

Disabled Children and the Equality Act 2010: What Early Years providers need to know and do

Philippa Stobbs
Council for Disabled Children

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1. Introduction

Every child deserves the best possible start in life and the support that enables them to fulfil their potential.

Children develop quickly in the early years and a child's experiences between birth and age five have a major impact on their future life chances.¹

The Department for Education (DfE) guidance on the Early Years Foundation Stage opens with these two important statements. They embody both a commitment to that *best possible start in life*, and a recognition of the importance of early experiences in shaping later life chances.

The importance of the early years of children's lives is widely recognised. From Marmot² to Leadsom³, from the EPPE studies⁴ to the report of the Children's Commissioner⁵ there is a consistent message about the importance of giving every child the best possible start in life. Recent research has taught us more about the importance of early experiences and their impact on life chances. Longitudinal studies have highlighted the impact of poorer early experiences of school for young disabled children⁶, compromised ambitions and expectations in teen years⁷ and, as disabled adults, experiences of social isolation that are linked to childhood identified disability⁸.

This Guide is intended to close this gap. It is designed to support all those working in the early years to ensure the best possible start in life for disabled children and positive early experiences that contribute to a better, happier childhood, to better lives as children grow through their teenage years and to improved life chances and better experiences as disabled adults.

The requirements of The Equality Act 2010 (EqA) apply in the context of other statutory requirements on early years providers, in particular:

- The requirements set out in the Statutory Framework for the Early Years Foundation Stage⁹;
- The requirements in the Children and Families Act 2014 (CFA) and the Special Educational Needs and Disability Code of Practice¹⁰.

This guide sets the disability discrimination duties in the context of duties to all young children. It sets out what early years professionals need to know and do in order to address inequalities and to ensure they do not discriminate against disabled children.

2. Early Years Foundation Stage

Early Years Foundation Stage (EYFS) provides a framework that brings together the *learning and development requirements and the safeguarding and welfare requirements*^A and sets the standards that all early years providers must meet to ensure that children learn and develop well and keep healthy and safe¹¹. These requirements have a legal basis in section 39(1) of the Childcare Act 2006 and apply to all early years providers: maintained schools; non-maintained schools; independent schools; all providers on the Early Years Register; and all providers registered with an early years childminder agency. The Early Learning Goals form part of the *learning and development requirements* of the EYFS. Revised EYFS guidance and revised Early Learning Goals were published in 2021¹².

EYFS is based on a set of guiding principles and, amongst other objectives, seeks to provide:

equality of opportunity and anti-discriminatory practices, ensuring that every child is included and supported.

EYFS sets out an inclusive approach, designed to be responsive to individual needs and all providers must make information available to parents and carers^B on how the setting supports disabled children and children with special educational needs (SEN). It focuses on delivering improved outcomes for all children and closing the achievement gap between disadvantaged children and others.

As part of a commitment to close gaps in achievement, the government gives priority to disadvantaged children and disabled children in accessing free early years education from the age of two.

A Throughout the Guide italics are used to indicate that a term or expression has a particular meaning which is defined in legislation. Many of these terms or expressions are explained in the Guide.

B Throughout the Guide, when we refer to 'parents', we include parents, carers and those with parental responsibility.

3. The Children and Families Act 2014

Under the Children and Families Act 2014 (CFA) local authorities (LAs) have responsibilities to disabled children as well as those with SEN. In particular, LAs must have regard to a set of principles including recognising the importance of: the views, wishes and feelings of children and their parents; their full participation in decision-making; information and support to enable them to participate in decision-making; and support to achieve the best possible educational and other outcomes.

LAs must identify disabled children as well as those with SEN; must commission services jointly with other agencies; must integrate services where it will promote well-being or improve quality of services; must publish a local offer of services; must provide information and advice; must keep services under review; and must both co-operate with, and seek the cooperation of, local partners. All of these duties apply equally to disabled children, and their parents, and to those with SEN.

These duties apply to LAs but, *local partners* are required to co-operate with the LA in fulfilling these duties. *Local partners* include a wide range of different bodies but, in early years, they include schools, academies and anyone else who makes provision for a child who has SEN. This will include the vast majority of, if not all, early years providers.

In particular, providers can anticipate the need to co-operate with the LA in identifying disabled children; in ensuring that parents of disabled children know about the information and support available locally and about the range of services available to disabled children through the local offer. They can also anticipate being expected to co-operate with the LA in meeting high standards of participation; respect for the views, wishes and feelings of disabled children and their parents; and in securing the best possible educational and other outcomes.

Under CFA, providers that are maintained nursery schools, mainstream maintained schools and academies are also specifically required to make sure that children with SEN engage in activities alongside their peers. Many children with SEN are also disabled (see section 12, below) and many of the EqA requirements support providers in meeting this duty.

The Special Educational Needs and Disability Code of Practice: 0–25 years¹³ (the Code) provides guidance on CFA. All providers of relevant early years education must *have regard* to the Code. That means that whenever they are taking decisions they must give consideration to what the Code says; they cannot ignore it; and they must be able to demonstrate in their arrangements for children with SEN or disabilities that they are fulfilling their statutory duties to have regard to the Code.



