CHAPTER 9

Equality and non-discrimination

continued

Key points

- Disabled children have had the benefit of protection from discrimination since the first the Disability Discrimination Act (DDA) 1995, and now enjoy protection under the Equality Act (EqA) 2010, as well as under Article 14 of the European Convention on Human Rights (ECHR).
- Despite this, disabled children remain routinely excluded and treated less favourably than others in many areas of public life.
- The EqA 2010 came into force in October 2010 and replaced the DDA 1995 and other previous equality legislation.
- The EqA 2010 outlaws a wide range of discriminatory treatment, alongside harassment and victimisation.
- A failure to make reasonable adjustments so that disabled children are not placed at a substantial disadvantage compared with non-disabled children is also a form of discrimination.
- As well as discrimination against disabled children, family and friends of disabled children will be protected from 'direct discrimination by association'.
- The duties in the EqA 2010 cover every area of public life, including education, service provision and employment.
- The prohibition of discrimination is supported by a public sector equality duty (PSED) and a general power to take 'positive action' to support the achievement of equality.
- Enforcement action in relation to most of the duties under the EqA 2010 can be taken in the county court. Claims against schools are dealt with by the First-tier Tribunal (Special Educational Needs and Disability) in England (except for certain types of admission appeal).

Introduction

9.1 Disabled children in England have had formal legal protection against discrimination since 1995 under the Disability Discrimination Act (DDA) 1995, and now under the Equality Act (EqA) 2010. However, disabled children still experience routine exclusion from many parts of public life – whether through being denied access to school trips on alleged health and safety grounds, or being told that a playground has no equipment that they are able to use. The vision of ordinary lives for disabled children enshrined in the Children Act 1989

(see chapter 3) requires disabled children to be able to access every opportunity available to non-disabled children. This chapter is about some of the legislation which seeks to ensure that this happens.

9.2 This chapter focuses on the provisions of the EqA 2010 and its related codes of practice and guidance, but also draws out the key themes and some of the judgments made both before and since the EqA 2010 came into force. Any reference in this chapter to a section or schedule is, unless the context shows otherwise, a reference to a section in or schedule to the EqA 2010. The chapter also considers the human right to non-discrimination under Article 14 of the European Convention on Human Rights (ECHR).

Legal framework

Discrimination legislation pre-Equality Act 2010

9.3 Protection from discrimination against disabled children in relation to their disabilities was first introduced by the DDA 1995 and then extended by the Special Educational Needs and Disability Act (SENDA) 2001. The DDA 1995 scheme followed earlier legislation prohibiting discrimination on the grounds of sex[1] and race.[2] Under the DDA 1995 scheme, disabled people (including disabled children) were protected from a number of different forms of discrimination in a wide range of contexts, for example, in the provision of goods and services, education, employment, performance of public authority functions and so on.

Equality Act 2010

9.4 The EqA 2010 extends protection from discrimination to people, with what are termed 'protected characteristics', in almost every area of public life. This chapter focuses on the protected characteristic of disability (see paras 9.7–9.15). The Act has two main purposes – to harmonise discrimination law, and to strengthen the law to support progress on equality.[3] Accordingly, the meaning of the EqA 2010's provisions must be interpreted in light of the courts' decisions under predecessor legislation (in this context the DDA 1995 scheme) and consistently with decisions across the different spheres of activity

1 Sex Discrimination Act 1975.
2 Race Relations Act 1976.
3 Explanatory Notes to the EqA 2010 at [10].

that the Act covers and protected characteristics. The principle of equality underpinning the EqA 2010 'is intended to promote and protect the dignity of all persons in society'.[4] The policy of the EqA 2010 is, therefore, to promote equality in every area of public life and as such any exceptions to the duties it imposes are to be interpreted restrictively.[5]

9.5 Further, the meaning of the EqA 2010's provisions must be interpreted in the light of statutory and non-statutory guidance. The Equality and Human Rights Commission (EHRC) has published statutory codes of practice for employment, equal pay, and services, public functions and associations ('the Part 3 Code of Practice').[6] The EHRC has also published non-statutory technical guidance[7] in the areas of schools,[8] auxiliary aids for disabled pupils, further and higher education and the public sector equality duty (PSED) under the EqA 2010.

9.6 This chapter considers the provisions of the EqA 2010 and the codes of practice and guidance of most relevance to disabled children and their families – namely the sections that relate to:

- 'prohibited conduct' (Part 2, Chapter 2);
- services and public functions (Part 3);
- education (Part 6);
- 'advancement of equality', which includes the PSED (Part 11) and to a lesser extent work (Part 5).

It also covers the issue of enforcement (Part 9), which is addressed further in chapter 11 on remedies generally. While other areas such

4 Part 3 Code of Practice, para 13.2.

5 Part 3 Code of Practice, para 15.5.

6 The purpose of the codes of practice is 'to provide a detailed explanation of the Act and to apply legal concepts in the Act to everyday situations where services are provided': Part 3 Code of Practice, p9.Statutory guidance must be taken in to account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant: Equality Act 2006 s15.

7 The EHRC explains that:

> We had originally planned to produce statutory codes of practice on the Public Sector Equality Duty (PSED), which came into force on 5 April 2011, and for statutory codes of practice for Schools and the Further and Higher Education (FEHE) sector. In the light of the Government's position not to lay codes before Parliament, the Commission has decided for now to produce the original text of these codes as technical guidance. Technical guidance is a non-statutory version of a code, however it will still provide a formal, authoritative, and comprehensive legal interpretation of the PSED and education sections of the Act. It will also clarify the requirements of the legislation.
>
> See: www.equalityhumanrights.com/legal-and-policy/legislation/equality-act-2010/equality-act-codes-practice-and-technical-guidance.

8 The English guidance is called Technical Guidance for Schools in England.

as associations (Part 7)[9] and transport (Part 12) may well be of great importance to some disabled children, the aspects of the EqA 2010 listed above are those which should make a difference to the lives of *all* disabled children.

The definition of disability

Equality Act 2010 – a protected characteristic

9.7 EqA 2010 s4 specifies that disability is a 'protected characteristic' for the purposes of the Act.[10] The definition of 'disability' is provided in section 6(1), which states:

> A person (P) has a disability if–
> (a) P has a physical or mental impairment,[11] and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

9.8 This is a deliberately broad definition, and there is no need for a medical diagnosis – what matters is the effect of an impairment, not its cause so that in many cases it will be possible to consider the effects of an impairment (the substantial adverse effect) and to infer from that, that there is an impairment.[12] The elements of the definition are fleshed out by Schedule 1, which:

- provides for regulations to specify conditions which do or do not fall within the definition of 'impairment' (see para 9.10 below);[13]
- states that an impairment is 'long-term' if it has lasted for 12 months or is likely to last for 12 months;[14]

9 Discrimination by organisations such as the Scouts or the Guides is covered by the provisions of the EqA 2010 in relation to associations: Part 3 Code of Practice, 13.7.

10 The other protected characteristics are: age; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

11 Which includes a sensory impairment: Part 3 Code of Practice, para 2.7.

12 *Power v Panasonic UK Ltd* [2003] IRLR 151; and Part 3 Code of Practice, Appendix 1, p282. See also on the meaning of 'impairment' in *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] ICR 1498.

13 Sch 1 para 1.

14 Sch 1 para 2. An impairment will also be 'long term' if it is it is likely to last for the rest of the life of the person affected, where this is less than 12 months. "Likely should be interpreted as meaning that it could well happen rather than it is more probable than not that it will happen": *Boyle v SCA Packaging* [2009] ICR 1056.

- states that an impairment is to be judged as to whether it has a substantial impact, irrespective of any medical or other treatment to alleviate the impact of the impairment;[15]
- states that a severe disfigurement is to be treated as an impairment having 'a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities'; regulations may prescribe circumstances where a severe disfigurement will not be treated as having such an effect;[16]
- specifies that cancer, HIV infection and multiple sclerosis are all disabilities within the meaning of section 6 (so that a child diagnosed with any of these conditions does not need to fulfil any of the other elements of the section 6 test);[17] and
- states that a person with a progressive condition meets the 'substantial adverse effect' test if the condition is likely to result in such an effect in future, even if it does not at the relevant time.[18]

9.9 The schedule further provides a power[19] for regulations to specify certain symptoms or presentations ('effects of a prescribed description') which may or may not amount to 'substantial adverse effects' within the meaning of section 6.

9.10 The Equality Act (Disability) Regulations 2010[20] (the 'Disability Regs 2010') provide a list of broadly anti-social impairments or effects that are excluded from the definition, including addictions and a tendency to start fires. They also provide that persons who are certified as blind, severely sight impaired, sight impaired or partially sighted by a consultant ophthalmologist are deemed to have a disability.

9.11 Perhaps the most significant exclusion for disabled children under the Disability Regs 2010 is 'a tendency to physical or sexual abuse of other persons',[21] an issue often raised in the context of children with behavioural issues, particularly in schools. In *X v The Governing Body of a School*,[22] the Upper Tribunal dismissed a discrimination appeal against the exclusion of a six-year-old girl with autism from her school because she had a 'tendency to physical abuse' as evidenced by her violent behaviour. The Upper Tribunal did not

15 Sch 1 para 5.
16 Sch 1 para 3.
17 Sch 1 para 6.
18 Sch 1 para 8. Regulations may specify what constitutes a progressive condition: para 8(3).
19 Sch 1 para 4.
20 SI No 2128 made pursuant to powers set out in EqA 2010 Sch 2 para 1.
21 Disability Regs 2010 reg 4(1)(c).
22 [2015] UKUT 7 (AAC); [2015] ELR 133.

accept that 'physical abuse' connoted a mental element or a power imbalance.[23] Whether there was a 'tendency to physical abuse' was a factual question for determination by the tribunal, albeit that the stage of the child's development will be a relevant factor as to whether the exclusion applies in their case.[24]

9.12 Importantly, in *X v The Governing Body of a School* the Upper Tribunal held that, as a result, it did not matter that the 'excluded condition' arose out of a legitimate impairment' (autism) which was itself protected under EqA 2010 s6. However, in the more recent case of *C v Governing Body of a School*[25] looked at this issue again, this time in the context of an 11-year-old boy who had been excluded from school for behaving 'aggressively'. His parents brought a claim under the EqA 2010 complaining that the exclusion amounted to disability discrimination. At first instance, the tribunal held that, although L generally met the definition of a disabled person, he had been excluded because of his 'tendency towards physical abuse'. Therefore,[26] he was to be treated as not falling within the definition of 'disability' and was not protected by the EqA 2010 to the extent of that behaviour.

9.13 On appeal, his parents argued that Disability Regs 2010 reg 4(1)(c) breached ECHR Article 14 read with Protocol 1 Article 2 (the right to education) and should, under Human Rights Act (HRA) 1998 s3, be read down so as to comply. The Upper Tribunal agreed, expressly extending the protections of the Act 'to children in education who have a recognised condition that is more likely to result in a tendency to physical abuse'.[27] The approach under *X v The Governing Body of a School* was described as 'repugnant', Judge Rowley finding that:

> . . . in my judgment the Secretary of State has failed to justify maintaining in force a provision which excludes from the ambit of the protection of the Equality Act children whose behaviour in school is a manifestation of the very condition which calls for special educational provision to be made for them. In that context, to my mind it is repugnant to define as 'criminal or anti-social' the effect of the behaviour of children whose condition (through no fault of their own) manifests itself in particular ways so as to justify treating them differently from children whose condition has other manifestations.[28]

23 Paras 109–118.
24 [2015] UKUT 7 (AAC); [2015] ELR 133 at [119].
25 [2019] PTSR 857.
26 Pursuant to Disability Regs 2010 reg 4(1)(c).
27 At [95].
28 At [90].

