



## **RAINE'S FOUNDATION SCHOOL**

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## **LDBS EQUALITY ACT OPPORTUNITIES POLICY**

**EQUALITY ACT 2010 ADVICE FOR SCHOOL LEADERS, SCHOOL STAFF, GOVERNING BODIES AND LOCAL AUTHORITIES**

**Revised and applicable from SEPTEMBER 2016**

### **Change History**

<b>Date</b>	<b>What changed</b>	<b>Committee Date Approved</b>
20 September 2016	New	20 September 2016
Derivation	Race Relations Act 1976 and as amended under the Race Equality Act of 2001 and the Sex Discrimination Act 1975	
Revision Policy	3 Yearly	

## **ABOUT THIS ADVICE**

This is non statutory advice from the Department for Education. It has been produced to help schools to understand how the Equality Act affects them and how to fulfil their duties under the Act.

On 1 October, the Equality Act 2010 replaced all existing equality legislation such as the Race Relations Act, Disability Discrimination Act and Sex Discrimination Act. It has consolidated this legislation and also provides some changes that schools need to aware of.

## **EXPIRY/REVIEW DATE**

This advice will next be reviewed before April 2012, when schools are required to publish information under the new Specific Duties for the first time

## **WHO IS THIS ADVICE FOR?**

This advice is for:

- School leaders, school staff and governing bodies in maintained schools and Academies but may also be useful for local authorities and parents.

## **KEY POINTS**

- The Equality Act 2010 provides a single, consolidated source of discrimination law. It simplifies the law and it extends protection from discrimination in some areas.
- As far as schools are concerned, for the most part, the effect of the new law is the same as it has been in the past – meaning that schools cannot unlawfully discriminate against pupils because of their sex, race, disability, religion or belief and sexual orientation.
- The exceptions to the discrimination provisions for schools are all replicated in the new act – such as the content of the curriculum, collective worship and admissions to single sex schools and schools of a religious character.
- Schools that were already complying with previous equality legislation should not find major differences in what they need to do. However, there are some changes that will have an impact on schools as follows:

### **New Protection in Schools**

Protection against discrimination is now extended to pupils who are pregnant or have recently given birth, or who are undergoing gender reassignment.

### **Health Related Questions for Job Applicants**

It is now unlawful for employers to ask health-related questions of applicants before job offer, unless the questions are specifically related to an intrinsic function of the work. This means that schools should no longer, as a matter of course, require job applicants to complete a generic health questionnaire as part of the application procedure. DfE are considering the implications of this in relation to existing guidance for schools on establishing fitness and ability

to teach (as required by the Health Standards (England) Regulations 2003). In the meantime, schools are advised to review their existing practices to ensure they are complying with both the Health Standards Regulations and Section 60 of the Equality Act. Schools may decide to ask necessary health questions after job offer. In any case, they should ensure that any health-related questions are targeted, necessary and relevant to the job applied for.

### **Positive Action**

New Positive Action provisions will allow schools to target measures that are designed to alleviate disadvantages experienced by, or to meet the particular needs of, pupils with particular protected characteristics. Such measures will need to be a proportionate way of achieving the relevant aim. Previously a school providing – for example - special catch-up classes for Roma children or a project to engage specifically with alienated Asian boys might have been discriminating unlawfully by excluding children who didn't belong to these groups...

### **Victimisation**

It is now unlawful to victimise a child for anything done in relation to the Act by their parent or sibling.

### **Auxiliary Aids**

The Act will extend the reasonable adjustment duty to require schools to provide auxiliary aids and services to disabled pupils. However this duty is not due to come into effect until a later date, following consultation on implementation and approach.

### **Equality Duties**

The three existing general and specific equality duties on schools (race, disability and gender) to eliminate discrimination and advance equality of opportunity will be combined into a single, less bureaucratic and more outcome-focused duty extending to all of the protected characteristics.

These are the new provisions of the Act but schools will need to be aware of how the rest of the Equality Act applies to them. This is set out below.

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## **Chapter 1 – Overview of the Act**

1.1 The Equality Act 2010 replaced nine major Acts of Parliament and almost a hundred sets of regulations which had been introduced over several decades. It provides a single, consolidated source of discrimination law, covering all the types of discrimination that are unlawful. It simplifies the law by getting rid of anomalies and inconsistencies that had developed over time, and it extends protection against discrimination in certain areas.

1.2 As far as schools are concerned there are some changes, which this guidance will explain, but for the most part the effect of the law is the same as it has been in the past – schools which are already complying with the law will not find major differences in what they need to do. In some areas – in particular the single Equality Duty which will replace the three separate duties on race, disability and gender – the overall effect of the new Act will be to reduce a certain amount of bureaucracy and so should be less burdensome and more effective.

### **Schools: who and what the Act applies to**

1.4 In England and Wales the Act applies to all maintained and independent schools, including Academies, and maintained and non-maintained special schools. In Scotland it applies to schools managed by education authorities, independent schools and schools receiving grants under section 73(c) or (d) of the Education (Scotland) Act.

1.5 The Act makes it unlawful for the responsible body of a school to discriminate against, harass or victimise a pupil or potential pupil

- in relation to admissions,
- in the way it provides education for pupils,
- in the way it provides pupils access to any benefit, facility or service, or
- by excluding a pupil or subjecting them to any other detriment.

1.6 The “responsible body” is the governing body or the local authority for maintained schools in England and Wales, the education authority in the case of maintained schools in Scotland, and the proprietor in the case of independent schools, Academies or non-maintained special schools. In practice, any persons acting on behalf of the responsible body – including employees of the school – are liable for their own discriminatory actions, and the responsible body is also liable unless it can show that it has taken all reasonable steps to stop the individual from doing the discriminatory action or from doing anything of that kind.

1.7 The Act deals with the way in which schools treat their pupils and prospective pupils: the relationship between one pupil and another is not within its scope. It does not therefore bear directly on such issues as racist or homophobic bullying by pupils. However, if a school treats bullying which relates to a protected ground less seriously than other forms of bullying – for example dismissing complaints of homophobic bullying or failing to protect a transgender pupil against bullying by classmates – then it may be guilty of unlawful discrimination.

1.8 The school’s liability not to discriminate, harass or victimise does not end when a pupil has left the school, but will apply to subsequent actions connected to the previous relationship between school and pupil, such as the provision of references on former pupils or access to “old pupils” communications and activities.

### **Protected Characteristics**

1.9 It is unlawful for a school to discriminate against a pupil or prospective pupil by treating them less favourably because of their

- sex,
- race,

- disability,
- religion or belief
- sexual orientation
- gender reassignment,
- pregnancy or maternity

1.10 It is also unlawful to discriminate because of the sex, race, disability, religion or belief, sexual orientation or gender reassignment of another person with whom the pupil is associated. So, for example, a school must not discriminate by refusing to admit a pupil because his parents are gay men or lesbians. It would be race discrimination to treat a white pupil less favourably because she has a black boyfriend.

1.11 It is also unlawful to discriminate because of a characteristic which you think a person has, even if you are mistaken. So a teacher who consistently picks on a pupil for being gay will be discriminating because of sexual orientation whether or not the pupil is in fact gay.

1.12 The new Act extends protection against discrimination on grounds of pregnancy or maternity to pupils, so it will be unlawful – as well as against education policy – for a school to treat a pupil unfavourably because she is pregnant or a new mother. This is covered in more detail in Chapter 3 (3.21 – 3.24).

