

**Disability Discrimination Act 1995**

# **Code of Practice Post-16**

**Code of Practice (revised) for  
providers of post-16 education  
and related services**



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Disability Discrimination Act 1995

# **Code of Practice Post-16**

**Code of Practice  
(revised) for providers  
of post-16 education  
and related services**

London: TSO

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# Foreword

The Disability Rights Commission has written and produced this revised Code of Practice concerning new duties (under the provisions of the Disability Discrimination Act 1995 and associated regulations) upon providers of post-16 education and related services which came into force on 1 September 2006.

This Code replaces the previous Code of Practice for providers of post-16 education and related services, which was first published in 2002.

The Disability Discrimination Act 1995 was amended by the Special Educational Needs and Disability Act 2001 and introduced, for the first time, measures prohibiting disability discrimination in the post-16 education sector (and also introduced similar measures in respect of schools – see Code of Practice: Schools).

The initial duties which came into operation on 1 September 2002 – prohibiting less favourable treatment of disabled course applicants and students for disability-related reasons and requiring reasonable adjustments to be made for disabled course applicants and students experiencing substantial disadvantage in this context – have been supplemented by further duties upon post-16 education providers to make adjustments through providing auxiliary aids and services (which came into effect on 1 September 2003), and by the duties upon post-16 education providers to make reasonable adjustments to the physical features of premises (which came into effect on 1 September 2005).

By implementing the anti-discrimination requirements of the European Employment Framework Directive (see EU Council Directive 2000/78/EC of 27 November 2000) within Great Britain – through The Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006 (Statutory Instrument 2006 No. 1721) – to apply to virtually all post-16 education providers, the government has clearly recognised the link between improving educational attainment levels for disabled people and thereby enabling better access to employment opportunities.

The new duties aim to reduce inequalities experienced by disabled people in relation to post-16 education. By doing this, it is expected that the educational attainment levels of disabled people will significantly improve and that this, in turn, will diminish inequalities disabled people experience in access to, and progression within, the labour market.

Providing effective means of obtaining increasingly necessary higher and further education qualifications is one of the ways in which full participation in society is encouraged. I firmly believe the new duties will make a real difference to disabled people in this regard and will also benefit post-16 education providers by helping them offer the highest quality of education services for all students.

**Bert Massie CBE**

Chairman,  
Disability Rights Commission

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# 1 Introduction

- 1.1 This Code of Practice replaces the earlier 'Code of Practice for providers of post-16 education and related services'.
- 1.2 This Code of Practice covers the duties set out in Chapter 2 of Part 4 of the Disability Discrimination Act 1995 (as amended by the Special Educational Needs and Disability Act 2001 and the Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006).
- 1.3 The duties imposed on the majority of post-16 education providers changed on 1 September 2006. The changes are as a result of the Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006 which implement the European Employment Framework Directive (2000/78/EC) in respect of vocational training in the further and higher education sector.
- 1.4 These changes affect the following education providers:
- higher education institutions
  - further education institutions (England and Wales)
  - colleges of further education (Scotland)
  - local education authorities securing higher and further education, including adult and community education (England and Wales)

SI 2006/1721

- education authorities securing further education (Scotland)
- other specific institutions listed in regulations (see Chapter 11 for more detail).

1.5 However, for a few post-16 education providers the duties have not changed. These education providers are:

- schools when providing further education for adults
- local education authorities when providing recreational or training facilities (in England and Wales)
- education authorities when providing recreational and training facilities (in Scotland).

The duties for these education providers are set out only in Appendix A.

1.6 This Code describes the duties as set out in Part 4 of the DDA 1995 and does not deal in detail with the Disability Equality Duty which is explained in two separate Codes: **The Duty to Promote Disability Equality: Statutory Code of Practice (England and Wales)** and **The Duty to Promote Disability Equality: Statutory Code of Practice (Scotland)**.

1.7 With the exception of a few specialist residential schools designated by regulations, schools provision, including that for pupils over 16, is not covered in this Code but in a separate **Code of Practice: Schools**.

1.8 Education providers not listed in paragraphs 1.4 and 1.5 are not covered by the post-16 provisions

of Part 4 of the DDA 1995 but may be covered by Part 3 of the Act. Those duties are not covered in this Code but in the **Code of Practice: Rights of Access: services to the public, public authority functions, private clubs and premises.**

## **Purpose of post-16 sections of Part 4 of the Act**

- 1.9 The Disability Discrimination Act 1995 (the Act) brought in measures to prevent discrimination against disabled people in the areas of employment and service provision. The Special Educational Needs and Disability Act 2001 (SENDA) amended the DDA 1995 to cover education. The post-16 sections of Part 4 of the Act deal specifically with post-16 education and with related services such as recreational and training facilities provided by local education authorities (in England and Wales) and education authorities (in Scotland). Part 4 of the Act is based on the principle that disabled people should not be discriminated against in education. Education providers must comply with the duties set out in Part 4, as must others to whom those duties apply.

## **Purpose of the Code**

- 1.10 This Code of Practice (the Code) gives practical guidance on how to prevent discrimination against disabled students and disabled people wanting to access education or other related provision. It describes the duties of education providers in this regard. The Code helps disabled people to understand the law and what they can do if they feel that they have been discriminated against. By encouraging good practice, the Code assists education providers to work towards the elimination of discrimination against disabled people and to avoid disputes.

1.11 The Code also gives guidance on the law which is intended to help lawyers when advising their clients, and to assist courts when interpreting new legal concepts. The Code explains the operation and effect of technical statutory provisions – some of which only came into force on 1 September 2006, and many of which have a complex legal effect. Because of this, the Code is necessarily comprehensive and detailed. However, the Disability Rights Commission (DRC) also produces a range of other publications about the Act, and about the rights of disabled people under it, which are intended to be of use to a range of audiences and for a variety of purposes. Details of how to obtain these publications are given in paragraphs 1.28 and 1.29.

s 53A

1.12 The DRC has prepared and issued this Code under the Act at the request of the Secretary of State. It applies to England, Wales and Scotland.

### **Status of the Code**

s 53A(8)

1.13 The Code does not impose legal obligations, nor is it an authoritative statement of the law – that is a matter for the courts. It is, however, a ‘statutory’ Code. This means that it has been approved by Parliament and is admissible as evidence in legal proceedings under the Act. Courts must take into account any part of the Code that appears to them relevant to any question arising in those proceedings. If education providers follow the guidance in the Code, it may help to avoid an adverse decision by a court in such proceedings.

## How to use the Code

- 1.14 This chapter gives an introduction to the Code.
- 1.15 Chapter 2 sets out some general guidance on how to avoid discrimination. This chapter is relevant to all education providers covered by the post-16 provisions of Part 4 of the DDA 1995.
- 1.16 Chapter 3 contains an overview of the Act's provisions on post-16 education providers, and those provisions are examined in more detail in subsequent chapters. This chapter is only relevant to those education providers listed in paragraph 1.4
- 1.17 Chapters 4, 5, 6 and 7 examine in detail the legal concepts and duties for education providers. Chapter 4 details what is meant by direct discrimination, Chapter 5 explains the duty to make reasonable adjustments for disabled people, and Chapter 6 explains disability-related discrimination and the relevance of justification. Chapter 7 explains what is meant by harassment and victimisation. These chapters are only relevant to those education providers listed in paragraph 1.4.
- 1.18 Chapters 8, 9 and 10 consider the practical application of these principles in the context of admissions, student services and qualifications. These chapters are only relevant to those education providers listed in paragraph 1.4.
- 1.19 Chapter 11 explains who has responsibility for the Act's provisions on post-16 education, particularly where third parties are involved. Chapter 12 looks at particular issues concerning adjustments to premises, and Chapter 13 deals with various other points and explains what happens if

discrimination is alleged. These chapters are relevant to all education providers covered by the post-16 provisions of Part 4 of the DDA 1995.

1.20 Appendix A outlines the duties for the education providers not affected by the changes brought about by the Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006. These education providers are:

- schools when providing further education for adults
- local education authorities when providing recreational or training facilities (in England and Wales)
- education authorities when providing recreational and training facilities (in Scotland).

1.21 Appendix B gives more information on what is meant by 'disability' and by 'disabled person'. Separate statutory guidance relating to the definition of disability has been issued under the Act. Appendix C lists other sources of relevant information about matters referred to in the Code.

1.22 Each chapter of the Code should be viewed as part of an overall explanation of the Act's provisions on post-16 education. In order to understand the law properly it is necessary to read the Code as a whole. The Code should not be read too narrowly or literally. It is intended to explain the principles of the law, to illustrate how the Act might operate in certain situations and to provide general guidance on good practice. There are some questions which the Code cannot resolve and which must await the authoritative interpretation of the courts and tribunals. The Code is not intended to be a substitute for taking appropriate

advice on the legal consequences of particular situations.

## **Examples in the Code**

- 1.23 Examples of good practice and how the Act is likely to work are given in boxes. They are intended simply to illustrate the principles and concepts used in the legislation and should be read in that light. The examples should not be treated as complete or authoritative statements of the law.
- 1.24 While the examples refer to particular situations, they should be understood more widely as demonstrating how the law is likely to be applied generally. They can often be used to test how the law might apply in similar situations involving different disabilities, or different types of post-16 education. In general, however, the examples attempt to use as many different varieties of disabilities and situations as possible to demonstrate the breadth and scope of the Act. References to men or women are given for realism and the examples could, of course, apply to people of either gender.

## **References to 'education providers' in the Code**

- 1.25 Throughout the Code, references are made to 'education providers' for convenience. However, as explained in Chapter 3 and Appendix A, the Act's provisions on post-16 education impose obligations on persons who might not ordinarily be described as post-16 education providers.

## Other references in the Code

- 1.26 References to the Act are shown in the margins. For example, s 1(1) means section 1(1) of the Act and Sch 1 means Schedule 1 to the Act. References to Part 2, 3 or 4 refer to the relevant Part of the Act. Where reference is made to regulations, the appropriate Statutory Instrument (SI) number is shown in the margin.

## Changes to the legislation

- 1.27 The Code refers to Part 4 of the Disability Discrimination Act as of 1 September 2006. There may be changes to the Act or to other legislation, for example, to the range of people who are considered to be 'disabled' under the Act, which may have an effect on the duties explained in this Code. You will need to ensure that you keep up-to-date with any developments that affect the Act's provisions. You can get relevant information from the DRC (see paragraph 1.29 for contact details).

## Further information

- 1.28 Copies of the Act and regulations made under it can be purchased from The Stationery Office (see inside the front cover of the Code for details). Separate Codes covering other aspects of the Act, and Guidance relating to the definition of disability, are also available from The Stationery Office. The text of all the DRC's Codes (including this Code) can also be downloaded free of charge from the DRC website (see paragraph 1.29).



1.29 Free information about the Act is available on the DRC website. It can also be obtained by contacting the DRC Helpline. This information is available in accessible formats.

Website: [www.drc-gb.org](http://www.drc-gb.org)

Telephone: 08457 622 633

Textphone: 08457 622 644

Fax: 08457 778 878

Post: DRC Helpline  
FREEPOST  
MID 02164  
Stratford Upon Avon  
CV37 9BR

## Table 1: Changes to the Act

The table below summarises the main changes to the Act's provisions on post-16 education taking effect on 1 September 2006. It only covers the changes for education providers described in this Code – the duties for education providers not affected by these changes are explained in Appendix A. It does not include all the changes occurring on that date, and it is not a full explanation of the law.

	Position before 1 September 2006	Position after 1 September 2006
Scope	Discrimination relevant to all education provision including admissions, student services and exclusions.	<p>New specific provisions in relation to qualifications.</p> <p>New specific provisions prohibiting discriminatory adverts.</p> <p>New specific provisions prohibiting instructions and pressure to discriminate.</p> <p>New specific duties that apply after a relationship has ended.</p>

	<b>Position before 1 September 2006</b>	<b>Position after 1 September 2006</b>
Types of discrimination	<p>Three kinds of discrimination:</p> <ul style="list-style-type: none"> <li>■ Less favourable treatment for a reason related to disability.</li> <li>■ Failure to make reasonable adjustments.</li> <li>■ Victimisation.</li> </ul>	<p>Four kinds of discrimination:</p> <ul style="list-style-type: none"> <li>■ Direct discrimination.</li> <li>■ Failure to make reasonable adjustments.</li> <li>■ 'Disability-related discrimination'.</li> <li>■ Victimisation.</li> </ul>
When is justification relevant?	<p>Justification was of relevance in cases about:</p> <ul style="list-style-type: none"> <li>■ Less favourable treatment.</li> <li>■ Failure to make reasonable adjustments.</li> </ul>	<p>Justification is only relevant in cases about:</p> <ul style="list-style-type: none"> <li>■ Disability-related discrimination.</li> </ul>
Harassment	Covered, but no separate provisions on this.	New provisions on harassment.



