

## **BRIEFING NOTE**

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### **PROVISION OF EQUIPMENT AND TECHNOLOGY FOR CHILDREN AND YOUNG PEOPLE WITH A SENSORY IMPAIRMENT**

### **FUNDING ARRANGEMENTS IN THE CONTEXT OF THE SPECIAL EDUCATIONAL NEEDS FRAMEWORK AND THE EQUALITY ACT 2010**

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Please note that a number of the guidance documents referred to in this note were written prior to the introduction of the Children and Families Act 2014. References in this document to statements of SEN should now be taken to also include Education, Health and Care (EHC) plans.

## **FUNDING FOR EQUIPMENT AND ACCESS TECHNOLOGY TO ENABLE ACCESS TO TEACHING AND LEARNING AND PARTICIPATION**

### **1. INTRODUCTION: HOW EQUIPMENT IS FUNDED**

- 1.1 Many children and young people with sensory impairment require equipment and access technology to access teaching and learning both in formal education settings such as nurseries, schools and colleges and informal settings such as at home and clubs.
- 1.2 A child and young person's entitlement to equipment is covered by both the SEND framework and the Equality Act framework. It is also covered by social care legislation.

#### **Funding equipment for children in their early years (0-4 years) and pupils in schools**

- 1.3 The most likely source of funding for equipment is a local authority's dedicated schools grant (DSG)<sup>1</sup>:
- a) Local authorities will fund equipment from the high needs block (HNB) allocation although some may use their early years block (EYB) funding. In many cases the funding is held by sensory impairment teams. In some cases the funding is held by the SEN team such as the SEN assessment service and allocated on the advice of specialist teachers. The advantages of such an approach are highlighted in guidance issued by the DfE and Equality and Human Rights Commission (EHRC)
- b) The Schools Block allocation is delegated to schools. In many areas schools are required to make a contribution to the cost of equipment from their delegated funding. In many cases amount of contribution has been determined locally by each local authority as part of developing their accessibility strategies to comply with the planning duties to improve the accessibility of schools for disabled pupils set out in schedule 10 of the Equality Act 2010.
- 1.4 In some cases local authorities may have adopted a broad definition of "capital spending" and purchased some of their equipment from education capital budgets regarding such equipment as a capital asset. Pressure on capital budgets may have reduced the ability of LAs to use capital budgets in this way.

#### **Funding of equipment for students in Further Education**

- 1.5 On the whole FE colleges have funded equipment from their mainstream budgets for course provision with additional funding for disadvantage along with funding for high needs students who may have had an Education, Health and Care (EHC) plan (or previously a Learning Difficulties Assessment (LDA)). From 2013 onwards colleges will receive for high needs students place funding from the Education Funding Agency (EFA) (currently £10,000) and top up funding directly from the local authority for places commissioned by the LA. Funding for lower needs students is provided by the EFA. (see NatSIP briefing note on post-16 funding for more details)

#### **Social Care Funding**

- 1.6 Equipment and technology for children with a sensory impairment can also be important to their development and welfare. Section 2 of the Chronically Sick and Disabled Persons Act 1970 imposes a specific duty on social services to provide services if the local authority is satisfied that such a service is "*necessary in order to meet the needs of that person*". To determine when a service is "necessary"

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<sup>1</sup> The DSG is made up of (i) the schools block delegated to schools; (ii) the High Needs Block for funding children and young people with high level needs aged 0-25 years although LAs use funding for sensory specialist support services supporting learners with and without statutory assessment; (iii) the Early Years Block that funds early years education. Central government determines the overall level of DSG local authorities receive and this is ring fenced to education. The DSG sets out how much is allocated in each of the 3 blocks but none of the blocks is ring fenced. Children and young people up to the age of 19 years don't need a statutory assessment and plan to be regarded as high needs but they do if they are over 19 years.

a child would need to receive a Section 17 child in need assessment under the Children Act 1989. Children with sensory impairment are eligible for an assessment as they are disabled. However to receive the support the assessment has to show that the service is “necessary” with any appeals having to be considered by the High Court. In many LAs the main funding route for equipment for children and young people with a sensory impairment is the education service.

(For more information on the CSDPA 1970 see blog from by Steve Broach, Barrister, Monckton Chambers: <https://rightsinreality.wordpress.com/2014/08/25/csdpa-the-mystery-duty-for-disabled-childrens-social-care/>)

## 2. PROVISION OF EQUIPMENT AND THE EQUALITY ACT AND RELATED GUIDANCE

2.1 There are two<sup>2</sup> key aspects of the Equality Act 2010 that are most relevant to the provision of equipment:

- a) The **reasonable adjustments duty**: The duty requires LAs and education providers to make reasonable adjustments to avoid placing a disabled child or young person at a substantial disadvantage compared with others in accessing education. Its purpose “*is to provide access to an education as close as is reasonably possible to the standard normally offered to students at large*”<sup>3</sup>. The Equality Act brought the provision of auxiliary aids and services, which includes equipment, within the scope of the reasonable adjustment duty for schools in September 2012<sup>4</sup>. **The reasonable adjustments duty is an anticipatory duty**<sup>5</sup> (ie reasonable adjustments are to be made before the child or young person with sensory impairment experiences a substantial disadvantage – proactive reasonable adjustments should be made to avoid placing the child at a substantial disadvantage).
  