1.13 Protection for transgender pupils against gender reassignment discrimination is also new in this Act. This is covered in more detail in Chapter 3 (3.3 - 3.6)

1.14 The term “**protected characteristics**” is used as a convenient way to refer to the categories to which the law applies.

1.15 A person’s age is also a protected characteristic in relation to employment and the Act extends this (except for children) to the provision of goods and services, but this does **not** apply to pupils in schools. Schools therefore remain free to admit and organise children in age groups and to treat pupils in ways appropriate to their age and stage of development without risk of legal challenge, even in the case of pupils over the age of 18.

### Unlawful behaviour

1.16 The Act defines four kinds of unlawful behaviour – direct discrimination; indirect discrimination; harassment and victimisation.

1.17 **Direct discrimination** occurs when one person treats another less favourably, because of a protected characteristic, than they treat – or would treat – other people. This describes the most clear-cut and obvious examples of discrimination – for example if a school were to refuse to let a pupil be a prefect because she is a lesbian.

1.18 **Indirect discrimination** occurs when a “provision, criterion or practice” is applied generally but has the effect of putting people with a particular characteristic at a disadvantage when compared to people without that characteristic. An example might be holding a parents’ meeting on a Friday evening, which could make it difficult for observant Jewish parents to attend. It is a defence against a claim of indirect discrimination if it can be shown to be “a proportionate means of achieving a legitimate aim”. This means both that the reason for the rule or practice is legitimate, and that it could not reasonably be achieved in a different way which did not discriminate.

1.19 **Harassment** has a specific legal definition in the Act - it is “unwanted conduct, related to a relevant protected characteristic, which has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person”. This covers unpleasant and bullying

behaviour, but potentially extends also to actions which, whether intentionally or unintentionally, cause offence to a person because of a protected characteristic.

1.20 Where schools are concerned, the offence of harassment as defined in this way in the Act applies only to harassment because of disability, race, sex or pregnancy and maternity, and not to religion or belief, sexual orientation or gender reassignment. It is very important to recognise that this does **not** mean that schools are free to bully or harass pupils on these other grounds - to do so would still be unlawful as well as unacceptable. Any case against the school would be on grounds of direct discrimination rather than harassment.

1.21 Thus, if a teacher belittles a pupil and holds her up to ridicule in class because of a disability she has, this could lead to a court case alleging unlawful harassment. The same unacceptable treatment directed at a lesbian pupil, or based on a pupil's religion, could lead to a case claiming direct discrimination. The practical consequences for the school, and the penalties, would be no different.

1.22 **Victimisation** occurs when a person is treated less favourably than they otherwise would have been because of something they have done ("a protected act") in connection with the Act. A protected act might involve, for example, making an allegation of discrimination or bringing a case under the Act, or supporting another person's complaint by giving evidence or information, but it includes anything that is done under or in connection with the Act. Even if what a person did or said was incorrect or misconceived, for example based on a misunderstanding of the situation or of what the law provides, they are protected against retaliation unless they were acting in bad faith. The reason for this is to ensure that people are not afraid to raise genuine concerns about discrimination because of fear of retaliation.

1.23 As well as it being unlawful to victimise a person who does a protected act, a child must not be victimised because of something done by their parent or a sibling in relation to the Act. This means that a child must not be made to suffer in any way because, for example, her mother has made a complaint of sex discrimination against the school, or her brother has claimed that a teacher is bullying him because he is gay, whether or not the mother or brother was acting in good faith.

1.24 If a pupil has himself or herself done a protected act – such as making a complaint of discrimination against a teacher – then the child's own good faith will be relevant. For example, if the parent's complaint is based on information from her son and the son was deliberately lying, it is not victimisation for the school to punish him in the same way as it might do any other dishonest pupil. Unless it can be clear that the mother was also acting in bad faith (for example that she knew her son was lying) it would still be unlawful to victimise her for pursuing the complaint.

### **Special provisions for Disability**

1.25 The law on disability discrimination is different from the rest of the Act in a number of ways. In particular, it works in only one direction – that is to say, it protects disabled people but not people who are not disabled. This means that schools are allowed to treat disabled pupils more favourably than non-disabled pupils, and in some cases are required to do so, by making reasonable adjustments to put them on a more level footing with pupils without disabilities. The definition of what constitutes discrimination is more complex. Provision for disabled pupils is closely connected with the regime for children with special educational needs. Chapter 4 deals in detail with disability issues.

### **Definition of parents**

1.26 Any reference to a parent in the Act and in this guidance is a wide reference (as in education law generally) not only to a pupil's birth parents but to adoptive, step and foster parents, or other persons who have parental responsibility for, or who have care of, a pupil.

## **Chapter 2 - General Exceptions**

2.1 These are exceptions which apply to all schools or broad categories of schools – schools with a religious character and single sex schools.

### **Single Sex Schools**

2.2 Single sex schools are still able to refuse to admit pupils of the opposite sex. This does not stop a single sex school admitting a small number of pupils from the opposite sex on an exceptional basis or in relation to particular courses or classes only. If a single sex school has such pupils, limiting them to particular courses or classes is not discrimination. However, other forms of sex discrimination by the school against its opposite-sex pupils would still be unlawful. This means that (for example):

- A school which admits only boys is not discriminating unlawfully against girls.
- A boys' school which admits some girls to the Sixth Form, or which lets girls attend for a particular GCSE course not offered at their own school is still regarded as a single-sex school.
- A boys' school which admits girls to A-level science classes is not discriminating unlawfully if it refuses to admit them to A-level media studies or maths classes.
- A boys' school which admits girls to the Sixth Form but refuses to let them use the same cafeteria or go on the same visits as other Sixth Form pupils would be discriminating unlawfully against them.
- A girls' school which permits a pupil who is undergoing gender reassignment to remain after they adopt a male gender role would not lose its single-sex status.

### **Schools with a religious character**

2.3 Schools with a religious character (commonly known as faith schools) have certain exceptions to the religion or belief provisions which allow them to discriminate because of religion or belief in relation to admissions and in access to any benefit, facility or service.

#### **Admissions**

2.4 Schools with a religious character may give priority in admissions to members of their own religion. The Admissions Code provides that this may only be done when a school is oversubscribed – schools subject to the Code are not permitted to refuse admission to pupils not of their faith if they have unfilled places.

- For example, a Muslim school may lawfully give priority to Muslim pupils when choosing between applicants for admission. However, the Admissions Code will not allow it to refuse to accept pupils of another or no religion unless it is oversubscribed.

The exception is not in fact confined to preferring children of the school's own faith. It would, for example, allow a Church of England school to allocate some places to children from Hindu or Muslim families if it wanted to ensure a mixed intake reflecting the diversity of the local population. It would not, however, allow the school to base this selection on ethnic background rather than faith.

#### **Benefits facilities and services**

2.5 In addition to the admissions exception, schools with a religious character also have exceptions for how they provide education to pupils and in the way they allow access to other aspects of school life which are not necessarily part of the curriculum. For example:

- A Jewish school which provides spiritual instruction or pastoral care from a rabbi is not discriminating unlawfully by not making equivalent provision for pupils from other religious faiths.
- A Church of England school which organises visits for pupils to sites of particular interest to its own faith, such as a cathedral, is not discriminating unlawfully by not arranging trips to sites of significance to the faiths of other pupils.
- A child of a different faith could not claim, for example, that they were being treated less favourably because objects symbolic of a school's faith, such as the Bible, were given a special status in the school.