# 2

## How can discrimination be avoided?

### Introduction

2.1 There are various actions which education providers can take in order to avoid discriminating against disabled people. By doing so, education providers are not only likely to improve the overall performance of the institution but will also minimise the incidence of expensive and time-consuming litigation. In addition, these actions will assist education providers in complying with the Disability Equality Duty, which all those operating in the public education sector will be covered by either directly or indirectly. The Disability Equality Duty requires all public authorities – including education providers covered by the Part 4 duties outlined in this Code – when carrying out their functions to have due regard to the need to:

- promote equality of opportunity between disabled persons and other persons
- eliminate discrimination that is unlawful under the Act
- eliminate harassment of disabled persons that is related to their disabilities
- promote positive attitudes towards disabled persons
- encourage participation by disabled persons in public life; and

SI 2005/2966

- take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons.

To assist certain public authorities – including education providers – in complying with the above duty (known as the general duty), regulations lay down certain steps which these authorities must take. These are known as the 'specific duties'. They include the obligation to produce a Disability Equality Scheme which, amongst other things, requires public authorities to set out the steps which they will take (known as the action plan) to comply with the general duty. The general and specific duties do not create any individual rights for disabled people, but the Disability Rights Commission can enforce the specific duties, and a failure to comply with the general duties may result in actions in the High Court (in England and Wales) or the Court of Session (in Scotland) by way of judicial review proceedings.

- 2.2 This chapter sets out some guidance on ways to help ensure that disabled people are not discriminated against. It also addresses only some of the aspects of the Disability Equality Duty. Education providers should refer to the Statutory Codes of Practice on the Duty to Promote Disability Equality for full details of the obligations which they must comply with in relation to the duty (see Appendix C).

### **Understanding the social dimension of disability**

- 2.3 The concept of discrimination in the Act reflects an understanding that functional limitations arising from disabled people's impairments may not inevitably restrict their ability to participate

fully in society. It is often environmental factors (such as the structure of a building, or an education provider's practices) or attitudes which unnecessarily lead to these restrictions. This principle underpins the duty to make reasonable adjustments described in Chapter 5.

Understanding this will assist education providers in avoiding discrimination. It is as important to consider which aspects of education provision create difficulties for a disabled person as it is to understand the particular nature of an individual's disability.

## **Recognising the diverse nature of disability**

- 2.4 It is estimated that there are over 10 million disabled people in our society. The nature and extent of their disabilities vary widely, as do their requirements for overcoming any difficulties which they may face. If education providers are to avoid discriminating, they need to understand this, and to be aware of the effects that their decisions and actions – and those of their agents and employees – may have on disabled people. In practice many of the steps that can be taken to avoid discrimination cost little or nothing and are easy to implement.

## **Avoiding making assumptions**

- 2.5 It is advisable to avoid making assumptions about disabled people. Disabilities will often affect different people in different ways and people with the same impairment may have different needs. The following suggestions may help to avoid discrimination caused by some assumptions. Do not assume that:
- because a person does not look disabled, he is not disabled

- because you do not know of any disabled students at your institution, there are none
- most disabled people use wheelchairs
- people with learning disabilities cannot benefit from education
- a person with a mental health condition cannot do a demanding course
- all blind people read Braille or have guide dogs
- all deaf people use sign language
- because a disabled person may have fewer qualifications, or non-traditional qualifications, than a non-disabled person, he has less to offer.

### **Finding out about disabled people's requirements**

2.6 The Act requires education providers to think about ways of complying with their legal duties. Listening carefully to disabled people and finding out what they require will help education providers to meet their obligations by identifying the best way of meeting disabled people's needs. There is a better chance of reaching the best outcome if discussions are held with disabled people at an early stage. The anticipatory nature of the reasonable adjustments duty (explained in Chapter 5) requires education providers to be proactive in finding out about individual disabled people's requirements and thinking about the needs of disabled people in general. In addition, the specific duties regulations require the involvement of disabled people in the development of the Disability Equality Scheme and the gathering of evidence (see paragraph 2.14).



- 2.7 Often, discussing with disabled people what is required to meet their requirements will reassure an education provider that suitable adjustments can be carried out cheaply and with very little inconvenience.
- 2.8 There are various ways in which the views of disabled people can be obtained. Many larger education providers have established formal structures for seeking and representing the views of disabled people. Smaller education providers can also consult with disabled students, although the methods may be less formal. Guidance for education providers on the involvement of disabled people in the development of the Disability Equality Scheme is available from the DRC (see Appendix C).

A course tutor sets up a meeting with a student with a learning disability to explain the process of progressing to the next level of their course and to give the student an opportunity to discuss their requirements for the course.

A university has developed a system through which students can feed back on all elements of the university by completing on-line questionnaires. The university ensures that students are made aware of this system and that the questionnaires are available in a range of accessible formats.

### **Seeking expert advice**

- 2.9 It may be possible to avoid discrimination by using in-house knowledge and expertise – particularly if information or views are obtained

from the disabled person concerned. However, on occasion it may be necessary to seek expert advice about the needs of an individual disabled student. Expert advice might be especially useful if a person is newly disabled or if the effects of a person's disability become more marked. In addition, expert technical advice may assist in making adjustments to physical features or providing technical support for disabled students. A starting point for advice about meeting the needs of disabled people may be the university or college disability office, local and national disability organisations and further and higher education organisations which may have particular expertise in disability issues.

## **Planning ahead**

- 2.10 The duties under Part 4 of the Act are owed to disabled people in general. It is likely to be cost-effective for education providers to plan ahead. Considering the needs of a range of disabled people when planning for change (such as when a new course is being validated or an existing course is being reviewed, planning a building refurbishment, a new IT system, or the design of a website) is likely to make it easier to implement adjustments for individuals when the need arises. In addition a failure to consider the needs of disabled people in such planning is likely to render an education provider in breach of its Disability Equality Duty. The general duty requires education providers to adopt a proactive approach, mainstreaming disability equality into all relevant decisions and activities.
- 2.11 Education providers are more likely to be able to comply with their duties under the Act if they have access audits carried out to identify any improvements which can be made to a building to

make it more accessible. Access audits should be carried out by suitably qualified people, such as those listed in the National Register of Access Consultants (see Appendix C for details).

A local education authority (LEA) providing recreational and training facilities is re-designing its website, which it uses to promote the organisation as well as to advertise courses. The provider ensures that the new design for the website is easy to read for people who use a variety of access software; has the website checked for accessibility; and invites disabled readers of the website to let the provider know if they find any part of it inaccessible.

## Auditing policies and procedures

2.12 Part 4 places a duty on education providers to anticipate the needs of disabled people in general. In order to comply with this duty, education providers need to keep all their policies under review, and to consider the changing needs of disabled people as part of this process. It is advisable for education providers to do this in addition to having a specific policy to prevent discrimination. Education providers are likely to have policies about matters such as:

- data protection
- freedom of information
- health and safety
- equal opportunities
- assessment
- admissions
- disciplinary procedures and code of conduct

- student complaints procedure
- student charter
- learning and teaching
- emergency evacuation procedures.

All of these policies (and any other that an education provider has) need to be regularly reviewed and, if necessary, amended to ensure they do not discriminate against disabled people.

A further education college has a students' charter which includes a commitment to ensuring that all students are informed about the college's policies and procedures through an intranet site. The charter says that the intranet site should be accessible to all students, including those who use access software.

A further education college has a procedure for the timetabling and room allocation of all examinations. An early stage of the procedure is to gather information from students about any reasonable adjustments they require in the examinations so that these can be taken into account when scheduling the examinations.

An education provider introduces an admissions policy. It takes advice from a number of disability organisations to ensure that the system it introduces doesn't discriminate against disabled people. It also ensures that every year the system is monitored to ensure that disabled applicants are not, on average, less likely to gain admission than non-disabled applicants and if they are that they take measures to address this.

A university revises its disciplinary procedure to include consideration of disability-related absence when making decisions about issues relating to course attendance. Disability-related absence is separately recorded in attendance registers.

A community education provider using new buildings reviews the emergency evacuation policies and procedures to ensure that there are individual evacuation plans for any disabled people who need them.

## **Implementing anti-discriminatory policies and practices**

2.13 Education providers are more likely to comply with their duties under the Act, and to avoid the risk of legal action being taken against them, if they implement anti-discrimination policies and practices. These are often referred to as equality policies or diversity policies. Additionally, in the event that legal action is taken, education providers may be asked to demonstrate to a court that they have effective policies and procedures in place to minimise the risk of discrimination. Although large and small education providers are likely to have different kinds of anti-discrimination policies and practices, it is advisable for all education providers to take the following steps:

- Establish a policy which aims to prevent discrimination against disabled people and which is effectively communicated to all students, employees and agents of the education provider.

- Inform all students, employees and agents that conduct which breaches the policy will not be tolerated, and respond quickly and effectively to any such breaches.
- Provide disability awareness and equality training to students and employees. In addition, train employees and agents so that they understand the education provider's policy on disability, their obligations under the Act and, in particular, the legal duty to make reasonable adjustments. Some employees/agents may have discrete, more frequent and predictable contact with disabled people than others and, therefore, require more specialised training.
- Monitor the implementation and effectiveness of such a policy.
- Address acts of disability discrimination by students and employees as part of disciplinary rules and procedures.
- Have complaints and grievance procedures which are easy for disabled people to use and which are designed to resolve issues effectively.
- Have clear procedures to prevent and deal with harassment for a reason related to a person's disability.
- Establish a policy in relation to disability-related absence, and monitor the implementation and effectiveness of such a policy.
- Consult with disabled students about their experiences of the education provider.

- Regularly review the effectiveness of reasonable adjustments made for disabled people in accordance with the Act, and act on the findings of those reviews.
- Keep clear records of decisions taken in respect of each of these matters.

An adult education college introduces a new disability policy. It discusses with its HR department how best to deliver training to its staff, many of whom work part-time. The HR department asks an external training company run by disabled people to run training sessions for all staff.

A small education provider introducing a similar policy asks the chief executive to devote a staff meeting to explain the policy to her staff and to discuss why it is important and how it will operate.

A large further education college issues a questionnaire to students about their experiences of attending the college. The questionnaire invites specific comments on the quality of provision for disabled students.

A small education provider asks disabled learners to feed back views on the provider's approach to disability issues.

## Gathering information

- 2.14 Gathering information relating to students is an important way to determine whether anti-discrimination measures taken by an organisation are effective, and ensuring that disability equality is a reality within that institution.
- 2.15 Gathering information about students is a different process to obtaining information from individual disabled students about their reasonable adjustments requirements. The processes should be separate and it should be made clear to students and applicants why the information is being collected.
- 2.16 The disability equality specific duties require public authorities to set out the following in their Disability Equality Schemes:
- arrangements for gathering information on the effect of their policies and practices on the educational opportunities available to, and on the achievements of, disabled students
  - arrangements for gathering information on the effect of their policies and practices on the recruitment, development and retention of their disabled employees.
- 2.17 It is important to understand that information gathering is not an end in itself but that the information obtained must be analysed and used as the basis for preparing disability action plans, and reviewing the effectiveness of those actions taken. The information gathered is in fact evidence of an authority's progress in relation to disability equality. For this reason the Disability Equality Scheme is also required to include a statement of the public authority's arrangements for making use of the information gathered in these ways and



in particular its arrangements for reviewing on a regular basis the effectiveness of the action plan and preparing subsequent Disability Equality Schemes.

- 2.18 'Educational opportunities' should be interpreted broadly, to include aspects across the breadth of activities made available by the education provider. It may include gathering information on harassment and bullying, as well as information on the promotion of positive attitudes towards disabled students and pupils and the encouragement of their participation in public life.
- 2.19 'Achievements' should be interpreted to include not only the attainment of formal qualifications, but also a range of other achievements such as improving attendance or achieving positions of responsibility.
- 2.20 Information must be gathered sensitively, with appropriately worded questions, and confidentiality must be ensured. Knowing the proportion of disabled people at various levels of the institution, and at various stages in relation to the admissions process, can help an education provider determine where practices and policies need to be improved. The extent to which formal monitoring can be carried out will depend on the size of the institution.
- 2.21 Monitoring will be more effective if students (or applicants) feel comfortable about disclosing information about their disabilities. This is more likely to be the case if the education provider explains the purpose of the monitoring and if students or applicants believe that the education provider genuinely values disabled students and is using the information gathered to create positive change.

