexible about how policies, procedures and practices are applied is likely to help avoid discrimination.

5.10 Schools should also be aware of inadvertently discriminating against pupils by following procedures too strictly (read paragraphs 5.21 to 5.25). Reviewing all policies, procedures and practices will help a school ensure that it does not discriminate. This will also help it comply with the Public Sector Equality Duty (PSED).

Example:

5.11 A school uniform policy states that girls are permitted to wear small stud earrings, but boys cannot wear earrings at all. This may be direct sex discrimination.

Example:

5.12 A school has an attendance policy that rewards pupils who have 100% attendance for an entire school year with a book token. Rigid application of this policy may amount to indirect disability discrimination against a pupil with cancer, because he will not be able to attend school every day. Not awarding

the book token may also be discrimination arising from disability.

5.13 Schools need to carefully plan, consider and review all policies, procedures and practices to ensure that they do not discriminate against any pupils. Schools should consult parents and pupils when designing policies. Furthermore, schools must have regard to statutory duties to consult parents about policies under other legislation, for example in relation to relationships and sex education. As well as national frameworks and guidance, such as the Whole School Approach to Racism and Racist Incidents.

School uniform policies

5.14 In relation to school uniforms, setting different rules for pupils with different protected characteristics, or failing to take account of different impacts on particular protected characteristics, might result in discrimination. Schools will need to consider whether it is proportionate to have a uniform requirement that will affect a group with protected characteristics more than groups who do not share that characteristic. If it is not proportionate, it is likely to be unlawful.

Example:

5.15 A school has a rule that requires girls to wear clothing that is much more expensive than that required of boys. This is likely to be direct sex discrimination.

5.16 Applying a policy rigidly without allowing flexibility for certain pupils might also result in discrimination.

Example:

5.17 A school uniform policy says that pupils cannot wear headgear in school. This policy requires a Sikh pupil to remove his turban, which conflicts with a genuine requirement of his religion. This may be indirect discrimination based on religion or belief.

Example:

5.18 A school uniform policy says that boys are not allowed to wear certain hairstyles, including cornrows. This policy may be indirect race discrimination. For more information, read our guidance on Preventing hair discrimination in schools.

Example:

5.19 A school requires all pupils to wear regulation nylon trousers. A disabled pupil with sensory processing differences wears cotton trousers instead of the regulation nylon ones, because the nylon trousers feel upsetting and distracting to him. If the school does not make reasonable adjustments to allow the pupil to continue wearing the non-regulation trousers, this may be indirect disability discrimination, discrimination arising from disability and a failure to make reasonable adjustments.

Example:

5.20 A school requires all pupils of the same sex to follow a uniform policy where girls wear skirts and boys wear trousers. The policy may put a pupil with the protected characteristic of gender reassignment at a disadvantage. This may amount to indirect discrimination. The policy is unlikely to be justified if it

is applied in every case and does not allow consideration of whether it is proportionate to treat a trans pupil in this way. The school may need to alter the uniform policy either to allow for exceptions to the policy or to include a gender-neutral uniform option. The school should also consider whether its uniform policy may disadvantage pupils with other protected characteristics. Often a gender-neutral uniform option will avoid this risk.

Behaviour and discipline

5.21 Schools must also ensure that any policies designed to protect pupils do so without discrimination. This includes policies related to behaviour and discipline.

5.22 Behaviour and discipline policies can discriminate against pupils in two ways. Firstly, the behaviour that engages the policy may be due to a protected characteristic. Therefore, applying the policy at all may be discrimination. This is particularly the case where the policy is applied to a disabled pupil. Secondly, the way the behaviour policy is then applied may also be discriminatory.

Example:

5.23 A school has a behaviour policy that if a pupil shouts out in class three times, they will automatically be given a detention. A disabled pupil who has autism sometimes makes involuntary sounds in class as part of her condition. She is given a detention for shouting out three times in a class. The school's rigid application of the policy to this pupil is likely to amount to

indirect disability discrimination. Giving the pupil a detention as a result of strictly applying the policy to her is also likely to amount to discrimination arising from disability. This is because the school has not made a reasonable adjustment to the policy to allow behaviours that arise from disability. As a result, the school will find it very difficult to justify the treatment as a proportionate means of achieving a legitimate aim.

Example:

5.24 The same pupil deliberately shouts to her friend in class on three separate occasions. She does this on purpose, knowing she is breaking a school rule. On this occasion, it would not be discriminatory to apply the behaviour policy.

However, the pupil receives transport from home to school as a result of her condition and an after-school detention means that she would miss her transport home. Because the pupil receives transport due to her disability, preventing her access to transport when the sanction could be adjusted to avoid this may be indirect disability discrimination, discrimination arising from disability and a failure to make reasonable adjustments. For example, the detention could be moved to break time or lunchtime.

Example:

5.25 Two new first year pupils at a secondary school are caught selling cannabis to other pupils. One of the pupils is White and the other is Black. The White pupil is given a fixed term exclusion for two weeks before being allowed to return to the school. The Black pupil is permanently excluded. Although the

school is justified in punishing both pupils, the school has given different penalties to the two pupils on the basis of their race. This would be direct race discrimination.

Bullying

5.26 The Act does not cover bullying by pupils to other pupils, but a school is required to ensure that it does not discriminate in the way in which it deals with bullying in school. There should be no difference between the seriousness with which a school deals with bullying for reasons arising from a protected characteristic and bullying for reasons not connected with a protected characteristic.

Example:

5.27 A pupil who has been bullied by a group of former friends because they have argued is given strong support by the school and the bullying is dealt with firmly. Another pupil who has experienced bullying because she is from a Roma background is told that she needs to learn to tolerate such things in life and has to toughen up. This would be direct race discrimination if the difference in treatment was because of her ethnicity.

Example:

5.28 A school has a policy covering racist bullying and any pupil who participates in racist bullying is excluded for at least one day. However, the school does not have a policy dealing with homophobic bullying and pupils who participate in such bullying are usually given only a detention. This could lead to direct sexual orientation discrimination.

Reduced and part-time timetables

5.29 Sometimes schools will offer disabled pupils reduced or part-time timetables with the positive intention of making the school day more accessible for the pupil by making it shorter. However, in some circumstances, shorter days may amount to discrimination arising from disability and a failure to make reasonable adjustments. An example of this would be if the pupil would be able to attend a full day at school if support was provided as a reasonable adjustment. The failure to make a reasonable adjustment that enables the pupil to attend school full-time would be unfavourable treatment because of something arising in consequence of their disability. This cannot be justified.

5.30 In other situations, the school may be able to justify the reduced or part-time timetable by showing it is a proportionate means of achieving a legitimate aim, for example if the pupil is too tired to cope with a full day at school. Where this is the case, it would not be discriminatory.

Example:

5.31 A pupil with chronic fatigue syndrome is too tired by lunchtime to attend her afternoon classes. The school adjusts her timetable to allow her to go home at lunchtime. She is also provided with additional adjustments to assist with her condition and to enable her to catch up with missed teaching at her own pace. This is unlikely to be discrimination.

Example:

5.32 A pupil with ADHD and autism is given a part-time timetable. This is because her behaviour becomes more challenging after lunch. The school has not considered whether it can reallocate any support from teaching assistants to assist the pupil. The pupil's behaviour arises from her disability. She is at a disadvantage because she is being denied the opportunity to attend school full-time. This is likely to be discrimination arising from disability and a failure to make reasonable adjustments and may also be direct discrimination.

Curriculum, methods of teaching and options

5.33 All teaching, including curriculum delivery, classes, practical sessions, school trips, class outings and homework are subject to the Act. Choices offered to pupils (such as National Qualification option choices) and the opportunity to take vocational courses (including engineering or social care qualifications) are also subject to the Act.

Curriculum choices

5.34 Generally, pupils should be offered the same opportunities regardless of their protected characteristics. However, there are exceptions. One exception is where pupils require reasonable adjustments (read chapter 7) to a school's standard practice of entering pupils for a certain number of assessments. For example, this might apply to National Qualifications. Another exception is where a school is

undertaking activities under the positive action provisions that are explained in detail in chapter 8. Apart from in these exceptions, limiting the choices available to pupils with certain protected characteristics may be unlawful discrimination.

Example:

5.35 Certain subjects, such as engineering, are promoted by a school to male pupils. Other subjects, such as health and social care, are promoted to female pupils. This could result in direct sex discrimination.

Example:

5.36 A pupil with a severe learning disability is only entered for three National 4s, including English and Maths, with the agreement of the pupil and his parents. This is because he requires extra teaching time to study the subjects he is entered for. This is likely to be a reasonable adjustment and a proportionate means of achieving the legitimate aim of passing some National 4s, meaning it is not discrimination arising from disability.

Curriculum delivery

5.37 The way in which the curriculum is delivered must not discriminate against a pupil with a protected characteristic. This includes curriculum delivery outside of the school, for example, on school trips (read paragraphs 5.39 to 5.44).

5.38 How the curriculum is delivered can be used to address stereotyping and inequality. Teaching staff should be encouraged to think about the way in which they deliver their

teaching to ensure that they do not inadvertently discriminate against pupils.

School trips (educational and non-educational)

5.39 The nature and timing of school trips can lead to discrimination if this results in certain pupils with a protected characteristic being unable to participate. An example would be if trips routinely clashed with Eid, but not with Easter. The way in which a trip is organised can also lead to discrimination if, for example, the necessary reasonable adjustments are not made for a disabled pupil. A school is less likely to discriminate if it considers the need to include all pupils, regardless of their protected characteristics, when planning a trip. This pre-planning may be easier than arranging a trip and then trying to amend it to make it inclusive. It may be sensible for schools to consult their additional support for learning teachers as a starting point when planning a trip.

Example:

5.40 A pupil with a visual impairment is told that he will not be able to attend a school camping trip because he will be unable to take part in many of the activities. The school does not make any attempt to make the activities accessible. This is discrimination arising from disability, which the school is unlikely to be able to justify because of its failure to make reasonable adjustments.

Example:

5.41 A school with several Jewish pupils arranges a residential trip at a venue that does not provide kosher food. A religiously observant Jewish pupil is not able to participate in the trip because he is unable to eat the food provided. This could constitute indirect discrimination based on religion or belief unless the policy could be objectively justified.

Example:

5.42 A school arranges a trip to an international rugby match and offers places on the trip to male pupils only. This would be direct sex discrimination, even if a similar trip to an international netball match were arranged for female pupils. Restricting the netball trip to female pupils only would also be direct sex discrimination.

Example:

5.43 A school plans a trip to a natural history museum. The school is concerned that a pupil with Down's syndrome may be unable to participate without one-to-one support to explain the exhibits to her. If the pupil was not allowed to attend the trip, this may be direct disability discrimination. However, after talking to the pupil and her parents, the school makes a space available on the bus to allow the pupil's personal assistant to attend the trip with her and support her to participate. This avoids discrimination, allows the pupil to enjoy the trip with her friends and is an example of good practice.

5.44 Forward planning will help schools arrange trips in which all pupils are able to participate. Offering a range of different trips

and activities, at different times of the year, may also help the school ensure that no pupils are excluded from taking part.

Tests, assessments and exams

5.45 A school must ensure that any tests, assessments or examinations arranged by the school do not discriminate against a pupil. Assessment questions that assume pupils have the same cultural, linguistic, religious or lifestyle experiences could lead to indirect discrimination. This is because pupils with certain protected characteristics may be disproportionately disadvantaged by such questions.

5.46 A school must make the necessary reasonable adjustments for disabled pupils in relation to tests and assessments. This may include providing assistive technology for disabled pupils where this amounts to a reasonable adjustment (read chapter 7). Other bodies, such as exam boards (for example, Qualifications Scotland) and other awarding organisations (AOs), may be responsible for external examinations and assessments. However, a school will still be responsible for ensuring that it does not discriminate when conducting these examinations and assessments. AOs have duties under the Act that are not covered in this guidance. Read our Services, public functions and associations: Code of Practice for more information on these duties.

Example:

5.47 A pupil with Tourette's syndrome is excluded from an exam because other pupils are distracted by the involuntary

movements and noises he makes. These are connected to his condition. The school does not make an alternative arrangement for him to sit the exam, such as taking the exam in a separate room. The exclusion from the exam is likely to be discrimination arising from disability. The school is unlikely to be able to justify this because it has failed to make reasonable adjustments.

Example:

5.48 A primary school sets a question in a primary 7 science test about the water cycle. To achieve the highest marks, pupils need to understand seasonal weather in the United Kingdom. A pupil who has recently moved from Uganda does not understand British seasonal weather and so loses marks. This may be indirect race discrimination as pupils from other countries or cultural backgrounds may be less likely to be familiar with British seasons.

Example:

5.49 A pupil with a visual impairment uses a text-to-speech reader to read exam questions to them in their Maths National 5 exam. This is likely to be a reasonable adjustment.

Careers education and information

5.50 A school must not unlawfully discriminate in the way in which it provides careers education, information, advice or guidance. Making assumptions about the types of careers that pupils would be interested in based on particular protected characteristics could amount to discrimination.

5.51 Schools should aim to identify and remove barriers to participation that their pupils may face. They can take steps to do so by explaining the full range of education, training and employment opportunities available to all pupils.

Example:

5.52 To help pupils make choices for further study, a secondary school sets up information sessions for pupils on the different academic and non-academic options. A pupil from a Gypsy Roma Traveller community is assigned a session on vocational courses. However, she is denied the opportunity to attend a session on academic options because it is assumed that her way of life would make these inappropriate for her. This would be direct race discrimination.

The same secondary school does not invite a pupil who is a wheelchair user to attend either session because it is assumed that she will not seek further education or look for employment. This would be direct disability discrimination and discrimination arising from disability.

Work experience and work placements

5.53 Allocating pupils to different types of work placement based on protected characteristics could be discrimination. Pupils' choices of and opportunities for work experience or work placements should not be restricted because of a protected characteristic.

5.54 If a school fails to consider work experience for a disabled pupil, this may amount to direct disability discrimination or discrimination arising from a disability by the school.

5.55 A school will not normally be responsible for any discrimination that occurs when a pupil is on work placement. However, the school will be responsible for ensuring that there is no discrimination in the way in which work experience and work placement opportunities are offered. Effective communication between schools and work placement providers will help schools minimise the chances of discrimination and ensure that the school is not liable for aiding discrimination (read chapter 3).

Example:

5.56 A male pupil expresses an interest in a work experience placement at a children's nursery. A teacher tells him, without asking the nursery, that they will not be able to put him forward for the placement because they believe that the employer would prefer a female pupil. This would be direct sex discrimination by the school.

A female pupil asks to undertake work experience in the field of engineering. The teacher puts her forward for the placement at the nursery and tells her that this is more suitable for her because she will probably get married at a young age and raise children. This would be direct sex discrimination by the school.

5.57 Employers providing work opportunities will be subject to the work provisions of the Act in relation to their treatment of pupils seeking or undertaking placements.

After-school clubs and extracurricular, leisure and sporting activities

5.58 Where a school provides extracurricular services or activities to its pupils, which may take place outside the traditional school day, these are still covered by the schools provisions of the Act. This would include after-school activities, such as sporting clubs and drama and musical productions. The range of activities offered and the way they are offered and delivered must not discriminate.

Example:

5.59 A female pupil in a primary school is told that she will not be able to continue playing in the school football team, which is coached by the PE teacher on the school field. This is because some parents have complained about the school having a mixed-sex team, even though it is in line with Scottish Schools' Football Association guidance. This would be direct sex discrimination.

Example:

5.60 A school distributes discounted tickets to cricket matches to male pupils, but it does not offer the tickets to female pupils. This is likely to be direct sex discrimination.

5.61 Where a separate provider of services runs an after-school club on the school premises, this would be covered by the services provisions of the Act, not the schools provisions. For example, where an independent childcare provider runs an after-school childcare facility using a building on the school site, it would be a service provided by the independent childcare provider. Read chapter 2 and the Services, public functions and associations: Code of Practice for more information.

Example:

5.62 An independent childcare provider offers an after-school club to pupils at a primary school. The after-school club is run from an unused classroom on the school's site. The after-school club refuses to allow a disabled pupil to attend. The pupil's parents must complain to the independent provider under the services provisions of the Act.

Example:

5.63 A school offers an after-school club to its pupils, which it runs from the school hall. The after-school club refuses to allow a disabled pupil to attend because it has a policy that all pupils must be able to use the toilet independently, and the pupil's disability means that she cannot. The pupil's parents complain to the school that it has discriminated against the pupil. This may amount to indirect disability discrimination by the school unless the school can show that it is pursuing a proportionate means of achieving a legitimate aim. This could be, for

example, the health and safety of all pupils attending the club (including the disabled pupil) and available staffing resources.

