



# Duties and definitions

*"Do you know who your disabled pupils are?"*

*"Do you know what your duties towards your disabled pupils are under the DDA?"*

*"Do you know how many different sets of duties work together to support disabled pupils?"*

*"Do you know how those different duties work together?"*

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This section provides a guide to the duties in the DDA. This includes an account of how the DDA duties fit with the SEN duties and the planning duties and it provides more detail on the definition of disability used in the DDA.

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# Duties and definitions

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# 1. The duties

The SEN and Disability Act 2001 amended the SEN framework, set out in the Education Act 1996, and extended the Disability Discrimination Act (DDA) 1995 to cover the provision of education.

The guidance in this resource is designed to support schools and local education authorities in England in meeting their duties to disabled pupils.

This section examines the duties on local education authorities and schools in Part 4 of the DDA and Part 4 of the Education Act 1996. It is also relevant to extended school provision, particularly where the provision is made at the school and for the school's own pupils. Extended services provided by others, for example: youth services, voluntary agencies or private companies, are all covered by the DDA, but by different parts of the DDA. A separate section, in the introduction to *Improving access for disabled children: early years* explains how the duties apply to early years providers who are not schools.

## The written guide

The text of this section of the written resource is also available on the CD-ROM, so that:

- materials can be copied and used in training and development activities; and
- text can be converted into other formats, for example large font, for increased accessibility.

## Three sets of duties

Since 2002, three sets of duties have combined to provide the statutory framework that underpins equality of opportunity for disabled pupils in accessing school education:

- the disability discrimination duties in Part 4 of the DDA;
- the planning duties in Part 4 of the DDA;
- the Special Educational Needs (SEN) duties in the Education Act 1996.

Together the three sets of duties are designed to ensure access to education and the inclusion of disabled pupils in every aspect of school life. They focus on the removal of barriers to the progress of disabled pupils and underpin what many schools are already putting into practice. Each set of duties provides an important element:

- the disability discrimination duties provide protection from discrimination;
- the planning duties provide for improvements to increase access, over time; and
- the SEN framework provides auxiliary aids and services.

## Disability discrimination duties in Part 4 of the DDA

It is unlawful for schools to discriminate against disabled pupils. A school discriminates if:

- it treats a disabled pupil or prospective pupil less favourably than another for a reason related to their disability and without justification;
- it fails, without justification, to take reasonable steps to avoid placing disabled pupils at a substantial disadvantage. This duty is often known as the 'reasonable adjustments' duty.

The reasonable adjustments duty requires schools to think ahead, anticipate the barriers that disabled pupils may face and remove or minimise them before a disabled pupil is placed at a substantial disadvantage. Reasonable adjustments may need to be made in admissions, exclusions and '*education and associated services*,' a term that covers every aspect of the life of the school. A Code of Practice, published by the Disability Rights Commission (DRC)<sup>1</sup> provides guidance on the way the duties operate. The Code provides examples illustrating how the duties apply in practical situations in schools. Ofsted expects to see evidence of practical adjustments being made in the classroom and in other areas of school life.

In general it is the governing body of the school that is the 'responsible body' for the DDA duties and needs to ensure that everyone in the school, staff or volunteer, is aware of the duties owed to disabled pupils. To avoid discrimination against any disabled pupil, all staff need to implement the duties in relation to their area of responsibility: in the classroom for a class teacher, on a school trip for a member of staff planning a school trip, at lunch times and break times for ancillary staff, in a particular area of curriculum for those with curriculum responsibilities, across the whole school for the headteacher.

If parents think that their child has been discriminated against, they have a right of redress by making a claim of disability discrimination to the SEN and Disability Tribunal (SENDIST). If the Tribunal finds that a school has discriminated unlawfully against a disabled pupil it can order any remedy that it sees fit, except financial compensation.

## Planning duties in Part 4 of the DDA

Local education authorities (LEAs) and schools are required to develop accessibility strategies and plans, respectively, to improve access to school education for disabled pupils.

The strategies and plans are required to show how, over time, access to local schools will be increased by:

- increasing access to the curriculum for disabled pupils;
- making improvements to the physical environment of the school to increase access to education and associated services;
- making written information accessible in a range of different ways for disabled pupils, where it is provided in writing for pupils who are not disabled.