### What is not permissible

2.6 These exceptions allow such schools to conduct themselves in a way which is compatible with their religious ethos. But the Equality Act does not permit less favourable treatment of a pupil because they do not (or no longer) belong to the school's religion. For example, it would be unlawful for a Catholic school to treat a pupil less favourably because he rejected the Catholic faith and declared himself to be a Jehovah's Witness or an atheist.

2.7 Nor does it allow them to discriminate on religious grounds in other respects, such as excluding a pupil or subjecting a pupil to any other detriment. It also does not permit them to discriminate in relation to other protected characteristics, for example a school with a religious character would be acting unlawfully if it refused to admit a child because he or she was gay – or their parents were.

### Curriculum

2.8 The content of the school curriculum has never been caught by discrimination law, and this Act now states explicitly that it is excluded. However the way in which a school provides education – the delivery of the curriculum – is explicitly included.

2.9 Excluding the content of the curriculum ensures that schools are free to include a full range of issues, ideas and materials in their syllabus, and to expose pupils to thoughts and ideas of all kinds, however challenging or controversial, without fear of legal challenge based on a protected characteristic. But schools will need to ensure that the way in which issues are taught does not subject individual pupils to discrimination.

2.10 Some examples can best explain the distinction between content and delivery of the curriculum as the Act applies:

- A boy complains that it is sex discrimination for him to be required to do a module on feminist thought.
- A girl complains that putting *The Taming of the Shrew* on the syllabus is discriminatory; or a Jewish pupil objects to having to study *The Merchant of Venice*.
- A fundamentalist Christian objects to the teaching of evolution in science lessons unbalanced by the teaching of "intelligent design"
- A school does a project to mark Gay Pride Week. A heterosexual pupil claims that he finds this embarrassing and that it discriminates against him on grounds of his sexual orientation; a Christian or a Muslim pupil objects to it on religious grounds.

- A Muslim pupil objects to the works of Salman Rushdie being included on a reading list.

2.11 All of the above are examples of complaints against the content of the curriculum, and none of them would give rise to a valid complaint under the Act.

2.12 However, valid complaints that the curriculum is being delivered in a discriminatory way might well arise in situations such as the following:

- A teacher uses the fact that *The Taming of the Shrew* is a set book to make derogatory generalisations about the inferiority of women, in a way which makes the girls in the class feel belittled. Or, in teaching *The Merchant of Venice*, he encourages the class to laugh at a Jewish pupil.
- In class discussions, black pupils are never called on and the teacher makes it clear that she is not interested in their views.
- Girls are not allowed to do design technology or boys are discouraged from doing food technology. This is not intrinsic to the curriculum itself but to the way in which education is made available to pupils.
- The girls' cricket team are not allowed equal access to the cricket nets, or the boys' hockey team is given far better resources than the girls' team. This would be less favourable delivery of education rather than to do with the sports curriculum per se.

### **Acts of worship**

2.13 There is a general exception, which applies to all schools, to the religion or belief provisions which allows all schools to have acts of worship or other forms of collective religious observance. This means the daily act of collective worship, which for maintained schools is mandatory and should be of a broadly Christian nature, is not covered by the religion or belief provisions. The exception means that schools will not be acting unlawfully if they do not provide an equivalent act of worship for other faiths.

2.14 Schools are also free to celebrate religious festivals and could not be claimed to be discriminating against children of other faiths if, for example, they put on a nativity play at Christmas or hold a celebration to mark other religious festivals such as Diwali or Eid.

### **Uniforms**

2.15 The Equality Act does not deal specifically with school uniform or other aspects of appearance such as hair colour and style, and the wearing of jewellery and make-up, but the general requirement not to discriminate in the treatment of pupils applies here as in relation to other aspects of school policy. It is for the governing body of a school to decide whether there should be a school uniform and other rules relating to appearance, and if so what they should be. This flows from the duties placed upon the governing body by statute to manage the school.

2.16 Long-standing guidance makes it clear that schools must have regard to their obligations under the Human Rights Act 1998 (it is here rather than in relation to equality law that most case law has been determined to date) as well as under equality law, and that they need to be careful that blanket uniform policies do not discriminate because of race, religion or belief, gender, disability, gender reassignment or sexual orientation. Consequently it will be up to the individual school to consider the implications their uniform requirements have on their pupils.

2.17 For example, differences in dress requirements for girls and boys are standard, and where they don't have significantly more detrimental effects on one sex or the other they are unlikely to be regarded as discriminatory. But it might be unlawful if, for example, the uniform was considerably more expensive for girls than for boys. Schools

need also to consider whether flexibility is needed in relation to uniform to meet the needs of a pupil who is undergoing gender reassignment. It may also be discrimination because of disability if, for example, a child who has a skin condition which means they cannot wear nylon is not allowed to wear cotton trousers as part of the uniform.

2.18 There are potential issues around school uniform policies and religion and belief. Schools should be sensitive to the needs of different cultures, races and religions and act reasonably in accommodating these needs, without compromising important school policies, such as school safety or discipline. It is well established that it would be race discrimination to refuse to let a Sikh child wear a turban because of a school policy requiring that caps be worn, but legal judgments have not supported the absolute right of people of faith to wear garments or jewellery to indicate that faith.

### **Bullying**

2.19 The issue of bullying motivated by prejudice is a particularly sensitive issue. Although the relationship between one pupil and another is not within the scope of the Act (see paragraph 1.7), schools need to ensure that all forms of prejudice motivated bullying are taken seriously and dealt with equally and firmly.

2.20 The Department for Education has published specific guidance on bullying including homophobic and transphobic bullying and bullying related to sexual orientation, transgender, disability, race and religion:  
<http://www.teachernet.gov.uk/wholeschool/behaviour/tacklingbullying/>

The Gender Identity Research and Education Society have published “Guidance on Combating Transphobic Bullying in Schools” <http://www.gires.org.uk/transbullying.php>

And Stonewall have a wealth of material on homophobic bullying on their website:  
[http://www.stonewall.org.uk/at\\_school/education\\_for\\_all/default.asp](http://www.stonewall.org.uk/at_school/education_for_all/default.asp)

### **Schools’ duty of care**

2.21 This guidance sets out the position on the extent of the Equality Act only. However, as pointed out already, it must be remembered that schools also have many other duties, including their duty of care to their pupils, and their duty to deliver key areas of the curriculum such as religious education or sex and relationship education.

## **Chapter 3 –Special issues for some protected characteristics**

3.1 This chapter covers all protected characteristics apart from disability, which is covered separately in Chapter 4. It outlines general concepts applicable to all or most characteristics and specific exceptions where they apply. It also provides some definitions of protected characteristics and the interaction between some of those characteristics.

3.2 Apart from those areas discussed in chapter 1 and highlighted again in this chapter, the Act does not contain significant changes in the law with regard to the majority of discrimination legislation applicable to schools. Schools that already employ non-discriminatory practices and adhere to government guide lines should already be acting within the spirit and letter of the Act and should need to make only minor adjustments, if any. However, it may be useful to review the school's compliance in the light of this guidance.

### **Gender reassignment**

3.3 Protection from discrimination because of gender reassignment in schools is new for pupils in the Equality Act, although school staff are already protected. This means that for the first time it will be unlawful for schools to treat pupils less favourably because of their gender reassignment and that schools will have to factor in gender reassignment when considering their obligations under the new Equality Duty.