9.14 It is important to note, however, that even where a child's behaviour still brings them within this definition, a claim of disability discrimination can still be made in relation to treatment which does not relate to that behaviour but is otherwise related to their disability.[29] For example, in the context of reasonable adjustments where a child has both a disability, and also an excluded condition (such as a tendency to physical abuse), the question is whether reasonable adjustments are only directed at the excluded condition or are also directed at the disability. Thus, in *Governing Body of X Endowed Primary School v Special Educational Needs and Disability Tribunal and others*[30] the Administrative Court found that because the reasonable adjustments which were proposed were directed at the whole of the child's behavioural difficulties and not just to the excluded part, the claim for discrimination on the basis of failure to make reasonable adjustments should succeed.

9.15 The Disability Regs 2010 also provide for the position regarding children under six, when the effect of the impairment may not be long term or have a substantial effect on normal day-to-day activities. An inference can be drawn such that a child who is under six years old is deemed to meet the definition where the impairment would normally have a substantive and long-term adverse effect on a person over six years of age.[31]

No protection for 'non-disabled' people

9.16 The EqA 2010 ensures that the status of being 'non-disabled' is not a protected characteristic. This asymmetrical protection is considered to have stemmed from the need to prohibit the historic discrimination against disabled people. As a result, it will not be discrimination under the EqA 2010 for a service or education provider for example, to treat a disabled person more favourably than they treat a non-disabled person.[32]

29 *Edmund Nuttall Law v Butterfield* [2006] ICR 77; [2005] IRLR 751; *P v Governing Body of a Primary School* [2013] UKUT 154 (AAC).

30 [2009] IRLR 1007, paras 69–71.

31 Disability Regs 2010 reg 6.

32 EqA 2010 s13(3).

Guidance

9.17 Guidance has been issued about the matters to be taken into account in determining any question for the purposes of considering whether a person is disabled under EqA 2010 s6(1).[33]

'Disability' in international law

9.18 Further guidance on the definition on 'disability' comes from the UN Convention on the Rights of Persons with Disabilities (UNCRPD), which the UK ratified in 2009. In the same year it was also approved by the European Union, and as an international agreement, this is binding on and prevails over acts of the European Union.[34] The UNCRPD provides that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.[35]

9.19 When deciding whether someone meets the test of a disability for the purposes of either the EqA 2010 or the HRA 1998 (see para 9.138), domestic courts or tribunals may be assisted by a number of European cases concerning the meaning of disability. The European definition is, however, broadly similar to the definition provided for in the EqA 2010: see *HK Danmark v Dansk almennyttigt Boligselskab*,[36] in which the European Court of Justice (ECJ) defined 'disability' as:

> . . . a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.[37]

33 HM Office for Disability Issues, *Equality Act 2010 Guidance – Guidance on matters to be taken into account in determining questions relating to the definition of disability*. Issued under EqA 2010 s6(5) and Sch 1 Pt 2, paras 10–16.

34 Though it does not have direct effect, rather the European directives must be interpreted in a manner consistent with the convention: *Z v A Government Department* Case C-363/12, [2014] IRLR 563; [2014] EqLR 316, ECJ. See chapter 2 for the role of international conventions such as the UNCRPD in domestic law.

35 Recital (e).

36 Case C-335/11, [2013] IRLR 571, ECJ.

37 Case C-335/11, [2013] IRLR 571, ECJ at [38].

Discrimination – 'prohibited conduct'

Overview

9.20 The EqA 2010 effectively outlaws certain forms of behaviour, in so far as they are directed against disabled children and adults, and others with 'protected characteristics'. The Act refers to these forms of behaviour as types of 'prohibited conduct', which is described as 'discrimination', victimisation and harassment, and consists of (so far as is particularly relevant to disabled children):

- direct discrimination (section 13);
- discrimination arising from disability (section 15); and
- indirect discrimination (section 19).[38]

9.21 A 'failure to comply with a duty to make reasonable adjustments' also constitutes discrimination: see paras 9.44–9.47. Each of these forms of discrimination is considered below.

Direct discrimination

9.22 Direct discrimination, the most obvious form of discrimination, is prohibited by EqA 2010 s13. In the context of disability, direct discrimination takes place when a decision is taken concerning a disabled person which is based on prejudicial or stereotypical assumptions concerning disability generally, or the specific disability in question. As a general rule,[39] direct discrimination is simply unlawful and incapable of 'justification'.[40]

9.23 What constitutes 'less favourable treatment' should not be treated too onerously and should take into account the perception of the person claiming to have experienced discrimination. A good example of this is the case of *R v Birmingham City Council ex p Equal Opportunities Commission*,[41] a judicial review where it was claimed that Birmingham City Council treated girls less favourably by

38 Collectively defined as 'disability discrimination': see EqA 2010 s25(2). The EqA 2010 also prohibits instructing, causing or inducing someone to discriminate against, harass or victimise a disabled person and knowingly helping someone discriminate against, harass or victimise another person.

39 For the specific statutory exceptions, see EqA 2010 s191 and Sch 22.

40 Solely in relation to some areas of employment, there is a limited exception for 'genuine occupational requirements' and specifically the provisions relating to disability are disapplied in relation to service or work experience opportunities in the armed forces; Employment Code, para 13.22.

41 [1989] AC 1155, [1989] IRLR 173, HL.

providing fewer places in selective schools for them. The House of Lords agreed: it was not necessary to show that selective education was 'better' than non-selective education to make good the point. It was sufficient that, by denying the girls the same opportunity as the boys, the council was depriving them of a choice which was valued by them (or, at least, by their parents).

9.24 Accordingly, the Part 3 Code of Practice suggests that '[l]ess favourable treatment could also involve being deprived of a choice or excluded from an opportunity'.[42] As both of these are routine features of the lives of disabled children, the EqA 2010 has the potential in this respect to require significant changes in the practice of service providers, public authorities and others.

9.25 In most circumstances, direct discrimination requires that the service provider's treatment of the person is less favourable than the way the service provider treats, has treated or would treat a person who does not have the protected characteristic.[43] This other person is referred to as a 'comparator' – a hypothetical comparator rather than an actual person can be relied on if need be. The EqA 2010 requires that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case.[44] However, it is not necessary for the circumstances of the two people to be identical in every way; what matters is that the circumstances which are relevant to the treatment are the same or nearly the same for both them and the comparator. For the purpose of direct discrimination on the grounds of disability, the EqA 2010 does state that the circumstances includes a person's abilities.[45]

9.26 While the comparator for direct disability discrimination is the same as for other types of direct discrimination, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).[46]

42 Part 3 Code of Practice, para 4.5.

43 The same analysis would apply to other persons covered by the EqA 2010, for example schools or employers.

44 EqA 2010 s23.

45 EqA 2010 s23(2)(a).

46 EqA 2010 s23(2)(a).

9.27 Because of this, in practice, direct discrimination is rarely successfully raised in the context of disability, where discrimination in more likely to occur as a result of some manifestation of the disability than the disability per se. However, where it is relevant is in those cases where assumptions are made about a disability or the effects thereof. For example, the technical guidance issued by the EHRC gives some guidance as to what might amount to direct discrimination in the context of schools:

a. A school tells a pregnant school pupil that she will not be able to continue with practical science lessons because it is a health risk. The pupil and her parents complain to the school, because there is no demonstrable health risk in the activities being carried out. This is likely to be direct discrimination because of pregnancy.

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

c. A school organises a trip to the theatre to see a Shakespeare play. The school decides that a pupil with a hearing impairment would receive greater benefit from watching a subtitled film version of the play, so it arranges for her to stay behind at school to watch the film in the audiovisual suite. The pupil, however, would prefer to attend the theatre to see the play with her peers. Although the school may consider its intentions to be good, preventing the pupil from seeing the play at the theatre is likely to be direct disability discrimination.

9.28 As the technical guidance makes clear, direct discrimination is unlawful, irrespective of the school's motive or intention, and regardless of whether the less favourable treatment of the pupil is conscious or unconscious.[47] Indeed, in a number of cases the motives have been found to be well meaning, benign and even laudable, but nonetheless discriminatory.[48]

Discrimination arising from disability

9.29 Discrimination arising from disability, prohibited by EqA 2010 s15, was the government's response to the decision of the House of Lords

47 Para 5.7.

48 See eg *R (E) v JFS Governing Body* [2010] 2 AC 728.

in the case of *Lewisham LBC v Malcolm*[49] which held that the comparator for 'less favourable treatment' became a non-disabled person with the same characteristics, or who behaved in the same way, as the disabled person. This meant that as long as the disabled child was treated in the same way as a non-disabled child exhibiting the same behaviour or having the same characteristic, there would be no less favourable treatment. What it ignored, of course, was that the behaviour or characteristic in question may be manifestation or consequence of the disability itself.

9.30 Section 15 attempted to resolve this problem by:

> . . . re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment.[50]

It removed the need for any comparator[51] and specifies instead that a person discriminates against a disabled person if he or she:

- treats him or her 'unfavourably'[52] 'because of something arising "in consequence of" his or her disability';[53] and
- cannot show that the treatment is 'a proportionate means of achieving a legitimate aim'.[54]

9.31 Notably, there is no need to compare a disabled person's treatment with that of another person to prove a claim for discrimination arising from a disability. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of their disability.

49 [2008] UKHL 43; [2008] 1 AC 1399.

50 Explanatory Notes to the EqA 2010 at [70].

51 Part 3 Code of Practice, para 6.7.

52 Meaning that the disabled person is put at a disadvantage: Part 3 Code of Practice, para 6.8.

53 Meaning 'anything which is the result, effect or outcome of a disabled person's disability': Part 3 Code of Practice, paras 6.9–6.11.

54 Section 15(1)(a) and (b). Part 3 Code of Practice, para 6.2 refers to this as 'objective justification'. The term 'legitimate aim' is not defined in the EqA 2010, but Part 3 Code of Practice, para 6.19 states that a legitimate aim 'must be legal, must not be discriminatory in itself, and it must represent a real, objective consideration'. A service provider who is simply aiming to reduce costs or improve competitiveness 'cannot expect to satisfy the test': Part 3 Code of Practice, para 6.20. 'Proportionate' is also not defined in the EqA 2010 but for treatment to be proportionate it must be necessary: Part 3 Code of Practice, para 6.20. Again, financial considerations alone cannot render treatment proportionate: Part 3 Code of Practice, para 6.24.

9.32 Unlike direct discrimination, discrimination arising from disability can be justified, if it is a proportionate means of achieving a legitimate aim (the 'justification defence').

9.33 The Part 3 Code of Practice gives the following as an example of discrimination arising from disability in a service provision context:

> A mother seeks admission to a privately run nursery for her son who has Hirschprung's disease, which means that he does not have full bowel control. The nursery says that they cannot admit her son because he is not toilet trained and all the children at the nursery are. The refusal to admit the boy is not because of his disability itself; but he is experiencing detrimental treatment as a consequence of his disability.[55]

9.34 It has been held that the 'something' which is the cause of the unfavourable treatment must be identified by the court or tribunal. In particular, if there are a number of different reasons why a child might have been treated unfavourably, the court or tribunal will need to make findings as to which were relevant.[56]

9.35 Where that something is identified, the court or tribunal will need to consider whether the unfavourable treatment 'arose in consequence' of that disability. This means asking whether the disability was 'a reason and thus an effective cause'[57] of the unfavourable treatment. Importantly, the disability does not need to be the sole or even the main cause of the unfavourable treatment.

