

Disabled Children and the Equality Act 2010: What teachers need to know and what schools need to do

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1. Introduction

The Equality Act 2010 (EqA) is designed to address the disadvantage and discrimination experienced by particular groups of people and to provide a legal framework for addressing these inequalities. The duties in EqA cover most aspects of our national life: the duties affect a wide range of responsibilities, including those of employers, landlords, providers of services and education. There are duties that are owed to individuals and duties to plan more widely for increased equality of opportunity. This guide provides a summary of what teachers need to know and what schools need to do to prevent and address inequalities and ensure they do not discriminate against disabled pupils.

It is important to recognise from the start that schools have a range of duties under EqA: to staff, as employees; to parents and others, where the school is providing a service to other people using the school; and to pupils, staff and others who share other protected characteristics as well as disability. It is often more efficient and more effective for schools to bring these duties together and embed them in wider school planning processes.

However, schools' duties towards disabled pupils differ from other EqA duties, in some key respects:

- EqA treats disability differently, most notably in that, for most groups, equality is rooted in equal treatment, but for disabled people, and for disabled pupils, schools may, and often must, treat them more favourably;
- schools' duties towards pupils are defined differently, and under different sections of EqA from those towards staff and other users of the school;
- schools' duties are defined differently from those of other providers of education such as early years settings, colleges and universities; and
- under the Children and Families Act 2014 (CFA), schools have other, complementary responsibilities towards disabled children and young people and to those with special educational needs (SEN).

This guide is designed to help teachers understand the legislation and how it applies to their work with disabled pupils in their school. It explains what EqA requires of schools and of governors, trustees and others who are the *responsible body*¹ for the school.

The guide includes examples illustrating practices that may amount to discrimination or that may help schools to avoid discrimination. Many of these examples are drawn from the decisions of the First-tier Tribunal (SEN and Disability), referred to as the Tribunal, and the Upper Tribunal. Throughout the text, checkpoints highlight particular aspects of the duties, or provide additional information or insights.

¹ Throughout this guide italics are used to indicate that a term or expression has a particular meaning which is defined in legislation or explained in guidance. Many of these terms or expressions are explained in this guide.

This guide is designed to raise awareness of EqA among a wide group of teachers, leaders, governors, support staff, parents and others working in and with schools. It should not be used as a guide to any individual situation or as a substitute for legal advice.

References and sources of information and advice are listed at the back of the guide.

Checkpoint: a high-quality inclusive approach

All schools can expect and must plan for disabled pupils. However, schools that provide high-quality inclusive provision for all pupils; that work in close consultation with parents and pupils themselves; that make adjustments to ensure disabled pupils participate in all aspects of school life; that accept and celebrate difference; and that do not compromise aspirations for disabled pupils are likely to realise benefits for disabled pupils as well as pupils who are not disabled. The experience of growing up together, with an appreciation of diversity, is important preparation for life beyond the school gates and can contribute to a fairer society.

2. The Equality Act 2010: key concepts

EqA uses two key concepts as a foundation for the duties:

- *protected characteristics*; and
- *prohibited conduct*.

It is important to be familiar with these terms and what they mean.

Under EqA, there are nine *protected characteristics*:

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

Of these, age and marriage and civil partnership do not apply to schools' duties towards their pupils, though they do apply to schools' employment duties and wider duties under EqA.

Prohibited conduct is the general term applied to discriminatory behaviour that is unlawful under EqA. The different forms of prohibited conduct are summarised and explained below.

3. Does the Equality Act apply to all schools?

EqA applies to all schools whether they are constituted as: academies or maintained schools; nursery, primary, secondary or all-through schools; mainstream, special or non-maintained special schools; publicly-funded or independent schools; and it applies to pupil referral units and alternative provision academies. The schools' duties apply to early years provision and sixth form provision where the provision is made in a school. Where early years provision is made in a setting that is not a school, or where sixth form provision is made in a college or 16-19 academy, the law still applies, but slightly differently. The duties covered in this guide are schools' duties. Where the duties apply differently to different types of school this is highlighted².

4. Who has responsibility for the school's equality duties?

It is the responsible body for the school that has responsibility for the duties in EqA. For a maintained school the responsible body is the governing body; for an academy, it is usually the academy trust; for an independent school, the proprietor; and for a pupil referral unit, the local authority (LA). The school is responsible for the actions of its employees while working at the school, and for others, *agents*, working on their behalf, so schools need to be able to show that they have taken reasonable steps to make sure employees and *agents* understand that they must not discriminate.

Whilst the institutional responsibilities lie with the responsible body, teachers have individual professional responsibilities under the Teachers' Standards. They:

...must have an understanding of, and always act within, the statutory frameworks which set out their professional duties and responsibilitiesⁱ.

The Standards explicitly include duties under EqA. From the very first steps in their career, teachers are expected to be aware of the impact of high-quality teaching on pupils' life chances, to adapt their teaching in a responsive way without lowering their expectations and to ensure all pupils have the opportunity to experience meaningful successⁱⁱ.

5. Who counts as disabled?

The definition of disability in EqA is broad: 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.

² The Council for Disabled Children provides a parallel guide for early years settings: *Disabled Children and the Equality Act 2010: What Early Years providers need to know and do*

A physical or mental impairment includes learning difficulties, mental health conditions, medical conditions and hidden impairments such as specific learning difficulties, autism, and speech, language and communication impairments.

In deciding whether someone is disabled, it is the effect of an impairment that has to be considered. If the impairment has a *substantial* and *long-term* effect on a person's ability to carry out normal day-to-day activities it may amount to a disability.

Substantial is defined as being more than minor or trivial; *long-term* is defined as a year or more.

