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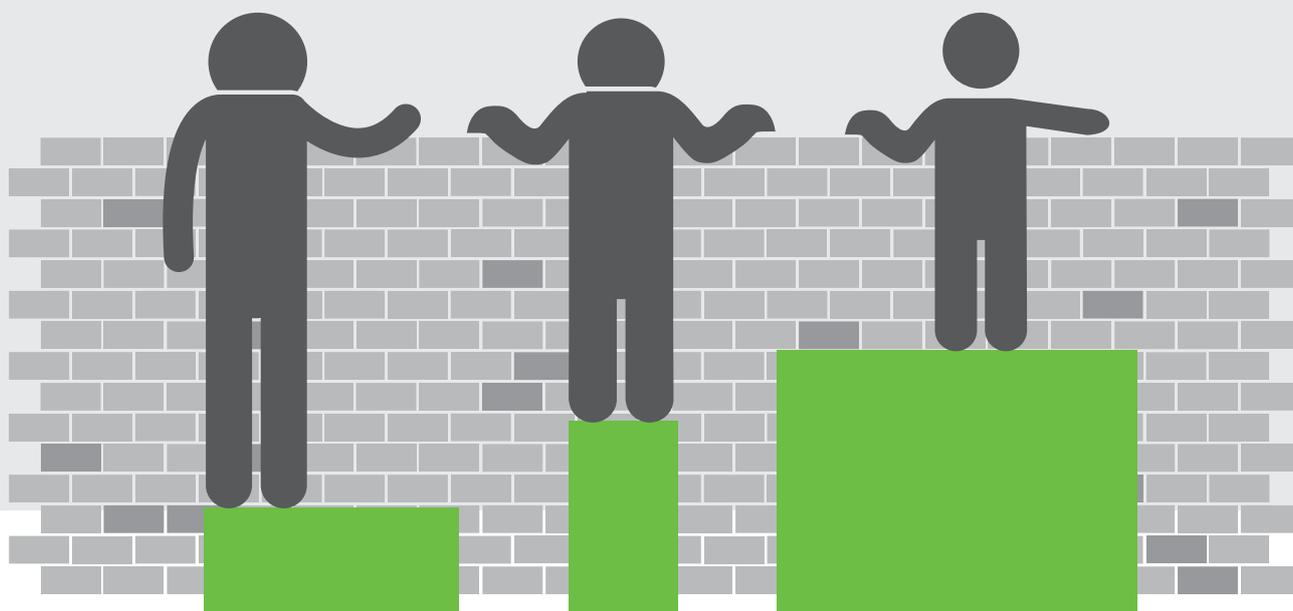
# A guide to help governing boards<sup>1</sup> comply with equality law when considering a headteacher's decision to exclude an autistic pupil

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## Key points:

- Be aware of the different forms of disability discrimination and the school's legal duties under the Equality Act 2010.
- Understand autism and how it impacts on the individual pupil (eg sensory sensitivities, anxiety). Try to understand why the pupil acts in a particular way and provide appropriate support.
- Behaviour is a form of communication and disruptive behaviour can be an indication of unmet needs.
- Encourage collaborative working between parents and other professionals/services.
- Consider whether exclusion is an appropriate and proportionate measure and whether alternatives have been explored.



## Introduction

This guide outlines the legal requirements of the [Equality Act 2010](#) for schools in relation to the exclusion of disabled pupils. The examples given relate specifically to autistic pupils and are intended to help schools avoid disability discrimination claims.

Autistic pupils<sup>2</sup> are three times as likely to be excluded from school as pupils with no special educational needs (SEN)<sup>3</sup>. The most common reason given by headteachers is '*Physical assault against an adult*'. However, disruptive behaviour can be a manifestation of a pupil's autism and excluding a pupil for exhibiting disability related behaviour can amount to discrimination arising from disability, unless it can be justified.

Where a governing board is legally required to consider a headteacher's decision to exclude a disabled pupil, they must ensure that the school is being compliant with equality legislation. Governing boards can play an important role in reducing the exclusion rate for disabled pupils by ensuring that their needs are met; reasonable adjustments are made to policies and practices and by meeting the other legal obligations of the Equality Act 2010, to avoid disability discrimination.

## The definition of disability

The Equality Act 2010 (The Act) defines a disability as *a physical or mental impairment that has a substantial and long-term adverse effect on the disabled person's ability to carry out normal day-to-day activities*<sup>4</sup>. Mental impairment includes conditions such as autism, but there is no need for a person to have a medically diagnosed cause for his or her impairment; what matters is the effect of the impairment, not the cause.

The Act makes it unlawful for the responsible body<sup>5</sup> 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.

This guide focuses on how governing boards can avoid unlawful discrimination in relation to school exclusion.