5.64 Indirect discrimination may occur when pupils with particular protected characteristics are inadvertently prevented or discouraged from taking part in certain activities and opportunities.

Example:

5.65 A school with a significant proportion of Jewish pupils arranges extracurricular drama sessions on a Saturday morning, when Jewish pupils who observe the Jewish Shabbat will not be able to attend. This is likely to result in indirect religion or belief discrimination, unless the school can justify holding the sessions at a time when Jewish pupils may not be able to attend.

If the same school arranges school football matches for Saturday morning, because this is when the local school league can provide referees and pitches, this is likely to be a proportionate means of achieving a legitimate aim and therefore lawful.

School facilities

5.66 The way in which school facilities are provided can lead to discrimination. School facilities can include:

- classrooms
- bathrooms

- laboratories
- libraries
- IT facilities
- school halls
- dining halls
- playgrounds
- sporting facilities
- changing rooms
- residential accommodation for boarders

Example:

5.67 A secondary school library is on the first floor of the school building. There is no lift to the first floor. A disabled pupil who uses a wheelchair is not able to access the school library as a result. This is likely to be discrimination arising from disability and also a failure to make reasonable adjustments unless there are reasons why moving the library, or a quiet space with access to library resources, to an accessible location would not be a proportionate means of achieving a legitimate aim.

5.68 The law in Scotland requires schools to provide separate toilet facilities for boys and for girls. Toilet cubicles are required to be partitioned and to have lockable doors.

Example:

5.69 A secondary school is considering how to provide appropriate changing facilities for a trans pupil who identifies as a girl. The

school decides that the pupil must use the boys' changing room. This is unlikely to be justified and so is likely to be unlawful indirect gender reassignment discrimination. A suitable alternative might be to allow the pupil access to a single-user, lockable changing room, which might be a staff changing room or a mixed-sex accessible bathroom.

Example:

5.70 A school that has several Muslim pupils does not provide Halal food in its canteen. This results in the Muslim pupils being unable to eat school lunches. This is likely to be indirect religion or belief discrimination because the school is unlikely to be able to justify this action.

Example:

5.71 A school does not provide vegan or lactose-free food in its canteen. A pupil with a severe dairy allergy is unable to eat school lunches as a result. This is likely to be indirect disability discrimination, because the school is unlikely to be able to justify its actions.

5.72 There are specific exceptions in relation to communal accommodation, which are explained in chapter 10.

School fees and charges

5.73 If a school charges different rates for the same service for UK pupils and pupils from overseas, this could be indirect race discrimination. However, if the school is offering a different service for overseas pupils, for example, longer school terms,

additional boarding facilities or English language teaching services, this could be justified.

Subjecting a pupil to any other detriment

5.74 The Act says that a school must not discriminate by subjecting a pupil to 'any other detriment' (section 85, paragraph 2(f)). 'Detriment' is not legally defined in the Act but is interpreted very broadly. It is generally taken to mean some disadvantage and can include:

- denying an opportunity or choice
- anything that a reasonable person would consider had changed the pupil's position for the worse

5.75 A reasonable person is a person who can be expected to act in a fair and sensible way. 'Detriment' does not need to be physical, academic or disciplinary, but an unjustified sense of grievance would not be enough.

5.76 Even if a school thinks that it is acting in the best interests of a pupil, its actions may still amount to a detriment.

Example:

5.77 A school careers coordinator decides not to offer a placement at a construction firm to a Muslim pupil. This is because he is worried that the pupil will find it too hard to 'fit in' and may experience bullying from employees of the firm. Instead, he decides to send the pupil for a placement in business, which he feels is more appropriate for the pupil. This is despite the

pupil expressing an interest in working in a construction firm. The coordinator's decision not to offer the placement is likely to be direct discrimination because of religion or belief. To avoid the pupil being bullied, the careers coordinator should have had a conversation with the placement provider to share his concerns and seek reassurance.

5.78 Exclusions are dealt with separately to detriment in section 85, paragraph 2(e). Read chapter 6 for more information about exclusions. 'Detriment' can include other penalties, punishments or sanctions, such as restraint, detentions and isolation.

Restraint

5.79 The Scottish Government has published guidance on physical intervention in schools and the legal framework for restraint in schools.

5.80 In the Scottish Government's guidance, 'physical intervention' means 'physical contact carried out with the purpose of providing support to or preventing the actions of a child or young person'. 'Restraint' means 'an act carried out with the purpose of restricting a child or young person's movement, liberty and / or freedom to act independently'. There are many types of restraint. Restraint can involve physical contact, including physical and mechanical restraint, and acts such as seclusion. Restraint should only be used to prevent an immediate risk of injury and should only be considered where no less restrictive options are viable. It can never be used to punish a pupil. We provide more information on this in our

human rights framework for restraint.human rights framework for restraint.

5.81 The courts have found that physically restraining a pupil inappropriately is always unfavourable treatment that will amount to a detriment under section 85, paragraph 2(f).[14] Schools must take care to ensure that appropriate restraint is only used proportionately and as a last resort.

Isolation

5.82 In Scotland, isolation techniques include seclusion. In the Scottish Government's guidance, 'seclusion' means 'an act carried out with the purpose of isolating a child or young person, away from other children and young people and staff, in an area in which they are prevented from leaving'. Seclusion is a form of restraint, as explained in our human rights framework for restraint,human rights framework for restraint, and should only be used as a safety measure.

5.83 Seclusion should only be used as a last resort, in an emergency to avert an immediate risk of injury to a pupil, or others, where no less restrictive option is possible. It should end as soon as the immediate risk of injury is reduced. It should only be used once other strategies have been tried.

5.84 Seclusion should last for the shortest time necessary to allow for continuation of the pupil's education. The principles explaining the duration of the seclusion should be clearly set out in the school's behaviour policy.

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[14] ASN_D_14_01_2021

5.85 The behaviour policy should also make sure that the reasons seclusion might be used are clearly set out with information about where the pupil will go, how long the removal will last and how the pupil will be supervised. As soon as the immediate risk of injury has passed, the pupil should be free to leave the space they were secluded in and offered support to return to an appropriate space. The behaviour policy should be consistent with other internal policies, including safeguarding and health and safety policies. Policies should also clearly set out how pupils should be reintegrated back into class after the seclusion. Parents should be informed that their child has been secluded on the day it happens.

5.86 Schools should not use isolation rooms, also known as ‘removal rooms’ and ‘time out rooms’, when a pupil breaks school rules or acts disruptively or as part of routine practice or a default response to behaviour. They are different to the seclusion rooms used by pupils with certain conditions or types of disability to regulate themselves, with support from a trusted member of staff. Any room a pupil is secluded in must be in an appropriate area of the school, must not be locked, and must be stocked with appropriate resources, for example, a desk and chair. It must also be supervised by trained members of staff.

5.87 Schools should consider a pupil’s additional support needs or disabilities before deciding to seclude.

5.88 Schools should keep clear records of which pupils are secluded or restrained and whether they have any protected

characteristics, in particular additional support needs or disabilities. Schools should also monitor and analyse their overall use of restraint and seclusion to consider effectiveness, as well as to comply with their duties under the PSED and specific duties.

5.89 Case law suggests that isolating pupils from each other can amount to a 'detriment' for the purposes of the Act.[15]

Example:

5.90 A disabled pupil with a diagnosis of ADHD is repeatedly sent to her school's isolation room because of her disruptive behaviour. The pupil spends at least one day each week away from her peers, missing out on classroom-based education. This may amount to indirect disability discrimination and discrimination arising from the pupil's disability, unless the school can show that it is a proportionate means of achieving a legitimate aim. If no reasonable adjustments have been made to account for the impact of the pupil's disability on her capacity to conform to school rules, or to adjust the sanction being imposed on her, it may also be a failure to make reasonable adjustments.

[15] HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al Hijrah School [2016] EWHC 2813 (Admin)

What is not covered by the Act

Content of the curriculum

5.91 Schools' obligations under the Act do not apply to anything done in connection with the content of the curriculum. Schools are not restricted in the range of issues, ideas and materials that they use, although public schools must follow the Curriculum for Excellence. Schools have the academic freedom to expose pupils to a range of thoughts and ideas, even if controversial. Even if the content of the curriculum causes offence to pupils with certain protected characteristics, this will not make it unlawful.

5.92 However, the way in which the curriculum is taught is covered by the non-discrimination provisions of the Act (section 89, paragraph 2, section 85, paragraph 2(a)).

Example:

5.93 A school science curriculum includes teaching on evolution. This would not be discrimination based on religion or belief against a pupil whose religious beliefs include creationism.

Example:

5.94 A school teaches the novel Of Mice and Men. A disabled pupil cannot complain that this is disability discrimination because one of the characters, who has a learning disability, is portrayed negatively because of his disability, and the novel could be read as hostile to people with learning disabilities.

However, the pupil can complain of disability discrimination if, in teaching it, the teacher encourages the class to laugh at the character with a learning disability. This could amount to disability discrimination or harassment because the comments do not relate to the content of the curriculum but the way in which it is taught.

Acts of worship or other religious observance

5.95 Acts of worship or other religious observance organised by or on behalf of a school are not covered by the provisions prohibiting religion or belief discrimination, whether or not they are part of the curriculum (schedule 11, paragraph 6).

5.96 All schools can carry out acts of worship or other religious observance. Public schools are obliged to carry out religious observance under the Education (Scotland) Act 1980 (section 8) and Scottish government policy guidance.

5.97 Schools are not required to provide opportunities for separate worship for the different religions and beliefs represented among their pupils to avoid discrimination. Parents may have their child excused from religious observance, and the act of asking for the child to be excused must not place an undue burden on the parents, for example by asking parents to provide a detailed and personal explanation of their own religious beliefs. Pupils must be informed of a withdrawal request and may give their views and object to the request. The school must follow the steps set out in the Children (Withdrawal from Religious Education and Amendment of UNCRC Compatibility Duty)(Scotland) Act 2026. If a pupil objects and these steps are followed, the school must reject the parents' request.

5.98 Schools are not prohibited from organising or participating in acts of worship or religious observance celebrating any faith. Doing so would not amount to religion or belief discrimination against pupils of other religions or of no religion.

Example:

5.99 A school organises an annual nativity play for pupils and a carol concert to celebrate Christmas. It would not be discrimination based on religion or belief if the school were to fail to hold events to celebrate Diwali for Hindu pupils.

Example:

5.100 A school that is attended mainly by Christian pupils arranges special events to celebrate Diwali and Hanukkah. This would be lawful and may be an example of good practice.

Schools conducted in the interest of a denominational body

5.101 The Act permits schools conducted in the interest of a denominational body to discriminate in the provision of education and access to a benefit, facility or service on the grounds of religion or belief. This means that such schools are permitted to conduct themselves in a way that discriminates against pupils on the grounds of religion or belief in certain ways. For example, a school conducted in the interest of a denominational body does not have to make special provision for pupils of a different faith or incorporate aspects of their faith into its curriculum.

5.102 However, that does not mean that a school can act unlawfully, including discriminating against, harassing or victimising pupils on the basis of another protected characteristic. A school is also not permitted to victimise or harass a pupil on the grounds of religion or belief, or any other protected characteristic, whether it is a school conducted in the interest of a denominational body or not (schedule 11, paragraph 5).

Example:

5.103 An independent Muslim school segregates pupils by sex for all purposes, including all lessons, breaktimes and after-school activities. Though there is separate but equal treatment of both sexes, this is likely to be unfavourable treatment arising from denying pupils the opportunity to interact on the basis of sex. This may amount to direct sex discrimination.

Example:

5.104 A Jewish school that provides spiritual instruction or pastoral care from a rabbi is not discriminating by not making equivalent provision for pupils from other religious faiths.

Example:

5.105 A Roman Catholic public school that organises a school trip to the catholic shrine of Lourdes is not discriminating by not arranging a trip to Mecca for 20 Muslim pupils who attend the school.

5.106 If a school is not conducted in the interest of a denominational body, this exception will not apply and the school must still comply with the Act (schedule 11, paragraph 5). This is the case even for a school with a particular tradition.

Example:

5.107 An independent school which is not conducted in the interest of a denominational body has a long military tradition and a historic association with the Church of Scotland. Despite its historic association, the school cannot discriminate against pupils who are not Christian in the provision of education. This is because it is not conducted in the interest of a denominational body.

5.108 This exemption does not cover exclusions or subjecting a pupil to any other detriment, so a pupil cannot be punished or penalised for things that relate to their religion or belief. In relation to how this exemption applies to admissions, read chapter 4.

Example:

5.109 A pupil at an Episcopalian primary school tells his class during a religious and moral education lesson that he has decided to become a humanist. The pupil is told to leave the class and is given a detention for being insubordinate by telling the class that he has renounced the school's faith. This is likely to be direct discrimination because of religion or belief.

5.110 If a member of school staff conveys their beliefs in a way that involves angrily criticising or mocking a particular pupil or group of pupils on the basis of a protected characteristic, then this would be unacceptable in any circumstances, and would constitute discrimination.

Example:

5.111 A teacher at a Roman Catholic public school tells pupils, including a gay pupil, that homosexuality is 'wrong'. This would be direct discrimination because of sexual orientation.

For more information about general exceptions to the Act and specific exceptions relating to schools, read chapter 10.

Pregnancy and maternity discrimination

5.112 It is unlawful for a school to restrict the education, benefits, facilities or services available to pregnant or breastfeeding pupils, or to restrict the options available to them.

5.113 It is not direct discrimination against a male pupil to offer a female pupil more favourable treatment, because of her pregnancy or maternity, or because she is breastfeeding

(section 13, paragraph 6). Therefore, a school can offer pregnant or breastfeeding pupils additional education, benefits, facilities or services, or can offer them in a more flexible or favourable way than they are offered to other pupils. However, schools should also avoid making assumptions about the educational and career aspirations of teenage mothers. For more information about pregnancy and maternity read chapter 3.

Example:

5.114 A school offers extra tuition to a pregnant pupil who misses lessons because she is attending antenatal appointments. A male pupil misses lessons due to lateness and is required to make up the work in his own time without extra tuition. The male pupil alleges that he has been treated less favourably than the pregnant pupil. The male pupil cannot compare himself to the pregnant pupil, because she did not attend lessons due to attending antenatal appointments and the treatment by the school was due to her pregnancy.

Example:

5.115 A school arranges for a pregnant pupil to attend parenting classes at a local college, but these clash with her National 5 Computing Science classes. Preventing her from attending certain classes would be pregnancy and maternity discrimination. To avoid this, it might be necessary to offer additional National 5 Computing Science lessons, so that the pupil does not miss out.

Example:

5.116	A pupil who gave birth recently wants to stand for the student representative council. The school is concerned that being a school council member as well as a new mother and studying may be too many commitments for the pupil to manage. The school cannot prevent her from standing because she is a teenage mother. To do so would be unfavourable treatment because of her maternity, so it would be pregnancy and maternity discrimination.

Chapter 6: Exclusions from school

How the Equality Act 2010 works with exclusions legislation

6.1 Exclusions are where pupils are removed from and prevented from attending school. They are different to isolation (read paragraphs 5.82 to 5.90). Exclusions can be permanent (which is removal from the register of a school) or temporary.

6.2 In some instances, schools may seek to send a pupil off school premises without the school recording the decision as an exclusion and without following its formal exclusion process. However, in accordance with the Scottish Government guidance, pupils must not be sent home on any such ‘informal exclusion’ or sent home to ‘cool off’ (calm down). Exclusions must always follow the formal exclusion process.

6.3 Exclusions should always be a last resort, as is set out in the Scottish Government guidance in paragraph 2.

6.4 Public schools managed by education authorities are subject to regulations 4 and 4A of the Schools (General) (Scotland) Regulations 1975 as amended and section 28H of the Education (Scotland) Act 1980 as amended, which sets out a statutory regime for exclusions. The Scottish Government has also issued guidance for schools on exclusions and relevant

national policy. This legislation and guidance set out the circumstances where a pupil can be excluded and their right to appeal. The legislation and guidance also cover requirements for education authorities where a decision to exclude has been taken.

6.5 Nothing in the Equality Act 2010 (the Act) conflicts with the other legal obligations of schools in relation to exclusions.

6.6 Independent and grant-aided schools are not subject to the statutory regime for exclusions, but they are obliged to comply with the Act.

