



Department
for Education

Equalities considerations as part of the appraisal and pay determination process

**Departmental advice for local authorities,
maintained schools, academies and free
schools**

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Summary

About this departmental advice

The Department for Education is committed to helping schools eradicate unlawful discrimination through its policy-making and implementation. This advice is intended to provide support for schools in ensuring their equalities responsibilities are being met when making decisions about or relating to pay. It also provides guidance which will help schools ensure that they do not discriminate against individuals or groups of staff when making pay decisions.

Expiry or review date

This advice will be kept under review and, if necessary, updated in the light of future School Teachers' Review Body (STRB) reports.

Who is this advice for?

This advice is for:

- Local authorities
- School leaders, school staff and governing bodies in all maintained schools, academies and free schools

Overview – The Equality Act 2010

1. Schools must not directly discriminate against anyone because of a relevant protected characteristic¹. For example, if a school chooses not to give a female teacher a pay rise because she is pregnant, that is unlawful. Indirect discrimination is also potentially unlawful where, for example, a school's pay policy, though applied equally to all, might disadvantage a particular group.
2. When formulating pay policies and making pay decisions schools should take care to avoid discriminating against teachers on grounds of their protected characteristics. They should also ensure that part-time teachers² and fixed-term teachers³ are not treated less favourably. At the same time, schools should recognise the benefits of taking equalities considerations seriously. A pay system that contributes to raising educational standards will also recognise and reward teachers fairly and appropriately.
3. All public authorities – including schools – must comply with the new Public Sector Equality Duty (PSED) introduced by the Equality Act 2010⁴. To discharge the duty schools must have due regard to the need to:
 - (i) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act⁵,
 - (ii) advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it⁶,
 - (iii) foster good relations between people who share a relevant protected characteristic and people who do not share it⁷.
4. The effect of the equality duty is that schools must have due regard to the needs at (i) to (iii) above in relation to the management of their pay policies. Public authorities are also required to prepare and publish equality objectives and publish information, to demonstrate compliance with the general duty⁸. Complying with the PSED will also assist schools in avoiding direct or indirect discrimination.

¹ Protected characteristics are defined by the Equality Act 2010.

² Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

³ Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

⁴ Section 149 of the Equality Act 2010.

⁵ Applies to all protected characteristics.

⁶ Applies to age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, and sexual orientation

⁷ As per 6 above.

⁸ The Equality Act 2010 (Specific Duties) Regulations 2011.

What this means for teachers' pay

5. The duty to have due regard to the needs set out above means in the context of teachers' pay that, whenever pay policies are amended or pay decisions made for individuals, decision-makers and appraisers in schools should assess whether there are implications for people with particular protected characteristics. In particular, equality should be considered in relation to:

- **Objective setting** – the nature and weighting of performance objectives agreed during a teacher's appraisal should be non-discriminatory and should provide teachers with an equal opportunity to access pay progression. This will have implications for the training of appraisers and for the moderation of the appraisal arrangements at the school;
- **Pay progression criteria** – the nature and degree of challenge of pay progression criteria should be considered to avoid indirect discrimination.
- **Recommendations and decisions on teachers' pay progression** – the outcomes should be recorded and reported, taking account of the profile/characteristics of those who are granted pay progression and those who do not receive pay progression;
- **The nature and scale of pay progression of teachers at the school** – in particular, where some teachers receive accelerated pay progression (e.g. double-jumping), the governing body should look at the profile/characteristics of the teachers concerned as against other teachers not in receipt of accelerated progression;
- **Appeals** – both in terms of teachers accessing the appeals process and the outcome of pay appeals at the school (the Department has produced additional departmental advice aimed at supporting schools with the appeals process).

6. In that regard it is good practice for schools to record what steps they undertake to avoid discrimination before and at the time that they develop policy and take decisions, and monitor the effectiveness of those steps in eliminating discrimination - they should also keep these under review on a continuing basis. Equality monitoring is the most effective and efficient method of identifying potential inequality in workplace policies and procedures. The Equality and Human Rights Commission (EHRC) has published a considerable amount of information to help employers undertake equality monitoring. Once potential inequalities have been identified, schools should take steps to amend arrangements in order to avoid discrimination. On-going equality analysis can assist schools in identifying any potential inequality and would help demonstrate that the school is attempting to eliminate discrimination and advance equality etc. A breakdown of pay decisions according to each protected characteristic (where applicable) would provide an initial snap-shot. Comparisons year on year would then show trends and may identify potential discriminatory practices or procedures.

7. It is also important that considerations about equality issues, either at a system level or for individual teachers, take account of the cumulative effect of decisions over time. For example, individual pay progression decisions in a particular year may in themselves be taken in accordance with the school's pay policy. However, when all of the pay decisions in a school are looked at over a number of years, it may become apparent, for example, that a greater proportion of men received higher rates of pay progression or faster pay progression than women. This kind of pattern may be an indication of some form of inequality in the decision-making process and should come to light if the PSED is properly discharged. Indirect discrimination in pay decisions is more common than direct discrimination and is likely to be highlighted by annual equality monitoring of pay decisions.