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<sup>1</sup> DRC (2002) Disability Discrimination Act 1995: Part 4 Code of Practice for Schools

Because the planning duties require LEAs and schools to make improvements, over time, to the physical environment of schools, physical alterations are not included in the reasonable adjustments duty.

The legislation requires the provision of information in alternative formats to be made within a reasonable period of time and taking into account the views expressed by pupils, or by their parents, about their preferred means of communication.

The plans and strategies are required to be in writing and have to be resourced and implemented. Plans and strategies run for three years, from 1 April 2003 to 31 March 2006 in the first instance, renewable every three years thereafter. During the three-year period, plans and strategies must be kept under review and, if necessary, revised.

Schools are required to report annually on their accessibility plans, and on other aspects of their DDA and SEN duties. With the removal of the requirement on the governing body to publish an annual report to parents, the school is required to make this report in the school prospectus. LEAs are required to make their strategies available upon reasonable request. Wider requirements relating to the freedom of information also mean that public bodies, including schools and local authorities, are required to make such information available.

The governing body of the school is responsible for the school's accessibility plan. The development and implementation of the plan will involve different members of staff according to their responsibilities:

- the development of access to the curriculum will need to be led by those with curriculum responsibilities;
- the development of materials in different formats is likely to involve all staff in respect of materials used in their own teaching; and
- the headteacher, or a senior manager, will need to lead on improvements to the physical environment, the deployment of resources and the coordination of the plan across the whole school.

Ofsted inspects the quality of school plans and local authority strategies. In particular Ofsted expects to see the three key elements of the planning duties addressed in plans and strategies. The Secretary of State has powers to instruct schools and local authorities to draw up a plan or strategy if they do not have one, or to order improvements if this should be necessary.

## Definition of disability

The disability discrimination duties are owed to all pupils who are defined by the DDA as being disabled and under the planning duties schools and local authorities have a general duty to improve the accessibility of schools for disabled pupils. 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 or her ability to carry out normal day-to-day activities.'*

Physical or mental impairment includes sensory impairments and also hidden impairments. In the DDA *'substantial'* means *'more than minor or trivial'*. *'Long-term'* means has lasted or is likely to last more than 12 months.

The definition is broad and includes children with a wide range of impairments, including learning disabilities, dyslexia, diabetes or epilepsy where the effect of the impairment on the pupil's ability to carry out normal day-to-day activities is adverse, substantial and long-term.

A significant number of pupils is included in the definition. Information in the following sections provides more detail, see *A bit more about definitions*, page 15.

## Special Educational Needs duties in the Education Act 1996

Though the definition of disability comes from the DDA and the definition of SEN comes from the Education Act 1996, there is a significant overlap between the two groups of children. In the next section there is more detail on the definitions of disability and SEN and the likely areas of overlap.

The definition of SEN includes many, but not necessarily all, disabled children: a disabled child has special educational needs if they have a disability and need special educational provision to be made for them in order to be able to access the education which is available locally.

The SEN duties provide support for children identified as having SEN. The 1996 Act sets out duties on local education authorities to:

- identify;
- assess; and
- make additional or different provision available, for example: equipment or human resources, where necessary.

The SEN duties require schools and LEAs to make appropriate provision for children and young people with SEN, so the provision of 'auxiliary aids and services' is not included in the reasonable adjustments duty under the DDA.

Governing bodies of schools are required to use their 'best endeavours' to ensure that appropriate provision is made for children with special educational needs. Both LEAs and schools, and others working with them, are required to 'have regard to' the SEN Code of Practice which provides the main guidance on how they might interpret their duties. SEN responsibilities are coordinated within the school by the SEN Co-ordinator (SENCO).

Parents who do not agree with the decisions of the LEA about the assessment of their child's needs, or the special educational provision to be made for their child through a statement, have a right of appeal to the SEN and Disability Tribunal.

