**Introduction**

**Note to consultees**

The provisions of this paper covering rights for disabled people in schools and post-16 education apply to **England, Wales and Scotland**. The provisions on special educational needs apply to **England and Wales**

1. The Government is committed to raising standards in education for all children, including those with special educational needs. The Government is equally committed to ensuring comprehensive civil rights for disabled people. A great deal has already been achieved without changing the law. But an opportunity has arisen for the Department for Education and Employment (DfEE) to introduce a Bill during this Parliamentary Session to take forward proposals in relation to special educational needs (in England and Wales) and rights for disabled people in education (across Great Britain). The Government wishes to consult those with an interest before that legislation is introduced into Parliament.
2. The Queen’s Speech on 17 November 1999 heralded a Bill on Special Educational Needs. The Secretary of State for Education and Employment, when responding to the publication of the Disability Rights Task Force (DRTF) Report on 13 December 1999, said that the Government would bring forward legislation to take forward the Task Force’s recommendations on education. This consultation - and the forthcoming Bill - will therefore cover:
   1. rights for disabled people in education (in Great Britain):
3. in schools; and
4. in post-16 education, i.e. in further, higher and adult education and youth services provision and, in Scotland, community education; and
   1. special educational needs (in England and Wales).
5. This offers the best means of securing a coherent approach to dealing with rights for disabled people in education and at the same time allows the undertaking to legislate for areas highlighted in the document *Meeting Special Educational Needs: A Programme of Action* in November 1998 to be fulfilled.
6. This consultation paper is divided into 2 main sections, the former with 2 subsections:
   1. Annex A: Rights for Disabled People in Education:
      1. Annex A1: proposals to take forward the Disability Rights Task Force recommendations on schools;
      2. Annex A2: proposals to take forward the Disability Rights Task Force recommendations on post-16 education;
   2. Annex B: Special Educational Needs (SEN).
7. The final section is the Regulatory Impact Assessment (Annex C) which is the Government’s assessment of the costs and benefits of the new legislation to the private and voluntary sectors.
8. In covering this range of material in a single consultation exercise we recognise that some consultees’ interest may be confined to certain elements of the proposals. For example, the SEN provisions are not relevant to Scotland. The document is collated to allow easy access to the relevant sections.

Timetable for consultation

1. Cabinet Office guidelines suggest that consultation should normally be at least eight weeks. Given the Government’s commitment to introduce legislation in the current Session, and the need to consult on the Bill’s contents, Ministers have approved a shorter and more focused consultation period. The DfEE will also hold meetings during the consultation period with key parties with an interest in the Bill. This consultation paper is available on the DfEE website at **www.dfee.gov.uk/sen** and onthe disability website at **www.disability.gov.uk**
2. Consultees should note that many of the issues in this paper have already been raised in other contexts. They may therefore not wish to comment further on proposals on which they may have already previously commented. The SEN Programme of Action (November 1998) reflected consultation on the SEN Green Paper, set out the Government’s intention to legislate, in England and Wales, for children with SEN and gave a commitment to review the statutory framework for inclusion. The report of the DRTF *“From Exclusion to Inclusion*” was published on 13 December 1999, and is available at www.disability.gov.uk. When the report was published, the Government announced its intention to legislate to address the education recommendations.

Territorial coverage

1. The provisions in the Bill relating to special educational needs will apply to England and Wales only. The Scottish Executive is preparing a programme of action on special educational needs in Scotland to build on existing initiatives. This will be the subject of separate consultation.
2. The provisions on rights for disabled people in education will apply - except for the duty on education providers in the schools sector to plan systematically to increase accessibility - to England, Wales and Scotland since equal opportunities issues are matters reserved to the UK Parliament. The duty to plan in this regard is a devolved matter. It will be for Scottish Executive Ministers to consider the application of this policy in Scotland. This, too, will be the subject of separate consultation. The Bill will legislate to apply the planning duty to Wales though it will be for the National Assembly to consider implementation. This consultation is taking place on the same basis and at the same time in England, Scotland and Wales.
3. This Bill will not cover Northern Ireland.

Open Government

1. Under the Government’s Open Government principles, responses to this consultation will be made available to the public on request unless you state that all or part of your response should remain confidential.
2. At the end of the consultation period, the responses can be read at the following locations:

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| --- | --- |
| England and Wales | Public Enquiry Unit, Department for Education and Employment, Sanctuary Buildings, Great Smith Street, London SW1P 3BT  Telephone : 0171 925 5555 (0870 000 2288 after 3 April) |
| Scotland | Alan Gold, Scottish Executive Library, K SPUR, Saughton House, Edinburgh EH11 3XD  Telephone : 0131 244 4552 |

**Annex A:** **Rights for disabled people in education**

1. The provision of many educational services to the public is currently exempted from Part III of the Disability Discrimination Act (DDA) 1995 (access to goods, facilities, services and premises). The Government believes that this exemption is unjust and indefensible. The Government therefore proposes that new duties should be applied to education in schools (including nursery schools), further education, higher education, adult education, youth service provision and, in Scotland, community education. The new legislation is intended to ensure that people in education receive protection from unfair discrimination as disabled people in other areas of society now enjoy.
2. The Government announced a three strand strategy in October 1997 to take forward its manifesto commitment to “comprehensive, enforceable civil rights for disabled people”. It undertook to:
   1. establish a Disability Rights Commission (DRC);
   2. implement the later rights under Part III of the Disability Discrimination Act (Access to Goods and Services); and
   3. establish a Disability Rights Task Force (DRTF) to advise the Government on how to implement its manifesto commitment.
3. The DRC becomes operational in April 2000. New rights under Part III of the DDA were implemented in October 1999 and the final rights will be implemented in 2004. The DRTF was established in December 1997 and its final report was published in December 1999 with over 150 recommendations. The Government announced its intention to legislate to address the education recommendations immediately and is considering the other recommendations.
4. Ministers accept the view of the Disability Rights Task Force that it would not be appropriate simply to lift the education exemption from Part III of the Disability Discrimination Act. The Task Force said (p49): “*there are extensive provisions relating to children with SEN in education legislation already and overlaying these with duties in separate legislation…would create a complex legal framework in this area. We favoured more clarity, not less. In addition the language used in the DDA is framed for one-off services, and not for universal services such as education*.” Ministers consider that new duties to be placed on education providers are more suited to the education context and are a more practical means of ensuring that disabled children and students have real and enforceable rights against discrimination in education.

Definition of disability

1. The definition of disability to be used with the new duties is that given in the Disability Discrimination Act 1995. The DDA defines a disabled person as someone who has:

“a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities”.

It also provides protection for people who have had a disability in the past.

1. The DfEE’s Circular 20/99 *What the Disability Discrimination Act (DDA) 1995 Means for Schools and LEAs* gives guidance (at paragraph 6) on what this definition covers. The DDA definition differs from definitions used in education legislation, for example, that for “special educational needs” in schools or “learning difficulties” in further education. Not all disabled children will have a special educational need or a learning difficulty, although many will. The Scottish Executive is preparing advice for education providers in Scotland.