These terms set a relatively low threshold; they rule out conditions such as broken limbs, which normally heal in much less than a year, and cover more people than many imagine. The Family Resources Survey carried out in 2018/19 estimates that 8% of children are disabledⁱⁱⁱ.

Checkpoint: EqA counts some conditions as a disability regardless of the '*substantial and long-term adverse effect*' threshold: EqA names cancer, multiple sclerosis and HIV as disabilities; it requires severe disfigurements to be treated as having an adverse effect on a person's ability to carry out normal day-to-day activities; and it includes progressive conditions, that is, conditions that get worse over time, before the effect is substantial. Under the regulations, people who are certified³ as blind or partially sighted are also considered to be disabled^{iv}.

Disabled children and young people are covered by the SEN framework⁴ where their disability prevents or hinders them from making use of facilities that are generally provided, and they require special educational provision, that is, something additional to or different from provision made generally for others of the same age. The definition of disability used in the SEN framework is that used in EqA.

Checkpoint: disability, special educational needs and medical conditions

Though the definitions of disability and SEN are covered by different legislation, in practice there is a significant overlap. Children and young people with more significant SEN, including those who have an education, health and care plan under CFA, are more likely to be covered by EqA: not because they meet the definition of SEN or have a plan, but because they are more likely to have an impairment that has a substantial and long-term effect on their ability to carry out normal day-to-day activities.

Research by Bath and Bristol Universities^v estimates that about three-in-ten disabled children of primary age and about four-in-ten disabled children of

³ A person who is 'certified' as blind, severely sight impaired, sight impaired or partially sighted by a consultant ophthalmologist, can be 'registered' with their local social services team

⁴ The SEN framework is set out in the Children and Families Act 2014, associated regulations and the *Special educational needs and disability code of practice: 0-25 years* (DfE and DH, 2015)

secondary age do not have SEN. The disability discrimination legislation in EqA covers disabled children and young people whether or not they have SEN.

Children and young people who have a range of medical conditions, such as epilepsy, diabetes or more severe forms of asthma and eczema, are likely to be covered by the definition of disability but may not be identified as having SEN. Under CFA, schools also have responsibilities for pupils with medical conditions: schools must make arrangements to support them and must have regard to statutory guidance. The guidance is designed to:

ensure that all children with medical conditions, in terms of both physical and mental health, are properly supported in school so that they can play a full and active role in school life, remain healthy and achieve their academic potential^{vi}.

For the purpose of avoiding discrimination, anticipating and making *reasonable adjustments*, and meeting wider responsibilities, schools need to know who their disabled pupils are.

There are different ways in which a school may become aware that a pupil may be disabled: they may receive information from a pupil's previous school; they may be told by the child's parents; it may be through careful observation of a child's progress and behaviour. Asking questions is an obvious way of finding out but, with no duty on either parents or pupils themselves to disclose a disability, schools need to ask questions in a way that both respects a pupil's dignity and privacy and encourages parents, or children and young people themselves, to share information. If parents think that information might be used against their child, for example to encourage them to go to a different school^{vii}, rather than to support them to be included, they may be reluctant to share information.

It is important to recognise that parents may not think of their child as being disabled and may not be aware that, because of the nature and impact of their child's impairment, their child is covered by EqA. Schools should therefore ask questions in the broadest possible terms and ask about any learning difficulty, disability or health condition. It may help to focus the discussion on any adjustments that the school may need to make, rather than on the nature or existence of a disability. Schools should have this discussion around the time of admission but, because individual impairments can change, should also take regular opportunities to check with parents and with children and young people themselves.

If a claim of discrimination were made to the Tribunal, it would be no defence for the school to say that it did not know that a pupil was disabled, unless the *school could not reasonably have been expected to know* that they were disabled. A key point here is whether the school knows about a pupil's impairment or condition, not whether that impairment or condition amounts to a disability under the definition in

EqA. Ultimately, that issue is decided by the Tribunal. This further underlines the importance of schools understanding the breadth of the definition.

Beyond these individual considerations, schools need to know who their disabled pupils are for planning purposes: to tailor their *accessibility plan* appropriately and to inform the way they meet the *public sector equality duty*. Where they are asked to, schools must also co-operate with the LA in the LA's duty, under CFA, to identify disabled pupils and those with SEN.

Checkpoint: disabled or 'a mainstream child'

Some people have a relatively restricted view of what counts as a disability and may not be aware of the breadth of the definition of disability. The risk for schools is that, in holding a narrow view of the definition, they may underestimate the number of pupils covered by the duties and may inadvertently discriminate against a disabled pupil.

In a claim of disability discrimination relating to Child P, a school recognised his SEN but did not think of him as disabled. The Tribunal determined that he met the definition and that he had been discriminated against:

However, it was clear that the teachers at the school had a different understanding of the threshold for disability, and did not regard Child P as disabled; in their view, that category indicated a greater degree of learning or other difficulty than Child P was affected by: as the class teacher put it, Child P was "a mainstream child".^{viii}

The Office for Disability Issues published guidance, in 2011^{ix}, on a range of issues to be taken into account when deciding who may be covered by the definition⁵. Ultimately, for pupils in school, the decision as to whether the pupil counts as disabled, and is therefore protected against discrimination under EqA, is taken by the Tribunal. The Tribunal decides this when a claim of discrimination is made.

Checkpoint: tendency to physical abuse

Regulations^x exempt certain conditions from being considered as impairments. This includes a *tendency to physical abuse*. In August 2018, a decision by the Upper Tribunal determined that, for children in education, who have a recognised condition that is more likely to result in a *tendency to physical abuse*, the regulations do not remove a child from the definition of disability or from the protection that EqA provides^{xi}.

⁵ The case law, from 2018, covered in the checkpoint on the 'tendency to physical abuse', post-dates this guidance.