A sixth form college monitors the participation of students in optional college activities. The college becomes aware that, although there are a number of disabled students attending the college, students with mobility-related impairments are less likely to participate in these activities. It uses this information to review the accessibility of the activities including the timing, transport arrangements and venues.

- 2.22 Some institutions, especially large ones, choose to monitor by broad type of disability to understand the barriers faced by people with different types of impairment.

A university notices through monitoring that the institution has been successful at retaining most groups of disabled people on courses, but not people with mental health conditions. It acts on this information by contacting an organisation that provides advice and good practice in providing education to people with mental health conditions and acting on the advice received.

- 2.23 Many education providers will already be collecting information on disability. They will need to ensure that this evidence is both appropriate and sufficient to enable them to consider the impact which their policies and practices are having upon their general duty to promote disability equality.

A university is collecting a wide range of information but this is held in a number of different departments such as the Registry and the Faculty. The university uses a cross-

departmental group to collate information about its students and review why the information is collected and how it is used.

- 2.24 Public authorities are required to put into effect arrangements for gathering information and making use of it. In their annual reporting on the duty, they must set out the results of the information gathering which they have carried out. This should detail the evidence which has been obtained and the implications of that evidence. In addition, the authorities should spell out what has been done with the information which has been obtained and what actions will be taken as a result of that.

### **Attracting disabled applicants**

- 2.25 An education provider that becomes aware that suitably qualified disabled people have not applied to study on courses it provides should take steps to encourage disabled people to apply. Failing to act on a recognition that disabled people are not applying to the education provider is likely to be in breach of the Disability Equality Duty.
- 2.26 It will be helpful for education providers to seek advice from local or national disability organisations on ways to attract disabled people or to work with other local providers of education and schools. Providing information about the support available for disabled students and holding 'open days' to enable disabled applicants to discuss support needs may encourage applications from disabled people.

By monitoring the admissions process, an education authority notices that very few disabled people apply for courses. In light of this information, it decides to ask a local organisation of disabled people to advertise its courses.

A further education college is advertising its new prospectus of courses. It places an advert in the newsletter of a local disability organisation and arranges 'drop-in' sessions in conjunction with the disability organisation for disabled people to find out more about studying at the college.

2.27 Education providers need to consider carefully what information should be included in advertisements and promotional materials and where they should be placed. This is necessary both to encourage disabled applicants and to avoid breaching the discriminatory advertisement provisions. Further details about the obligations not to discriminate in advertisements are provided in paragraphs 8.15 to 8.18.

A prospectus that makes clear reference to the policy and procedures of an institution in relation to disabled people may encourage more disabled people to apply for courses.

An advertisement that appears in the disability press and talking newspapers may encourage disabled people to apply for courses.

## Promoting a positive image

- 2.28 One of the aspects of the Disability Equality Duty, as outlined above, is the need to promote positive attitudes towards disabled people. As well as contributing to the overall goal of equality of opportunity, promoting such attitudes will ensure that education providers demonstrate that they are aware of the needs of disabled people and that they are striving to create a more diverse student body. It will in turn attract more disabled students, and encourage more students and prospective students to participate in the monitoring which the provider is conducting.

A university ensures that its 'Graduation Success Stories' includes the successes of disabled graduates in an appropriate and sensitive manner including those with hidden disabilities.

A sixth form college reviews the images used in its careers materials to ensure that they reflect positive images of disabled people.

## Resolving disputes

- 2.29 Having policies and practices to combat discrimination, together with regular consultation with students, is likely to minimise disputes about disability discrimination. But when such disputes do occur, it is in the interest of education providers to attempt, wherever possible, to resolve them as they arise. Complaints procedures can provide an open and fair way for students to make their concerns known, and can enable complaints to be resolved quickly before they become more

significant problems. Use of the complaints procedures may highlight areas in which the duty to make reasonable adjustments has not been observed, and can prevent misunderstandings leading to complaints of discrimination being commenced in court. It is important to ensure that complaints procedures are accessible to disabled people.

2.30 Chapter 13 contains further information about complaints procedures and about resolving disputes under the Act. Any attempts at internal resolution of a dispute should be carried out in a non-discriminatory way to comply with the Act.

# 3

## The Act's provisions on post-16 education: an overview

### Introduction

3.1 This chapter gives an overview of the provisions of the Act relating to post-16 education. It explains who has rights and duties under those provisions and outlines what is made unlawful by them. Later chapters explain the provisions in greater detail. This chapter describes the duties for the following education providers only:

- higher education institutions
- further education institutions (England and Wales)
- colleges of further education (Scotland)
- local education authorities when securing higher and further education, including adult and community education (England and Wales)
- education authorities when securing further education (Scotland)
- other specific institutions listed in regulations (see Chapter 11 for more detail).

### Who has rights under the Act?

#### Disabled people

3.2 The Act gives protection from discrimination to a 'disabled' person within the meaning of the Act. A 'disabled' person is someone who has a physical or mental impairment which has an effect

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on his or her ability to carry out normal day-to-day activities. That effect must be:

- substantial (that is, more than minor or trivial); and
- adverse; and
- long term (that is, it has lasted or is likely to last for at least a year or for the rest of the life of the person affected).

3.3 Physical or mental impairment includes sensory impairment. Hidden impairments are also covered (for example, mental illness or mental health conditions, learning disabilities, dyslexia, diabetes and epilepsy).

3.4 In addition to the basic definition of a 'disabled person' there are some special provisions and exceptions. This means that in the case of people with severe disfigurements the disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities. Some progressive conditions are automatically deemed to be disabilities for the purposes of the Act, others will be subject to the special rules on progressive conditions. Further details are provided in Appendix B.

3.5 In considering its duties under the Act, an education provider should not use any definition of 'disabled person' which is narrower than that in the Act. An education provider who is requested to make a disability-related adjustment may ask the person requesting it for evidence that the impairment is one which meets the definition of disability in the Act. It may be appropriate to do so where the disability is not obvious or where the adjustment is not something that could have been



anticipated. However, education providers should not ask for more information about the impairment than is necessary for this purpose. Nor should they ask for evidence of disability where it ought to be obvious that the Act will apply.

A woman who requires dialysis as a result of her health condition asks to miss lectures to attend regular hospital appointments. The education provider could legitimately ask to see a letter from the doctor or an appointment card. However, the education provider then asks her questions about why she needs dialysis and the cause of her health condition. These are unnecessary questions and are likely to amount to discrimination.

- 3.6 In order to avoid discrimination, it would be prudent for education providers not to attempt to make a fine judgement as to whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the needs of each student and applicant.

### **People who have had a disability in the past**

- 3.7 People who have had a disability within the meaning of the Act in the past are protected from discrimination even if they no longer have the disability.

An applicant discloses on her application form that from 1992 to 1994 she had long-term depression after her father died. Refusing to interview or offer her a place on a course because she has had a disability in the past is likely to amount to discrimination. The fact that

the disability preceded the Disability Discrimination Act 1995 is irrelevant.

### **Overlap with other definitions**

3.8 The definition of disability used in the Act is not the same as other definitions in other legislation. In particular, the definition is not the same as the definition of 'difficulty in learning' used in the Further and Higher Education (Scotland) Act 2005 or the definition of 'learning difficulty' used in the Learning and Skills Act 2000. The Disability Discrimination Act definition is based on ability to carry out normal day-to-day activities, whereas the Learning and Skills and Further and Higher Education (Scotland) Acts definitions relate specifically to learning. Some people may be covered by both, and others may be covered by only one of these definitions. Education providers should be aware that they may need to make different provision for people covered by the different pieces of legislation.

### **More information about the meaning of disability**

3.9 For a fuller understanding of the concept of disability under the Act, reference should be made to Appendix B. A government publication, **Guidance on matters to be taken into account in determining questions relating to the definition of disability**, provides additional help in understanding the concept of disability and in identifying who is a disabled person. Where relevant, the guidance must be taken into account in any legal proceedings.

## People who have been victimised

- 3.10 The Act also gives rights to people who have been victimised, whether or not they have a disability or have had one in the past. (See paragraphs 7.2 to 7.8.)

s 55

## Students

- 3.11 The Act applies to any disabled people (including those overseas) who are enquiring about, or applying for, admission to a course in Great Britain, and any disabled students (including those overseas) attending, undertaking or enrolled on a course in Great Britain.

s 31A(3)

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A disabled student from Germany applies to a university in Britain to undertake a year's study as part of his course. The British university has a duty not to discriminate against him when he is enquiring about the period of study, when he is applying to the university, or whilst he is attending the university.

- 3.12 A student does not have to be undertaking a complete course to have rights under the Act. Someone who is enquiring about, applying to, attending or undertaking a course of study at an educational institution (however long or short the study period) is covered. This includes people doing single modules, evening courses or distance learning. Similarly, anyone enquiring about, applying to or enrolled on a course or using recreational or training facilities provided by a local education authority (England and Wales) or education authority (Scotland) is protected by the Act.

A disabled school pupil applies to do a taster course at her local further education college as part of a programme to encourage young people to stay in learning after 16. The further education college has a duty not to discriminate against her when she is enquiring about or applying for the taster day, or during the day she attends the college.

A disabled adult learner decides to undertake a distance learning course in computer studies provided by a higher education institution. The higher education institution has a duty not to discriminate against the learner when he enquires about or applies for the course, or when he is enrolled on the course.

s 28UA

### **Ex-students**

- 3.13 The Act also applies to any disabled person who has been a student. This is explained in greater detail in paragraphs 9.49 to 9.52.

## **Who has obligations under the Act?**

### **Education providers**

s 28R(6) and (7)  
Sch 4C Para 1  
and 10

- 3.14 Only those education providers listed in Chapter 2 of Part 4 of the Act have duties under that chapter. Those that are not listed do not have duties under the post-16 provisions of Part 4 but may have duties under Chapter 1 (the schools provisions) of Part 4 or under Part 3 (see paragraphs 3.19 to 3.22).
- 3.15 The changes to Chapter 2 of Part 4 of the Act (the post-16 provisions) that came into force in September 2006 do not affect all of the post-16

education providers listed in the Act. There are two different sets of duties for two types of post-16 education providers.

3.16 The first set of duties apply to the following education providers:

- institutions in the higher education sector
- institutions in the further education sector and, in Scotland, colleges of further education
- local education authorities when securing higher and further education, including adult and community education and, in Scotland, education authorities when securing further education
- other specific institutions listed in regulations (see Chapter 11).

These duties are explained in detail in Chapters 3 to 13 of this Code.

3.17 The second set of duties apply to the following education providers:

- schools when providing further education for adults under s 58 of the School Standards and Framework Act 1998
- local education authorities when providing recreational or training facilities (in England and Wales) and education authorities when providing recreational or training facilities (in Scotland).

The duties that apply to these education providers are set out only in Appendix A.

3.18 Further details on all the education providers covered by the post-16 sections of Part 4 are set out in Chapter 11.

### **Other providers of education**

3.19 The post-16 sections of the Act do not apply to other providers of education, even if the provision, education or qualifications they offer are the same as those offered by the organisations that are covered. The key issue is whether the education provider itself is covered. If the provider is not one of those listed above, the provision does not fall under the post-16 sections of the Act. However, as is explained in the following paragraphs, that provider may have responsibilities under other Parts of the Act.

3.20 Schools providing sixth form education to pupils over 16 have duties under the Schools provisions of Chapter 1 of Part 4 of the Act. For further details of these duties see the **Code of Practice: Schools**.

3.21 Private providers of post-16 education, such as private colleges (other than those listed in regulations – see paragraph 3.14) or training providers are not covered by Part 4 of the Act but by Part 3 of the Act. For further details of these duties see the **Code of Practice on Rights of Access: services to the public, public authority functions, private clubs and premises**.

3.22 Training and recreational facilities not provided by local education authorities (England and Wales) or education authorities (Scotland), such as clubs and activities run by voluntary organisations, the Scouts or other youth clubs are not covered by the post-16 sections of the Act. They are covered by the Part 3 duties.

A university in the USA offers its students the opportunity to study for a year in Great Britain. The students attend lectures and seminars in a college in Great Britain owned and run by their home institution. This provision is not covered by Part 4, but is likely to be covered by Part 3.

A private college offers a course in typing and shorthand leading to an examination. The course and the qualification are identical to those offered by a nearby further education college. However, the private college is not covered by Part 4 of the Act, but by Part 3.