6.7 While internal isolation is not an exclusion for the purposes of the exclusions legislation, or under section 85, paragraph 2(e) of the Act, isolation can still amount to a detriment. Discriminatory isolations are likely to be unlawful under section 85, paragraph 2(f) of the Act. Read paragraph 5.89.

6.8 The Act does not prohibit schools from excluding pupils with particular protected characteristics. However, it does prohibit schools from excluding pupils because of their protected characteristics or from discriminating during the exclusions process.[16]

6.9 Schools have duties under the Public Sector Equality Duty (PSED) and specific duties. To meet their duties, schools should monitor exclusions for patterns or trends among the pupils who are excluded and should take into account

[16] Mr and Mrs B v Proprietor of St Dominics Grammar School [2025] UKUT 048 (AAC)

individual pupils' relevant circumstances. Schools should also ensure that they consider early intervention for groups at an increased risk of exclusion. Read paragraphs 2.37 to 2.50.

Examples and terminology in this chapter

6.10 The examples in this chapter are intended to specifically illustrate how the Act applies in relation to exclusions. They do not refer to any other education legislation, which may also apply to the particular circumstances in the examples. In some situations, the treatment described may be a breach of both education legislation and the Act.

What the Act says about exclusions

6.11 The Act says that it is unlawful for the responsible body of a school to discriminate against or victimise a pupil by excluding them from the school (section 85, paragraph 2(e) and section 85, paragraph 5(e)).

What is unlawful under the Act

6.12 It is unlawful to exclude a pupil because of a protected characteristic. This covers all types of exclusion, including permanent (which is removal from the register of a school) and temporary exclusions.

6.13 Excluding a pupil because of a protected characteristic would be direct discrimination.

Example:

6.14 A school excludes a boy from a Black Caribbean background for fighting with a boy from a White English background. The school does not exclude the White boy. It is the first offence for both pupils, both are equally to blame for the incident and they are in the same year group. The school has made its decision on the basis of race. This would be direct race discrimination.

Example:

6.15 A co-educational school excludes a pupil because they declare their intention to undergo gender reassignment and begin to present in the style of the opposite sex. This would be direct gender reassignment discrimination.

6.16 It is also direct discrimination to exclude a pupil because they are perceived to have a protected characteristic or because they are associated with someone with a protected characteristic.

Example:

6.17 The pupil's brother tries to set up a support group for trans pupils to show his support for his sibling. The school gives the brother a detention because it says the brother is being insubordinate and is criticising the school's decision. This may be direct gender reassignment discrimination (by association),

even though the pupil himself is not intending to undergo gender reassignment.

6.18 It is unlawful to exclude a pupil with a particular protected characteristic for behaviour that a pupil without that characteristic would not be excluded for.

Example:

6.19 On a school trip, several pupils were abusive to the coach driver and swore at him. The boys who swore were given detentions and not allowed to go on the next school trip but were not excluded. However, the girls who swore were excluded, because the head teacher said their behaviour was 'inappropriate for young ladies'. This would be direct sex discrimination because the female pupils were excluded for behaviour that the male pupils were not excluded for.

6.20 Behaviour and exclusions policies that apply to all pupils but result in pupils with a particular protected characteristic being more likely to be excluded may result in indirect discrimination. However, this will not be the case if the way the policy has been applied can be justified as being a proportionate means of achieving a legitimate aim. This concept is explained in chapter 3. Schools that are subject to the PSED should regularly review their behaviour and exclusion policies and how they are applied. Meeting the requirements of the PSED and specific duties will help schools to avoid policies that indirectly discriminate. Read paragraphs 2.37 to 2.50.

Example:

6.21 A school monitors its exclusion rates and discovers that a much higher proportion of boys of Eastern European heritage are excluded than any other category of pupil. This suggests that the practice of excluding for certain behaviours, while applied equally to all pupils, might disproportionately disadvantage boys of Eastern European heritage. The school must ensure that its exclusion policy does not indirectly discriminate against boys of Eastern European heritage but is a proportionate means of achieving a legitimate aim. In doing so it considers relevant data to try to understand issues that might result in this disproportionality, taking steps to employ the least discriminatory means of applying its policy. Further, for each individual pupil who faces exclusion, the school challenges itself to make sure that the exclusion is justified.

Disabled pupils

6.22 Schools must take account of the specific needs of individual disabled pupils. Consideration should be given to whether a reasonable adjustment could be made to help the pupil avoid the behaviour for which exclusion is being considered, or whether an alternative punishment to exclusion could be given which may be more appropriate to cater for the pupil's disability. Failure to do this may lead to a breach of the duty to make reasonable adjustments under the Act.

6.23 If a disabled pupil is excluded for behaviour connected to their disability, this could be discrimination arising from disability. This is because exclusions can amount to unfavourable

treatment under section 15 of the Act. However, it will not be discrimination if the school can justify the exclusion as being a proportionate means of achieving a legitimate aim. An exclusion is unlikely to be justified if the school has not first considered and complied with its duty to make reasonable adjustments for that pupil.

Example:

6.24 In independent school finds out that a pupil has been diagnosed with foetal alcohol syndrome. The school did not know about his disability when he was offered a place at the school. If it had been aware of the disability, the school would not have offered a place, because the admissions team felt the school would be unable to meet the pupil's needs.

The school cannot exclude the pupil because of his disability, as to do so would be direct disability discrimination. It is also unlawful for the school to have an admissions policy not to admit disabled pupils.

The school's concern may arise from its aim to protect other pupils and staff from challenging behaviour, if the pupil is known to have previously displayed such behaviour. However, the school must still show that it has complied with the Act by not discriminating against the pupil because of his disability or by failing to make reasonable adjustments for him. The school's duty to make reasonable adjustments is anticipatory which means it should have already thought about what reasonable adjustments could be put in place for disabled

pupils. The school should consider whether any reasonable adjustments could be made to support the pupil.

6.25 If excluding a pupil with a co-ordinated support plan (CSP), the pupil's school is usually named in the CSP and the education authority must follow the statutory process of reviewing the CSP before the named school can be changed. The education authority continues to be required to meet the pupil's additional support needs and to consider what support the pupil may need, whether there is a CSP in place or not.

Example:

6.26 A supply teacher is alarmed by what she perceives to be threatening behaviour by an autistic pupil. The supply teacher told the pupil that he could not sit in his normal seat, because it was not appropriate for the activity that they were doing. This upset the pupil and caused him to behave in an agitated way. The school advised the pupil's parents to collect him and gave the pupil an exclusion lasting three days. The pupil always sat in the same seat in the classroom which was recognised as a reasonable adjustment for his autism by his class teacher. The pupil's reaction was connected to his disability. Therefore, the exclusion was unfavourable treatment which arose as a consequence of his disability. It would be discrimination arising from disability unless it was a proportionate means of achieving a legitimate aim. Because the school had not advised the supply teacher of the reasonable adjustment, the school would have failed to make reasonable adjustments which would also be unlawful discrimination.

6.27 The Act requires schools to make reasonable adjustments for disabled pupils both to its exclusions process and to the sanction imposed. This might mean applying different sanctions, or applying them in a different way, to avoid putting a disabled pupil at a substantial disadvantage as compared to non-disabled pupils. Read chapter 7 for more information about reasonable adjustments.

Example:

6.28 A pupil with global developmental delay amounting to a disability is excluded for repeatedly getting up from his seat during lessons and disrupting other pupils. He does not understand that he is supposed to stay seated and moves whenever he needs to request support or feels uncomfortable. It is the school's policy that repeated disruptive behaviour is punished by exclusion. The school is under a duty to make reasonable adjustments to its policy. This might mean not penalising some of the disruptive behaviour which is connected to the pupil's disability and working with him to help him remain in his seat during lessons.

Example:

6.29 An autistic pupil with vocal tics tends to shout out in class and in school corridors. She is excluded for shouting out on three occasions in one day, under a 'zero tolerance' behaviour policy. This is likely to amount to disability discrimination. The school is under a duty to make reasonable adjustments to its policy by not penalising the pupil for behaviour arising in consequence of her disability.

Pregnancy and maternity discrimination

6.30 It is unlawful to exclude a pupil because of her pregnancy or maternity.

6.31 Pregnancy and maternity discrimination is explained in more detail in chapter 3.

Excluded pupils

6.32 Education authorities have duties under section 14, paragraph 3 of the Education (Scotland) Act 1980 to provide education for excluded pupils without ‘undue delay’. This includes permanent and temporary exclusions. Undue delay is not defined, although the Scottish Government guidance suggests that it is reasonable to expect alternative education provision to be in place after 3 days.

6.33 While carrying out these duties, an education authority has obligations under the Act not to discriminate against, harass or victimise these pupils. The duty not to discriminate continues while a pupil is excluded.

Chapter 7: Reasonable adjustments for disabled pupils

7.1 Schools have a duty to provide reasonable adjustments (the duty) for disabled pupils under section 20 of the Equality Act 2010 (the Act). This duty goes beyond simply avoiding discrimination. Its purpose is to ensure that the experience of disabled pupils is as close as reasonably possible to that of non-disabled pupils. The reasonable adjustments duty applies to all schools in Scotland irrespective of how they are funded or managed.

The reasonable adjustments duty

7.2 The duty is 'to take such steps as it is reasonable to have to take to avoid the substantial disadvantage' to a disabled person caused by a provision, criterion or practice applied by or on behalf of a school, or by the absence of an auxiliary aid or service.

7.3 The duty to make reasonable adjustments requires a school to take positive steps to ensure that disabled pupils can fully participate in the education provided, and that they can enjoy the other benefits, facilities and services that the school provides for pupils.

7.4 A school's duty to make reasonable adjustments is an anticipatory one, owed to disabled pupils generally. Therefore, schools need to think in advance about what disabled pupils might require and what adjustments might need to be made for them (section 20, schedule 13, paragraph 2).

7.5 In the Act, there are three elements to the reasonable adjustments duty. They are:

- provisions, criteria and practices (section 20, paragraph 3)
- physical features (section 20, paragraph 4)
- auxiliary aids and services (section 20, paragraph 5)

7.6 There is little difference in how the first and third elements of the duty apply in schools, as compared to other contexts. However, the second element of the reasonable adjustments duty in respect of physical features applies differently in schools. Read paragraphs 7.42 to 7.49 for more information on how the second element and the Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002 apply.

Example:

7.7 Following assessment, a disabled pupil's co-ordinated support plan (CSP) includes the use of an adapted keyboard, which is purchased for his use. The keyboard can be detached and reattached to computers as the pupil moves between subject classrooms. The education authority introduces a policy that prevents USB devices from being attached and so the

adapted keyboard can no longer be moved among different computers. The authority makes a reasonable adjustment to its policy so that the individual pupil can be given a login that will allow him to attach his keyboard.

Who the duty applies to and when it applies

7.8 The reasonable adjustments duty is owed to disabled pupils. The Act says that a pupil has a disability if they have a physical or mental impairment that has a long-term and substantial adverse effect on their ability to carry out normal day-to-day activities. Physical or mental impairments that are considered disabilities for the purposes of the Act include sensory impairments, such as those affecting sight or hearing, as well as mental health conditions, if those conditions have long-term and substantial adverse effects on normal daily activities.

7.9 Long-term is defined as lasting for at least 12 months, or likely to last for at least 12 months.

7.10 The definition of disability is explained in chapter 3 and more guidance on disability discrimination can be found on our website.

7.11 Because the duty is anticipatory, it applies regardless of whether the school knows that a pupil is disabled. This means schools must consider and take action to remove barriers that impede people with one or more kinds of disability before an

individual disabled pupil seeks to access the school. Schools must not wait until a disabled person approaches them before they consider their duty to make reasonable adjustments. Schools should anticipate the requirements of disabled pupils and the adjustments that may have to be made for them. This complements duties under the Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002. Read paragraphs 7.42 to 7.49.

7.12 In many cases, schools will be aware of a pupil's disability for a variety of reasons. For example, parents may volunteer information about their child's disability. However, in other cases, it may not be immediately obvious that a pupil is disabled. Underachievement and unexplained behaviour may indicate an underlying disability that has not yet been identified.

7.13 Some disabled pupils may have additional support needs and receive additional support for learning in school or may have a CSP under the Education (Additional Support for Learning) (Scotland) Act 2004 (ASL 2004 Act). However not all disabled pupils will have additional support needs (for further detail, read paragraph 3.244).

7.14 If a school knows that a pupil is disabled, it must provide reasonable adjustments for that pupil. The school may take into account the adjustments it has already considered as part of the anticipatory duty, but may still need to make further adjustments for the individual disabled pupil.

7.15 Disabled pupils and their parents have a right to request that a pupil's disability is treated as confidential. In this case, it is reasonable for the school to consider the request for confidentiality. The school still has a duty to make reasonable adjustments, but the adjustments it can make might be different to those that it would otherwise have made if there had not been a confidentiality request.

7.16 Whether or not a pupil receives additional support for learning or has a CSP, schools have a duty to actively consider the needs of the pupil and whether there are further reasonable adjustments that should be made for them (read paragraphs 7.101 to 7.108).[17]

7.17 A reasonable adjustment can be made in addition to any additional support for learning. Examples include allowing a disabled pupil to sit exams in a smaller room or adapting uniform policies.

7.18 For further information about the interaction between the ASL 2004 Act and the Act, read paragraph 3.244.

What is meant by 'substantial disadvantage'

7.19 The reasonable adjustments duty is triggered where there is a need to avoid 'substantial disadvantage'. 'Substantial' is defined as being anything more than minor or trivial. Whether

[17] KTS v Governing Body of a Community Primary School [2024] UKUT 139 (AAC)

a disabled pupil is at a substantial disadvantage or not will depend on the individual situation (section 212, paragraph 1).

Example:

7.20 A disabled pupil with severe manual dexterity difficulties finds it difficult to write large amounts of text by hand and so it takes him considerably longer than other pupils. In a lesson in which large amounts of text are being copied from the board, he would be at a substantial disadvantage. However, in a lesson in which work can be completed on a computer using dictation software, he would not be at a substantial disadvantage.

7.21 The experience of a disabled pupil will be compared to that of a non-disabled pupil to determine whether the disabled pupil is at a substantial disadvantage. The non-disabled pupils do not need to attend the same school. For example, if the pupil attends a school where most or all pupils are disabled, the disabled pupil may be compared to a hypothetical, non-disabled pupil.

Example:

7.22 A visually impaired pupil who can see material only in 16pt font or larger will be at a substantial disadvantage compared to non-disabled pupils, if materials are provided in smaller print.

7.23 In other cases, a pupil's disadvantage will not be so obvious, but it will be no less a substantial disadvantage.

Example:

7.24 A pupil with chronic fatigue syndrome finds it harder to concentrate in lessons in the afternoon because of an increase in her tiredness. Though the pupil appears not to be disadvantaged when compared to her peers during morning lessons, she is not able to concentrate in afternoon lessons, so she is disadvantaged in learning the content of those lessons. The school provides her with a recording device to record those lessons that she is not able to concentrate as well in, a reduced timetable allowing her to focus on core subjects and access to online learning materials.

What the duty covers

Provision, criterion or practice

7.25 The phrase ‘provision, criterion or practice’ is not defined in the Act. The duty in relation to provisions, criteria and practices covers the way in which a school operates on a daily basis, including its decisions and actions.

7.26 To be unlawful, a ‘provision, criterion or practice’ must put a disabled pupil at a substantial disadvantage when they are compared to a non-disabled pupil. A ‘provision, criterion or practice’ may include any school policies or procedures, as well as common ways of dealing with matters arising at a school.

7.27 The phrase ‘provision, criterion or practice’ should be interpreted widely. It could include, for example:

- any formal or informal policies
- rules
- practices
- arrangements
- criteria
- conditions
- prerequisites
- qualifications
- provisions

7.28 It is not necessary to specify whether something is a provision, criterion or practice. If it can be said to be a rule, policy, practice or decision, or a combination of these, it will be considered a provision, criterion or practice. It can include decisions to do something in future, such as a policy or criterion that has not yet been applied. It can also include a 'one-off' or discretionary decision, if it reflects the way in which things generally are or will be done, or there is some element of repetition to the decision. For more information about provisions, criteria or practices, read paragraphs 3.46 to 3.47.

Example:

7.29 A secondary school has a policy that female pupils must wear knee-length pleated skirts. This is a provision, criterion or practice (a school policy). The same secondary school decides to amend its policy to allow female pupils to wear knee-length pleated skirts or trousers at the start of the next

school year. Although the policy will start in the future, it is still a provision, criterion or practice.