9.36 Where a person is treated unfavourably because of something arising 'in consequence of' his or her disability, the onus will generally be on the person responsible for the treatment to show that what was done was a proportionate means of achieving a legitimate aim. For example, in the case of behavioural difficulties in the classroom, the 'legitimate aim' might be the protection of the health and safety of teachers and other pupils, or the maintenance of coherent behaviour policy. A proportionate response might be implementation of 'reasonable adjustments' – for example, staff training on de-escalation techniques. In such cases, a failure to make a relevant reasonable adjustment is likely to make it 'very difficult' for an individual to

55 Part 3 Code of Practice, para 6.4.

56 *P v Governing Body of a Primary School* [2013] UKUT 154 (AAC) [52].

57 *Governing Body of X Endowed Primary School v Special Education Needs and Disability Tribunal and others* [2009] EWHC 1842 (Admin); *Edmund Nuttall Ltd v Butterfield* [2006] ICR 77; and *P v Governing Body of a Primary School* [2013] UKUT 154 (AAC) [52].

show that any potentially discriminatory treatment was a proportionate means of achieving a legitimate aim.[58]

9.37 In determining whether otherwise discriminatory conduct has been justified, three elements have been explained by Mummery LJ in *R (Elias) v Secretary of State for Defence:*[59]

> First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?

9.38 This was explained further by the Court of Appeal in *Hardy and Hansons Plc v Lax*[60] which confirmed that the assessment as to proportionality is one for the court or tribunal to make itself, and the party seeking to justify its actions is *not* entitled to any margin of discretion. Accordingly, whether or not a measure is justified will not depend upon the subjective belief of the alleged discriminator and the test is not whether they considered other alternatives at the time of implementing the measure in question. Neither will an objective justification be undermined because the s consideration of the issue was inadequate or procedurally flawed, although, of course, that might – as a matter of fact – have meant that they failed to appreciate that there were other, less discriminatory, alternatives available.[61]

9.39 No discrimination contrary to section 15 occurs if the alleged discriminator can show that he or she did not know, and could not reasonably have been expected to know, that the disabled person 'had the disability'. Knowledge is of all the facts that constitute a disability, and it is therefore no answer that the alleged discriminator had been (incorrectly) advised that the child was not disabled.[62]

9.40 In the context of services and public functions, the Code of Guidance states that in order to rely on this defence, 'a service provider must do all they can reasonably be expected to do to find out if a person has a disability'.[63] Further, public bodies and those exercising public functions (eg schools) are subject to the PSED, which

58 Part 3 Code of Practice, para 7.15; the code also makes the point that unlawful discrimination may still arise even if a reasonable adjustment has been made, if the adjustment is unrelated to the treatment complained of.

59 [2006] 1 WLR 3213, para 165.

60 [2005] ICR 1565 paras 31–33.

61 *Hardy and Hansons v Lax,* para 35

62 *Gallop v Newport* [2013] EWCA Civ 1583; [2014] Eq LR 141 IRLR 211.

63 Para 6.16.

requires enquiries to be made once it is on notice that there may be a relevant disability.[64]

Indirect discrimination

9.41 Another type of discrimination likely to be relevant to disabled children is indirect discrimination, contrary to EqA 2010 s19. These provisions aim to address forms of discrimination which, while they do not explicitly entail or propose different treatment, in practice disadvantage people with particular protected characteristics.[65] Indirect discrimination occurs if a person applies a 'provision, criterion or practice' (PCP) which is discriminatory in relation to (in this case) a person's disability.[66] A four-stage test is set out[67] to determine whether a particular PCP is discriminatory in relation to a disabled child – it will be if:

1) it applies, or would apply, to people who are not disabled;
2) it puts, or would put, disabled people 'at a particular disadvantage'[68] when compared with non-disabled people;
3) it puts, or would put, the individual disabled child at that disadvantage; and
4) the person applying or operating the provision, criterion or practice cannot show it to be a proportionate means of achieving a legitimate aim.[69]

9.42 The Part 3 Code of Practice suggests[70] that it is 'unlikely' that the protected characteristic in a claim of indirect discrimination will be taken to be disability in general, but rather the individual's specific disability. Indeed, EqA 2010 s6(3)(b) provides that 'a reference to persons who share a protected characteristic is a reference to persons who have the same disability'.[71] It may, therefore, be that if an indi-

64 *Pieretti v Enfield LBC* [2011] PTSR 565; (2010) 13 CCLR 650.

65 Part 3 Code of Practice, para 4.4.

66 EqA 2010 s19(1). The terms 'provision, criterion or practice' overlap and should be 'construed widely so as to include, for example, any (formal or informal) policies, rules, practices, arrangements, criteria, prerequisites, qualifications or provisions': Part 3 Code of Practice, para 6.3. The terms also cover proposals and one-off discretionary decisions: Part 3 Code of Practice, para 6.4.

67 EqA 2010 s19(2).

68 EqA 2010 s19(2)(b).

69 See fn 53 above for discussion of the concepts of 'proportionate' and 'legitimate aim'.

70 At para 5.17.

71 See also *R (Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin).

vidual with a visual impairment claims to have been indirectly discriminated against, the appropriate comparator would be a person without any visual impairment, rather than a non-disabled person.

9.43 Arguably, because a failure to make reasonable adjustments will also amount to discrimination (see below), it may be that the indirect discrimination provisions of the EqA 2010 add little to the protection afforded to disabled children. However, where indirect discrimination comes in to its own is in anticipatory situations where, for example, a service provider proposes to introduce a new scheme, new charges, or to re-locate a service.

Reasonable adjustments

9.44 The EqA 2010 protects disabled people from discriminatory treatment in specified areas by the imposition of a duty to make reasonable adjustments for them.[72] The duty is anticipatory,[73] continuing and evolving, and seeks to level the playing field. The Part 3 Code of Practice explains that in a services context, the policy of the EqA 2010 is to 'provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large'.[74]

9.45 There are three elements to the reasonable adjustment duty, not all of which apply in every context as will be explained below:[75]

1) a requirement, where a 'provision, criterion or practice'[76] puts a disabled person at a substantial disadvantage[77] in comparison with persons who are not disabled, to take such steps as is reasonable to avoid the disadvantage;[78]
2) a requirement, where a 'physical feature' puts a disabled person at a substantial disadvantage in comparison with persons who are

72 The generic elements of which are set out at EqA 2010 ss20–22.

73 Part 3 Code of Practice, para 7.3.

74 Part 3 Code of Practice, para 7.4.

75 EqA 2010 s20(2).

76 'Provision, criterion or practice' is to be interpreted broadly and can relate to a one-off decision; see eg *British Airways plc v Starmer* [2005] IRLR 862.

77 Meaning more than minor or trivial: Part 3 Code of Practice, para 7.11 and EqA 2010 s212(1). Whether disadvantage is substantial is measured by comparison with what the position would be if the disabled person in question did not have a disability. It is more likely to be reasonable for a service provider with substantial financial resources to have to make an adjustment with a significant cost than for a service provider with fewer resources: Part 3 Code of Practice, paras 7.30 and 7.31.

78 EqA 2010 s20(3).

not disabled, to take such steps as is reasonable to avoid the disadvantage;[79] and

3) a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with persons who are not disabled, to take such steps as is reasonable to 'provide the auxiliary aid'[80] or 'service'.[81]

9.46 A further specific aspect of the duty is to provide information in accessible formats.[82] Disabled people cannot be charged for the costs of making the reasonable adjustment.[83] The content of the duty in specific areas is governed by schedules to the Act as set out in section 20(13), the most relevant here being services and public functions (Schedule 2) and education (Schedule 13).

9.47 A failure to comply with any of the three aspects of the duty (if applicable) set out above is a breach of the duty[84] and constitutes discrimination.[85] Importantly, there is no defence of justification or proportionality in a reasonable adjustments case, and the duty to make reasonable adjustments is discharged only once the complainant is no longer at a substantial disadvantage. Accordingly, it is no answer to say that some adjustments were made or some steps taken, if it was not enough to prevent the child from being at a disadvantage. The question is whether 'one more step' would have been reasonable.[86]

Discrimination because of association or perception

9.48 To a limited extent, the EqA 2010 also protects against direct discrimination because of association with a disabled person, or as to the 'perception' that a person has or will develop a disability.[87]

79 EqA 2010 s20(4). This potentially includes removing the feature, altering it or providing a reasonable means of avoiding it: EqA 2010 s20(9). The duty applies to physical features in the broadest sense, including 'any other physical element or quality': EqA 2010 s20(10). A non-exhaustive list of physical features is provided by Part 3 Code of Practice, para 7.60.

80 EqA 2010 s20(6).

81 Services are included within this aspect of the duty by EqA 2010 s20(11). An auxiliary aid or service is 'is anything which provides additional support or assistance to a disabled person', for a list of examples see Part 3 Code of Practice, para 7.47.

82 EqA 2010 s20(6).

83 EqA 2010 s20(7).

84 EqA 2010 s21(1).

85 EqA 2010 s21(2).

86 *Archibald v Fife Council* [2004] IRLR 651.

87 EqA 2010 s13(1) and see also s26(4).

9.49 In the case of discrimination because of perceived disability, however, the alleged discriminator must believe that all the elements in the statutory definition of disability are present – though it is not necessary that he or she should attach the label 'disability' to them.[88] Accordingly, someone who merely considers that a child is 'not very bright',[89] for example, or is clumsy,[90] does not perceive 'disability'.

9.50 Discrimination of this kind can arise only in the context of direct discrimination where the requirement is that the person has been treated less favourably 'because of' a disability. However, in relation to discrimination arising from disability, indirect discrimination or reasonable adjustments, the wording of the respective sections requires that the claimant be 'a disabled person' or, in the case of indirect discrimination, that the complainant 'shares' the protected characteristic with others.[91]

9.51 However, direct discrimination (and harassment and victimisation) can arise when a person is treated less favourably as a result of the person's association with a disabled child – for instance, a parent denied a business loan simply because he or she lived with a disabled child. Accordingly, in *Coleman v Attridge Law*[92] the Grand Chamber of the ECJ interpreted the Framework Directive so as to prohibit discrimination against persons *associated with* a disabled person. In Sharon Coleman's case, she argued that her employer made it difficult for her to get time off work to care for her disabled son, whereas it placed no similar restrictions on other employees who took time off for other reasons.[93]

Harassment and victimisation

9.52 Finally, EqA 2010 Part 2 outlaws two specific forms of prohibited conduct – harassment and victimisation.

9.53 Three different kinds of harassment are prohibited:

88 Para 35.

89 *Dunham v Ashford Windows Ltd* [2005] I.C.R. 1584 paragraph 37.

90 *English v Thomas Sanderson Blinds* [2009] ICR 543 paras 48–49.

91 See *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763; [2014] EqLR 553 where the Court of Appeal refused to extend protection to persons associated with a disabled person in the context of the duty to make reasonable adjustments.

92 (C 223/08) [2008] ECR I–5603.