A school sixth form provides further education funded by the Learning and Skills Council. However, the institution itself is not a college. The sixth form will be covered by the schools sections of the Act and not the post-16 sections.

A voluntary organisation runs a youth club. It receives some funding from the local authority. However, the club is not part of Youth and Community Services and so falls within Part 3 of the Act, not Part 4.

A students' union at a university is not an education provider under post-16 Part 4. Therefore any discrimination by a students' union will not be covered by Part 4 but by Part 3 of the Act.

### Others to whom the post-16 provisions apply

3.23 In addition, the Act's provisions on post-16 education may also impose obligations upon the following people and organisations:

- landlords of premises occupied by an education provider to whom the post-16 provisions apply (see Chapter 12)
- employees and agents of an education provider to whom the post-16 provisions apply (see Chapter 11).

### Overlap with qualifications bodies

3.24 Professional bodies conferring professional or trade qualifications have duties under Part 2 of the Act. For further details see the **Code of Practice for Trade Organisations and Qualifications Bodies**. From September 2007 general qualifications bodies conferring general qualifications, such as GCSEs, will have duties under Part 4 of the Act. The overlap between post-16 education providers and bodies awarding qualifications is explained in more detail in Chapter 11.

### What does the Act say about discrimination in post-16 education?

#### Effect of the Act

- 3.25 The Act makes it unlawful for an education provider to discriminate against a disabled person in relation to the provision of education and related services. The Act also makes it unlawful for an education provider to harass a disabled person (see paragraph 3.32).
- 3.26 The Act does not prevent education providers from treating disabled people more favourably



than those who are not disabled, although there may be other legal obligations that affect this.

### **Forms of discrimination**

3.27 The four forms of discrimination which are unlawful for education providers are:

- direct discrimination (explained in Chapter 4)
- failure to comply with a duty to make reasonable adjustments (explained in Chapter 5)
- 'disability-related discrimination' (explained in Chapter 6); and
- victimisation of a person (whether or not he is disabled) (explained in Chapter 7).

### **Aspects of education in respect of which discrimination is unlawful**

3.28 In relation to admissions, the Act says that it is unlawful for an education provider to discriminate against a disabled person:

- in the arrangements made for determining admissions to the institution
- in the terms on which it offers to admit him to the institution, or
- by refusing or deliberately omitting to accept an application for his admission to the institution.

What this means in practice is explained in Chapter 8.

3.29 In relation to 'provision for students', the Act says that it is unlawful for an education provider to discriminate against a disabled student:

**s 28R(1)**

**s 28R(2) and (3)**

- in the student services it provides, or offers to provide
- by excluding him from the institution either permanently or temporarily.

What this means in practice is explained in Chapter 9.

3.30 In relation to qualifications conferred by the education provider, the Act says that it is unlawful for an education provider to discriminate against a disabled person:

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

What this means in practice in relation to students is explained in Chapter 9, and in relation to non-students is explained in Chapter 10.

3.31 The Act also makes it unlawful for an education provider to discriminate against a disabled person after the relationship between the education provider and the disabled person has come to an end (see paragraphs 9.49 to 9.52).

## What else is unlawful under the Act's provisions on post-16 education?

### Harassment

- 3.32 In addition to what it says about discrimination, the Act says it is unlawful for an education provider to subject a disabled person who is a student at that institution, or seeks admission as a student to that institution, to **harassment** for a reason which relates to his disability. The Act also says that it is unlawful to subject a disabled person who holds or applies for a qualification conferred by the education provider to harassment. What the Act says about harassment is explained in more detail in Chapter 7.

s 28SA

### Instructions and pressure to discriminate

- 3.33 It is also unlawful for an education provider to instruct another person, or put pressure on him, to act unlawfully under the post-16 provisions of Part 4. This means pressure to discriminate, whether applied directly to the person concerned, or indirectly but in a way in which he is likely to hear of it. However, the Act does not give individual disabled people the right to take legal action in respect of unlawful instructions or pressure to discriminate. Such action may only be taken by the DRC (see paragraphs 13.11 to 13.12).

s 28UB and  
s 28VA

### Who is liable for unlawful acts?

- 3.34 The legal responsibility for ensuring that discrimination does not take place lies with the responsible body for an education provider. There may also be instances when an education provider is responsible for the acts of others. This is explained in more detail in Chapter 11.

s 28R(5) and  
Sch 4B

## Other provisions

### Terms of agreements

s 28X

3.35 Any term in an agreement is void (and therefore unenforceable) if its effect is to:

- require someone to do something which would be unlawful under the Act
- exclude or limit the operation of the Act; or prevent someone making a claim under the Act.

A college requires a disabled student travelling on a field trip to sign an agreement stating that he does not hold the college responsible for making any adjustments to aspects of the trip because of his disability. This agreement is not legally binding. Therefore it cannot be enforced and does not prevent the student from making a claim under the Act.

s 28X

3.36 An agreement to settle or compromise a claim brought under the Act is not affected by this rule.

### What does the Act say about statutory obligations?

s 59

3.37 An education provider is not required to do anything under the Act that will result in a breach of legal obligations under any other legislation or enactment. However, it is only in cases where a statutory obligation is specific in its requirements, leaving an education provider with no choice other than to act in a particular way that the provisions of the Act may be overridden. This provision in the Act is of narrow application, and it is likely to permit disability discrimination only in rare circumstances. Nothing in the Act makes

unlawful anything done for safeguarding national security.

### **Enforcing rights under the post-16 provisions of Part 4**

- 3.38 Claims of disability discrimination under the post-16 provisions of Part 4 are taken in the county court in England and Wales or the sheriff court in Scotland. More information about enforcement is given in Chapter 13.

### **Introduction to the different forms of discrimination**

- 3.39 Chapters 4, 5, 6 and 7 describe the four forms of discrimination relevant to education providers in more detail, and explain the differences between them. They explore, in particular, the distinction between direct discrimination and disability-related discrimination. These two forms of discrimination both depend on the way in which the education provider treats the disabled person concerned – both require the disabled person to have been treated less favourably than other people are (or would be) treated. However, whether such treatment amounts to one of these forms of discrimination or the other (and, indeed, whether the treatment is unlawful in the first place) depends on the circumstances in which it arose.
- 3.40 The order in which the forms of discrimination are described is not intended to indicate a hierarchy of discrimination. Each form of discrimination constitutes a breach of the Act and therefore enables a disabled person to make a claim against the education provider. However, the order in which the forms of discrimination are described may provide a useful order in which to consider

s 28V

3

the different forms to ascertain whether or not discrimination has taken place.

# 4 What is direct discrimination?

## Introduction

- 4.1 One of the ways in which an education provider discriminates against a disabled person is where the education provider treats the disabled person less favourably, **on the grounds of his disability**. This chapter examines this form of discrimination.

## What does the Act say?

- 4.2 The Act says that an education provider's treatment of a disabled person amounts to direct discrimination if:
- the treatment is on the ground of his disability, and
  - the treatment is less favourable than the way in which a person not having that particular disability is (or would be) treated; and
  - the relevant circumstances, including the abilities, of the person with whom the comparison is made are the same as, or not materially different from, those of the disabled person.
- 4.3 Direct discrimination depends on an education provider's treatment of a disabled person being less favourable on the ground of his disability, as compared with the way in which the education provider treats (or would treat) an appropriate comparator. If, on the ground of his disability, the disabled person is treated less favourably than the

s 28S(10)

comparator is (or would be) treated, the treatment amounts to direct discrimination. (Identifying an appropriate comparator is explained in paragraph 4.9.)

### **When is direct discrimination likely to occur?**

- 4.4 Treatment of a disabled person is 'on the grounds of' his disability if it is caused by the fact that he is disabled or has the disability in question. However, disability does not have to be the only (or even the main) cause of the treatment complained of – provided that it is one of the reasons for the treatment.
- 4.5 If the less favourable treatment occurs because of the education provider's generalised, or stereotypical, assumptions about the disability or its effects, it is likely to be direct discrimination. This is because an education provider would not normally make such assumptions about a non-disabled person, but would instead consider his individual abilities. Decisions based on the fact that a person has a disability rather than on the effects of the disability are likely to be direct discrimination. In addition, less favourable treatment which is disability-specific, or which arises out of prejudice about disability (or about a particular type of disability), is also likely to amount to direct discrimination.

A blind woman is not offered a place on an IT course because the education provider wrongly assumes that blind people cannot use computers. The education provider makes no attempt to look at her individual circumstances or abilities but makes an assumption based on the fact she is blind. The education provider has treated the woman less favourably than other



people by not offering her a place on the course. The treatment was on the grounds of the woman's disability (because assumptions would not have been made about a non-disabled person). This is likely to be direct discrimination and therefore unlawful.

A lecturer seeking to appoint a student representative for a course rejects an application from a disabled student with a severe facial disfigurement solely on the ground that other student representatives might be uncomfortable working alongside him. This is likely to amount to direct discrimination and therefore to be unlawful.

A disabled woman who uses a wheelchair applies for a history course. She has the same qualifications as other applicants, but the education provider wrongly assumes that the wheelchair will cause an obstruction in the lecture rooms. Therefore she is not offered a place on the course. Other applicants with the same qualifications but who are not wheelchair-users were offered places. This is likely to amount to direct discrimination and therefore be unlawful.

- 4.6 Direct discrimination will often occur where the education provider is aware that the disabled person has a disability, and that is the reason for the education provider's treatment of him. However, direct discrimination may also occur even though the education provider is unaware of a person's disability.

A lecturer makes it clear that progression onto the next stage of a course will require commitment and good attendance. The lecturer recommends that people who have mental health conditions, the effect of which may result in problems with attendance, should consider whether the course would be suitable for them. A student on the course who did not attend a number of sessions during the previous year of the course due to periods of depression decides to leave the course because of the comments. This is likely to amount to direct discrimination and therefore be unlawful.

- 4.7 Direct discrimination need not be conscious – people may hold prejudices that they do not admit, even to themselves. Thus, a person may behave in a discriminatory way while believing that he would never do so. In some cases, apparently neutral reasons for less favourable treatment of a disabled person may, on investigation, turn out to be direct discrimination.

A student with a speech impairment is studying for a politics degree. A lecturer does not enter the student as a candidate for a debating session because he assumes that students with speech impairments would have difficulty participating. Although the lecturer had good intentions when making this assumption, the effect was to treat the disabled student less favourably on the grounds of his disability. The act of direct discrimination in this case is the assumption that anyone who has a speech impairment would have difficulty participating in a debating session, effectively rejecting a whole category of people with no consideration for their individual abilities.

4.8 In situations such as those described in the above examples, it will often be readily apparent that the disabled person concerned has been treated less favourably on the grounds of his disability. In other cases, however, this may be less obvious. The way of telling whether or not the treatment is discriminatory (and of establishing what kind of discrimination it is) is to focus on the person with whom the disabled person should be compared.

### **Identifying comparators for direct discrimination**

4.9 In determining whether a disabled person has been treated less favourably in the context of direct discrimination, his treatment must be compared with that of an appropriate comparator. This must be someone who does not have the same disability. It could be a non-disabled person or a person with other disabilities. The comparator may be real or hypothetical (see paragraph 4.15).

Student A who has a mental health condition is absent from his course for one term because of his disability, and is removed from the course. Non-disabled student B who is also absent for one term because of a family bereavement is not removed from the course. Student C is a wheelchair user who is also absent for one term because of a family bereavement and is not removed from the course. On the face of it this appears to be less favourable treatment on the grounds of student A's disability. Student B is potentially an appropriate comparator as he is not disabled. Similarly student C is potentially an appropriate comparator as he has a different disability.

## Relevant circumstances

- 4.10 An appropriate comparator is one whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person. There is no need to find a comparator whose circumstances are the exactly same as those of the disabled person in every respect. The comparator's **relevant circumstances** (including his abilities) must be the same as, or not materially different from, those of the disabled person.

In the previous example, the relevant circumstances are the course and period of absence. Both student B and student C have the same relevant circumstances as student A and therefore either is an appropriate comparator.

- 4.11 In order to identify an appropriate comparator it is necessary to first identify the **relevant circumstances** in respect of the less favourable treatment complained of. It is important therefore to focus on those circumstances which are, in fact, relevant to the matter to which the less favourable treatment relates.

A disabled person who has an impairment that affects her dexterity is not entered for an exam because her handwriting speed is slower than that of her peers. The relevant circumstance in this instance is the writing speed. Therefore, the correct comparator would be a person not having the dexterity-related impairment who writes at the same speed.

A wheelchair user with one GCSE is not accepted on a business studies A level because the entry requirements onto the course require applicants to have two GCSEs. The correct comparator is a person who is not a wheelchair user who also has one GCSE.

