

**EXPLANATORY MEMORANDUM TO THE
EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) ACT 2004
(CONSEQUENTIAL MODIFICATIONS) ORDER 2005**

2005 No. 1791

1. This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

This order amends the Disability Discrimination Act 1995 (“DDA”) in consequence of the Education (Additional Support for Learning) (Scotland) Act 2004 (the “2004 Act”).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. This order is to be made in exercise of the powers conferred by sections 104, 112(1) and 113 of the Scotland Act 1998. The order is, by virtue of Schedule 7 paragraph 3(2)(b) to that Act, subject to type C procedure and is subject to affirmative resolution procedure in both Houses of the UK Parliament.

3.2. The Scottish Parliament does not have competence to make laws in reserved areas and the subject-matter of the Disability Discrimination Act 1995 is reserved under Section L2 of Schedule 5 to the Scotland Act 1998. Section 104 of the Scotland Act 1998 provides for subordinate legislation to be made in the UK Parliament containing provisions that are necessary or expedient in consequence of any Act of the Scottish Parliament, in this case, the Education (Additional Support for Learning) (Scotland) Act 2004. Section 28F of the DDA, among other things, imposes a residual duty on education authorities in Scotland not to discriminate in the exercise of their functions under a number of enactments in that section. The 2004 Act imposes new functions on education authorities in Scotland and it is necessary that this residual duty not to discriminate in the exercise of functions is extended to education authorities carrying out functions under the 2004 Act.

3.3. It will be noted from paragraph 5.1 below that this order extends to GB. This is because section 28F of DDA extends to GB. Although the DDA, with some exceptions, extends to the UK, section 28F of that act was inserted by section 16 of the Special Educational Needs and Disability Act 2001 (the “2001 Act”). By virtue of section 43 of the 2001 Act section 16 only has GB extent. Therefore section 28F of the DDA has been given GB extent.

4. Legislative Background

4.1. The 2004 Act will be commenced in stages beginning early in 2005 but is not expected to be substantively in force before November 2005. In particular, the provisions to which this order relates will not come into force before November 2005.

4.2. Section 28F of the Disability Discrimination Act 1995, inserted by the Special Educational Needs and Disability Act 2001, requires education authorities in Scotland not to discriminate against a disabled pupil or disabled person who may be admitted to school as a pupil in carrying out their functions under the Acts listed in subsection (1)(b) of that section.

4.3. The 2004 Act replaces the system for assessment and recording of children and young people in Scotland with special educational needs, including the record of needs process established by the Education (Scotland) Act 1980, as amended by the Education (Scotland) Act 1981 and subsequent legislation. Additional support needs are defined more broadly than special educational needs.

4.4. The 2004 Act places new duties upon education authorities to make provision for additional support in connection with the school education of children and young persons having additional support needs. For children with enduring complex or multiple needs that require support from outside education services, a coordinated support plan must be prepared by the education authority. Education authorities are also under a duty to provide independent mediation services for all parents of children with additional support needs and to exchange information with agencies responsible for supporting such children after they leave school. Additionally, education authorities have a power to help children with additional support needs who are not in the public education system.

4.5. Article 2 of this order amends section 28F of the DDA to ensure that when the education authorities carry out their functions under the 2004 Act the prohibition against discrimination in section 28F will apply.

5. Extent

This order extends to GB.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State for Scotland has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of The Education (Additional Support for Learning) (Scotland) Act 2004 (Consequential Modifications) Order 2005 are compatible with the Convention rights.

7. Policy background

7.1. The need for this order was identified in autumn 2003 following consultation on the draft Bill. The relevant provisions of the 2004 Act will not, however, come into force before November 2005, and it is necessary now, in consequence of this Act, to prepare now for this commencement.

7.2. Section 16 of the Special Educational Needs and Disability Act 2001 amends the DDA by inserting new sections 28F and 28G. This makes it unlawful for an LEA in England and Wales, or an education authority in Scotland, to discriminate against a disabled pupil or disabled prospective pupil in the discharge of its functions under various Acts relating to education. These are intended to cover the general education related functions of authorities that affect pupils or prospective pupils generally. An authority will already be under certain duties in Part 4 of the DDA (where it is the

responsible body for a school). When considering which anti-discrimination duties apply to its schools functions, an authority should first look at whether the duties not to discriminate under section 28A apply. If they do not, then the duty under this section - known as the "residual duty" - will apply.

7.3. This order adds the new 2004 Act to the list of education acts relating to Scotland in section 28F(1)(b), thereby requiring an education authority not to discriminate against a disabled pupil or a prospective pupil who is disabled when discharging its functions under 2004 Act.

7.4. This order is being brought forward at this time in time for the coming into force of the relevant provisions of the 2004 Act in late 2005.

8. Impact

8.1. A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2. There will be no impact on the public sector.

9. Contact

Clare Jones at the Scotland Office, e-mail: clare.jones@scotland.gsi.gov.uk, can answer any queries regarding the instrument.