This means that, in line with the duties set out below, schools must make *reasonable adjustments* to prevent or manage challenges presented by pupils who have disabilities that make them more prone to physical abuse, just as they must for pupils with disabilities that manifest themselves in other ways. Schools must also be able to justify any sanction as *proportionate*.

6. What do the duties cover?

Schools must not discriminate against a pupil, or a child or young person who might become a pupil at the school in relation to:

- admissions;
- the provision of education;
- access to any benefit, facility or service; and
- exclusion or other forms of detriment, that is, other forms of disadvantage.

The duties cover not just teaching and learning in classrooms, but lunchtimes and playtimes, school clubs, activities and trips, in effect, the whole life of the school.

7. What is discrimination?

EqA sets out the four main forms of *prohibited conduct* that apply to all pupils who share *protected characteristics*. These are:

- *direct discrimination*;
- *indirect discrimination*;
- *harassment*, and
- *victimisation*.

In addition, the following forms of prohibited conduct apply to disabled people, including disabled pupils in schools:

- *discrimination arising from a disability*;
- a failure to make *reasonable adjustments*.

8. Direct discrimination

Direct discrimination is treating a disabled pupil *less favourably* because they are disabled.

Example 1: a pupil with Down's syndrome is not permitted to go on a trip to a museum. Staff decide that because of her learning difficulty she will not be able to participate in the activities arranged for the visit.

In this example, it is because of the child's disability that the staff decide she will not go on the trip. This is likely to be direct discrimination. It is irrelevant whether or not

there is an intention to discriminate. It is the outcome rather than the intention that is key in the eyes of the law.

Direct discrimination can also take place where a pupil who is not disabled is treated less favourably because they are associated with a person who is disabled, or because they are wrongly thought to be disabled, or they are treated as if they were disabled.

In some circumstances it may be necessary to treat a disabled pupil more favourably than a pupil who is not disabled, for example, by not applying the standard disciplinary sanction and adopting different strategies to support a disabled pupil in managing their behaviour. It is not direct discrimination against a non-disabled pupil to treat a disabled pupil more favourably.

Under EqA, there is no justification for direct discrimination.

9. Indirect discrimination

Indirect discrimination is applying a *provision, criterion or practice* that puts a disabled pupil at a disadvantage compared with someone else who is not disabled and in a way that cannot be justified.

Schools risk discrimination if they apply a blanket policy, a policy that is applied in the same way to all pupils but puts disabled pupils at a particular disadvantage.

Example 2: a primary school has a healthy snacks policy. A pupil with diabetes is told she cannot eat her high calorie snack in the playground at break time and is told to sit outside the head teacher's office instead.

Example 3: a secondary school requires all pupils to wear the school uniform from a specified provider. A pupil has severe eczema which is exacerbated by the particular fabric used in the uniform trousers.

In the 'healthy snacks' example, the policy was applied in the same way to all pupils; only the girl with diabetes was placed at a disadvantage. In the 'uniform' example, the policy was applied in the same way to all pupils but only the pupil with eczema was placed at a disadvantage. These two examples are likely to be indirect discrimination. Both examples are based on actual cases that went to the Tribunal.

Under EqA there may be justification for actions that may otherwise amount to indirect discrimination or to *discrimination arising from a disability*. The actions may be justified if what a school did was a *proportionate means of achieving a legitimate aim*.

The concepts of a *legitimate aim* and *proportionate means* are not defined in EqA. Guidance from the Equality and Human Rights Commission indicates that these terms may be taken to have the following meaning^{xii}:

- a *legitimate aim* may include such aims as ensuring the wellbeing and dignity of pupils, the fair exercise of power, and the maintenance of academic and behavioural standards; and
- *proportionate* means *appropriate and necessary*. It would need to be shown that the same legitimate aim could not be achieved by a less discriminatory means.

However, schools must also think ahead when they are planning their policies and must plan and make *reasonable adjustments* to these policies for disabled pupils. This does not mean that they have to change their policies for pupils who are not disabled though, in many cases, that may offer a simpler solution.

10. Discrimination arising from disability

Discrimination arising from disability is treating a disabled pupil unfavourably because of something arising in consequence of their disability.

Example 4: a school behaviour policy sets a two-day exclusion for any pupil who swears at a teacher. Child M, a pupil with a communication impairment, misunderstands an instruction from the teacher; he responds inappropriately; the teacher interprets his response as insolence; the incident escalates to the point where the pupil swears at the teacher; the head excludes the boy.

In this case, the behaviour that led to the exclusion arose from the nature of the child's impairment and the Tribunal found that the school had discriminated^{xiii}.

The school would have been able to justify the exclusion if it had been able to show that it was a *proportionate means of achieving a legitimate aim*, for example that the exclusion was a *proportionate means* of maintaining behavioural standards at the school.

Checkpoint: proportionate means

Child P is a pupil with social and emotional difficulties, organisational difficulties, language difficulties and poor self-esteem. He was excluded from school several times for infringements of the behaviour policy. The exclusions amounted to six weeks during his GCSE year, that is, 30 school days out of the statutory 45-day limit in a single academic year⁶, and had affected Child P's GCSE grades.

The judgment contained the following points:

...it is not enough for the school to show that they achieved their legitimate aim for Child P; they have to show that they did it by proportionate means. We find

⁶ This means a pupil cannot have one fixed-period exclusion of 46 school days or more; and cannot have shorter fixed-period exclusions that add up to more than 45 school days in a school year.

the means used were disproportionate; they were unnecessarily damaging to Child P. It follows that the claim of discrimination [...] is clearly made out.

And

To treat everyone the same, to apply the school's rules and procedures on behaviour management regardless of disability, is to discriminate against a pupil whose disabilities call for a proportionate response, or adjustments, to be made.