- b) **The public sector equality duty**: Section 149 of the EA imposes a duty on ‘public authorities’ and other bodies when exercising public functions to have due regard to the need to [...] “**advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it...**”

### Reasonable Adjustments Duty

2.2 Both the DfE and Equalities and Human Rights Commission (EHRC) provide helpful guidance:

- a) In June 2014 the DfE issued its guidance “The Equality Act 2010 and schools: Departmental advice for school leaders, school staff, governing bodies and local authorities”  
<https://www.gov.uk/government/publications/equality-act-2010-advice-for-schools>
  
- b) In 2014 the EHRC issued “Technical Guidance for Schools in England” This guidance applies to the provisions in the Equality Act 2010 that were brought into force on 1 October 2010, and the extension of reasonable adjustments to include auxiliary aids and services that were brought into force on 1 September 2012. The most relevant section is chapter 6 of this guidance  
<https://www.equalityhumanrights.com/en/publication-download/technical-guidance-schools-england>
  
- c) In April 2014 the EHRC issued “Technical Guidance on Further and Higher Education”  
<https://www.equalityhumanrights.com/en/publication-download/equality-act-2010-technical-guidance-further-and-higher-education>

2.3 Key points from the DfE and EHRC guidance:

- a) **The reasonable adjustment duty applies to both schools and local authorities:**  
The DfE guidance states “*The duty to provide auxiliary aids as part of the reasonable adjustment duty is a change for all schools from September 2012 and also extends to maintaining local authorities*”<sup>6</sup> (para 4.14).

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<sup>2</sup> The Equality Act 2010 also retains the duty on LAs and schools to produce accessibility strategies and accessibility plans

<sup>3</sup> EHRC “Technical Guidance on Further and Higher Education” April 2014 (para 7.3)

<sup>4</sup> It was already a duty on FE colleges

<sup>5</sup> See para xix of the introduction to the SEND Code of Practice (DfE May 2015)

<sup>6</sup> Although the DfE refers to “maintaining LAs” the School Finance Regulations enable LAs to retain centrally in its High Needs Block funding for specialist support including equipment for pupils irrespective of the type of school they attend.

The EHRC guidance for schools states *“from 1 September 2012, the reasonable adjustments duty for schools and education authorities includes a duty to provide auxiliary aids and services for disabled pupils... This chapter explains how the requirement to include auxiliary aids and services within the reasonable adjustments duty works in schools and education authorities”* (para 6.1 and 6.2)

#### **b) Definition of an auxiliary aid and substantial disadvantage:**

The DfE guidance confirms there is no legal definition of “auxiliary aids and services” However it says *“considering the everyday meaning of the words, is, however, helpful. “Legal cases have referred to the Oxford English Dictionary definition of auxiliary as ‘helpful, assistant, affording aid, rendering assistance, giving support or succour’ and that auxiliary aids and services ‘are things or persons which help’. Examples of what may be considered an auxiliary aid could be; hearing loops; adaptive keyboards and special software. (DfE para 4.18)*

The EHRC guidance on FE and HE states auxiliary aids include items such as equipment, induction loops/infrared broadcasting systems and audio-visual fire alarms (para. 7.41)

This guidance also makes the point that it is just not a matter of purchasing equipment; *“education providers should ensure that any auxiliary aids they provide are carefully chosen and properly maintained. They should have in place contingency arrangements in case of an unexpected failure of an auxiliary aid”*. (Para 7.42) Thus it is important to consider the support required to ensure effective use of equipment of disabled children and young people and not just its purchase.

The Equality Act states that disadvantage must be **substantial**, which is defined as more than minor or trivial. So the critical question is whether the provision of equipment will prevent a disadvantage for children and young people with a sensory impairment that is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis

#### **c) Obligation on education providers to make a reasonable adjustment**

Whether or not the provision of equipment is a reasonable adjustment for a school or early years setting to take depends on context and circumstances and there are no hard and fast rules. For example with regard to schools paragraph 6.20 of the EHRC guidance for schools states; *“The Act does not say what is ‘reasonable’. This allows flexibility for different sets of circumstances so that, for example, **what is reasonable in one set of circumstances may not be reasonable in another”**. Para 6.21 states; *“the crux of the reasonable adjustments duty is not whether something is an auxiliary aid or whether it is an adjustment to a practice, but whether it is something that is reasonable for the school to have to do. It is not possible for a school to justify a failure to make a reasonable adjustment; the question is only whether or not the adjustment is reasonable”*. Hence if an adjustment is reasonable there can be no excuses for not making it. However, whether it is reasonable depends on circumstances.*

