

INFORMATION SHEET

Making It Happen: Positively managing risk for children and adults with severe learning disabilities

The Equality Act 2010

Thank you to Doughty Street Chambers for their help with this resource. The following individuals contributed to this resource:

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Introduction

Summary information about the Equality Act 2010 and how it is relevant to positively managing risk for children and adults with severe learning disabilities during Covid 19.

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Summary

[The Equality Act 2010](#) (“EA”) is the core piece of anti-discrimination legislation in the United Kingdom. It applies across a range of areas of life, including to the provision of services and public functions, employment and education. It prohibits direct and indirect discrimination in these contexts and also sets out the duty to make reasonable adjustments.

The EA prohibits discrimination on the grounds of “protected characteristics”. One protected characteristic is disability. Disability is defined for the purposes of the EA as follows:

A person (P) has a disability if –

- (a) P has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Further guidance on the meaning of disability for the purposes of the EA can be found [here](#).

Key Points

There are four types of prohibited discrimination relevant to disabled people under the EA.:

1. direct discrimination;
2. indirect discrimination;
3. discrimination arising from disability; and
4. failing to make reasonable adjustments where there is a duty to do so.

Direct discrimination is the most straightforward. A person directly discriminates against another person if they treat that other person less favourably *because* they are disabled (section 13). For example, if a gym refuses entry to a potential customer *because* they are disabled, this would be direct discrimination.

Indirect discrimination is a bit more complicated. To determine if something is indirect discrimination, there are four relevant questions:

1. Does the person or organisation have a “provision, criterion or practice” which they apply to everyone, whether or not they are disabled?
2. Does that “provision, criterion or practice”, when applied to people who are disabled, place them at a disadvantage when compared to non-disabled people?
3. Does that “provision, criterion or practice” place the particular disabled person in question at a disadvantage?

4. Can the person or organisation show the “provision, criterion or practice” is a “proportionate means of achieving a legitimate aim”? (section 19).

What the final stage of this inquiry means is that a person or organisation may be able, in some cases, to justify applying a rule or adopting a practice which disadvantages disabled people. However, the onus is on them to show that the rule or practice is in place in order to pursue a “legitimate aim” and that it is “proportionate”; that is, that it does not disadvantage disabled people more than it needs to in order to secure the legitimate aim.

A pertinent example would be a school that adopts a rule that children cannot attend if they are unable to maintain social distance. This is a general rule applied to everyone. However, when applied to some disabled children, who are less spatially aware or for other reasons unable to socially distance, it places them at a disadvantage by barring their attendance at school. The question would be whether the school could justify the rule as a proportionate means of preventing the spread of Covid-19. It is arguable they could not, because Government Guidance is clear children with SEND should be supported to return to school. Further, other steps could be taken which are less drastic than excluding the child from school to prevent the spread of Covid-19, such as ensuring the child is accompanied by a support person and encouraged to wash their hands regularly.

Discrimination arising from disability occurs where a person or organisation treats a disabled person unfavourably *because* of something “arising in consequence of that person’s disability”. As with indirect discrimination, this will not be unlawful if the person or organisation can show that their treatment of the disabled person was a “proportionate means of achieving a legitimate aim” (section 15).

An example would be where a student with ASD is excluded from school because they hit a teacher. If their violence toward their teacher arose in consequence of their disability, namely ASD, then their exclusion might be discriminatory. Being excluded is clearly unfavourable treatment. The question would then be whether excluding the student with ASD was a proportionate means of achieving the legitimate aim of

upholding school rules and protecting staff members from harm. It might not be proportionate if other things could be done to support the student at school so that they do not become dysregulated and violent again.

The duty to make reasonable adjustments is made up of three requirements (section 20):

1. Where a person or organisation applies a “provision, criterion or practice” which puts a disabled person at a substantial disadvantage, that person or organisation must take such steps as are reasonable to avoid that disadvantage.

For example, where a school applies a rule that students are not allowed to use calculators in maths exams this is a rule that might put a disabled student, for example a student with dyscalculia, at a substantial disadvantage when compared with non-disabled students. The school must take reasonable steps to avoid that disadvantage. Arguably, it would be reasonable to allow the disabled student to use a calculator.