Codes of Practice

1. The new provisions for schools and for post-16 education will have associated Codes of Practice, which will be prepared by the DRC and approved by the Secretary of State before laying before Parliament. These Codes will be distinct from the existing *Code of Practice on the Identification and Assessment of Special Educational Needs*. The disability Codes of Practice will give practical guidance and advice on how education providers can meet their new duties and could be taken into account by a tribunal or court in the case of an appeal. However, there will be no statutory duty on education providers to have regard to the provisions of the Codes.

Other Statutory Provisions

1. An education provider will not be required to do anything under the new duties that will result in a breach of legal obligations under other legislation or enactment. For instance, education providers might have to obtain statutory consents before making adjustments involving changes to premises, such as approval under the Building regulations (in Scotland, a building warrant), planning permission, listed building consent, scheduled monument consents and fire regulations approval. The new duties will not over-ride the need to obtain such consents. The education provider will not have to make an adjustment if it requires statutory consents for which he has applied and it has not been given. All new buildings are already required to comply with Part M of the Building Regulations (in Scotland, Part T of the Building Standards (Scotland) Regulations).

Considering the needs of disabled people in advance

1. In many cases, the need to make adjustments for disabled children and students arises because their needs have not been considered in advance. There are many instances where forward planning removes the need for adjustments in future and will usually be more cost-effective. For example, although it might be unreasonable to introduce colour contrasting throughout a building to assist an individual disabled person who is visually impaired, it would cost very little to do this when the building is being redecorated. The new duties will include a requirement for institutions to think about the needs of disabled students in advance. This will reduce the number of adjustments that need to be made on an ad-hoc basis in response to an individual disabled student, thus creating an environment where provision for disabled pupils and students is seen as on a par with, and not different from, that for other pupils and students.
2. Education providers will be considered to know of a pupil’s or student’s disability when a member of staff is told or where the provider would reasonably be expected to know the pupil or student is disabled. Otherwise, if a student fails to declare a disability or asks a member of staff or counsellor to keep it confidential, then the education provider cannot be expected to make adjustments to meet their particular needs.

Disability Rights Commission

1. The powers and duties of the Disability Rights Commission will be extended to cover these new provisions.

Implementation

1. The Government wishes to implement the duties as soon as is reasonably practical. It recognises that some of the duties carry greater implications for education providers and will therefore need to consider whether to stage the implementation so that the timetable for the introduction of the new duties is realistic. For the duties to be implemented, the rights of redress mechanisms will need to have been established.

**Further information**

1. There are a number of booklets about the Disability Discrimination Act, available free of charge, on the Government's Disability Website at: www.disability.gov.uk/dda/dle/index.html. Short factsheets are also available, free of charge, at: www.disability.gov.uk/dda/dx/index.html.
2. The DDA Helpline also stocks these booklets and factsheets, which are available in alternative formats. Those on the definition of disability, the DDA's employment provisions and the DDA's access to goods and services provisions might be of particular interest. The DDA Helpline can be contacted at: Freepost, MID02164, Stratford-upon-Avon, CV37 9BR, telephone 0345 622 633, textphone 0345 622 644, fax 0345 622 611 and e-mail: ddahelp@stra.sitel.co.uk.

**Q1:** **Do you agree that it is necessary, where it is not obvious that a student is disabled, for a student to disclose his/her disability to the institution in order to benefit from the new duties (paragraph 10)?**

**Q2: What do consultees consider would be a reasonable and realistic timetable for introducing the new duties which are set out in the following annexes A1 and A2 (paragraph 12)?**

**Annex A1: Disability Rights Task Force (DRTF) recommendations for schools**

***The structure of the education service differs between England, Wales and Scotland. References in this section of the consultation paper to “education providers” in the schools sector should, in relation to Scotland, be taken to mean “local authorities and independent and grant-aided schools”. In England and Wales, they should be taken to mean “LEAs and schools”. The responsibility for the new duties on schools in England and Wales falls upon governing bodies of maintained schools, LEAs in relation to maintained nursery schools and Pupil Referral Units and proprietors of independent schools. References to maintained schools apply only to England and Wales.***

1. The DRTF recommended various new duties to introduce comprehensive, enforceable rights for disabled children in schools. To address these recommendations, the Government proposes new duties on education providers. This consultation exercise meets recommendation 4.12 that there should be public consultation with all those with an interest.
2. The proposed legislation would make it unlawful for education providers to discriminate against a disabled child by:
   1. treating a disabled child less favourably on the grounds of their disability than a non-disabled child, without justification, in the arrangements made for the provision of education;
   2. failing to take reasonable steps to change any policies, practices or procedures which place a disabled child at a substantial disadvantage compared to a non-disabled child; and
   3. failing to take reasonable steps to provide education using a reasonable alternative method where a physical feature places a disabled child at a substantial disadvantage compared to a non-disabled child.
3. Disabled children will have new rights of redress in relation to these duties. The means of redress will be consolidated with that for cases brought under SEN legislation by extending the jurisdiction of the SEN Tribunal. In Scotland, where there is no Tribunal, it is proposed that the Sheriff Court would hear cases.
4. The Disability Rights Commission will produce a code of practice for education providers in relation to the new rights.
5. In England and Wales, there will also be a new duty on education providers to plan systematically to increase the accessibility of schools for disabled children. In Scotland, planning for access is devolved and, as described at paragraph 12, the Scottish Executive will consider proposals to introduce this measure in due course.
6. The Government accepted the DRTF recommendation that there should be no general duty on education providers to provide auxiliary aids and services for disabled children. Ministers expect that, regardless of their legal duties, education providers will adopt best practice to ensure the equalisation of educational opportunities for disabled children.

*Duty not to discriminate*

1. For this duty, it is intended that discrimination will take place if, for a reason which relates to his disability, a disabled person is treated less favourably than another person and that less favourable treatment cannot be justified. The aim here is to create, so far as is reasonably possible, a level playing field for all children regardless of whether or not they are disabled. However, where academic, sporting, musical or other ability are factors in determining whether a student is admitted to a school, this should continue.
2. The general principle is that the disabled pupil should never be discriminated against (on the grounds of their disability) in the arrangements made for the provision of education. However, less favourable treatment may be justifiable in some circumstances, though each case would be judged on its merits.

Examples: Where the behaviour of a disabled child who has behavioural difficulties make it difficult for him to participate in class discussion without significant disruption to other children’s education, a teacher may be justified in setting him separate work during the discussion.

A teacher does not choose a disabled pupil with Down’s Syndrome to be a member of a school football team simply because some parents have said they would prefer not to have him in the team with their children. This is unlikely to be justified.

*Reasonable adjustments to practices, policies and procedures*

1. School policies, practices and procedures should not put a disabled child at a substantial (i.e. more than minor or trivial) disadvantage to non-disabled children. The duty is that schools should have to review their policies, practices and procedures to ascertain whether they are likely to have such an effect in their application to disabled pupils and, if the answer is yes, change those policies and practices unless they are justified.