3.4 Gender reassignment is defined in the Equality Act as applying to anyone who is undergoing, has undergone or is proposing to undergo a process (or part of a process) of reassigning their sex by changing physiological or other attributes. This definition means that in order to be protected under the Act, a pupil will not necessarily have to be undertaking a medical procedure to change their sex but must be taking steps to live in the opposite gender, or proposing to do so. The concepts of perception and association also apply to gender reassignment.

A glossary of terminology related to the transgender field can be found on the Gender Identity Research and Education Society website, here: <http://www.gires.org.uk/mglossary.php>

3.5 The protection against discrimination because of gender reassignment now matches the protection because of sexual orientation in schools. That is protection from direct and indirect discrimination and victimisation, which includes discrimination based on perception (see 1.11) and on association (see 1.10). Schools need to make sure that all gender variant pupils, or the children of transgender parents, are not singled out for different and less favourable treatment from that given to other pupils. They should check that there are no practices which could result in unfair, less favourable treatment of such pupils. For example, it would be unlawful discrimination for a teacher to single out a pupil undergoing gender reassignment and embarrass him in front of the class because of this characteristic.

3.6 It is relatively rare for pupils – particularly very young pupils – to want to undergo gender reassignment, but when a pupil does so a number of issues will arise which will need to be sensitively handled. There is evidence that the number of such cases is increasing and schools should aim to address any issues early on and in a proactive way. Further guidance is available from the GIRES website – see paragraph 2.19 for links to their bullying guidance.

### **Race?**

3.7 The definition of race includes colour, nationality and ethnic or national origins.

3.8 Schools need to make sure that pupils of all races are not singled out for different and less favourable treatment from that given to other pupils. Schools should check that there are no practices which could result in unfair, less favourable treatment of such pupils. For example, it would be unlawful for a selective school to impose a higher standard for admission to applicants from an ethnic minority background, or for a school to impose stricter

disciplinary penalties on African Caribbean boys than they do in similar circumstances to children from other backgrounds.

### **Is it lawful to segregate pupils by race or ethnicity?**

3.9 Segregation of pupils by race is always direct discrimination. It would thus be unlawful for a school to put children into sets, or into different sports in PE classes, according to their ethnicity. This stipulation in the Act is to make it clear that claims that segregated treatment is “separate but equal” cannot be sustained where race is concerned. It does not mean that schools cannot take positive action to deal with particular disadvantages affecting children of one racial or ethnic group, where this can be shown to be a proportionate way of dealing with such issues.

3.10 Race Equality Duty – schools currently have a statutory duty which requires them to take proactive steps to tackle racial discrimination, and promote equality of opportunity and good race relations. Under the Equality Act, this will be replaced by the general equality duty and the new specific duties – covered in chapter 5 of this guidance.

### **Religion or Belief**

Please also see the section on schools with a religious character in Chapter 2.

3.11 The Equality Act defines “religion” as being any religion, and “belief” as any religious or philosophical belief. A lack of religion or a lack of belief are also protected characteristics. These definitions are fairly broad and the concepts of religion and belief therefore must be construed in accordance with Article 9 of the European Convention on Human Rights and with existing case law. This means that to benefit from protection under the Act, a religion or belief must have a clear structure and belief system, and should have a certain level of cogency, seriousness and cohesion, and not be incompatible with human dignity.

3.12 “Religion” will include for example all the major faith groups and “belief” will include non-religious worldviews such as humanism. Religion will also include denominations or sects within a religion, such as Catholicism or Protestantism within Christianity. It is not however intended to include political beliefs such as Communism or support for any particular political party.

3.13 Lack of religion or belief is also included in the definition of “religion or belief”. This means it will be unlawful to discriminate against someone on the grounds that they do not adhere, or sufficiently adhere, to a particular religion or belief (even one shared by the discriminator), or indeed any religion or belief at all – such as, for example, an atheist.

3.14 Discrimination because of religion or belief means treating a person less favourably than another person is or would be treated, because of their religion or belief, or the religion or belief they are perceived to have, their lack of religion or belief, or the religion or belief, or lack of it, of someone else with whom they are associated.

3.15 The Equality Act makes it clear that unlawful religious discrimination can include discrimination against another person of the same religion or belief as the discriminator. This is to ensure that any potential discrimination between, e.g. Orthodox and Reform Jews, or Shia and Sunni Muslims, would also be unlawful. So if a Muslim pupil is not chosen for a part in a school play because it is thought to be inappropriate for a girl of that faith, that will be discrimination even if the decision was taken by a Muslim teacher. Nor could a Muslim teacher choose one Muslim pupil over another for a part in the play because he thinks the chosen pupil is a more observant member of his faith and should be rewarded.

3.16 The definition of discrimination on grounds of religion or belief does not address discrimination on any other ground (such as race, sex or sexual orientation). The Act does not allow a teacher to discriminate against a pupil because of his own personal religious views about homosexuality or the role of women for example. This is explained

more thoroughly later in this chapter, in the section entitled *Sexual Orientation and Religion or Belief* (paragraphs 3.26-3.30)

## **Sex/Gender**

Please also see the section on single sex schools in Chapter 2.

3.17 Schools need to make sure that pupils of one sex are not singled out for different and less favourable treatment from that given to other pupils. They should check that there are no practices which could result in unfair, less favourable treatment of boys or girls. For example, it would be unlawful for a school to require girls to learn needlework while giving boys the choice between needlework and woodwork classes.

3.18 **Gender Equality Duty** - Schools currently have a statutory duty to promote gender equality and must have a gender equality scheme in place. Under the Equality Act, this will be replaced by the general equality duty and the new specific duties – this is covered in chapter 5 of this guidance.

## **Single sex classes**

3.19 Whilst there is no express exemption in the same way that there is for same-sex schools, it is not necessarily unlawful to have some single-sex classes in a mixed school, provided that this does not give children in such classes an unfair advantage or disadvantage when compared to children of the other sex in other classes. For example, it would be lawful to teach sex education to single-sex classes, as long as the classes were provided to both boys and girls, but unlawful to provide remedial classes just for boys who needed help with reading without doing the same for girls in a similar position. A positive action initiative specifically to help boys in such a position would not necessarily be unlawful but the school would need to be able to show that this was a proportionate way of dealing with a specific disadvantage experienced by boys and connected to their gender. It would not be proportionate simply to refuse help to girls with reading difficulties in order to help boys as a group catch up with the higher average attainment of girls. Pupils undergoing gender reassignment should be allowed to attend the single sex class that accords with the gender role in which they identify.

## **Single sex sport**

3.20 Although the Equality Act forbids discrimination in access to benefits, facilities and services; the Act does contain an exception which permits single-sex sports. It applies to participation in any sport or game, or other activity of a competitive nature, where the physical strength, stamina or physique of the average woman (or girl) would put her at a disadvantage in competition with the average man (or boy). But while this exception might permit a mixed school to have a boys-only football team, the school would still have to allow girls equal opportunities to participate in comparable sporting activities. The judgment on whether girls would be at a physical disadvantage needs to take into account the particular group in question, so it is much less likely to justify segregated sports for younger children. Where separate teams exist, it would be unlawful discrimination for a school to treat one group less favourably – for example by providing the boys' hockey or cricket team with much better resources than the girls'.