A disabled person with schizophrenia applies for a place on a course at his local college and declares his history of mental illness. The college refuses him a place. The decision is based on assumptions about the effects of schizophrenia, without adequate consideration of the individual's abilities and the impact of the impairment in his particular case. The comparator here is a person who does not have schizophrenia, but who has the same abilities to do the course (including relevant qualifications and experience) as the disabled applicant. Such a person would not have been rejected without adequate consideration of his individual abilities.

- 4.12 In some cases, the **effects** of the disability may be relevant; however, the fact of the disability itself is not a relevant circumstance for these purposes. This is because the comparison must be with a person **not** having that particular disability.

An education provider does not accept a woman with cerebral palsy onto a course in car maintenance because the course requires a level of manual dexterity which she does not have. The correct comparator is someone who does not have cerebral palsy but has a similar level of manual dexterity and is accepted onto the course.

4.13 If a disabled person alleges that he has been refused a place on a course on the grounds of his disability, it is only appropriate to compare those of his circumstances which are relevant to his ability to do the course. It is not appropriate to compare other circumstances which are not relevant to this issue. The need to focus on relevant circumstances applies not only to admissions cases of this kind, but also to any other situation where direct discrimination may have occurred.

In the above example, the speech of the applicant is also affected by her cerebral palsy. The course does not require clarity of speech. The comparator in a claim for direct discrimination would be an applicant with a similar level of manual dexterity but it would not be necessary for the comparator to have a speech impairment (because the way in which the applicant speaks is not relevant to the applicant's ability to do the course).

4.14 Once an appropriate comparator is identified, the situations described in the examples at paragraph 4.5 and 4.11 could amount to direct discrimination.

In the example about the blind woman who is not offered a place on the IT course, there is direct discrimination because the woman was treated less favourably on the grounds of her disability than an appropriate comparator (that is, a person who is not blind but who has the same abilities to do the course as the blind applicant). Such a person would not have been rejected out of hand without consideration of her individual abilities.

In the example about the disabled person with a severe facial disfigurement who applies to be a student representative, there is direct discrimination because the student was treated less favourably on the grounds of his disability than an appropriate comparator (that is, a person who does not have such a disfigurement but who does have the same abilities to do the job). Such a person would not have been rejected in the same way.

In the example about the disabled woman who is not offered a place on a history course because she uses a wheelchair, there is direct discrimination because the woman was treated less favourably on the grounds of her disability than an appropriate comparator (that is, a person who does not use a wheelchair but who does have the same abilities to do the course). Such a person would not have been rejected in the same way.

In the example about the disabled person who is not entered for an exam because her handwriting is slower than that of her peers, this would be direct discrimination if another person who does not have the same impairment but with a similar writing speed was or would have been entered for the exam.

In the example about the wheelchair user not accepted on a business studies A level. This would be direct discrimination if another applicant, who was not a wheelchair user, with only one GCSE was accepted or would have been accepted onto the course.

In the example about the disabled person with schizophrenia refused a place on a course, there is direct discrimination because the disabled person was treated less favourably on the grounds of his disability than an appropriate comparator (that is, a person with the same abilities).

- 4.15 It may not be possible to identify an actual comparator whose relevant circumstances are the same as (or not materially different from) those of the disabled person in question. In such cases a hypothetical comparator may be used. Evidence which helps to establish how a hypothetical comparator would have been treated is likely to include details of how other people were treated in circumstances which were broadly similar.

In the example at 4.9, student A is removed from his course due to his absence from the course for one term because of his mental health condition. If, in a similar situation, there was no actual comparator, such as students B and C, but a student on the course was told that she could have time off for pregnancy leave, then the treatment of this student might be used as evidence that a hypothetical non-disabled student who misses a term would not have been removed from the course.

- 4.16 It should be noted that the type of comparator described in the preceding paragraphs is only relevant to disability discrimination when assessing whether there has been direct discrimination. A different comparison is made when assessing whether there has been a failure to comply with a duty to make reasonable



adjustments (see Chapter 5) or when considering disability-related discrimination (see Chapter 6).

### **Relevance of reasonable adjustments to comparison**

- 4.17 When comparing a disabled person's abilities with another person's abilities to consider whether or not direct discrimination has occurred, the disabled person's abilities should be assessed **as they in fact are**, whether or not reasonable adjustments have been made.
- 4.18 In some cases there will be particular reasonable adjustments which an education provider was required by the Act to make, but in fact failed to make. It may be that those adjustments would have had an effect on the disabled person's abilities. But in making the comparison, the disabled person's abilities should be considered as they **in fact** were, and not as they would or might have been had those adjustments been made. (The failure to make reasonable adjustments may give rise to a separate claim. The duty to make reasonable adjustments is explained in Chapter 5.)
- 4.19 On the other hand, if adjustments have in fact been made which have had the effect of enhancing the disabled person's abilities, then it is those enhanced abilities which should be considered. The disabled person's abilities are being considered as they **in fact** are (and not as they might have been if the adjustments had not been made).

An applicant for a degree course is required to sit an entrance test. The applicant is visually impaired and requires the test paper in an enlarged font. The university does not provide

the test paper in the font requested. The applicant does not pass the test and is not offered a place on the course. This is not direct discrimination, as the comparator would be a non-disabled person who also failed the test. (But the disabled person would be likely to have good claims in respect of two other forms of discrimination; failure to make reasonable adjustments and disability-related discrimination.)

Another disabled person with a visual impairment who applies for the course and has to sit the test is allowed to have the test papers in an enlarged font and passes the test. However, the disabled candidate is rejected although non-disabled applicants with the same test score as her were offered places. This is likely to amount to direct discrimination, as the comparator would be a person not having a visual impairment who achieved the same test score.

### **Can direct discrimination be justified?**

s 28S(9)

- 4.20 Treatment of a disabled person which amounts to direct discrimination under the Act's provisions in Part 4 is unlawful. It can never be justified.

### **What happens if direct discrimination occurs?**

- 4.21 Where an education provider directly discriminates against a disabled applicant or student in relation to matters covered by Chapter 2 of Part 4 of the Act, it will be committing an act of unlawful discrimination. A disabled person will be able to make a claim based on this (see Chapter 13 for more details about claims).

## What evidence is needed to prove that direct discrimination has occurred?

4.22 Paragraph 3.38 explains that claims of disability discrimination under the Act's provisions on post-16 education take place in the county court (England and Wales) or sheriff court (Scotland). A person who brings a claim for unlawful discrimination must show that discrimination has occurred. He must prove this on the balance of probabilities in order to succeed with a claim in the court.

4.23 The Act says that, when such a claim is heard by a court, the court **must uphold the claim** if:

- the claimant proves that he is covered by the definition of disability; and
- the claimant proves facts from which the court could conclude in the absence of an adequate explanation that the person against whom the claim is made (the defendant) has acted unlawfully; and
- the defendant fails to prove that he did not act in that way.

4.24 Where a disabled person is able to prove on the balance of probabilities facts from which an inference of unlawful discrimination could be drawn, the burden of proof shifts to the defendant. This means that the education provider must show that it is more likely than not that its conduct was not unlawful. Its practical effect in relation to direct discrimination can be summarised as follows:

- To prove an allegation of **direct discrimination**, a claimant must prove facts (from all the evidence before the court) from

which it could be inferred in the absence of an adequate explanation that he has been treated less favourably by the defendant on the grounds of his disability than an appropriate comparator has been, or would be, treated.

- If the claimant does this, the claim will succeed unless the education provider can show cogent and persuasive reasons that disability was not **any** part of the reason for the treatment in question.

For the purposes of direct discrimination claims, the test to determine upon whom the burden of proof lies should in practice comprise a two-stage process, but the court hearing does not have to be split into two similar stages. Instead, these matters should be addressed in the court judgment after the respective parties have given evidence and made submissions.

A disabled student is not awarded a qualification despite having obtained the same scores in the course assessments as another student who was awarded the qualification. The onus is on the education provider to demonstrate that the reason for not awarding the qualification was a non-discriminatory one. If the education provider is unable to demonstrate this unlawful discrimination will be inferred in these circumstances.

- 4.25 The fact that there has been a failure to comply with a relevant provision of the Code must be taken into account by a court, where it considers it relevant, in determining whether there has been discrimination or harassment (see paragraph 1.13).

# 5

## What is the duty to make reasonable adjustments?

### Introduction

- 5.1 One of the ways in which an education provider discriminates against a disabled person is by failing to comply with the duty to make reasonable adjustments for the benefit of a disabled person. This chapter examines the circumstances in which a duty to make reasonable adjustments arises and outlines what an education provider must do in order to discharge the duty. It also sets out the factors to be taken into account when determining what a reasonable adjustment is and finally considers competence standards.
- 5.2 The duty to make reasonable adjustments is a cornerstone of the Act and requires education providers to take positive steps to ensure that disabled people can access education and related services. This goes beyond simply avoiding treating disabled people less favourably and in some cases it may also mean taking additional steps to which non-disabled people are not entitled. Many reasonable adjustments are inexpensive and in some cases Disabled Students' Allowances or other funding will be available to cover some of the costs.

### What is the duty to make reasonable adjustments?

- 5.3 Education providers have a duty to take such steps as it is reasonable for them to have to take

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(1D)

in all the circumstances of the case in the situations described below. The duty to make reasonable adjustments arises where:

- a provision, criterion or practice, other than a competence standard, applied by or on behalf of the education provider; or
- any physical feature of premises occupied by the education provider,

places disabled persons at a substantial disadvantage compared with people who are not disabled. An education provider has to take such steps as it is reasonable for it to have to take in all the circumstances to prevent that disadvantage – in other words the education provider has to make a ‘reasonable adjustment’. There is no justification under the DDA for a failure to make a reasonable adjustment.

5.4 The duty applies in relation to a provision, criterion or practice, other than a competence standard:

- relating to the arrangements an education provider makes for determining admissions to the institution
- relating to student services provided for, or offered to, students by the education provider
- relating to the conferment of qualifications by the education provider.

5.5 The duty also applies where any physical feature of the education provider’s premises places a disabled person at a substantial disadvantage in comparison with persons who are not disabled when the disabled person:

- seeks admission to that education provider
- is a student at that education provider
- applies for a qualification which the education provider confers
- holds a qualification which was conferred by the education provider.

A wheelchair user applies for a three-year degree course at a large university. Many of the main entrances to the department where the student's lectures will be held, and a number of the student facilities, are inaccessible. This means that the student has to access these buildings through 'service entrances' at the back of buildings. Although the university thinks it has made a reasonable adjustment by allowing access via the 'service entrances', the duty has not in fact been discharged. This is because the student still experiences substantial disadvantage using the 'service entrances' in that it takes longer to enter the building through this route, these entrances are difficult to navigate and the student is separated from her peers. It may be reasonable for the university to take steps to make the main entrance to these buildings accessible or to rearrange the lecture timetable so they are held in an accessible building.

- 5.6 The duty also covers some disabled people who are no longer students. The circumstances in which this arises are considered in paragraphs 9.49 to 9.52.
- 5.7 It does not matter if a disabled person cannot point to an actual non-disabled person compared with whom he is at a substantial disadvantage. The issue is whether the provision, criterion or

practice, or physical feature, places disabled persons at a substantial disadvantage.

### **What disadvantages give rise to the duty?**

- 5.8 The Act says that only substantial disadvantages give rise to the duty. Substantial disadvantages are those which are not minor or trivial. Given that the duty to make reasonable adjustments refers to 'disabled persons' what matters is that a provision, criterion or practice, or a physical feature is capable of causing a substantial disadvantage to the disabled person in question. Whether it actually has this effect on him in a particular case is a question of fact.

A sixth form college has several sites and students are required to move between sites to attend different classes. This is likely to place student with mobility difficulties at a substantial disadvantage as they may find it difficult to move between sites and arrive late for classes and therefore give rise to the duty to make reasonable adjustments.

### **To whom is the duty to make reasonable adjustments owed?**

- 5.9 An education provider's duty to make reasonable adjustments is an anticipatory duty owed to disabled people and students at large. It does not only arise when an individual disabled student presents himself to the education provider. Disabled people are a diverse group with different requirements that education providers need to consider strategically.



All teaching staff at a college produce all their handouts in electronic form so that they can easily be converted into large print or put into other alternative formats. The staff are anticipating reasonable adjustments that might need to be made.

A small college that is unable to employ a large number of specialist staff ensures it has close links with other organisations so that it is able to call on specialist support workers (for example, for learners who are dyslexic) when the need arises. It therefore anticipates reasonable adjustments that it might need to make if it has applications from disabled students.