Examples: A school has a policy of using only the cheapest local transport company to take its pupils on school trips and that company does not provide transport which is suitable for disabled children. It might be reasonable for the school to consider adjusting its policy and using another company which can take a disabled pupil, or make alternative arrangements suitable for the disabled pupil. (Schools would still, of course, need to consider Value for Money issues.)

A school has a policy of not allowing children to eat in the classroom. It should consider changing this policy for a disabled pupil who has diabetes and who needs to eat at regular intervals to maintain sugar levels.

*Reasonable steps to provide education by alternative methods*

1. Where physical features of premises place a disabled pupil - for example with limited mobility - at a disadvantage in comparison with non-disabled children, the school should be required to do everything it reasonably can to mitigate the effects of the feature and provide the pupil with the educational service. The school will not be required to remove or alter the physical features of premises.

Examples: A library is located on the top floor of a school which has no lift. The school should consider relocating that library to an accessible ground floor room if that is something that can reasonably be achieved. If it is not reasonable for the school to do this, it should consider taking reasonable steps to ensure that a disabled child can have access to the information and other facilities in the library. This might include providing the pupil with a list of titles in the library and arranging for the books to be brought down to him where he can read them in a quiet room.

A school has a disabled pupil with a mobility-related impairment. It should consider taking reasonable steps to ensure that all his classes are timetabled to take place in classrooms which are accessible to him.

1. This duty, and the preceding duty to make reasonable adjustments to policies, practices and procedures, are as far as possible, anticipatory (as recognised by the DRTF in its recommendation 4.5). Schools should recognise that disabled children may join the school, anticipate the obvious consequences of their physical features or the effect that their policies, practices and procedures may have for disabled pupils and ensure that, where it is reasonable for them to do so, their policies, practices and procedures are not such as would prevent them from receiving the same education as other children at the school.

Planning duty

1. In Scotland, planning for access is devolved. This Bill will therefore not impose a planning duty on schools and local authorities in Scotland. The Scottish Executive will consider proposals to introduce this measure in due course.
2. In England and Wales, there will be a duty on LEAs to plan for increasing systematically over time the accessibility to disabled children of all maintained schools, maintained nursery schools and pupil referral units in their area. This might include adaptations such as:
3. improved colour schemes for those with sensory disabilities;
4. making materials available for blind children; or
5. making physical changes to buildings for wheelchair users.

This duty will be to increase access progressively and Ministers do not want to prescribe what has to be done by the LEA at any particular time. LEAs will have freedom to determine how they implement this duty. For example, an LEA may decide to focus on making particular schools completely accessible and then spreading this to other schools over time. Another LEA may decide to target improved access for particular types of impairment which it considers have the most difficulty accessing mainstream education.

1. LEA plans will be dovetailed with existing planning arrangements to avoid placing new burdens on LEAs. In England, it will also be linked to the *School Access Initiative.*  This provides capital support for projects to make mainstream schools accessible to disabled pupils, including pupils in wheelchairs and those with hearing and visual impairments. LEAs in Wales, in addition to their normal General Capital Funding allocations, will also able to bid for capital in support of these measures against their allocations under the National Assembly for Wales’ *New Deal: Additional Capital Funding for Schools* Programme.
2. There will also be a duty on maintained schools, non-maintained special schools, city technology colleges and independent schools to plan to increase systematically the accessibility of their premises and of the curriculum to disabled pupils within the context of the resources available to them.
3. For maintained schools, there will be an obligation to set out in their annual report their plans to increase the accessibility of premises and curriculum to disabled pupils. The annual report already has to include information about the arrangements for admission of disabled pupils, steps taken to prevent less favourable treatment of such pupils and the facilities available to assist access to the school by disabled pupils. Non-maintained special schools will be required to set out in the annual prospectus its plans to increase accessibility for disabled children. Independent schools and city technology colleges will be expected to produce ‘accessibility plans’.

Rights of redress

1. There should be rights of redress for disabled children and their parents where they feel that they have suffered unfair discrimination in schools on grounds of the child’s disability. These are applied in relation to the duties not to discriminate, to make reasonable adjustments to policies, practices and procedures and to take reasonable steps to provide education using an alternative method.
2. The Disability Rights Task Force has recognised that the work of the SEN Tribunal in England and Wales has been appropriate to the school setting. The Task Force stated that “*we considered that the less formal nature of the process, compared to that of county courts, was to be commended*.” Chairs and members of the Tribunal have a detailed knowledge of a range of SEN issues. The primary focus of the Tribunal is on ensuring that children with SEN have access to support, resources and the curriculum that are appropriate to them.
3. The Government proposes to accept the recommendation of the DRTF that the jurisdiction of the SEN Tribunal in England and Wales be extended to hear cases in relation to the new duties (apart from breaches of the planning duty). It believes that the same features that make the SEN Tribunal more user-friendly to parents and their children would be appropriate for a reconstituted Tribunal in disability cases too. The focus of the new Tribunal would be, for disabled children, to ensure that they did not suffer unfair discrimination while in school and they had, as far as is reasonably possible, access to the facilities and curriculum of the school of their parents’ choice.
4. The Tribunal would hear cases on SEN and disability discrimination. It would have the ability to hear them at the same time where this was appropriate to produce a consistent outcome. Ministers wish to avoid the possibility that the case can be heard as either SEN or disability discrimination with different results. Extension of the remit of the SEN Tribunal along these lines would, of course, have significant implications in terms of its membership, staffing and funding.
5. Ministers do not believe that the SEN Tribunal should have the power to award financial compensation in relation to disability discrimination cases in schools in England and Wales. They believe that the emphasis should be on securing the appropriate *educational* remedy. The prospect of financial compensation would make hearings more formal, adversarial and possibly longer and more acrimonious. It would not guarantee access to education for disabled people and may sour relationships between the partners in a disabled child’s education. For these reasons, Ministers are minded to follow the approach in SEN cases and not to offer compensation as a remedy in disability discrimination cases.
6. In Scotland, the redress mechanism would take account of the fact that SEN appeals are currently made to Scottish Executive Ministers. In the absence of an SEN Tribunal, it is proposed that disability discrimination cases in Scotland would be heard in the Sheriff Court. As in England and Wales, the Government wishes to ensure that parents have the right to take action through the court/tribunal system to ensure that disabled children do not suffer unfair discrimination while in school and have, as far as is reasonably possible, access to the facilities and curriculum of the school of their parents’ choice. Ministers are concerned to ensure that, in England, Wales and Scotland, the remedies are coherent and consistent.

When the duties should apply

1. Schools are covered currently by Part III of the DDA in respect of the right of access to goods, facilities, services and premises for the non-educational services that they provide (for example, Parent Teacher Association meetings).
2. It is intended that the new duties will apply to teaching during school hours and all other teaching, activities and other opportunities offered to pupils by or with the authority of the school.

