



## **Changes to SENDO in relation to further and higher education (from 1 September 2006)**

This briefing note summarises changes to the Special Educational Needs and Disability (NI) Order 2005 (SENDO) which came into effect on 1 September 2006. The legislative changes mean that the existing Disability Discrimination Code of Practice for Further & Higher Education (2005) requires updating. It is important that this briefing note is used when interpreting the 2005 Code of Practice and any other guidance which was produced by the Equality Commission prior to September 2006. A revised Code will be published in due course.

The Special Educational Needs and Disability (Northern Ireland) Order 2005 (“SENDO”) prohibits discrimination against disabled students and prospective students by schools and institutions of further and higher education.

The provisions of SENDO that apply to institutions of further and higher education were substantially amended on 1 September 2006 in order to fully implement Council Directive 2000/78/EC (the EU Framework Employment Directive). The effect of the amendments is to give greater protection to disabled persons against disability discrimination in further and higher education.

The amendments to SENDO were made by the Special Educational Needs and Disability (Northern Ireland) Order 2005 (Amendment) (Further and Higher Education) Regulations (Northern Ireland) 2006 (the “Regulations”). These Regulations came into operation on 1 September 2006.

The Regulations amended SENDO in several ways:

## **1. Amendments to the definitions of Disability Discrimination**

SENDO initially prohibited two forms of disability discrimination, namely, disability-related discrimination and failure to comply with the duty to make reasonable adjustments. The Regulations make some important amendments to the definitions relating to these forms of discrimination. The Regulations also create a third form of disability discrimination, namely, direct disability discrimination. These amendments are described in further detail below:

### **a. Definition of Direct Disability Discrimination**

The definition is as follows:

“a responsible body directly discriminates against a disabled person if, on the ground of the disabled person’s disability, it treats the disabled person less favourably than it treats or would treat a person not having and who has not had that particular disability and whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person”

[Regulation 6(5) adds a new Article 29(10) to SENDO]

This means that it will not possible for a responsible body to justify an act of direct disability discrimination.

### **b. Justification of Disability-related Discrimination**

The definition of this term will largely remain unchanged except to the following extent. Initially under SENDO, a responsible body had a defence if it committed an act of disability-related discrimination where it could show that it did not know, and could not reasonably be expected to know, that the student or prospective student was disabled. This so-called “lack of knowledge” defence has been removed and it will no longer be available.

### **c. Definition of the duty to make reasonable adjustments**

The existing definition will be replaced by the following:

“Where-

- (a) a provision, criterion or practice, other than a competency standard, is applied by or on behalf of a responsible body,
- (b) it is a provision, criterion or practice relating to-
  - (i) the arrangements for determining admissions to the institution, or
  - (ii) to student services provided for, or offered to, students by the responsible body, and
- (c) that the provision, criterion or practice placed disabled persons at a substantial disadvantage in comparison with persons who are not disabled,

it is the duty of the responsible body to take steps as are reasonable, in all the circumstances of the case, to prevent the provision, criterion or practice having that effect”  
[Regulation 8 adds a new Article 30 to SENDO].

The reasonable adjustment duty also applies to the physical features of premises.

One very important substantive change to the reasonable adjustment duty as a result of the Regulations is that it will no longer be possible for a responsible body to justify a failure to comply with the duty. Therefore, where the duty arises, all reasonable steps must be taken to fulfil it and a failure to do so will not be capable of being justified.

## **2. Extension of the range of persons and activities covered by SENDO**

SENDO initially prohibited disability discrimination in relation to the treatment of prospective students (ie arrangements for and decisions about admission) and students (provision of services and decisions about suspension or expulsion). The Regulations make some important amendments that extend the range of the protection offered by SENDO. The additional activities and persons that will be covered are described in further detail below.

### **a. Harassment**

It is unlawful for responsible bodies to harass students, prospective students and former students. Harassment will occur where, for a reason related to a disabled person's disability, a responsible body engages in unwanted conduct which has the purpose or effect of violating a disabled person's dignity, or of creating an intimidating, humiliating or offensive environment for that person.

[Regulation 5 amends Article 28 of SENDO and Regulation 7 inserted a new Article 29A].