A university encourages its lecturers to put lecture notes on the institution intranet. It introduces new procedures to ensure that all notes put on the intranet meet established guidelines to ensure that there is no conflict with specialist software or features that students with dyslexia may be using. It therefore anticipates reasonable adjustments that it might need to make for certain disabled students.

A college makes its budget allocations to departments at the beginning of the year. Because it knows that the need for unexpected reasonable adjustments may arise at any time during the year, it sets aside an amount for unanticipated adjustments, in addition to covering costs through a central budget for adjustments. It therefore anticipates that it may need to make reasonable adjustments.

- 5.10 The issue of anticipatory reasonable adjustments is particularly relevant in respect of buildings, whether these are owned, rented or leased.

A university ensures that its Estates Department is thoroughly briefed on all aspects of physical access through carrying out access audits of its premises. Each time building works are undertaken a further assessment is made of how the building can be made more accessible. For example, when an area is repainted the department ensures it is using colour contrasts, which will help students with a visual impairment. It also carries out an acoustic audit to ensure it is responding appropriately to deaf students. The university is anticipating reasonable adjustments that might need to be made.

### **At what point does the duty to make reasonable adjustments arise?**

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- 5.11 Education providers should not wait until a disabled person approaches them before they give consideration to their duty to make reasonable adjustments. Education providers should be planning continually for the reasonable adjustments they need to make, whether or not they have disabled students. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them. In many cases, it is appropriate to ask students to identify whether they have any particular requirements and, if so, what adjustments may need to be made. Failure to anticipate the need for an adjustment may result in it being too late to comply with the duty to make the adjustment when a disabled person

requires it and therefore constitute a failure to discharge the duty.

A further education institution advertises a course available for all staff to receive deaf awareness training, even though there are currently no students at the institution who would be classified as deaf. Staff attendance on the course results in attracting deaf students to the institution and it increases course applications. It is also one way that the institution makes reasonable adjustments in advance of deaf students attending the college.

The admissions office and the disability office at a higher education institution work together to ensure that the institution's admissions process is as accessible as possible and that applications and arrangements for admissions ask whether the student requires any reasonable adjustments.

### **Must education providers anticipate every barrier?**

- 5.12 Education providers cannot be expected to anticipate the needs of every prospective student, but they are required to think about and take reasonable steps to overcome barriers that may impede persons with particular kinds of disability – for example, people with visual or mobility impairments.
- 5.13 When considering the provision of a reasonable adjustment, an education provider should be flexible with its approach. However, there may be situations where it is not reasonable for an

education provider to anticipate a particular requirement. Education providers are expected to anticipate the specific adjustments required by some individuals.

An education provider does not produce examination papers in large font as it is not aware that any students have a visual impairment. However, should a student require such a paper, this is an adjustment that is easily foreseeable and it is likely to be reasonable for the education provider to provide it.

- 5.14 Once an education provider has become aware of the requirements of a particular disabled student or applicant, it might then be reasonable for the education provider to take a particular step to meet these requirements. This is especially so where a disabled person has pointed out the difficulty that he or she faces in accessing services, or has suggested a reasonable solution to that difficulty.

A university anticipates that some deaf students will require the use of BSL interpreters and ensures it has access to BSL interpreters at short notice. However, a student who arrives at the university uses American Sign Language (ASL) and had not previously notified the university of this. As soon as the university is aware of this it should make the necessary reasonable adjustment by seeking an ASL interpreter, even though it may not have been reasonable to have arrangements with an ASL interpreter before the student arrives.

## **How can education providers identify possible adjustments to physical features?**

- 5.15 Education providers are more likely to be able to comply with their duty to make adjustments in relation to physical features if they arrange for an access audit of their premises to be conducted and draft an access plan or strategy. Acting on the results of such an audit may reduce the likelihood of successful legal claims against the education provider.
- 5.16 In carrying out an audit, it is recommended that education providers seek the views of people with different disabilities, or those representing them, to assist in identifying barriers and developing effective solutions. Education providers can also draw on the extensive experience of local and national disability groups or organisations of disabled people.

## **How long does the duty continue?**

- 5.17 The duty to make reasonable adjustments is a continuing duty. Education providers should keep the duty under regular review in light of their experience with disabled people applying for courses and using student services. In this respect it is an evolving duty, and not something that needs simply to be considered once and then forgotten. What was originally a reasonable step to take might no longer be sufficient and the provision of further or different adjustments might then have to be considered.
- 5.18 Equally, a step that might previously have been an unreasonable one for an education provider to have to take could subsequently become a reasonable step in light of changed circumstances. For example, technological developments may

provide new or better solutions to the difficulties faced by disabled people.

### **Which disabled people does the duty protect?**

- 5.19 The anticipatory duty to make reasonable adjustments applies in admissions and in all student services. It may also apply after the disabled person has left the education institution (see paragraphs 9.49 to 9.52). In addition there is a duty to any disabled person who applies for or holds a qualification conferred by the education provider (see Chapter 10).

### **What if the education provider does not know that the person is disabled, or is an actual or potential student?**

- 5.20 Although education providers have a duty to think ahead and to anticipate what reasonable adjustments may be needed for disabled people in general (see paragraphs 5.9 to 5.14), an education provider will only discriminate against an individual disabled person in respect of a failure to make reasonable adjustments if:

- it knows, or could reasonably be expected to know, that the person has a disability and is likely to be placed at a substantial disadvantage, and
- the failure to make the adjustment was attributable to that lack of knowledge.

The education provider must, however, do all it can reasonably be expected to do to find out whether this is the case. The action that it is appropriate to take to find out about a person's disability may differ between different types of

provision. The government has issued guidance on the reasonable action an education provider should take to find out about people's disabilities (see Appendix C). If an education provider can show that it did not know, and could not reasonably have been expected to know that the person was disabled, it can defend the failure to make reasonable adjustments for that individual person.

5.21 An education provider should be proactive in encouraging people to disclose a disability. This might involve:

- asking applicants to courses to declare their disabilities on application and enrolment forms
- publicising the provision that is made for disabled people, or providing opportunities for students to tell tutors/teachers or other staff in confidence
- asking students once they are on the course whether they need any specific arrangements because of a disability
- explaining to students the benefit of disclosure and how this information will be kept confidential
- ensuring that the atmosphere and culture at the institution or service is open and welcoming so that disabled people feel safe to disclose a disability.

A university ensures that all students who declare a disability on their application form are given the opportunity to discuss their reasonable adjustment requirements with an appropriate member of staff and are made aware of who they

should approach if their requirements change or they experience any difficulties relating to their disability that may cause them to be at a substantial disadvantage.

- 5.22 The duty to take steps to find out about people's disabilities and potential substantial disadvantage applies equally to a disabled person who is an actual or potential applicant for a course or qualification conferred by the education provider.
- 5.23 If the education provider might reasonably have been expected to know or find out about a person's disability, then it cannot defend the failure to make reasonable adjustments on the grounds that it did not know that the person was disabled.
- 5.24 If an education provider's agent or employee (such as a student adviser, or an admissions officer) knows, in that capacity, of a person's disability, the education provider will not usually be able to claim that it does not know of the disability, and that it therefore has no duty to make a reasonable adjustment. Education providers therefore need to ensure that where information about disabled people may come through different channels, there is a means which is suitably confidential for bringing the information together, to make it easier for the education provider to fulfil its duties under the Act. All staff should be aware of the action they should take if they become aware that a student or applicant is disabled.

A student at a large university tells a university librarian that she has a disability. The university's teaching and learning arrangements



put the student at a substantial disadvantage because of the effects of her disability and the student claims that a reasonable adjustment should have been made. It would not be a defence for the higher education institution to claim that it did not know of her disability. This is because the librarian's knowledge means that the education provider's duty under the Act applies.

A student declares that he is disabled on his application form for his part-time college course and notes that due to his hospital appointments, he may not be able to attend all elements of the course. Although the admissions office knows that the student might have a disability under the Act, it does not pass this information on to the tutors who teach the course. The college cannot claim that it did not know about the disability and so is likely to be acting unlawfully if it fails to make a reasonable adjustment.

- 5.25 Information will not be imputed to the education provider if it is gained by a person providing services to students independently of the education provider. This is the case even if the education provider has arranged for those services to be provided.

An education provider arranges for students to be allowed to use a local information, advice and guidance service in addition to its own in-house service. The agreement states that the local service is not acting on behalf of the education provider in allowing students to use the service. Any information about a student's disability obtained by an adviser during the student's use

of the service would not be passed on to the education provider. Therefore the education provider would not have breached the duty to make reasonable adjustments if the student had told the local service but not the education provider that he was disabled.

## Confidentiality and reasonable adjustments

- 5.26 A disabled person has a right to request that the existence or nature of his or her disability be treated as confidential. In determining whether it is reasonable to make an adjustment the responsible body must have regard to the extent that making the adjustment is consistent with a disabled person's request for confidentiality.
- 5.27 In some instances this might mean that reasonable adjustments have to be provided in an alternative way in order to ensure confidentiality.

A student with a visual impairment can only read clearly if he has text enlarged into 16-point type. He has requested strict confidentiality. Normally his tutors would give a visually impaired student large-print handouts at the beginning of each class. However, because he has asked the tutors not to tell any of his fellow students about his disability or to draw attention to it in any way, they agree to give him his handouts in advance so that he can look at them before the lesson but does not have to be seen reading them during the class.

- 5.28 In some cases a confidentiality request might mean that a less satisfactory reasonable

adjustment is provided or that no reasonable adjustment can be provided.

A student with AIDS is on a chemical engineering course. He does not want other students to know of his condition. His condition means that he sometimes needs to have time off. His tutors have offered to arrange extra time in the laboratory for him after hours to make up for the time he misses. However, he has refused this because he thinks it would draw attention to him and his condition. Instead they offer to provide him with extra lecture notes. Although this adjustment may be less effective, it is likely to be lawful.

### **What are 'provisions, criteria and practices'?**

- 5.29 Provisions, criteria and practices are broad terms which cover all of an education provider's arrangements, policies, procedures and activities. The duty to make reasonable adjustments applies, for example, to selection and admissions procedures and to examination and assessment procedures used by education providers.

A student with a visual impairment has difficulty using the IT services at his university because his screen reading software is not easily compatible with the IT system and does not allow him to upload the software. He raises this issue with the IT department, who agree to make changes to the system so that the software is compatible and install the screen reading software permanently on his user account. This is likely to be a reasonable adjustment to the way in which the university provides access to IT facilities.

A college has limited car parking space close to their main site. Car parking spaces are reserved for staff, whilst students can use a car park that is a short distance away. A student who has a mobility impairment and needs to park near to the college, is given a designated car parking space in the staff car park. This is likely to be a reasonable adjustment to the college's car parking policy.

### What is a 'physical feature'?

5.30 The Act says that the following are to be treated as a physical feature:

- any feature arising from the design or construction of a building on the premises occupied by the education provider
- any feature on the premises of any approach to, exit from, or access to such a building
- any fixtures, fittings, furnishings, furniture, equipment or materials in or on the premises, and
- any other physical element or quality of any land comprised in the premises occupied by the education provider.

All these features are covered, whether temporary or permanent. Considerations which need to be taken into account when making adjustments to premises are explained in Chapter 12.

The design of a particular classroom makes it difficult for someone with a hearing impairment to hear, because it is a large room and has hard

flooring which means that sound echoes. That is a substantial disadvantage caused by the physical features of the education provider's premises.

Clear glass doors at the end of a corridor in a college present a hazard for a visually impaired student. This is a substantial disadvantage caused by the physical features of the college.

- 5.31 Physical features will include steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, lighting and ventilation, lifts and escalators, floor coverings, signs, furniture, and temporary or movable items. This is not an exhaustive list.

### **What is the duty in relation to conferment of qualifications for non-students?**

- 5.32 In addition to the duty in relation to admissions and arrangements and student services, education providers also have a duty to make reasonable adjustments for disabled people who are not students but apply for the conferment of a qualification or hold a qualification conferred by the education provider.
- 5.33 The duty applies in relation to a provision, criterion or practice, other than a competence standard, for determining on whom a qualification is to be conferred which places a disabled person at a substantial disadvantage. This duty only covers a disabled person who has applied for the conferment of a qualification or has notified the

s 28T(1A)

education provider that he may apply for the conferment of a qualification. This duty only applies to disabled persons who are not students and who are therefore not covered by the duties described in paragraph 5.4.