Examples of activities subject to these duties:

1. break times;
2. school meals provision; study support activities provided by the school or by a parents’ association with the authority of the school;
3. school trips; and
4. school choirs and orchestras.

Who should they apply to

1. The duties should apply to:
   1. children of compulsory school age;
   2. children who are below compulsory school age if they receive nursery education in a school;
   3. children who exceed compulsory school age if they are pupils at a school.

School admissions in England and Wales

1. The new duties not to discriminate against disabled young people in schools will apply to the admissions arrangements for maintained and independent schools. The purpose of the new duties is to ensure that, so far as it is reasonable for them to do so, disabled children have the same rights as non-disabled children to go to a school of their choice and are not treated less favourably for a disability-related reason than their non-disabled peers. Existing admission arrangements would not change; rather, those responsible for admissions would be placed under a NEW duty to avoid unfair discrimination against disabled children in the way in which they operate the arrangements for admissions to schools.
2. LEAs and governing bodies of maintained schools have to comply with parents’ preference as to the school at which they wish education to be provided for their child except in certain circumstances. These circumstances include that compliance with the preference would prejudice “the provision of efficient education or the efficient use of resources” (section 86 of the School Standards and Framework Act 1998). These efficiency reasons should not be used as an excuse by the LEA or governing body not to make reasonable adjustments in order to accommodate a disabled child seeking admission. An independent school should not be able to justify a decision not to admit a disabled child who meets its selection criteria for reasons which would not exist if the new duties on reasonable adjustments had been complied with.
3. Maintained schools will continue to be able to select on the grounds of ability and aptitude to the extent that they are permitted to do so by statute. Independent schools will continue to be able to select on the basis of ability and aptitude. However, all schools will have to make reasonable adjustments to their admissions and selection policies and arrangements to ensure that, so far as is reasonably possible, disabled children compete on a level playing field with their non-disabled peers.
4. In the maintained sector there are statutory admissions appeal arrangements. Disability discrimination cases relating to admissions will be heard and enforced through the existing system.
5. The admissions provisions do not apply to independent schools. However, it is important that disabled children have rights of redress against independent schools as they do against other service providers who are alleged to have discriminated. Independent schools are not subject to local arrangements for appeals against non-admission to schools; the Government therefore proposes that cases brought against independent schools involving discrimination in relation to a child’s disability be heard by the reconstituted SEN Tribunal. In respect of admissions to independent schools, the right to appeal to the SEN Tribunal will relate solely to cases of disability discrimination.

School Admissions in Scotland

1. As in England and Wales, the new duties not to discriminate against disabled children in schools will apply to the admissions arrangements for publicly-funded, grant-aided and independent schools in Scotland. The current systems of admissions for publicly-funded schools (of catchment areas or feeder primaries, and placing requests) will not change; rather, authorities will be under a new duty to avoid discrimination against disabled children in the way in which they operate admissions to schools.
2. This general right of action in the Sheriff Court in cases of disability discrimination in Scotland will also apply to cases of disability discrimination in relation to school admissions in publicly-funded, grant-aided and independent schools. In practice, on appeals relating to placing requests, we would expect that Education Appeals Committees (which have a statutory role in appeals on placing requests in Scotland) to take claims of discrimination on grounds of disability into account when making their decisions.

**Q3: Do consultees see any difficulties in implementing the new duties on education providers in the schools sector?**

**Q4: Do consultees agree that the new rights of redress for pupils should mirror the proceedings of the existing SEN Tribunal with its emphasis on remedy through educational means (paragraphs 17-22)? Annex A2: Disability Rights Task Force** (**DRTF) recommendations on post-16 education**

1. The DRTF recommended that the Government introduces a separate section on further, higher and LEA-secured adult education in civil rights legislation to secure comprehensive and enforceable civil rights for disabled people. To achieve this, the Government proposes new duties that would cover further and higher education sector institutions and local education authorities (local authorities in Scotland) in relation to the further education (including local authority community education services in Scotland) they secure. These are referred to as “*education providers*” throughout this section.
2. The legislation would make it unlawful for education providers, in relation to the provision of education and services provided primarily for students, to discriminate against a disabled person by:
   1. failing to make a reasonable adjustment, where any arrangements, including physical features of premises, place him at a substantial disadvantage in comparison to persons who are not disabled; or
   2. unjustifiably treating him less favourably, for a reason which relates to his disability, than the provider treats others to whom that reason does not apply.
3. A Code of Practice prepared by the Disability Rights Commission, would be issued in relation to the new duties. A disabled person complaining of discrimination would have redress through the county court (in Scotland, the Sheriff Court). The Government proposes that voluntary conciliation arrangements are available in relation to complaints under these new duties.
4. These provisions, together with the schools provisions, will form new duties on education providers. Other providers of education services to the public will fall within the existing Part III of the DDA since the Government is ending the exclusion of education from coverage by the DDA’s access to service provisions. In addition, where education providers offer services to the public other than education and services provided primarily for students, these are already covered by the existing Part III of the DDA and this will continue.

**Overall Approach**

1. The Task Force recommended that simply lifting the exclusion of further, higher and LEA-secured adult education from Part III of the DDA would not be the best way forward. Part III makes discrimination unlawful in relation to the “standard” or “terms” of service and “refusal to provide” a service. The Government believes that the relationship between a student seeking and an education provider offering education is different from that between a customer and service provider under Part III, especially where the student spends a substantial amount of time using the provider's services. Part III only allows service providers to justify less favourable treatment in limited circumstances; these circumstances are inadequate to protect the legitimate justifications that education providers, which have admissions criteria to their courses, should be allowed to offer. More details on these issues are given below.
2. In formulating the policy on post-16 education, we have sought to provide as much certainty as possible as to:
   1. which providers of education will be covered; and
   2. which of the services they offer will be covered.
3. This is balanced with a desire to minimise confusion for providers of education already subject to Part III of the DDA. There is a division between coverage by the new duties and coverage by existing Part III duties which Ministers believe achieves these aims. Any provider of education or services to the public not covered by the new schools or post-16 provisions will fall within the existing Part III duties when they lift the exclusion. So disabled students will have comprehensive civil rights, whether this is under Part III or the new provisions.

**Education Providers**

1. Ministers propose that the new duties apply to a defined group of providers, in relation to both the provision of education and services provided primarily for students. The defined group of providers are:
   1. publicly funded further and higher education sector institutions; and
   2. local education authorities in relation to further education they secure.

All other providers of education to the public will be covered by the existing duties in Part III of the DDA when the exclusion is lifted.