**b. Conferring qualifications and treatment of qualification-holders**

It is unlawful for a responsible body to discriminate against disabled persons in relation to the conferring of qualifications. This protection applies to the awarding of qualifications (eg the arrangements for determining to whom awards will be made and the decisions to award or refuse to award such qualifications) and to the treatment of persons who hold such qualifications (eg by harassing those persons, or by withdrawing the qualifications, or by varying the terms on which they are held). The duty to make reasonable adjustments also applies to the conferring of qualifications and the treatment of qualification-holders.

[Regulation 5 amends Article 28 of SENDO and Regulation 8 amends Article 30].

**c. Former students**

It is unlawful for a responsible body to discriminate against or harass disabled persons who are former students of the body. This will cover activities such as the provision of references.

[Regulation 10 inserted a new Article 30A into SENDO].

**d. Past disabilities**

SENDO initially offered protection against discrimination to persons who are disabled. The Regulations extend the protection to persons who have had a disability in the past.

[Regulation 14 amends Article 48 of SENDO].

**3. Competence standards**

SENDO (as amended by the Regulations) makes special provisions for circumstances where the discriminatory treatment of a disabled person results from the application of a “competence standard”. A “competence standard” is defined as being an academic, medical or other standard applied for the purpose of determining whether or not a person has a particular level of competence or ability. [Regulation 6(5) adds a new Article 29(11) to SENDO].

It is unlawful to apply a “competence standard” in circumstances where it would amount to direct disability discrimination (eg requiring disabled applicants to have higher A-Level grades than non-disabled applicants when determining who to admit to a course of study).

Where the application of a “competence standard” might amount to disability-related discrimination, it will have to be justified but the justification defence is different to that which ordinarily applies in cases of disability-related discrimination (ie the material and substantial justification test). The justification defence that applies to “competence standards” requires the responsible body to show that the standard is, or would be, applied equally to persons who do not have the disabled person’s particular disability, and that the application of the standard is a proportionate means of achieving a legitimate aim.

### **Example**

A college requires all prospective students to have a GCSE in Mathematics as a basic entrance requirement, even for arts/humanities subjects. A blind applicant does not have this qualification but can show that this is because of a reason related to his disability.

To justify the requirement the college has to show that it is a proportionate means of achieving a legitimate aim. This competence standard may be easier to justify as a requirement for entry to scientific and mathematical courses than for arts/humanities courses.

[Regulation 6(5) adds a new Article 29(6) to SENDO].

Although competence standards which might cause disability-related discrimination must be objectively justified, there is otherwise no duty

to make reasonable adjustments in respect of competence standards in general.

#### **4. Reversal of the Burden of Proof in legal proceedings**

In any legal proceedings dealing with a complaint of disability discrimination or harassment, where the claimant (eg prospective student, student or former student) proves facts from which the court could conclude in the absence of an adequate explanation that the responsible body acted in a way which is unlawful under SENDO, the court shall uphold the claim unless the responsible body proves that it did not so act. In effect, the responsible body will have to prove that it did not discriminate (i.e. there is a reversal of the burden of proof). This will make it considerably easier for claimants to prove their claims.

[Regulation 11 inserted a new Article 31(1A) into SENDO].

#### **5. Other unlawful acts**

The Regulations have amended SENDO so as to prohibit some other forms of discriminatory behaviour. For example, it will be unlawful for a responsible body to instruct or induce another person to commit an act of disability discrimination. It will also be unlawful for a responsible body to publish a discriminatory advertisement (e.g. in a newspaper or internal notice board). The Equality Commission has been given powers to enforce these new provisions.

[Regulation 10 inserted new Articles 30B and 30C into SENDO and Regulation 12 inserted a new Article 31A].

**For further information, please contact:**

Advice and Compliance team  
Equality Commission for Northern Ireland  
Equality House  
7-9 Shaftesbury Square  
Belfast BT2 7DP

Telephone: 028 90 500 600  
Textphone: 028 90 500 589  
Email: [information@equalityni.org](mailto:information@equalityni.org)  
Website: [www.equalityni.org](http://www.equalityni.org)

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