4. What this Guide does and doesn't do

This Guide explains the Equality Act 2010 (EqA) within the context of the EYFS and CFA. The focus is primarily on how the EqA duties apply to disabled children in early years settings in England. It shows how EqA applies to different types of providers and how settings can comply with the legislation. It offers examples of how the duties work and suggests some simple approaches that may help to ensure that disabled children are not discriminated against. It draws on the good practice that already exists in many early years settings.

The Guide focuses on the way EqA duties apply to the childcare and education provided in early years settings. It recognises, and provides a read across to, but does not attempt to summarise, the SEN duties. These are explained in the Code, particularly in Chapter 5, which provides guidance on the SEN responsibilities of early years settings that are in receipt of government grants.

The Guide does not go into the detail of other groups of children who are protected under EqA, nor does it cover other duties on early years providers such as employers' duties to staff, including disabled staff. Throughout this guide there are reminders of these wider duties, as they apply to other groups of children and to other people, such as employees.

The Equality and Human Rights Commission (EHRC), publishes a number of statutory Codes of Practice including those on employers' duties¹⁴ and the provision of services¹⁵ and a range of guidance on the application of EqA for schools¹⁶ and others with responsibilities under EqA. The Department for Education (DfE) also provides guidance on EqA for schools¹⁷.

This Guide is designed to raise awareness of EqA among a wide group of practitioners, managers, teachers, support staff, parents and others working with them in the early years. It should not be used as a guide to any individual situation or as a substitute for legal advice^C.

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

C See links and resources section at the back of the Guide.

5. The Equality Act 2010

EqA is designed to address the disadvantage and discrimination experienced by particular groups of people and to provide a legal framework for addressing these inequalities. The duties in EqA cover most aspects of our life and affect a wide range of responsibilities: including those of employers, landlords, service providers, public authorities and education providers. There are duties that are owed to individuals and duties to plan more widely for increased equality of opportunity for groups of people.

It is important to recognise from the start that early years settings have a range of duties under EqA: to staff, as employees; to parents and others, where a setting is providing a service to other people; and to children, staff and others who share other *protected characteristics* as well as disability. It is often more efficient and more effective to bring these duties together and, in particular, where settings are meeting longer term requirements to address inequalities, to embed these in wider planning processes.

Different duties apply to schools, which are covered by Part 6 of EqA, and to other early years settings, which are covered by Part 3 of EqA. This Guide brings these duties together for all early years providers.

Under EqA, there are important ways in which disability is treated differently from other *protected characteristics*, most notably in that, for most groups, equality is rooted in equal treatment, but for disabled people, and for disabled children, settings may, and often must, treat them more favourably.

Checkpoint: there are two important terms in EqA

- *Protected characteristics*; and
- *Prohibited conduct*.

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

6. Protected characteristics

Under EqA, there are nine *protected characteristics*:

- Age;
- Disability;
- Gender reassignment;
- Marriage and civil partnership;
- Pregnancy or maternity;
- Race;
- Religion or belief;
- Sex; and
- Sexual orientation.

Of these, age, and marriage and civil partnership do not apply to duties towards young disabled children, though they do apply to employment and other duties under EqA.

7. Prohibited conduct

Prohibited conduct is the general term applied to discriminatory behaviour that is unlawful under EqA. EqA sets out the four main forms of *prohibited conduct*:

- *Direct discrimination*;
- *Indirect discrimination*;
- *Harassment*; and
- *Victimisation*.

In addition, the following forms of prohibited conduct apply to disabled children, and to disabled people in other contexts:

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

The different forms of *prohibited conduct* are explained in more detail in sections 13 to 21, below.

8. How the Equality Act 2010 applies to different settings

EqA applies to all early years settings: to schools and preschools, to mainstream and to special, to children's centres, to private, voluntary, independent and state-maintained settings, to individual child-minders and to networks of accredited childminders. The duties cover all providers of early education and childcare whether or not they are in receipt of government funding.

However, there are differences in the way the duties apply to schools and to other settings. The practicalities of which settings are covered by which part of EqA are explained in the next two sections (sections 9 and 10) and, where there are differences, in subsequent sections.

9. Early years settings that are schools, Part 6 of the Equality Act 2010

Early years settings that are constituted as schools are covered by Part 6 of EqA. Part 6 applies to all schools: private or state maintained, mainstream or special^D.

The duties in Part 6 of EqA cover discrimination in:

- Admissions;
- The provision of education;
- Access to any *benefit, facility or service*;
- Exclusion or other forms of detriment, that is: other forms of disadvantage.

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

It is the *responsible* body for the school who has responsibility for the duties in EqA. For a maintained school the *responsible* body is the governing body, for an independent school it is the *proprietor*, which is the owner, the governing body, the management group or the trustees. For an academy, it is usually the Academy Trust. Where the LA has responsibility for admissions, for example admissions to maintained schools, or where the LA provides Portage^E, or other home visiting services, it is the LA that is the responsible body.

D The Council for Disabled Children provides a more detailed guide for schools: Disabled Children and the Equality Act 2010: What teachers need to know and what schools need to do

E Portage is a home visiting educational service for young disabled children and children with SEN and their families.