Example:

7.30 A secondary school allows some National 5 students to reduce the number of National 5s they take to 4 if they have health concerns amounting to a disability. However, the same secondary school has a policy that pupils must have 6 National 5 passes to go on an annual ski trip. This policy will amount to a provision, criterion or practice and therefore will be subject to the duty to make reasonable adjustments.

7.31 Schools' duties to make reasonable adjustments to provisions, criteria and practices include ensuring that school policies are adjusted where necessary to accommodate the needs of disabled pupils. This may include amending policies to accommodate the reasonable needs and requirements of disabled pupils.

7.32 Many reasonable adjustments will often involve a moderate change in practice.

Example:

7.33 A school uniform policy would fall within this element of the reasonable adjustments duty and a school may be required to make adjustments to this policy for disabled pupils. For example, adjustments may be required for an autistic pupil who has hypersensitivity to certain clothing textures. Adjustments to the school uniform policy are unlikely to cost the school money.

Example:

7.34 A school has a behaviour policy that requires pupils not to shout out in lessons. A pupil with Tourette's Syndrome is not sanctioned under the behaviour policy when she makes involuntary sounds in class. The behaviour policy has been reasonably adjusted to remove the sanction for involuntary sounds for students with disabilities causing them to make involuntary noises.

Auxiliary aids or services

7.35 An 'auxiliary aid or service' is not defined by the Act but can be anything that provides additional support or assistance for a disabled pupil and is not part of the fabric of the building. It can include, for example, a piece of equipment, or support from a member of staff. It can also include the provision of information in an accessible format. It does not mean that a disabled pupil can use the auxiliary aid or service for personal purposes outside school.

7.36 Many of the reasonable adjustments that schools make for disabled pupils include the use of auxiliary aids, such as coloured overlays for dyslexic pupils, pen grips, adapted PE equipment, adapted keyboards and accessible computer software.

Example:

7.37 Providing a pupil who is a wheelchair user with a support assistant to push them around school would be an auxiliary service. Similarly, providing a pupil with support to ensure they

take their medication at lunchtime would be an auxiliary service. Providing a moveable step so that a pupil with restricted growth syndrome can reach the desks in the science lab would be an example of providing an auxiliary aid.

Example:

7.38 A pupil requires a learning support aid to access the education and the other benefits, facilities and services that the school provides. Providing such an aid, for example a one-to-one teaching assistant while he is at school, is part of the school's duty to make reasonable adjustments. This is because the adjustment is needed to avoid the substantial disadvantage experienced by the disabled pupil while he is at school.

7.39 A school is not required to provide anything that the pupil requires outside of education. However, there may be circumstances in which the school allows the pupil to use a piece of equipment provided by it in other circumstances.

Example:

7.40 A school has provided a pupil with dictation software to assist with work in school. It may be reasonable for the school to allow the pupil to use the dictation software to help them learn their lines for a performance in an external drama club.

7.41 The reasonable adjustments duty includes making sure that the reasonable adjustment provided actually works. Therefore, a school is responsible for the maintenance and repair of a

piece of equipment it provides to a disabled pupil. Schools may want to work with other schools in their local area, or with the education authority, to share resources, both in terms of equipment and the maintenance and repair of equipment.

Physical features

7.42 A school does not have a duty to remove a physical feature which puts a disabled pupil at a substantial disadvantage. Instead, schools have a duty to plan to improve access for disabled pupils generally, including in relation to the physical environment of the school (schedule 13, paragraph 2).

7.43 This duty is set out in the Education (Disability Strategies and Pupils' Educational Records) (Scotland) Act 2002, which requires responsible bodies to prepare and implement accessibility strategies to improve, year-on-year, access to education. Specifically, the strategies should relate to access to the curriculum, access to the physical environment of schools, and information for and communication with disabled pupils.

7.44 The purpose of an accessibility strategy is to:

- increase the participation of disabled pupils in the school's curriculum (for example, by offering training to staff on inclusive teaching or seeking advice from health or specialist services)
- improve the physical environment of the school (for example, by providing sensory areas, quiet spaces or ramps)

- improve communication with disabled pupils (for example, Easy Read versions of important policies, accessible videos of information about the school)

7.45 Before implementing the strategy, the school must consult children, parents and young persons as they think appropriate. Schools must also have regard to guidance issued by the Scottish Ministers about who to consult and the content and form of an accessibility strategy (read paragraphs 7.60 to 7.61 in relation to the views of the pupil and their family). Schools must also consider the need to allocate adequate resources for implementing the strategy. The strategy should be reviewed and further strategies prepared at least every 3 years. Education Scotland can look at accessibility strategies when inspecting schools (read paragraphs 7.47 to 7.49).

Example:

7.46 A grant-aided primary school decides to review its accessibility strategy, which has been in force for nearly three years, and publish a new accessibility strategy to cover the next three-year period. As a starting point, it considers comments from its latest Education Scotland inspection report. In the report, Education Scotland checked that the strategy identified and addressed the needs of pupils with additional support needs and disabilities, that it provided a strategy to improve accessibility and that the school monitored its effectiveness. The school notes that Education Scotland recommended more engagement with parents and pupils, so it decides to do a survey of all parents and pupils to inform its new strategy. It

publishes a draft version of its strategy for parents, staff and pupils to consider, before publishing the final version at the start of the new three-year period. This represents good practice.

7.47 Under the Standards in Scotland's Schools etc. Act 2000, Education Scotland can review the way in which education authorities exercise their functions in relation to the provision of school education. This may include the duties of education authorities under the (Disability Strategies and Pupils' Educational Records) (Scotland) 2002 Act. If Education Scotland considers that sufficient opportunity for improvement has been given and the education authority are failing or have failed to take satisfactory action to improve, a reference can be made to the Scottish Ministers with regard to the seriousness of the failure. If the education authority does not satisfactorily secure improvement, the Scottish Ministers may issue an enforcement direction requiring action to be taken. This review only covers public schools.

7.48 Inspection of all schools is provided for in the Education (Scotland) Act 1980. There is a similar process of references to the Scottish Ministers under the 1980 act for public schools and grant-aided schools. If following inspection, Education Scotland are not satisfied with improvement by the education authority or managers of a grant-aided school, a reference can be made to the Scottish Ministers, and the Scottish Ministers can issue an enforcement direction.

7.49 A failure to comply with Scottish Ministers' enforcement directions can be enforced through the courts.

What 'reasonable steps' means

7.50 The duty to make reasonable adjustments requires schools to take what are referred to in the Act as 'reasonable steps' to make adjustments.

7.51 As explained in paragraph 7.4, the duty to make reasonable adjustments is an anticipatory one for schools. This does not mean that schools are required to think of every possible disadvantage a disabled student might face and put steps in place to address it. It means schools must think generally about what disabled pupils might require and what adjustments could be put in place for them. However, the duty to make reasonable adjustments is a continuing duty, which means that schools must continue to assess what a pupil needs, or to consider whether there are advances in technology which might mean a new potential adjustment is available.

7.52 The Act does not say what is 'reasonable'. Therefore, what amounts to a reasonable adjustment will vary according to different sets of circumstances. What is reasonable in one set of circumstances may not be reasonable in another.

7.53 The Act obliges schools to make only 'reasonable' adjustments. It is important to document carefully any

decisions taken on reasonable adjustments so that they can be justified, for example to parents or a tribunal.

7.54 For example, schools may have to provide a disabled pupil with:

- a piece of equipment, such as an adapted keyboard
- assistance from a sign language interpreter, lip-speaker or deaf-blind communicator
- extra staff assistance
- electronic or manual notetaking service
- induction loop or infrared broadcast system
- videophones or access to video phone calls
- audiovisual fire alarms
- readers for people with visual impairments
- assistance with guiding
- specialised computer software

7.55 Steps that result in a reasonable adjustment for some disabled pupils may not necessarily be an effective reasonable adjustment for other disabled pupils. There is no defined list of reasonable adjustments, which, if in place, mean that a school has met its duty to make reasonable adjustments. Instead, it is a balancing exercise of factors. Some of the factors that are likely to be taken into account in deciding what it is or is not reasonable for a school or an education authority to have to do are set out in paragraph 7.59. These factors are based on

factors that tribunals and courts have already taken into account when considering reasonable adjustments.

7.56 Whether the adjustment is an auxiliary aid or an adjustment to a practice, it should be something that is reasonable for the school to have to do. If the adjustment is reasonable, the school must make it. It is not possible for a school to justify a failure to make a reasonable adjustment.

7.57 If, having considered the issue thoroughly, there are genuinely no steps that would be reasonable for a school to take to make its education, benefits, facilities or services more accessible, the school is unlikely to be in breach of the law if it makes no changes. However, it is unlikely that there will be absolutely nothing that a school will be able to do for a pupil in such a situation.

7.58 Where a school decides that there are no reasonable steps that it can take, it is important that it sets out its reasons so that, if necessary, it can explain why it has acted in the way that it has, for example to the pupil, the pupil's parents or to a tribunal.

Factors that affect what is reasonable

7.59 There are various factors that affect whether an adjustment can be considered reasonable for a school to make, including but not limited to:

- the views of the pupil and their parents

- the resources of the school, the availability of financial or other assistance, and the financial and resource costs of making an adjustment
- the extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil
- the practicability of the adjustment
- the effect of the disability on the individual
- health and safety requirements
- the need to maintain academic, musical, sporting and other standards
- the interests of other pupils and prospective pupils and any disruption the reasonable adjustment would cause to them
- the extent to which support will be provided to the pupil under the ASL 2004 Act

The views of the pupil and their parents

7.60 The disabled pupil and their parents will have detailed knowledge of the pupil's disability and how it affects them. They will therefore be able to provide an important view of what reasonable adjustments will be required.

7.61 Where a disabled pupil has a condition which means that they are unable to easily engage in discussions around their support needs, reasonable adjustments are likely to be required to assist the pupil to communicate their views.

Resources, available assistance and resource costs of making an adjustment

7.62 Cost and resources are factors that are taken into account in determining what is ‘reasonable’, but they are only as important as the other factors set out at paragraph 7.59.

7.63 It is more likely to be reasonable for a school with substantial financial resources to make an adjustment with a significant cost than it would be for a school with fewer resources. If a suitable adjustment costs little or nothing to implement, it is likely to be reasonable to implement it. This is unless another factor, such as practicability or effectiveness, makes it unreasonable.

7.64 The significance of the cost of a step may depend in part on:

- what the school might otherwise spend in the circumstances
- the extent to which a proposed adjustment will actually meet the pupil’s need
- what other schools, in similar situations, might spend

7.65 The resources available to the school in practice, such as its staffing levels, should be taken into account, as should the other demands on those resources.

7.66 Schools’ responsibilities for planning and delivering improvement through the Education (Disability Strategies and Pupils’ Educational Records) (Scotland) Act 2002 should anticipate future financial costs associated with making reasonable adjustments.

7.67 In assessing the likely costs of making an adjustment, the availability of external funding should be taken into account, for example from social work services or health boards.

Example:

7.68 A disabled pupil with cerebral palsy uses a manual wheelchair occasionally, but not every day. The wheelchair that he normally uses is being repaired and so he is having difficulties moving around the school. The school has a wheelchair that it allows him to use in school until his is repaired. This is a reasonable adjustment for the school to make because the school already has this resource available to it. If the school did not have a wheelchair, it would not be expected to purchase one for the pupil as a reasonable adjustment. However, it may be expected to make other reasonable adjustments for the pupil.

7.69 If a disabled pupil owns a particular piece of special or adapted equipment that they are prepared to use while at school, it may be reasonable for the school to allow the use of the equipment. The school will need to have considered why it is not reasonable if it decides not to allow the pupil to use their own equipment.

Example:

7.70 A severely dyslexic pupil has an app on her mobile phone which enables her to speak her exam answers and which produces written text for her. The pupil asks to use her mobile phone in her History National 5 exam. Her school refuses the

request for two reasons. Firstly, the school can provide the same programme on a computer belonging to the school and it provides the pupil with training on how to use the computer before her exam. Secondly, the school is worried that the pupil could use her mobile phone in the exam to obtain the answers either from the internet or from a third party. The school's own computer is not connected to the internet, so there can be no suggestion that the pupil has cheated if she uses the school's equipment.

The effectiveness of the adjustment in avoiding the disadvantage

7.71 Schools need to think carefully about what adjustments can be made to avoid the disadvantage experienced by individual disabled pupils. Pupils with the same disability might need different adjustments to overcome the disadvantage. It is important not to make assumptions about a disabled pupil's needs because this may lead a school to provide an ineffective adjustment. Instead, pupils and their parents should be consulted in relation to proposed reasonable adjustments.

Example:

7.72 A large secondary school admits a deaf pupil who is considered to be disabled. The school decides, without consulting the pupil, to install an induction loop in all teaching rooms. However, the pupil does not use a hearing aid and so is unable to benefit from the induction loop. The types of reasonable adjustment that the school may wish to consider as being effective might include:

- telling all staff to ensure that they face the pupil when speaking
- providing a deaf base (a specialist unit providing tailored support and trained staff to help deaf pupils or pupils with hearing loss)
- providing a British Sign Language (BSL) interpreter or a communication support worker

Whether the adjustment proposed is reasonable will depend on all of the factors set out, including what the pupil will find effective. The school should implement any useful elements that it is able to reasonably implement after consulting with the pupil and their parents.

7.73 It is unlikely to be reasonable for a school to have to make an adjustment that does little or nothing to reduce the disadvantage experienced by the disabled pupil, even if the pupil requests this.

7.74 Where there is a prospect of an adjustment having some positive effect on reducing the substantial disadvantage experienced by the disabled pupil, then it may be reasonable for the school to have to make the adjustment.

7.75 If a school makes a different adjustment to the one suggested by the pupil that is less effective or is not an equivalent measure and does not avoid the substantial disadvantage to the pupil, the school will not be meeting its duty to make reasonable adjustments.

7.76 Where there are other reasonable steps that a school could take, a school will not comply with its reasonable adjustments duty if the adjustment it chooses to make provides little benefit to the pupil.

7.77 A school will meet its duty to make reasonable adjustments where it makes a reasonable adjustment that is of little benefit alone if, when put in place together with other possible reasonable adjustments, it would be effective in overcoming the disadvantage.

Example:

7.78 A disabled pupil with chronic fatigue syndrome finds moving around a large three-floor secondary school very tiring. She requests that all of her lessons take place during the morning as she finds that she is too tired to concentrate in the afternoon. Initially the school adjusts the pupil's timetable and the location of her classes to minimise the amount that she has to move around the school, although she still has lessons throughout the day. However, she is still too exhausted to complete the school day because of her tiredness in the afternoon.

Changing the timetable and location of the pupil's lessons is not an equivalent measure to all of her lessons being in the morning, because the pupil is still unable to concentrate during the afternoon so misses out on learning during the afternoon classes.

The school then makes further adjustments:

- giving her a ‘buddy’ to carry her books for her
- providing a device to record the afternoon lessons that she misses
- providing a laptop and online learning for afternoon classes when she is too tired to attend school

These adjustments enable her to attend more lessons and to be less disadvantaged when she does miss lessons.

7.79 It will usually be a matter of discussing with the pupil, and those who know the pupil, what their needs are and what is likely to be most effective.

7.80 Schools should also review reasonable adjustments regularly, particularly if a pupil’s circumstances change.

The practicability of the adjustment

7.81 It is more likely to be reasonable for a school to have to make an adjustment that is easy, than one that is difficult. However, in some circumstances it may be reasonable to have to make a difficult adjustment.

Example:

7.82 A visually impaired pupil requires printed handouts to be prepared in size 16 font or larger. This can easily be accommodated by ensuring that fonts are set to this size prior to any documentation being printed and this would be a reasonable adjustment.

Example:

7.83 A pupil who is a wheelchair user is unable to access classes on the first floor. A reasonable adjustment may be for the school to rearrange the timetabling and location of classes so that all of her classes are on the ground floor. Although this may be difficult, it does not mean it is not a reasonable adjustment for the school to make. If specialist facilities such as science labs are available only on the first floor, then it may not be possible to move classes that require the use of the specialist equipment to a different classroom. In this case, the school will need to consider what other adjustments it could make to enable the disabled pupil to access learning opportunities equivalent to those of her peers.

The effect of the disability on the individual

7.84 The effect of a disability on a particular pupil will affect the adjustments that it is reasonable for a school to make.

Example:

7.85 A disabled pupil with severe dyslexia finds it very difficult to read text typed on white paper. The school provides handouts on yellow paper for her, which helps her. This would be a reasonable adjustment for this pupil.

