

# **EDUCATION (DISABILITY STRATEGIES AND PUPILS' RECORDS) (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Education (Disability Strategies and Pupils' Records) (Scotland) Bill introduced in the Scottish Parliament on 18 December 2001. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 45–EN.

### **POLICY OBJECTIVES OF THE BILL**

#### **Accessibility strategies**

2. The purpose of the Bill is to parallel in Scotland, as appropriate, the provisions of sections 14 and 15 of the Special Educational Needs and Disability Act 2001 (c.10) ("the 2001 Act"), which apply only in England and Wales. The objective of the provisions on accessibility strategies is to require local authorities (referred to in the Bill as "education authorities"), independent and grant-aided schools in Scotland to prepare a strategy to plan to improve access to both the school environment and the curriculum for children with a disability and to improve communication to pupils with disabilities; to keep the strategy under review; and implement the strategy.

3. The improvements to the rights of pupils and students with disabilities in the 2001 Act originate from recommendations made by the Disability Rights Task Force (DRTF) in 1999. The DRTF was established by the UK Government in 1997 to provide advice on how to secure comprehensive and enforceable civil rights for people with disabilities. The exclusion of the provision of education from the areas covered by the Disability Discrimination Act 1995 (c.50) ("the 1995 Act") had generated considerable controversy at the time, and education was quickly established as a major priority for the DRTF. Accordingly, UK Ministers decided to introduce legislation to implement the DRTF's recommendations in the area of education. These new rights, and the imposition of new duties on education providers, were enacted by the 2001 Act.

4. Sections 11, 12 and 13 of the 2001 Act insert new provisions in the 1995 Act which make it unlawful for education providers throughout Britain to discriminate against children on grounds of their disability, although there is no requirement for physical alterations to be made to school buildings or for auxiliary aids to be provided. Instead, these requirements are dealt with by the imposition of a duty to prepare and implement an accessibility strategy, which will

provide over time for improving access to the school environment and the curriculum and the provision of school information. Imposition of such a duty in Scotland is a devolved matter and, for this reason, sections 14 and 15 of the 2001 Act imposed this duty in relation to England and Wales only. If education providers in Scotland do not plan for improvement, many children with disabilities will continue not to benefit from the same opportunities in education as other children, who do not have a disability.

5. Ministers are committed to promoting as far as possible the inclusion of pupils with special educational needs and disabilities in mainstream Scottish schools. The Scottish Executive considers it important that schools and local authorities tackle the existing barriers to access for pupils with disabilities, either by removing such barriers or by ensuring that suitable alternative arrangements are made. Doing so will help children with disabilities to achieve their full educational potential, and should make pre-school and school life easier for them as they will be better able to participate in school classes and activities. The Scottish Executive believes that to fail to place a duty on education providers in Scotland, as has been enacted for in relation to counterparts in England and Wales, would be inequitable.

6. Local authorities and the proprietors, or managers, of non-local authority schools will be required to draw up written accessibility strategies. The strategies should set out how the education provider proposes progressively to increase the accessibility of the school environment, school information and the curriculum to pupils with disabilities and prospective pupils with disabilities.

7. Local authorities' strategies will be required to cover all school and pre-school education provided in schools and nursery schools managed by them. Their strategies must also cover pre-school education provided directly by local authorities in non-school premises, such as community centres.

8. The Scottish Ministers intend to issue guidance on how strategies should be drafted, how often they should be reviewed and how progress is to be measured. There will be flexibility in the format of the strategies. For example, local authorities and independent and grant-aided schools will not be obliged to produce a free-standing strategy. They could instead decide to incorporate it into their improvement objectives, which local authorities are required to produce under the Standards in Scotland's Schools etc. Act 2000 (asp 6), or in their school development plans. The guidance will give more details about this.

9. The duty to plan to improve accessibility is to cover both the physical environment of the school and access to the curriculum (i.e. to teaching and facilities for education). These may include, for example, such matters as widening doorways; installing lifts or ramps; installing induction loops; arranging teacher training in sign language; improved colour schemes; sound proofing; the provision of materials on tape or of facilities for allowing teaching material to be converted into Braille; or the provision of specialist furniture or IT equipment, etc.

10. The strategy will also be required to cover ways in which the communication of information to pupils with disabilities is to be improved. This refers to information which is provided in writing for pupils who do not have a disability and strategies will require to take account of any preferences expressed by the pupils or their parents.

11. The Executive recognises that children with disabilities come from all communities in Scotland. Guidance will provide that strategies should be sensitive to gender, ethnicity, age, sexual orientation, types of disability, religion and culture and to ensure that no groups are discriminated against directly or indirectly.