10. Early years settings that are not schools, Part 3 of the Act

Early years settings that are not constituted as schools are covered by Part 3 of EqA. Part 3 covers *services and public functions* and includes early years provision in or by: family centres, children's centres, pre-schools and play-groups, individual childminders, networks of accredited childminders and other private, voluntary and statutory provision that is not established as a school. The duties apply whether the services are provided free or in return for payment.

The duties in Part 3 of EqA cover:

- Whether or not a service is provided;
- The terms on which the service is provided;
- Stopping the service, or any other forms of detriment, that is: other forms of disadvantage.

The duties under Part 3 apply to the individual or the organisation that provides the service (the equivalent of the *responsible* body under Part 6). This applies whether they are in the private, public or voluntary sector. For a pre-school, playgroup or other voluntary group it is likely to be the management group for the particular setting or the organisation responsible for the service; for provision run by an LA it is the LA; for individual childminders it is childminders themselves; for childminders working with an agency, it is likely to be childminders themselves in respect of the provision they make for children in their care; a childminder agency would also have a responsibility to make sure they do not discriminate in their responsibilities.

11. Considerations for responsible bodies

Parts 3 & 6 of the Equality Act 2010

It is important to recognise that, though the *responsible* body is responsible for ensuring that disabled children are not discriminated against, this is also a responsibility that rests with its employees and *agents* (usually someone acting on its behalf). Anyone working in an early years setting could expose both themselves and the responsible body to a claim of discrimination: a volunteer or a member of staff, a manager or a trainee, a teacher, an assistant or an administrator. It follows that it will be important that the *responsible body* makes sure that those working in a setting, whether paid or unpaid, receive training and understand the duties towards disabled children and know about the *reasonable adjustments* that need to be made for particular children.

Whilst the institutional responsibilities lie with the *responsible body*, qualified teachers working in early years settings, whether or not they are schools, have individual professional responsibilities under the Teacher Standards¹⁸. They *must have an understanding of, and always act within, the statutory frameworks which set out their professional duties and responsibilities*. These explicitly include duties under EqA.

12. Which children are disabled?

The definition of disability in EqA is broad. EqA says that a person has a disability if they have: *a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.*

In the context of early years, *normal day-to-day activities* would include playing, sitting with other children in a group, singing songs and rhymes, running around, more focused table activities, listening to stories, reading stories, talking about stories, making marks, writing, in fact anything that a child might ordinarily do as part of the EYFS.

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

If an impairment has a *substantial and long-term* effect on a child's ability to carry out normal day-to-day activities it will amount to a disability.

Substantial is defined as being *more than minor or trivial*; *long-term* as *a year or more*. The meaning of *substantial* in EqA is slightly at odds with what it means in everyday use, where we tend to think of it as being quite big, for example, a substantial meal. It may be helpful to think of *substantial* in EqA as being big enough to 'have substance', hence *more than minor or trivial*. In combination, the terms *substantial* and *long-term* set a relatively low threshold and cover more children than many imagine. The household survey carried out in 2018/19 estimates that 8 percent of children are disabled¹⁹. The percentage may be lower for younger children.

It's important to note that, if a child is receiving treatment for a medical condition, whether they are disabled needs to be considered as if they were not receiving that treatment.

The Office for Disability Issues (ODI) provides guidance²⁰ on a range of issues to be taken into account in deciding who may be covered by the definition of disability. To note: the ODI guidance pre-dates case law from 2018 covered in the checkpoint on the *tendency to physical abuse*.

Checkpoint: tendency to physical abuse

Guidance on the definition of disability exempts certain conditions from being considered as impairments. This includes a *tendency to physical abuse*. A decision by the Upper Tribunal, in August 2018, determined that, for children in education, who have a recognised condition that is more likely to result in a *tendency to physical abuse*, the regulations do not remove a child from the definition of disability or from the protection that the EqA provides²¹.

This means that, in line with the duties set out below, schools and other settings must make *reasonable adjustments* to prevent or manage challenges presented by behaviour that arises in consequence of a disability and must be able to justify any action taken in these circumstances as *proportionate*.

Ultimately, if a claim of discrimination is made, the decision, about whether or not a child is disabled, is taken by the First-tier Tribunal (Special Educational Needs and Disability) (the Tribunal), for children in a school; and by the courts, for children in early years settings that are not schools.



Checkpoint: disability and special educational needs

Though the definitions of disability and special educational needs (SEN) are covered by different legislation, in practice there is a significant overlap. In particular, children with more significant SEN, including those who have an Education Health and Care plan (EHCP), are more likely to be covered by EqA. This likelihood is not strictly because they have an EHCP but because they are more likely to have an impairment that meets the definition of disability in EqA.

Research by Bath and Bristol Universities²² estimates that about three in ten younger disabled children (of primary age) do not have SEN. The disability discrimination legislation in EqA covers disabled children whether or not they have SEN. Children who have a range of health conditions, for example: epilepsy, diabetes or more severe forms of asthma and eczema, are likely to be covered by the definition of disability but may not have a special educational need.

In order to avoid discrimination, to anticipate and make *reasonable adjustments*, and to meet wider responsibilities, settings need to know their disabled children. However, the important point for settings is that they know about a child's impairment or condition, and understand that a child may be disabled under the definition in EqA.

