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Consultation Document

Auxiliary aids and services for disabled children

Date of issue: 11 November 2011

Action required: Responses by 3 February 2012

Auxiliary aids and services for disabled children

Overview

This consultation document seeks views on commencing the provision within the Equality Act 2010 which places a duty on schools and local authorities to provide auxiliary aids as part of their duty to make reasonable adjustments for disabled children.

How to respond

The consultation response form is available for completion at www.wales.gov.uk/consultations

Responses to this consultation should be e-mailed/posted to the address below to arrive by **3 February 2012** at the latest.

Further information and related documents

Large print, Braille and alternate language versions of this document are available on request.

The consultation document can be accessed on the Welsh Government website at www.wales.gov.uk/consultations

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Data protection

How the views and information you give us will be used.

Any response you send us will be seen in full by Welsh and UK Government staff dealing with the issues which this consultation is about. It may also be seen by other Welsh Government staff to help them plan future consultations.

The Welsh Government intends to publish a summary of the responses to this document. We may also publish responses in full. Normally, the name and address (or part of the address) of the person or organisation who sent the response are published with the response. This helps to show that the consultation was carried out properly. If you do not want your name or address published, please tell us this in writing when you send your response. We will then blank them out.

Names or addresses we blank out might still get published later, though we do not think this would happen very often. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 allow the public to ask to see information held by many public bodies, including the Welsh Government. This includes information which has not been published. However, the law also allows us to withhold information in some circumstances. If anyone asks to see information we have withheld, we will have to decide whether to release it or not. If someone has asked for their name and address not to be published, that is an important fact we would take into account. However, there might sometimes be important reasons why we would have to reveal someone's name and address, even though they have asked for them not to be published. We would get in touch with the person and ask their views before we finally decided to reveal the information.

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Introduction

1. The Equality Act [“the 2010 Act”] received Royal Assent on 8 April 2010. The Act has two main purposes – to harmonise discrimination law and to strengthen the law to support progress on equality. The 2010 Act consolidates a number of relevant enactments including the Disability Discrimination Act 1995 [“the DDA”].
2. The DDA had been amended by the Special Educational Needs and Disability Act 2001 in order to prohibit schools and local authorities from discriminating against disabled children in the matters of school admissions arrangements, exclusion and the provision of education and associated services and to oblige them to make reasonable adjustments to prevent such discrimination. However, schools and local authorities were exempted from making reasonable adjustments with regard to auxiliary aids at that time on the basis that auxiliary aids would already be provided through special educational needs (SEN) statements and through schools’ and local authorities’ duties under the DDA to plan to increase access to schools and the curriculum.
3. In response to a recommendation made to the UK Government in the Lamb Inquiry into parental confidence in the SEN system (report dated 16 December 2009), provision was made in the Act so that schools and local authorities in England, Wales and Scotland would no longer be excluded from the requirement to provide auxiliary aids or services (Section 20 (11) of the Act states that a reference to “auxiliary aids” includes auxiliary services) as part of their duty to make reasonable adjustments.
4. However, this new duty on schools and local authorities to provide auxiliary aids as part of the reasonable adjustments duty did not come into force at the same time as most of the rest of the 2010 Act, that is 1 October 2010.
5. This consultation seeks responses on two issues – firstly, the date by which the new duty should be brought into effect, including consideration of whether there are any reasons why the duty should not be commenced or should be commenced later than September 2011; secondly, whether regulations under section 22 of the 2010 Act would be necessary to define the duty on schools and local authorities to provide auxiliary aids. Regulations under section 22 could make provision as to the circumstances in which it is, or in which it is not, reasonable for a school/local authority to have to take certain steps as part of the reasonable adjustments duty or could set out things which are, or which are not, to be treated as auxiliary aids.
6. The 2010 Act makes a Minister of the UK Government responsible for commencing the new auxiliary aids duty, making any regulations under section 22 of the 2010 Act and for undertaking any consultation regarding these matters in relation to Wales. The Welsh Ministers have agreed however to consult in relation to Wales on the UK Minister’s behalf under section 83(1) of the Government of Wales Act 2006. It is understood that consultations will take place in England and Scotland on the questions posed in this consultation. The UK Government has confirmed that responses to the consultations in England, Scotland and Wales will be taken into account when deciding these questions. It is possible that separate provision in

relation to commencement and regulations may be made depending upon the outcome of the consultation in each jurisdiction.

The new duty to provide auxiliary aids and services

Which bodies does it apply to?