## **Pregnancy and maternity**

3.21 Protection for pupils from discrimination because of pregnancy and maternity in schools is new in the Equality Act. This means that for the first time it will be unlawful for schools to treat a pupil less favourably because she becomes pregnant or has recently had a baby. Schools will also have to factor in pregnancy and maternity when considering their obligations under the new Equality Duty (see chapter 5).

3.22 Although the specific provision in the Act is new, schools should already be aware of their specific responsibilities to any pupils in their care who become pregnant or parents. Previous government guidance issued in

2001 (DfES/0629/2001 on the 'Education of School Age Parents') and in the Absence and Attendance Codes Guidance for Schools and Local Authorities (January 2009, page 8), which is available on teachernet make it clear that schools must not exclude a pupil simply on the grounds of her becoming pregnant but should allow her no more than 18 calendar weeks authorised absence to cover the time immediately before and after the birth of her child. This is in order to ensure that she is reintegrated into education as quickly as possible.

3.23 Local Authorities have a duty under the Education Act 1996 to provide suitable education for all pupils for whom they are responsible including pupils of compulsory school age who become parents. 'Suitable education' must meet the needs of the pupil and should take account of their age, ability, aptitude and individual needs including any special educational needs they may have. The 2001 guidance emphasises the importance of support from re-integration and education welfare officers to enable pregnant pupils and school age mothers to complete their education.

3.24 Schools already have a duty of care to their pupils and we do not expect them to have to alter their policies because of this new legal provision, providing they are not excluding pregnant pupils or requiring them to study at home or in alternative provision when they wish to remain in school, and are letting them return to education when they have had their babies. Further guidance on dealing with issues arising from schoolgirls becoming pregnant can be found here: <http://www.teachernet.gov.uk/wholeschool/behaviour/attendance/pupilregis/>

### **Sexual orientation**

3.25 Schools need to make sure that all gay, lesbian or bi-sexual pupils, or the children of gay, lesbian or bi-sexual parents, are not singled out for different and less favourable treatment from that given to other pupils. They should check that there are no practices which could result in unfair, less favourable treatment of such pupils. For example, it would be unlawful for a school to refuse to let a gay pupil become a prefect because of his sexual orientation.

### **The relationship between Sexual Orientation and Religion**

3.26 There is a relationship between protection because of sexual orientation and protection of religious freedom. Protection in the area of discrimination on grounds of religion or belief and the right to manifest one's religion or belief is set out earlier in this chapter (3.11 – 3.16).

3.27 Many people's views on sexual orientation/sexual activity are themselves grounded in religious belief. Some schools with a religious character have concerns that they may be prevented from teaching in line with their religious ethos. Teachers have expressed concerns that they may be subject to legal action if they do not voice positive views on same sex relationships, whether or not this view is based on their faith. There are also concerns that schools with a religious character may teach and act in ways unacceptable to lesbian, gay and bi-sexual pupils and parents when same sex relationships are discussed because there are no express provisions to prevent this occurring.

3.28 Schools with a religious character, like all schools, have a responsibility for the welfare of the children in their care and to adhere to curriculum guidance. It is not the intention of the Equality Act to undermine their position as long as they continue to uphold their responsibilities in these areas. If their beliefs are explained in an appropriate way in an educational context that takes into account existing guidance on the delivery of Sex and Relationships Education (SRE) and Religious Education (RE), then schools should not be acting unlawfully.

3.29 However, if a school conveyed its belief in a way that involved haranguing, harassing or berating a particular pupil or group of pupils then this would be unacceptable in any circumstances and is likely to constitute unlawful discrimination.

3.30 Where individual teachers are concerned, having a view about something does not amount to discrimination. So it should not be unlawful for a teacher in any school to express personal views on sexual

orientation provided that it is done in an appropriate manner and context (for example when responding to questions from pupils, or in an RE or Personal, Social, Health and Economic education (PSHE) lesson). However, it should be remembered that school teachers are in a very influential position and their actions and responsibilities are bound by much wider duties than this legislation. A teacher's ability to express his or her views should not extend to allowing them to discriminate against others.

## **Chapter 4 - Disability**

4.1 As mentioned in Chapter 1, and as in previous equality legislation, the disability provisions in this Act are different from those for other protected characteristics in a number of ways.

4.2 The overriding principle of equality legislation is generally one of equal treatment - i.e. – that you must treat a black person no less well than a white person, or a man as favourably as a woman. However, the provisions relating to disability discrimination are different in that you may, and often must, treat a disabled person more favourably than a person who is not disabled and may have to make changes to your practices to ensure, as far as is reasonably possible, that a disabled person can benefit from what you offer to the same extent that a person without that disability can. So in a school setting the general principle is that you have to treat male and female, black and white, gay and straight pupils equally - but you may be required to treat disabled pupils differently. Discrimination is also defined rather differently in relation to disability

### **New provisions relating to disability**

4.3 The Disability provisions in the Equality Act mainly replicate those in the DDA. There are some minor differences as follows:

- Unlike the DDA the Equality Act does not list the types of day to day activities which a disabled person must demonstrate that they cannot carry out, thus making the definition of disability less restrictive for disabled people to meet.
- Failure to make a reasonable adjustment can no longer be defended as justified. The fact that it must be *reasonable* provides the necessary test.
- Direct Discrimination against a disabled person can no longer be defended as justified – bringing it into line with the definition of direct discrimination generally.
- Schools and local authorities will (when provisions are implemented) be under a duty to supply auxiliary aids and services as reasonable adjustments where these are not being supplied through Special Educational Needs (SEN) statements (see paragraphs 4.12 and 4.20)

### **Definition of disability**

4.4 The Act defines disability as when a person has a ‘physical or mental impairment which has a substantial and long term adverse effect on that person’s ability to carry out normal day to day activities.’ Some specified medical conditions, HIV, multiple sclerosis and cancer are all considered as disabilities, regardless of their effect.

4.5 The Act sets out details of matters that may be relevant when determining whether a person meets the definition of disability. Long term is defined as lasting, or likely to last, for at least 12 months.

### **Unlawful behaviour with regard to disabled pupils**

4.6 Chapter 1 (1.17 – 1.24) explains the general definitions in the Act of direct discrimination, indirect discrimination, victimisation and harassment. The rather different and more complex provisions that apply in the case of disability are set out here.

4.7 **Direct Discrimination:** A school must not treat a disabled pupil less favourably simply because that pupil is disabled – for example by having an admission bar on disabled applicants.

4.8 A change for schools in this Act is that there can no longer be justification for direct discrimination in any circumstances. Under the DDA schools could justify some direct discrimination – if was a proportionate means of meeting a legitimate aim. What the change means is that if a school discriminates against a person purely because

of their disability (even if they are trying to achieve a legitimate aim) then it would be unlawful discrimination as there can be no justification for their actions.

4.9 **Indirect Discrimination:** A school must not do something which applies to all pupils but which is more likely to have an adverse effect on disabled pupils only – for example having a rule that all pupils must demonstrate physical fitness levels before being admitted to the school – unless they can show that it is done for a legitimate reason, and is a proportionate way of achieving that legitimate aim.

4.10 **Discrimination arising from disability:** A school must not discriminate against a disabled pupil because of something that is a consequence of their disability – for example by not allowing a disabled pupil on crutches outside at break time because it would take too long for her to get out and back. Like indirect discrimination, discrimination arising from disability can potentially be justified.

4.11 **Harassment:** A school must not harass a pupil because of his disability – for example, a teacher shouting at the pupil because the disability means that he is constantly struggling with class-work or unable to concentrate.