If a claim of discrimination were made, it would be no defence that the provider did not know that a child was disabled, unless the provider can show that they could not reasonably have been expected to know that the child was disabled. Asking is an obvious way of finding out, so is careful observation of a child's development, learning and behaviour. When settings are asking questions, it is important to ask in such a way as both respects a child's dignity and privacy and encourages parents to share information. If parents think that information might be used against their child, for example to keep them out of a setting rather than to support them to be included in a setting, they may be reluctant to share information.

Checkpoint:

Some people have a relatively restricted view of what counts as a disability. They consider people with a sensory or physical impairment to be disabled but may not be aware that the definition of disability is much wider than that. The risk for settings is that in underestimating the number of children who may be covered by EqA, they may inadvertently discriminate against a disabled child.

The progress check at age two is an important opportunity to share any emerging concerns about a child's development. It is important to consider whether any developmental delay may indicate SEN or a disability. When a child turns five, the EYFS profile provides another opportunity to check learning and development. It can be used to determine whether there may be an underlying, unmet or unidentified learning difficulty or disability. The child's parent or carer should participate in this review.



13. Direct discrimination

Direct disability discrimination is treating a disabled child *less favourably* than another child is (or would be) treated because they are disabled.

Example 1:

A playgroup leaves a child behind when the rest of her group goes to the park to see a puppet show. The child has learning difficulties and the staff consider that there is no point in taking her as she will not understand the show.

Example 2:

A nursery school refuses admission to a child with a facial disfigurement. Staff are concerned that other children and their parents might be upset.

In the first example, it is because of the child's disability that the staff decide she will not go on the trip, in the second it is because of the child's disability that the school refuses admission. In both cases, this is likely to be *direct discrimination*.

Direct discrimination can also take place where a child who is not disabled is treated less favourably because they are associated with a person who is disabled (for example, because one of their parents is disabled), or because they are wrongly thought to be disabled.

In some circumstances it may be necessary to treat a disabled child more favourably than a child who is not disabled, for example, by waiving a policy or by making particular provision for a disabled child that is not available to their non-disabled peers. It is not direct discrimination against a non-disabled child to treat a disabled child more favourably.

Under EqA, there is no *justification* for direct discrimination.

14. Indirect discrimination

Indirect disability discrimination arises where a *provision, criterion or practice* puts, or would put, disabled children at a particular disadvantage compared with children without that disability.

Example 3:

A pre-school has a healthy snacks policy and does not allow children to eat high calorie snacks between meals. This would put a child with diabetes, who needs a carefully timed intake of calories, at a disadvantage.

Example 4:

An independent nursery requires high attendance from children before they are permitted to go on school trips. Children who have been absent from the nursery for medical treatment have been absent in the run up to the visit and are excluded from the visit.

Both of these examples will constitute indirect discrimination unless they can be *justified*, see section 16.

Indirect discrimination often arises when the responsible body applies a blanket policy. A blanket policy is a policy that is applied in the same way to all children. A blanket policy may put disabled children at a particular disadvantage: if the healthy snacks policy above was applied in the same way to all children, a child with diabetes would be placed at a disadvantage; if the attendance policy was applied in the same way to all children, and the children with a medical condition were excluded from the visit, they would be placed at a disadvantage. If an individual child is affected by these policies and is placed, or would be placed at a disadvantage, these examples may amount to *indirect discrimination*.

In some instances, a *provision, criterion, or practice* may put disabled children at a disadvantage but may be justified. *Justification* is addressed in section 16 below. Neither of the examples above are likely to be justified.

15. Discrimination arising from disability

Discrimination arising from disability arises where a disabled child is treated unfavourably because of something *arising in consequence of their disability*.

Example 5:

A nursery does not admit children until they are toilet trained. A mother seeks admission to the nursery for her child who has Hirschsprung's disease. Hirschsprung's disease may lead to the late establishment of bowel control and as a result the child is not yet toilet trained. The nursery refuses to admit the child because they are not toilet trained.

Example 6:

A young autistic child collects their sandwich box for their lunch and then has to queue for a drink. The autistic child is anxious and agitated in the queue and, when another child teases them, turns round and bites the other child. The school excludes the child for biting the other child.

Both of these are examples of being treated unfavourably because of something arising in consequence of a child's disability. These will constitute unlawful discrimination arising from disability unless the responsible body can show that its actions are justified.

To note: it doesn't matter whether what the setting does is set out in a policy, is a standard practice or is a one-off action.

In some circumstances, the setting may be able to justify unfavourable treatment. *Justification* is addressed in section 16, below.

If a responsible body knows, or should reasonably know, that a child is disabled, they cannot claim that they did not know that something the child did arose in consequence of the disability. This underlines the importance of having a proper understanding of a child's disability and how it can affect them.



16. Justification

In cases that might otherwise amount to indirect discrimination (section 14, above) or discrimination arising from disability (section 15, above), the responsible body may be able to argue that what they did was justified.