The EHRC guidance for FE and HE states *“Where there is an adjustment that the education provider could reasonably put in place and which would remove or reduce the substantial disadvantage, it is not sufficient for the education provider to take some lesser step that would not provide education or access to a benefit, facility or service in as accessible a manner”*. (Para 7.57)

#### **d) Criteria for determining whether or not an adjustment is reasonable for a school to make:**

Paragraph 6.26 of the EHRC guidance for schools describes the circumstances in which provision may be regarded as a reasonable adjustment. The circumstances given in the guidance are not exhaustive

but the following are factors that are likely to be taken into account when considering whether it is a reasonable adjustment for a school to provide equipment:

- (i) The extent to which support will be provided to the disabled pupil under the SEN framework.
- (ii) *“The resources of the school and the availability of financial or other assistance”*. Para 6.32 explains this further *“It is more likely to be reasonable for a school with substantial financial resources to make an adjustment with a significant cost than for a school with fewer resources”*. Para 6.53 states *“the Act obliges schools to make only ‘reasonable’ adjustments. Cost and resources are factors that are taken into account in determining what is ‘reasonable’”*
- (iii) *“The financial and other costs of making the adjustment”* (the higher the cost the less likely will it be considered a reasonable adjustment)
- (iv) *The extent to which taking any particular step would be effective in overcoming the substantial disadvantage suffered by a disabled pupil.*
- (v) *The practicability of the adjustment*
- (vi) *The effect of the disability on the individual*
- (vii) *Health and safety requirements*

Paragraphs 6.27 to 6.46 of the EHRC guidance for schools give a more detailed explanation of these considerations.

**e) Criteria for determining whether or not an adjustment is reasonable for FE colleges to make:**

Paragraph 7.61 of the EHRC’s guidance on FE and HE lists some of the factors which might be taken into account when considering what is reasonable for a FE college. They are very similar to those outlined for schools and include for example: (i) the effectiveness of equipment in overcoming the disadvantage; (ii) the practicability of the adjustment; (iii) the effect of the sensory impairment on the student; (iv) the financial and other costs of making the adjustment; (v) the extent to which equipment otherwise would be provided to disabled people or students

The EHRC guidance also states *“nothing in the Act requires an education provider to provide an auxiliary aid or service to be used for personal purposes unconnected to the education, benefit, facility or service being provided or to be taken away by the disabled student after use”* (para 7.43) .

So it is possible that where equipment is required outside school or college for purposes not related to education, the school or college may claim that the duty to provide rests with another organisation such as a local authority as part of its social care duties under the Children Act 1989 and Chronically Sick and Disabled Persons Act 1970.

**f) Provision of equipment under the SEN framework and under the Equality Act 2010**

The DfE guidance states:

*“Many disabled children will have a SEN and may need auxiliary aids which are necessary as part of their SEN provision; in some circumstances as part of a formal SEN statement . These aids may be provided in the school under the SEN route, in which case there will be no need for the school to provide those aids as part of their reasonable adjustment duty”* (para 4.15).

*“Schools will have to consider whether to provide auxiliary aids as a reasonable adjustment for disabled children. This will particularly be the case where a disabled child does not have an SEN statement or where the statement does not provide the auxiliary aid or service”. (para 4.16)*

***“There should be no assumption, however, that if an auxiliary aid is not provided under the SEN regime then it must be provided as a reasonable adjustment. Similarly, whilst schools and LAs are under the same reasonable adjustment duty, there should be no assumption that where it is unreasonable for a school to provide an auxiliary aid or service, for example on cost grounds, it would then be reasonable for the local authority to provide it. All decisions would depend on the facts of each individual case. The nature of the aid or service, and perhaps also the existence of local arrangements between schools and local authorities, will help to determine what would be reasonable for the school or the LA to provide. For example, where there is a centrally organised visual or hearing impairment service it may be reasonable for the local authority to provide more expensive aids or support through that service but not reasonable for an individual school to have to provide them”. (para 4.17)***

The EHRC guidance for schools gives a similar message in para 6.13:

*“Some disabled pupils will also have special educational needs (SEN) and may be receiving support via school-based SEN provision or have a statement of SEN. The fact that a disabled pupil has SEN or has an SEN statement does not take away a school’s duty to make reasonable adjustments for that pupil. In practice, of course, many disabled pupils who also have an SEN statement will receive all of the support they need through the SEN framework and there will be nothing extra that the school has to do. However, **some disabled pupils will not have SEN and some disabled pupils with SEN will still need reasonable adjustments to be made for them, in addition to any support that they receive through the SEN framework.**”*

The guidance for FE states that: *“the substantial disadvantage that the disabled student experiences may be overcome by support received under the SEN provision or EHC plan and so there will be no obligation under the Act for the further education institution or the local authority to make reasonable adjustments. In other cases, **a disabled student may need reasonable adjustments to be made in addition to the special educational provision that he or she is receiving.**” (para 7.71)*