7. The new duty applies to local authorities when exercising functions under the Education Acts, local authority maintained schools, local authority maintained nursery schools, independent schools, and non-maintained special schools. (The duty already applies to other service providers and public authorities, including early years providers that are not part of a maintained school.)

Which children does the duty cover?

8. The duty covers children who are disabled within the definition given in section 6 of the 2010 Act. The Act defines a disabled person as: a person who has a physical or mental impairment, such impairment having a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities. The duty to provide auxiliary aids as a reasonable adjustment does not apply to children who have special educational needs who do not meet the definition of having a disability as set out in the Act.

9. The duty to make reasonable adjustments is an anticipatory duty. This means that it applies not only to disabled pupils who are already at a school but also to disabled pupils who may be admitted in the future. This does not mean that schools and local authorities have to anticipate every possible auxiliary aid and service that might be required by current or future disabled pupils, but that they should anticipate those auxiliary aids and services which it would be reasonable to expect may be needed, such as printing text in large fonts for pupils with visual impairments or providing hearing loops for children with hearing impairments. Schools and local authorities need to be aware of the auxiliary aids and services that may be required but will not need to provide them ahead of an individual need being identified. Schools and local authorities already have a duty to plan to increase access to premises and the curriculum and a duty (which includes an anticipatory duty) to make reasonable adjustments in relation to provisions, criteria or practices which may put a disabled person at a substantial disadvantage.

In what circumstances does the duty apply?

10. Section 20(5) of the 2010 Act says that the duty applies "where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled". When the duty applies there is a requirement for the person to whom the duty applies "to take such steps as it is reasonable to have to take to provide the auxiliary aid". So, in the schools context, providers are not under a duty to provide an auxiliary aid or service to a disabled pupil just because it may be of benefit to the pupil, but only where not providing the auxiliary aid or service would mean that the pupil was put at a "substantial disadvantage" as compared with non-disabled pupils.

What are auxiliary aids and services?

11. There is no current definition in legislation as to what auxiliary aids and services are. There is a power under section 22 of the 2010 Act to make Regulations to say which things are, and which are not, to be treated as auxiliary aids (see paragraph 12 below). In the case of Bedfordshire County Council v Dixon-Wilkinson ([2009] EWCA Civ 678) Lord Justice Wall chose not to express an opinion on what may or may not constitute “auxiliary aids and services”, but referred to the Oxford English Dictionary definition of auxiliary as “helpful, assistant, affording aid, rendering assistance, giving support or succour”. Similarly, in the case of K v The School and the Special Educational Needs and Disability Tribunal ([2007] EWCA Civ 165) Lord Justice Wall said that auxiliary aids and services “are things or persons which help” and referred to the former Disability Rights Commission’s Code of Practice for Schools (2002) which gave the example of a child with a hearing impairment who has twice-weekly visits from a peripatetic teacher of the deaf and the use of a personal FM system (radio aid) as being an example of an auxiliary aid or service.

12. The auxiliary aids duty under the 2010 Act does not include a duty to remove or alter physical features. The duty to remove or alter physical features is a separate reasonable adjustments duty (referred to in the Act as the “second requirement”) which does not apply to schools or local authorities when exercising their functions under the Education Acts as schools and local authorities are alternatively obliged to plan to increase access to school premises and the curriculum.

What is “reasonable” when making “reasonable adjustments”?

13. Just as there is no explicit legal definition of auxiliary aids and services, there is also no explicit definition in law of what constitutes “reasonable” when making reasonable adjustments. The Equality and Human Rights Commission (EHRC) has already published non-statutory guidance for schools and is currently consulting on an updated version of its statutory code of practice for schools. The statutory code will give advice on what constitute auxiliary aids and services in the schools context and when it would be reasonable to have to make adjustments.

14. As referred to in paragraph 11, a Minister of the UK Government has the power to make Regulations under section 22 of the 2010 Act in relation to the duties to make reasonable adjustments. Regulations made under this power could provide for:

- matters to be taken into account in deciding whether it is “reasonable” for a person to have to take a particular step;
- circumstances in which it is, or in which it is not, reasonable for a person (such as a school or a local authority) to have to take steps of a prescribed description; or
- things which are, or which are not, to be treated as auxiliary aids.