A university routinely awards Masters degrees to people who have previously completed and been awarded an undergraduate degree. The process for obtaining the Masters degree is to apply to the university in writing. A disabled person wishes to apply for a Masters degree but finds completing written applications very difficult. It would be a reasonable adjustment for the university to allow the disabled person to apply by telephone.

#### s 28T(1B)

5.34 The duty also applies in relation to any other provision, criterion or practice (other than for determining to whom a qualification should be awarded and other than a competence standard) which places a disabled person at a substantial disadvantage. This duty covers a disabled person who holds a qualification conferred by the education provider or applies for a qualification which the education provider confers. This duty only applies to disabled persons who are not students and therefore not covered by the duties described in paragraph 5.4.

### **When is it 'reasonable' for an education provider to have to make adjustments?**

5.35 Whether it is reasonable for an education provider to make any particular adjustment will depend on a number of things, such as its cost and effectiveness. However, if an adjustment is one which it is reasonable to make, then the education provider must do so. Where disabled persons are

placed at a substantial disadvantage by a provision, criterion or practice of the education provider, or by a physical feature of the premises it occupies, the education provider must consider whether any reasonable adjustments can be made to overcome that disadvantage. There is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for education providers to ask) but, where the disabled person does so, the education provider must consider whether such adjustments would help overcome the disadvantage, and whether they are reasonable. For disabled students in higher education an assessment for Disabled Students' Allowance is likely to be a factor to take into account when determining appropriate reasonable adjustments but it is not determinative (see paragraphs 5.54 and 5.55).

- 5.36 Effective and practicable adjustments for disabled people often involve little or no cost or disruption and are therefore very likely to be reasonable for an education provider to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – and so may be a reasonable adjustment to make. Many adjustments do not involve making physical changes to premises. However, where such changes do need to be made, education providers may need to take account of the considerations explained in Chapter 12 which deals with issues about making alterations to premises.
- 5.37 The Act does not specify that any particular factors should be taken into account when determining what is reasonable. What is a reasonable step for a particular education provider to have to take depends on all the circumstances of the case. It will vary according to a number of factors including:

- whether taking any particular steps would be effective in overcoming the difficulty that disabled people face in accessing the student services in question
- the type of service being provided
- the nature of the institution or service and its size and resources
- the effect of the disability on the individual disabled person or student
- the extent to which it is practicable for the education provider to take the steps
- the financial and other costs of making the adjustment
- the financial resources available to the education provider
- the availability of grants, loans and other assistance to disabled students (and only disabled students) for the purpose of enabling them to receive student services (such as Disabled Students' Allowances)
- the extent to which aids and services will otherwise be provided to disabled people or students
- health and safety requirements; and
- the relevant interests of other people including other students.

5.38 Without attempting to be exhaustive, these are factors that might be taken into account when considering what is reasonable. These factors make a useful checklist, particularly when considering more substantial adjustments. The effectiveness and practicability of a particular adjustment should be considered first. If it is practicable and effective, the financial aspects



should be looked at as a whole – the cost of the adjustment and resources available to fund it. Furthermore, an appropriate balance has to be struck between financial considerations and disabled people’s access to education and associated services. Other factors listed above and below might also have a bearing.

### **The effectiveness of the step in preventing the disadvantage**

- 5.39 It is unlikely to be reasonable for an education provider to have to make an adjustment involving little benefit in reducing the disadvantage experienced by the disabled person.

A wheelchair user cannot access classes on a course that take place on the higher floor levels of the small college he attends. There isn’t an accessible lift between floors in the college premises and it is unlikely to be reasonable for the education provider to install an accessible lift. Instead of relocating classes to an accessible floor, so that the student can attend the course without experiencing substantial disadvantage, the college asks the wheelchair user to change to a different course where classes are held at an accessible floor level. This step would not be effective in preventing the disadvantage experienced in relation to the course the wheelchair user has chosen to undertake.

- 5.40 However, an adjustment which, taken alone, is of marginal benefit, may be one of several adjustments which, when looked at together, would be effective. In that case, it is likely to be reasonable to have to make it. Effective steps might not always be the most obvious steps.

### **The type of service being provided**

- 5.41 What is appropriate in one setting might not be appropriate in another setting. Clearly more extensive adjustments may be considered reasonable when they facilitate access to core services. It is more likely to be reasonable for an education provider to have to make an individualised adjustment with significant costs for a student who is likely to be at the institution for some time than for a temporary student.

### **The nature of the institution or service and its size and resources**

- 5.42 An education provider, such as a university, with greater resources may be required to make more expensive adjustments than one with limited resources, such as a small college. For example, a larger education provider may find it easier to carry out disruptive building works to improve access by using alternative buildings which are not available to a small education provider. Even when an education provider's specific disability budget has been exhausted, they will still be required to make reasonable adjustments.

### **The effect of the disability on the individual disabled person or student**

- 5.43 The effect of an individual's disability may affect what adjustments are reasonable for an education provider to make.

### **The practicability of the adjustment**

- 5.44 It is more likely to be reasonable for an education provider to have to make an adjustment which is easy to make than one which is difficult. In some

circumstances it may be reasonable to have to make an adjustment, even though it is difficult.

A person with restricted growth applies for a course in photography. The darkroom that will be used needs some adjustments to be made to make a workstation accessible for the student. This will require some building work which cannot be completed before the start of term. However, the course tutor makes some small changes to the structure of the course so that it begins with non-darkroom work, to allow the adjustments to the darkroom to be made.

- 5.45 There may be some instances, when, although an adjustment might overcome the substantial disadvantage, it will not be practicable for the education provider to take such a step.

A person with severe learning difficulties is taking a weekly local history class. Although much of the class is practically-based, involving visits to local places of interest, the tutor also regularly gives out articles from history journals. While every effort should be made to ensure that the person with learning difficulties understands what the articles say, it might not be practicable for the tutor to try to represent them all in pictorial or symbol form which is the method used by the person with learning difficulties.

A young person with dyslexia is a student on a one-year diploma course. His disability makes it difficult for him to read long texts and, ideally, he would like all his books on audiotape. However, his course has a very long reading list which

changes every year. Although the college does have a system for putting texts onto tape, this process takes some time and it is unlikely to be practicable for the college to provide him with all his books on tape during the year. It is likely, however, to be reasonable to discuss with the student other reasonable adjustments to reduce the disadvantage.

### **The financial and other costs of the adjustment**

- 5.46 If an adjustment costs little or nothing it would be reasonable unless some other factor (such as practicability or effectiveness) made it unreasonable. The costs to be taken into account include those for staff and other resources. The significance of the cost of a step may depend in part on what the education provider might otherwise spend in the circumstances. In assessing the likely costs of making an adjustment, the availability of external funding should be taken into account.

### **The financial resources of the education provider**

- 5.47 It is more likely to be reasonable for an education provider with substantial financial resources to have to make an adjustment with a significant cost, than for an education provider with fewer resources. The resources in practice available to the education provider as a whole should be taken into account as well as other calls on those resources. For larger education providers, it is good practice to have a specific budget for reasonable adjustments – but limitations on the size of any such budget will not affect the

existence of the education provider's duties to disabled students. Where the resources of the education provider are spread across more than one education institution, the calls on them all are likely to be taken into account in assessing reasonableness. The reasonableness of an adjustment will depend not only on the resources in practice available for the adjustment but also on all other relevant factors (such as effectiveness and practicability).

A sign language user wishes to use the careers service at a higher education institution. Although the careers service has a very small budget and does not have sufficient funds to cover the cost of an interpreter, the institution has a large enough budget to cover the cost and funding should be provided in order to make its careers service accessible to the student.

### **The availability of grants, loans and other assistance to disabled students**

- 5.48 Some disabled students following higher education courses will be eligible for Disabled Students' Allowances, the specific purpose of which is to pay for additional aids and services which students require because of a disability. It would not be reasonable to expect an education provider to pay for the same aids and services for which Disabled Students' Allowances are available.

A student with dyslexia on a FE course has a laptop computer paid for by a charitable grant. It is unlikely to be reasonable to expect the university to fund another laptop computer for the student to use in lectures, if the student can take her own laptop to lectures easily.

- 5.49 However, there are instances when disabled students might need reasonable adjustments to be provided by the education provider in addition to those resourced through the Disabled Students' Allowances. Education providers should anticipate that this might be the case.

A student who has cerebral palsy has received funding through his Disabled Students' Allowance to buy an adapted keyboard to use with his computer. However, it is too cumbersome for him to transport every day from his residence to the university. It is likely to be reasonable to expect the university to provide him with a similar adaptation for a computer within the IT suite at the university.

A student who is a BSL user receives funding through his Disabled Students' Allowance to cover the cost of a BSL interpreter for some, but not all, of his lectures. Subject to effectiveness, practicability and cost (amongst other factors), it may be reasonable for the university to provide him with individually-tailored additional communication support for his other lectures.

- 5.50 A disabled person is not required to contribute to the cost of a reasonable adjustment, therefore an education provider should not charge a student for any reasonable adjustments. To do so is likely to amount to discrimination.
- 5.51 If a disabled person has a particular piece of special or adapted equipment which he is prepared to use whilst studying, this might make it reasonable for the education provider to have to

take some other step (as well as allowing the use of the equipment).

A disabled student has a dictaphone which he needs in all lectures and whilst working at home. The education provider allows him to use it in all lectures and ensures that he is able to sit close to the front of the lecture room so that he is able to obtain a clear recording of the lecture.

### **The extent to which aids and services will otherwise be provided to disabled people or students**

- 5.52 There will be some instances when a disabled person or student is provided with support from another agency. In these cases, it would not be reasonable to expect the responsible body to duplicate this support.

A man with physical disabilities who needs assistance with toileting is enrolled on an adult education course. His disabilities mean that he requires a support worker with him at all times. He is already receiving a package of care funded by his local authority and he has a full-time support worker allocated to him. It is unlikely to be reasonable to expect the education authority to provide an additional support worker to carry out the same role. However, if he also needs additional learning support it is the education provider's duty to provide the necessary reasonable adjustment.

## Health and safety requirements

5.53 The Act does not override health and safety legislation. If making a particular adjustment would increase the risks to the health and safety of any person (including the disabled person in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risks are likely to arise. There might be instances when, although an adjustment could be made, it would not be reasonable as it would endanger the health and safety either of the disabled person or of other people. However, education providers are not required to eliminate all risk and should look at reasonable adjustments which will minimise risks. Risk management should be an ongoing process throughout a student's time at the institution.

A wheelchair user with a stairclimbing wheelchair is required to attend lectures on the first floor of a building without a lift. The education provider has concerns about the health and safety risks associated with him using his stairclimbing wheelchair. Following a risk assessment the education provider identifies the main risk and puts processes in place to minimise these such as ensuring the student is accompanied whilst moving up and down stairs and that other students are aware of the need to allow him space to do so.

5.54 There might be other instances where responsible bodies could make anticipatory reasonable adjustments in line with health and safety legislation, ensuring compliance with, and not infringing, that legislation.



An education provider trains staff to use evac chairs and installs flashing fire alarms to reduce the risks associated with the evacuation of disabled students in the case of a fire.

- 5.55 Health and safety issues must not be used spuriously to avoid making a reasonable adjustment. Education providers should avoid making uninformed assumptions about health and safety risks.

A university chaplaincy refuses to provide a temporary ramp into the chapel for a wheelchair user because they say that wheelchair users pose a health and safety hazard by preventing other people reaching the fire exits in an emergency. The chaplaincy have made an unjustified assumption about health and safety and failed to consider and discharge the duty to make reasonable adjustments. Therefore, the treatment is likely to amount to unlawful discrimination.

A student with HIV wants to take a nursing course. The education provider assumes that his condition will create a health and safety risk and refuses him a place. If the college had obtained further information about the student's condition and the associated risks it would have been able to put adjustments in place to ensure there were no unnecessary health and safety risks.

## The relevant interests of other people including other students

- 5.56 Ordinarily the views of other people regarding the reasonable adjustments required by a disabled person will be irrelevant. However, there are limited circumstances where the provision of a particular reasonable adjustment for a disabled person will disadvantage other people. This is only relevant where the adjustment results in significant disadvantage for other people such as other students. In such a case, the education provider may not be expected to make the adjustment.

A disabled person applies for a full-time course at an education provider. His health condition requires hospital appointments for dialysis three times a week. For the disabled person to take part in the course full-time, he would either have to miss large amounts of the course, or the timetable would need to be substantially revised, which would make it very difficult for many other members of the course to attend. It is likely that this would not be a reasonable adjustment, as it would significantly adversely affect other students on the course. In this case, it is likely to be appropriate to look at alternative arrangements, such as a similar part-time course.