#### **g) The advantages of a centrally funded arrangements**

The EHRC guidance for schools highlights the advantages of a centrally organised and funded aids service. Paragraph 6.56 the EHRC guidance for schools states *“Are individual schools expected to meet the cost of auxiliary aids and services if they already pay into a central local authority budget to meet such costs? Centrally organised and funded aids and services are often the most effective and efficient way of meeting the needs of disabled children. In some situations, individual schools pay an amount into a local authority ‘pot’ set up to meet the cost of access needs and are able to draw on that pot for such needs; or a local authority may provide auxiliary aids and services out of funds that it would otherwise pass on to schools for such aids and services. It is unlikely, in these circumstances, to be reasonable for an individual school to pay any more in providing additional aids and services.*

#### **h) The reasonable adjustment duty is an anticipatory duty**

The guidance from EHRC and DfE stresses that the reasonable adjustment duty is an anticipatory duty. This means that if it is clear that a child and young person requires equipment to avoid being placed at a substantial disadvantage the equipment should be provided before that disadvantage is experienced.

## The Public Sector Equality Duty

- 2.4 The Public Sector Equality Duty is particularly relevant when considering the need to provide equipment outside of the school. This briefing is based on the EHRC's *Technical Guidance on the Public Sector Equality Duty: England (Aug 2014)*  
<https://www.equalityhumanrights.com/en/publication-download/technical-guidance-public-sector-equality-duty-england>.
- 2.5 The aim of the duty is to advance equality into the day-to-day business of public bodies". It is intended to accelerate progress towards equality placing a responsibility on them to consider how they can work "to tackle systemic discrimination and disadvantage.
- 2.6 Section 149 of the Act imposes a duty on 'public authorities' and other bodies when exercising public functions to have due regard to the need to:
- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act
  - advance equality of opportunity** between persons who share a relevant protected characteristic and persons who do not share it
  - foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- 2.7 Thus a key question when considering equipment for children and young people with sensory impairment outside a formal education setting is whether such provision will **advance equality of opportunity** in participating in everyday activities and in their physical, social, emotional and intellectual development. In many cases it can be shown that the provision of equipment will advance equality of opportunity.
- 2.8 The Court of Appeal has made it clear that the general equality duty not only applies to general formulation of policy but also applies to decisions made in applying policy in individual cases.<sup>7</sup> (Eg the day to day decisions over providing equipment for a child or young person with sensory impairment).
- 2.9 The courts have also said that the general equality duty is not something which has to be considered only when a body is exercising a statutory function under specific legislation. Instead it applies to the carrying out of any function of a public authority.<sup>8</sup> Thus for example it applies irrespective of any duties the local authority may or may not have under SEN or children's social care legislation to provide equipment.

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<sup>7</sup> *Pieretti v. Enfield Borough Council* [2010] EWCA 1104, para 26 per Wilson LJ.

<sup>8</sup> *Barnsley MBC v. Norton* [2011] EWCA Civ 834, Lloyd LJ at para 15.

- 2.10 The EHRC guidance has used case law to describe what having **due regard** means in practice. Those which are most relevant to the provision of equipment include:
- a) needing to “*consciously consider the need ... to .. advance equality of opportunity*” for children and young people with a sensory impairment when making decisions about equipment.
  - b) considering the relevance and impact of the equipment with have – “*the greater the relevance and potential impact, the higher regard required by the duty*”.
  - c) ensuring the decisions on providing equipment take into full consideration the aims of the public sector equality duty outlined in paras 2.5 and 2.6 above.
  - d) keeping a record of the decisions made about the provision of equipment and the reason for them. Para 2.21 of the EHRC guidance says it is good practice to keep an accurate record showing that the general equality duty has been considered “*and pondered relevant questions*”. “*Proper record keeping encourages transparency and will discipline those carrying out the relevant function to undertake the duty conscientiously. If records are not kept, it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by [s.149]*”

### **Funding and the equality duty**

- 2.11 The EHRC guidance clarifies the position with regard to the availability of funding; “*whilst questions of available resources may form part of its decision-making consideration, a body cannot avoid complying with the duty by claiming that it does not have enough resources to do so. The courts have said that even where the context of decision making is financial resources in a tight budget, that does not excuse non-compliance with the duty and ‘indeed there is much to be said that in straitened times the need for clear, well informed decision making when assessing the impacts on less advantaged members of society is as great, if not greater’*”.<sup>9</sup> (para 2.23)