Justification requires the responsible body to show that what it did was a *proportionate* means of pursuing a *legitimate aim*. A *legitimate aim* must be sufficiently important and may include such aims as:

- The fair exercise of powers;
- Ensuring the health and safety of pupils and staff, provided that risks are clearly specified;
- Maintaining academic and behaviour standards; and
- Ensuring the wellbeing and dignity of children²³.

Proportionate means *appropriate* and *reasonably necessary*. There needs to be a fair balance between the need to achieve the legitimate aim and the disadvantage caused to the disabled child. It would normally need to be shown that the same legitimate aim could not be achieved by a less discriminatory means.

In example 6, above, the setting may be able to justify the exclusion if they could demonstrate that it was a *proportionate means of achieving a legitimate aim*, for example that the exclusion was a reasonably necessary means of protecting the wellbeing of other children in the setting.

However, settings must think ahead when they are planning their policies and must plan and make *reasonable adjustments* so that disabled children are not at a *substantial disadvantage*, see sections 19, 20 and 21, below.

17. Harassment

Disability-related harassment is unwanted conduct related to disability which *violates the dignity* of the child, or creates an *intimidating, hostile, degrading, humiliating or offensive environment* for them.

Harassment could include bullying, mocking or belittling a disabled child in connection with their impairment.

Harassment cannot be justified.

18. Victimisation

Victimisation is subjecting a child to detriment because they, or sometimes someone connected to them, has done a *protected act* under the EqA. *Protected acts* are most commonly complaints about or allegations of breaches of EqA.

Example 7:

During an inspection, the parent of the young autistic child, see example 6, above, complains to Ofsted about their child's exclusion for biting another child. The parent says that the school should not have excluded their child and that if they had prevented the anxieties linked to the child's autism, the incident would never have happened. Because the parent complained, the school does not allow the child to go on a museum visit with their class.

To note: in the example above the parent did not refer to EqA, they just made it clear that they felt that their child had been treated badly because of their disability. This is likely to be a *protected act*. The school's treatment of the child in response to the complaint is likely to constitute victimisation.

The duty not to victimise applies differently to schools (under Part 6) and to other settings (under Part 3). For schools the *protected act*, that is, the complaint or allegation, can be made by the child, their parent or a sibling. In other settings, the *protected act* can be made by the child and only in certain circumstances by the child's parents. Regardless, it is best practice to treat all allegations of discrimination with respect and without retaliation.



19. Reasonable adjustments

The reasonable adjustments duty includes three requirements and these apply differently in different settings. This is explained in more detail in the next section, section 20. First, we set out some key features of the duty and look at some examples.

Where something a setting does might put disabled children at a *substantial disadvantage* compared with other children who are not disabled, settings must take reasonable steps to avoid that disadvantage. This is referred to as the reasonable adjustments duty.

The duty is anticipatory: it requires settings to think ahead and consider what adjustments they may need to make so that disabled children can be included in the life of the setting as fully as possible. Settings can often avoid *indirect discrimination and discrimination arising in consequence of a disability* by thinking ahead, planning and making reasonable adjustments.

A reminder: *substantial disadvantage* is defined as a disadvantage that is *more than minor or trivial*.

In example 6, above: there may be reasonable adjustments that the school could have made. Reasonable adjustments in this situation might have been:

- Putting the drinks ready on the table before lunch, at least for the child with autism, in order to avoid the queuing;
- Asking the child's parents about ways of reducing or avoiding anxiety for their child;
- Training staff in understanding the nature of the child's autism so that they could deploy techniques to reduce anxiety;
- Giving the boy a safe place to go to when he does get too anxious.

It is good practice to involve parents and children themselves in planning reasonable adjustments. Parents and children are often best placed to help settings think about what disadvantage might arise and what reasonable adjustments may work best.

Example 8:

The parent of a young disabled child visits a nursery. The manager can see that the parent is anxious about whether their child will be able to manage in a group setting. The manager invites the parent to go round the nursery and carry out a risk assessment with them. This enables the parent to identify aspects of the organisation of the nursery that might be difficult for their child. Together, the manager and parent identify creative adjustments to overcome the barriers that the parent identifies.

The following are some further examples of adjustments that have been made for disabled children to ensure that they can join in the life of the setting as fully as possible.

Example 9:

Two children with a hearing impairment are going to be admitted to a children's centre. The centre:

- Arranges training for staff in the appropriate use of radio aids;
- Draws up guidance for staff in the light of the training. This includes guidance on the use of radio microphones, the transfer of microphones to other children at group times, and checking that the children's aids are set correctly for different activities;
- Changes the location of the book corner. The rooms in this centre have large windows down one side. Staff decide to change the location of the book corner so that, at story times and at other times when the children come together as a group, the natural light illuminates the face, mouth and gestures of the staff talking to the children;
- Pays particular attention to having visual prompts to hand when they are planning activities with the children and using puppets and other props at story times.

Example 10:

A childminder is going to provide for a child with a physical impairment. The child uses a standing frame for parts of the day. The childminder thinks that it may be unsafe to let the child go in and out of the house and it may be difficult for the child to play on some of the outdoor toys.

At an early visit the childminder invites the parents to look at the question of access and at the outdoor toys that are available.

Between them they assess the risks involved in getting up and down the steps to the outside area and they consider which equipment may help the child by encouraging particular activities and which might present a risk.