## Support to the development of inclusive practice in schools

The statutory duties set a clear framework for the development of inclusive practice in schools. Stemming from these are other inclusive elements in the educational framework. These include guidance,<sup>2</sup> some of which is statutory, that shapes national and local policy and practice in relation to disabled children and children with special educational needs:

- a statutory 'general inclusion statement' in the National Curriculum;

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<sup>2</sup> Full references to the guidance listed here can be found in the *Resources* section of the CD-ROM

- a Special Educational Needs Code of Practice that states that every teacher is a teacher of pupils with SEN;
- teacher training standards that recognise the responsibilities of all teachers to children with SEN;
- Ofsted inspection of educational inclusion;
- guidance to schools and LEAs, *Inclusive schooling: Children with special educational needs*, on their general duty to include children with special educational needs in a mainstream school where parents want that;
- guidance on *The distribution of resources to support inclusion*.

## Disability discrimination duties, planning duties and SEN duties in context

Each set of duties contributes an important element to access and inclusion for disabled pupils in schools, providing:

- auxiliary aids and services, through the SEN framework;
- physical improvements to increase access to education, through the planning duties;
- protection from discrimination, through the disability discrimination duties: the duties to make reasonable adjustments and not to treat less favourably.

However, in practice, schools and local authorities do not isolate the duties from each other. They work with all the duties together to support disabled pupils:

School A knows that disabled pupil B is going to be admitted next term. Pupil B has a visual impairment. He needs a closed-circuit television (SEN framework) and some specialist software to be provided for him (the school already has this for use with other pupils) so that he can access printed material. He needs the occasional support of a specialist teacher (SEN framework). His teachers need to adapt their teaching style to suit him (reasonable adjustments) and pay particular attention to his physical location in the classroom (reasonable adjustments) and to pupil grouping to ensure that he is not isolated from his peers (reasonable adjustments). To enable him to find his way around the school independently, the school needs to have adapted the visual environment of the school, with colour contrast, step markings and way-signing (planning duties).

If the package of duties is working as a seamless whole, a visitor to the school sees a young boy learning successfully alongside his peers.

## The SEN framework and the planning duties

There are two ways in which the SEN framework and the planning duties overlap:

- the provision of materials in alternative formats; and
- the provision of equipment.

### Materials in alternative formats

One area of overlap between the SEN framework and the planning duties is in respect of the provision of materials in alternative formats. Many pupils who need written materials provided in alternative formats may currently have such provision

made through the SEN framework, for example pupils who use Braille, pupils who use picture or symbol communication systems or simplified text. The responsibility for such provision for individual pupils is through the SEN framework, regardless of whether it is provided by the local authority, through a statement, or by the school, and that will vary depending on the local funding arrangements.

The planning duties require schools and local authorities to show how they are making written information more accessible in a range of different ways for disabled pupils, where that information is provided in writing for pupils who are not disabled. The focus of the planning duties is on building accessible formats into school provision over time. Through the operation of the planning duties, formats that may currently be available on a one-off basis for individual pupils under the SEN framework, should become part of the provision that schools have available for any disabled pupil who may need it. The duties shift the focus from provision for individual pupils through the SEN framework to accessible formats built into the school's provision.

### **The provision of equipment**

In the same way much provision of equipment is through the SEN framework.

Pupils who use, for example:

- laptops,
- coloured overlays,
- concept key boards,
- spell checkers,
- enlarged computer screens and keyboards,
- switches or closed circuit television,

will probably have such equipment provided through the SEN framework, again, provided either by the local authority or by schools from their delegated budget.

The planning duties also include the provision of equipment as 'improvements to the physical environment to increase access for disabled pupils' and the Schools Access Initiative includes funding for such equipment. The planning duties shift the focus from provision for individual pupils through the SEN framework to equipment that is available for the benefit of any disabled pupil who may need it.

## **The reasonable adjustments duty and the planning duties**

The planning duties have a distinctive contribution in respect of the physical environment but in respect of access to the curriculum there are some areas of overlap with the reasonable adjustments duty.

### **Planning duties and the physical environment**

The requirement to 'improve the physical environment of the school to increase access to education and associated services' is specific to the planning duties. Physical alterations are excluded from the duty to make reasonable adjustments. The Disability Rights Task Force, who advised the Government on the design of this part of the legislation, recommended that, rather than including physical alterations in the reasonable adjustments duty, which would make the duties more responsive to the individual pupil arriving in an individual school, a more strategic approach

should be taken. They argued that the planning duty would lead to greater benefits for a greater number of disabled pupils.