8. Although, as set out above, it is important that schools embed equality throughout their management of the appraisal and pay determination process, there are some specific key areas where schools will want to take particular care in terms of ensuring that equality issues are properly considered and unlawful discrimination avoided.

(i) Non-portability of salary

9. Since September 2013, where a teacher moves from one school to another, the new school has no longer been required to match the teacher's previous salary. This new flexibility has enabled schools to better match an appropriate salary level to the specific post on offer. However, when considering new appointments and appropriate levels of salary, decisions must be taken within the context of ensuring that teachers are not discriminated against in that process on the ground of a protected characteristic. An example of this might be where a teacher returns to a school following a career break. Although it is good practice for a teacher and a school to agree the terms on which the teacher will return from the break, schools should also take into account the potential for indirect discrimination.

10. Schools should avoid discriminating against teachers returning to the profession following a career break whether they return to the same school or to another school. Blanket policies against pay portability are likely to disadvantage women teachers who have taken a break from teaching to give birth and/or to care for their children.

(ii) Teachers who are on maternity or long-term disability or sickness absence

11. Where a teacher is away from school because of maternity leave, it is unlawful for the school to deny that teacher an appraisal and subsequent pay progression decision **because of** her maternity. When a teacher returns to work from maternity leave, the school must give her any pay increases that she would have received, following appraisal, had she not been on maternity leave.

12. Schools need to take a practical and flexible approach to conducting appraisals and making pay decisions for those absent on maternity leave, including where a teacher has been absent for part or all of the reporting year.

13. In those circumstances, schools should ensure that the absent teacher receives fair treatment while ensuring the integrity and robustness of the school's appraisal process for all teachers. When considering these options, schools should seek to ensure that they minimise bureaucracy for all involved. Schools should consider conducting appraisals prior to individuals departing on maternity leave, even if this is early in the appraisal year, and basing any appraisal and pay determination on the evidence of performance to date in that appraisal year. Account could also be taken of performance in previous appraisal periods if there is very little to go on in the current year. However, schools should not require teachers to use Keeping in Touch (KIT) days for the purposes of appraisal.

14. Schools should ensure that their pay and appraisal policies incorporate any adjustments which can reasonably be made to give a teacher who is absent for disability related reasons an equal opportunity to participate in appraisal and to access pay progression. While there is no equivalent of the "maternity equality clause" (i.e. the clause that deems a woman to have received a pay rise to which she would have been entitled had she not been on maternity leave) in the Equality Act, schools should consider utilising the same range of options outlined above for teachers on maternity leave.

15. When a teacher returns to work following a disability related absence, the school must not refuse a pay increase that the teacher would have received, following appraisal, had he or she not been absent for a reason related to disability, if the reason for the refusal is the teacher's disability or the refusal cannot be objectively justified.

(iii) Equal pay considerations

16. Even where individual schools have robust pay policies in place and make pay decisions for individual teachers that are compliant with the direct discrimination provisions in the Equality Act, there is still the possibility for equal pay issues to arise. This may be where, for example, teachers seek to demonstrate that the pay policy in one school disadvantages teachers in that school compared to teachers in another employed by the same employer; and the former school had a greater proportion of either men or women affected by the respective pay policy. At this point, in order to successfully defend the claim, the employer of the teachers in both schools would need to be able to show objective justification for the difference in pay.

17. The principal means of preventing equal pay claims is for schools to ensure that individual pay decisions are fully compliant with the Equality Act as set out above, and that the duty to have due regard is discharged. Schools will need to satisfy themselves that pay decisions year on year are not indicating a pattern that might cause concern. This may be, for example, where a disproportionately higher number of men than women are receiving progression generally or higher rates of progression.

18. Schools should consider identifying:

- the pay profile of teachers by age, disability, race and gender;
- the reasons that teachers with different protected characteristics are rewarded differently if that is the case;
- whether teachers who share particular protected characteristics are being treated less favourably than other teachers.

19. The government is clear that the duties on schools and employers should not be overly burdensome and schools and local authorities will need to consider how to make best use of the data they already collect in relation to pay and how this may change as pay policies and schools' confidence in using and refining them mature over time.

Further equalities advice

Useful resources and external organisations

- <http://www.equalityhumanrights.com/advice-and-guidance/new-equality-act-guidance/equality-act-guidance-downloads/>
- <http://www.equalityhumanrights.com/publication/equal-pay-statutory-code-practice>

Other relevant departmental advice and statutory guidance

- <https://www.gov.uk/government/publications/equality-act-2010-advice-for-schools>



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