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<sup>1</sup> The term 'governing board' includes the governing body of an independent school, a maintained school, the management committee of a pupil referral unit (PRU) and the academy trust of an academy.

<sup>2</sup> The term 'pupils' is used to apply to children and young people on the autism spectrum of compulsory school age.

<sup>3</sup> <https://www.gov.uk/government/statistics/permanent-and-fixed-period-exclusions-in-england-2015-to-2016> 'National tables: SFR35/2017', (see Tables 6 and 7)

<sup>4</sup> [Equality Act 2010, section 6](#) and [Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability](#)

<sup>5</sup> The governing body is likely to be the responsible body in relation to a claim about exclusions. The responsible body for an independent school, academy or free school is the proprietor.

## What is unlawful disability discrimination?

The forms of disability discrimination that are unlawful under the school provisions of the Act are:

- direct discrimination
- indirect discrimination
- discrimination arising from disability
- failure to make reasonable adjustments.

It's also unlawful for a school to harass or victimise a pupil, their parent, sibling or anyone else that has or is thought to have made or helped with a complaint about discrimination.

The Act introduced a single Public Sector Equality Duty (PSED)<sup>6</sup> (sometimes also referred to as the 'general duty') that applies to public bodies, including schools.

### Direct disability discrimination

Direct disability discrimination occurs when a school treats a disabled pupil less favourably because of their disability than it treats, or would treat, a non-disabled pupil.

#### **Example:**

*An autistic pupil is excluded from a school trip because the school believes that she will not be able to participate in the activities, but no consideration has been made to make reasonable adjustments. This is likely to be direct disability discrimination.*

Direct disability discrimination is always unlawful.

### Indirect disability discrimination

In terms of school exclusion, indirect disability discrimination can occur if a school applies a 'blanket' behaviour policy in the same way to all pupils, which has the effect of putting a group of pupils who share a protected characteristic (such as disability) at a disadvantage and the school cannot show that it is justified: a 'proportionate means of achieving a legitimate aim'. This 'objective justification' test is explained below in the section on *discrimination arising from disability*.

**Example:** *A school has a policy that if a pupil receives three detentions in a term, they will automatically be given a one-day fixed period exclusion. Pupils on the autism spectrum are much more likely to break the school rules than other pupils. Rigid application of this policy is likely to amount to indirect disability discrimination because, where a reasonable adjustment has not been made, a school will find it very difficult to justify the treatment as a proportionate means of achieving a legitimate aim.*

Most discrimination in schools is unintentional and may come about because of rigid policies or practices. Reviewing all practices and policies will help a school to avoid discriminatory practices, as well as help it to comply with the public sector equality duty.

<sup>6</sup> [Equality Act 2010, section 149](#) and [EHRC: Public Sector Equality Duty Guidance for Schools in England](#)

## Discrimination arising from disability

Discrimination arising from disability occurs when a school treats a disabled pupil unfavourably because of something connected with their disability (such as their disability related behaviour) and cannot show that this treatment is justifiable – ie that it is 'a proportionate means of achieving a legitimate aim' (Equality Act 2010 s15).

One of the key aspects to the exclusion of autistic pupils is whether the behaviour for which they are being excluded is a direct consequence of their condition or not – disability or disobedience?

**Example:** *An autistic pupil was excluded for a fixed period from school for misbehaving in a lunchtime queue. The incident occurred following a sudden change to the order that the classes went into lunch. The autistic pupil did not respond to the instructions of lunchtime staff, who remarked on the pupil's rudeness; intolerance and aggression when other pupils entered her personal space. The pupil covered her ears, hid in the kitchen, which was out-of-bounds to pupils and refused to move. However, all of the pupil's responses were in keeping with her diagnosis of autism.*

In the example above, the treatment of the autistic pupil (ie exclusion) could only be justified if the school could show it to be a *proportionate means of achieving a legitimate aim*. In the example, the legitimate aim is *the protection of the health and safety of teachers and other pupils in the queue and the pupil whilst in the kitchen*. Rather than excluding the pupil however, a more proportionate response could be to implement 'reasonable adjustments' eg allowing the pupil to go to lunch five minutes before other pupils, as well as lunchtime staff training in autism; teaching the pupil about social situations, by using social stories™, for example: reasonable adjustments that the school had previously agreed to make, but had neglected to do. A failure to make relevant reasonable adjustments is likely to make it difficult for a school to show that any potentially discriminatory treatment was **a proportionate** means of achieving a legitimate aim. Health and safety issues must not be used inappropriately to avoid making a reasonable adjustment. It is for the school to justify the treatment. It must produce evidence, such as an individualised risk assessment and not rely on mere generalisations about health and safety.