Example:

7.86 Another disabled pupil with severe dyslexia finds it difficult to read text on any colour of paper without a plastic overlay sheet. The school provides the pupil with a plastic overlay sheet to use in all lessons. This would be a reasonable adjustment for this pupil.

Health and safety requirements

7.87 The Act does not override health and safety legislation. If making a particular adjustment would increase the risks to the health and safety of any person, including the disabled pupil in question, then this is a relevant factor in deciding whether it is reasonable to make that adjustment.

7.88 However, as with the approach to any question of health and safety and risk assessment, schools are not required to eliminate all risk. Suitable and sufficient risk assessments should be used to help the school to determine where risks may arise and what action can be taken to minimise those risks. Risk assessments should be specific to the individual pupil and the activities in question. Proportionate risk management relevant to the disability should be an ongoing process throughout a disabled pupil's time at the school.

7.89 There might be instances in which, although an adjustment could be made, it would not be reasonable to do so because it would endanger the health and safety either of the disabled pupil or of other people. There might be other instances in which schools could make anticipatory reasonable adjustments in line with health and safety legislation, ensuring compliance with that legislation.

7.90 Health and safety issues must not be used inappropriately to avoid making a reasonable adjustment. Schools should avoid making uninformed assumptions about health and safety risks.

Example:

7.91 A disabled pupil with a stair-climbing wheelchair applies to a large secondary school with several flights of stairs. The school prevents him from using the stair-climbing wheelchair in the school because it thinks that it will be dangerous. However, after carrying out a risk assessment and finding out more about the wheelchair, the school realises that it does not present a significant health and safety risk, and therefore that it would be reasonable for the school to allow him to use it.

Example:

7.92 A disabled pupil who has severe food allergies receives a place at a local independent special school. During the transition process, his parents express concern about the management of his allergies at school. The headteacher recognises that the responsibility for allergies is not limited to the catering or special school nursing teams. The headteacher decides to adopt a whole-school approach to all allergies. This could be evidence of the school meeting its anticipatory duty to make reasonable adjustments for all pupils. This leads to the school updating its Allergy Safety Policy so that it covers training and awareness, governance and risk management. The local NHS children's allergy service produces a healthcare plan for the pupil which is shared with the school. The healthcare plan lists the pupil's allergies, symptoms and management information. As part of the Allergy Service's care planning, risks are considered, and this information is used by the school to inform a risk assessment for the pupil. The risk assessment identifies ways to reduce risk for the pupil, such

as reviewing if and when curriculum activities use food products. The pupil's Home Economics course involves a practical element of meal planning and preparation. School staff liaise with the pupil and his parents to ensure planned recipes are suitable and, where necessary, recipes and ingredients modified. Given the pupil's medical condition and the risks, these are reasonable adjustments for the school to make. The specific adjustments for the pupil are within the context of the whole- school approach. As part of this, the school reviews the catering team staffing levels to ensure that pupils with allergies can be safely accommodated. In addition, the school's allergy education programme covers staff training including first aid and raising allergy awareness across the school community. If the pupil (or any pupil in school) has an allergic reaction, all staff know how they should respond.

The need to maintain academic, musical, sporting and other standards

7.93 The reasonable adjustments duty does not prevent a school from choosing, for example, its best footballers, singers or mathematicians where a consideration of standards is relevant, for example in an inter-school competition. However, it should not be assumed that a consideration of standards will mean that a disabled pupil will be barred from an activity when those standards are not relevant.

7.94 Under the Curriculum for Excellence, every pupil, including those with a disability, is entitled to experience a broad general education. This includes learning across the full range of

outcomes and experiences associated with physical education, physical activity and sport, including cooperation and competition.

Example:

7.95 A school regularly takes part in football matches with other local schools and selects its best footballers to play in the team. A pupil who is a wheelchair user is very keen on sport, but not able to play football at the necessary standard to be chosen for the team. The school is not required, as a reasonable adjustment, to select him for the team because it is permitted to select only the best football players. The school hosts a fun match where it plays against other schools to raise money for charity. The pupil is selected to play in the team on this occasion.

The interests of other pupils and prospective pupils

7.96 Ordinarily, the interests of other pupils regarding the reasonable adjustments required by a disabled pupil will be irrelevant. However, there are limited circumstances in which the provision of a particular reasonable adjustment for a disabled pupil will disadvantage other pupils. This is relevant only where the adjustment results in significant disadvantage for other pupils. In such a case, it may not be reasonable to expect the school to make the adjustment.

Example:

7.97 A disabled pupil with an acquired brain injury is unable to regulate his body temperature. This means that he is at risk of developing hypothermia if he gets too cold. His parents ask that his classroom is kept at a hot temperature. However, this would mean that the other pupils in the class would be uncomfortably hot. The school may not be expected to keep the classroom at the requested temperature, but it could take other steps, such as raising the classroom temperature to a level that is still comfortable for other pupils, placing the pupil in the hottest part of the room, such as by a radiator, and relaxing the school uniform policy to allow him to wear warmer and more comfortable clothing.

7.98 There will, however, be other instances in which there is a duty to make an adjustment despite some inconvenience to others. In deciding what adjustments are reasonable, it is important to consider the level of inconvenience to others against the substantial disadvantage faced by the disabled pupil.

Example:

7.99 A primary school plans a school trip to a local science museum in its town to undertake some activities. One of the pupils in the class is deaf. The museum does not have appropriate resources for deaf visitors. The school discusses the matter with the pupil and her parents and determines that the pupil will be unable to participate in the trip. The school decides to change the trip and attend a museum in a neighbouring town, which has hearing loops, BSL talks and live speech to text captioning. Although this will cause some

inconvenience to the other pupils because the travel time to and from school is longer, the school decides that this is a reasonable adjustment to make, given the substantial disadvantage faced by the disabled pupil if she is unable to attend the trip.

Example:

7.100 A secondary school takes its pupils on a week-long outdoor activity course every year. The school always goes to the same place. It offers a wide range of exciting activities which the pupils can participate in. This year, one disabled pupil has severe anxiety and needs to be able to return home every day. When deciding on what adjustment to make for the disabled pupil, the school considers cancelling the trip and seeking an alternative, such as day trips closer to the school.

The school considers whether or not denying pupils the opportunity to attend the week-long trip is reasonable and decides to continue with the planned trip to the outdoor activities centre. This means that pupils do not miss out on the residential experience and are not required to travel to and from activities each day. But, to minimise the disadvantage faced by the disabled pupil, the school arranges for transport from his home to attend the centre for day visits, so that the pupil has the benefit of being able to participate in the activities with his peers. If the school had not made this adjustment, he would not have been able to participate at all. This is likely to be a reasonable step for the school to have to

take. It is unlikely to be reasonable for the school to have to alter its decision to undertake the week-long activities course.

Additional support for learning for disabled pupils under the Education (Additional Support for Learning) (Scotland) Act 2004

7.101 There is some overlap between pupils who are disabled and those who have additional support needs (read paragraphs 7.13 to 7.18).

7.102 Schools should take account of any additional learning support or CSP when assessing a pupil's needs and consider whether further reasonable adjustments are required to overcome the substantial disadvantage the pupil experiences.

Example:

7.103 A disabled pupil with a CSP attends a mainstream secondary school. The additional support for learning that she receives comprises two hours a week of specialist teaching and use of an electronic notetaker in lessons. Because the support that she requires is already being provided, the school does not have to make additional reasonable adjustments.

7.104 In other cases, a disabled pupil may need reasonable adjustments to be made, in addition to the additional support for learning that they are receiving.

Example:

7.105 A disabled pupil with attention deficit hyperactivity disorder (ADHD) who attends a public primary school receives some

individual teaching assistant support. He is diagnosed with severe asthma and needs assistance with his nebuliser. Though this could and should be considered to be an additional support need, the duty on reasonable adjustments is clear: because his asthma is likely to be a disability for the purposes of the Act, a failure to provide a reasonable adjustment will place him at a substantial disadvantage.

Example:

7.106 The school trains the teaching assistant to provide the pupil with the assistance that he needs. This could be a reasonable adjustment for the school to make.

7.107 Many disabled pupils will be classified as having additional support needs, but where that is not the case, for disabled pupils who are experiencing a substantial disadvantage, the school must still consider whether reasonable adjustments need to be made.

Example:

7.108 A disabled pupil at a primary school has diabetes and requires daily support with reading blood sugar levels and insulin injections. He is classified as having additional support needs and receives additional support for learning from a learning support assistant during school hours.

The school arranges a residential school trip for his year group. The pupil wishes to attend but is not able to do so unless his support is available. If he missed the trip with his classmates he would be placed at a substantial disadvantage

and would miss out on additional valuable learning experiences available not non-disabled pupils. Because he is disabled, the school is under the duty to make reasonable adjustments.

The following options could avoid the disadvantage and enable the pupil to attend:

- asking his learning support assistant to go on the trip and provide support beyond the normal school day
- liaising with other agencies if the pupil has a CSP to see if any support can be provided by them
- discussing with the pupil and his parents ways in which they think the support could be provided, such as a family member going on the trip to provide the overnight support

These steps are all potentially reasonable depending on the circumstances. If it is not possible for the school to find a reasonable means of enabling the pupil to attend, then it should consider whether there is an alternative equivalent trip that could be organised for that year group which the disabled pupil would be able to participate in.

The reasonable adjustments duty and additional support for learning

7.109 Even where additional support for learning, a CSP or a non-statutory additional support plan such as an individualised educational programme (IEP), is in place, schools have a duty to consider the needs of their pupils. Schools must determine

whether reasonable adjustments, over and above the additional support for learning or CSP, are needed to address any substantial disadvantage which is experienced by the disabled pupil. For many disabled pupils, additional support for learning or their CSP will meet all of their needs, meaning that they do not require any additional reasonable adjustments, auxiliary aids or services, other than those already provided. In these cases, schools will be under no obligation to duplicate that support and there may be no further reasonable adjustments the school must make.

7.110 In other cases, schools will provide reasonable adjustments, auxiliary aids and services to disabled pupils that need them. For example, for pupils who do not have CSPs.

7.111 Case law states that making and complying with a CSP is a reasonable adjustment.[18] Failing to make, comply with, maintain, not providing an adequate plan or not following timescales for providing a plan can amount to a failure to make reasonable adjustments and discrimination arising from disability (read paragraph 3.94).

Charging for providing reasonable adjustments

7.112 It is unlawful for a school to pass on the costs of or charge a pupil or parent (as defined in chapter 1) for the school's provision of a reasonable adjustment in any circumstances.

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[18] KTS v Governing Body of a Community Primary School [2024] UKUT 139 (AAC)

This is irrespective of the financial cost to the school and how the school is funded (section 20, paragraph 7). However, as set out in paragraph 7.59, the cost of an adjustment is one of the factors to be considered when considering whether or not the adjustment is reasonable.

7.113 Parents can volunteer to pay towards the cost of making an adjustment. If a parent volunteers to pay towards the cost of making an adjustment, that is a factor that must be taken into account in deciding whether the adjustment is reasonable.

Example:

7.114 An independent selective school provides a severely dyslexic disabled prospective pupil with overlay sheets to assist him in completing the admission assessment for the school. The school bills the cost of this adjustment to the pupil's parents without the parents offering to fund the costs. This would be discrimination.

Case studies

7.115 This section includes case studies and examples to explain how the duty to make reasonable adjustments applies in different circumstances.

Provision of auxiliary aids to avoid disadvantage

Example:

7.116 A pupil with a recent diagnosis of severe dyslexia and autism attends an independent school and does not receive any additional support. His parents believe that he needs some one-to-one support and specialist teaching, because he is falling behind his peers.

Is the pupil at a substantial disadvantage? Is this because he does not have an auxiliary aid or service?

7.117 The pupil in this example is falling behind with his schoolwork without one-to-one support and / or specialist teaching. This may indicate that he is at a substantial disadvantage without an auxiliary aid being provided. The auxiliary aids the pupil may need are one-to-one support and specialist teaching. If the school doubts that he is at a substantial disadvantage, it could conduct or arrange an internal assessment of the pupil's abilities. This would help the school learn more about any disadvantage that the pupil is experiencing and about the steps that could be taken to avoid any substantial disadvantage.

7.118 If the assessment suggests that he is not at a substantial disadvantage, then the school is not required to make any reasonable adjustments.

Is it reasonable for the school to provide auxiliary aids or services?

7.119 This will depend on the resources available to the school and the other factors listed in paragraph 7.59.

Adjusting a provision, criteria or practice

Example:

7.120 An autistic pupil has a tendency to hit at other pupils when distressed or dysregulated, because he loses the ability to understand the impact of his physical acts on other pupils and staff. The pupil is usually allowed to go first into the dinner hall. However his usual teacher is not present one day, and he is told off by a supply teacher for pushing to the front and made to go to the back of the queue. The pupil becomes dysregulated and punches the wall beside the supply teacher. The pupil is penalised, as this is the third time he has behaved aggressively, and the school has a 'three strikes' behaviour policy meaning that pupils who infringe the behaviour policy on three occasions will face a sanction.

Is there a provision, criterion or practice?

7.121 The school's 'three strikes' behaviour policy is a provision, criterion or practice which is applied equally to all pupils at the school.

Is the pupil at a substantial disadvantage? Is this because of the provision, criterion or practice?

7.122 The pupil's disability means that he is not able to regulate his behaviour in the same way as a non-disabled pupil. However, he faces the same punishment for the same behaviour as a non-disabled pupil who is able to control his behaviour and who is therefore less likely to behave in a way that breaches

the behaviour policy. Consequently, the disabled pupil is experiencing a substantial disadvantage.

Could the disadvantage be avoided?

7.123 If the supply teacher had been made aware of and maintained the pupil's usual routine, the pupil may not have become dysregulated and lashed out and may not have breached the behaviour policy as a result.

7.124 The school could also take steps to make reasonable adjustments to its behaviour policy to cater for pupils with similar disabilities, for example:

- including additional 'strikes' on occasions where the behaviour policy is breached
- considering mitigating circumstances (here, the absence of the pupil's usual class teacher and the alteration to his usual routine)
- considering the pupil's ability to comply with the reasonable expectations behind the behaviour policy when he is impacted by his disability

Is it reasonable for the school to take these steps?

7.125 These steps are all likely to be reasonable, depending on the circumstances. The school will need to consider the impact on the pupil, as well as the impact on other pupils, prospective pupils and staff.

Avoiding disadvantage while waiting for an additional support needs assessment and CSP

Example:

7.126 A pupil who uses a wheelchair starts at a primary school part way through the school year, his family having recently returned to Scotland from abroad. His parents request that the education authority carry out an assessment, because they think that he may have additional support needs arising from a disability that requires significant support from education and health services. It is likely that any additional support for learning that he needs will be provided through an EHC plan, but until the statutory assessment process is completed and any CSP issued, the pupil is struggling to access education. This is because he is unable to move around the school without assistance and needs help with writing, and with lifting and moving books and other learning materials. He also does not have access to remote learning set up at home.

Is the pupil at a substantial disadvantage? Is this because he does not have an auxiliary aid or service?

7.127 The pupil is unable to access education because he cannot access the school and does not have access to remote education. This is a substantial disadvantage.

7.128 The auxiliary services the pupil may need are individual support to help him move around the school, help with writing and help to lift and move learning materials. If he is not able to

access the school, the services may help him receive education remotely.

7.129 The pupil is unable to access education in the absence of these services, which would put him at a substantial disadvantage.

Is it reasonable for the school to provide these auxiliary aids or services?

7.130 By providing individual and specialist support in school the pupil could be put in the position where there is no substantial disadvantage. Alternatively, the pupil may be able to receive education remotely if he is not able to access the school. This might, for example, be by watching live lessons at home or in an accessible classroom, or by undertaking online learning at home. In addition:

- a national agency might be asked to provide an equipment loan so that he can access digital versions of textbooks used by other pupils
- the school might access the Books for All Scotland Database to find the books required and download them to a computer that he can access in school
- the national agency might provide a device, through an equipment loan back, that the pupil can use to turn the electronic pages of the accessible copy of the book

7.131 Although support for this pupil would probably be provided through a CSP in due course, it is reasonable for the school to

put in place at least some support to enable the pupil to access education in the meantime.

7.132 Depending on the circumstances, it may be reasonable for the school to have to provide the alternative services relating to remote education, but not to provide the services to enable him to access his education at the school.

7.133 Though this example relates to a pupil who has recently moved to Scotland, the same factors might apply to a pupil who is awaiting a diagnosis or has recently become disabled.