93 Part 3 Code of Practice, paras 5.16 and 5.20–21.

1) A person engages in 'unwanted conduct'[94] related to disability and the conduct has the purpose of violating the child's dignity or 'creating an intimidating, hostile, degrading, humiliating or offensive environment'.[95]
2) The conduct is as above but is of a 'sexual nature'.[96]
3) Less favourable treatment of a child because they have submitted to or rejected sexual harassment or harassment relating to sex (or gender reassignment in a further and higher education, services and work context).[97]

9.54 It is possible to have unwanted conduct 'related to a disability', where the child himself or herself is not disabled but is harassed because of the disability of someone with whom he or she is associated. It may also be possible, for a child who has difficulties falling short of a disability, to claim in relation to *perceived* disability.[98] However, there must be a close nexus between the unwanted behaviour and a disability satisfying the full statutory test, whether perceived or actual. For example, calling an able-bodied but clumsy child a 'spastic', while offensive, does not necessarily impute perceived disability and is not therefore harassment contrary to the EqA 2010.[99]

9.55 Whether the conduct has the necessary purpose or effect should be judged in all the circumstances, including the perceptions of the disabled child.[100] Clearly in cases involving sexual harassment of a minor, there is other relevant legislation such as that covering criminal behaviour.

9.56 Victimisation occurs if a person is subjected 'to a detriment' because he or she does, or it is believed that he or she has done or may do, a 'protected act'.[101] The 'protected acts' are, in essence, any act done in relation to the EqA 2010. This will include bringing a claim that there has been disability discrimination, but may also

94 Unwanted conduct can include any kind of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour: Part 3 Code of Practice, para 9.3.

95 EqA 2010 s26(1).

96 EqA 2010 s26(2).

97 EqA 2010 s26(3).

98 *English v Thomas Sanderson Blinds* [2009] ICR 543.

99 *English v Thomas Sanderson Blinds* [2009] ICR 543 paras 48–49; *Peninsula Business Service Ltd v Baker* [2017] ICR 714.

100 EqA 2010 s26(4).

101 EqA 2010 s27(1).

include a protest or complaint of discrimination.[102] A person can be unlawfully victimised, even though he or she does not have the 'protected characteristic'. Accordingly, a mother of a disabled child could make such a claim if she were told that she would be refused a carer's service (see chapter 8, paras 8.16–8.22) if she complained about the disability discrimination she believed to be taking place in a children's centre. If a school subjects a pupil to a detriment because his or her parent or sibling has carried out a protected act, this will also amount to victimisation of the pupil.[103]

Services and public functions

Provision of services

9.57 Service providers[104] are prohibited from discriminating against disabled children and people with other protected characteristics. However, service providers (and persons performing public functions, see para 9.64 below) are not prohibited from discriminating against children on grounds of age.[105] As such, a disabled child could bring a discrimination claim against a service provider in relation to the child's status as a disabled person but not his or her status as a child.

9.58 The Part 3 Code of Practice states that:

> Part 3 is based on the principle that people with the protected characteristics defined in the Act should not be discriminated against when

102 EqA 2010 s27(2).

103 EqA 2010 s86.

104 A 'service provider' is a person concerned with the provision of a service to the public, whether for payment or not: EqA 2010 s29(1). The term encompasses those providing goods and facilities as well as services: EqA 2010 s31(2). It also includes services provided in the exercise of a public function: EqA 2010 s31(3).The EHRC's Technical Guidance for Schools in England makes clear at para 1.4 that early years education providers other than nursery schools maintained by a local authority and nursery education provided by any school (either maintained or independent) have duties under Part 3 of the EqA 2010 as service providers. Local authorities have obligations under the education provisions of the Act where they are the responsible body for the school; in relation to their other education-related functions, most of these will be covered by Part 3 of the Act.

105 See EqA 2010 s28(1)(a): 'This Part does not apply to the protected characteristic of age, so far as relating to persons who have not attained the age of 18.'

using any service provided publicly or privately, whether that service is for payment or not.[106]

9.59 The EqA 2010 does not distinguish between service providers of different types or size; the same duties apply to all service providers, although the Part 3 Code of Practice recognises that the way the duties are put into practice may vary between service providers – for example, what might be a reasonable adjustment for a large and well-resourced service provider to make might not be for one that is small and poorly resourced.[107]

9.60 In particular, service providers must not:

- discriminate against a disabled child who requires[108] their service by not providing that service[109] (see paras 9.22–9.43 for the meaning of 'discriminate');
- discriminate against a disabled child while providing them with a service by providing it on worse terms or with a poorer quality than that offered to others, terminating the service or 'subjecting [the child] to any other detriment';[110]
- harass a disabled child who requires or is receiving their service[111] (see para 9.52 for the meaning of 'harassment'); or
- victimise a disabled child by not providing the service or providing it on worse terms[112] (see para 9.56 for the meaning of 'victimisation').

9.61 Service providers are also subject to the duty to make reasonable adjustments;[113] see paras 9.44–9.47. The Part 3 Code of Practice suggests that service providers are not expected to anticipate the needs of every individual who may wish to use their services, but to consider what reasonable steps may be required to overcome barriers faced by persons with particular kinds of disability – the examples given being visual impairments or mobility impairments.[114] This of course begs the question as to whether it would be 'reasonable' for a

106 Part 3 Code of Practice, p7.

107 Part 3 Code of Practice, para 7.30

108 'Requiring' a service also means 'seeking to obtain or use the service': EqA 2010 s31(6).

109 EqA 2010 s29(1). 'Not providing the service' also means providing a poorer quality of service or providing it on less favourable terms or in a less favourable manner than it is generally offered to the public: EqA 2010 s31(7).

110 EqA 2010 s29(2).

111 EqA 2010 s29(3).

112 EqA 2010 s29(4) and (5).

113 EqA 2010 s29(7)(a).

114 Part 3 Code of Practice, para 8.22.

service provider not to anticipate the need to make adjustments to ensure access for persons with other types of disability. The Code of Practice does suggest that, once a service provider becomes aware of the requirements of a particular disabled person, it may be reasonable for them to take a particular step to meet their individual needs.[115]

9.62 Service providers also need to take active steps to ensure that discrimination is not occurring in the provision of their services.[116] This is particularly so as a service provider will be liable for unlawful acts committed by their employees unless they have taken reasonable steps to prevent such acts.[117] Service providers are advised by the Part 3 Code of Practice to take a number of steps to ensure compliance with their duties, including establishing a policy to ensure equality of access to their services and communicating this policy effectively to their staff.[118]

9.63 The EHRC has issued a range of specific non-statutory guidance concerning, for example, rights to equality in relation to healthcare and social care services (which sets out how the EqA 2010 applies to healthcare services provided both in clinical settings and the home) and in relation to services provided by local councils and government departments.[119]

Performance of public functions

9.64 In addition to duties on service providers, EqA 2010 Part 3 places duties on persons performing public functions. Together, these duties mean that every action (or inaction) of a public authority and the exercise of every public function (even if not related to the provision of services) is covered by the EqA 2010 – unless specifically excluded.[120]

115 Part 3 Code of Practice, para 8.24.

116 Part 3 Code of Practice, para 4.10.

117 Part 3 Code of Practice, para 3.10.

118 Part 3 Code of Practice, para 4.11.

119 The latest guidance was published in March 2011 and was last updated in October 2018.

120 EqA 2010 s29(6). The public functions provisions are residual and apply only where other provisions of the EqA 2010 do not: Part 3 Code of Practice, para 12.2. See also Part 3 Code of Practice, para 12.20.

9.65 The term 'public function' has the same meaning in the EqA 2010 as the phrase 'function of a public nature' within the HRA 1998.[121] For the purposes of the Act, only those functions of a public authority which are not services and do not fall within Part 4 (premises), Part 5 (work) and Part 6 (education) of the Act are covered by the public function provisions. Often the public authority will be acting under a statutory power or duty when performing such a function. Examples of such activities would be law enforcement or the collection of taxes.[122]

9.66 In practice, the duties under the EqA 2010 imposed on persons exercising public functions and those providing a service are 'essentially the same'.[123] The duty in relation to public functions is, however, more clearly expressed: a person carrying out a public function must not 'do anything that constitutes discrimination, harassment or victimisation'.[124] Persons carrying out a public function are also subject to the reasonable adjustments duty.[125]

9.67 There has been limited case-law concerning the duty prohibiting discrimination by public authorities. Under the DDA 1995 scheme,[126] the leading authority was *R (Lunt and another) v Liverpool CC*;[127] due to the similarity in the statutory schemes, this case still provides useful guidance. The case involved an application by a vehicle developer for approval of a specific type of taxi in Liverpool. The local authority's refusal was challenged successfully on the ground that the council had failed to take into account a class of wheelchair users with wheelchairs of a certain length and that this failure amounted to

121 EqA 2010 s31(4). This term has been the subject of significant judicial consideration within the Human Rights Act 1998 scheme. Although it should be given a broad interpretation, there will be occasions where it will not be obvious if a body is providing a function of a public nature – for instance, a private company carrying out a function under contract from a local authority. See Lester, Pannick and Herberg, *Human rights law and practice*, 3rd edn, LexisNexis, 2009, para 2.6.3. Under Care Act 2014 s73, a registered care provider providing care and support to a disabled young person aged over 18 or support to their carer, in the course of providing personal care or residential accommodation, is taken to be exercising a function of a public nature in providing the care or support where the care or support is arranged or paid for by a local authority. However, such organisations would almost certainly be covered as service providers under the EqA 2010 scheme.

122 Part 3 Code of Practice, para 11.13.

123 Part 3 Code of Practice, para 11.17.

124 EqA 2010 s29(6).

125 EqA 2010 s29(7)(b).

126 DDA 1995 s21B.

127 [2009] EWHC 2356 (Admin); [2010] RTR 5.

unjustified discrimination. The approach taken in *Lunt* was followed by the court in *R (Gill) v Secretary of State for Justice*,[128] where a prisoner had been prevented from accessing offending behaviour programmes in prison because of his learning disability. The court held that the secretary of state had unlawfully breached the duty on public authorities under the DDA 1995 scheme and had discriminated against the prisoner by failing to provide programmes which were accessible to him.[129]

9.68 The same approach was adopted by the Court of Appeal in *ZH v Commissioner of Police of the Metropolis*.[130] An autistic boy had become 'stuck' at the side of a swimming pool, and jumped into the water when approached by police. He ended up being restrained by the police, and put in the cage at the back of a police van. The Court of Appeal upheld a decision that the police had failed to make reasonable adjustments (this case was also argued under the DDA 1995 scheme). The police should have consulted the boy's carers from the school (at least one carer was present the whole time), to inform themselves properly before taking any action which led to the application of force. Their treatment of him was also in breach of human rights law.

Reasonable adjustments – service providers and public functions

Overview

9.69 The operation of the duty to make reasonable adjustments on service providers and persons carrying out a public function is governed by EqA 2010 Sch 2.[131] The schedule specifies that all three aspects of the reasonable adjustment duty apply:[132] see para 9.45. In addition to the duty to help disabled persons avoid the disadvantage they might face in relation to a physical feature, service providers and persons carrying out a public function have an additional duty to 'adopt a reasonable alternative method of providing the service or exercising the function'.[133]

128 [2010] EWHC 364 (Admin); (2010) 13 CCLR 193.

129 [2010] EWHC 364 (Admin); (2010) 13 CCLR 193 at [80].

130 [2013] EWCA Civ 69; (2013) 16 CCLR 109.

131 Sch 2 para 1 states that the schedule applies where a duty to make reasonable adjustments is imposed by this Part of the Act.