### **The three elements of advancing the equality of opportunity**

- 2.12 The Equality Act explains that having due regard to the need to advance equality of opportunity involves having due regard, in particular, to the need to –
- (a) “*remove or minimise disadvantages suffered by people who share a relevant protected characteristic that are connected to that characteristic.*
  - (b) *take steps to meet the needs of people who share a relevant protected characteristic that are different from the needs of people who do not share it.*
  - (c) *encourage people who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such people is disproportionately low*”.
- 2.13 Thus in terms of making decisions over the provision of equipment it is necessary to consider (i) the extent to which it is required to minimise the disadvantage faced by children and young people with sensory impairment; (ii) it meets their needs; and (iii) the extent it encourages and enables full participation in everyday activities.
- 2.14 Where it decided not to provide equipment the local authority would need to be able to explain how it complied with its duties: “*Where during the exercise of its functions a body subject to the duty has identified proportionate positive action measures that would address disadvantage, particular needs or low participation but nevertheless decides not to take the action, it should be able to explain how it complied with the general equality duty in reaching its decision*” (EHRC para 3.17)

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<sup>9</sup> R. (W) v. Birmingham City Council [2011] EWHC 944, Blake J at para 45.

### 3. REASONABLE ADJUSTMENTS AND THE SPECIAL EDUCATIONAL NEEDS AND DISABILITY CODE OF PRACTICE

3.1 The SEND Code of Practice (DfE 2015) highlights key requirements of the Equality Act 2010. Paragraphs xix to xxi of the introduction to the SEND Code highlights that the duty is on both local authorities and educational establishments to make reasonable adjustments, promote equality of opportunity and publish information on how they discharge this general duty. As these paragraphs explain, the provision of equipment is both a reasonable adjustment and a way of promoting equality of opportunity the following requirements apply:

*“The Equality Act 2010 sets out the legal obligations that schools, early years providers, post-16 institutions, local authorities and others have towards disabled children and young people:*

- *[...] They **must** make reasonable adjustments, including the provision of auxiliary aids and services, to ensure that disabled children and young people are not at a substantial disadvantage compared with their peers. This duty is anticipatory – it requires thought to be given in advance to what disabled children and young people might require and what adjustments might need to be made to prevent that disadvantage.*
- *Public bodies, including further education institutions, local authorities, maintained schools, maintained nursery schools, academies and free schools are covered by the public sector equality duty and when carrying out their functions **must** have regard to the need to eliminate discrimination, promote equality of opportunity and foster good relations between disabled and non-disabled children and young people. They **must** publish information to demonstrate their compliance with this general duty and **must** prepare and publish objectives to achieve the core aims of the general duty. Objectives **must** be specific and measurable.*
- *[...] All providers **must** make reasonable adjustments to procedures, criteria and practices and by the provision of auxiliary aids and services. Most providers **must** also make reasonable adjustments by making physical alterations. Schools and local authority education functions are not covered by this last duty, but they **must** publish accessibility plans (and local authorities, accessibility strategies) setting out how they plan to increase access for disabled pupils to the curriculum, the physical environment and to information.*
- *School governing bodies and proprietors **must** also publish information about the arrangements for the admission of disabled children, the steps taken to prevent disabled children being treated less favourably than others, the facilities provided to assist access of disabled children, and their accessibility plans.”*

3.2 The SEND Code also advises that the provision of equipment as a reasonable adjustment should be considered alongside the planning and review of SEN provision:

*“Where a child or young person is covered by SEN and disability legislation, reasonable adjustments and access arrangements should be considered as part of SEN planning and review.” (para xxii of the Introduction to the Code)*

*“When early years settings, schools and colleges, local authorities and others plan and review special educational provision and make decisions about children and young people with SEN... they should consider, at the same time, the reasonable adjustments and access arrangements required for the same child or young person under the Equality Act.” (para 1.35)*

3.3 The Code also states there is low threshold for deciding whether a child or young person is disabled and hence for support under the Equality Act to be provided such as reasonable adjustments. This threshold is defined as “a long term and substantial (or ‘more than minor or trivial’) adverse impact

on their ability to carry out normal day to day activities”. Sensory impairment falls within this definition. The Code also states “there is a significant overlap between disabled children and young people and those with SEN. Where a disabled child or young person requires special educational provision they will also be covered by the SEN definition” (see paragraph xviii of the introduction to the Code).

#### 4. THE LOCAL OFFER AND EQUIPMENT

4.1 The EHRC and DfE guidance highlight the degree of discretion Local Authorities have in deciding with education providers the best way of meeting duties under the Equality Act 2010. In this respect there is little change from the flexibilities under the SEN and Disability Act 2001 with the requirement to produce Accessibility Strategies. The Children and Families Act 2014 requires LAs to revisit these arrangements when producing their Local Offers. The SEND Code of Practice 2014 sets out the key requirement with regard to the provision of equipment:

- a) **Eligibility criteria for equipment:** “The Local Offer **must** include eligibility criteria for services where relevant and make it clear where to go for information, advice and support” (para 4.7)  
Thus we can expect the Code to set out when a child and young person with SI can expect equipment and support in its use to be provided.
- b) Arrangements for securing services: The local offer must set out arrangements for “...securing the services, **provision and equipment required by children and young people with SEN or disabilities**” and “enabling available facilities to be accessed by disabled children and young people and those with SEN (this should include ancillary aids and assistive technology, including Augmentative and Alternative Communication).” (para 4.32)
- c) Information on accessibility: “The Local Offer **must** include information about ... the local authority’s accessibility strategy<sup>10</sup> (under paragraph 1 Schedule 10 to the Equality Act 2010)”. (para 4.30 of the SEND Code)
- d) Information on the early years: Para 48 states that the local offer must provide information on what support parents can receive at home to aid their child’s development.