Schools also have a duty to make *reasonable adjustments* so that disabled pupils are not at a *substantial disadvantage*. In examples 2 and 3 and Child M and Child P, above, there may have been reasonable adjustments that the schools could have made.

11. What are reasonable adjustments?

Where a school's *provision, criterion or practice* might put a disabled pupil at a *substantial disadvantage* compared with other pupils who are not disabled, schools must take *reasonable steps* to avoid that disadvantage. This is usually referred to as the *reasonable adjustments duty*.

The duty is anticipatory: it requires schools to think ahead and make reasonable adjustments so that disabled pupils can participate in the whole life of the school and in order to avoid any disadvantage that might otherwise occur.

Schools can often avoid *indirect discrimination* and *discrimination arising in consequence of a disability* by thinking ahead and planning and making reasonable adjustments.

Example 5: the timetable is adjusted to provide time for the reinforcement of new skills for a pupil with learning difficulties.

Example 6: a student with a visual impairment sits at the back of the class to accommodate her field of vision.

Example 7: pupils with dyslexia are given a green card to indicate to teachers that they may need extra time to complete written tasks.

Example 8: where the school policy would normally provide for a 2-day exclusion, the policy is adjusted to provide an alternative punishment for a pupil where his behaviour arises from his disability. The punishment marks the seriousness of the incident, is understood by the pupil, and does not involve excluding him in these circumstances.

Any of these examples may be a reasonable adjustment.

In example 4, Child M, above, reasonable adjustments might have included: staff training on communication impairments; training on how to communicate with this pupil in particular; and, in the event that the incident occurred despite all such adjustments, a further adjustment might have been to provide an alternative form of punishment, for example, a detention. This might also have constituted a *proportionate means of achieving a legitimate aim* and therefore have avoided discrimination arising from disability.

Checkpoint: The Equality and Human Rights Commission provides the following guidance on reasonable adjustments and the exclusion of disabled pupils:

[EqA] requires schools to make reasonable adjustments for disabled pupils both to the exclusions process and to the disciplinary sanctions imposed. This might mean applying different sanctions, or applying them in a different way, to avoid putting a disabled pupil at a substantial disadvantage in relation to non-disabled pupils^{xiv}.

It is good practice to involve parents and pupils themselves in planning reasonable adjustments. Parents and pupils are often best placed to help schools think about what disadvantage might arise in school and what reasonable adjustments may work best. The principles that underpin CFA emphasise the importance of respecting the views, wishes and feelings of children and young people, and of their participation in decision-making⁷. These principles should encourage and support schools in securing the effective participation of disabled pupils in planning and implementing reasonable adjustments. This is likely to be supported by the school's own evidence of the beneficial impact when they do.

Checkpoint: participation

Department for Education (DfE) guidance on exclusions makes it clear that, where practical, the head teacher should give the pupil an opportunity to present their case before taking the decision to exclude^{xv}. In a number of claims of disability discrimination that have gone to the Tribunal, schools have been criticised for not having sought the pupil's views.

The *SEN and disability code of practice^{xvi}* encourages a consideration of special educational provision and reasonable adjustments alongside each other.

Sometimes schools may need to call on specialist advice to inform the planning of reasonable adjustments but most reasonable adjustments consist of adjustments to policies and practices, cost little or nothing and are relatively easy to implement once teachers recognise the need for adjustments and see the benefits for disabled

⁷ The principles in CFA s19 apply directly to LAs. By extension they also apply to schools who are required to co-operate with the LA in meeting its duties to children and young people with SEN and disabilities.

pupils. The essence of reasonable adjustments is that they anticipate where disadvantage may arise and are put in place to prevent or limit that happening.

The reasonable adjustments duty includes three key requirements that apply to most providers of services. To make sure that disabled people are not at a substantial disadvantage, the requirements for most providers are:

- to make adjustments to any provision, criterion or practice;
- to make alterations to physical features; and
- to provide auxiliary aids and services.

For schools and disabled pupils, the first and third requirements apply, the second does not.

A bit more about the requirements:

- the first requirement, to make adjustments to any provision, criterion or practice, relates to the way schools organise themselves, deploy resources, and the day-to-day practices that they follow, whether or not these are articulated in a written policy. Examples 5 to 8, above, are relevant here;
- the second requirement, to make alterations to physical features, does not apply to schools. However, schools are under a duty to plan to increase accessibility, see *accessibility planning duty*, below; and
- the third requirement, to provide *auxiliary aids*, covers the provision of auxiliary aids and services.

A bit more about auxiliary aids and services:

- Auxiliary aids and services may include equipment, the provision of specialist advice to the school, or direct teaching or support to the disabled pupil.
- It is likely that much of what schools might be expected to provide by way of auxiliary aids and services, under EqA, could also be provided, as special educational provision, through the SEN framework. Where something is already provided through the SEN framework, schools can take this into account in deciding what reasonable adjustments to make, see Checkpoint, below.
- The SEN Framework requires LAs to set out what schools and other settings are expected to provide from their delegated resources and to publish this as part of the SEN and disability local offer^{xvii} (this is often referred to as the 'normally available' or 'ordinarily available' provision). This requirement helps to clarify the respective responsibilities of schools, LAs and other agencies.

And a bit more about alterations to physical features:

- whilst the reasonable adjustments duty does not require schools to make alterations to physical features to meet the access needs of an individual pupil, it may be good practice to do so and, if alterations are specified as special educational provision in Section F of an Education, Health and Care plan, it is a duty on the LA to make them.