They agree a plan and the parents seek the views of the occupational therapist at their next visit. When the child starts the placement, the childminder knows how the child can get in and out and which equipment they should be encouraged to use.

Sometimes settings may need to call on specialist advice to inform the planning of reasonable adjustments but most reasonable adjustments consist of adjustments to policies and practices, cost little or nothing and are relatively easy to implement once staff recognise the need for adjustments and see the benefits for disabled children. The essence of reasonable adjustments is that they anticipate where disadvantage may arise and are put in place to prevent that happening.



The duty to make reasonable adjustments is a continuing duty. This means that it is not a one-off, or once and forever duty; adjustments need to be kept under review. Over time, adjustments may need to be changed; new and different adjustments may need to be made to make sure disabled children are not at a *substantial disadvantage* compared with other children who are not disabled.

Example 11:

A child with an egg allergy is going to be admitted to a nursery class in a primary school. The school:

- Implements an individual healthcare plan agreed with nursing staff and including special meal-time arrangements which will be supervised by named staff;
- Arranges for a nurse to come in and train staff; and
- Makes adjustments to the handling of egg products in the kitchen.

Example 12:

A pre-school checks its policies, including its admissions policy, and makes some changes to ensure that conditions in the policy do not discriminate against disabled children.

EYFS requires all providers to promote the good health of children attending the setting and to have and implement a policy and procedures for administering medicines. In addition, under CFA, schools, are required to make arrangements for supporting pupils at the school with medical conditions. In 2014, the DfE published statutory guidance, *Supporting pupils at school with medical conditions*²⁴. The guidance is clear that schools should ensure that children with medical conditions can access the same opportunities at school as any other child. It recognises that children with medical conditions may be disabled. This guidance supports schools, and other providers, in understanding what may be considered reasonable adjustments for this group of children.

20. Reasonable adjustments: 3 key requirements

The reasonable adjustments duty includes three key requirements:

- To make adjustments to *provisions, criteria or practices*;
- To make adjustments to *physical features*; and
- To provide *auxiliary aids and services*.

These requirements apply differently in different settings: early years settings that are not schools are required to meet all three of the requirements; early years settings that are schools are required to meet the first and the third requirements. Whilst the duty to alter physical features does not apply to schools, schools have *accessibility planning* duties that do not apply to other providers (see section 23, below).

Adjustments to any provision, criterion or practice – all settings

The first requirement applies in the same way to all settings. Early years settings are required to make reasonable adjustments to any provisions, criteria or practices that put disabled children at a substantial disadvantage.

Most of the examples in section 19, above, relate to adjustments to provisions, criteria and practices, that is, the way settings organise themselves, deploy resources, operate their policies and the day-to-day practices that they follow.

The failure to make a reasonable adjustment overlaps with indirect disability discrimination in that both are concerned with provisions, criteria and practices that place disabled children at a disadvantage.

Physical features – settings that are not schools

Providers that are not schools have a duty to make reasonable adjustments to physical features that put disabled children at a substantial disadvantage. This might involve removing a physical feature, altering it, or finding a reasonable way of avoiding it.

For example, if the provider's premises do not have level access, reasonable adjustments might include offering a different convenient level-access entrance, providing a portable ramp, or changing the use of rooms inside a building. The concept of *reasonableness* still applies to such arrangements. Even where providers use rented premises, they may have responsibility for making physical alterations, but, depending on the use of the rest of the building and on the use of the building at other times, the landlord may also have responsibilities. Again, providers have to do what it is *reasonable* to do.

Auxiliary aids and services – all settings

All providers have a duty to take reasonable steps to provide an auxiliary aid or service if a disabled child would be put at a substantial disadvantage without it.

Auxiliary aids and services may include the provision of equipment, advice or direct support to a disabled child. It is likely that much of what might be provided by way of auxiliary aids and services, under EqA, could also be made, as *special educational provision*, through the SEN framework.

EqA is clear about the direct duty on providers to make reasonable adjustments. However, in practical terms, providers may be able to draw on the SEN framework for support beyond that which they might reasonably be expected to make themselves. Such support might include the use of SEN Inclusion Funding, the support of an Area Special Educational Needs Coordinator (SENCO) or other services provided in the early years by the LA and local health agencies. Where something is already provided through the SEN framework, this can be taken into account in deciding what reasonable adjustments to make.

LAs must publish a *local offer* that includes information about services that can provide support in early years settings. All adjustments are covered by the concept of *reasonableness*. This is discussed in the next section.

21. What is reasonable?

The concept of *reasonableness* takes into account a number of factors: costs and available resources, health and safety, whether something is already provided through the SEN framework, the interests of other children and other considerations such as practicability. So, for example: the cost of taking a particular step can be taken into account alongside a consideration of the practicability of making a particular adjustment and the resources available to the setting. Settings can take these considerations into account when they plan what they may need to do for disabled children.

The cost of making a particular adjustment may be seen in the light of the resources available to the setting, so that an individual childminder or a small setting with a small budget may not be expected to make adjustments that might be expected of a larger setting with a larger budget.