### Planning duties and the curriculum

In respect of increased access to the curriculum, the planning duties overlap with the reasonable adjustments duty. The overlap is not simply in terms of the coverage of the curriculum, it also relates to:

- timing: with both duties requiring schools to think ahead;
- the generality of disabled pupils: with both duties requiring schools to anticipate the needs of the generality of disabled pupils.

However, whilst there are significant overlaps, there are differences of focus and degree. Under the planning duties changes are more likely to:

- be to curriculum design, schemes of work, and related assessment systems, in effect: the curriculum infrastructure;
- take the school further ahead in terms of the period of time for which it is planning, with the life of the school's accessibility plan being three years in the first instance;
- impact on a wider group of disabled pupils, including prospective pupils;
- be managed in a more cost effective way.

These are not categorical differences. In respect of the curriculum, in particular, they are differences of emphasis and degree. The planning duties tend to take schools further ahead in their anticipation, deeper into the structures and systems of the school, and draw on a more planned approach to the use of resources, ultimately to the benefit of a wider group of pupils.

### Developing capacity: reasonable adjustments and accessibility planning

Making reasonable adjustments and implementing accessibility plans both help to develop schools' capacity to provide improved access to every aspect of school life for disabled pupils. This doesn't happen overnight; it is a gradual and a cumulative process.

There is much evidence from the Reasonable Adjustments Project (RAP) that the arrival of an individual disabled pupil can be the reason for a school to start making reasonable adjustments. Once this process is underway, the school does not need to make the same amount of 'adjustment' for the next pupil. There is a good example of this in *Making reasonable adjustments for disabled pupils*, DVD3. Charlotte and Hollie follow Alex to North Leamington Community School and Arts College. The adjustments made for Alex make it easier for Charlotte and Hollie. It is easier for the school because of changes they have already made; it is easier for the pupils because they are not breaking new ground or asking the school to make as many changes. Some of the things that the school needs to do are already incorporated into their policies, practices and procedures. As schools gain experience and see the results of their efforts, they gain confidence in working with a wider range of pupils. This confidence breeds its own success.

Schools have to think ahead, anticipate barriers and remove them or minimise them. The duties require schools to make changes to the way that they do things. As schools do this for successive pupils they may build their expertise in a range of ways:

- listening to pupils in order to better understand what may constitute a barrier for them;
- drawing on parents' expertise to gain insights into what has worked at home or in other settings;
- working collaboratively and creatively with other agencies, schools, partners and stakeholders to identify ways of removing barriers;
- reviewing outcomes and considering them against the provision they have made for a pupil, learning as much from what doesn't work as from what does work.

Many adjustments will require the whole staff of the school to do something differently, for example, a change in timetabling, a change in homework policy. There are aspects of making reasonable adjustments that require collective rather than individual effort and institutional rather than individual change. Both the reasonable adjustments duty and the planning duties call widely on resources and staffing across the school and require coordination at the most senior level.

As changes affect more fundamental structures they become more deeply embedded in the practice of the school and become a more intrinsic part of what we might call 'ordinary' good teaching. Successive waves of making reasonable adjustments, planning and increasing access to the whole life of the school, and the gradual incorporation of these into 'ordinary' good teaching, are likely to raise the threshold from which the next round of reasonable adjustments is made and the next round of plans is constructed. In this way there is a gradual development of schools' capacity to include and provide access to every area of school life for disabled pupils.

## The nature of good practice

Both the Accessibility Planning Project (APP) and RAP identify the requirements of the respective duties and the principles of good practice that have informed the project work. These requirements and principles are published as part of the materials.

The majority of practitioners involved with the two projects have not been focused on what they need to do to comply with the legislation, rather they have focused on:

- what they need to do for an individual disabled pupil to ensure that pupil can join in the life of the school; or
- how they need to plan to improve access and inclusion for disabled pupils in the longer term.

Those working with the two projects were driven by their commitment to the pupils, not by a consideration of what would keep them from appearing before the SEN and Disability Tribunal or from being criticised by Ofsted for the quality of their accessibility plan or strategy. The materials reflect the good practice identified through the projects.