132 Sch 2 para 2(1).

133 Sch 2 para 2(3)(b).

9.70 The meaning of 'substantial disadvantage'[134] in relation to the exercise of a public function is either being placed at a substantial disadvantage in relation to a potential benefit or suffering an 'unreasonably adverse experience' when being subjected to a 'detriment'.[135]

Exceptions

9.71 EqA 2010 Sch 2 contains an important exception to the reasonable adjustment duty on service providers. The duty does not require a service provider to take any step which would 'fundamentally alter' the nature of the service or of the trade or profession of the service provider.[136]

9.72 The use of the phrase 'fundamentally alter' indicates that this is a high threshold which is not intended to be a general 'get out clause' to prevent service providers from making reasonable adjustments in favour of disabled children and others with protected characteristics. A more straightforward exception is also established in relation to persons carrying out a public function, who are not required by the duty to take a step which they have no power at law to take.[137]

9.73 Schedule 3 exempts from the duties on service providers and persons carrying out public functions:

- parliament;[138]
- the preparation or consideration of legislation in the UK Parliament or the devolved Scottish Parliament and Welsh Assembly;[139]
- judicial functions;[140]
- a decision not to commence or continue criminal proceedings;[141]
- the armed forces;[142]
- the security services;[143]
- specified immigration decisions;[144] and
- transport by air[145] or by land other than in specified vehicles.[146]

134 See para 9.45.
135 Sch 2 para 2(5).
136 Sch 2 para 2(7).
137 Sch 2 para 8.
138 EqA 2010 Sch 3 para 1.
139 EqA 2010 Sch 3 para 2.
140 EqA 2010 Sch 3 para 3(1)(a).
141 EqA 2010 Sch 3 para 3(1)(c).
142 EqA 2010 Sch 3 para 4.
143 EqA 2010 Sch 3 para 5.
144 EqA 2010 Sch 3 para 16.
145 EqA 2010 Sch 3 para 33.
146 EqA 2010 Sch 3 para 34.

9.74 Other than the above specified exceptions, the duties apply to all service providers and all those carrying out a public function. The EqA 2010 thereby obliges a wide range of public and private individuals and organisations to consider their policies, procedures and practices to ensure that they are avoiding discrimination and making necessary reasonable adjustments.

Education

Overview

9.75 It is well documented that major inequalities remain for certain groups which prevent some individuals from making the most of their abilities and talents and achieving their full potential. This is certainly the case for disabled pupils (see in this context paras 1.65–1.70 and chapter 4, where the duties in relation to children and young people with special educational needs (SEN) are discussed). In one early DDA 1995 case,[147] a disabled child was excluded from his school's nativity play, prevented from making a Christmas card to take home, was not invited to the school disco and was left out of a school trip and a class photograph. The school was ordered to apologise, to revise its policies for disabled pupils and for recruiting staff and the governing body and staff also had to attend disability equality training. While it is hoped that such blatant examples of discrimination will be rare, the equality duties on education providers and, in particular, on schools remain of central importance to the life chances of disabled children.

9.76 EqA 2010 Part 6 Chapter 1 is concerned with education provided by all schools[148] (and local education authorities (LEAs) in the context of accessibility strategies, see paras 9.80–9.82).[149] Chapter 2 of Part 6 deals with further and higher education, including further education

147 Personal correspondence with the authors, 25 July 2010.

148 Meaning schools maintained by the local education authority, academies and free schools, and independent schools, both special and mainstream: EqA 2010 s85(7). Where schools are providing a non-educational service, for example through renting their premises to a community group, they are covered by the provisions of Part 3 of the EqA 2010 in relation to service providers: Part 3 Code of Practice, para 11.8.

149 See further, Philippa Stobbs, *Disabled Children and the Equality Act 2010: What teachers need to know and what schools need to do, including responsibilities to disabled children and young people under the Children and Families Act 2014*, Council for Disabled Children, March 2015.

courses provided by maintained schools, further and higher education courses and recreational and training facilities and recreational and training facilities secured by local authorities.

Schools and LEAs

9.77 The responsible body[150] for a school must not discriminate against a disabled child in relation to admissions,[151] exclusions[152] or the provision of education in the school[153] (see para 9.22 for the meaning of 'discrimination') and must not harass[154] or victimise[155] a pupil or prospective pupil (see paras 9.53–9.56 for the meaning of 'harassment' and 'victimisation'). This effectively prohibits[156] discrimination in relation to all aspects of school life and obliges the authorities regularly to review their practices, policies and procedures.

9.78 Although the responsible bodies for schools are also under the duty to make reasonable adjustments[157] (see paras 9.44–9.47) this is limited to the requirement to make adjustments in relation to provisions, criteria or practices and to provide auxiliary aids and services.[158] Where the provision, criteria or practice or the need for an auxiliary

150 Meaning the local authority or governing body of a maintained school, the Academy Trust for academies and the proprietor of an independent school.

151 EqA 2010 s85(1). Although the use of admissions criteria is permitted, schools must ensure that the criteria they use does not discriminate, either directly or indirectly, against anyone with a protected characteristic, and indirect discrimination may occur if admissions criteria exclude a greater proportion of (for example) disabled children: Department of Education, *Non-statutory guidance to the Equality Act 2010 and Schools*, May 2014 (the Education Guidance), paras 1.5, 1.7 and 4.7.

152 EqA 2010 s85(2)(e). Note also the requirement in the School Exclusions Guidance that 'pupils should only be excluded from school as a last resort': see chapter 4, para 4.220.

153 EqA 2010 s85(2)(a).

154 EqA 2010 s85(3).

155 EqA 2010 s85(4) and (5). Disabled children are also protected from victimisation as a result of the conduct of their parents: EqA 2010 s86.

156 The prohibitions do not apply to anything done in relation to the content of the school curriculum: EqA 2010 s89. This ensures that the Act does not inhibit the ability of schools to include a full range of issues, ideas and materials in their syllabus and to expose pupils to thoughts and ideas of all kinds. The way in which the curriculum is taught is, however, covered by the reference to education in EqA 2010 s85(2)(a), so as to ensure issues are taught in a way which does not subject pupils to discrimination: Explanatory Notes to the EqA 2010 at [306].

157 EqA 2010 s85(6).

158 EqA 2010 Sch 13 para 2(2).

aid or service involves the provision of information, the duty includes ensuring that information is provided in an accessible format (see para 9.46). The duty to make reasonable adjustments to physical features does not apply to schools because it was argued that the protection this offered is covered by school accessibility plans[159] (see para 9.80). The reasonable adjustment duty applies in relation to disabled pupils generally, not just those already at the school,[160] and applies in certain circumstances to pupils who have left the school.[161] A key reasonable adjustment will often be to avoid operating blanket policies. A good example of this is the use of internal exclusion or public 'black marks' for pupils whose disability makes it difficult for them to comply with a behaviour policy. In such cases repeated sanctions are cumulatively highly demoralising and can ultimately prevent a child from receiving an equal education.

9.79 A maintained school governing body or an independent special school proprietor in England can be given directions by the secretary of state[162] if it fails to comply with one of the duties imposed on it by the EqA 2010.[163]

Accessibility strategies and plans

9.80 Two schedules apply in relation to schools. The first, EqA 2010 Sch 10, deals with accessibility for disabled pupils.[164] Under this schedule, local authorities must prepare an accessibility strategy for their maintained schools[165] which sets out a plan for:

- increasing the extent to which disabled pupils can 'participate in the schools' curriculum';[166]
- improving the physical environment of the school for the purpose of increasing access for disabled children;[167] and
- improving the delivery of information for disabled pupils.[168]

159 EqA 2010 Sch 10 and EqA 2010 Sch 3 Pt 10.
160 EqA 2010 Sch13 para 2(3)(b).
161 EqA 2010 s108.
162 Under Education Act 1996 ss496–497.
163 EqA 2010 s87.
164 Both current and prospective pupils: EqA 2010 Sch 10 para 6(4).
165 EqA 2010 Sch 10 para 1. Maintained schools are those included within the definition in section 20 of the School Standards and Framework Act 1998: Sch 10 para 6(7), being community, foundation and voluntary schools.
166 EqA 2010 Sch 10 para 2(1)(a).
167 EqA 2010 Sch 10 para 1(2)(b).
168 EqA 2010 Sch 10 para 1(2)(c) and (3).

9.81 The accessibility strategy must be in writing,[169] must be kept under review[170] and must be implemented.[171] Adequate resources must be allocated for implementing the strategy[172] and the authority must have regard to any guidance which may be issued by the secretary of state.[173] It is highly likely that the strategy will need to cover staff training, the importance of which in achieving compliance with the EqA 2010 cannot be overestimated.

9.82 At the school level (including independent schools), the responsible body must prepare an accessibility plan.[174] Each school's plan must cover the same matters as an accessibility strategy[175] (see above) and the responsible body is subject to the same procedural requirements as a local authority – producing the plan in writing, keeping it under review and implementing it.[176] Again, adequate resources must be allocated to the implementation of the plan.[177] Importantly, any inspection of the school can review the performance of the responsible body in preparing and implementing its accessibility plan.[178] This gives the duty teeth, as any failure to produce a plan or any seriously inadequate plan is likely to be criticised in inspection reports. However, an individual pupil cannot bring a claim against their school for a failure to make a reasonable adjustment in relation to a physical feature, in other words the 'teeth' given to school pupils are not as sharp as those benefitting students in further and higher education, service users and employees.

169 EqA 2010 Sch 10 para 1(4).

170 EqA 2010 Sch 10 para 1(5).

171 EqA 2010 Sch 10 para 1(6).

172 EqA 2010 Sch 10 para 2(1)(a). The precise duty is to 'have regard to the need to allocate adequate resources for implementing the strategy'.

173 EqA 2010 Sch 10 para 2(1)(b), (2) and (3).

174 EqA 2010 Sch 10 para 3(1).

175 EqA 2010 Sch 10 para 3(2)–(3).

176 EqA 2010 Sch 10 para 3(4)–(6).

177 EqA 2010 Sch 10 para 4(1).

178 EqA 2010 Sch 10 para 3(7)–(8). In England, equality and diversity are now a 'limiting judgement' in Ofsted inspections. This means that if equality measures are not being implemented effectively, this will restrict the overall inspection grade. This is part of the common inspection framework under which Ofsted assess education providers, under the Education and Inspections Act 2006.

Exceptions – selection

9.83 The second schedule relevant to schools is EqA 2010 Sch 11, which sets out the exceptions to duties imposed on schools by the EqA 2010. Part 3 of this schedule deals with the disability-related exception regarding 'permitted forms of selection'.[179] Selection permitted for maintained schools is that specified in the School Standards and Framework Act 1998.[180] Permitted selection for independent schools is defined as:

> Arrangements which provide for some or all of [a school's] pupils to be selected by reference to general or special ability or aptitude, with a view to admitting only pupils of high ability or aptitude.[181]

9.84 Taken together, these exceptions significantly weaken the duty on schools not to discriminate against disabled pupils in relation to admissions.

9.85 In addition to the EqA 2010 duties, Children and Families Act 2014 s100 imposes further duties on schools in relation to pupils with medical conditions. Statutory guidance has been published to support the implementation of duty.[182] The governing body must ensure that arrangements are in place to support pupils with medical conditions. In doing so, they should ensure that such children can access and enjoy the same opportunities at school as any other child and in particular schools are obliged to comply individual health care plans to assist in achieving this aim.