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<sup>10</sup> LAs and schools are required to plan for: (i) increasing access for disabled pupils to the school curriculum; (ii) improving access to the physical environment of schools and (iii) improving the delivery of written information to disabled pupils.

## 5 FREQUENTLY-ASKED QUESTIONS

### Q1 **Now the provision of auxiliary aids and service has been brought within the reasonable adjustments duties for schools are they now required to fund the provision of all equipment?**

No. The reasonable adjustment duty applies to both schools and local authorities. What is considered a reasonable adjustment for an education setting to make depends on circumstances. What is a reasonable adjustment for one establishment may not be reasonable in other. Factors to be taken into account include the cost, the resources available to the education setting, whether equipment is provided under the SEN framework and the extent to which the equipment is also required to support daily living and participation outside of school. (See para 2a & g of this briefing paper)

### Q2 **When does providing equipment under the reasonable adjustment duty under the Equality Act apply?**

It applies:

When the child or young person is placed at a substantial disadvantage in accessing education provision if the reasonable adjustment (equipment) is not provided and

- a) Where the reasonable adjustment (equipment) is effective in helping to reduce the substantial disadvantage and
- b) Where the cost is reasonable within the context of the overall resources available to the local authority and education establishments and
- c) Where the equipment is not provided through the SEN framework

(See para 2.3 c & d of this briefing note)

### Q3 **If it is agreed that a reasonable adjustment is to be made, who should be making the reasonable adjustment, the education establishment or the LA?**

It depends on circumstances. For “high needs” children and young people provision is likely to be made LA through the SEN framework and not made as a reasonable adjustment. The DfE guidance says it cannot be assumed that it is an educational establishment’s responsibility to provide equipment as a reasonable adjustment where it is not provided by the LA under the SEN framework. It also says neither can it be assumed the LA will make the reasonable adjustment! Much depends on the circumstances of the case taking into account the factors outlined in the answer to Q1 above. For example larger establishments with bigger budgets may be able to provide some equipment as a reasonable adjustment but the expectations on a small early years provider would be much less.

There is therefore room for local discretion and the LA coming to a pragmatic solution with education establishments. The DfE guidance highlights the benefits of centrally organised aids service describing them as “*often the most effective and efficient way of meeting needs*”. A similar point is made in the EHRC guidance. This makes eminent sense as it gets round the problem of who funds equipment, for example, where a child with a radio aid moves from primary to secondary school.

Where equipment can be used to prevent disadvantage outside of school/college and help ensure full participation in day to day activities enjoyed by non-disabled children and young people, then it is less likely that responsibility for equipment would rest with an education establishment. It is more likely it will fall to the local authority to make the provision under its public sector equality duties and social care duties under the Children Act 1989 and Chronically Sick and Disabled Person’s Act 1970.

(See paras 2.3 a & g of this briefing note)

**Q4 When is equipment provided under the Equality Act and when is it provided under the SEN framework? (i.e. How do we know which framework applies to a children or young person with sensory impairment?)**

Equipment is likely to be provided and funded under the SEN framework where children and young people have high levels of SEN and would meet the eligibility criteria for statutory assessment and plans. However it is important to be mindful that the reasonable adjustment duty is an anticipatory duty to avoid substantial disadvantage in accessing education. Therefore it is important not to wait until decisions are made about statutory assessments and producing a plan are made. This is emphasised in the SEND Code of Practice (July 2014).

(See para 2.3f above)

**Q5 Is there a difference between settings such as a small early years providers and a large secondary schools?**

Yes. Whether provision of equipment is a reasonable adjustment for an education establishment to make depends on circumstances. Cost and availability of resources is an important consideration when deciding whether it is reasonable to expect an education establishment to make provision. It would be more reasonable for a large establishment to purchase equipment than a small nursery. This would need to be reflected in a local authority's local offer and Accessibility Strategy.

(See para 2.3g of this briefing note)

**Q6 What are the implications of the Children and Families Act 2014 which bring FE colleges with in SEN framework?**

In many cases equipment for high needs students would previously have been funded through the Learning Difficulty Assessment. With the transfer of responsibility to LAs for commissioning post-16 provision for young people with high needs then it is possible that in most cases LAs will allow the student to transfer equipment they need from use in the school to use in the college as part of the transitions planning of the EHC Plan.