And a bit about reasonable adjustments and pupils with medical conditions:

- CFA requires maintained schools, academies, and pupil referral units to make arrangements for supporting pupils at the school with medical conditions and to have regard to statutory guidance, *Supporting pupils at school with medical conditions*^{xviii}.
- The guidance is clear that pupils with medical conditions may count as disabled under EqA; that schools should ensure that they can access the same opportunities at school as other pupils; and it supports schools in understanding what may be considered reasonable adjustments for this group of pupils.
- *Supporting pupils at school with medical conditions* also provides schools with guidance on the development of policies on the management and administration of medicines and on putting in place systems for supporting individual pupils with medical needs.

Checkpoint: what is *reasonable*?

The Equality and Human Rights Commission makes it clear that it is not possible to say what will or will not be reasonable in any particular situation, but provides guidance on factors that may be taken into account when deciding what is reasonable^{xix}:

- what special educational provision may be being made for a pupil who is disabled;
- the cost of a particular adjustment and the resources available to the school;
- the likelihood that a particular adjustment would be effective;
- the practicability of a particular adjustment;
- health and safety requirements;
- the need to maintain academic, musical, sporting and other standards; and
- the interests of other pupils and prospective pupils.

Some teachers may feel that making reasonable adjustments is in some way favouring disabled pupils. EqA allows for more favourable treatment, see *direct discrimination*, above. At the heart of the reasonable adjustments duty is the recognition that treating everyone the same, regardless of disability, may result in discrimination.

Check point: ‘to treat everyone the same, ...regardless of disability, is to discriminate...’

In the case of Child P, the Judge said: *The essence of section 20 [of EqA] is that reasonable adjustments may have to be made for disability: the House of Lords*

decision [in a different case, cited as a precedent] makes it clear that positive discrimination, in favour of disabled people, can be called for under this section. To treat everyone the same, to apply the school's rules and procedures on behaviour management regardless of disability, is to discriminate against a pupil whose disabilities call for a proportionate response, or adjustments, to be made.

In practice, making reasonable adjustments prevents disadvantage and recognises that to treat disabled pupils equally, it may be necessary to do things differently for them. Schools must do what it is reasonable to do and are not expected to do anything unreasonable. So, under EqA:

- there is no justification for failing to make a reasonable adjustment;
- schools, along with other service providers, are not permitted to charge for making a reasonable adjustment.

To make sure that disabled pupils are not at a disadvantage, schools should ensure that disabled pupils play as full a part as possible in school life. Under CFA, mainstream schools and maintained nursery schools are also specifically required to make sure that children with SEN engage in school activities alongside their peers. Many pupils with SEN are also disabled, see section 5, above. Reasonable adjustments are an important element in achieving their inclusion.

There are many creative and inspiring examples of reasonable adjustments being made by schools across the country. Often schools are not aware that what they are doing counts as a reasonable adjustment: they are just doing what they think needs to be done to ensure that all pupils can join in all the benefits of the school with their peers. This approach, well embedded in the school's ethos, means the school is much less likely to discriminate against a disabled pupil.

12. Harassment

Harassment is behaviour which violates the dignity of a disabled pupil, or creates an *intimidating, hostile, degrading, humiliating or offensive environment* for them, and is prohibited conduct under EqA. Harassment would include bullying, mocking or belittling a disabled pupil.

13. Victimisation

Many parents are reluctant to challenge their child's school, not least because they worry that it will in some way affect how the school treats their child. The legislation protects people from negative action by the school when they take any protected action under EqA, for example: parents who make a complaint or bring a claim to the Tribunal, a disabled child who reports an incident, or another pupil who provides evidence of what happened. These are all protected acts under EqA and this protection applies even where the initial complaint is not ultimately upheld.

14. What happens if a school does discriminate?

If a parent thinks that their child may have been discriminated against, they can make a claim of disability discrimination to the Tribunal. EqA, amended by CFA, provides for young people over school leaving age but under the age of 18 to make a claim of disability discrimination on their own behalf^{xx}.

Parents or young people need to bring a claim of disability discrimination within six months of the action that they believe amounted to discrimination. Where discrimination has extended over a period of time and is part of a *course of action*, the six months starts from the last instance of discrimination. The Tribunal has the power to extend the six months if it considers it just and equitable to do so.

Checkpoint: exclusions

Where parents dispute the decision of a governing body not to reinstate a permanently excluded pupil, they can ask for this decision to be reviewed by an independent review panel. Where parents think there may have been disability discrimination in relation to a fixed-period or permanent exclusion, they can also make a claim to the Tribunal, in parallel, should they so wish.

15. Schools' wider responsibilities

In addition to their responsibilities to individual disabled pupils, schools have duties to disabled pupils collectively, to other disabled people using the school and to people who share other protected characteristics.

Schools must:

- look ahead and plan to make their school more accessible to disabled pupils, *the accessibility planning duty*;
- improve equality of opportunity for disabled people, under the *public sector equality duty*.

Schools must not:

- discriminate against other disabled people: disabled teachers and others employed at the school, disabled parents, carers and other people using the school;
- discriminate against other groups of children and adults who share other *protected characteristics* under EqA, for example sex, race and sexual orientation.

Schools can:

- take *positive action* to address the impact of discrimination for particular groups of people who share *protected characteristics*, see below.

16. What is an accessibility plan?

The reasonable adjustments duty requires schools to think ahead and make adjustments so that individual disabled pupils can participate in the whole life of the school. The accessibility planning duty requires a more planned approach to opening up key aspects of the life of the school so that, over time, disabled pupils are more comprehensively included in the whole life of the school and fewer adjustments are needed for individual disabled pupils. The duty requires schools to draw up an accessibility plan that sets out how, over time, the school is going to:

- increase access to the curriculum for disabled pupils;
- improve the physical environment of the school to increase access for disabled pupils; and
- make written information more accessible to disabled pupils by providing information in a range of different ways^{xxi}.

