

**2006 No. 332**

**DISABLED PERSONS**

**The Special Educational Needs and Disability (Northern Ireland) Order 2005 (Amendment) (Further and Higher Education) Regulations (Northern Ireland) 2006**

*Made* - - - - *9th August 2006*

*Coming into operation in accordance with regulation 1(2) and (3)*

The Department for Employment and Learning<sup>(a)</sup>, being a Department designated<sup>(b)</sup> for the purposes of section 2(2) of the European Communities Act 1972<sup>(c)</sup> in relation to discrimination, makes the following Regulations in exercise of the powers conferred by section 2(2):

**Citation and commencement**

1.—(1) These Regulations may be cited as the Special Educational Needs and Disability (Northern Ireland) Order 2005 (Amendment) (Further and Higher Education) Regulations (Northern Ireland) 2006.

(2) These Regulations shall come into operation on the day after that on which they are made so far as enabling anything to be done for the purposes of preparing and bringing into operation on or after 1st September 2006 a code of practice under section 54A of the Disability Discrimination Act 1995<sup>(d)</sup> concerning any provision of the 2005 Order as it will have effect on or after that date by virtue of these Regulations.

(3) Except as provided for by paragraph (2), these Regulations shall come into operation on 1st September 2006.

**Interpretation**

2.—(1) In these Regulations—

“the 2005 Order” means the Special Educational Needs and Disability (Northern Ireland) Order 2005<sup>(e)</sup>.

(2) The Interpretation Act (Northern Ireland) 1954<sup>(f)</sup> shall apply to these Regulations as it applies to an Act of the Assembly.

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(a) Formerly the Department of Higher and Further Education, Training and Employment; *see* 2001 c. 15 (N.I.)

(b) The European Communities (Designation) (No. 3) Order 2002 (S.I.2002/1819)

(c) 1972 c.68

(d) 1995 c.50; section 54A was inserted by Article 11 of the Equality (Disability, etc.) (Northern Ireland) Order 2000 (S.I. 2000/1110 (N.I. 2)) and amended by regulation 20 of the Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004 (S.R. 2004 No.55) and Article 41 of the Special Educational Needs and Disability (Northern Ireland) Order 2005 (S.I. 2005/1117 (N.I. 6))

(e) S.I. 2005/1117 (N.I. 6)

(f) 1954 c. 33 (N.I.)

### **Transitional provisions**

3. Paragraph (1A) of Article 31 of the 2005 Order (inserted by regulation 11) applies in relation to a claim presented to a county court before the commencement date as well as one presented on or after that date; but it does not affect any claim which was determined by a county court before 1st September 2006.

### **Amendments to the 2005 Order**

4. The 2005 Order is amended as follows.

### **Discrimination against disabled students and prospective students, and harassment**

5. In Article 28 (discrimination against disabled students and prospective students), after paragraph (3) insert—

“(3A) It is unlawful for the body responsible for an educational institution to discriminate against a disabled person—

- (a) in the arrangements which it makes for the purpose of determining upon whom to confer a qualification;
- (b) in the terms on which it is prepared to confer a qualification on him;
- (c) by refusing or deliberately omitting to grant any application by him for a qualification; or
- (d) by withdrawing a qualification from him or varying the terms on which he holds it.

(3B) It is unlawful for the body responsible for an educational institution to subject to harassment a disabled person who—

- (a) holds or applies for a qualification conferred by the institution;
- (b) is a student at the institution; or
- (c) seeks admission as a student to the institution.”.

### **Meaning of “discrimination” and “harassment”**

6.—(1) Article 29 (meaning of “discrimination”) is amended as follows.

(2) In paragraph (1) for “Article 28” substitute “this Chapter”.

(3) For paragraph (2) substitute—

“(2) For the purposes of this Chapter, a responsible body also discriminates against a disabled person if it fails to comply with a duty imposed on it by Article 30 or 30A(5) in relation to the disabled person.”.

(4) Omit paragraph (4).