School transport

Example:

7.134 An autistic pupil attends a school and is provided with transport in the form of a school bus funded by the education authority. The bus takes her to school at 8.30am and takes her back home at 3.30pm. She wants to attend an after-school activity and, although there is a public service bus that she could catch home, she would need to change buses, and she is not familiar with the route which is one she would not be able to take without assistance.

Is the pupil at a substantial disadvantage? Is this because she does not have an auxiliary aid or service?

7.135 The pupil is at a substantial disadvantage because she cannot attend the after-school activity. The auxiliary services the pupil may need would be either to transport her after the

after-school activity, or to support her with travelling home independently.

Is it reasonable for the school to provide these auxiliary aids or services?

7.136 By providing the pupil with individual transport, the pupil could be put in the position where there is no substantial disadvantage. Alternatively, the school could support the pupil to develop her independent travelling skills, which might include someone escorting her on the bus the first few times or practising the route with her.

7.137 Some disabled pupils are eligible for transport from home to school, provided by education authorities under the Education (Scotland) Act 1980. Education authorities are responsible for making the arrangements they consider necessary to provide free transport to school for pupils in their area. Education authorities must provide free transport to pupils who live further away from their school than the statutory walking distances. These are: two miles for pupils under eight and three miles for pupils eight and above. The law also allows education authorities to provide free transport even when they do not have a legal duty to do so, for example for disabled pupils or pupils with additional support needs who live within the statutory walking distance. Pupils may also be entitled for other reasons.

7.138 The reasonable adjustments duty on after-school activity providers, where they are operating independently from the school, may not extend to transport to and from the premises.

7.139 Where the after-school provision is provided for or commissioned by the school, pupils are being provided with a benefit, facility or service by the school. Therefore, the school is under a duty to make adjustments to ensure that, where it is reasonable, the disabled pupil has the same access as a non-disabled pupil. A reasonable adjustment could include individual transport. In circumstances where transport is being provided for non-disabled pupils for after-school activities, such transport must be fully accessible for disabled pupils as well. The transport provider may charge for this transport but is not allowed to charge more for disabled pupils.

Avoiding substantial disadvantage when organising school trips

Example:

7.140 A disabled pupil wishes to attend a residential school trip along with the rest of her year group. Her disability puts her at a substantial disadvantage in undertaking day to day activities. The school is concerned that the school will not be able to meet the pupil's needs while she is on the trip.

Is the pupil at a substantial disadvantage? Is this because she does not have an auxiliary aid or service?

7.141 The pupil's disability means that, without an auxiliary aid or service she cannot attend the school trip because the school cannot meet her needs while she is on the trip.

7.142 There are no auxiliary aids or services that will ensure the pupil's needs are met while she is on the trip. Therefore, their absence would not put her at a substantial disadvantage as, even if they were provided, she would not be able to attend.

Is it reasonable for the school to take the step of cancelling the school trip?

7.143 The Act does not require a school to cancel school trips or any other activities arranged for pupils. However, it does require a school to consider how they can give disabled pupils the same opportunities to participate as other pupils. This should include considering alternative trips to those previously arranged by the school, by providing additional assistance to enable the disabled pupil to attend or by facilitating the disabled pupil to attend for only some of the trip. Schools could check trip options with additional support for learning teachers before offering them to pupils.

7.144 Schools may find solutions that allow everyone to benefit from the trip or activity by working with disabled pupils and their parents (who will have experience of taking their children on trips). They can also learn from the experiences of specialists, additional support for learning teachers and other schools. Schools must remember that additional assistance offered to enable a disabled pupil to attend a school trip amounts to a reasonable adjustment and they cannot charge extra for it. However, direct payments that a pupil receives as a result of their disability could be used by the pupil to pay for a personal assistant to attend a residential trip with the pupil. This would

not be the school charging for making the reasonable adjustment.

Chapter 8: Positive action

What ‘positive action’ is

8.1 ‘Positive action’ is action that the Equality Act 2010 (the Act) allows schools to take to:

- address disadvantage experienced by groups of pupils who share a protected characteristic
- meet different needs of pupils who have particular protected characteristics, or
- facilitate or encourage participation by pupils with particular protected characteristics in activities in which their participation is disproportionately low

8.2 Positive action may therefore be used to address concerns when they are connected to a particular protected characteristic. Examples of concerns include:

- lower participation of pupils in certain subjects
- higher levels of exclusion of pupils with additional support needs and disabilities
- lower levels of attainment by pupils who experience disadvantage due to a protected characteristic
- higher numbers of exclusions of children from certain ethnic minorities, or other protected characteristic groups

- higher levels of bullying of pupils from protected characteristic groups, for example, disabled pupils

8.3 Positive action can include:

- providing additional or bespoke education
- separate facilities
- providing activities in different ways
- targeting resources or opportunities to benefit a particular disadvantaged group

8.4 In this context, there are particular provisions in relation to disabled people. The Act does not prohibit treating a disabled person more favourably than a non-disabled person. This does not need to be done as positive action because section 13, paragraph 3 of the Act allows disabled people to be treated more favourably than non-disabled people. This exception permitting more favourable treatment applies only to disabled people.

8.5 However, positive action measures may be appropriate to achieve equality of opportunity between disabled people with different impairments. This means schools can implement positive action measures to overcome disadvantage, meet differing needs or increase participation of pupils with one impairment when compared to pupils with a different impairment. Schools do not then have to implement equal positive action measures for pupils with other impairments.

8.6 Measures that are permitted by the Act's positive action provisions are lawful, even if they involve discrimination

against members of other groups that might otherwise be unlawful under the Act. This is on the condition that any measures meet the statutory conditions for taking positive action. Read paragraphs 8.11 to 8.14.

Example:

8.7 In monitoring the gender breakdown of Higher design and manufacture, a school notes the low number of girls choosing to study the subject. To encourage more girls to participate in the subject, the school considers:

- inviting a female designer to speak at an assembly
- asking female university students studying design and manufacture at a local university to run activities at the school's design and manufacture club

None of these steps are likely to involve less favourable treatment of any other group sharing another protected characteristic. This means these actions would be lawful without having to rely on the Act's positive action provisions. The school also considers:

- arranging sessions just for girls in design and manufacture
- organising opportunities for girls to observe a female designer in the workplace

These steps involve more favourable treatment of female pupils. However, the disadvantage to other groups of pupils is likely to be outweighed by the benefit of increasing participation of female pupils. Because these steps are

proportionate ways of achieving the school's aim, they would be lawful under the Act's positive action provisions.

The school also thinks about setting different entry requirements for female and male pupils onto Higher courses. Girls would not have to meet the requirement of having studied design and manufacture at National 5 level to be accepted onto the course, even though boys would.

These steps could increase participation by female pupils. However, they involve preferential treatment of female pupils and less favourable treatment of male pupils, who have different entry requirements placed on them. Because there are less discriminatory steps that the school could take to increase participation by female pupils, changing the entry requirement for girls is unlikely to be a proportionate means of achieving this aim. Therefore, it is likely to be unlawful.

8.8 Schools have no duty to take positive action. However, schools that are subject to the Public Sector Equality Duty (PSED) and specific duties may wish to consider using positive action to help them comply with the duties and improve outcomes for particular groups of pupils. This includes public schools by an education authority and grant-aided schools. Read paragraphs 8.41 to 8.42 for further information.

What the Act says

8.9 The Act says that a school may take any action that is proportionate to meet any of the aims stated in the Act ('stated

aims', which are set out in paragraph 8.10), where it reasonably thinks that pupils who share a protected characteristic:

- experience a disadvantage connected to that protected characteristic
- have needs that are different from the needs of persons who do not share that protected characteristic, or
- have disproportionately low participation in an activity compared to those who do not share that protected characteristic

These are known as the statutory conditions (section 158, paragraph 1).

8.10 The stated aims are:

- enabling or encouraging persons who share the protected characteristic to overcome or minimise that disadvantage
- meeting those different needs, or
- enabling or encouraging persons who share the protected characteristic to participate in that activity (section 158, paragraph 2)

Basic requirements for taking positive action

8.11 The statutory conditions set out two basic requirements for taking positive action:

- the school must reasonably think that one or more of the three conditions in which positive action may be taken has arisen (read paragraph 8.9)
- the action the school takes must be proportionate to meet the relevant stated aims

8.12 The first requirement means that there must be some indication or evidence to show that one or more of the relevant conditions in paragraph 8.9 has arisen. However, it does not require a school to have sophisticated data or research to show that this is the case. It may simply involve looking at the profiles of pupils and / or making enquiries of other schools in the area. Schools have data that can be used as a basis for action, as well as relevant external research. For example, a decision to take positive action could be based on quantitative evidence of pupils with a protected characteristic underperforming. It could also be taken based on qualitative evidence such as:

- consultations or focus group work with pupils and staff
- equality impact assessments
- survey results
- complaints and discrimination claims
- inspection reports, or
- evidence of similar problems gathered by other schools

Example:

8.13 A school reviews its data on exclusions and finds that a disproportionate number of pupils who have been excluded are boys from particular ethnic groups. The school also looks at data held at the local and national level, which reflects the school's own evidence. The school then runs some focus groups with pupils and parents from these ethnic groups to understand the reasons why these pupils are facing higher levels of exclusions.

8.14 The second requirement means that consideration must be given to whether the action taken to meet one or more of the stated aims is proportionate. Proportionality requires a balancing exercise between the aim of the action and the less favourable treatment of others it may result in. The disadvantages caused must not be disproportionate to the aims pursued. The courts have set out a four-stage test to assess proportionality. This test was outlined by the Supreme Court in the case of Bank Mellat v Her Majesty's Treasury [2013] UKSC 38.[19]

8.15 The Supreme Court has confirmed that this four-stage test of proportionality applies in a positive action context.[20]

Example:

8.16 Following the focus groups in the previous example, the school implements a policy on tackling racial inequality and

[19] Bank Mellat v Her Majesty's Treasury [2013] UKSC 38

[20] R (Z and another) v Hackney London Borough Council and another [2020] UKSC 40

undertake staff training. It also implements a programme of positive action that specifically targets the needs of Black Caribbean boys. This includes parent and pupil workshops, visits from Black role models and learning mentors.

This falls within the positive action provisions because:

- the school reasonably thinks that Black Caribbean boys are experiencing a collective disadvantage, and / or have needs different to pupils without that protected characteristic (the statutory condition), and
- the action the school takes to meet its aims is proportionate

8.17 For a measure to be proportionate, the following four-stage test must be met:

Stage 1: the aim must be sufficiently important to justify limiting a fundamental right.

Stage 2: the measure taken must be rationally connected to the aim being pursued. A measure is rationally connected to an aim if its implementation can reasonably be expected to contribute to achieving the aim.

Stage 3: the means chosen to accomplish the aim must be no more than necessary. The court will consider whether another less intrusive measure could have been used without unacceptably compromising the achievement of the aim.

Stage 4: the impact of any infringement of rights must be proportionate to the likely benefit of the measure.

8.18 When considering proportionality in relation to positive action, the factors considered will vary depending on the stated aim or aims.

8.19 The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the particular activity will need to be balanced against:

- the impact of the action on other protected groups
- the relative disadvantage, needs or participation of these groups, and
- any potential cost implications

Example:

8.20 A primary school analyses its data and finds that boys' literacy levels are lower than girls' literacy levels overall. The school decides to meet its aim of increasing boys' literacy by running additional literacy classes for all boys, adopting different learning styles and more intensive support for boys. This approach would involve less favourable treatment of any female pupils who are underachieving.

This is unlikely to be a proportionate means of achieving a legitimate aim because another measure could have been used without compromising the achievement of the stated aim. For example, the school could have run additional classes for all pupils who have low literacy levels.

Example:

8.21 A secondary school reviews its data on participation in PE and discovers that female Muslim pupils are far less likely to take

part in swimming lessons than other groups of pupils. After speaking with pupils and parents, the school found that the mixed-sex swimming classes and the types of swimming costume required by the school are the main barriers preventing these pupils from participating. The school decides to run separate swimming lessons for female Muslim pupils, with a female swimming instructor. It also makes a change to the PE uniform to allow a full-body swimming costume to be worn. This is likely to be a proportionate means of achieving the school's aim.

Although this would involve less favourable treatment of other pupils who will not have access to these lessons, the action is rationally connected to the aim to increase participation of female Muslim pupils in PE. There is no less intrusive measure that could be used, and there is a minimal infringement on other pupils' rights. Any less favourable treatment would be balanced by the fact that other female and male pupils have similar amounts of access to swimming classes, and non-Muslim female pupils are permitted to wear a similar style of swimming costume if they wish.

8.22 If positive action continues indefinitely, without any review, it may cease to be proportionate. This is because the action taken may have remedied the situation which had been the basis for the positive action. This could make it unlawful to continue to take the action. Therefore, schools implementing positive action measures should indicate that they only intend to take action while the relevant statutory conditions apply,

rather than indefinitely. Schools should monitor the impact of the action and review progress towards the stated aim.

The stated aims in more detail

Taking action to overcome or minimise disadvantage

8.23 This is the first of the stated aims for which schools may take positive action (section 158, paragraph 2(a)). The Act does not define what ‘disadvantage’ means, but it includes exclusion, rejection, lack of opportunity or choice and barriers to accessing provision.

8.24 The Act does not limit the action that could be taken, provided it meets the statutory conditions in section 158, paragraph 1 (read paragraph 8.9). For example, positive action could include action to identify possible causes of the disadvantage through consultation and surveys. It could also include a review of data, followed by proportionate steps to achieve the aim, such as:

- targeting provision at specific disadvantaged groups, for example through advertisements, outreach programmes to encourage increased take-up
- aiming provision specifically at a disadvantaged group
- making provision in a different way, at different times or in different locations

- enabling or providing a group with specific provision
- advertising a provision in a publication aimed at a particular group

Example:

8.25 A school is aware, from monitoring data and observations, that few Asian parents attend parent-teacher meetings. As a result, they are missing valuable opportunities to discuss their children's education. A focus group identifies that the issue is a lack of interpretation services.

In response, the school advertises in its communications with parents that it will provide interpretation services during appointments. During parent-teacher meetings, the school provides interpretation services along with slightly longer appointments where those interpretation services are provided, to allow time for interpretation to take place. This would be a lawful positive action taken to minimise disadvantage.

Taking action to meet different needs

8.26 The second of the stated aims for which positive action may be taken is to meet the needs of pupils who share a protected characteristic where those needs are different from the needs of pupils who do not share that characteristic (section 158, paragraph 2(b)). Such needs may arise because of past or present discrimination or disadvantage, or because of other factors that apply particularly to pupils who share a protected characteristic.

8.27 Needs may also be different because of a disproportionate failure to meet those needs in comparison with the needs of other groups, or because of the particular importance of the need or needs to the group in question.

8.28 The only limit that the Act places on positive action to meet different needs is that it must be a proportionate means of achieving that aim. Taking positive action to meet that aim could include:

- providing education at a particular time
- developing different ways of making provision more suited to the needs of particular groups
- making additional provision specifically to meet particular needs, such as additional English language classes for pupils whose first language is not English

Example:

8.29 A school analyses the data it holds about what its former pupils do after leaving school. This is called pupil destination data. The school becomes aware that girls from particular ethnic groups are disproportionately more likely to leave school at the age of 16 and not continue in education or training. The school is also aware of gradual disengagement from education by these pupils from the age of 14. The school decides to run activities for these pupils from age 14 to try to prevent this disengagement. These activities include targeted careers education, giving the pupils the opportunity to visit local employers and training providers, and being assigned a

mentor from the same background who has continued in education or training after the age of 16. While this involves more favourable treatment of these pupils, it is likely to be a proportionate means of achieving the school's aims, and so lawful under the Act's positive action provisions.

Taking action to encourage participation

8.30 The third reason to take positive action is to enable or encourage pupils who share a protected characteristic to participate in an activity (section 158, paragraph 2(c)). There must be a reasonable belief that participation by people with that characteristic is disproportionately low. There needs to be reliable indication or evidence that participation is low compared to participation by members of other groups, and this needs to be adjusted if necessary to allow for relevant factors such as type of school and locality.

8.31 Positive action may be taken to facilitate access to the activity itself and to enable or encourage participation. It includes activities undertaken, organised or facilitated by a school. Examples might include school trips abroad or careers events. Positive action could also allow schools to address the low take-up of particular courses by a particular pupil group.

