

my child in school



Disability Discrimination

a practical guide to
parents' legal rights



Contents

Part 1: Disabled children in school	1
Key principles	1
Schools' general duties to all disabled children	2
Schools' duty to individual children – unlawful discrimination	2
Which children are covered?	3
Who needs to know?	5
Which activities are covered?	5
Part 2: Dealing with discrimination	5
Talking to the school	5
Less favourable treatment	6
Failure to make reasonable adjustments	8
Taking matters further	10
Further help	13

Important note

This booklet covers disability discrimination in schools in England. It does not cover students aged 16 and over in further or higher education.

Definitions and abbreviations

Code of practice Code of practice for schools (Disability Discrimination Act 1995 part 4)

DDA Disability Discrimination Act 1995 (as amended)

EHRC Equality and Human Rights Commission. This has replaced the Disability Rights Commission.

Guidance Disability Discrimination Act – Guidance on matters to be taken into account in determining questions relating to the definition of disability 2006

Tribunal First-Tier Tribunal (Special Educational Needs and Disability)



If there is anything in this booklet you don't understand or if you would like more information, please call our free advice line on 0808 800 5793.

“Is my disabled child getting fair treatment at school?”

Under the Disability Discrimination Act, disabled children have the right to be treated fairly at school. This booklet will tell you the sorts of things that schools must do to plan for the needs of disabled children. It will also help you to decide whether it is likely your child is being treated unfairly (discriminated against) because of their disability.

Part 1 Disabled children in school

Key principles

A key principle of the Disability Discrimination Act is that, wherever possible, disabled people should have the same opportunities as non-disabled people in their access to education. You can find information about who counts as a disabled person on page 3.

Part 4 of the Disability Discrimination Act covers disability discrimination in schools. It applies to existing pupils and those who may be pupils at a school in the future. The Act says that schools should not treat disabled pupils less favourably or put them at a substantial disadvantage. Schools should also make reasonable adjustments to the way they do things to avoid disabled pupils being put at a disadvantage.

All schools are covered. As well as state-maintained schools this includes independent schools, non-maintained schools and pupil referral units.

The Act covers admissions, exclusions and ‘education and associated services’. These include the day-to-day teaching and learning at the school but also activities, school trips, sports and school meals.

Code of practice

There is a code of practice for schools on Part 4 of the DDA. It explains Part 4 of the Disability Discrimination Act and can be referred to in legal proceedings. The Code gives concrete examples and practical advice. Copies are available from the Equality and Human Rights Commission (see Further help, page 13).

Schools' general duties to all disabled children

Accessibility plan

Schools have a general duty to plan for the needs of all disabled children. Each school must have an accessibility plan. This will set out how they are going to improve access to education for disabled pupils over time. The plan must cover improvements in 3 different areas:

- improvements in access to the curriculum
- improvements in physical access
- improvements in providing information to pupils in different formats.

Disability equality scheme

All publicly funded schools, including CTCs and Academies, also come under the requirements of the disability equality duty. This means that they must be more proactive in considering disability equality in all aspects of school life. It must not just be an afterthought. Schools must show how they will improve opportunities and outcomes for all users of the school including staff, pupils and parents. Schools must publish a disability equality scheme drawn up with the involvement of disabled people. Part of the disability equality duty involves preventing harassment of disabled people. This is particularly relevant as many disabled children report being bullied at school.

Planning ahead

As well as a duty to existing pupils, schools also have an 'anticipatory duty'. This duty is to take reasonable steps to make sure that disabled children are not placed at a disadvantage. It means that schools must plan ahead for disabled pupils and should not wait until a disabled child is actually admitted to the school.

Schools' duty to individual children – unlawful discrimination

The DDA also makes it unlawful for a school to discriminate against an individual disabled child.

Unlawful discrimination takes place if a school discriminates, without justification, against disabled pupils in any part of school life.

Unlawful discrimination

Unlawful discrimination may take place in two ways:

1. A school treats a disabled pupil differently from other pupils and this has a harmful effect **and/or**
2. A school treats a disabled pupil in exactly the same way as other pupils and this has a harmful effect.

The discrimination can consist of

- Less favourable treatment
- Failure to make reasonable adjustments

Unlawful discrimination is covered in detail in Part 2 of this booklet. See page 5.