Checkpoint: accessibility

Accessibility is often thought of as physical access to buildings. The accessibility planning duty is wider than this:

The curriculum access requirements focus on increasing the extent to which pupils can participate in the school's curriculum. This might mean, for example: addressing any restrictions and increasing the range of subjects that disabled pupils can opt for; or training PE teachers in a wider range of activities that can include disabled pupils. However, this duty is not only about timetabled lessons; it is about the collective organised experiences and activities for pupils throughout the school day and beyond, so the plan should also address any shortfall in the participation of disabled pupils in a whole range of activities, such as school councils, break and lunchtime activities, school trips and visits.

The information requirements focus on improving the ways in which information that is readily accessible to pupils who are not disabled can be made available to disabled pupils. There is a particular focus on taking account of the preferences of disabled pupils about how they like to receive information. This might include: providing screen reading software or making sure that printed materials are provided in the correct font for pupils with a visual impairment; or providing training for staff in making key documents available in Easy Read versions for pupils with a learning difficulty.

The physical accessibility requirements are also broadly expressed. This is not just about ramps and doorways, it is about how schools can improve the physical environment to increase the extent to which disabled pupils can benefit from both the education provided at the school and the wider offer of the schools, the *benefits, facilities and services* at the school. This might include: introducing adjustable height benches for practical subjects; increasing colour contrast in

corridors and doorways so that pupils with a visual impairment can find their way around the school more independently; improving the acoustic environment through room design; or providing a quiet area in the playground for pupils who find more rumbustious play areas overwhelming⁸.

Schools' plans must be in writing and must be resourced and implemented. A new accessibility plan must be published every three years (from March 1st 2006)^{xxii} and must be reviewed and revised as necessary.

Checkpoint: 3-year timescale

With a specified 3-year timescale for accessibility plans, schools need to consider not just where their current disabled pupils will be in 3 years' time, but also think ahead to their new pupil intake and the range of impairments they may be able to anticipate in future.

Accessibility plans can be published as standalone documents or as part of other documents, for example, they can be incorporated into school equality schemes, school development or improvement plans or school building or estate strategies, as appropriate. CFA requires schools to publish information as to the school's accessibility plan, see section on publication of information, below.

Checkpoint: an accessibility plan may helpfully be embedded in the school development or other, broader, plan that has the oversight of the senior leadership team and the governing body. This is a good way of ensuring that the plan, and progress on implementation, is monitored and it avoids good, well thought through plans gathering dust on a shelf or sitting in a forgotten folder on someone's laptop; it can help to ensure that plans happen and the benefits are realised.

17. What is the Public Sector Equality Duty?

The public sector equality duty (PSED) is a general duty that applies to publicly-funded schools, and to other public bodies, including the DfE and Ofsted. It requires them to have due regard to the need to:

- eliminate discrimination, harassment, victimisation and other *prohibited conduct*;
- improve equality of opportunity; and

⁸ The DfE sets out design and construction standards in Building Bulletins, for example, *Building Bulletin 93: Acoustic Design of Schools - Performance Standard*; and *Building Bulletin 102: Designing for disabled children and children with SEN*. To note: area guidance in BB102 has been superseded, but BB102 still provides relevant design guidance.

- foster good relations between different groups of people: those who share a *protected characteristic* and those who do not.

Having *due regard* to the need to improve equality of opportunity involves having *due regard* to the need to remove or minimise disadvantage, to meet the needs of pupils who share *protected characteristics* and to encourage their participation in public life and, in a school, in the life of the school. Fostering good relations includes having *due regard* to the need to tackle prejudice and promote understanding between those who share protected characteristics and those who do not.

Having *due regard* is a key term in the general duty. To show *due regard* schools will need to have considered how their policies and practices affect disabled pupils before they implement them, rather than wait until they can see the actual impact. If challenged, schools will need to be able to demonstrate how they had *due regard* to the requirements of the PSED.

The PSED covers all *protected characteristics* under the EqA. The focus in this guide is on disability.

Checkpoint: This part of EqA applies to maintained schools, pupil referral units, nursery schools and academies but not to other independent schools. Non-maintained special schools are covered by the general duty, above, but not by the specific duties discussed below.

Many schools not covered by either the general or the specific duty will nonetheless choose to follow the requirements as a matter of good practice.

18. Specific duties under the Public Sector Equality Duty

Sitting under the general requirements, discussed above, there are specific duties. The general requirements apply to all schools; the specific duties apply to maintained schools, academies and pupil referral units.

The specific duties require maintained schools, academies and pupil referral units to:

- publish equality information, no more than a year after the last information was published; and
- prepare and publish equality objectives, no more than four years after the last equality objectives were published.

Equality information is information that is gathered and analysed in order to understand how pupils with different characteristics are performing. This information can help schools to understand the impact of their policies, practices and decisions on different groups of pupils, identify areas of inequality that may need to be addressed, and plan more effectively. The published information must be sufficient to demonstrate the school's compliance with the general duty. It must be published at

least annually but can be published more frequently, or updated as new information becomes available.

The focus of the specific duty is on measurable outcomes that will eliminate discrimination, improve equality of opportunity and foster good relations. The school's equality objectives must be designed to achieve these outcomes. The objectives must be specific and measurable, with new objectives being set not more than four years after the previous objectives were set. Schools need to consider how progress towards the objectives will be measured.

The intention is that these considerations should become embedded in schools' policies and practices so that schools routinely consider the impact of decisions they make on disabled pupils, and those who share other protected characteristics.

Example 9: Information gathered by the school shows that disabled pupils are under-represented in participation in after-school activities. The school sets an objective of increasing the participation of disabled pupils in after-school activities to ten percent of all of those attending.