### **Reasonable adjustments and when they have to be made**

4.12 The duty to make reasonable adjustments applies only to disabled people. For schools the duty is summarised as follows:

- Where something a school does places a disabled pupil at a disadvantage compared to other pupils then the school must take reasonable steps to try and avoid that disadvantage.
- Schools will be expected to provide an auxiliary aid or service for a disabled pupil when it would be reasonable to do so and if such an aid would alleviate any substantial disadvantage that the pupil faces in comparison to non-disabled pupils.

Schools are not subject to the other reasonable adjustment duty to make alterations to physical features because this is already considered as part of their planning duties.

***(Please note: the duty to provide auxiliary aids is new to schools and will not be introduced until a later date to allow time for planning and informed implementation)***

4.13 A minor change for schools is that a failure to make a reasonable adjustment cannot now be justified, whereas under the DDA it could be. However this change should not have any practical effect due to the application of the reasonableness test – i.e. if an adjustment is reasonable then it should be made and there can be no justification for why it is not made. Schools will not be expected to make adjustments that are not reasonable.

4.14 In addition to having a duty to consider reasonable adjustments for particular individual disabled pupils, schools will also have to consider potential adjustments which may be needed for disabled pupils generally as it is likely that any school will have a disabled pupil at some point. However, schools are not obliged to anticipate and make adjustments for every imaginable disability and need only consider general reasonable adjustments - e.g. being prepared to produce large font papers for pupils with a visual impairment even though there are no such pupils currently admitted to the school. Such a strategic and wider view of the school's approach to planning for disabled pupils will also link closely with its planning duties (covered in 4.21).

4.15 The Act does **not** set out what would be a reasonable adjustment or a list of factors to consider in determining what is reasonable although the EHRC code of practice will include factors that should be taken into account. It will be for schools to consider the reasonableness of adjustments based on the circumstances of each case. However, factors a school may consider when assessing the reasonableness of an adjustment may include the financial or other resources required for the adjustment, its effectiveness, its effect on other pupils, health and

safety requirements and whether aids have been made available through the Special Educational Needs route (see 4.20 below).

4.16 Cost will inevitably play a major part in determining what is reasonable and it is more likely to be reasonable for a school with substantial financial resources to have to make an adjustment with a significant cost, than for a school with fewer resources. For example, a small rural primary school may not be able to provide specialised IT equipment for any disabled pupils who may need it and it may not be reasonable for the school to provide that equipment. On the other hand, a much larger school might reasonably be expected to provide it.

4.17 Often, though, effective and practicable adjustments for disabled pupils will involve little or no cost or disruption and are therefore very likely to be reasonable for a school to have to make.

4.18 Schools generally will try to ensure that disabled pupils can play as full a part as possible in school life and the reasonable adjustments duty will help support that. However, there will be times when adjustments cannot be made because to do so would have a detrimental effect on other pupils and would therefore not be reasonable – for example, if a school put on a geology field trip which necessarily involved climbing and walking over rough ground and after fully considering alternatives to accommodate a disabled pupil in a wheelchair who could not take part it determined that there was no viable alternative or way of enabling the disabled pupil to participate or be involved, it would not have to cancel the trip as originally planned. This is unlikely to constitute direct discrimination or failure to make a reasonable adjustment

4.19 The reasonable adjustments duties on schools are intended to complement the accessibility planning duties (covered in 4.21) and the existing special educational needs (SEN) statement provisions which are part of education legislation, under which Local Authorities have to provide auxiliary aids to pupils with a statement of special educational need.

4.20 The duty applies in respect of all disabled pupils but many will have an SEN statement and auxiliary aids provided by the LA and so may not require anything further. However, if the disabled pupil does not have a statement (or the statement doesn't provide the necessary aid) then the duty to consider reasonable adjustments and provide such auxiliary aids will fall to the school (*after the relevant provisions come into force*).

### **Schools' duties around accessibility for disabled pupils**

4.21 Schools and LAs need to carry out accessibility planning for disabled pupils. These are the same duties as previously existed under the DDA and have been replicated in the Equality Act 2010.

4.22 **Schools** must implement accessibility plans which are aimed at:

- increasing the extent to which disabled pupils can participate in the curriculum;
- improving the physical environment of schools to enable disabled pupils to take better advantage of education, benefits, facilities and services provided; and
- improving the availability of accessible information to disabled pupils.

4.23 Schools will also need to have regard to the need to provide adequate resources for implementing plans and must regularly review them. An accessibility plan may be a freestanding document but may also be published as part of another document such as the school development plan.

4.24 OFSTED inspections may include a school's accessibility plan as part of their review.

### **Local Authority's duties around accessibility for disabled pupils**

4.25 **LAs** must, for the schools for which they are responsible, prepare accessibility strategies based on the same principle as the access plans for schools.

4.26 Guidance on the planning duties, which offers advice to schools and LAs on how to develop plans and

strategies and gives examples on approach, was published in 2002 and can be accessed at :  
[http://www.teachernet.gov.uk/doc/2220/Access\\_Guide\\_.pdf](http://www.teachernet.gov.uk/doc/2220/Access_Guide_.pdf).

4.27 Further guidance on this and all other areas of disability in schools is available in the “Implementing Disability Discrimination Act in Schools and Early Years Settings” pack, which although it refers to the repealed DDA, contains helpful advice for schools in the area of disability and is still currently available at:  
<http://publications.education.gov.uk/default.aspx?PageFunction=productdetails&PageMode=publications&ProductID=DFES%20160%202006&>

## Chapter 5 - The Public Sector Equality Duty

5.1 The Equality Act 2010 introduced a single Public Sector Equality Duty (PSED) on public bodies including maintained schools and Academies which extends to all protected characteristics - race, disability, sex, age, religion or belief, sexual orientation, pregnancy and maternity and gender reassignment. This combined equality duty came into effect in April 2011. It has three main elements. In carrying out their functions, public bodies are required to **have due regard to the need to:**

- Eliminate discrimination and other conduct that is prohibited by the Act,
- Advance equality of opportunity between people who share a protected characteristic and people who do not share it,
- Foster good relations across all characteristics - between people who share a protected characteristic and people who do not share it.

5.2 Where schools are concerned, age will be a relevant characteristic in considering their duties in their role as an employer but not in relation to pupils.

5.3 All public bodies were previously bound by three separate duties to promote disability, race and gender equality. The new simpler, less bureaucratic PSED has replaced these three duties

5.4 All schools are already subject to the need to have due regard to the three elements of the duty as outlined above. What having “due regard” means in practice has been defined in case law. For schools this means:

- Decision makers in schools must be aware of the duty to have “due regard” when making a decision or taking an action which may have implications for people with particular protected characteristics.
- Schools should consider equality before and at the time that they develop policy and take decisions, not as an afterthought, and they need to keep it under review on a continuing basis.
- The equality duty has to be integrated into the carrying out of the school’s functions, and the duty has to be carried out seriously, rigorously and with an open mind – it is not just a question of ticking boxes.
- Schools can’t delegate responsibility for carrying out their duty to anyone else.

5.5 It is good practice for schools to keep an adequate record showing that they have actually considered their equality duties and pondered relevant questions. There is no legal requirement to produce an equality impact assessment document. All that is needed is for the equality issues to be properly considered, at the time decisions are taken, and for a simple record to be kept of how those decisions were reached.