For any adjustment that may have health and safety implications a setting would be well advised to carry out a risk assessment with a view to eliminating or minimising the risks involved. A setting should write down what risks they have identified and how these will be managed. Where difficult issues arise, it may be important to seek advice beyond the setting. Health and safety considerations should not be seen as automatic barriers to disabled children. Instead they should help to determine how to include disabled children safely in the life of the setting. Ultimately, these considerations do not relieve the setting of their responsibility to identify and make reasonable adjustments. They do affect decisions about which reasonable adjustment should be made.

Whatever reasonable adjustments are made, it is never lawful to charge for a reasonable adjustment. Settings must do what it is reasonable to do and are not expected to do anything unreasonable. So, under EqA there is no justification for failing to make a *reasonable adjustment*.

22. What happens if a disabled child is discriminated against?

If a parent thinks that their child may have been discriminated against, they can make a claim of disability discrimination.

For schools, covered by Part 6 of EqA, the child's parent makes a claim of disability discrimination to the Tribunal, or, in respect of disability discrimination in admissions, to a local admissions appeal panel. If the Tribunal determines that there has been unlawful discrimination, it can order any remedy it sees fit, but no financial compensation is available.

Where settings are covered by Part 3 of EqA, that is providers other than schools, a claim of discrimination is heard in the County Court and, if the Court determines that there has been unlawful discrimination, the remedies available normally include financial compensation, including compensation for injury to feelings.

Parents need to bring a claim within six months of the discrimination so, if a claim is brought in relation to an action by the school or setting on 2 January, it should be brought by no later than 1 July. Where discrimination has extended over a period of time, the six months is timed from the last instance of discrimination. The Tribunal has the power to extend the six months if it considers it just and equitable to do so.



23. Accessibility planning for schools

For schools, the EqA reasonable adjustments duty does not include the requirement to make physical alterations to buildings. Requirements in relation to adapting the physical environment are covered by a different part of the legislation: the accessibility planning duties. These require schools to develop plans to improve accessibility for disabled children over time. There are similar duties on LAs.

Accessibility plans must show how schools are going to make improvements in three areas:

- Improvements in access to the curriculum;
- Physical improvements to increase access to the buildings;
- Improvements in the provision of information in different formats for disabled children.

Accessibility plans must be in writing and must be resourced and implemented. A new accessibility plan must be published every three years (from March 1st 2006)²⁵ and the plan must be reviewed and revised as necessary. Ofsted can inspect school accessibility plans and LA accessibility strategies.

24. What is the public sector equality duty?

In addition to their responsibilities to individual disabled children, certain public bodies, including state-maintained schools, have more general duties under the public sector equality duty. These duties also apply to any organisation that is exercising a *public function*; this is likely to include providers in receipt of government funding for the free early education entitlement.

The public sector equality duty requires such providers to have due regard to the need to:

- Eliminate discrimination, harassment, victimisation and other *prohibited conduct*;
- Improve equality of opportunity; and
- Foster good relations between different groups of people: those who share a *protected characteristic* and those who do not.

Having *due regard* to the need to improve equality of opportunity involves having due regard to the need to remove or minimise disadvantage, meet the needs of children who share *protected characteristics* and encourage their participation in public life and, in an early years setting, in the life of the setting. Fostering good relations includes having *due regard* to the need to tackle prejudice and promote understanding.

Specific duties

Specific duties sit under the general requirements described above and apply to maintained schools and academies but not to other schools or settings. Regulations require maintained schools and academies to publish information to *demonstrate their compliance* with the general duty. This information must be published annually.

Maintained schools and academies must also prepare and publish objectives to achieve the core aims of the general duty: to eliminate discrimination, increase equality of opportunity and foster good relations.

These objectives must be specific and measurable and new objectives must be published within four years of the previous objectives.

Example 13:

A school collects information that shows that young disabled children are less likely to attend wrap-around care before and after the hours of funded nursery education. The school sets an objective of doubling the take-up of wraparound care by disabled children.

Example 14:

An analysis of attendance data shows that disabled children have higher rates of absenteeism. The school sets an objective to halve absenteeism amongst disabled children over four years.

To achieve these objectives, the school will need to put in place specific actions. Some of the actions needed may require staff training, curriculum adjustments, and detailed work with parents, the involvement of the child and the engagement of other agencies, but the focus is on measurable outcomes that will eliminate discrimination, improve equality of opportunity and foster good relations. The intention is that these considerations should become embedded in policies and practices.

25. Positive action

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

Settings are not discriminating if they treat disabled children more favourably than non-disabled children if the only reason for the different treatment is their disability, see section 13 *direct discrimination*, above.

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

- Address the impact of discrimination that is current or discrimination that has happened in the past
- Meet the particular needs of disabled children (or groups of children who share other protected characteristics)
- Facilitate participation in activities where participation is disproportionately low.

Positive action is focused on groups of children rather than individuals. This might involve designing provision, changing the way provision is made, its timing or location to increase take-up by particular groups of children. Positive action can overcome barriers for groups of children, improve their education and, ultimately, outcomes.