12. Scottish Ministers will prescribe by regulations the period which accessibility strategies should cover. Guidance will give further details regarding how often the strategies should be reviewed, and revised if necessary, during this period. It is important to emphasise that Ministers intend to use their powers under the Bill to impose a duty progressively to increase access over time and the Scottish Ministers do not plan to set parameters for what has to be done by local authorities or schools at any particular time. For example, a local authority may initially decide to improve the accessibility of one or more chosen schools in its area only, or it may decide first to direct its attention to improving accessibility for those with a particular type of disability. The policy is that, in addition to the duty to plan to increase accessibility, there is a duty on education providers to implement the strategy.

13. The Scottish Ministers wish to promote measured change on a reasonable timescale which will allow management of costs, but nevertheless delivers real improvements as quickly as possible. Additional funds will be available to local authorities to support improvements in public sector schools.

14. In preparing a strategy, the local authority, or school proprietor or manager, will be required to consult relevant children and young people and parents. Further details as to which parents, children and young people will have an interest in the accessibility strategy and should be consulted in its preparation will be provided in guidance. They must also have regard to any guidance issued by the Scottish Ministers specifying other persons or bodies who should be consulted in connection with preparing the strategy. The guidance is expected to specify that persons who should be consulted should include: the schools and pre-school education establishments concerned (and their staff), parents, pupils with disabilities, health professionals, organisations of and for people with disabilities, and other equality groups, such as those representing minority ethnic groups. They will also be obliged to have regard to any such guidance as regards the content of the strategy. This guidance may specify that the strategy should include details of how the responsible body plans to promote awareness of disability to both pupils and staff within the schools and pre-school education centres for which it is responsible.

15. Local authorities and schools will not be required to submit their plans to the Scottish Executive for approval. However, the Bill contains rights for the Scottish Ministers to be provided on request, with a copy of the strategy, and for any other person (including schools or parents) to have the opportunity, on request, to inspect the strategy at a reasonable time. Guidance may specify that local authority accessibility strategies should form part of the authority's annual statement of improvement objectives (under section 5(2)(b) of the Standards in Scotland's Schools etc. Act 2000).

16. Existing provision for inspections in sections 9 to 12 of the Standards in Scotland's Schools etc. Act 2000 will enable Her Majesty's Inspectorate of Education to ensure that the local authority or school is implementing their strategy. Therefore, inspections of local authorities and schools could include inspection of the accessibility strategy and of its implementation and review.

## **Pupils' educational records**

17. The objective of section 4 of the Bill is to confer power on the Scottish Ministers to make provision, in regulations, relating to the keeping, transferring and disclosure of pupils' records. The Scottish Ministers intend to exercise this power to reinstate a right for parents in Scotland to access their child's school education records.

18. Parents in Scotland had previously been provided with a right of access to their child's school records under the School Pupil Records (Scotland) Regulations 1990 (SI 1990/1551) ("the 1990 regulations"). Those regulations, however, applied only to records that were not subject to data protection legislation. At the time they were made, the Data Protection Act 1984 (c.35) applied only to computerised records and the regulations therefore applied only to manual records. The Data Protection Act 1998 (c.29) ("the 1998 Act") and the secondary legislation made under it extended data protection legislation to manual records. This in effect emptied the 1990 regulations of all force.

19. The 1998 Act (which replaces the Data Protection Act 1984) applies across the UK, and provides for the regulation of the processing of information relating to individuals. It applies to all personal information held in electronic form and manual information held in structured files. Its provisions do not provide parents with an independent, statutory right of access to their children's school records, and new legislation is therefore required to reinstate such a right. Such legislation has been made in England and Wales subsequent to the 1998 Act.

20. In order to ensure that all parents across Scotland have equal rights to access their child's school records, it is intended that regulations made under section 4 of the Bill will apply to all independent schools as well as to all publicly funded schools. The 1990 regulations do not apply to independent schools.

21. It is intended that regulations made under section 4 of the Bill will comply with the principles of the 1998 Act and any secondary legislation made under it. They will not, therefore, give parents a right to access sensitive personal data that the local authority holds about their child. Sensitive personal data is defined in section 2 of the 1998 Act and includes information about a person's physical or mental health or condition, and about their sexual life. This will not affect parents' rights to see their child's Record of Needs or other formal assessments (psychological or health) carried out to identify their child's special educational needs.

22. Draft regulations made under section 4 of this Bill will be issued for consultation as soon as possible after the Bill comes into force.

## **ALTERNATIVE APPROACHES**

### **Accessibility strategies**

23. Two possible alternatives to legislation were considered but rejected as they would not have provided implementation of the policy objectives in full. First, it would be possible to include the preparation of accessibility strategies as a performance indicator under the framework of national priorities for education provided for in the Standards in Scotland's Schools etc. Act 2000. However, this option would carry little weight behind it and could be applicable only to local authority schools and, therefore, is highly unlikely to achieve as much

progress as is desired. It would be narrower in its scope than the England and Wales legislation which the Scottish Ministers wish to parallel.