(5) For paragraphs (5) to (9) substitute—

“(5) Treatment, other than the application of a competence standard, is (subject to paragraphs (7) to (9)), justified for the purposes of paragraph (1)(b) if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.

(6) The application by a responsible body of a competence standard to a disabled person is (subject to paragraphs (8) and (9)) justified for the purposes of paragraph (1)(b) if, but only if, the body can show that—

- (a) the standard is, or would be, applied equally to persons who do not have his particular disability, and
- (b) its application is a proportionate means of achieving a legitimate aim.

(7) If in a case falling within paragraph (1), other than a case where the treatment is the application of a competence standard, a responsible body is under a duty under Article 30 or 30A(5) in relation to the disabled person, but fails to comply with that duty, its treatment

of that person cannot be justified under paragraph (5) unless that treatment would have been justified even if it had complied with that duty.

(8) Subject to paragraph (9), regulations may make provision, for the purposes of this Article, as to circumstances in which treatment is, or as to circumstances in which treatment is not, to be taken to be justified.

(9) Treatment of a disabled person by a responsible body cannot be justified under paragraph (5), (6) or (8) if it amounts to direct discrimination falling within paragraph (10).

(10) 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 that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.

(11) In this Article and Article 30, "competence standard" means an academic, medical or other standard applied by or on behalf of a responsible body for the purpose of determining whether or not a person has a particular level of competence or ability."

7. After Article 29 insert—

#### **"Meaning of "harassment"**

**29A.**—(1) For the purposes of this Chapter, a responsible body subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, that body engages in unwanted conduct which has the purpose or effect of—

- (a) violating the disabled person's dignity, or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect referred to in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect."

#### **Duty to make reasonable adjustments**

8. The following heading is substituted for that of Article 30 and the following paragraphs are substituted for paragraph (1) of that Article—

#### **"Responsible bodies' duties to make adjustments**

**30.**—(1) Where—

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

it is the duty of the responsible body to take such steps as are reasonable, in all the circumstances of the case, to prevent the provision, criterion or practice having that effect.

(1A) Where—

- (a) a provision, criterion or practice, other than a competence standard, is applied by or on behalf of a responsible body,

- (b) it is a provision, criterion or practice for determining on whom a qualification is to be conferred,
- (c) a disabled person is, or has notified the body that he may be, an applicant for the conferment of that qualification, and
- (d) the provision, criterion or practice places the disabled person at a substantial disadvantage in comparison with persons who are not disabled,

it is the duty of the responsible body to take such steps as are reasonable, in all the circumstances of the case, to prevent the provision, criterion or practice having that effect.

(1B) Where—

- (a) a provision, criterion or practice, other than a competence standard, is applied by or on behalf of a responsible body,
- (b) it is a provision, criterion or practice other than one mentioned in paragraph (1)(b) or (1A)(b), and
- (c) it places a disabled person who—
  - (i) holds a qualification conferred by the responsible body, or
  - (ii) applies for a qualification which the responsible body confers, at a substantial disadvantage in comparison with persons who are not disabled,

it is the duty of the responsible body to take such steps as are reasonable, in all the circumstances of the case, to prevent the provision, criterion or practice having that effect.

(1C) Where any physical feature of premises occupied by a responsible body places disabled persons at a substantial disadvantage in comparison with persons who are not disabled in relation to—

- (a) the arrangements which that body makes for determining admissions to the institution, or
- (b) student services provided for, or offered to, students by that body,

it is the duty of the body to take such steps as are reasonable, in all the circumstances of the case, to prevent the feature having that effect.

(1D) Where any physical feature of premises occupied by a responsible body places a disabled person who—

- (a) applies for a qualification which that body confers, or
- (b) holds a qualification which was conferred by that body,

at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the body to take such steps as are reasonable, in all the circumstances of the case, to prevent the feature having that effect.”.

9. In Article 30(2) and (4), for “paragraph (1)” substitute “any of paragraphs (1) to (1D)”.

## **Other unlawful acts**

10. After Article 30 insert—

*“Other unlawful acts*

### **Relationships which have come to an end**

**30A.**—(1) This Article applies where—

- (a) there has been a relevant relationship between a disabled person and a responsible body, and
- (b) that relationship has come to an end.