Examples of legitimate aims might include:

- ensuring that education, benefits, facilities and services are targeted at those who most need them
- the fair exercise of powers
- ensuring the health and safety of pupils and staff, provided that risks are clearly specified
- maintaining academic and behaviour standards
- ensuring the wellbeing and dignity of pupils.

Discrimination arising from disability will occur if the following three conditions are all met.

- a) A school treats a disabled pupil unfavourably – that is, puts them at a disadvantage – even if this was not the school's intention.
- b) This treatment is because of something connected with the disabled pupil's disability, such as disability-related behaviour.
- c) The treatment cannot be justified by showing that it is 'a proportionate means of achieving a legitimate aim'.

However, if a school did not know, or could not reasonably have been expected to know, that a pupil was disabled, then the unfavourable treatment will not be unlawful.

If the decision to exclude an autistic pupil is given as a result of physically aggressive behaviour, this might be classified as 'A tendency to physical abuse of others', which is not considered to be an impairment for the purposes of the Act, even when it occurs as a result of a condition, such as autism, that is considered to be an impairment for the purposes of the Act<sup>7</sup>.

When considering whether an autistic pupil's behaviour is a direct consequence of their disability, or affected by it to some degree, governors may wish to request to see the pupil's autism diagnostic report and/or education, health and care (EHC) plan, if applicable. Reports from other professionals might also refer to this behaviour being a part of the pupil's disability (occupational therapist, educational psychologist, speech and language therapist, autism specific teacher, SENCO etc). Alternatively, it may be useful to refer to the [National Institute for Health and Care Excellence \(NICE\): Autism spectrum disorder in under 19s: recognition, referral and diagnosis](#). Further information on the challenges that autistic pupils may face in school and how this can affect their behaviour can be found on The National Autistic Society's [website](#).

Headteachers should take account of any contributing factors that are identified after an incident of poor behaviour has occurred, before deciding to exclude<sup>8</sup>. For an autistic pupil, in order to reduce or replace behaviour that causes concern, school staff need to understand why the pupil acts in a particular way. If they understand the cause, they can then provide appropriate support. Disruptive behaviour can be an indication of unmet needs<sup>9</sup>. In consultation with parents, the school may consider asking the local authority to make an assessment of the pupil's education, health and care (EHC) needs, or, for a pupil who already has an EHC plan, requesting an emergency review of the plan.

## Failure to make reasonable adjustments

The duty to make reasonable adjustments requires a school to take positive steps to enable disabled pupils to fully participate in all aspects of school life – to ensure that they are not placed at a substantial disadvantage compared to non-disabled pupils. This duty is an anticipatory one and therefore schools need to think in advance about what disabled pupils might require and what adjustments might be needed.

Where practical, the headteacher should give a pupil facing exclusion an opportunity to present their case before taking the decision to exclude<sup>10</sup>. For an autistic pupil, reasonable adjustments might be required to allow them to communicate their account of what happened, such as allowing them time to become calm following an incident; allowing them to speak to a member of staff with whom they have a good relationship; the pupil producing a comic-strip representation of the incident; allowing the pupil time to process questions.

The governing board should identify the steps they will take to ensure all parties will be supported to participate and have their views properly heard<sup>11</sup> (ie in a meeting to consider the headteacher's decision to exclude a pupil).

<sup>7</sup> See paragraphs A12-A13 from [The Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability](#)

<sup>8</sup> [Department for Education \(DfE\): Exclusion Statutory Guidance - September 2017 paragraph 18](#)

<sup>9</sup> [Department for Education \(DfE\): Exclusion Statutory Guidance - September 2017 key points](#)

<sup>10</sup> [Department for Education \(DfE\): Exclusion Statutory Guidance - September 2017 paragraph 17](#)

<sup>11</sup> [Department for Education \(DfE\): Exclusion Statutory Guidance - September 2017 paragraph 68](#)

Regarding an incident that has led to exclusion, the governing board should consider whether the headteacher can demonstrate that their actions are justified and that no reasonable adjustments could have been made to prevent the incident which led to the exclusion.

Where a school decides that there are no reasonable steps that it can take, it is important that it sets out its reasons for this decision so that, if it is challenged by the pupil's parents, it can explain to them and, if necessary, a tribunal why it has acted in the way that it has. In a case involving disability, if a school has not complied with its duty to make relevant reasonable adjustments, it will be difficult for it to show that the treatment was proportionate.

In the earlier example involving the autistic pupil in the lunchtime queue, as the school had not put in place the agreed reasonable adjustments to help the pupil overcome her difficulties (regarding social interaction, coping with changes to routine, processing information, sensory processing) and it was this that led to the pupil's agitation, this would be classified as a *failure to make reasonable adjustments*. An exclusion is unlikely to be justified in circumstances in which the school has not complied with its duty to make reasonable adjustments for that pupil.