## The national policy context

The APP and RAP projects were commissioned as part of the Government's ten year Strategy on SEN, *Removing barriers to achievement* (2004). *Removing barriers to achievement* is one of a number of elements in the Government's approach to disability and to wider change in children's services. Of particular relevance here are:

- the children's Green Paper, *and Every Child Matters: Change for Children* (2004);
- the publication of a *National Service Framework for Children, Young People and Maternity Services* (2004), in particular *Standard 8: Disabled Children and Young People and those with complex health needs*;
- the report from the Cabinet Office on *Improving the life chances of disabled people* (2005); and
- the passage of the Disability Discrimination Act 2005.

## The Disability Discrimination Act 2005

The DDA 2005 places a duty to promote disability equality on all public bodies, including schools and local authorities. This requires them to have due regard to the need to:

- eliminate discrimination;
- eliminate harassment related to a disability;
- promote equality of opportunity between disabled people and other people;
- promote positive attitudes towards disabled people;
- encourage participation by disabled people in public life; and
- take steps to take account of disabled people's disabilities even where that involves treating disabled people more favourably than other people.

The duties apply to disabled pupils, disabled staff and disabled people who use services provided by schools and local authorities.

Regulations made under the DDA 2005 place specific duties on schools and local authorities, to develop a disability equality scheme to support the implementation of the general duty set out above. Local authorities and secondary schools are required to publish their disability equality scheme by 4 December 2006, primary schools and special schools by 3 December 2007.

The Disability Rights Commission (DRC) has published a Code of Practice on *The Duty to Promote Disability Equality* which sets out the requirements of a disability equality scheme. The DRC is also providing guidance for schools on the general 'duty to promote' and the specific duties, including the duty to publish a disability equality scheme.

Good practice in accessibility planning and in making reasonable adjustments, as identified through *Improving access for disabled pupils* and *Making reasonable adjustments for disabled pupils*, in this resource, will help schools and local authorities to meet their duties under the DDA 2005.

## The planning context

Some of the structural changes that follow from *Every Child Matters* change the context within which the accessibility planning duties sit. Children's Trust arrangements will cover responsibilities for planning and commissioning services for children and local authorities will draw up a Children and Young People's Plan bringing together social care, education and other services. The Plan is designed to help secure five main outcomes for children and young people:

- being healthy;
- staying safe;
- enjoying and achieving;
- making a positive contribution;
- economic well being.

These outcomes are woven into 'education and associated services' and, as such, schools and local authorities are required to make reasonable adjustments for disabled pupils to support them in achieving these outcomes. The DVD materials in *Making reasonable adjustments for disabled pupils* show many examples of schools making reasonable adjustments that will help disabled pupils to achieve these outcomes.

The accessibility planning duties on schools and local authorities continue at a time when other planning requirements are removed. However, the duties will sit within a new framework that is increasingly structured to enable multi-agency working. *Improving access for disabled pupils* encourages local authorities to dovetail the accessibility planning duties with other requirements within the context of the Children and Young People's Plan.

It is important that the accessibility planning duties are co-ordinated with the new frameworks at school and at local authority level. The implementation, review and revision of plans and strategies will almost certainly be covered more effectively by being included within these structures. However, the experience of APP partner authorities and their schools was that the unique focus of the accessibility strategy or plan is essential to the identification and removal of barriers for disabled pupils: a plan developed separately for focus and incorporated into broader structures for a more certain guarantee of implementation.



## 2. Is Tom disabled?

### 1. Does Tom have a difficulty with any of the following 'normal day-to-day activities'?

*Mobility:* getting to/from school, moving about the school and/or going on school visits?

*Manual dexterity:* holding a pen, pencil or book, using tools in design and technology, playing a musical instrument, throwing and catching a ball?

*Physical co-ordination:* washing or dressing, taking part in games and Physical Education?

*Ability to lift, carry or otherwise move every day objects:* carrying a full school bag or other fairly heavy items?

*Continence:* going to the toilet or controlling the need to go to the toilet?

*Speech:* communicating with others or understanding what others are saying; how they express themselves orally or in writing?

*Hearing:* hearing what people say in person or on a video, DVD, radio or tape recording?

*Eyesight:* ability to see clearly (with spectacles/contact lenses where necessary), including any visual presentations in the classroom?

*Memory or ability to concentrate, learn or understand:* work in school including reading, writing, number work or understanding information?