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

26. Publishing information for parents and carers

As part of their responsibilities under the EYFS, all providers must make information available to parents and carers on how the setting supports children with special educational needs and disabilities. Over and above this, early years settings that are schools must publish information about their SEN policies; this includes key information about aspects of schools' duties to disabled children:

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

27. Information, advice and support for children and their parents

Duties in CFA require LAs to make information, advice and support available. The requirements include the provision of information, advice and support for children and parents; disabled children and their parents, as well as those with SEN; and information, advice and support on education, health and social care provision.

LAs must draw these services to the attention of parents; schools must provide contact details for support services for parents, including details of the local SEND Information, Advice and Support Service. All providers will want to make sure that parents know about these services and have access to the information, advice and support that they provide.

28. Getting it right and avoiding discrimination

Where early years providers have a 'can do' attitude and are committed to including disabled children in the full life of the setting, they are unlikely to have any difficulty in complying with the duties in EqA. However, there are some things that all providers would sensibly do to reduce the risk of discriminating against a disabled child.

Reviewing

An important part of meeting the duties is ensuring that settings do not inadvertently discriminate against disabled children. If all settings recognise that they already have disabled children on roll, or are likely to admit them, then one of the key things that they will want to do is to review their policies, practices and procedures and revise them where necessary. In doing this they will sensibly look across all the different areas of the life of the setting, and may want to check their admissions policy in particular.

Embedding equality considerations

Where equality considerations are taken into account in every day decisions made by settings, the impact should be that, over time, the culture and attitudes of the setting become more welcoming, outcomes for disabled children improve, and providers do not have to make so many individual adjustments for individual children because, in the widest sense, all that the setting has to offer is more accessible to all children.

Working in partnership with parents

Sharing information is a crucial part of meeting the EqA duties. Providers will want to make sure that they provide opportunities for parents, and disabled children themselves, to share information about potential or actual barriers, and the sort of adjustments that may need to be made to remove those barriers. An important part of encouraging the sharing of information will be developing parents' trust that information that they share will be handled sensitively. Such trust is more likely to develop where parents encounter a welcome, rather than resistance to their child, a willingness to explore possibilities rather than a refusal to consider them.



Training

It is important that senior staff in any setting are aware of and understand the duties towards disabled children. It is also important that all staff and volunteers are aware of the EqA duties, of the main requirements in the legislation, and understand disability as an equality issue. Training is an important element in raising awareness of the duties and of the disability equality commitments on which they are based.

Working with others

For some disabled children, as well as working in partnership with parents and drawing on their expertise in understanding their own child, settings will need to seek help beyond their own expertise and resources. Services vary from area to area and settings will want to know what is available locally.

Under CFA, providers of relevant early years education should be involved with, and are required to co-operate with, LAs in the development of their local offer, see above. The local offer must include information about the support available across education, health and social care services for disabled children and children with SEN, including information about:

- Services assisting providers to support young children with medical conditions;
- Childcare for disabled children and children with SEN;
- The provision that the LA expects to be available from providers of relevant early years education;
- Information, Advice and Support Services: services providing parents and children with information, advice and support on SEN and disability, on education, health and care;
- Support groups who can support parent carers of disabled children.

The local offer should also include information about:

- Provision such as Area SENCOs, SEN support or learning support services, educational psychology services, sensory support services or specialist teachers and therapy services such as speech and language therapy;
- Support available to parents to aid their child's development at home, including such services as Portage;
- Arrangements for identifying and assessing children's needs in the early years;
- Arrangements for reviewing children's progress including health and development reviews between the ages of 2 and 3;
- The LA's arrangements for providing top-up funding for children with high needs;
- The arrangements for EHC needs assessments and plans.

29. Conclusion

The disability discrimination duties sit alongside an inclusive framework for early learning and development and an SEN framework that focuses significantly on participation and outcomes for disabled children and children with SEN. Together, the duties are designed to provide a strong legal framework to underpin equality of opportunity for young disabled children.

Disabled children's enjoyment of childhood is dependent on their positive early experiences and its impact on their life chances cannot be over-estimated. Settings that are committed to and striving for equal opportunities and inclusion can be confident that they are making a difference for disabled children. They are unlikely to face difficulties in meeting the duties. What is required of all settings is what is reasonable in all the circumstances of the case.



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Links and resources

Council for Disabled Children (CDC)

www.councilfordisabledchildren.org.uk

Children's Rights Alliance England (CRAE)

www.crae.org.uk

Equality and Human Rights Commission

www.equalityhumanrights.com/en

Foundation Years

www.foundationyears.org.uk

First-tier Tribunal (SEND)

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

Independent Provider of Special Education Advice (IPSEA)

www.ipsea.org.uk

Information, Advice and Support Services Network (IASSN)

<https://www.councilfordisabledchildren.org.uk/what-we-do-0/networks/information-advice-and-support-services-network/find-your-local-ias-service>

Legal advice

www.gov.uk/find-legal-advice

SEND Information Organisations Group (SENDIOG)

www.councilfordisabledchildren.org.uk/about-us-0/networks/information-advice-and-support-services-network/find-out-about-sendiog

United Nations Convention on the Rights of the Child

www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child



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Let's work together: 020 7843 6000 | cdc@ncb.org.uk

London: 23 Mentmore Terrace, London, E8 3PN

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