Which children are covered?

Before deciding whether there may have been disability discrimination you will need to check that your child would count as disabled under the DDA.

For the purposes of the Act, a disabled person is someone who has a physical or mental impairment (difficulty) which has a substantial, long-term and harmful effect on their ability to carry out normal day-to-day activities.

Schools also have a parallel duty to make provision for children with special educational needs. These are children with learning difficulties who need extra help at school.

Many, but not all, disabled pupils have special educational needs. Some, but not all, pupils with special educational needs are also disabled.

What counts as disability?

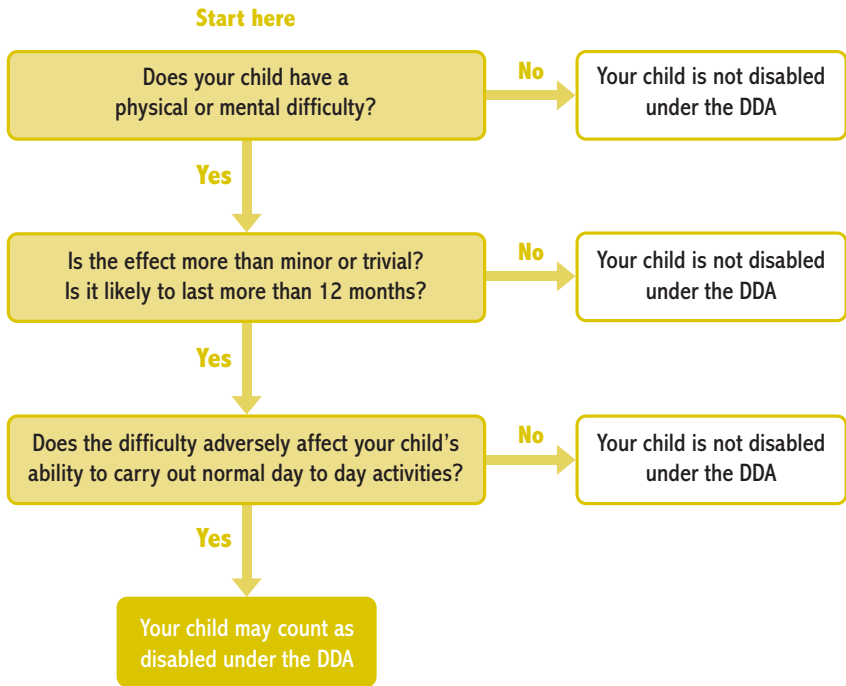
There is no definitive list of conditions and a diagnosis will not in itself mean your child will be classed as disabled. What is important is the effect on your child's daily life.

Section A.6 of the Guidance says that a disability can arise from a wide range of impairments. As well as more visible conditions, these can include developmental disabilities such as autism, dyslexia and dyspraxia, learning difficulties and mental health conditions.

Section A.12 of the Guidance lists conditions that are specifically excluded e.g. addiction to tobacco, drugs or alcohol; tendency to physical or sexual abuse of others; seasonal conditions such as hayfever.

Is my child disabled?

Answer the questions on the following chart to help you decide if your child may count as disabled under the DDA.



To help you decide

Look also at the box on page 3.

Ignore any improvements made by treatment or medication. The only exception is if your child wears glasses or contact lenses. In this case look at how your child functions with glasses or lenses.

Are any of the following affected?

- Memory; ability to concentrate, learn or understand
- Walking
- Using their hands
- Coordination
- Continance
- Ability to lift or carry
- Speech, hearing, eyesight
- Understanding danger

For more detailed information see Code 4.3–4.7 & App 1; Guidance A.4-A15

Who needs to know?

You are not obliged to tell a school about your child's disability but it will be easier for the school to make adjustments for your child if you inform them.

It is generally not unlawful discrimination if the school did not know, and could not have been reasonably expected to know, about a disability. However, it may be unlawful discrimination if the school did not actively seek out information about disability or plan ahead.

Which activities are covered?

Disability discrimination is unlawful in "education and associated services, admissions and exclusions".