1. The provision of education by further and higher education sector institutions funded by one of the Funding Councils[[1]](#footnote-1) is exempt from the provisions of Part III of the DDA. Sector institutions will all be subject to the new duties under the proposed legislation. Private providers who are already subject to Part III of the DDA will be working towards compliance and should remain subject to Part III. However, many private providers of education are classed as “voluntary organisations” and are currently exempt from Part III. This exemption for voluntary organisations will be removed and all private providers will be treated consistently and covered by Part III. This will mean that students at private institutions are treated consistently, whether or not they receive public funding for their tuition fees. The arrangements for post-16 education in England and Wales will undergo significant changes through the measures in the Learning and Skills Bill, which is currently before Parliament.
2. The arguments for different duties for education providers from those in Part III for other service providers are set out in paragraph 5. However, it is clear that LEA-secured adult education (in Scotland, local authority community education services) raises some issues in relation to the duties: for example, more learners are likely to be part-time or attend short courses, less of the provision is likely to be selective and courses take place on a range of premises rather than dedicated LEA centres. One option might be to place LEA adult education (local authority community education services in Scotland) - along with the Youth Service and voluntary providers - under Part III of the current DDA.
3. However, (as indicated above) the Government’s intention is that as far as possible there should be common arrangements for those involved in adult and community learning. As part of these arrangements, adult and community learning, with LEAs as a key strategic local player, is seen as playing a crucial role in the Government’s aim to widen participation, particularly amongst the most disadvantaged in society. It is right that LEAs should have to play a similarly pro-active role in combating discrimination in disability as all other providers.

Contractors

1. The new duties will apply to education providers in relation to the provision of education and services primarily for students. This raises the issue of where institutions contract out the provision of these services or they are provided on their behalf by student organisations such as students’ unions. It is proposed that the new duties only apply to the education provider themselves, with other providers of such services falling within Part III of the DDA. However, there are arguments that provision **on behalf of** institutions should also be covered by the new duties rather than by Part III of the DDA, in particular that it will often take place on institutions’ premises and be similar to other provision for students.

**Services covered**

1. The new duties apply to the provision of “education and services provided primarily for students” by the institution. While the exemption of publicly funded higher and further education from Part III of the DDA applies to the “education” they provide, Ministers believe that limiting the new duties to just “education” is too narrow. Higher and further education sector institutions offer many services to students, which although not essential to the achievement of the educational qualifications they are pursuing, are part and parcel of their wider educational experience. Services offered by institutions primarily to students*,* such as careers and welfare advice and sporting and leisure facilities should be subject to the new duties. Applying the new duties to this coherent package of services seems sensible although it will mean that some services currently under Part III of the DDA would transfer to fall under the new duties.
2. Part III also already applies to the many services institutions offer that are peripheral to a student’s educational experience and which are aimed at the wider public to raise revenue. This should continue.
3. As with any definition, there will be doubt at the margins. A regulation making power will be taken which will allow certain services to be deemed to fall within “education and services provided primarily for students”.
4. Services to students that are not provided by the institution but by another body, such as a students’ union, will be covered by Part III, although these may take place on the institution’s premises.

Coverage of Services

New provisions: education and services primarily for students provided by the institution

Examples of services to which the new duties will apply:

1. teaching and research facilities
2. student letting and accommodation services
3. careers advice
4. health, welfare and faith services
5. extra-curricular courses for students and employment agency services
6. leisure and social facilities primarily for students: bars, student restaurants, common rooms, clubs and associations, sports facilities
7. admission, examination and assessment arrangements
8. open days and induction events
9. references for students, graduation services and alumni membership
10. complaints and appeals procedures.

Part III of the Disability Discrimination Act

Examples of services to which Part III of the DDA already applies (and will continue to do so) or will apply in future when the exclusion is lifted:

1. facilities primarily for the public: sports centre, arts centre, bars, car parking facilities
2. facilities provided and operated by a third party at the institution (which may include many of the services listed above).

**New Duties**

1. The remainder of this section deals with the new duties (see above for education providers to which the new duties apply). The “*services*” to which the new duties apply are education and services provided primarily for students.

Discrimination

1. There are two forms of discrimination that will be made unlawful:
   1. failure to make a reasonable adjustment, where any arrangements, including physical features of premises, for *services* place a disabled person at a substantial disadvantage in comparison to persons who are not disabled; and
   2. unjustified less favourable treatment, for a reason which relates to a disabled person’s disability.

*Reasonable Adjustments*

1. An education provider would discriminate against a disabled person if he failed to make a reasonable adjustment to any arrangements, including physical features of premises, for *services* that place the disabled person at a substantial disadvantage in comparison to persons who are not disabled. In judging whether an education provider needs to consider making a reasonable adjustment, a disabled student is compared to his peers. This is a more appropriate test, when considering access to public sector education, than asking whether the disabled student finds it “impossible or unreasonably difficult” to access education (which would be the test in Part III of the DDA). This does mean that education providers might have to consider making adjustments in more circumstances than if they had been covered by Part III. Examples of some of the arrangements to which education providers will need to consider making reasonable adjustments are:
   1. admission, administrative and examination procedures;

Examples: A university looks for experience of voluntary work in its admission criteria for a social work course. A disabled student’s disability has meant that they have found it difficult to secure voluntary work in comparison to people without a disability. The university should consider adjusting this part of its admission criteria, perhaps by asking for examples of skills gained in other contexts.

A disabled student has mental health problems that makes it difficult for her to concentrate for lengthy periods. A university considers allowing her a break of 15 minutes during a three hour examination.

A college’s welfare service is open to students at lunch-times only. A disabled student has to have dialysis during this time. This places her at a substantial disadvantage to students without her disability. The welfare service should consider allowing the student to make an appointment at a different time.

* 1. course content, including work placements;

Examples: A college’s Business Studies course includes a requirement for examples of hand-written notes. The college should consider replacing this element of the course for a disabled student who is unable to write.

A university requires students to find and undertake 5 weeks of work experience as part of their course. A disabled student is experiencing difficulty in finding a local employer to take him on because of his disability. The university should consider adjusting its practice of requiring students to find their own placement by offering assistance to the disabled student. If this is unsuccessful, the university should consider replacing this part of the course for this student.

A university requires all students to take a year abroad as part of a language degree. A disabled student, because of his disability, feels unable to undertake this. The university considers the year abroad as an integral part of the course and decides that it would not be reasonable to waive this requirement. The university considers offering the student a related language degree course instead, which does not require a year abroad.

* 1. physical features of premises;

Examples: A college enrols a disabled student with a hearing impairment. Before the student starts the course, the college should consider equipping the lecture halls he will use with induction loops so that his hearing aid can operate effectively.

A university has a disabled student who is a wheelchair user. It considers installing a temporary ramp at her graduation ceremony so that she is not substantially disadvantaged in participating.

* 1. teaching arrangements.

Example: A university lecturer traditionally uses a blackboard to write on during his lectures. A disabled student who lip-reads is taking the course. The lecturer should consider using an overhead projector instead so that he does not need to turn his back to the lip-reader.

1. Education providers will also need to consider whether it is reasonable to provide additional equipment and services:
   1. additional teaching;

Example: A college should consider arranging for its ICT Department to teach a disabled student who is dyslexic how to make best use of new technologies to read text and spell-check the student’s work.