(2) In this Article a “relevant relationship” is a relationship during the course of which an act of discrimination against, or harassment of, one party to the relationship by the other party to it is unlawful under any preceding provision of this Chapter.

(3) It is unlawful for the responsible body—

- (a) to discriminate against the disabled person by subjecting him to a detriment, or
- (b) to subject the disabled person to harassment,

where the discrimination or harassment arises out of and is closely connected to the relevant relationship.

(4) This paragraph applies where—

- (a) a provision, criterion or practice applied by the responsible body to the disabled person in relation to any matter arising out of the relevant relationship, or
- (b) a physical feature of premises which are occupied by the responsible body,

places the disabled person at a substantial disadvantage in comparison with persons who are not disabled but are in the same position as the disabled person in relation to the responsible body.

(5) Where paragraph (4) applies, it is the duty of the responsible body to take such steps as are reasonable, in all the circumstances of the case, to prevent the provision, criterion or practice, or feature, having that effect.

(6) Paragraph (5) imposes duties only for the purpose of determining whether a responsible body has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such.

(7) Nothing in paragraph (5) imposes any duty on the responsible body if it does not know, and could not reasonably be expected to know, that the person has a disability and is likely to be affected in the way mentioned in that paragraph.

(8) In paragraph (2), reference to an act of discrimination or harassment which is unlawful includes, in the case of a relationship which has come to an end before the commencement of this Article, reference to such an act which would, after the commencement of this Article, be unlawful.

### **Instructions and pressure to discriminate**

**30B.**—(1) It is unlawful for a responsible body to instruct another person to do any act which is unlawful under this Chapter or to procure or attempt to procure the doing of any such unlawful act by that other person.

(2) It is also unlawful for a responsible body to induce, or attempt to induce, another person to do any act which is unlawful under this Chapter by—

- (a) providing or offering to provide that person with any benefit, or
- (b) subjecting or threatening to subject that person to any detriment.

(3) An attempted inducement is not prevented from falling within paragraph (2) because it is not made directly to the person in question, if it is made in such a way that he is likely to hear of it.

### **Discriminatory advertisements**

**30C.**—(1) It is unlawful for a responsible body to publish or cause to be published an advertisement which—

- (a) invites applications in relation to any course or student service provided or offered by it, or any qualification conferred by it, and
- (b) indicates, or might reasonably be understood to indicate, that such an application will or may be determined to any extent by reference to—
  - (i) the applicant not having any disability, or any particular disability, or

- (ii) any reluctance on the part of the person determining the application to comply with a duty imposed on it by Article 30.

(2) Paragraph (1) does not apply where it would not in fact be unlawful under this Chapter for an application to be determined in the manner indicated (or understood to be indicated) in the advertisement.

(3) In this Article, “advertisement” includes every form of advertisement or notice, whether to the public or not.”.

### **Enforcement, remedies and procedures**

**11.**—(1) Article 31 (enforcement, remedies and procedures) is amended as follows.

(2) In paragraph (1)—

- (a) in sub-paragraph (a), after “him” insert “, or subjected him to harassment,”, and
- (b) in sub-paragraphs (b) and (c), for “discriminated against him in such a way” substitute “done so”.

(3) After paragraph (1) insert—

“(1A) Where—

- (a) a claim is brought under paragraph (1), and
- (b) the claimant proves facts from which the court could, apart from this paragraph, conclude in the absence of an adequate explanation that the defendant has acted in a way which is unlawful under this Chapter,

the court shall uphold the claim unless the defendant proves that he did not so act.”.

**12.** After Article 31 insert—

#### **“Enforcement of Articles 30B and 30C**

**31A.**—(1) This Article applies to an act which is unlawful under Articles 30B or 30C.

(2) Legal proceedings in relation to an act to which this Article applies may only be brought by the Commission in accordance with this Article and may not be brought by anyone else.