5.6 If a school has not specifically mentioned the relevant general equality duty when carrying out a particular function, this does not mean that the duty to have ‘due regard’ has not been performed., but it will be easier to demonstrate if challenged that the duty has been fulfilled if some record is made at the time. The duty should be implemented in a light-touch way, proportionate to the issue being considered.

5.5 The Act also introduces specific duties, which are designed to help public authorities to meet their obligations under the PSED. The PSED is set out on the face of the Act, while the specific duties are set out in secondary legislation.

## **Specific Duties**

5.6 The Specific Duties are expected to come into effect in September 2011. They are designed to help public bodies fulfil their obligations under the general duty. They are intended to be flexible, light-touch and proportionate rather than being a rigid bureaucratic process or a “tick-box” exercise. The emphasis will be on transparency to allow local democratic accountability.

5.7 The Specific Duties will require schools, to publish information demonstrating how they are meeting the aims of the general duty, and to prepare and publish equality objectives. Again, how these are achieved will not be prescribed - nor will they require particular schemes or reports to be produced so there is no requirement to publish an equality scheme. However, in line with good practice, such a scheme could be one of the ways in which schools choose to demonstrate their compliance with the general duty. It will be for schools to decide whether to do this and, if so, what form it should take. They will have until 6 April 2012 to publish their initial information and objectives, and then will need to update the information at least annually and to publish objectives at least once every four years.

5.8 Data about employees will not need to be published where a public authority has fewer than 150 employees, which means that for the great majority of schools, only pupil-related data will need to be published

5.9 Further guidance will appear here on what schools will need to do to comply with the specific duties. In the mean time, general guidance is available from the EHRC on <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-duties/new-public-sector-equality-duty-guidance/>

## **Chapter 6 - Local Authorities and Education Functions**

6.1 The provisions in the Act extend to Local Authorities (LAs) generally in relation to their functions as a public body but this guidance does not explain those general provisions and LAs should refer to the EHRC guidance on service provision at [\(web link to EHRC Codes of Practice\)](#) for more details of how they will be affected. However, there are some specific provisions and implications in respect of their education functions and these are covered in this chapter.

### **Establishment and closure of schools**

6.2 As with schools generally, the provisions on age discrimination do not apply to LAs in relation to their functions in the provision of schools under section 14 of the Education Act 1996 and in the establishment, alteration and closure of schools. This means that, for example, an LA would not be acting unlawfully by closing a secondary school when it leaves the nearby primary school open.

6.3 Similarly, the sex and religion or belief discrimination provisions do not extend to LAs in relation to establishing schools – so for example, it would not be unlawful if an LA establishes a school for girls, following local demand, without at the same time also establishing a school for boys for which there is no demand - or similarly, if it establishes a school of one religion but not another. However, this exemption does not override an LA's duties under section 14 of the Education Act – that it must ensure that there are sufficient schools providing appropriate education to meet demand.

### **School Curriculum**

6.4 The discrimination provisions on age and religion or belief do not extend to anything an LA does in relation to the school curriculum – so, for example, an LA would not be unlawfully discriminating on religion or belief grounds if it provided curriculum support/advice to schools in its area in subjects which some parents, due to their religion, may object to such as history or science – or on age grounds if the LA support for primary schools is more varied and comprehensive than that for secondary schools.

### **School Admissions**

6.5 LAs play a key role in the school admissions process in maintained schools. The discrimination provisions on age do not extend to anything an LA does in relation to school admissions, so existing approaches in which admissions and transition between schools are determined by a child's age will not be open to challenge.

6.6 The discrimination provisions on religion or belief also do not extend to anything an LA does in relation to admissions to a school with a religious character. For example, a discrimination claim against an LA in respect of its role in the admissions process of a school with a religious character would fail, provided the school was over-subscribed and therefore lawfully prioritising places to children of its religion.

### **School Transport**

6.7 LAs are responsible for the provision of transport to schools for pupils living in their authorities and the discrimination provisions on age and religion or belief do not extend to these transport arrangements. So, for example, an LA would not be unlawfully discriminating simply if it arranges a school bus to a faith school on the outskirts of town but not to another maintained school in the area – or if it lays on transport to a primary school but not to the nearby secondary school.

6.8 Whilst the discrimination provisions in the above two equality areas do not extend to school transport, LAs still need to ensure that their transport policies do not unlawfully discriminate in relation to other protected

characteristics or contravene the Human Rights Act and also that they comply with the statutory school transport guidance ([web link to LA Transport Guidance](#)) issued in 2007 following the Education and Inspections Act 2006. This makes clear, for example, that the same provision for transport should be made to enable the child of non-religious parents to attend a maintained school if the parent feels that this is important in view of his own belief system, as is made to enable the child of religious parents to attend a faith school which is not the nearest to their home.

### **Acts of Worship**

6.9 The discrimination provisions on religion or belief do not extend to an LA's involvement in or arrangement of acts of worship or other religious observance in or on behalf of schools for which it is responsible.

### **Reasonable Adjustments for Disabled Pupils**

6.10 Chapter 4 (4.12 – 4.20) covered the responsibility on schools in relation to providing reasonable adjustments for disabled pupils. LAs, in relation to their education functions, are under the same duty - to have accessibility strategies, provide reasonable adjustments for school pupils, with the aim of avoiding disadvantage, and providing auxiliary aids and services (when introduced).

## **Chapter 7 – How the Act is enforced**

7.1 The enforcement mechanisms contained in this Act are similar to those under existing legislation. This chapter summarises very briefly how they work in relation to the education provisions of the Act.

### **Discrimination claims – court proceedings**

7.2 Proceedings in relation to a contravention of the education provisions of this Act (other than disability – see 7.5 below) will be brought in a county court by the pupil (or in the pupil's name).

7.3 Proceedings must be brought within 6 months of the date of the act to which the claim relates, although the county court has power to extend this period if it considers it just and equitable to do so.

7.4 If the court rules that there has been a contravention then it has the power to award an appropriate remedy including an award of damages.

### **Discrimination claims - tribunal proceedings for disability cases**

7.5 Specialist tribunals which have experience and knowledge of disability issues will hear cases of contravention of the education provisions on grounds of disability. In England this will be the First-tier Tribunal.

7.6 Claims of discrimination or harassment against a pupil by a school will be made to the tribunal by the parent of the pupil.

7.7 As with the county court for other types of discrimination, claims have to be brought within 6 months of the act and the tribunal has the power to consider claims after that time has passed if it considers it just and equitable to do so.

7.8 If the tribunal rules that there has been a contravention then it has the power to make an order of a remedy which it sees as appropriate. Such a remedy will be with a view to removing or reducing the adverse affect on the pupil concerned. However, the remedy in a disability case will not include payment of compensation. It is expected that an education remedy will be the most appropriate – for example, if the tribunal finds that a school has discriminated against a disabled pupil by failing to provide extra help needed to compensate for her disability it may order the school to put in place the necessary measures to meet her needs and help her to catch up with other pupils.

### **Burden of proof**

7.9 A new provision for schools is the reversal of the burden of proof in cases of contravention of the Act's provisions in both court and tribunal cases. This brings education cases into line with the rest of the legislation. It means that if a complainant can establish facts which could lead to the conclusion that an act of discrimination has taken place, then it will be down to the respondent (in this case the school) to show that the reason for what happened was something other than discrimination. However, such defensive reasoning will only be necessary if a case is brought and schools are not expected to develop a body of evidence to justify their everyday actions.