* 1. communication and support services to disabled students;

Examples: A university should consider arranging for trained students to assist new blind students during the induction week with orientation around campus.

A disabled student has repetitive strain injury and is unable to use a standard keyboard to type up her assessments. The college should consider arranging for her to use an adapted keyboard or purchasing voice recognition software to allow her to complete her assessments.

A disabled student with mental health problems uses the university’s counselling services. They are unable to meet his particular needs and consider it unreasonable, because of the specialist provision required, to make additional services available for him. They do refer him to the local authority which has such services.

* 1. the provision of information in alternative formats; and

Example: A college lecturer notifies students through the year of articles that they are required to read. A disabled student who is blind is taking the course. The lecturer should consider providing the disabled student with the list of all the articles at the beginning of the year so that the library can arrange for them to be put on audio tape. These can then be kept for future blind students.

* 1. training for staff.

Example: A deaf student is accepted onto a course at a college. Before he starts, the personal tutor allocated to him should consider attending a deaf awareness course.

*Assessing what is a reasonable adjustment*

1. There are a number of factors which, in particular, education providers will have to consider when assessing whether an adjustment or additional equipment or service is “reasonable”:
   1. whether the adjustment would affect the maintenance of academic and other standards;

Example: A disabled student has a choice of modules in her final year at university. Because of her disability, she does not reach the required standard to take a practical musical module. The university considers lowering the standard of musical ability required would jeopardise standards. The university offers her an alternative module.

* 1. the cost of the adjustment and the financial resources available;

Example: A deaf student who is able to lip-read considers that a palantypist (a typist who types speech into a machine which displays it on a computer screen) would enable him to participate more fully in group seminars. The university considers, given the circumstances, that the cost is unreasonable.

* 1. whether making the adjustment or additional provision is practical;

Example: A disabled person who uses a wheelchair is to attend an interview at a university in one week’s time. The university considers it impractical to provide a ramp to the building in which the interviews take place in the time available. The interview is moved to take place in an accessible building.

* 1. the effectiveness of the adjustment or additional provision;

Example: A disabled student with dyslexia has significant difficulty in reading in stressful circumstances. A university offers him additional reading time during an examination. This adjustment is ineffective since the student still cannot read the paper. The university should consider providing a reader instead.

* 1. the disruption caused to others;

Example: A disabled student, who plays for the college orchestra, has difficulty concentrating for lengthy periods of time. She asks that the orchestra adjusts its choice of material to only play short pieces and has breaks between each piece. The college considers this unreasonable since it limits the ability of other members of the orchestra to progress to longer and more complex pieces of music.

* 1. whether the student, or others, should provide the additional provision or services; and

Example: A disabled student is in receipt of Disabled Students’ Allowance that fully covers the cost of a note-taker. The college would not have to pay for the note-taker.

* 1. the importance of the service to which access is being sought.

Example: It might be reasonable for a local education authority, or a local authority in Scotland, to make an adjustment for a disabled student taking a weekly basic skills course or a course leading to a qualification, where it might consider the same adjustment for a one-off leisure course unreasonable.

*Less Favourable Treatment*

1. The second form of discrimination is unjustified less favourable treatment. An education provider will discriminate against a disabled person if, for a reason that relates to the disabled person’s disability, the provider treats him less favourably that he treats others to whom the reason does not apply and the provider cannot show that the treatment is justified.
2. A similar test for justification to the test found in the employment provisions of the DDA should apply here so that the provider could justify less favourable treatment if the reason for it is both material to the circumstances of the particular case and substantial. The Courts have interpreted the duty not to treat less favourably in the employment field widely and also held that “justification” should be viewed as a balance between the interest of employers and employees. A similar approach will be taken in the new duties on education, in the relationship between a student and the education provider.
3. This second form of discrimination should not be seen as wholly separate from the failure to make reasonable adjustments. Education providers will have to think of whether there is a reasonable adjustment that can be made to alleviate the substantial disadvantage a disabled student is facing, before they attempt to justify less favourable treatment. In most cases, there will be adjustments the education provider can make before he considers justifications.

Examples: A disabled student’s learning difficulty is the reason he has lower academic qualifications than a non-disabled peer. A university applies the same admission standards to both and does not take on the disabled student. This is less favourable treatment for a reason relating to the disabled student’s disability because, but for the disability, the student would have the same academic qualifications. However, the university might have to justify this less favourable treatment but it must, of course, first consider whether it is reasonable to adjust the admission standards in this case.

A disabled student’s disability is the reason she has to take time off and misses three lessons of her course. A college requires all students who miss three lessons to take the course again. This is less favourable treatment for a reason relating to the disabled student’s disability because, but for the disability, the student would not have missed any lessons. However, the college might have to justify this less favourable treatment but it must, of course, first consider whether it is reasonable to adjust its policy on lessons missed for this particular student.

A disabled student, who is a wheelchair user, does not pass her first year exams because she has not studied sufficiently although she had every opportunity to do so. Like other students who have failed, she is required to retake the exams. This is not less favourable treatment for a reason relating to the disabled student’s disability because the disability did not affect her exam results.

*Justification*

1. It is important that education providers are able to determine their admission standards, design of courses and the level of attainment required of students. Of course, they need to consider reasonable adjustments to their arrangements where these disadvantage disabled students but education providers should always be able to justify less favourable treatment if they reasonably consider it necessary to maintain relevant standards. This justification should not extend to considerations based on assumptions or ignorance of a disabled person’s ability. Examples of other justifications for less favourable treatment to be covered include:
   1. the ability of the disabled student to benefit from the provision;

Example: A disabled student with specific learning difficulties would be unable to understand a particular course and to pass the final qualification. He is refused admission to the course. This might be justified. The college would have to consider whether there are any reasonable adjustments which could be made. For instance, the college could suggest that he takes a course more suited to his needs and ability.

* 1. effect on provision for other students;

Examples: A disabled student requires oxygen from an oxygen cylinder that the student takes with him. During examinations, the institution asks the disabled student to work in a room separate from other students because the administration of oxygen is distracting. In the absence of any reasonable adjustments that could be made to allow him to sit the exam with others, this would be justified.

A disabled student with severe behavioural difficulties turns up without notice to an educational event organised by a voluntary organisation funded by the LEA. The volunteer leading the event assesses that she would be unable to meet the disabled student’s needs without disrupting the provision for others and turns the student away. This might be justified. She, however, raises the issue with the LEA and it should consider whether a reasonable adjustment could be made, such as the provision of additional support, to meet the disabled student’s needs at future events.

A disabled student with Down’s Syndrome applies for a basic skills course provided by his local education authority (LEA). The LEA places him on a specialist course for disabled people rather than the mainstream course to which he applied, because other students have said that they would prefer not to have him on the mainstream course. This is unlikely to be justified.

* 1. the disabled student would be unable to meet medical or other requirements of a profession to which the course leads; and

Example: A teacher training institution gives priority for admission to students committed to entering the teaching profession after completing their course. It rejects a disabled applicant on the grounds of a disorder that makes him medically unfit to teach. Depending on the severity of the condition and the circumstances of the case, this might be justified.