(3) Where the Commission thinks that a person has done an act to which this Article applies the Commission may apply to a county court.

(4) On an application under paragraph (3) in respect of an alleged act to which this Article applies, the court shall determine whether the allegation is correct.

(5) The Commission may apply to a county court for an injunction restraining a person from doing an act to which this Article applies where—

- (a) either—
  - (i) a court has determined under paragraph (4) that the person has done an act to which this Article applies, or
  - (ii) the Commission thinks that the person has done an act to which this Article applies, and
- (b) the Commission thinks that if unrestrained the person is likely to do another act to which this Article applies.

(6) Paragraph (1) does not apply to an act which constitutes an offence.

(7) In this Article “the Commission” means the Equality Commission for Northern Ireland.

#### **Enforcement of Articles 30B and 30C: supplemental matters**

**31B.**—(1) An application under Article 31A(3) may be presented or made only—

- (a) within the period of six months beginning with the date (or last date) on which the alleged unlawful act occurred, or
- (b) with the permission of the court.

(2) A determination under Article 31A(4) shall not be relied upon by a county court in proceedings under Article 31A(5) while an appeal against the determination—

- (a) is pending, or
- (b) may be brought (disregarding the possibility of an appeal out of time with permission).

(3) An application under Article 31A(5) may be made only—

- (a) within the period of five years beginning with the date (or last date) on which the unlawful act referred to in that paragraph occurred, or
- (b) with the permission of the court.”.

### **Occupation of premises**

**13.** In Article 32(1)(c) (occupation of premises by educational institution), after “Article 30” insert “or Article 30A(5)”.

### **Amendment of Article 48**

**14.** In Article 48 (relationship of this part with the 1995 Act), for paragraph (10) substitute—  
“(10) After paragraph 5 insert—

**6.** References in Chapter I of Part III of the 2005 Order to a disabled pupil are to be read as references to a pupil who has had a disability.

**7.** References in Chapter II of Part III of the 2005 Order to a disabled student are to be read as references to a student who has had a disability.

**8.** In Article 15(3)(a) and (4) of the 2005 Order, after “disabled” insert “or that he had had a disability”.

**9.** In Article 16(1) of the 2005 Order, in sub-paragraphs (a) and (b), after “not disabled” insert “and who have not had a disability”.

**10.**—(1) In Article 29 of the 2005 Order in paragraph (3)(a), after “disabled” insert “or that he had had a disability”;

(2) in paragraph (6)(a) of that Article, after “who do not have” insert “and have not had”; and

(3) in paragraph (10) of that Article, for “that particular disability” substitute “and who has not had that particular disability and”.

**11.** In Articles 30(1)(c), (1A)(d), (1B)(c), (1C) and (1D)(a) and 37(1)(d), 2(c) and (3) of the 2005 Order, after “not disabled” insert “and who have not had a disability”.

**12.** In Article 35(8) of the 2005 Order after “not having that particular disability” insert “and who has not had that particular disability”.

**13.** In Article 37(4)(b) of the 2005 Order for “has” substitute “has had”.”.

### **Amendment of Schedule 2**

**15.**—(1) Schedule 2 (enforcement and procedure) Part II is amended as follows.

(2) In paragraph 4(1)—

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(a) Article 30(1), (1A), (1B), (1C) and (1D) is inserted by regulation 8



- (a) for “Article 31” substitute “Chapter II of Part III”, and
  - (b) for “Chapter II of Part III” substitute “that Chapter”.
- (3) In paragraph 5(4)(a) omit the words “of discrimination”.

### **Amendment of Schedule 3**

16. In paragraph 1 of Schedule 3 (premises occupied by educational institutions under leases), after “Article 30” insert “or Article 30A(5)”.