2. Where a physical feature puts a disabled person at a substantial disadvantage, there will in certain circumstances be a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

For example, a shop has a small step at its entrance which may prevent wheelchair users from being able to access the shop. It would be a reasonable adjustment to have a ramp available to facilitate wheelchair access.

3. Where, but for provision of an auxiliary aid, a disabled person would be put at a substantial disadvantage, reasonable steps must be taken to provide an auxiliary aid. This can include the provision of a special piece of equipment, an interpreter, provision of additional information and so forth.

For example, a school might provide a student with dyslexia with Assistive Technology which enables them to dictate their written work. This might be a reasonable adjustment.

More detail and specific guidance on how these provisions apply can be found in:

- The Equality and Human Rights Commission: Services, Public Functions and Associations Statutory Code of Practice. Click [here](#).
- The Equality and Human Rights Commission: Employment Code of Practice. Click [here](#).
- The Equality and Human Rights Commission: Schools Technical Guidance. Click [here](#).
- The Equality and Human Rights Commission: Reasonable Adjustments for Disabled Pupils Auxiliary Aids Technical Guidance. Click [here](#).
- The Equality and Human Rights Commission: Technical Guidance on Further and Higher Education. Click [here](#).

Relevance

The provisions of the EA have remained in force throughout the pandemic. They are significant in many different settings, as set out above.

Examples might include:

- The local gym adopts new rules to manage the risk of Covid-19. These include that there can only be one person in the vicinity of each piece of exercise equipment while it is in use and social distancing must be observed throughout the gym while moving about. This would disadvantage a disabled person who requires support in order to use the equipment and navigate the gym. Accordingly, this could be indirect discrimination and/or a failure to make reasonable adjustments. The gym could be asked to make an adjustment to

allow the disabled person's support worker to accompany them while using equipment.

- A school might adopt a zero tolerance policy to students failing to comply with new rules put in place to manage the risk of Covid-19. The rules might say that any student who fails to adhere to social distancing, fails to wash their hands regularly, or spits at school will be excluded. If this was applied without any alteration to a disabled student who is unable to comply with those rules because of their disability, this could be indirect discrimination and/or disability arising from discrimination.
- A shop has a rule that nobody can come in and purchase goods unless they are wearing a face mask. This will put some people with disabilities at a disadvantage, such as those with ASD who find wearing a face-mask distressing. This would be indirect discrimination and/or a failure to make reasonable adjustments. The shop should be asked to recognise an [exemption](#) for those unable to wear face masks due to their disability.

There is some government guidance in relation to compliance with the EA in certain settings. For example:

- NHS England [guidance](#) states that all NHS health services should make reasonable adjustments where necessary to allow equal access to healthcare, for instance giving a priority appointment if the person finds it difficult waiting in their GP surgery or hospital. People with additional support needs can bring someone who supports them (e.g. a family member or care-worker) to an appointment or to stay with them in hospital.

Government [guidance](#) emphasises that, when making decisions about visiting, care homes should conduct individual risk assessments, to assess the needs and vulnerabilities of individual residents and the role that visiting can play in this. Care home providers should work with the resident, their family and friends, and professionals such as social workers or clinicians. All decisions should be taken in light of general legal obligations, such as those under the Equality Act 2010 and

Human Rights Act 1998. Providers must also have regard to the DHSC [ethical framework for adult social care](#)

Remedies if things go wrong

It may be possible to resolve matters simply by explaining why a disabled person needs an adjustment to a particular rule or practice and requesting this.

Depending on the context, you might consider using the complaints process for the service provider, organisation, school etc that is involved.

If this is ineffective, it is possible to enforce the EA. The forum in which you do so will depend on the context in which the discrimination occurred. For example, an adult might bring proceedings in the county court in relation to discrimination in the provision of services or public functions, or in an educational setting. A child's parent might bring proceedings in the First-tier Tribunal against a responsible body of a school for discrimination.

Legal advice should be sought before mounting any legal action. The CBF can direct you to solicitors with expertise in discrimination law. Depending on your means, you may be able to get some legal aid for advice

Further resources

The most useful resources are the Codes and Technical Guidance developed by the Equality and Human Rights Commission, above.

See also the useful guide from Disability Rights UK, [here](#). This includes a list of useful contacts.

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