* 1. health and safety considerations.

Example: Students are allowed to work unsupervised in a laboratory. A college decides, after a proper assessment, that there are significant health and safety risks attached to allowing a blind student to work on his own. In the absence of any reasonable adjustments that could be made to allow the blind student to work on his own, this would be justified.

**Rights of Redress**

1. The remedies currently available to the Special Educational Needs Tribunal include directing an LEA to take a particular course of action. It is proposed that the Tribunal should have powers, in relation to schools, to consider disability discrimination cases in England and Wales and that, in Scotland, these powers be given to the Sheriff Court. Ministers do not believe that extending such a power of direction into the further and higher education sectors in Great Britain is compatible with the autonomy of institutions. So the remedy available to disabled students will have to mirror those available to students pursuing cases of race and sex discrimination in education, which is financial compensation. Although there might appear to be merit in taking such cases to a reconstituted SEN Tribunal in England and Wales, the introduction of financial compensation as a remedy would undermine the ethos and character of the Tribunal’s proceedings (as explained in paragraphs 17-22 of Annex A1). Thus Ministers propose that students take cases of disability discrimination to the county court or, in Scotland, the Sheriff Court. This would be consistent with cases under Part III of the DDA and the provisions in other discrimination legislation relating to education.
2. Ministers are keen that effective complaint and conciliation arrangements are put in place to enable the disabled students and education providers to resolve disagreements under these new duties. These should offer a speedy resolution to disputes and minimise the need to embark on court cases. However, there would be no compulsion to use the conciliation arrangements. The Disability Rights Commission Act required the DRC to arrange for conciliation services to be available for cases taken under Part III of the DDA. This could provide a model for conciliation arrangements under the new duties.

**Q5: Should the new duties apply to publicly funded higher and further educational institutions and Part III to the private and voluntary sectors (paragraphs 8-9)?**

**Q6: Do you agree that LEA-secured adult education and, in Scotland, local authority community education services should be treated together with further and higher education sector institutions and covered by the new duties (paragraphs 10-11)?**

**Q7: Should education providers be covered by the new duties in relation to only their own provision? Or should this be extended to any provision on their behalf (paragraph 12)?**

**Q8: Should education and services provided by an institution primarily for students fall within the new duties and other services remain in Part III? Is such a division workable (paragraphs 13-16)?**

**Q9: Are there other types of reasonable adjustments that providers should have to consider (paragraphs 19-20)?**

**Q10: Although the list at paragraph 21 (‘assessing what is a reasonable adjustment’) is not complete, are there other factors that should be taken into consideration ?**

**Q11: Are there any other factors that should be considered in justifying less favourable treatment (paragraphs 22-25)?**

**Q12. Should the remedies and court used for these discrimination cases be the same as for Part III and other discrimination cases in education (paragraph 26)?**

**Q13. What conciliation arrangements would be appropriate (paragraph 27)?**

**Annex B: Special Educational Needs (SEN)**

**(*This section of the consultation paper relates to England and Wales only. Consultees are asked to note that the Scottish Executive has included proposals on inclusion in forthcoming legislation in Scotland. Scottish Executive Ministers also intend to review the current arrangements for the assessment of children with special educational needs and for the provision, subsequently, of appropriate education.)***

1. The Department for Education and Employment (DfEE) published the Green Paper *Excellence for All Children: Meeting Special Educational Needs* (in Wales, *The BEST for Special Education*) in October 1997. This explained the Government’s vision of excellence for all children and encompassed children with special educational needs.
2. The documents *Meeting Special Educational Needs: A Programme of Action,* published in November 1998 in England, and *Shaping the Future for Special Education*, published in January 1999 in Wales, set out a proposed action programme for the next three years. They built on the Green Papers, the responses to the subsequent public consultation, and the advice of the DfEEs National Advisory Group on SEN and, in Wales, from the Welsh Advisory Group on SEN. The DfEE undertook to legislate, as Parliamentary time allowed, to implement the proposals in the action programme. The proposed SEN provisions of the Bill are as follows.

Parent Partnership

*“we will expect all LEAs to have a parent partnership scheme and to provide schools and local agencies (including those working with pre-school children) with information about the services available” (Programme of Action: Chapter 1, paragraph 8)*

“*we will expect parent partnership schemes to ensure that the parents of any child identified as having SEN should have access to an independent parental supporter” (Programme of Action: chapter 1, paragraph 9)*

1. It is proposed that all LEAs will be required to offer a parent partnership service and provide schools and local agencies (including those working with children below compulsory school age) with information about the services available. The services (to be elaborated in guidance) will include providing parents of any child identified as having SEN with access to an Independent Parental Supporter. Not all parents will wish to use the services of an IPS, of course, but the opportunity should be available to them. The LEA will be responsible for ensuring that a Parent Partnership Service is provided but they need not necessarily provide it themselves.
2. The duty to be placed on LEAs to make a Parent Partnership Service available to parents of all children with SEN will make the existing requirement to provide a “Named Person” unnecessary. This requirement will therefore be removed.

Conciliation arrangements

*“we will expect LEAs to establish conciliation arrangements, with an independent element, for resolving disputes with parents” (Programme of Action: Chapter 1, paragraph 11)*

1. Closely linked to the parent partnership requirement will be a new requirement on LEAs to establish independent conciliation arrangements for resolving disputes with parents. There are currently no procedures for dispute resolution other than the SEN Tribunal. In order to reach, as far as possible, a satisfactory solution through conciliation and reassure parents that the issues have been objectively considered, Ministers believe that the arrangements themselves should be independent of the LEA. Parents will not be obliged to use conciliation services if they do not wish to, and the new arrangements will not remove, or compromise in any way, the rights of parents to lodge an appeal with the SEN Tribunal.

Revised SEN Code of Practice

*“we will produce a revised Code to come into effect during the academic year 2000/2001” (Programme of Action: Chapter 2, paragraph 4)*

1. The Government will revise the SEN Code of Practice and the DfEE will consult widely on those revisions. There are also a number of minor technical amendments that can be made through this Bill that will help to streamline the service to parents of children with SEN.

A requirement on governing bodies and LEAs to notify parents that their child has been identified as having SEN

1. There is currently no statutory requirement on governing bodies (or LEAs in the case of maintained nursery schools) to notify parents of a decision by the school that their child has SEN although they must inform those that will teach the child (section 317 of the Education Act 1996). It will be a new requirement on governing bodies and LEAs that parents should be notified, usually by a teacher, in such cases. If possible, this requirement will also be placed on providers of early years education outside the maintained sector.

Time taken by LEAs in making a statutory assessment

1. Under Schedule 26 of the Education Act 1996, the Secretary of State’s power to make regulations governing time limits in relation to the process of making a statutory assessment only becomes effective when an LEA *has made* a decision to make an assessment and not beforehand when an LEA is deciding *whether* to make an assessment. This was a technical oversight that will be corrected by amending Schedule 26 of the Education Act 1996 to give the Secretary of State a power to make regulations at the point where the LEA proposes an assessment or receives a request to make one.