8.32 The only limit that the Act places on positive action to encourage participation is that it must be a proportionate means of achieving that aim. Positive action to achieve that aim could include:

- providing training or additional classes targeted at pupils with a particular protected characteristic

- extending or changing locations or times for activities to take place
- making the provision in different ways
- targeting advertisements, prospectuses and sources of advice
- improving careers advice and providing mentoring for pupils who have the protected characteristic
- using outreach and monitoring

8.33 More than one aim may be promoted or achieved by an action, and more than one action may address achieving a particular aim. For example, targeting advertisements and using outreach might both address the aim of taking action to encourage participation.

Example:

8.34 An education authority analyses its data on the types of work experience placement taken by its pupils and finds that girls are far less likely to undertake a placement with science, engineering and technology employers than boys. The education authority gathers more evidence and finds that this under-representation extends to further and higher education and into wider employment.

The education authority decides to implement a programme with the aim of increasing the numbers of female pupils undertaking placements in science, engineering and technology. It runs a construction and engineering industry awareness day for female pupils. The day starts with a visit to two local employers, where pupils are encouraged to try out the equipment. This is followed by a tour of the local further

education college to meet apprentices, and to hear from women working in construction and engineering. The education authority follows up on this initial taster event by working with the local education business partnership to find work placements with local employers. While this involves more favourable treatment of girls, it is likely to be a proportionate means of achieving the school's aims, and so lawful under the Act's positive action provisions.

Implementing and monitoring positive action

8.35 It is good practice for schools, when considering positive action, to draw up an action plan that sets out:

- evidence of the disadvantage, the particular needs and / or the disproportionately low levels of participation of those who share a protected characteristic
- an analysis of the causes of the disadvantage
- feedback from relevant groups about the disadvantage
- specific outcomes in relation to the stated aims the school is aiming to achieve
- an identification of possible steps to achieve the aims
- an assessment of the proportionality of those possible steps
- the steps that the school decides to take to achieve its aims

- arrangements for monitoring progress and reviewing the positive action steps
- measurable indicators of progress towards those aims, set against a timetable

8.36 It is also good practice for schools to consult with groups of pupils who share the protected characteristic in question, and their parents, before deciding whether to take positive action. This is likely to be helpful in identifying needs and evaluating possible actions. It is also advisable for schools to explain to staff, parents and pupils why positive action is being taken and what it involves.

Example:

8.37 A secondary school has lesbian, gay, bisexual and transgender (LGBT) pupils and pupils whose parents are LGBT. The school wants to ensure that any barriers to learning that these pupils are facing, connected to those protected characteristics, are solved by appropriate measures. The school decides to run a small consultation group with the pupils, which is facilitated with the help of a local LGBT charity, to understand their needs better. The group reports several barriers affecting these pupils' full participation in school life. These include homophobic and transphobic bullying, which is contributing to underachievement, school anxiety and avoidance, and which is putting some pupils at risk of dropping out. The group make several suggestions for activities to address these barriers, alongside a whole-school approach to tackling homophobic and transphobic bullying. This includes

inviting external speakers who are LGBT role models and running various activities for LGBT history month. These steps do not involve less favourable treatment of any group sharing another protected characteristic, so such actions would be lawful without having to rely on the positive action provisions within the Act. The group also suggests setting up a special mentor programme for LGBT pupils and offering LGBT pupils a chance to meet with other pupils who are tackling homophobia and transphobia in their schools. While this involves more favourable treatment of LGBT pupils, it is likely to be a proportionate means of achieving the school's aims. This means it would be lawful under the Act's positive action provisions.

8.38 If a school takes positive action, it should monitor the impact of it and regularly review progress towards the identified aim. This will help the school understand whether the action is successful, and make sure that the action continues to be lawful. This is because action might cease to be proportionate if circumstances change so that the conditions for taking the action no longer apply. For the same reason, it is good practice for schools to plan to take positive action for a set period only, and for the position to be reviewed at the end of that period.

Example:

8.39 A school IT coordinator sets up a computer science club for girls, alongside the existing computer science club open to all pupils. They do this to try to address the low numbers of

female pupils studying IT. Other schools have found that the clubs encourage girls to get involved with IT, which has been seen as a male-dominated field. The clubs allow girls to explore things they are interested in within a supportive environment.

The aims of the club are explained to staff. The school also sends a newsletter to all parents to explain the aims of the club and that it is going to run for just one year initially to see if it resolves the issue. The engagement with the school community and commitment to monitoring and reviewing impact are examples of good practice.

Example:

8.40 A school has a large intake of refugee pupils. The school decides to employ a support worker to work with the pupils to help them to settle in at the school. The school monitors the pupils' integration into the school and decides, after one year, that the pupils have integrated well into school life. At this time, the school decides that the support worker is no longer needed. Again, the monitoring and review are examples of good practice and lead to the school deciding positive action is no longer needed.

Positive action and the Public Sector Equality Duty

8.41 Public schools managed by education authorities and grant-aided schools are subject to the PSED and specific

duties and may wish to consider using positive action to help them to comply with the duties (section 149, paragraph 1 (3)).

Example:

8.42 When deciding what action to take under the PSED, an education authority analyses its data on attainment at Primary 7. It finds that Gypsy / Traveller pupils are underachieving compared to other pupils when previous attainment is considered.

The education authority sets an outcome under the duty, to address the underachievement of Gypsy / Traveller pupils. To ensure that any potential positive actions they propose are lawful, the education authority draws up an action plan which sets out:

- evidence of the disadvantage
- its proposed actions
- a proportionality assessment of the proposed actions
- a timetable with measurable indicators to achieve its aim
- arrangements to monitor progress and review the positive action steps intended to improve attainment for Gypsy / Traveller pupils

The education authority decides to undertake a range of activities including study skills support, mentoring and additional classes. These activities act as positive action measures and contribute to meeting the duty to advance equality of opportunity.

Chapter 9: Dispute resolution and enforcement

9.1 This chapter explains what happens if someone makes a complaint against a school under the Equality Act 2010 (the Act), and what forms of redress exist. It also explains what action may be taken to address any discrimination, harassment or victimisation that is found to have taken place.

9.2 This chapter is not intended to be a procedural guide to raising an action in the sheriff court, or making a claim to the Additional Support Needs Tribunal. The tribunal forms part of the Health and Education Chamber of the First-tier Tribunal for Scotland.

9.3 The Sheriff Court Ordinary Cause and Simple Procedure Rules contain the procedure for making a claim in civil courts in Scotland. The procedures for the Additional Support Needs Tribunal are available from the Tribunal website.

Resolving disputes

Complaints procedure

9.4 In many instances, the pupil who believes that they have been discriminated against, or a parent acting on their behalf, will raise the complaint directly with the school. ‘Parent’ is defined

in chapter 1 as anyone who has parental responsibility for the child.

9.5 Complaints of disability discrimination can only be made against schools rather than individual members of staff. This is because findings of disability discrimination are made against schools under section 110, paragraph 7 of the Act. Read paragraph 3.88 to 3.118 and chapter 7 for more information about disability discrimination.

9.6 All schools should have complaints procedures, which should be able to deal with complaints of discrimination, harassment and victimisation.

9.7 Education authorities are also required to have a complaints procedure to deal with all complaints relating to schools in their area under the Scottish Public Services Ombudsman Act 2002 (section 16A). Education authorities must also publicise their complaints procedures.

9.8 Grant-aided schools and independent schools have their own complaints procedures, and any complaints are made directly to the school. Non-statutory guidance issued by the Scottish Government from March 2021 (Registration of independent schools: guidance for applicants, proprietors, and parents) states that independent schools are expected to have a clear complaints policy.

9.9 It is also important for schools to comply with the Public Sector Equality Duty (PSED) and the specific duties and ensure their complaints procedures are accessible to everyone. If appropriate, they should make them available in different

languages or alternative formats. Read chapter 2 paragraphs 2.37 to 2.50 for a detailed explanation of the PSED.

9.10 Schools must make reasonable adjustments to any internal complaints procedures to prevent disabled people from being placed at a substantial disadvantage in comparison with people who are not disabled. Failure to do so will itself amount to discrimination.

Making a complaint

9.11 Where a complaint arises, it is likely to be in everyone's interest to try to resolve it through the school's complaints procedure. However, there may be occasions when resolving it in this way is not possible, practical or appropriate. A formal complaint regarding a public school may be made directly to the education authority.

9.12 Parents and pupils aged 12 or over may choose to make a claim in the sheriff court or the tribunal. However, making or defending a claim can be lengthy, expensive and difficult for those involved. It can have a damaging impact on the pupil and the school's reputation. The time limits for making a claim in the sheriff court or Additional Support Needs Tribunal are not extended if a complaint is made through a school's internal complaints procedure or to an education authority before bringing it to the court or Tribunal. Read paragraphs 9.19 to 9.21 for more information about time limits.

9.13 Parents and pupils aged 12 or over can also make a complaint to the Scottish Public Services Ombudsman (SPSO) about a public school if they have completed the complaints process

through the education authority first. The SPSO will not deal with complaints about the curriculum, how pupils are taught or about disciplinary matters. The SPSO cannot consider complaints relating to grant-aided schools.

9.14 A parent or pupil aged 12 or over can also make a complaint to the Scottish ministers under the Education (Scotland) Act 1980 (section 70) if they think an education authority or the management of a grant-aided school has failed to carry out one of its duties under education law. This includes the law relating to additional support for learning. There is an application form for section 70 complaints available from the Scottish Government, along with guidance about the process. If the Scottish ministers decide there has been a failure, they will make an order that says the responsible body must carry out the duty within a set time and they will contact the responsible body to make sure it has complied with the order.

Obtaining information ('the questions procedure')

9.15 Before starting legal proceedings, it may be helpful to the person considering bringing them to obtain information from the school. This can help them decide whether they have a valid claim. This information may include:

- copies of internal communications relating to the complaint (such as emails or meeting minutes)
- copies of any relevant codes of conduct or procedures

- copies of any decisions made by the school in respect of the complaint

9.16 Depending on the nature of potential proceedings, the information sought will vary.

9.17 Previously, there was a mechanism under the Act allowing anyone alleging discrimination to ask questions of the person they said had acted unlawfully against them. This procedure was repealed in 2014.[21] However, it is still considered good practice for a pupil (or their parent acting on their behalf) who thinks that they may have been unlawfully discriminated against, harassed or victimised, to seek relevant information before issuing a formal claim, and for the school to respond. This may prevent the complaint escalating to a formal claim.

9.18 Claimants can also obtain documents and information via Subject Access Requests under section 45 of the Data Protection Act 2018, or under Regulation 5 of the Pupils' Educational Records (Scotland) Regulations 2003.

Time limits

9.19 A claim must normally be started within six months of the alleged discrimination. Where discrimination continues over a period of time, the six months begins at the date of the last

[21] Section 138 of the Equality Act 2010 was repealed by section 66 of the Enterprise and Regulatory Reform Act 2013 which was brought into effect from 6 April 2014 by the Enterprise and Regulatory Reform Act 2013 (Commencement No.6, Transitional Provisions and Savings Order 2014).

discriminatory act. For example, if a disabled pupil is removed from the playground on multiple occasions over a period of six months because of behaviour arising from their disability, this may amount to a continuing process.

9.20 However, where the continuing discrimination is a person's failure to do something, the six months begins when the person in question decided not to take that action. This could be from the date on which the person:

- said that they were not going to do it
- did something inconsistent with doing it
- could have reasonably been expected to do it and did not[22]

9.21 Courts and tribunals have the discretion to consider a claim brought outside the six-month period if they consider that it is fair, just and equitable to do so (section 118, schedule 17, paragraph 4).

Where claims are made

Sheriff court

9.22 All claims arising from incidents of discrimination, harassment and victimisation, in relation to protected characteristics other

[22] The Governing Body of School T v AA and RA [2023] UKUT 311

than disability, are brought in the sheriff court. This includes claims against public schools, grant-aided schools and independent schools.

Additional Support Needs Tribunal

9.23 Disability discrimination claims arising from incidents of discrimination, harassment and victimisation in schools are made to the Additional Support Needs Tribunal. This includes claims against public schools, grant-aided schools and independent schools.

The United Nations Convention on the Rights of the Child (UNCRC)

9.24 Public authorities, and other organisations when carrying out 'functions of a public nature', have a duty not to act incompatibly with the UNCRC requirements as set out in the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (the 2024 Act).

9.25 This duty applies to public schools. Other schools may be covered if they perform certain functions of a public nature, even if not all the functions are public and the functions are not publicly funded.

9.26 Schools may also be covered if they carry out public functions under a contract or other arrangement with a public authority. For example, where a private organisation is involved in the education of a pupil with an education authority (such as an independent school when the fees are paid by an education authority). In this example, the input of the independent school

is treated as the work of a public authority and covered by the 2024 Act.

9.27 A claim against a school which is acting, or proposing to act, in a way that is incompatible with the UNCRC requirements can be brought in the Additional Support Needs Tribunal, or the sheriff court, if it has the jurisdiction to grant the remedies being sought.

9.28 Parties can rely on the UNCRC requirements in any legal proceedings in the Additional Support Needs Tribunal and sheriff court.

9.29 Read the Health and Education Chamber's guidance on Additional Support Needs under the 2024 Act (document reference: PGN 01 2025 UNCRC).

Claims made in the sheriff court

Claims that can be heard by the sheriff court

9.30 Claims against schools relating to all protected characteristics other than disability (gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation) are made to the sheriff court. Claims about disability discrimination are made to the Additional Support Needs Tribunal (read paragraphs 9.41 to 9.49).

Who can make a claim

9.31 Anyone can make a claim to the sheriff court if they believe that they have been discriminated against, harassed or

victimised. The only exceptions to this are where a person is claiming disability discrimination (section 114, paragraph 1, section 116 and schedule 17, paragraph 8).

9.32 A parent may make a claim on behalf of their child up to the age of 16.

9.33 A parent may also have the right to make a claim on behalf of a child over the age of 16 where the child lacks the legal capacity to make a claim.

9.34 Pupils over the age of 16 may make a claim in their own right.

9.35 Under the age of 16, a pupil has the right to make a claim in their own right if they have sufficient understanding and maturity to do so.

9.36 A pupil over the age of 12 is presumed to have sufficient understanding and maturity to instruct a solicitor in such proceedings.

9.37 A pupil under the age of 12 can also make a claim in their own right, provided that they have the required maturity and understanding to do so.

9.38 Where both pupil and parent have rights to make a claim, either may do so.

Remedies in sheriff court claims

9.39 The sheriff court has the power to award all the remedies that the Court of Session can grant in proceedings in reparation or in a petition for judicial review. These remedies include (under section 119):

- a declaration that unlawful discrimination, harassment or victimisation has taken place, or a declaration that no unlawful discrimination, harassment or victimisation has taken place
- an order for specific implement requiring the school to do something (such as to admit the child as a pupil) or an interdict to prevent the school from repeating any discriminatory act in the future
- damages to compensate for any loss suffered by the person bringing the claim, including compensation for injury to feelings
- interest on any damages
- expenses

9.40 An ‘interdict’ is a court order which prevents a wrong or an anticipated wrong.

Additional Support Needs Tribunal claims

Claims the Additional Support Needs Tribunal can hear

9.41 Disability discrimination claims against schools in Scotland are heard by the Additional Support Needs Tribunal (schedule 17).

Who can make a claim

9.42 A disabled pupil who has legal capacity can make a claim that they have been discriminated against.

9.43 A pupil aged 12 or over is presumed to have capacity.

9.44 Where a disabled pupil does not have legal capacity, the pupil's parent may make a claim.

9.45 Where both pupil and parent have rights to make a claim, either may do so.

Remedies in the Additional Support Needs Tribunal

9.46 The Additional Support Needs Tribunal has wide case management powers under the First-tier Tribunal for Scotland Health and Education Chamber Rules of Procedure 2018. These include powers to require a party, or another person, to provide documents or information. These include powers to require a party, or another person, to provide documents or information.

9.47 The Additional Support Needs Tribunal may make any order that it thinks appropriate in that individual case, with the intention of trying to remedy the damage done to the disabled person, and to reduce any future disadvantage. It can make orders which are binding on all types of school, including independent schools.[23] Examples of the type of remedies ordered by the Additional Support Needs Tribunal include:

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[23] Ashdown House School v JKL and MNP [2019] UKUT 259

- a letter of apology
- admission of a child to a school or nursery
- reinstating of an excluded pupil
- staff training
- changes to policies and procedures
- additional education for a pupil who has missed education
- an additional school trip for a pupil who has missed a trip
- providing a British Sign Language (BSL) interpreter
- providing access to the deaf base (a specialist unit providing tailored support and trained staff to help deaf pupils or pupils with hearing loss)

9.48 The Additional Support Needs Tribunal cannot order the payment of compensation or damages. ‘Damages’ is money a court orders someone to pay after they’ve been found legally responsible for causing harm. ‘Compensation’ is any payment to make up for a loss or injury – whether from a court, an insurance company, a government scheme or an out-of-court settlement.