The duty to make reasonable adjustments also applies to school policies. Autistic pupils are much more likely to break the school rules than pupils who are not autistic. This means that they could be placed at a substantial disadvantage if schools rigidly apply their behaviour policy. The Act requires schools to make reasonable adjustments for disabled pupils both to the exclusions process and to the disciplinary sanctions imposed. This might mean applying different sanctions, or applying them in a different way, to avoid putting a disabled pupil at a substantial disadvantage in relation to non-disabled pupils.

**Example:** *An autistic pupil is excluded for repeatedly getting up from his seat during lessons and disrupting other pupils by going up to them and flapping his arms. It is the school's policy that repeated disruptive behaviour is punished by exclusion. However, the school is under a duty to make reasonable adjustments to its policy, which might mean disregarding some of the disruptive behaviour and working with the pupil to help reduce his anxiety and to improve his social skills.*

The flapping arms in the example is 'stimming' or self-stimulatory behaviour and a characteristic of autism that can be an individual's way of self-regulating or calming themselves, but can also indicate that a person is in a state of heightened anxiety and stress. Excluding a pupil for exhibiting this behaviour would have been considered *discrimination arising from disability* (punishing them for their disability related behaviour).

A common misapprehension is that all pupils must be treated the same way and that exceptions cannot be made to behaviour policies. It is true that the overriding principle of equality legislation is generally one of equal treatment, but for disability it is different. Schools may, and often must, treat a disabled person *more favourably* than a person who is not disabled. It is never direct discrimination against a non-disabled pupil to treat a disabled pupil more favourably.

**Example:** *A pupil with Asperger's syndrome can sometimes act in a disruptive manner in class. The school does not take disciplinary action, but uses agreed strategies to manage his behaviour. A non-disabled pupil who is also disruptive in class is punished for his behaviour. This difference in treatment would not be direct discrimination against the non-disabled pupil.*

The school's behaviour policy should acknowledge the school's legal duties under the Act, including the importance of avoiding discrimination<sup>12</sup>.

<sup>12</sup> DfE: [Behaviour and discipline in schools Advice for headteachers and school staff](#), para 12

## Key questions:

- Is the pupil disabled for the purposes of the Act<sup>1</sup>?
- Is the excluded pupil's behaviour a direct consequence or manifestation of the pupil's autism, or at least affected by their disability? Look for references to this particular behaviour being part of the pupil's autism in professionals' reports.
- Did the headteacher give the excluded pupil an opportunity to present their case before taking the decision to exclude and were reasonable adjustments made to allow them to do so?
- Does the exclusion amount to *discrimination arising from disability* (punishing them for their disability related behaviour)? It will not be unlawful if it was a proportionate means of achieving a legitimate aim or the school did not know, and could not reasonably have been expected to know, that the pupil was disabled.
- If the pupil has an education, health and care (EHC) plan, consider whether the support being provided is sufficient to meet their needs.
- What reasonable adjustments is the school making to its practices to avoid placing the pupil at a substantial disadvantage compared to non-disabled pupils?
- What reasonable adjustments have been made to the school's behaviour policy to avoid claims of indirect disability discrimination and discrimination arising from disability?
- Has the headteacher applied a blanket behaviour policy in the same way to all pupils, which has the effect of putting a group(s) of pupils who share a protected characteristic (disability) at a disadvantage and is not able to justify this treatment as a *proportionate means of achieving a legitimate aim* (ie indirect disability discrimination)?
- Does the school's behaviour policy acknowledge the requirements of the Act<sup>2</sup>?
- Has account been taken of any contributing factors, such as bullying? What were the triggers and setting events (eg factors that may have made the pupil more anxious and therefore less tolerant of people and environments and more susceptible to exhibiting challenging behaviour)<sup>3</sup>?
- Is exclusion providing an effective sanction? (DfE exclusion guidance para 20) Are there more *proportionate means of achieving a legitimate aim* that would avoid the need for exclusion?

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<sup>1</sup> [Equality Act 2010, section 6](#) and [Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability](#)

<sup>2</sup> [Behaviour and discipline in schools: guidance for headteachers and staff, para 12](#)

<sup>3</sup> [Department for Education \(DfE\): Exclusion Statutory Guidance - September 2017](#) paras 18 and 63

## Useful links:

- The [Equality and Human Rights Commission \(EHRC\) Technical Guidance for Schools in England](#) outlines the legal requirements of the Equality Act 2010 for schools.
- [The Equality Act 2010: advice for schools](#)
- [The Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability \(Office for Disability Issues – HM Government\).](#)
- The Autism Education Trust (AET): '[Working together with your child's school](#)': a parents' guide to help parents identify priorities to encourage a positive and constructive relationship with school.