*Perception of the risk of physical danger:* inability to recognise danger e.g. when jumping from a height, touching hot objects or crossing roads?

### 2. Is Tom's difficulty caused by an underlying impairment or condition?

### 3. Has Tom's impairment or condition lasted, or is it likely to last, more than 12 months?

### 4. Is the effect of Tom's impairment or condition 'more than minor or trivial'?

If you have answered yes to questions 1 to 4, then Tom is probably disabled under the Disability Discrimination Act. If Tom receives medical or other treatment to reduce or remove the effects of his condition, he may still be disabled. The test is whether the effects would recur if he were to stop his treatment.





### 3. A bit more about definitions

A common perception is that the definition of a disability applies to a small group of people, commonly thought to be only those with a physical or sensory impairment. In practice it applies to a much larger group of people. A report from the Cabinet Office (2005) *Improving the Life Chances of Disabled People*, draws on estimates that suggest that about 11 million adults and 772,000 children in the UK are disabled, equivalent to 24% of the adult population and 7% of all children.

The Disability Discrimination Act 1995 (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 or her ability to carry out normal day-to-day activities.'*

Appendix 1 of the Disability Rights Commission's *Code of Practice for Schools: Disability Discrimination Act 1995: Part 4* provides a more detailed account of the definition of disability. To understand the definition, and its breadth, it is important to understand a number of key terms used in the definition:

#### Impairment

In the DDA definition:

- *'physical impairment'* includes sensory impairment;
- *'mental impairment'* includes learning difficulties and an impairment resulting from or consisting of a mental illness.

The definition can include a wide range of impairments, including hidden impairments such as dyslexia, autism, speech and language impairments, Attention Deficit Hyperactivity Disorder (ADHD). An impairment does not of itself mean that a pupil is disabled. It is the effect on the pupil's ability to carry out normal day-to-day activities that has to be considered.

#### Normal day-to-day activity

The test of whether an impairment affects normal day-to-day activity is whether it affects one or more of the following:

- mobility;
- manual dexterity;
- physical co-ordination;
- continence;

- ability to lift, carry or otherwise move everyday objects;
- speech, hearing or eyesight;
- memory or ability to concentrate, learn or understand;
- perception of risk of physical danger.

To date the definition of disability has been tested mainly in relation to adult services. A child's ability to memorise, concentrate, learn, speak, move is central to their education. An impairment that has a long-term and substantial effect on a child's ability to do these things may amount to a disability.

## Long-term and substantial

The expressions '*long-term*' and '*substantial*' are somewhat misleading in that they are neither particularly long-term nor very substantial. '*Long-term*' is defined in the DDA as having lasted or being likely to last 12 months or more. Clearly this rules out conditions such as a broken limb which is likely to mend within that time. '*Substantial*' means '*more than minor or trivial*' but it may helpfully be thought of as meaning '*having some substance*.' The combined effect of these two terms is to lower the threshold of what may count as a disability, thus including more people in the definition.

## Disfigurements

Pupils with severe disfigurements are covered by the DDA and do not need to prove that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities.

## Progressive conditions

Progressive conditions are conditions that are likely to change and develop over time. Pupils who have progressive conditions are included in the definition and are likely to be covered as soon as there is some effect on their ability to carry out normal day-to-day activities, and before there is a substantial effect. Changes to the DDA, brought in by the Disability Discrimination Act 2005, specifically bring people with cancer, multiple sclerosis and HIV infection within the DDA definition as soon as they have the condition and before there is necessarily any effect on their ability to carry out normal day-to-day activities.

Pupils with a severe disfigurement do not have to prove that their impairment has a substantial adverse effect on their ability to carry out day-to-day activities.

## Diagnosis

The existence of an impairment or condition should not be confused with whether a child has been given an official diagnosis. A particular condition exists, whether or not it has been officially diagnosed.