### **The 'Questions Procedure'**

7.10 The Act extends to schools procedures which already exist elsewhere for complainants to ask questions in respect of a contravention of the Act before a formal case is taken to the County Court. This means that if a pupil believes that he/she has been discriminated against or harassed by their school then, before deciding whether to bring a case, they can ask questions of the school about their treatment. Special forms have been developed for this purpose and these, together with advice on using them, is available here ([web link to questions procedure and forms](#)).

7.11 It is hoped that this procedure will help to establish the facts in a way which may make it possible to address problems at local level and reduce the number of cases going to a court or an employment tribunal. Where cases do go further, it will be helpful to have a common understanding of the issues involved, and this can speed up the process.

7.12 Questions asked by a pupil (either on the prescribed forms or otherwise) and the answer by the school can be used as part of evidence in any subsequent court or tribunal case.

7.13 A court or tribunal can draw an adverse inference from a lack of a response after 8 weeks or from a vague or evasive answer by the school – which means that giving such a response, or none, would not be in the school's best interests. The only exception to this would be if the school can show that giving a different response would have an effect on any criminal matters or proceedings.

## **Chapter 8 – Education Specific Employment Provisions**

8.1 The general provisions on employment apply to schools in their role as employers and this is briefly summarised below, however, schools should consult the EHRC’s guidance and Codes of Practice for Employers for more detailed information on the employment provisions of the Act and how they will be affected as an employer (see links at the end of this chapter). In addition, there are some specific employment issues just for schools and a new employment provision on health questioning which will affect schools and these are summarised below.

### **What the Act covers**

8.2 All of the protected characteristics, including age, are covered by the employment provisions of the Act.

8.3 As an employer, a school must not discriminate against a potential employee in respect of whether to offer a job or the terms on which it offers a job and it must not discriminate against an existing employee in respect of the benefits facilities and services it offers to its employees including training opportunities, promotion or dismissal. For example, a school must not demand higher/better qualifications from female applicants for teaching posts than it does for male applicants. It could not dismiss a black teacher who was discovered using school facilities for personal use if it also discovered a white teacher using the same facilities but did not dismiss him – unless the reason for the different treatment could be demonstrated to be something other than their race. Harassment (as defined at 1.19) against potential or existing employees in relation to any of the protected characteristics is also unlawful, as is victimisation of any person who has done a protected act (see para 1.22).

### **Reasonable Adjustments**

8.4 Schools as employers are under the same duties to make reasonable adjustments in relation to disability for their employees or potential employees as they are for their pupils as set out in Chapter 4 (4.12 – 4.20). They must make reasonable adjustments to arrangements or practices to alleviate disadvantage and must also take reasonable steps to provide any necessary auxiliary aids and services. They are also under the duty to consider alterations to physical features of the school where that is reasonable to avoid disadvantage caused by disability.

### **Enquiries about health and disability**

8.5 A new provision introduced by the Act makes it unlawful for an employer to enquire about the health of an applicant for a job until a job offer has been made, unless the questions are specifically related to an intrinsic function of the work - for example ensuring that applicants for a PE teaching post have the physical capability to carry out the duties. We are currently considering the implications of this in relation to existing guidance for schools on establishing fitness and ability to teach - as required by the Health Standards (England) Regulations 2003. In the meantime, schools are advised to review their existing practices to ensure they are complying with both the Health Standards Regulations and the Equality Act.

8.6 Schools should no longer, as a matter of course, require job applicants to complete a generic ‘all encompassing’ health questionnaire as part of the application procedure. Instead schools should ask any health questions which are necessary to ensure that the applicant can carry out an intrinsic function of the work for the post they have applied for. Schools may decide to ask necessary health questions after job offer. In either case, they should ensure that any health-related questions are targeted, necessary and relevant to the job applied for.

8.7 In addition, these provisions will also affect recruitment practices under the Safeguarding Children and Safer Recruitment in Education Guidance, section 4.34 of which advises schools to seek out past sickness records of candidates before interview. This guidance is also under consideration and in the meantime, in order to ensure compliance with these new provisions, schools are advised not to seek out past sickness records until they have made a conditional job offer.

## **Employment exceptions for schools with a religious character**

8.8 There are some specific exceptions to the religion or belief provisions of the Equality Act for employment by schools designated as having a religious character.

8.9 For the purposes of legislation, these schools fall into two broad categories – Voluntary Aided (VA) is one category and Voluntary Controlled (VC) and Foundation schools together form the other. VA schools have more autonomy than VC/foundation schools, especially in terms of employment. Academies, free schools and independent schools with a religious character generally operate under conditions which mirror those in VA schools.

8.10 All of the situations described here are provided for by existing legislation which has not been changed by the Equality Act.

### **Voluntary Controlled and Foundation Schools with a religious character**

#### *Headteachers*

8.11 At VC and foundation schools, when appointing a head teacher the governing body may take into account any candidate's suitability and ability to preserve and develop the religious character of the school. The head may also be a reserved teacher – see below.

#### *Reserved Teachers*

8.12 VC and foundation schools must include reserved teachers where the number of teaching staff is more than two. Reserved teachers are selected according to their competence to teach RE according to the tenets of the school's faith and are specifically appointed to do so. This may include the headteacher.

8.13 The number of reserved teachers must not exceed one-fifth of the teaching staff (including the headteacher). For these purposes, where the total number of teaching staff is not a multiple of five, it will be deemed to be the next higher multiple of five. For example, if there were eight teachers at a school, for this purpose the total number would be deemed to be ten and the maximum number of reserved teachers would be two.

8.14 These teachers must not be appointed unless the foundation governors are satisfied that they are suitable and competent to give religious education. The foundation governors can insist on dismissing a reserved teacher who fails to give suitable and efficient religious education.

#### *Other Teachers and Non-teaching Staff*

8.15 Non-teaching staff and teachers other than those appointed as reserved teachers must not be treated unfavourably in any way because of their religion. This means they cannot be dismissed because of their religious opinions or attendance at religious worship, they cannot be required to deliver RE and cannot be subjected to a detriment for not giving RE or attending worship.

### **VC/Foundation Schools with a religious character becoming Academies**

8.16 A VC school or a foundation school with a religious character which chooses to convert to Academy status will continue to be governed by the provisions described above which apply to VC and foundation schools.

### **Voluntary Aided schools, Independent schools, Academies and Free Schools with a religious character**

### *Teaching Staff (including Headteachers)*

8.17 Voluntary Aided schools may apply religious criteria when recruiting or dismissing any member of their teaching staff. In recruitment, remuneration and promotion they may give preference to persons:

- whose religious opinions are in accordance with the tenets of the religion of the school;
- who attend religious worship in accordance with those tenets; or
- who give, or are willing to give, religious education in accordance with those tenets.

8.18 In considering dismissals, the governing body may have regard to any conduct that is incompatible with the precepts, or with the upholding of the tenets, of the religion of the school. A teacher appointed to teach RE may be dismissed by the governing body without the consent of the local authority if he fails to give such education efficiently and suitably.

### *Non-teaching staff*

8.19 Religious criteria may not be applied to any other posts in a VA school unless there is a genuine occupational requirement. This would need to be justified but might, for example, apply to a member of staff required to give pastoral care to pupils.

### **Further information**

8.20 Detailed guidance on the employment provisions of the Act can be found here:

<http://www.acas.org.uk/index.aspx?articleid=3017> and the statutory Code of Practice on employment here:

<http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/>