This covers all parts of school life from teaching through to lunch-time activities, after-school clubs and trips. The code of practice paragraph 4.23 gives examples. Some of these are:

- curriculum
- classroom organisation
- timetabling
- homework
- access to school facilities
- school sports
- school policies
- breaks and lunchtimes
- the serving of school meals
- interaction with peers
- assessment and exam arrangements
- school discipline and sanctions
- school clubs and activities
- school trips

Part 2 Dealing with discrimination

Talking to the school

If you have a disabled child it will help to keep in close communication with the school. Ask for a copy of the accessibility plan and disability equality scheme so that you know what the school has said it will do. If you think your child is being treated unfairly, it is best to try to talk to the school as soon as possible. Try to sort things out informally first with your child's class teacher or head of year. You may be able to suggest ways in which the school could do things differently. If you are not happy you can go to someone higher in the school, such as the Headteacher or the governing body. They may be able to put things right.

If the school does not sort things out, this booklet will help you decide whether or not the school might be unlawfully discriminating against your child. It cannot tell

you for sure. Different people can come to very different conclusions about the same case. If you decide that it may be unlawful discrimination you could make a claim.

Even if you decide there is no unlawful discrimination your child's problems may arise from special educational needs which are not being met. (For advice on special educational needs, see the ACE booklets *Getting Extra Help*, *Asking for a Statutory Assessment*, *Getting the Statement Right*.)

Less favourable treatment

Is this discrimination?

What the law says

The law says that if a disabled pupil is treated less favourably than another pupil for a reason linked to their disability this will be unlawful disability discrimination if:

- the reason does not apply to the other pupil and
- the less favourable treatment is not justified.

The school's justification for less favourable treatment must be material and substantial.

What this means is that the school must not treat your child less well than a child who is not disabled without having a very good argument for doing so.

You will need to think about the following questions:

1. What is the reason for treating your child differently?

The *reason* is the school's explanation for treating your child differently.

For example if they say that your son cannot go on a trip because of his poor behaviour, then the *reason* is your child's poor behaviour. Sometimes there may be more than one reason and not all reasons may be expressed.

2. Is the reason linked to your child's disability?

To take the example above of a child denied access to a school trip: A child with Tourette's syndrome is told he cannot go because he swore in class. This behaviour is linked to his disability as swearing is one of the symptoms of Tourette's. This *may* be disability discrimination through less favourable treatment. Go to question 3.

Another child who is partially sighted is also barred from the trip because of swearing. This is not a reason connected to his disability. This is *not* disability discrimination through less favourable treatment.

3. Are children who are not disabled treated better if they behave the same or present the same issues as your child?

No. If they are treated the same this is not disability discrimination through less favourable treatment. So if any child who swears in class would be banned from the trip, there is no discrimination.

Yes. In this case there may be disability discrimination. This would apply if a child without any disability were allowed to go on the trip even though he swore in class. You now need to look at whether the treatment can be justified.

ACE advises

A recent legal case (London Borough of Lewisham v Malcolm) has made it harder for parents to successfully claim unfavourable treatment. This is because the courts have said that the treatment of a disabled child must be compared to the treatment of a child who is not disabled, but who behaves or presents in the same way.

Previously the comparison was made with a child who was not disabled and who did not behave or present in the same way.

Please note that some of the examples in the code of practice relate to the old comparator.

However schools must still make reasonable adjustments to avoid putting disabled pupils at a serious disadvantage so you should think carefully about how you make your case.

Can the treatment be justified?

The law says that if a school can justify treating a disabled pupil less favourably, this is not unlawful discrimination.

The code of practice says that for less favourable treatment to be “justified”:

- there must be a clear connection between the justification and the circumstances of the case *and*
- the justification must be more than minor or trivial *and*
- no reasonable steps could be taken by the school to avoid treating the pupil less favourably.

ACE advises

This is an area where different people may disagree. A school may feel that it is justifiable to treat a particular disabled child less well. A parent may feel that this is not justifiable and that their child is facing unlawful discrimination.

The final decision lies with the Tribunal or the appeals panels.

For admissions only: Less favourable treatment can be justified if it is the result of a permitted form of selection. So, if a child with significant learning difficulties is refused entry to a grammar school because she did not pass the entrance test, this may be justified.

For all other cases: Look at whether the school has given a good reason (“justification”) for the less favourable treatment. If it doesn’t, then this is likely to be unlawful discrimination.

If the school does give a justification, is there a clear connection between the school’s justification of the treatment and your child’s case? Is the school’s justification more than minor or trivial? If the answer to either of these questions is *no* then the less favourable treatment is not justified.