Further and higher education

9.86 EqA 2010 Part 6 Chapter 2 is concerned with the provision of further and higher education. The following paragraphs are concerned with the duties on further and higher education institutions, as opposed to those on maintained schools providing further education courses or on local authorities when securing further and higher education courses or recreational and training facilities, which are different. These duties are explained more fully in the EHRC's Technical Guidance on Further and Higher Education. Exceptions to the duties

179 EqA 2010 Sch 11 para 8(1).

180 EqA 2010 ss99 and 104; Sch 11 para 8(2)(a) and (b).

181 EqA 2010 Sch 11 para 8(2)(c).

182 Department of Education, *Supporting Pupils at School with Medical Conditions*, April 2014.Updated 16 August 2017.

on further and higher education institutions are explained in chapter 14 of that guidance.

9.87 In relation to admissions, a responsible body[183] of a further or higher education institution must not discriminate[184] against a disabled person:

- in the arrangements it makes for deciding who is offered admission as a student;
- as to the terms on which it offers to admit the person as a student; or
- by not admitting the person as a student.[185]

9.88 Furthermore, responsible bodies must not discriminate against a disabled person:

- in respect of the way it provides education for the student; or
- in respect of the way it gives the student access to a benefit, facility or service; or
- by excluding the disabled person; or[186]
- by subjecting them to any other detriment.

Harassment[187] and victimisation[188] by responsible bodies are also prohibited.[189]

9.89 Responsible bodies of further education and higher education institutions also have a duty to make reasonable adjustments for current, prospective (and in certain circumstances former) disabled students.[190] All aspects of the duty apply – the obligation to make appropriate changes to their provisions, criteria and/or practices; to provide auxiliary aids and services (including providing information in accessible formats – see para 9.46) and to adapt physical features. See paras 9.44–9.47 for more on the reasonable adjustment duties.[191] Financial assistance to cover the extra costs of studying as a result of a disability (including a long-term health condition, mental health

183 Governing bodies or boards of management: EqA 2010 s91(12).

184 See paras 9.23–9.36 for the meaning of 'discrimination'.

185 EqA 2010 s91(1).

186 EqA 2010 s91(2)(e).

187 EqA 2010 s91(5).

188 EqA 2010 s91(6)–(8).

189 See paras 9.53–9.56 for the meaning of 'harassment' and 'victimisation'.

190 EqA 2010 s91(9). See paras 9.44–9.47 for the duty to make reasonable adjustments under the EqA 2010.

191 EqA 2010 s93.

condition and a specific learning difficulty) is currently available[192] in the form of the disabled students allowances (DSAs), although significant reforms to reduce the role of DSAs have been proposed with greater emphasis to be placed on institutions' reasonable adjustment duties; see further chapter 10 at paras 10.98–10.101.

9.90 However, further and higher education institutions are not required to make reasonable adjustments to 'competence standards' which are defined as academic, medical or other standards that are applied in order to determine whether a person has a particular level of competence or ability,[193] such as the ability to play a musical instrument to the standard required for entry onto a performance course. The reasonable adjustments duty does apply to the process by which the competence is assessed.

General qualifications bodies

9.91 The EqA 2010 imposes specific duties on general qualifications bodies[194] which confer academic school and FE qualifications (such as GCSEs) not to discriminate against disabled school children and others with protected characteristics. Part 5 of the EqA 2010 (which relates to work) also imposes duties on qualifications bodies[195] which can confer any academic, medical, technical or other standard. As with further and higher education providers, there is no duty on qualifications bodies to make a reasonable adjustment in relation to the application of a competence standard.[196] The application of a competence standard by a qualifications body to a disabled person

192 The government (November 2015) undertook a review into the working of the DSAs with potential transfer of the financial responsibility to universities and individual students. Unsurprisingly, this review has met with fierce opposition from many in the sector.

193 EqA 2010 Sch 13 para 4(2) and (3).

194 A general qualifications body is an authority or body which can confer a relevant qualification: EqA 2010 s97(2). A 'relevant qualification' is any qualification which may be prescribed by the secretary of state or the Welsh ministers: EqA 2010 s97(3). Responsible bodies of schools are not qualifications bodies (s97(4)(a)) so any in-school examinations will not be covered by this duty, but will be covered by the schools duties.

195 A qualifications body is an authority or body which can confer a relevant qualification: EqA 2010 s54(2). A 'relevant qualification is an authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitated engagement in a particular trade of profession' (s54(3)). These are separate 'relevant qualifications' to those set out under s97(3).

196 EqA 2010 Sch 8 para 15(2).

is not disability discrimination unless it amounts to indirect discrimination.[197]

9.92 The primary duty on general qualifications bodies is not to discriminate against disabled children in their arrangements for deciding 'upon whom to confer a relevant qualification',[198] in setting the terms on which qualifications will be awarded[199] or by not awarding a qualification[200] (see paras 9.23–9.24 for the meaning of 'discrimination'). Furthermore, once a qualification has been awarded, a body must not discriminate against a disabled child by withdrawing the qualification,[201] varying the terms on which it is held[202] or subjecting the child to any other detriment.[203]

9.93 General qualifications bodies are also prohibited from harassing[204] or victimising[205] a disabled child (see paras 9.53 and 9.56 respectively for the meaning of the terms 'harassment' and 'victimisation').

9.94 General qualifications bodies owe the duty to make reasonable adjustments for disabled children.[206] However, the appropriate regulator may (subject to consultation[207]) specify aspects of the body's functions to which the duty does not apply.[208] The Explanatory Notes to the EqA 2010[209] suggest that 'it could be specified that the requirement to achieve a particular mark to gain a particular qualification is not subject to reasonable adjustments' or that giving an exemption from a part of an exam would not be a reasonable adjustment.[210] An example given in the Explanatory Notes of a reasonable adjustment by a general qualifications body is as follows:

197 EqA 2010 s53(7).
198 EqA 2010 s96(1)(a).
199 EqA 2010 s96(1)(b).
200 EqA 2010 s96(1)(c).
201 EqA 2010 s96(2)(a).
202 EqA 2010 s96(2)(b).
203 EqA 2010 s96(2)(c).
204 EqA 2010 s96(3).
205 EqA 2010 s96(4), (5).
206 EqA 2010 s96(6).
207 EqA 2010 s96(9)(a). Equality Act 2010 (General Qualifications Bodies) (Appropriate Regulator and Relevant Qualifications) Regulations 2010 SI No 2245 set up Ofqual as the appropriate regulator for this purpose.
208 EqA 2010 s96(7).
209 Explanatory Notes at [327].
210 For further information, see Explanatory Notes at [328] and Appendix 1 of the EHRC's Technical Guidance on Further and Higher Education.

> A visually impaired candidate is granted a modified paper (enlarged font) by a qualifications body in order that she can read her English GCSE exam.[211]

9.95 In deciding whether to exclude certain functions from the reasonable adjustments duty, the regulator must have regard to the need to:

- minimise the extent to which disabled persons are disadvantaged in attaining the qualification because of their disabilities;[212]
- ensure that the qualification gives a reliable indication of the knowledge, skills and understanding of a person upon whom it is conferred;[213] and
- maintain public confidence in the qualification.[214]

9.96 Arguably, the inclusion of the 'public confidence' factor in the consideration of whether to exempt a general qualifications body's function from the reasonable adjustments duty puts too great an emphasis on the 'standards' agenda and means insufficient weight will be given to the first criterion – the need to minimise the disadvantages faced by disabled people taking public examinations.

9.97 In achieving compliance with the reasonable adjustment duty, general qualifications bodies must have regard to any relevant code of practice.

9.98 Further guidance on the duties on both general qualifications bodies and on qualifications bodies is contained in Appendices 1 and 2 respectively of the EHRC's Technical Guidance on Further and Higher Education.

Advancement of equality

Public sector equality duty

9.99 EqA 2010 Part 11 includes a general PSED,[215] replacing the previous public sector duties for the individual equality strands.[216] The PSED gives public bodies legal responsibilities to demonstrate that they are taking action on equality in policy-making, the delivery of services, and public sector employment. The PSED is similar in spirit and

211 Explanatory Notes at [328].
212 EqA 2010 s96(8)(a).
213 EqA 2010 s96(8)(b).
214 EqA 2010 s96(8)(c).
215 EqA 2010 s149.
216 In relation to disability, DDA 1995 s49A, inserted by the DDA 2005.

intention to the pre-existing duties, but is structured differently in some important specific respects.

9.100 In relation to disabled children, the duty on public authorities[217] is to have 'due regard',[218] in the exercise of their functions, to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Act;[219]
- advance equality of opportunity between disabled children and others;[220] and
- foster good relations between disabled children and others.[221]

9.101 The duty applies both to the formulation of policy and to decisions in individual cases, as shown by the Supreme Court's judgment in *Hotak v Southwark LBC*.[222] In *R (Brown) v Secretary of State for Work and Pensions,*[223] the court considered what a relevant body has to do to fulfil its obligation to have due regard to the aims set out in the PSED. The six principles it set out[224] have been accepted by courts in later cases.[225] Those principles are that:

- Those subject to the PSED must be made aware of their duty to have 'due regard' to the aims of the duty.
- Due regard is fulfilled before and at the time a particular policy that will or might affect people with protected characteristics is under consideration as well as at the time a decision is taken. Due regard involves a conscious approach and state of mind.
- A body subject to the duty cannot satisfy the duty by justifying a decision after it has been taken.

217 'Public authorities' are defined in EqA 2010 Sch 19 (brought into effect through s150). They include central government departments, health bodies, local government organisations and governing bodies of maintained schools. Further public authorities may be specified by the secretary of state or the Welsh ministers (s151) subject to consultation and consent (s152).

218 The concept of 'due regard' was considered in *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2009] PTSR 809, where at [31] Dyson LJ said it meant 'the regard that is appropriate in all the particular circumstances'.

219 EqA 2010 s149(1)(a).

220 EqA 2010 s149(1)(b).

221 EqA 2010 s149(1)(c).

222 [2015] UKSC 30; [2015] 2 WLR 1341 per Lord Neuberger at [78]–[79].

223 [2008] EWHC 3158 (Admin); [2009] PTSR 1506.

224 *Brown* at [90]–[96].

225 Including cases about the duty in section 149 of the Act. See, for example, *R (Greenwich Community Law Centre) v Greenwich LBC* [2012] EWCA Civ 496; [2012] EqLR 572.

- The duty must be exercised in substance, with rigour and with an open mind in such a way that it influences the final decision. The duty has to be integrated within the discharge of the public functions of the body subject to the duty. It is not a question of 'ticking boxes'. However, the fact that a body subject to the duty has not specifically mentioned EqA 2010 s149[226] in carrying out the particular function where it is to have 'due regard' is not determinative of whether the duty has been performed. But it is good practice for the policy or decision-maker to make reference to section 149 and any code or other non-statutory guidance in all cases where section 149 is in play.
  In that way the decision-maker is more likely to ensure that the relevant factors are taken into account and the scope for argument as to whether the duty has been performed will be reduced.
- The duty is a non-delegable one. The duty will always remain the responsibility of the body subject to the duty. In practice, another body may actually carry out the practical steps to fulfil a policy stated by a body subject to the duty.[227]
- The duty is a continuing one.