A case supported by the Disability Rights Commission illustrates the issue:

*The parents of a boy with Attention Deficit Hyperactivity Disorder (ADHD) went to the SEN and Disability Tribunal (SENDIST) alleging discrimination. The Tribunal accepted that the pupil had a clinically well-recognised mental impairment and therefore was likely to be covered by the definition of disability. However SENDIST struck out the claim. They determined that as the diagnosis of ADHD post dated the alleged discrimination the child was not disabled at the time of the alleged discrimination and therefore not protected by the DDA.*

*The DRC supported an appeal to the High Court where the appeal was conceded by SENDIST; the decision to strike out proceedings was set aside and the claim was referred back for re-consideration by SENDIST.*

The fact that the child had not been given an official diagnosis was not relevant to the question of whether the child had a particular impairment. The impairment was considered to amount to a disability because it had a long-term and substantial adverse effect on the child's ability to carry out normal day-to-day activities, despite the fact that at the point of the discrimination there was no official diagnostic label given. The child's disability was the same before the diagnosis as after.

Equally a diagnosis does not of itself mean that a child is covered by the DDA. The child's impairment has to have a long-term and substantial adverse effect on the child's ability to carry out normal day-to-day activities, whether or not it has a label.

## Disregard of treatments

For the purposes of the definition, all treatments, except the use of spectacles, are ignored. The effect of the impairment has to be considered as it would be without any medication or other treatment. So a young person whose epilepsy is well controlled by drugs has to be considered as he would be if he were not having regular treatment.

The combined effect of the different elements in the definition is to include a large group of children within the definition of disability.

## The definition of special educational needs

The Education Act 1996 says that '*a child has special educational needs if he or she has a learning difficulty which calls for special educational provision to be made for him or her.*' It also says that '*a disability, which prevents or hinders them from making use of education facilities*', amounts to a learning difficulty if it calls for special educational provision to be made. Special educational provision is provision that is additional to or otherwise different from provision that is normally available in the area.

It is often thought that special educational needs broadly equates to learning difficulties. In fact the definition includes more children than those who have '*learning difficulties*' in the commonly accepted sense. This is because the definition of learning difficulties in the legislation includes children who have a disability and who need something additional or different to be provided for them. So, for example, a child with a visual impairment who needs materials to be provided in an enlarged

font is defined in the legislation as having a learning difficulty even if they are not behind in their learning.

## Disability and special educational needs

Many children who have SEN will also be defined as having a disability under the DDA. For planning purposes and for the avoidance of discrimination, it may be helpful to think of more pupils with SEN being included in the definition of disability rather than fewer: it is likely that many of the pupils who have SEN and a statement or who are at *School Action Plus*, or *Early Years Action Plus*, will count as disabled.

However, not all children who are defined as disabled will have SEN. For example, those with severe asthma, arthritis or diabetes may not have SEN but may have rights under the DDA. Similarly, not all children with SEN will be defined as having a disability under the Disability Discrimination Act. In particular some children whose emotional and behavioural difficulties have their origins in social or domestic circumstances may fall outside the definition.

An extract from the Disability Rights Commission's Code of Practice for schools, below, is helpful in explaining this in more detail:

*The early experience of the introduction of Parts 2 and 3 of the Act, relating to employment and to the provision of goods and services, respectively, was that many of the cases brought turned on the question of definition. This Code cannot determine which pupils have or do not have a disability but the following considerations may be relevant:*

- *a child may have significant behaviour difficulties and these may relate to an underlying physical or mental impairment, which amounts to a disability as defined by the Act. If they do, the child will be covered by the Act by reason of the underlying impairment. The importance of schools seeking to identify any underlying impairment is highlighted in Chapter 7 of the DRC Code;*
- *in addition, a behaviour difficulty may arise from a mental illness. The Act says that mental impairments resulting from or consisting of a mental illness are not covered by the legislation unless that illness is clinically well recognised, that is, 'recognised by a respected body of medical opinion.' It is therefore likely that, in respect of such illnesses, the extent to which a condition is well-recognised will determine whether or not a child has a disability, for the purposes of the Act;*
- *where a child has a behaviour difficulty for a reason other than a disability, for example arising from social or domestic circumstances, it is likely that such a difficulty is not covered by the legislation.*

DRC Code of Practice for schools

The DDA 2005 removes the requirement for a mental illness to be 'clinically well-recognised.' This change means that the bullet point above on mental illness is no longer accurate as the Code predates the 2005 Act. The change serves to broaden the group of pupils who may be covered by the definition in the DDA, particularly in respect of mental health conditions.