Example 10: an analysis of attendance data shows that disabled pupils have higher rates of absenteeism. The school sets an objective to halve absenteeism amongst disabled pupils over four years.

Example 11: a primary school identifies a significant attainment gap at the end of Key Stage 2 between disabled pupils and pupils who are not disabled. The school sets an objective to double the number of disabled pupils who achieve 'expected' level in English at the end of Year 6.

Example 12: no disabled pupil holds any position of responsibility in the school. The school sets an objective that 5 disabled pupils will be in positions of responsibility in 3 years' time.

Example 13: the school's analysis of behaviour incidents shows significant over-representation of disabled pupils. The school sets a target to halve the number of behaviour incidents involving disabled pupils.

Schools are expected, and it is certainly good practice, to involve disabled pupils in considering what information should be gathered and what objectives should be set. It is good practice to seek parents' views as well. Involving disabled pupils, parents, staff and others in the development of equality objectives, or the review of the school's accessibility plan, can help schools to understand the impact of its policies and practices and to identify effective improvements.

The information and the objectives must be published somewhere that is accessible to the public; most schools use their website.

As with an accessibility plan, the information and objectives required under the specific duties can be published as part of another document, for example: as part of an equality policy or a school improvement plan. Schools that have an equality policy need to check that they have published information and have set objectives as required under the PSED.

19. Positive action

In general, EqA makes positive discrimination unlawful. However, there are some specific exceptions:

EqA allows for the more favourable treatment of disabled people, including disabled pupils in schools; and more favourable treatment does not amount to discrimination against those who are not disabled, see section 8 on *direct discrimination*, above.

EqA also allows schools to take positive action in order to:

- address the impact of a disadvantage that is current or that has happened in the past to those who share a particular protected characteristic;
- meet the particular needs of pupils who share a protected characteristic; or
- facilitate participation in activities where participation of those sharing a particular protected characteristic is disproportionately low.

Positive action can overcome barriers for groups of pupils, improve education and ultimately outcomes. It is focused on groups of pupils rather than individual pupils and might involve designing provision, changing the way provision is made, its timing or location to increase take-up by particular groups of pupils; special arrangements to increase the participation of groups of pupils in school events or activities such as trips abroad; improving careers advice or providing mentoring for particular groups of pupils.

EqA limits positive action in that it must be a proportionate means of achieving one or more of the three aims set out above. However, because the more favourable treatment of disabled pupils is allowed under other parts of EqA, it is not constrained by the considerations that limit positive action.

20. Publication of information

Under CFA, schools, including academies and maintained nursery schools, are required to publish information, their *SEN Information Report*, about the implementation of their SEN policies. The detail of the SEN requirements is specified in regulations^{xxiii}. CFA also requires the SEN Information Report to include information as to particular aspects of schools' duties to disabled pupils^{xxiv}:

- the arrangements for the admission of disabled pupils;
- the steps taken to prevent disabled pupils from being treated less favourably than other pupils;
- the facilities provided to assist access to the school by disabled pupils; and
- the school's accessibility plan.

This information must be published on the school's website.

21. Wider disability responsibilities in the Children and Families Act 2014

There are general duties in Part 3 of CFA that apply to disabled children and young people as well as to those with SEN. The key principles, in section 19, include the importance of: taking account of the views, wishes and feelings of children, their parents and of young people; their full participation in decision-making; information and support to enable them to participate in decision-making; and of support to achieve the best possible educational and other outcomes. LAs must identify disabled children and young people as well as those with SEN; must commission services jointly with other agencies; must integrate services where this will promote well-being or improve quality of services; must publish a local offer of services; must provide information and advice; must keep services under review; and must both co-operate with, and seek the co-operation of, local partners.

All of the duties above apply equally to disabled children, their parents, and to disabled young people as well as to those with SEN.

These duties apply to LAs but, as local partners in the duty to co-operate, schools should anticipate the need to co-operate with the LA in the fulfilment of these duties, including in identifying disabled children and young people; in ensuring disabled children, their parents and disabled young people know about the information and support and the range of services available locally; in meeting high standards of participation; in respecting the views, wishes and feelings of disabled children, their parents or of disabled young people; and in securing the best possible educational and other outcomes.

22. Information and support for children, parents and young people

Duties in CFA require LAs to make information, advice and support available to disabled children, their parents and to disabled young people, as well as to those with SEN. The duty covers the provision of information, advice and support on health and social care provision, as well as education and training. LAs must draw these services to the attention of parents, children and young people, schools and colleges, and must provide contact details of support services, including details of the local Information, Advice and Support Service. Schools will want to make sure that parents, children and young people know about these services and have access to the information, advice and support that they provide.

23. Disability, equality of opportunity and school inspection

When inspecting schools, Ofsted expects to see schools adapt, design or develop a curriculum with high ambition for all pupils, including disabled pupils and pupils with SEN. They expect that curriculum to be designed to meet as many needs as possible from the outset and schools to be proactive in planning adjustments to

facilitate meaningful inclusion; they do not expect schools to offer a reduced curriculum to disadvantaged or disabled pupils or to pupils with SEN.

Ofsted considers how well schools promote equality of opportunity and diversity to ensure pupils understand, appreciate and respect difference. To do this, Ofsted evaluates the experience of particular individuals and groups, such as disabled pupils and pupils with SEN, looking at the experience of a small sample of pupils and considering the way the school is working with a range of agencies to ensure that pupils receive the support they need. For disabled pupils and pupils with SEN, this includes ensuring that reasonable adjustments are made in accordance with EqA.

Ofsted also considers how well those with responsibility for the governance of the school ensure that the school is fulfilling its statutory duties, including those under EqA^{xxv}.