### **Interpretation provisions**

17.—(1) In Article 27 (interpretation of this chapter), in paragraph (1) at the appropriate place in alphabetical order insert—

““Provision, criterion or practice” includes any arrangements;

“Qualification” means any authorisation, qualification, approval or certification conferred by a responsible body;

“Discrimination” and other related expressions are to be construed in accordance with Article 29;

“Harassment” is to be construed in accordance with Article 29A;

“Physical feature”, in relation to any premises, includes any of the following (whether permanent or temporary)—

- (a) any feature arising from the design or construction of a building on the premises,
- (b) any feature on the premises of any approach to, exit from or access to such a building,
- (c) any fixtures, fittings, furnishings, furniture, equipment or material in or on the premises, and
- (d) any other physical element or quality of any land comprised in the premises.”.

(2) After Article 27(1), insert—

“(1A) References (however expressed) to the conferment of a qualification on a person by a responsible body include—

- (a) the renewal or extension of a qualification, and
- (b) the authentication of a qualification awarded to him by another person.”.

Sealed with the Official Seal of the Department for Employment and Learning on 9th August 2006.



*Bernie O'Hare*  
A senior officer of the  
Department for Employment and Learning



## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations implement (in Northern Ireland) the provisions of Council Directive 2000/78/EC (OJ No. L 303, 2.12.2000, p.16), establishing a general framework for equal treatment in employment and occupation (“the Directive”), so far as it relates to disability discrimination but only insofar as the Directive’s obligations impact upon Chapter II of Part III of the Special Educational Needs and Disability (Northern Ireland) Order 2005 (S.I. 2005/1117 (N.I. 6)) (“the 2005 Order”). The Disability Discrimination Act 1995 (Amendment) Regulations (Northern Ireland) 2004 (S.R. 2004/55), which came into operation on 1st October 2004, implemented the Directive’s obligations with respect to Parts II and III of the Disability Discrimination Act 1995.

New Article 28(3A) of the 2005 Order prohibits discrimination as regards the conferment of qualifications by bodies responsible for educational institutions or the arrangements made for the purpose of conferring such qualifications. *(Regulation 5)*

New Articles 28(3B) and 29A prohibit harassment by relevant institutions and define what harassment means. *(Regulations 5 and 7)*

New Article 29(2) defines discrimination as failing to comply with a duty imposed to make reasonable adjustments. The extent and meaning of that duty is set out in new Articles 30(1) to (1D) and 30A(5). *(Regulations 6, 8 and 10)*

New Article 29(5) to (11) amends the definition of “discrimination” and sets out the ambit of the justification defence for an act which constitutes discrimination. *(Regulation 6)*

New Article 29(10) prohibits direct discrimination and defines the term “direct discrimination”. *(Regulation 6)*

New Article 30(1) to (1D) imposes a duty to make reasonable adjustments in relation to admissions, student services, the conferment of qualifications and physical features of premises. *(Regulation 8)*

New Article 30A prohibits discrimination and harassment and imposes duties to make reasonable adjustments in relationships which have come to an end. *(Regulation 10)*

New Article 30B prohibits instructions and pressure to discriminate. *(Regulation 10)*

New Article 30C prohibits publishing discriminatory advertisements. *(Regulation 10)*

New Article 31(1A) makes provision for the burden of proof in proceedings brought under Chapter II. These Regulations also include transitional provisions concerning the burden of proof. *(Regulations 3 and 11)*

New Article 31A sets out the enforcement procedure for articles 30B and 30C. *(Regulation 12)*

These Regulations make provision for commencement on the day after they are made so far as enabling anything to be done for the purposes of preparing and bringing into operation on or after 1st September 2006 a code of practice under section 54A of the Disability Discrimination Act 1995 concerning any provision of the 2005 Order as it will have effect on or after that date by virtue of these Regulations. Otherwise, the Regulations come into operation on 1st September 2006. *(Regulation 1)*

A copy of the Transposition Notes in relation to the implementation of the Directive for Chapter II of Part III of the 2005 Order may be obtained from Further Education Division, Department for Employment and Learning, Adelaide House, 39-49 Adelaide Street, Belfast, BT2 8FD; and a copy has also been placed in the Library of the Northern Ireland Assembly.

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