Example

A child with Down’s Syndrome is not allowed to take part in the school Christmas play. The school seeks to justify this on the grounds that she might find it tiring and become upset. This is based on assumptions about the child and is not likely to be a material and substantial reason.

If there are reasonable steps (“adjustments”) that a school could take or could have taken to avoid treating a pupil less favourably, the treatment may not be justified.

This is something that schools need to look at very carefully to make sure they have done all that they could. For example if a child is denied access to an activity because it would not be safe, then the school should have carried out a risk assessment.

For more information on reasonable adjustments see the next section.

Failure to make reasonable adjustments

Schools must take reasonable steps to make sure that disabled pupils are not placed at a substantial disadvantage compared with non-disabled pupils. This is commonly known as the reasonable adjustments duty.

This generally means that unlawful disability discrimination occurs if:

- a disabled child is suffering because they are treated in exactly the same way as non-disabled children *and*
- the suffering would have been avoided if the school had taken certain reasonable steps.

What is substantial disadvantage?

First check whether your child is at a disadvantage. Compared with children who are not disabled:

- does your child have to spend more time and effort?



- is your child inconvenienced?
- does your child suffer indignity or discomfort?
- does your child have less opportunity or make less progress?

The code of practice says that this list is not exclusive, so your child may still be at a disadvantage if they are facing other difficulties. To count as unlawful discrimination the disadvantage must be more than minor or trivial.

Examples

A year 11 pupil with fine motor difficulties can only write very slowly. The school does not arrange any access arrangements such as a scribe or extra time for his GCSE exams. He is likely to be at a substantial disadvantage.

A child with dyslexia is expected to write down the homework from the board like everyone else. She often cannot manage to do this in time and has had several detentions for not doing her homework. She is likely to be at a substantial disadvantage.

You should now check if there were steps the school could take to avoid the disadvantage.

Are there reasonable steps to avoid disadvantage?

If there are reasonable steps (“adjustments”) that a school could take or could have taken to avoid putting a pupil at a substantial disadvantage, the disadvantage may not be justified.

To take the examples above:

For the pupil with writing difficulties a reasonable adjustment would be to apply to the exam board for extra time or a scribe.

For the dyslexic pupil a reasonable adjustment might be for the teacher to write in her planner or to have the homework questions printed out for her.

Exceptions

The code of practice says that reasonable steps do **not** include providing auxiliary aids and services or altering physical features of the school to suit the pupil. These are expected to be provided through special educational needs provision or long term planning.

To decide whether a step is reasonable, issues such as ‘cost’, financial and otherwise, are weighed against the treatment of the pupil.

The code of practice gives the following list of factors to take into account.

- the need to maintain academic, musical, sporting and other standards;
- the financial resources available;
- the cost of taking a particular step;
- the extent to which it is practicable to take a particular step;
- the extent to which aids and services will be provided to disabled pupils at the school as part of special educational needs provision;
- health and safety requirements;
- the interests of other pupils and persons who may be admitted to the school as pupils.

Do any of these factors apply to your child’s case? If they do, does the cost in time, money or effort outweigh the substantial disadvantage to your child? Opinions on this will vary and the final decision will rest with the Tribunal or appeals panels if you decide to take matters further.

Examples

A year 5 child with mobility difficulties has her lessons in a classroom on the ground floor. However the school library is on the top floor. Installing a lift would be altering the physical features of the school so this is not required as a reasonable step. It is not practicable to relocate the whole library to a room on the ground floor as there is not enough space. The school has made the reasonable step to relocate a small collection of books relating to the year 5 curriculum to some empty corridor space on the ground floor.

For more examples of reasonable adjustments see the code of practice, ‘Inclusive Schooling’ and ‘Implementing the DDA in schools and early years settings’. (Further help page 13)

Taking matters further

From the information given in this booklet you may feel that your child has suffered unlawful discrimination based on their disability. Start by talking informally to the school as suggested on page 5. If this fails there is more formal action you can take.

Who is responsible?

The duty not to discriminate is the responsibility of “the responsible body”. For schools this is generally the governing body. A claim of discrimination is made

against the responsible body not against the head, individual teacher or lunch-time assistant etc. If you are not sure who is responsible, check the code of practice paragraph 4.16. If you are still unsure, this will be sorted out if you make a claim of unlawful discrimination.