15. The power to make Regulations also existed under the DDA but, so far, no Regulations have been made. Other service providers in relation to whom the

auxiliary aids duty already applies, such as early years providers and further and higher education providers, have been able to meet the duty without requiring Regulations to define auxiliary aids and services or what is reasonable. It is the UK Government's view that it should not be necessary to make Regulations in respect of the application of the auxiliary aids duty to schools and local authorities. The UK Government also considers that there would be difficulties with making Regulations which listed auxiliary aids and services because the Regulations would have to be amended to reflect new aids and services as they became available. However the UK Government is keen to receive views on this issue. If Regulations were not made at the time of commencement of the auxiliary aids and services duty there would still be the opportunity to make Regulations at a later date if this proved to be necessary, for example, to address specific issues. In this regard, please see Question 2.

What will be the relationship between the auxiliary aids and services duty and schools' and local authorities' special educational needs duties under Part IV of the Education Act 1996?

16. It has been estimated that a quarter of children identified as disabled under the DDA do not also have an identified SEN¹ and, therefore, the remaining three quarters of disabled children do have SEN. Thus there is a large degree of overlap, but not an absolute correlation, between the disabled children cohort and the SEN cohort. Local authority maintained schools and local authorities already have duties to identify and meet pupils' special educational needs under Part IV of the Education Act 1996. Local authority maintained schools already have a duty to use their best endeavours to make the special educational provision that a child's learning difficulties call for. Local authorities, where necessary, have a duty to assess children's SEN and draw up SEN statements setting out the child's SEN and the special educational provision that will be made to meet the child's needs. The statutory guidance in the SEN Code of Practice recommends a graduated approach to meeting children's needs of "School Action", where the child's SEN is met through the resources which are normally available to the school, "School Action Plus", where the school might receive some outside help, and statements.

17. An indicator that a child may need a statutory assessment and a statement is where it would not be reasonable to expect a maintained mainstream school to meet a child's needs from its normal resources, even with some outside help via School Action Plus. Schedule 2 to the Education (Special Educational Needs) (Wales) Regulations 2002² sets out the form a SEN statement must take. In Part 3 of the statement the local authority must specify the special educational provision it considers appropriate to meet the child's SEN and in particular "any appropriate facilities and equipment, staffing arrangements and curriculum" that are required. The UK Government has indicated that it would expect any auxiliary aids and services which a child needs and which a maintained mainstream school could not be expected to meet from its normal resources would be set out in a child's statement, and a school would not be expected to provide these alternatively via the

¹ Porter, J., Daniels, H., Georgeson, J., Hacker, J., Gallop, V., Feiler, A., Tarleton, B., Watson, D. (2008) *Disability data collection for children's services*.

² S.I. 2002/152.

reasonable adjustments duty to provide auxiliary aids and services under the 2010 Act. The UK Government also believes that the great majority of children who need auxiliary aids and services will already be receiving them through SEN statements and so it is likely that things that disabled pupils might need that would otherwise fall within the auxiliary aids reasonable adjustments duty are probably already largely being met through the SEN route.

18. The new requirement for schools and local authorities to provide auxiliary aids is designed to ensure that there will be no disabled person who would be at a substantial disadvantage if this duty did not exist, for example disabled children without SEN statements. However, the UK Government believes that many schools will already be making reasonable adjustments to provide auxiliary aids and services for these disabled children.

When will the duty fall to a maintained school and when to the local authority?

19. The duty to make reasonable adjustments to provide auxiliary aids and services falls on both schools and the local authorities which maintain them. (For non-maintained schools, see paragraph 21 below). What might be unreasonable for a school to provide may nonetheless be reasonable for a local authority to provide when exercising its functions under the Education Acts. However, there should be no assumption that, where it is unreasonable for a school to provide an auxiliary aid or service, say on cost grounds, it would then be reasonable for the local authority to provide it. The decision would depend on the facts of each individual case and it is not possible to give specific guidance on this issue. However, it may be possible for local authorities and the schools they maintain to draw up agreements locally as to when it would be reasonable to expect a school to provide the auxiliary aid or service and when it would be reasonable for the local authority to do so. Some local authorities already have agreements with their schools on the provision of equipment with cost thresholds beyond which the local authority pays for the equipment and local areas may want to draw up agreements covering auxiliary aids and services more generally.

20. The nature of the aid or service and local arrangements will help to determine what it would be **reasonable** for the school or the local authority to provide. For example, where there is a centrally organised visual or hearing impairment service it may be reasonable to expect the local authority to provide more expensive aids or support through those services but not reasonable for the school to have to provide them. Referring to paragraphs 16 to 18 above, it may be that the child in question already has a SEN statement, or a statutory SEN assessment will be conducted and the child will have a statement in future, which will provide access to the prime auxiliary aids and services that he or she needs with there then being no necessity for the school to provide further services under the reasonable adjustments duty.