For disabled students with a lower level of need FE colleges have had to provide equipment as a reasonable adjustment for a number of years pre-dating the Equality Act 2010. The EHRC's *"Equality Act 2010 – Technical Guidance for Further and Higher Education"* (April 2014) sets out the factors to consider in determining whether the provision of equipment is a reasonable adjustment. They are very similar to those described in schools. There is no guidance on what happens where LAs provide as a preventative measure equipment in secondary schools for disabled young people with lower level needs. In developing their local offer LAs would need to come to an agreement about the arrangements for equipment following the young person to a new establishment and how that is funded.

**Q7 What happens when equipment is provided as a reasonable adjustment and the pupil moves educational establishment?**

Neither the guidance from the DfE or EHRC covers this. The onus is on the local authority to develop pragmatic arrangements with educational establishments. Such arrangements are helped if there is a central funding arrangement recommended both by the DfE and EHRC that would ensure the equipment followed the pupil into their new education setting (eg from primary to secondary school). This would then avoid the need for example a primary school retaining the equipment or trying to recoup from a secondary school a contribution to the original cost of purchase. Such an approach would be consistent with the trend towards greater personalisation and the possibility of personal budgets (real or notional).

**Q8 Should children and young people be able to use equipment in the home and in other settings outside of school/college<sup>11</sup>?**

In a number of cases equipment may be required to undertake school work at home (revision, homework, educational trips) so in these cases it is likely that the reasonable adjustment for use in school will apply out of school.

In addition, under its public sector equality duties a local authority has a duty to advance equality of opportunity of children and young people with a sensory impairment (i.e. remove or minimise disadvantages they experience, take steps to meet their needs, and encourage them to participate in public life and in any other activity where their participation may be low). So in a number of cases it would be a reasonable adjustment to provide equipment to access a wide range of activities outside of school and in particular those activities provided by the local authority (eg youth clubs, sporting activities, libraries). Also allowing disabled children and young people to use equipment outside of school would be consistent with the social care duties of local authorities to promote the welfare, participation and develop of children in need under the Children in Need Act and the Chronically Sick and Disabled Persons Act 1970.

However, it should be noted that education establishments are not required to provide equipment as a reasonable adjustment if it is also required to support everyday life outside of school/college. The duty for this rests with health services (e.g. hearing aids) or LAs.

**Q9 Who insures equipment for out of school/college use?**

In some cases parents have been encouraged to enquire whether equipment can be added to home insurance to insure against loss or damage. However, if the use of equipment is regarded as a reasonable adjustment then the cost or difficulties over insurance should not prevent that reasonable adjustment being made. The cost of insurance is unlikely to be a legitimate reason for failure by a LA to discharge its public sector equality duties. In addition, under the social care framework, LAs provide equipment to children and young people to use at home and non-educational settings so it would be difficult for a LA to maintain that it can cover the cost of loss and damage in one context but not another. The LA is regarded as a single entity as far as the Equality Act is concerned.

**Q10 What are the obligations of the LA towards children who are under the age of 2 years or who are not attending early years settings?**

The SEN Code of Practice (2015) sets out the importance of early identification and support for disabled children under 2 years (para 5.12 – 5.19). There are also obligations under the public sector equality duties and under the Children Act and Chronically Sick and Disabled Person's Act (see Q9 above).

**Q11 What happens if there is not sufficient budget to meet needs?**

Cost is a consideration in deciding whether the provision of equipment is a reasonable adjustment but lack of budget is not a legitimate excuse for not making a reasonable adjustment. The EHRC guidance for schools (para 6.21) states "*it is not possible for a school to justify a failure to make a reasonable adjustment; the question is only whether or not the adjustment is reasonable*". This principle would apply to a LA as well as an education establishment.

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<sup>11</sup> For an example of the benefits of equipment at home see "youtube" clip on parents taking about FM systems <http://www.youtube.com/watch?v=yf1n8Fs9JHs&feature=youtu.be>

Sensory Support Services need to be aware that in considering reasonable adjustments, consideration will be given to the overall budget available to the education service and not the budget that happens to be allocated to the service.

**Q12 What can parents or young people do if they do not think they are getting the equipment required to ensure full participation?**

The EHRC advises that parents and disabled young people should seek to resolve the matter before taking the matter to Tribunal or the Court. Details of dispute resolution and mediation is given in chapter 11 of the SEND Code of Practice.

If a parent or a young person still feels that there has been a failure to provide equipment as a reasonable adjustment then they can take the matter to the SEND Tribunal but:

- The SEND Tribunal can only hear cases against schools, nurseries and pupil referral **units maintained by a local authority, grammar schools, independent (private) schools and academies (which includes free schools)**. The LA may be required to attend the Hearing if it is the responsible body for the school (section 85(7) Equality Act 2010). The case would still be on whether the school has the resources to make the reasonable adjustment (rather than the LA) but it would be the LA who would be party to proceedings. If the parents were successful in the claim the order would be made against the LA as the responsible body for the school. For those schools which are not maintained by the LA, the case would generally be against the governing body
- It cannot hear cases against the LA, FE college or private nurseries. In this case the matter would need to be heard by the county court

It is possible that organisations representing parents or young people will advise them to take the matter to both the Tribunal and County Court at the same time as both processes have to be triggered within 6 months of the alleged failure to make a reasonable adjustment taking place.