9.102 In *R (Bracking) v Secretary of State for Work and Pensions,*[228] the first challenge to the decision to close the Independent Living Fund, the Court of Appeal approved the '*Brown* principles', as well as setting out additional principles that are relevant for a public body in fulfilling its duty to have 'due regard' to the aims set out in the general equality duty. These principles are that:

- The equality duty is an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
- The duty is upon the decision-maker personally. What matters is what he or she took into account and what he or she knew.
- A body must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy.

226 The equality duty in *Brown* was the disability equality duty in DDA 1995 s49A. Later cases have confirmed that the principles in *Brown* also apply to the PSED.

227 In those circumstances, the duty to have 'due regard' to the needs identified will only be fulfilled by the body subject to the duty if: 1) it appoints a third party that is capable of fulfilling the 'due regard' duty and is willing to do so; 2) the body subject to the duty maintains a proper supervision over the third party to ensure it carries out its 'due regard' duty.

228 [2013] EWCA Civ 1345; (2013) 16 CCLR 479.

9.103 In *Bracking*, the Court of Appeal also confirmed the need for a body subject to the duty to have available enough evidence to demonstrate that it has discharged the duty.

9.104 The courts have said that even where the context of decision-making is financial resources in a tight budget, that does not excuse non-compliance with the duty and:

> . . . indeed there is much to be said that in straitened times the need for clear, well-informed decision-making when assessing the impacts on less advantaged members of society is as great, if not greater.[229]

9.105 The 'equality of opportunity' limb of the duty in relation to disabled children requires particular regard to the following needs:

- removing or minimising disadvantages 'suffered' by disabled children that are connected to their disability;[230]
- taking steps to meet the needs of disabled children that are different from non-disabled children;[231] and
- encouraging disabled children to participate in public life.[232]

9.106 The 'foster good relations' limb of the duty requires particular regard to the need to:

- tackle prejudice;[233] and
- promote understanding.[234]

9.107 Any person who is not a public authority but who exercises public functions[235] (eg a private company providing public services on a contracted-out basis) must also have due regard to these matters in the exercise of their public functions.[236]

9.108 Compliance with the PSED may involve treating disabled children more favourably than others, so long as to do so would not contravene the EqA 2010 in some other way.[237]

229 *R (Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin); [2011] EqLR 705 at [45].

230 EqA 2010 s149(3)(a).

231 EqA 2010 s149(3)(b). This includes steps to take account of a disabled child's disabilities: s149(4).

232 EqA 2010 s149(3)(c).

233 EqA 2010 s149(5)(a).

234 EqA 2010 s149(5)(b).

235 A 'public function' is a function of a public nature for the purposes of the HRA 1998: EqA 2010 s150(5). See fn 91 above for more on the definition of a 'function of a public nature'.

236 EqA 2010 s149(2).

237 EqA 2010 s149(6).

9.109 The specific duties were introduced to support the general duty. These vary between England, Wales and Scotland and only apply to authorities which are listed in the relevant parts of EqA 2010 Sch 19 which can be amended by order.

9.110 In England, the specific duties are set out in the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017.[238] The specific duties require listed public bodies in England to:

- publish information to show their compliance with the PSED, at least annually;[239]
- set and publish equality objectives, at least every four years.[240]

9.111 This information should be published in an accessible format,[241] which should meet the standards set out in the Public Sector Transparency Board's Public Data Principles.

9.112 Detailed guidance about the operation of the PSED can be found in the Technical Guidance published by the EHRC.[242]

9.113 The PSED does not apply to the provision of education in schools in relation to the protected characteristic of age as age is not a protected characteristic in a schools context but does apply to schools in relation to disability.[243] Further exemptions from the duty include the courts[244] and parliament.[245]

9.114 A breach of the PSED does not create an individual cause of action.[246] However, such breaches can be (and regularly are) scrutinised by the High Court on an application for judicial review.[247]

9.115 The central importance of the equality duties has been recognised by the courts:

> An important reason why the laws of discrimination have moved from derision to acceptance to respect over the last three decades

238 SI No 353.

239 Reg 4.

240 Reg 5.

241 Reg 6.

242 Equality Act 2010 Technical Guidance on the Public Sector Equality Duty England.

243 EqA 2010 Sch 18 para 1(1).

244 EqA 2010 Sch 18 para 3.

245 EqA 2010 Sch 18 para 4.

246 EqA 2010 s156, meaning that an individual may not go to a court or tribunal and seek redress in their individual case for an alleged breach of the duty, other than by way of judicial review (see above).

247 See Part 3 Code of Practice, paras 14.38–14.41 for more on the use of judicial review to remedy breaches of the EqA 2010.

has been the recognition of the importance not only of respecting rights but also of doing so visibly and clearly by recording the fact.[248]

9.116 In addition to the first successful challenge to the Independent Living Fund decision in *Bracking* (see para 9.102 above), there have been numerous examples where the PSED under the EqA 2010 has been found to have been breached. In *R (Barrett) v Lambeth LBC,*[249] a local authority's decision to withdraw funding from a charity providing services to people with learning disabilities had amounted to a decision to no longer provide such services and was thus a breach of the section 149 equality duty. The services had previously been provided jointly by the local authority and the primary care trust and when an equality impact assessment (EIA) was written, it concluded that there was to be no change in the services provided and that, therefore, there was no perceived adverse impact on people with protected characteristics. The notion that because there would be no change in the services, the duty would not be engaged, misunderstood the duty.

9.117 In *R (RB) v Devon CC,*[250] it was held that both the local authority and the primary care trust had failed to discharge the PSED when deciding to appoint Virgin Care as the preferred bidder for a contract to provide integrated care and health services for children. In *R (Winder) v Sandwell MBC,*[251] a scheme which imposed a length of residence requirement to access support with council tax payments was held to have been adopted in breach of the PSED. In *Winder*, there was no evidence that the council had conducted any assessment at all of the race or gender impact of the residence requirement before it adopted its scheme.

Positive action

9.118 The EqA 2010 creates a further power to secure the advancement of equality through taking 'positive action'. There is no definition of what constitutes 'positive action' in the EqA 2010. The Explanatory Notes to the EqA 2010 suggest it allows measures to be targeted at

248 *R (Chavda and others) v Harrow LBC* [2007] EWHC 3064 (Admin); (2008) 11 CCLR 187 at [40].

249 [2012] EWHC 4557 (Admin); [2012] BLGR 299.

250 [2012] EWHC 3597 (Admin); [2013] EqLR 113.

251 [2014] EWHC 2617 (Admin); [2015] PTSR 34 at [92]–[95].

particular groups, including training to enable them to gain employment, or health services to address their needs.[252]

9.119 The power to take positive action arises in relation to disabled children if a person reasonably thinks that:

- disabled children suffer a disadvantage in relation to their disabilities;[253]
- disabled children have needs which are different to non-disabled children;[254] or
- participation in an activity by disabled children is disproportionately low.[255]

9.120 The EqA 2010 further specifies that positive action is permitted if it is a proportionate means of achieving one of the following aims:

- enabling or encouraging disabled children to overcome or minimise their disadvantages;[256]
- meeting disabled children's needs;[257] or
- enabling or encouraging disabled children to participate in activities where their participation is disproportionately low.[258]

9.121 However, the positive action power does not create a power for a person to do anything which is prohibited under any other Act.[259] Further actions which do not fall within the scope of the duty may be specified by regulations.[260]

9.122 Subject to any qualifications imposed by regulations, the positive action power is extremely broad and should mean that significantly greater thought is given by everyone in public life to the ways in which disabled children can be supported to overcome the disadvantages they face, both as a result of their impairments and as a result of socially constructed barriers to them leading ordinary lives. There is little evidence to date, however, of this power being used.

252 Explanatory Notes to the EqA 2010 at [519].
253 EqA 2010 s158(1)(a).
254 EqA 2010 s158(1)(b).
255 EqA 2010 s158(1)(c).
256 EqA 2010 s158(2)(a).
257 EqA 2010 s158(2)(b).
258 EqA 2010 s158(2)(c).
259 EqA 2010 s158(6).
260 EqA 2010 s158(3).

Enforcement

Overview

9.123 The EqA 2010 establishes specific legal routes to enforce breaches of the duties it creates in relation to equality and non-discrimination. The specific routes to enforcement under the EqA 2010 are discussed below; further coverage of enforcement routes generally is found in the remedies chapter (chapter 11).

9.124 EqA 2010 s113(1) specifies that proceedings relating to a breach of one of the duties in the Act must be brought in accordance with Part 9 'Enforcement'. A key exception to this, however, is that a claim for judicial review is not prevented, albeit that in relation to most of the EqA 2010 the specific enforcement route would provide an alternative remedy which would effectively bar an application for judicial review[261] (see para 11.92).

9.125 Under Part 9, claims for breach of duties by service providers, further or higher education providers or public authorities must be brought in the county court.[262]

9.126 Claims for breaches of the duties by schools must generally be brought to the First-tier Tribunal (Special Educational Needs and Disability).[263] However, claims relating to the admission of pupils, who do not have an education, health and care (EHC) plan, to state-funded schools are heard under the appeal arrangements for admissions decisions. Details of these will be provided by the school or local authority. See further chapter 11 at para 11.28.

9.127 Claims of breaches of the education duties against a local authority must be brought in the county court under the service provision duties or public function duties: see paras 9.57–9.68 in relation to these duties.

9.128 Discrimination claims against a work placement/apprentice provider must be made to the employment tribunal. Further information can be obtained from the Advisory Conciliation and Arbitration Service (ACAS).

County court

Time limits

9.129 Any claim to the county court under the EqA 2010 must be made within six months of the date of the act complained of, or within any

261 EqA 2010 s113(3)(a). An obvious exception to this is the PSED, which is only enforceable through an application for judicial review.

262 EqA 2010 s114(1)(a).

263 EqA 2010 s114(3), read with s116(1).

other period as the court thinks just and equitable.[264] Where conduct extends over a period, time only starts to run when the period ends.[265] In any complaint in relation to a failure to act, for example a failure to make reasonable adjustments, time starts to run when the negative decision was taken or on the expiry of the period when a person might reasonably have been expected to do the act.[266] In such cases the onus is on those alleging a failure to make reasonable adjustments to identify the date by which those adjustments ought reasonable to have been made.[267]

Remedies

9.130 The county court has available to it all the remedies open to the High Court to grant either on a claim in tort or in an application for judicial review.[268] In practice, this means that the court can make a declaration that the EqA 2010 has been breached, grant a mandatory order requiring a party to comply with its duties under the Act or award damages. The ability of the court to award damages for injury to feelings (whether alone or in conjunction with another award) is expressly stated.[269] The court may also award aggravated and/or exemplary damages when the person committing the unlawful act has behaved in a high-handed, malicious, insulting or oppressive manner.[270]

264 EqA 2010 s118(1). The wording of the EqA 2010 suggests that this could conceivably be shorter than six months, but Part 3 Code of Practice, para 16.10 states that this means 'such *longer* period as the court thinks is just and equitable' (emphasis added). The date when time stops running is the date the claim form is issued: Part 3 Code of Practice, para 16.12. The court should exercise this discretion having regard to all the circumstances, including the prejudice each party would suffer as a result of the decision: Part 3 Code of Practice, para 16.20.

265 EqA 2010 s118(6)(a). This would also encompass a 'continuing state of affairs', for instance a series of connected acts by different persons employed by the same service provider: Part 3 Code of Practice, para 16.18.

266 EqA 2010 s118(6)(b). In the absence of evidence to the contrary, a failure to act will be 'decided' when a person does something inconsistent with taking the action or on the expiry of the period when a person might reasonably have been expected to do the act: EqA 2010 s118(7).