How does the auxiliary aids duty affect independent schools and non-maintained special schools?

21. The new duty to make reasonable adjustments to provide auxiliary aids and services applies to independent schools, including non-maintained special schools (NMSS). These schools are not in the same situation as maintained schools as they

do not routinely have available to them the local authority's support services. However, the local authority's duty, where necessary, to assess and draw up SEN statements applies to all children from its area whether they are educated in the maintained or non-maintained sector. Local authorities may place children with statements in independent schools specially organised to make provision for children with SEN or in NMSS precisely in order to give children access to the specialist aids or services such schools can provide, so it is unlikely that additional auxiliary aids or services would reasonably be required for these children, as they are likely to already have access to those aids necessary to help them overcome any substantial disadvantage arising from their disability. Where disabled children without statements who need auxiliary aids and services to prevent them suffering substantial disadvantage are in "mainstream" independent schools those schools will need to consider whether it would be reasonable to provide the aids or services. Should they consider that it would not be reasonable, they or the parents of the child in question may want to request a SEN statutory assessment of the relevant local authority with a view to the child being given an SEN statement which would specify the auxiliary aids or services he/she may need.

What is the likely burden on schools and local authorities as a result of the new auxiliary aids duty?

22. When local authorities in England and experts in the disability field were contacted at the time the amendments to the Equality Bill were proposed (to expand the reasonable adjustments duty to schools and local authorities) opinion was divided. Many felt that this duty would not present a significant new burden on schools and local authorities because disabled children who needed auxiliary aids and services were, by and large, already being provided with them, primarily through the SEN framework. However, there was an underlying view that the new duty could potentially make schools and local authorities responsible for providing a wide range of aids and services, including aids and services which should otherwise be provided by other statutory agencies. As mentioned in paragraph 13, the EHRC will be producing a statutory code of practice and non-statutory guidance for schools which will give examples of when it is likely that it would be reasonable for a school or local authority to provide an auxiliary aid or service. Schools and local authorities must have regard to the statutory Code.

23. The Code will give a view on what constitutes an auxiliary aid or service in the schools context and when it would be reasonable for a school to take steps to provide an aid or service. Whether schools and local authorities will be under a duty to provide auxiliary aids and services will depend on the facts of each individual case. It would be for the Special Educational Needs Tribunal for Wales to decide what is reasonable in any particular case if there is a disability discrimination dispute before the Tribunal and the local authority or school is in Wales.

24. At this point, it is worth reminding readers of the nature of the auxiliary aids reasonable adjustments duty. It covers pupils who fall within the definition of disabled persons in the 2010 Act. Those pupils must, but for the provision of an auxiliary aid or service, be at a "substantial disadvantage" in comparison with non-disabled pupils. Finally, it must be reasonable for schools and local authorities to take steps to avoid that disadvantage by providing an auxiliary aid or service. A number of factors,

including cost, effectiveness and impact on the disability, would have to be considered when deciding whether it is reasonable to take such steps.

Where can parents seek redress if they feel that a school or local authority has failed in its duty to take reasonable steps to provide an auxiliary aid or service?

25. From the date the duty comes into effect the Special Educational Needs Tribunal for Wales will hear disability discrimination claims in Wales where the respondent is a school or a local authority.

When should the duty commence?

26. The UK Government is aware of concerns that some schools and local authorities may have about the implications of the new duty and that they may prefer a longer time to prepare for commencement. However, given what is said in this consultation document about the inter-relationship between the new duty and schools' and local authorities' existing duties under the SEN framework and the limits of the new duty, the UK Government believes that September 2012 would be a reasonable commencement date throughout England, Scotland and Wales.

See Question 1.

When the auxiliary aids and services duty commences

27. Paragraphs 14 and 15 explained that there is a power to make Regulations with regard to auxiliary aids and services and when it would be reasonable to provide them. Regulations could be introduced at the time the new duty comes into effect, they could be introduced after that date in light of schools' and local authorities' experience of the new duty or there could be a decision not to make Regulations.

See Question 2.

28. We are also interested in obtaining more information about the circumstances, and number, of children who might currently be missing out on the provision of auxiliary aids and services because of the absence of the auxiliary aids requirement on schools and local authorities exercising their education functions. Whilst we are aware that there is a cohort of children who are disabled but do not have SEN, or who might require reasonable adjustments unrelated to their SEN, we are not clear on exactly what additional auxiliary aids and services these disabled children might require other than those that a school might currently be providing anyway, either simply through "common sense" adjustments, or through SEN provision (including School Action, School Action Plus and statements). **See Question 3.**