To assist the complaints process the government has produced “Discrimination and other prohibited conduct complaints: questionnaires”. These provide the opportunity for a young person with sensory impairment or their parents with the opportunity to set out the nature of the complaint and the local authority or educational establishment the opportunity to respond in a structured way.

<https://www.gov.uk/government/publications/process-for-complaints-under-the-equality-act-2010>.

A breach of the public sector duty does not create an individual cause of action – (s156 EA 2010) but it is likely to be used in the course of giving evidence.

**Q13 Does the duty to provide auxiliary aids as a reasonable adjustments apply to multi-academy trusts, as well as individual academies?**

Many individual academies now form part of wider multi-academy trusts (MATs). None of the guidance documents by DfE or EHRC make any specific references to MATs and specifically, whether the MAT can be asked to fund an auxiliary aid if it considered unreasonable for an individual academy to do so. It is possible that a Tribunal, in ruling on whether it would be reasonable or not for an academy to fund the provision of an auxiliary, may take into account the resources available to the wider MAT to which the academy belongs. However, this is speculation and, until further guidance is issued or a Tribunal gives a view on this issue, there is no hard or fast answer.

As set out earlier in response to Q3, a pragmatic response, working with the local authority may be a more sensible option.

## 6 NatSIP SURVEY AND FIELDWORK FINDINGS

### Survey 2013

- 6.1 The table below shows the number of responses from a sample of LAs to the question “*has your local authority set out the reasonable adjustments it expects education providers to make from within their delegated budgets with regard to the provision of auxiliary aids and services for children with a sensory impairment*”?

Table 1 : Policy on Equipment

	Early years		Schools		FE	
	Yes	No	Yes	No	Yes	No
<b>HI Equipment</b>	9	7	11	6	7	6
<b>VI Equipment</b>	10	5	10	4	7	5

- 6.2 At first sight it would appear that a significant number of LAs do not have a policy. However, it is possible that some LAs who responded with a “no” may have a general policy on equipment for disabled children without having anything that is specific to sensory impairment
- 6.3 LAs were asked the question; “*in considering the respective roles of the local authority and different types of education providers with regard to providing auxiliary aids and services as a reasonable adjustment, does your local authority differentiate between early year’s settings, primary schools, secondary schools and FE colleges to reflect the different levels of resources available in each institution?*”
- 6.4 Out of a sample of 20 LAs 6 said they did while 13 said they did not. On the face of it this suggests that many LAs may be ignoring the guidance that suggests that what constitutes a reasonable adjustment will vary according to the size of the establishment. However, our focus group discussions indicate that this may be because equipment is centrally provided as advised in EHRC and DfE guidance or the contribution from all establishments towards cost of equipment was minimal.

### Focus Groups

- 6.5 Our focus group discussions indicate that many LAs have adopted a pragmatic approach to the provision of equipment and continue to fund centrally with a contribution from schools. In some cases it is an amount per pupil ranging from £100 to £500 or an amount per item of equipment. The issues discussed have been covered in the frequently asked questions in section 4.

## 2014 Survey Update

### Provision of equipment for under 2 year olds

- 5.6 21 local authorities responded to our straw poll. Although the numbers are small it appears that more LAs are now providing equipment to this age group

<b>Do you provide equipment to children with SI under 2 years old:</b>			
<b>Children with :</b>	<b>Yes</b>	<b>No</b>	<b>No response</b>
<b>MSI</b>	14	5	2
<b>VI</b>	14	5	2
<b>HI</b>	15	6	

### Who pays for equipment in Education Establishments

- 5.7 The table below shows that in the majority of LAs equipment is centrally funded for pupils attending pre 16 mainstream establishments. In case of special schools there is a greater expectation that they pay from their delegated budgets. In the case of post 16, in most areas the FE college pays from its delegated budget although in once case a LA would pay if the students had a Learning Difficulty Assessment. In a few instances schools were expected to make a contribution. In one case it was £250, in another it depended on whether the school demonstrated whether it had spent £6,000 on the pupil already in another case schools were expected to pay the first £1,000 towards the total cost of equipment for the pupil.

<b>Sources of funding for equipment:</b>			
<b>Type of establishment</b>	<b>Education establishment funds from delegated budget</b>	<b>LA funds all</b>	<b>LA funds with contribution from education establishment</b>
<b>EY setting</b>		20	1
<b>Primary</b>		18	3
<b>Secondary</b>		18	3
<b>Special Schools</b>	7	11	3
<b>FE colleges</b>	14	2	1