Naming of a type of school in a statement of SEN

1. Section 324 of the Education Act 1996 requires that a statement shall specify the type or name of school or other institution which the LEA consider would be appropriate for the child; and specify any provision for the child for which they make arrangements under section 319 of that Act and which they consider should be specified in the statement.
2. Parents sometimes make provision for their children outside the maintained sector. If the LEA is required to name a school that a child may never attend because he or she is at an independent school, this might result in the school keeping open a place that could otherwise be taken up by another child. It is proposed to amend the Act so that LEAs need specify only the type of school, but not name any particular school that the LEA considers would be appropriate for the child, in circumstances where the child’s parents have themselves made “suitable arrangements”.

Giving schools the power to request a statutory assessment

1. At present, a school has no right to request an assessment. This may disadvantage the less articulate or less confident parents who may rely on the school to approach the LEA on their behalf. Legislation will give schools the right to request an assessment and impose a duty on the LEA to decide whether to agree on the same basis as if the request had come from a parent. Parents will also have the right to appeal to the SEN Tribunal against a decision by an LEA to refuse to agree to a school’s request for a statutory assessment.

SEN Tribunal

*“If necessary we will legislate, when Parliamentary time allows, to specifically require LEAs to comply with Tribunal orders….” (Programme of Action: Chapter 2, paragraph 24)*

*“We will make further improvements to the effectiveness of the SEN Tribunal…” (Programme of Action: Chapter 2, paragraph 25)*

1. In addition to a proposal to link LEA implementation of Tribunal orders to timescales that were the subject of consultation last year, a number of other provisions are proposed in relation to the SEN Tribunal. These provisions are designed to reinforce and strengthen parental rights in relation to appeals directed to the Tribunal.

Requiring LEAs conceding an appeal to comply with the parent’s request

1. At present, many parents continue with appeals, even where the LEA does not defend the appeal, to ensure that the LEA complies with their request. This results in many needless appeals. Where an LEA decides to concede an appeal, the LEA will be required take the necessary steps to implement within a prescribed time the undertaking given to parents.

Requiring an LEA to give notice to parents of the time limits relating to an appeal to the Tribunal at the same time as notifying parents of their right of appeal

1. At present, LEAs are legally required to notify parents of their right of appeal but not all set out the time limits for such appeals. This leads to uncertainty and can sometimes result in an appeal being disallowed. When an LEA notifies a parent of the right of appeal, it will be required to state the time limits, in writing.

Where an appeal is against ceasing to maintain a statement, requiring the LEA to maintain the statement until the appeal is heard

1. The Programme of Action identified the issue of LEAs maintaining a statement in cases until an appeal against ceasing to maintain it is heard. Natural justice and the interests of the child argue for maintaining the statement until the appeal is resolved. LEAs will be required to maintain the statement until the outcome of the appeal is known.

Altering the wording of section 323(1)(a)

1. Section 323(1)(a) of the 1996 Act refers to the LEA informing the child’s parents that they “propose” to make an assessment of the child. The LEA then has six weeks to decide whether or not to make an assessment. An LEA’s proposal to make an assessment may confuse parents who might assume on receipt of the notice that an assessment will be made. The wording of this section will be amended to avoid such confusion.

Inclusion

*“We will review the statutory framework for inclusion” (Programme of Action: Chapter 3, paragraph 9)*

1. The Government is committed to promoting the inclusion of pupils with special educational needs in mainstream schools. This is the cornerstone of their strategy to raise standards and ensure that all children fulfil their potential. Ministers seek a more inclusive system which ensures that the education service offers excellence and choice for all. Three-quarters of respondents to the Green Paper supported the principle of inclusion.
2. The Government’s approach to inclusion has been practical and not dogmatic. The key objective must be to safeguard the interests of all children. Where parents seek a mainstream setting for their children, Ministers believe that the service should, as far as possible, provide this. Equally, where more specialist provision is sought, it is important and, Ministers believe, right that parents’ wishes are respected.
3. The SEN Programme of Action gave a commitment to review the statutory framework for inclusion and undertook to make changes if that work or the work of the Disability Rights Task Force (DRTF) showed a need. The DRTF recommended that *“in reviewing the statutory framework for inclusion, the Government should strengthen the rights of parents of children with statements to a mainstream placement, unless they want a special school and a mainstream school would not meet the needs of the child or the wishes of either the parent or child”.*
4. In practice, not all children who would benefit from education in a mainstream school receive it. The first caveat to section 316 of the Education Act 1996 - which seeks confirmation that a school can meet a child’s needs - is often used to refuse a mainstream place. Parents are not well placed to argue against such a judgement. Further, with the right strategies and support the vast majority of a child’s individual needs can be met in either a mainstream or specialist setting. The Government, therefore, intends to legislate to strengthen the right to a mainstream place by replacing section 316 - which has come to be seen as a negative statement - with a new positive provision firmly endorsing inclusion. The principles of the new provision would be that a child with SEN shall be educated within a mainstream setting unless:
   1. this is incompatible with the wishes of his or her parents; or
   2. a school or local authority cannot take reasonable steps to adapt its provision to secure a place for them in a mainstream setting without:
      1. prejudicing the efficient education of the children with whom he or she will be educated; or
      2. incurring unreasonable public expenditure.
5. Ministers intend the proposed change to send a clear signal that a mainstream place should only be refused in the small minority of cases where it can be demonstrated that the interests of all children cannot be safeguarded. They believe the new provision, in conjunction with the DRTF provisions, represent a significant step forward in removing the barriers to a more inclusive education service.

Questions

**Q14: Do you see any practical difficulties with the proposals on parent partnership and conciliation (paragraphs 3-5)?**

**Q15: Do you agree that schools and LEAs (in the case of maintained schools) should have a statutory duty to notify parents that the school has concluded that their child has SEN (paragraph 7)?**

**Q16: Do you agree that LEAs should not be required to specify the name of a school in part 4 of a statement in cases where the parents have themselves made suitable alternative arrangements for their child’s education (paragraphs 9-10)?**

**Q17: Do you agree that schools should be given the right to request that their LEA makes a statutory assessment and that parents should be allowed to appeal to the SEN Tribunal when the LEA have refused an assessment request from the child’s school (paragraph 11)?**

**Q18: Do you anticipate practical difficulties with the proposals in relation to the SEN Tribunal (paragraphs 12-16)?**

**Q19: Do you agree that the proposals to strengthen the right to a mainstream place strike the right balance between (i) strengthening inclusion and (ii) the interests of other children (paragraphs 17-21)?**

1. Further Education Funding Councils for England, Wales and the Scottish Further Education Funding Council. Higher Education Funding Councils for England and Wales and the Scottish Higher Education Funding Council. [↑](#footnote-ref-1)