267 *Matuszowicz v Kingston upon Hull CC* [2009] IRLR 288.

268 EqA 2010 s119(2). Damages should not, however, be awarded for breaches of s19 (indirect discrimination) unless the court has first considered whether to make any other disposal, unless the court is satisfied that the discrimination was intentional: s119(5) and (6).

269 EqA 2010 s119(4).

270 See eg *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102, and Part 3 Code of Practice, paras 16.55–16.56.

First-tier Tribunal (Special Educational Needs and Disability)

9.131 Claims of disability discrimination by schools must be made to the First-tier Tribunal (Special Educational Needs and Disability) (see paras 4.239 and para 11.60 for more on the tribunal). Tribunal claims are governed by the tribunal procedural rules.[271] The limitation period for a discrimination tribunal claim is six months from the date of the act or conduct complained of.[272] The tribunal has discretion to consider a claim that is out of time.[273]

9.132 If a breach of duty is identified, the tribunal may make any order that it sees fit to make,[274] other than awarding financial compensation or damages.[275] The tribunal should, in particular, look to 'obviate' or reduce the adverse effect on the disabled child of any discriminatory treatment in deciding how to exercise its discretion to make any order it thinks fit.[276] Remedies might for example include an apology to the child, or the publication of an explanation in the school's annual report.

Employment tribunal

9.133 The time limits for bringing a claim in an employment tribunal is three months from the date of the act complained of.[277] Acts may be seen in certain circumstances as continuing over a period of time (*Hendricks v Commissioner of Police of the Metropolis*[278]) and so the date from which the three-month period will run will be the end of this period. The tribunal has a discretion to extend time, where it would be just and equitable to do so.[279]

9.134 The employment tribunal has the power to order reinstatement to employment if a person has been dismissed unfairly, to award compensation for discrimination and losses caused by that discrim-

271 Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chambers) Rules 2008 SI No 2699.

272 EqA 2010 Sch 17 para 4(1). The same provisions apply as in the county court in relation to conduct extending over a period and failures to act: see para 9.129.

273 EqA 2010 Sch 17 para 4(3).

274 EqA 2010 Sch 17 para 5(2).

275 EqA 2010 Sch 17 para 5(3)(b).

276 EqA 2010 Sch 17 para 5(3)(a).

277 EqA 2010 s123(1)(a).

278 [2002] EWCA Civ 1686; [2003] 1 All ER 654.

279 EqA 2010 s123(1)(b).

ination. Where a personal injury has resulted from discriminatory treatment an employment tribunal can also make an award of damages for the personal injury. For example, if the discriminatory treatment an employee suffered had exacerbated a pre-existing condition then it would be open to a tribunal to make an award of damages to compensate for that.

9.135 Under EqA 2010 s124, a tribunal has the power to make recommendations for an employer to take certain steps within a specified period. These recommendations can be made 'for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate'. This is so that recommendations can help prevent similar types of discrimination occurring in future.

Burden of proof and general procedural matters

9.136 The EqA 2010 establishes a specific burden of proof for cases alleging breaches of its provisions. If there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court or tribunal must hold that the contravention occurred.[280] A court or tribunal can look at circumstantial evidence (which may include events before and after the alleged unlawful act) to help establish the basic facts.[281] However, a court or tribunal must not make this finding of a breach of the EqA 2010 if the person can show that they did not contravene the provision.[282] Thus, once a person has established facts from which a court could conclude that there has been an act of unlawful discrimination, harassment or victimisation, the burden of proof shifts to the respondent. To defend a claim successfully, the alleged discriminator will have to prove, on the balance of probabilities, that they did not unlawfully discriminate, harass, victimise or fail to make reasonable adjustments.[283]

9.137 Guidance on the way that court should apply the reverse burden is set out in *Igen Ltd v Wong; Chamberlin Solicitors v Emokpae; Brunel University v Webster*.[284]

280 EqA 2010 s136(2). This includes the First-tier Tribunal and the Special Educational Needs Tribunal for Wales: s136(6)(d) and (e).

281 Part 3 Code of Practice, para 16.25.

282 EqA 2010 s136(3).

283 Part 3 Code of Practice, para 16.26.

284 [2005] EWCA Civ 142; [2005] ICR 931.

ECHR Article 14 – the human right to non-discrimination

Overview

9.138 In addition to the protection from discrimination under the EqA 2010, disabled children also have the benefit of protection from discrimination in relation to their human rights. This protection comes from ECHR Article 14. As with the other ECHR rights, Article 14 is incorporated into English law through the HRA 1998 and therefore applies to the decisions of public bodies, such as maintained school; see chapter 2 at para 2.10.

9.139 ECHR Article 14 is not a free-standing prohibition on discrimination, but rather a prohibition on discrimination in the enjoyment of one or more of the substantive ECHR rights. The Court of Appeal has highlighted that 'one of the attractions of article 14 is that its relatively non-technical drafting avoids some of the legalism that has affected domestic discrimination law'.[285] In order for a claim under Article 14 to succeed the claimant needs to show that:

- the policy or decision gives rise to differential treatment between different groups;
- the relevant group has the necessary 'status';
- the issue is within the 'ambit' of one or more of the substantive ECHR rights; and
- the difference in treatment cannot be justified.

Differential treatment

9.140 ECHR Article 14 covers what would be thought of under domestic discrimination law as both 'direct' and 'indirect' discrimination (see paras 9.22 and 9.41 for definitions of these concepts).[286] What matters for the purposes of Article 14 is that a claimant can show that a decision or policy has a different effect on them than it would have on a person with a different characteristic or 'status' (see below).

285 *Burnip v Birmingham CC* [2012] EWCA Civ 629; [2013] PTSR 117.

286 See *Burnip* at [11]:

> That article 14 embraces a form of discrimination akin to indirect discrimination in domestic law is well known. Thus, in *DH v Czech Republic* (2007) 47 EHRR 59, para 175, the European Court of Human Rights . . . stated: 'a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group'.

9.141 ECHR Article 14 also imposes a positive duty on the state to ensure that ECHR rights are secured without discrimination. This includes a failure to discriminate positively in favour of a minority group or a failure to make accommodation to secure substantive equality for persons otherwise disadvantaged by apparently neutral rules. It also gives rise to '[a] positive obligation on the state to make provision to cater for . . . significant difference'.[287] The leading case on this positive obligation is *Thlimmenos v Greece*,[288] where the European Court of Human Rights (ECtHR) said '[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.[289] This largely mirrors the reasonable adjustments duties set out under the EqA 2010.[290]

9.142 At the European level, the positive obligation under ECHR Article 14 supported arguments concerning reasonable accommodation of children in education. In *Horvath and Kiss v Hungary*, the ECtHR emphasised the positive obligation of the state to 'undo a history of racial segregation in special schools'[291] and 'in light of the recognised bias in past placement procedures', the court stated 'that the [s]tate has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests'.[292] The ECtHR has yet to find a breach of Article 14 for the segregated education of disabled children but has found violations for failure to make 'accommodations'.[293]

9.143 In the domestic courts, the Court of Appeal applied the positive obligation in Article 14 in the case of *Burnip*, in which it was held that that Article 14 applies to cases where the obligation claimed involves the allocation of state resources – although careful consideration would need to be given to the state's explanation of this and whether it provided a legal justification for the failure to act (see paras 9.147–9.149 below).[294]

287 *Burnip v Birmingham CC* [2012] EWCA Civ 629; [2013] PTSR 117 at [15].

288 (2000) 31 EHRR 411.

289 (2000) 31 EHRR 411 at [44].

290 In European law this is referred to as 'reasonable accommodation' – see *Çam v Turkey*, no 51500/08, paras 84, 23 February 2016.

291 App No 11146/11, 29 January 2013 at [127].

292 App No 11146/11, 29 January 2013 at [116].

293 See Çam (footnote 290) and Enver Şahin v Turkey 23065/12 (2018).

294 *Burnip v Birmingham CC* [2012] EWCA Civ 629; [2013] PTSR 117 at [18].

Status

9.144 In order to succeed under Article 14, a claimant must show that they have a relevant 'status'. Examples of 'status' are given in the article, including race and sex. Disability generally is an example of 'other status'[295] and so disabled people can claim under Article 14 in relation to differential treatment compared with non-disabled people.

9.145 The comparison exercise requires defining who is receiving the differential treatment. This can be 'non disabled people', but it could also be other disabled people who experience disability in a different way. So as with indirect discrimination under the EqA 2010, this would include circumstances where the differential treatment is only apparent when a particular narrower pool of people are considered for comparison, rather than the whole group of people who would qualify as 'disabled'.[296]

Ambit

9.146 As noted above, ECHR Article 14 is not a free-standing right to be free from discrimination; instead, the differential treatment must be linked to one of the other ECHR rights. This is described as the case being within the 'scope' or 'ambit' of the other right. Lord Wilson clearly enunciated this principle in *Mathieson v Secretary of State for Work and Pensions*,[297] holding that:

> For the purposes of article 14, Mr Mathieson does not need to establish that the suspension of DLA amounted to a violation of Cameron's rights under either of those articles: otherwise article 14 would be redundant. He does not even need to establish that it amounted to an interference with his rights under either of them. He needs to establish only that the suspension is linked to, or (as it is usually described) within the scope or ambit of, one or other of them.[298]

295 See for example *Botta v Italy* (1998) 26 EHRR 241.

296 An example of this is demonstrated by the decision of the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250. In *Mathieson*, the challenge was to the rule whereby sick disabled children in NHS hospitals lose payment of their disability benefits after 84 days. The question of whether this group had a relevant status, as they were being compared with other individuals who were disabled and in still eligible for disability benefits, this was answered in the affirmative by Lord Wilson at [19]–[23].

297 [2015] UKSC 47; [2015] 1 WLR 3250.

298 [2015] UKSC 47; [2015] 1 WLR 3250 at [17].

Justification

9.147 The key question in many or most claims under ECHR Article 14 will be whether the differential treatment is justified. In every case, once the claimant has established a relevant difference in treatment, the burden is on the alleged discriminator to show justification.[299] In indirect discrimination cases, what has to be justified is not the scheme or measure as a whole but its discriminatory effect.[300]

9.148 In general, a measure will be unjustified and discriminatory if it 'does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[301]

9.149 However, in cases involving social security and potentially other issues involving the allocation of state resources,[302] a higher test for justification has been applied in domestic law. The question in those cases being held to be whether the measure is 'manifestly without reasonable foundation'.[303] Although the court must give the justification advanced careful scrutiny,[304] any reasonable justification was held to pass this test. However, in the case of *JD and A v The UK*[305] the Strasbourg court reaffirmed that this was not the correct approach to justification in cases of discrimination. On the contrary, outside the context of transitional measures designed to correct historic inequalities, 'very weighty reasons' would be required in order for discrimination against disabled people to be justified.[306]

299 *DH v Czech Republic* (2008) 47 EHRR 3 at [177].

300 *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449 at [188].

301 *Stec v UK* (2006) 43 EHRR 1017 at [51].

302 However the standard text of whether the measure was a proportionate means of achieving a legitimate aim was applied in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820, a case concerning student loans, see [27]–[33].

303 *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 WLR 1545.

304 Per Lady Hale in *Humphreys* at [22].

305 App nos 32949/17 and 34614/17, 24 October 2019.

306 *JD and A v UK* para 89 citing *Guberina v Croatia*, no 23682/13, 22 March 2016 para 73.