Type of school	Responsible body
Maintained school	Governing body
Pupil Referral Unit	Local Authority
Maintained Nursery School	Local Authority
Independent school	Owner (or those responsible for management of school)
Non-maintained special school	Owner (or those responsible for management of school)

Making a claim

Before you make a formal claim you may wish first to complain to the governing body of the school or the local education authority. You can also use the conciliation service provided by the Equality and Human Rights Commission. Contact the EHRC helpline for more information. If you use this service the 6 months' deadline for appealing to Tribunal is extended to 8 months.

If the problem is still not sorted out, make your claim to the appropriate body.

Issue	Claim/appeal to	Time scales
State-maintained schools and Academies		
Admissions (children without statements)	Admission appeal panel See ACE booklet 'Appealing for a School'	No statutory time limit. Check for local deadlines
Fixed term exclusions	Tribunal	Within 6 months of alleged discrimination
Permanent exclusions	Independent appeal panel See ACE booklet 'Permanent Exclusion'	Within 15 school days of governors upholding exclusion
Other (education and associated services)	Tribunal	Within 6 months of alleged discrimination
Independent schools and non-maintained special schools		
All issues	Tribunal	Within 6 months of alleged discrimination

Appeals about contents of a statement of special educational needs including the school named on part 4 are SEN appeals to Tribunal and must be made within 2 months of the final statement.

Possible remedies

Remedies will depend on what you are complaining about. If you are appealing over admissions or permanent exclusion you will be looking for a place at the school or reinstatement. Otherwise you may want to ask for an apology, staff training, change in policies or procedures, extra tuition to make up for lost learning or activities to make up for ones your child missed out on. Remedies do not include financial compensation.

Further help

From ACE

ACE freephone advice line: 0808 800 5793

Information and free advice booklets can be downloaded from www.ace-ed.org.uk or by contacting ACE (see back page).

From the Department for Children, Schools and Families

General information on schools and the DDA

www.teachernet.gov.uk/wholeschool/disability/disabilityandthedda/

Free publications to order from 0845 60 222 60

or to download from www.teachernet.gov.uk/publications

Inclusive Schooling

Promoting Disability Equality in Schools

Implementing the Disability Discrimination Act in Schools and Early Years Settings

(CD and print based information resource – available to schools and voluntary organisations)

From SEND – First Tier Tribunal (SEN and Disability)

Discrimination helpline: 01325 392760

Publication: **Disability Discrimination in Schools: How to Make a Claim**
available from: www.sendist.gov.uk/Parents

From the Equality and Human Rights Commission

Publications:

The Code of Practice for Schools: Guidance on matters to be taken into account in determining questions relating to the definition of disability 2006

Education – How do I make a claim?

Website: www.equalityhumanrights.com/your-rights/disability/

Advice line (England): 0845 604 6610

Useful websites and advice lines

IPSEA (Independent Panel for Special Education Advice)

IPSEA provides general advice relating to SEN and specific advice for tribunal appeals.

Website: www.ipsea.org.uk

General advice: 0800 018 4016

Tribunal advice: 0845 602 9579

Contact a Family – for families with disabled children

Contact a Family has details of support organisations for a wide variety of specific conditions including rare disorders.

Website: www.cafamily.org.uk

Helpline: 0808 808 3555

ACE is a charity and depends on grants and donations to operate our advice service. If you have found our advice helpful and would like to make a donation please visit www.ace-ed.org.uk
Thank you.

Whilst ACE has made all reasonable efforts to ensure that the information contained in this booklet is accurate and up-to-date at the time of publication, it does not constitute legal advice and should not be relied upon as a substitute for legal advice. ACE cannot accept any responsibility for any loss or damage suffered as a consequence of any reliance placed upon it.

© Advisory Centre for Education (ACE) Ltd. 2010

ACE, 1C Aberdeen Studios, 22 Highbury Grove, London N5 2DQ
Telephone: 020 7704 3370 (Admin only). Fax: 020 7354 9069
Registered Charity: 313142. Registered Company: 663126

Designed by Grasshopper Design Company
Printed by Wyndeham Gait, Castle Press, Victoria Street, Grimsby