24. Wider considerations: embedding the duties

This guide summarises schools' duties to disabled pupils in EqA and refers to some of the duties to disabled pupils in CFA. Compliance with the duties is, by definition, a requirement. The duties are designed to eliminate discrimination and improve equality of opportunity for disabled pupils, and others protected by EqA. An effective accessibility plan or set of equality objectives makes a difference and is an efficient way of removing barriers for disabled pupils. It can also reduce the extent to which schools need to make individual adjustments for individual pupils. However, the requirements of EqA are more easily met where schools:

- welcome all children and young people and their families;
- adopt values that celebrate difference and promote an inclusive ethos;
- adopt a pro-active approach to identifying barriers and finding practical solutions;
- build relationships with disabled pupils and with their families to inform and enable the participation of disabled pupils in all the opportunities at the school;
- ensure a voice for pupils themselves;
- are ambitious for disabled pupils;
- provide staff with the training and skills they need to include disabled pupils and access to more specialist support to supplement and complement what the school can provide on its own; and
- keep all their arrangements under regular review as different considerations change over time.

A whole school approach that embeds equality considerations in the culture and ethos of the school, in school policies and in everyday decisions, is more likely to achieve equality of opportunity:

... that all pupils can thrive together, understanding that difference is a positive, not a negative, and that individual characteristics make people unique (Ofsted)^{xxvi}

The impact of this should be that, over time, the culture and attitudes of the school community become more welcoming, outcomes for disabled pupils improve, and the school does not have to make so many individual adjustments for individual pupils because, in the widest sense, the school is more accessible for all pupils. In general, schools find that improving the school for disabled pupils has the effect of improving the school for everyone: other pupils, staff and parents too.

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Council for Disabled Children

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Links and resources

Council for Disabled Children (CDC)

www.councilfordisabledchildren.org.uk/

Children's Rights Alliance England (CRAE)

www.crae.org.uk/

Department for Education: Equality Act 2010: advice for schools

<https://www.gov.uk/government/publications/equality-act-2010-advice-for-schools>

Equality and Human Rights Commission

<https://www.equalityhumanrights.com/en>

First-tier Tribunal (SEN and Disability)

www.gov.uk/special-educational-needs-disability-tribunal/overview

Design and construction standards

[Approved Document M: Volume 2 - Buildings other than dwellings | Part M - Access to and use of buildings | Planning Portal](#)

[BS 8300-2:2018 Design of an accessible and inclusive built environment. Buildings. Code of practice \(bsigroup.com\)](#)

[BS 8300-1:2018 Design of an accessible and inclusive built environment. External environment. Code of practice \(bsigroup.com\)](#)

United Nations Convention on the Rights of the Child

www.ohchr.org/en/professionalinterest/pages/crc.aspx

United Nations Convention on the Rights of Persons with Disabilities

<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

References

- ⁱ Department for Education (July 2011 (introduction updated June 2013, latest terminology update December 2021) *Teachers' Standards: Guidance for school leaders, school staff and governing bodies*
- ⁱⁱ Department for Education (2019) *Early Career Framework*
- ⁱⁱⁱ Department for Work and Pensions (2020) *Family Resources Survey 2018/19*
- ^{iv} The Equality Act 2010 (Disability) Regulations 2010 (SI 2010/2128)
- ^v Porter J, Daniels, H, Georgeson J, Hacker J, Gallop V, Feiler A, Tarleton B and Watson D (2008) *Disability Data Collection for Children's Services Research Report*. Department for Children, Schools and Families: RR062
- ^{vi} Department for Education (2015) *Supporting pupils at school with medical conditions: Statutory guidance for governing bodies of maintained schools and proprietors of academies in England*
- ^{vii} Office of the Children's Commissioner (2014) *'It might be better if you looked elsewhere': An investigation into the schools admission process*
- ^{viii} Tribunal decision in the case of Child P
- ^{ix} Office for Disability Issues (2011) *Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability*
- ^x The Equality Act 2010 (Disability) Regulations 2010 (SI 2010/2128)
- ^{xi} Tribunal decision in the case of Child L
- ^{xii} Equality and Human Rights Commission (2010) *What equality law means for you as an education provider - schools*
- ^{xiii} Tribunal decision in the case of Child M
- ^{xiv} Equality and Human Rights Commission (2014) *Technical Guidance for Schools in England*
- ^{xv} Department for Education (2017) *Exclusion from maintained schools, academies and pupil referral units in England: Statutory guidance for those with legal responsibilities in relation to exclusion*
- ^{xvi} Department for Education and Department of Health (2015) *Special educational needs and disability code of practice: 0 to 25 years*
- ^{xvii} The Special Educational Needs and Disability Regulations 2014 (SI 2014/1530) regulation 53 and Schedule 2
- ^{xviii} Department for Education (2015) *Supporting pupils at school with medical conditions: Statutory guidance for governing bodies of maintained schools and proprietors of academies in England*
- ^{xix} Equality and Human Rights Commission (2015) *Technical Guidance: Reasonable Adjustments for Disabled Pupils: Guidance for Schools in England*

xx <https://www.gov.uk/complain-about-school/disability-discrimination>

xxi The Disability Discrimination (Prescribed Times and Periods for Accessibility Strategies and Plans for Schools) (England) Regulations 2005 (SI 2005/3221)

xxii The Disability Discrimination (Prescribed Times and Periods for Accessibility Strategies and Plans for Schools) (England) Regulations 2005 (SI 2005/3221)

xxiii The Special Educational Needs and Disability Regulations 2014 (SI 2014/1530)

xxiv Children and Families Act 2014, section 69(3)(b)

xxv Ofsted (2019) *School Inspection Handbook*

xxvi Ofsted (2019) *School Inspection Handbook*