24. Second, consideration was given to resting on statutory guidance under section 13 of the Standards in Scotland's Schools etc. Act 2000. Through this route, the Scottish Ministers could require local authorities to produce accessibility strategies. However, although more robust than the performance indicator route in relation to local authorities, it is equally deficient in not being capable of application to non-local authority schools.

25. Primary legislation to introduce the requirement to prepare accessibility strategies is, in the Scottish Executive's opinion, the best way of ensuring that school environments, the curriculum and school information become more accessible to pupils with disabilities, whilst giving the Scottish Ministers flexibility in determining how far schools have to go and how quickly they have to move towards accessibility.

### **Pupils' educational records**

26. The existing School Pupil Records (Scotland) Regulations 1990 could be left in place. This would not, however, provide a statutory right for parents to access their child's school records; the impact of the 1998 Act on the 1990 regulations has in effect removed that right.

27. Under section 38(2) of the 1998 Act, the Secretary of State could make an order to lift the prohibition on disclosing specified data to third parties provided that it is necessary "for the safeguarding of the interests of the data subject or the rights and freedoms of any individual". Such an order could be used to allow authorities to give parents access to their child's school records in the circumstances defined in the order. This would not, however, give parents in Scotland a statutory right to access their child's records.

28. The most appropriate approach is therefore considered to be to create a new power to make regulations (compliant with data protection legislation) to provide parents with a clear statutory right to access their children's school records.

## **CONSULTATION**

### **Accessibility strategies**

29. Consultation on the duty on education providers to prepare accessibility strategies was first carried out in Scotland as part of the consultation in 2000 on the draft Bill which became the 2001 Act. Although the imposition of such a duty in Scotland is a devolved matter, other provisions of that Act relate to the reserved matter of equal opportunities and, therefore, the consultation was carried out throughout Great Britain.

30. A six week formal consultation on the draft Education (Disability Strategies and Pupils' Records) (Scotland) Bill was carried out, and a number of interested parties were provided with the opportunity to discuss their views on accessibility strategies with the Scottish Executive. Children in Scotland (a national umbrella agency for organisations and professionals working with and for children and their families) carried out a consultation meeting with interested parties to discuss the draft Bill. At the same time, the Scottish Executive asked Capability Scotland to conduct a consultation with children on questions relating to the impact which the accessibility

strategies provisions of the Bill might have on them and the sort of changes which would be useful in their school. Due to the shortened consultation period, consultation with children was only possible on a small scale. However, a larger consultation exercise is expected to be carried out with a wider range of children as part of the public consultation on the draft guidance on accessibility strategies.

31. Sixty formal responses to the consultation were received from a variety of sources (primarily local authorities, schools, NHS Trusts and voluntary organisations). All respondents supported the principles behind the provisions of the draft Bill.

32. In relation to the provisions regarding accessibility strategies (sections 1 to 3), many respondents felt that the Bill was timely and necessary to ensure that schools across Scotland become more accessible to pupils with a wide range of disabilities, especially as it fits in well with policies to promote inclusion which local authorities are pursuing. Many also commented that they supported the proposal that strategies should cover not only access for pupils to the physical environment, but also to the curriculum and to information provided by the school or pre-school provider. The fact that strategies should be implemented over a phased period was also welcomed. Many education providers said that they were already taking considerable measures to improve the accessibility of their schools and pre-school provision.

33. However, respondents raised a number of concerns regarding the implementation of the draft Bill. The main concern, especially amongst the local authorities and independent schools, related to the need for extra resources to be allocated to implement accessibility strategies. Many felt that implementation costs could be significant and that the Scottish Executive should provide extra funding to enable strategies to be properly implemented. Some were concerned that, for independent schools, the cost of *preparing* an accessibility strategy would be greater than that estimated in the Regulatory Impact Assessment and they also felt that the cost of implementing the strategy could be significant. Independent schools were concerned that the duty to implement their strategies could be misinterpreted as a requirement on schools to be completely accessible to children with every kind of disability, even where there were no children with these disabilities attending the school.

34. A number of other respondents were concerned that arrangements for Her Majesty's Inspectorate of Education to monitor education authorities' and independent and grant-aided schools' accessibility strategies and their implementation were not strong enough or clear. Some felt there was a danger that unless systematic monitoring were carried out, responsible bodies might not implement their accessibility strategies or the strategies might not be ambitious enough. Others felt that there should be a clearly defined time scale for the preparation and implementation of accessibility strategies. A potential solution to this was suggested: if all local authority strategies were required (rather than just allowed) to form part of the statement of Improvement Objectives (required under section 5 of the Standards in Scotland's Schools etc. Act 2000) then the Scottish Ministers should automatically receive annually a copy of each local authority's strategy.