9.49 If the Additional Support Needs Tribunal has made an order against an education authority and the education authority has refused to comply with it, or is acting unreasonably in complying with the order, then the tribunal may refer the failure by the education authority to comply with a decision to the Scottish ministers.

The role of the Equality and Human Rights Commission (EHRC)

9.50 In addition to the rights given to an individual under the Act, the EHRC has enforcement powers in relation to the Act, under the Equality Act 2006 (section 20 to 33), which include powers to:

- undertake investigations
- issue unlawful act notices
- agree action plans
- enter agreements
- seek interdicts
- undertake PSED assessments
- issue PSED compliance notices (section 20 to section 33, Equality Act 2006)

9.51 If we suspect that a school has committed an unlawful act, we can conduct an investigation. If we find that the school has acted unlawfully, we can serve a notice requiring the school to prepare an action plan, or we can recommend actions, to avoid repetition or continuation of the unlawful act (section 20 to section 22, section 34, schedule 2, Equality Act 2006).

9.52 If we suspect that a school is committing an unlawful act, we may also enter into an agreement with the school. Under the agreement, the school must commit to complying with the relevant legislative provision under the Act that we think it has breached.

9.53 We monitor compliance with the agreement and implementation of any action plan agreed as part of it. If the school has complied, no further enforcement action will be taken (section 23, Equality Act 2006).

9.54 If we think that a person (which can include a school) is likely to commit an unlawful act, we have the power to apply to the court for an interdict to prohibit that person from committing that act (section 24, Equality Act 2006).

9.55 We also have power to take action even if no identifiable individual has been, or may be, affected by the unlawful act. We can take action regarding arrangements that would amount to an unlawful act if they were ever applied to an individual. For example, if a school published an advertisement that suggested it processed admission applications in a discriminatory manner, we may seek an interdict to prevent or withdraw publication of the advertisement. Our powers could also be used to challenge a provision, criterion or practice that indirectly discriminated, even if that has not yet put any particular pupil at a disadvantage (section 24A, Equality Act 2006).

9.56 We also have the power to assist a pupil who is taking legal action against a school where the pupil alleges discrimination which is unlawful under the Act (section 28, Equality Act 2006).

Chapter 10: Exceptions

10.1 This chapter explains the general exceptions across the Equality Act 2010 (the Act) that apply to all schools, and permit conduct that would otherwise be unlawful. It also explains the exceptions that only apply to certain types of schools and those that apply to specific school activities, which are also referred to in earlier chapters.

10.2 In general, discrimination, harassment and victimisation by a school is unlawful under the Act unless an exception applies. Any exception should normally be interpreted restrictively. This means that the wording should be taken to have the 'narrowest' (most limited) possible meaning.

10.3 The protections in the Act relating to schools do not apply to the protected characteristics of age, or marriage and civil partnership. This means that schools may treat pupils in different year groups differently without committing unlawful discrimination. For example, a school may allow senior school pupils to wear a different uniform to pupils in lower year groups. However, these protected characteristics remain relevant to schools acting in their capacity as an employer and a service provider.

10.4 In this chapter, the term 'harassment' refers to harassment related to the protected characteristics of:

- disability
- race

- sex

10.5 Harassment related to the three protected characteristics of gender reassignment, religion or belief and sexual orientation is not prohibited under the Act in schools (section 85, paragraph 10). However, a person who is subjected to unwanted conduct related to any of these three protected characteristics may be able to bring a claim of direct discrimination (read paragraphs 3.2 to 3.4).

10.6 Pregnancy and maternity is not a relevant protected characteristic for the purposes of harassment, but unwanted conduct related to pregnancy and maternity is likely to amount to harassment related to sex.

Statutory authority

10.7 As the Act applies to schools, it is not a breach to do something in relation to certain protected characteristics where it is required because of other legislation or another measure. A school's action will not be unlawful where there is a specific statutory requirement to act in a particular way. This is the case even if it appears to breach the Act's provisions.

10.8 However, the provisions of the Act may only be overridden where a statutory requirement is specific, leaving the school with no choice but to act in a particular way (section 191, schedule 22, paragraph 1). There are different exceptions applied to schools, depending on the relevant protected characteristic in a particular situation. These are set out in paragraph 10.9.

10.9 It is not a breach to do something in relation to the protected characteristics of disability, religion or belief or sexual orientation if it is required under an enactment, or a requirement or condition (read paragraphs 10.10 to 10.11). It is not a breach to do something in relation to the protected characteristic of sex if it is required under an enactment.

Protected characteristic	Not a breach of the Act
Disability	Anything required under an enactment, a requirement or condition
Religion or belief	Anything required under an enactment, a requirement or condition
Sex	Anything required under an enactment
Sexual orientation	Anything required under an enactment, a requirement or condition

10.10 An ‘enactment’ means:

- an act of Parliament or the Scottish Parliament
- an act or measure of the Senedd Cymru / Welsh Parliament
- orders and regulations made under or for the purposes of such acts or measures
- measures of the General Synod of the Church of England

10.11 In this section, a ‘requirement or condition’ means a requirement or condition that is made because of an enactment by:

- a Minister of the Crown

- a member of the Scottish Executive (Scottish Government)
- the Senedd Cymru / Welsh Parliament or the Welsh ministers
- the First Minister for Wales or the Counsel General to the Welsh Government

10.12 This exception applies to such measures, regardless of when they were passed or made.

10.13 If the school could still have complied with the enactment, requirement or condition without treating someone in a way that would breach the Act, then the exception would not apply.

Nationality discrimination authorised by statute or the executive

10.14 The Act does not prohibit certain types of discrimination in relation to schools.

10.15 These acts are not prohibited if they are:

- done to comply with an enactment
- an instrument made under an enactment
- a requirement imposed under an enactment or a ministerial arrangement or condition (schedule 23, paragraph 1)

10.16 An ‘instrument made under an enactment’ refers to secondary legislation for an Act of Parliament. It could include Statutory Instruments (SIs), orders, regulations or rules.

10.17 The types of discrimination are:

- direct or indirect discrimination on the grounds of nationality
- indirect discrimination, where the provision, criterion or practice refers to a person's ordinary place of residence, or how long a person has been present or resident in, or outside, the UK

10.18 The non-discrimination provisions of the Act may only be overridden where an obligation under the measures in paragraph 10.17 leaves a school with no choice but to act in a particular way in relation to a person's nationality or residence in the UK. This is explained in paragraph 10.46.

National security

10.19 A school will not breach the Act if it does anything that is proportionate to safeguard national security. This exception would apply to schools only in very rare circumstances. To be lawful, the particular act must be a proportionate means of safeguarding national security (section 192).

Schools that are charities

10.20 A school that is a charity or part of one will not breach the Act by only providing benefits to people who share a specified protected characteristic, if this is in accordance with the charitable instrument that establishes or governs the charity, and is:

- a proportionate means of achieving a legitimate aim, or
- for the purpose of preventing, or compensating for, a disadvantage linked to that protected characteristic (section 193 and section 194)

10.21 A ‘charitable instrument’ is a charity’s governing document.

Example:

10.22 It is lawful for Capability Scotland to run a school for pupils with severe and complex physical difficulties, and not for other disabled pupils or non-disabled pupils.

10.23 This exception does not permit a charity to limit a group of people who are to receive benefits by their race, as related to colour (section 194, paragraph 2). If a charitable instrument seeks to enable benefits to be provided to a group of people defined by colour, then it will be treated as if that definition did not exist. In this situation:

- if the group of people is defined only by colour, the charitable instrument will be applied as if it enabled benefits to be provided to all people generally
- if the group of people is defined partly by colour, the charitable instrument will be applied as if it enabled benefits to be provided to the group, without reference to colour

10.24 For more information, read chapter 13 of the Services, public functions and associations: Code of Practice.

Activity to support a charity

10.25 It is not a breach of the Act, as it applies to schools, to restrict participation in activities to people of only one sex where those activities are carried out for the purpose of promoting or supporting a charity (section 193, paragraph 7). An example would be a sponsored swim by female pupils only to raise money for charity.

Boarding and other communal accommodation

10.26 The provisions about communal accommodation are complex. Where they apply, they permit the provision of separate-sex sleeping accommodation for pupils.

10.27 ‘Communal accommodation’ is accommodation that includes dormitories or other shared sleeping accommodation that, for reasons of privacy, should be used only by people of the same sex (schedule 23, paragraph 3). It is likely to apply to schools offering single-sex boarding, as well as to other situations such as residential trips. Boarding means when pupils regularly live at the school in its boarding accommodation during term time. It can include:

- separate-sex shared sleeping accommodation for male or female pupils (for example, dormitories)
- residential accommodation, all or part of which should only be used by people of the same sex if the

accommodation's toilet or washing facilities are shared or communal (for example, school boarding houses)

- ordinary sleeping accommodation (for example, a double room which is shared with another pupil)

10.28 A benefit, facility or service is linked to communal accommodation if it cannot be properly and effectively provided except to those using the accommodation, for example, showers in a single-sex boarding block. The benefit, facility or service can only be refused to a person if they can be lawfully refused use of the accommodation.

10.29 The Act permits a school to:

- admit pupils to communal accommodation
- provide any benefit, facility or service linked to the accommodation

10.30 This is permitted where the following criteria are met:

- the communal accommodation is managed in a way that is as fair as possible to both boys and girls
- consideration has been given to whether and how far it is reasonable to expect that the accommodation should be altered or extended, or that further alternative accommodation should be provided
- consideration has been given to the relative frequency of demand for the accommodation by pupils of each sex
- in relation to gender reassignment, consideration is given to whether and how far the conduct in question is

a proportionate means of achieving a legitimate aim (read paragraphs 10.33 to 10.35)

10.31 These provisions mean that, where applicable, schools can make arrangements for separate-sex sleeping accommodation for pupils without being liable for sex discrimination or gender reassignment discrimination (schedule 23, paragraph 3(1)).

10.32 It is important to note that there are separate provisions applicable to the admission of pupils at mixed-sex schools that offer both boarding and day facilities (read paragraphs 4.71 to 4.72).

Boarding and trans pupils

10.33 In some circumstances, it may also not be appropriate for a trans pupil to board with pupils of the same sex, given welfare considerations that apply to all pupils. However, excluding a pupil from accommodation provided for their own sex should only be considered on a case-by-case basis where this is a proportionate means of achieving a legitimate aim (schedule 23, paragraph 3(4)).

10.34 If it was found that excluding a trans pupil was a proportionate means of achieving a legitimate aim, the school must then consider making suitable alternative arrangements to accommodate that pupil. In practice, this is likely to require additional provision of separate sleeping accommodation and toilets and shower facilities, where this is a proportionate means to achieve the legitimate aim of meeting the welfare needs of that pupil.

Example:

10.35 An independent secondary school provides boarding accommodation for male pupils in one dormitory and female pupils in a different dormitory. A trans girl pupil (who was born male) asks to move from the male dormitory to sleep in the female dormitory. To accommodate the pupil, it arranges for them to be accommodated in a single unit 'study bedroom'. The unit has its own ensuite bathroom with a toilet and shower. This is likely to be lawful.

Competitive sport

10.36 The Act includes exceptions that may apply in relation to a competitive sport, game or other competitive activity (section 195).

Sex and gender reassignment

10.37 It is not a breach of the Act for a school to make different arrangements for the participation of male and female pupils in a sport, game or other activity of a competitive nature in specific circumstances (section 195, paragraph 1). These circumstances are set out in the Act at section 195, paragraph 3. They are where an average pupil of one sex would be at a disadvantage as a competitor against an average pupil of the other sex, due to their physical strength, stamina or physique (in the Act, this is called a 'gender-affected activity'). In such circumstances, it will be lawful for a person to organise single-sex or separate-sex events.

10.38 The law on the interpretation of this exception is not settled and there is uncertainty as to what other sex-based arrangements for participation in a gender-affected activity may be lawful. However, it is likely also to be lawful for a person to adopt other sex-based rules in relation to participation that enable girls and boys to compete fairly and safely. An example may be a rule specifying the numbers of girls and boys on a mixed-sex team, intended to ensure fair and safe competition in a gender-affected team sport. Organisers should therefore seek their own advice on any other arrangements they propose to make.

Example:

10.39 A secondary school holds an athletics day where male and female pupils compete in separate races. This is not unlawful sex discrimination.

10.40 When deciding whether separate events should be organised for boys and girls, the school must consider whether there are significant differences in physical strength, stamina or physique at the age and stage of development of the pupils who are competing in the activity.

Example:

10.41 A primary school only has a football team for boys under 7 years old, as there are not enough girls for a full team. A girl asks to join the team. It may be unlawful to decline this request because she is a girl, unless the school can demonstrate that there are significant differences in physical strength, stamina or physique between girls and boys under 7

years old that would disadvantage girls taking part in football. Examples of disadvantage could be unfair competition or risks to health and safety.

10.42 Under the Act, any sex-based rules or arrangements relating to participation in a specifically gender-affected activity should be applied on the basis of the sex of a person at birth. Therefore, in a gender-affected activity, trans pupils should not be included in single-sex or separate-sex competitions for the sex with which they identify.

10.43 A school can have policies that restrict participation in single or separate-sex competitions for pupils who have undergone hormonal medical treatment that affects their muscle mass or strength, if this raises a legitimate concern and is justified. For example, this might be on the grounds of safety or fairness. In practice, it is unlikely that pupils will have undergone such treatment due to their age. Therefore, trans pupils should usually be able to participate in single or separate-sex competitions with pupils of their own sex.

Single-sex schools

10.44 Single-sex schools are allowed to restrict admission to pupils of only one sex, and to make some exceptions to admit pupils of the opposite sex, without this being unlawful sex discrimination (schedule 11, paragraph 1).

10.45 For more on admissions to single-sex schools, read paragraphs 4.60 to 4.70.

Nationality, birthplace or residency

10.46 The Act does not prohibit anything that is done because of a person's nationality or place of birth, or how long that person has lived in a particular area or place, and which applies to:

- selecting one or more pupils to represent a country, place or area or related association in a sport, game or other competitive activity, or
- complying with eligibility rules for participation in that activity

Selection by ability or aptitude

10.47 Under the Act, independent schools are permitted to select some or all of their pupils because of general or special ability or aptitude, with the aim of only admitting pupils of high ability or aptitude, without this amounting to discrimination against disabled pupils (schedule 11, paragraph 8). Schedule 11, paragraph 8 also provides for public schools to operate selective admissions arrangements if approved by the Scottish Ministers.

10.48 For more on selection by ability or aptitude, read paragraphs 4.45 to 4.54.

Schools conducted in the interest of a denominational body

10.49 In relation to admissions and some other areas, the Act provides an exemption from discrimination for schools conducted in the interest of a denominational body, on the grounds of religion or belief (schedule 11, paragraph 5).

10.50 For more information on admissions to schools conducted in the interest of a denominational body, read paragraphs 4.55 to 4.59.

10.51 The Act permits schools conducted in the interest of a denominational body to discriminate in the provision of education and access to a benefit, facility or service, on the grounds of religion or belief (schedule 11, paragraph 5). This means that such schools are permitted to conduct themselves in a way that discriminates against pupils on the grounds of religion or belief in certain ways. Therefore, a school conducted in the interest of a denominational body does not have to make special provision for pupils of a different faith, or incorporate aspects of those pupils' faith into its curriculum.

10.52 This exemption does not cover exclusions or subjecting a pupil to any other detriment, so a pupil cannot be punished or penalised for things that relate to their religion or belief.

10.53 For more information, read paragraphs 5.100 to 5.110.

Collective worship or other religious observance

10.54 Acts of worship or other religious observances organised by, or on behalf of, a school are not covered by the provisions prohibiting religion or belief discrimination, whether or not they are part of the curriculum (schedule 11, paragraph 6).

10.55 For more information, read paragraphs 5.94 to 5.99.

Content of the curriculum

10.56 As explained in chapter 5, schools are not restricted in the range of issues, ideas and materials they use in connection with the content of the curriculum, though public schools must follow the Curriculum for Excellence. Schools have the academic freedom to expose pupils to a range of thoughts and ideas, however controversial. Even if the content of the curriculum causes offence to pupils with certain protected characteristics, this will not necessarily make it unlawful.

10.57 However, the way in which the curriculum is taught is covered by the non-discrimination provisions of the Act (section 89, paragraph 2).