

*These notes refer to the Special Educational Needs And Disability Act 2001 (c.10) which received Royal Assent on 11 May 2001*

# **SPECIAL EDUCATIONAL NEEDS AND DISABILITY ACT 2001**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 2 – Disability Discrimination in Education**

##### *Chapter 2 – Further and Higher Education Institutions*

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

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

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

***Section 27: Meaning of “discrimination”***

104. This section amends the DDA by adding a new section 28S defining the meaning of discrimination. It works in the same way as the definition in section 5 of the DDA, except in the respects set out below. An explanation of section 5 of the DDA is set out in paragraph 30 of these Explanatory Notes.
105. As well as the general justification there are two specific justifications relating to the less favourable treatment duty. Less favourable treatment will be justified if it is necessary to maintain academic standards or other prescribed standards. It will also be justified in certain cases which will be set out in regulations.
106. Provision is also made for responsible bodies not to be liable where they do not know (and could not reasonably be expected to know) of a person’s disability (subsections (3) and (4)), both in relation to the less favourable treatment duty and the reasonable adjustment duty. Although the anticipatory nature of the latter duty means that an institution would have to consider what reasonable adjustments it might make generally to e.g. meet the needs of dyslexic students so that knowledge would not be relevant, it may need to know that a particular student was dyslexic in order to apply the policy to him. For example, if the policy was that dyslexic students would have extra time to finish their exams, the institution would need to know which students should benefit from that extra time. In those circumstances, an institution would not be liable for failure to provide the extra time where it did not know of the disability.
107. The reasonable adjustment duty under section 28 below is owed to students at large, unlike the duty owed to employees under section 6 of the DDA. For any particular student to bring an action, therefore, it is necessary for them to show not only that the general duty is breached but also that this breach was to their detriment.

***Section 28: Disabled students not to be substantially disadvantaged***

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

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

110. These provisions amend the DDA by inserting a new section 28U and a new Schedule 4C, which modify the effect of the rest of the Chapter as it applies, in England and Wales, to higher education secured by LEAs, further education for adults secured by LEAs, further education provided by the governing bodies of maintained schools, the activities of the statutory youth service and, in Scotland, to community education facilities provided by local authorities or voluntary organisations. Because of differences in arrangements, Schedule 5 makes separate provision for England and Wales on the one hand and for Scotland on the other.
111. The modifications from the formal further and higher education sector reflect the different nature of such education provision. The types of activities covered by this provision tend to be much more informal and are organised in a wide variety of community settings, rather than on an institutional model. The notion of an overall

course being a programme of learning rests with the provider of this programme of learning not necessarily the individual. Learners will be covered by the duties whether they participate in a complete programme of learning or just an individual activity on which they would register.

112. *Part 1 of Schedule 4C* modifies the rest of the Chapter in relation to England and Wales, so that, where further and higher education secured by LEAs or the governing bodies of schools is concerned, it would be unlawful for them to discriminate against disabled persons enrolled on a course, rather than against disabled students. Similarly, it would be unlawful for them to discriminate in the provision of services provided wholly or mainly for persons enrolled on a course, rather than in the provision of "student services". The activities of the statutory youth service are covered by the duty in modified section 28R(4). *Part 2 of Schedule 4C* modifies the rest of the Chapter in the same way in relation to those community education facilities in Scotland which are broadly comparable to the services in England and Wales covered by *Part 1 of Schedule 4C*. Community education in Scotland ranges across youth work, adult education and informal education in a broad sense.

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

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

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

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

118. **Schedule 6** inserts a provision for circumstances when parties fail to obtain consent and there is a breach of the duty under section 28T. It provides for the owner/lessor to be joined in any action against an educational institution.

***Section 32: Validity and revision of agreements***

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

***Section 33: Interpretation***

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

***Section 34: Removal of certain duties of funding bodies***

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