35. Some schools were concerned that it would not be possible or would lead to excessive cost to make physical alterations to their particular school to make it accessible to pupils with physical disabilities. One respondent questioned whether mainstream education was in fact appropriate for a large number of children with disabilities.

36. The Disability Rights Commission felt that protection under Part III of the Disability Discrimination Act 1995 did not go far enough in terms of planning in respect of access to the physical environment in non-school centres managed by a local authority. Therefore, they recommended that section 2 of the draft Bill should be extended to cover access to the school environment where pre-school education is being provided by a local authority in a non-school centre.

37. Some respondents also felt that the responsible body should be required (either in the Bill or through guidance) to consult with parents, children and young people in preparing their accessibility strategies. It was also suggested that health and other relevant professionals should be consulted regarding the contents of the strategy. Some respondents also felt that, although the education authority should co-ordinate a strategy for their area, the responsibility for the strategy should rest not solely with them, but with the local authority as a whole.

38. A number of consultees raised concerns that it was difficult for accessibility to be improved in those schools being built or run under public/private partnerships because private partners tended to reduce plans for disabled access facilities when costs needed to be cut or they charged the local authority a lot more than cost price for the installation of e.g. induction loops in a school. Respondents felt that local authorities would need to be very careful in negotiating future contracts with private partners to ensure that schools could be made fully accessible to children with disabilities.

### **Pupils' educational records**

39. In relation to the section regarding school pupil records (section 4), clarification of arrangements for parental access to their children's educational records was welcomed. A few respondents however said that the new regulations should ensure that parents' rights to access their children's Records of Need and other formal assessments of need were not affected. However, some recognised that parents should not generally be able to access sensitive personal data held about their children. A few felt that there was a need to clarify what sort of information should and should not be included in pupils' educational records (for example some reports, such as behaviour incident reports, might include the names of other pupils).

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities and human rights**

40. The Bill will have a positive effect on equal opportunities because it will help to ensure that children with any type of disability can benefit from the same quality of education as all other children. It will also ensure that education providers plan to provide additional support for children with disabilities. Equality of opportunity in school for children with disabilities will support and develop potential and make it more likely that these children can go on, after leaving school, to further or higher education or into employment and can develop successful careers.

41. Local authorities will be required to carry out their activities under the Bill in compliance with the requirements of the Race Relations (Amendment) Act 2000 (c.34), which outlaws race discrimination in all public functions and places a general duty on specified public bodies to promote race equality and specific duties on specified authorities.

42. The Scottish Executive is committed to promoting equality of opportunity for all. The measures contained in the Bill will improve the support available to children with disabilities across all Scottish communities. Particular needs associated with gender, ethnicity, sexual orientation, age and religion or faith will be considered by the Scottish Ministers before they issue guidance relating to the preparation of accessibility strategies.

43. The Scottish Executive believes that regulations relating to school pupil records made under section 4 of the Bill will be a positive step in terms of equal opportunities because it is intended that they will provide all parents with the same rights of access to their children's educational records, regardless of where they live in Scotland or which school their child attends. It is intended to ensure that the regulations will be consistent with existing data protection legislation. Therefore, the human rights of individual data subjects will be protected and enhanced.

### **Island communities**

44. The Bill will have no adverse impact on island communities. Although it may not always be feasible to provide facilities for children with disabilities in small island schools, the Bill should assist in promoting the inclusion of children in local mainstream schools by ensuring that better facilities are provided. Therefore, it should mean that it is even less common that children with disabilities have to be sent away from their homes in island communities to be educated in a residential special school.

### **Local government**

45. The Bill will have an effect on local government because it will ensure that local authorities plan strategically and proactively to improve the accessibility of education to pupils with disabilities. However, as part of both improvement objectives and bids to the Scottish Executive's Inclusion Programme fund, as well as their special educational needs framework, local authorities should already be planning to improve access for children with disabilities.

46. New regulations, made under section 4 of this Bill, should assist local government and schools in considering and acting upon requests made by parents to access their child's school records.

### **Sustainable development**

47. The Bill will have no negative effects on sustainable development. Its effects will be positive as it will promote social inclusion by increasing the opportunities for children with disabilities to receive the same education as other children, regardless of the area in which they live or their parents' ability to fund or argue for specialist provision for them. Accessibility strategies will require local authorities and independent and grant-aided schools to plan in the long-term for the requirements of children who may attend the school in future and, therefore, such planning must be sustainable in the long-term.

48. Provisions for the Scottish Ministers to make regulations in relation to school pupil records will have no impact on sustainable development.





*This document relates to the Education (Disability Strategies and Pupils' Records) (Scotland) Bill (SP Bill 45) as introduced in the Scottish Parliament on 18 December 2001*

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