- 5.57 There will, however, be other instances where there is a duty to make an adjustment despite some inconvenience to others. In deciding what adjustments are reasonable it is important to weigh the level of inconvenience to others against the substantial disadvantage to the disabled person.

A disabled student has an impairment that causes him to need short rest breaks due to fatigue. For the final 15 minutes of each class, the tutor asks students to complete a written exercise. Before this exercise, the tutor allows the student a short rest break if required. The other students complain that they have to wait an additional few minutes for the student. However, the delay does not significantly adversely affect the group to the extent that it makes the adjustment unreasonable. This is because the short delay experienced by other students is unlikely to be considered a sufficient reason for not allowing the disabled student to have rest breaks and thereafter allow him to participate in the written exercises.

### **Other factors**

- 5.58 Education providers should bear in mind that there are no rigid solutions and there are often several solutions to one situation. Education providers need to think flexibly about reasonable adjustments. Action which may result in reasonable access to services being achieved for some disabled people may not necessarily do so for others. Equally, it is not enough for education providers to make some changes if they still leave disabled people at a substantial disadvantage and there are other reasonable adjustments that can be made to overcome the disadvantage.

A deaf student applies to attend a small further education college and indicates that he requires an induction loop to access lectures. In line with its anticipatory duty the college has already purchased a portable induction loop and

provided some basic training for staff. The college discusses with the deaf student his reasonable adjustment requirements and ascertains that they do not need to install an induction loop in every seminar room and lecture theatre as the student can use the portable loop. The college then arranges for further staff training and also alerts maintenance staff to the need to ensure that the loop is working and is periodically tested.

Another deaf student applies to attend the same small further education college. The college assumes that it will need to purchase another portable hearing loop. However, after discussing with the student her requirements, the college finds that the student does not normally use a hearing loop and prefers to lip-read. The college ensures that all staff are aware of the need to face the student and to speak clearly when they are talking to her.

5.59 Similarly, an education provider will not have taken reasonable steps if it attempts to provide an auxiliary aid or service which in practice does not help disabled people to use the education provider's services. The way in which an auxiliary aid or service is provided may be just as important as the auxiliary aid or service itself.

A further education college buys a textphone and advertises the number in promotional material. As well as buying and advertising the number for the textphone, the college trains the reception staff in using the equipment and ensures that maintenance staff check that it is working at regular intervals.

- 5.60 Once an education provider has decided to put a reasonable adjustment in place, it is important to draw its existence to the attention of disabled students. In all cases, it is important to use a means of communication which is itself accessible to disabled people. Failing to make people aware of the adjustment, if it is not obvious, may be tantamount to not making the adjustment at all. In addition it is important to maintain the adjustment so that it continues to work.

A university installs a hearing induction loop in its reception area. Signs to indicate the presence of the loop are displayed and maintenance staff check that it is working at regular intervals.

- 5.61 If, having considered the issue thoroughly, there are genuinely no steps that it would be reasonable for an education provider to take to make its services accessible, the education provider is unlikely to be in breach of the law if it makes no changes. Such a situation is likely to be rare and will depend on the individual circumstances of the case.

### **What adjustments might an education provider have to make?**

- 5.62 The duty to make reasonable adjustments places education providers under a responsibility to take such steps as it is reasonable, in all the circumstances of the case, for it to have to take in order to remove the substantial disadvantage. The duty includes the provision of auxiliary aids and services and removing or altering physical features.
- 5.63 Any necessary adjustments should be implemented in a timely fashion and it may also

be necessary for an education provider to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled person in question before they are made, in the case of individualised adjustments.

In order to comply with the anticipatory duty an education provider makes structural or other physical changes such as widening a doorway, providing ramps as reasonable adjustments for wheelchairs, relocating light switches and door handles which could place disabled people at a substantial disadvantage and providing appropriate contrast in decor to help the safe mobility of visually impaired people.

Course materials and curriculum resources may need to be modified for some disabled students, for example, by producing them in Braille or on audio tape, and instructions for students with learning disabilities may need to be conveyed in Easy Read or orally.

A lecturer reads out text written on the board or on visual presentations during the lecture.

5.64 It may sometimes be necessary for an education provider to take a combination of steps.

A woman who is deafblind applies for a course at a further education college. The college:

(i) arranges facilities for her guide dog

- (ii) arranges for course materials to be provided in Braille, and
- (iii) provides disability equality training to staff and students.

5.65 Other steps an education provider might have to take could include:

- conducting a proper assessment of what reasonable adjustments may be required
- permitting flexible studying
- allowing a disabled student to take a period of disability leave.

A student who has cancer needs to undergo treatment and rehabilitation. His university allows a period of disability leave and a flexible reintroduction to the course on his return.

- employing a support worker to assist a disabled student.

A student with a mobility impairment is required to visit a range of organisations and collate a substantial amount of information for a research project. The education provider employs a support worker to assist her with this project.

- modifying disciplinary or complaints procedures.

A woman with a learning disability is allowed to take a friend (who does not study with her) to act as an advocate at a meeting with her education provider about a grievance. The education provider also ensures that the meeting is conducted in a way that does not disadvantage or patronise the disabled woman.

5.66 In some cases a reasonable adjustment will not work without the co-operation of other students. Other students may therefore have an important role in helping to ensure that a reasonable adjustment is carried out in practice. Subject to considerations about confidentiality (explained at paragraphs 5.26 to 5.28), education providers must ensure that such co-operation is sought. It is unlikely to be a valid defence to a claim under the Act that other students were obstructive or unhelpful when the education provider tried to make reasonable adjustments. An education provider would at least need to be able to show that it took such behaviour seriously and dealt with it appropriately. Education providers will be more likely to be able to do this if they establish and implement the type of policies and practices described at paragraph 2.13.

An education provider ensures that a student with autism has a structured timetable as a reasonable adjustment. As part of the reasonable adjustment it is the responsibility of the education provider to ensure that all staff co-operate with this arrangement.



An education provider makes reasonable adjustments for a student who lip-reads, including speaking clearly and facing the front during lectures, and ensuring that the palantypist the student uses has occasional breaks. The class tutor asks students to make similar adjustments so that the student can participate effectively in group work.

A student with a mental health condition recognises that at times his behaviour may be difficult for others to understand and therefore can be wrongly interpreted. He asks the education provider to explain this to his fellow students in an appropriate manner so that his behaviour is more likely to be understood.

- 5.67 Further examples of the way in which reasonable adjustments work in practice are given in Chapters 8, 9 and 10, which deal with admissions, student services and examinations.

### **Can failure to make a reasonable adjustment ever be justified?**

- 5.68 The Act does not permit an education provider to justify a failure to comply with a duty to make a reasonable adjustment.
- 5.69 Clearly, however, an education provider will only breach such a duty if the adjustment in question is one which it is reasonable for it to have to make. So, where the duty applies, it is the question of 'reasonableness' which alone determines whether the adjustment has to be made.

s 28S(2)

5.70 There is no duty to make any adjustment to a provision, criterion or practice of a kind which the Act defines as a 'competence standard'. However, the duty does apply to the process of demonstrating that a person meets the competence standard.

### What is a competence standard?

5.71 The Act defines a 'competence standard' as an academic, medical, or other standard applied by or on behalf of an education provider for the purpose of determining whether or not a person has a particular level of competence or ability.

An applicant for a degree in music, which involves a substantial element of performance, is required to demonstrate a certain level of ability in playing an instrument. This would be a competence standard.

The admission criteria for a course in choreography include a requirement to demonstrate 'a high level of physical fitness'. The course itself, however, is predominately theory-based and does not involve any strenuous physical activity. This is unlikely to be a competence standard.

5.72 Education providers are likely to impose various requirements and conditions in respect of courses.

5.73 However, any such requirement or condition only amounts to a competence standard if its purpose is to demonstrate a particular level of a relevant competence or ability. A requirement that a

person has a particular level of knowledge of a subject is likely to be a competence standard.

The requirement for students studying for a law degree to demonstrate a particular standard of knowledge of certain areas of law in order to obtain the degree is a competence standard.

- 5.74 On the other hand, a condition that a person can, for example, do something within a certain period of time will not be a competence standard if it does not determine a particular level of competence or ability.

A requirement that a student must physically attend an examination at a particular location is not a competence standard.

A requirement that a student sitting a written exam must 'write neatly' is not a competence standard.

A requirement that a person completes a test in a certain time period is not a competence standard unless the competence being tested is the ability to do something within a limited time period.

- 5.75 Sometimes the process of assessing whether a competence standard has been achieved is inextricably linked to the standard itself. The passing of an assessment may be conditional upon having a practical skill or ability which must be demonstrated by completing a practical test. Therefore, in relatively rare circumstances, the

ability to take the test may itself amount to a competence standard.

An assessment for a practical course in car maintenance cannot be done solely as a written test, because the purpose of the test is to ascertain whether someone can complete car repairs.

### **What is the significance of this distinction?**

5.76 Special rules apply in relation to the application of a competence standard to a disabled person by or on behalf of an education provider. The effect of the Act is that:

- there is no duty to make reasonable adjustments in respect of the application of a competence standard; and
- in the limited circumstances in which disability-related discrimination of a disabled person in the application of such a standard may be justified, justification is assessed by reference to a special statutory test (see Chapter 6).

5.77 It is very important to ascertain whether a particular provision, criterion or practice of an education provider is a genuine competence standard and, if so, whether the matter at issue concerns the application of that standard to the disabled person.

5.78 Although there is no duty to make reasonable adjustments in respect of the application of a competence standard, such a duty does apply to the process by which competence is assessed. So although an education provider has no duty to

alter a competence standard, it needs to consider whether or not a reasonable adjustment could be made to some aspect of the process by which it assesses a competence standard. However, there may be an overlap between a competence standard and any process by which an individual is assessed against that standard.

A woman taking a written test for a qualification in office administration asks the education provider for extra time for the test because she has dyslexia. This is likely to be a reasonable adjustment for the education provider to make. She also asks if she can leave out the questions asking her to write a business letter and to précis a document, because she feels that these questions would substantially disadvantage her because of her dyslexia. The education provider would not have to make this adjustment because these questions are there to determine her competence at writing and précising, so are part of the competence standard being tested.

### **What happens if the duty to make reasonable adjustments is not complied with?**

- 5.79 Where an education provider does not comply with the duty to make reasonable adjustments it will be committing an act of unlawful discrimination. A disabled person will be able to make a claim based on this (see Chapter 13 for more details about claims).

## What evidence is needed to prove that the duty to make reasonable adjustments has not been discharged?

- 5.80 Paragraph 3.38 explains that claims of disability discrimination under the Act's provisions on post-16 education take place in the county court (England and Wales) or sheriff court (Scotland). A person who brings a claim for unlawful discrimination must show that discrimination has occurred. He must prove this on the balance of probabilities in order to succeed with a claim in the court.
- 5.81 The Act says that, when such a claim is heard by a court, the court **must uphold the claim** if:
- the claimant proves that he is covered by the definition of disability, and
  - the claimant proves facts from which the court could conclude in the absence of an adequate explanation that the person against whom the claim is made (the defendant) has acted unlawfully, and
  - the defendant fails to prove that he did not act in that way.
- 5.82 Where a disabled person is able to prove, on the balance of probabilities, facts from which an inference of unlawful discrimination could be drawn, the burden of proof shifts to the defendant. This means that the education provider must show that it is more likely than not that its conduct was not unlawful. Its practical effect in relation to failure to make reasonable adjustments can be summarised as follows:

- To prove an allegation of failure to make a reasonable adjustment, a claimant must prove facts (from all the evidence before the court) from which it could be inferred in the absence of an adequate explanation that he is placed at a substantial disadvantage by the defendant's provisions, criteria or practices, or by the defendant's physical features of premises, in contrast to non-disabled persons.
- The burden then shifts to the defendant to prove that there were no adjustments that reasonably could have been made to remove the disadvantage in question, or to prove that the matters concern the application of a competence standard.

For the purposes of reasonable adjustment claims, the test to determine upon whom the burden of proof lies should in practice comprise a two-stage process, but the court hearing does not have to be split into two similar stages. Instead, these matters should be addressed in the court judgment after the respective parties have given evidence and made submissions.

If a provision of this Code appears to a court to be relevant it must take that provision into account when determining whether there has been discrimination or harassment (see paragraph 1.13).





# 6

## What is disability-related discrimination?

### Introduction

- 6.1 One of the ways in which an education provider discriminates against a disabled person is where the education provider treats the disabled person less favourably, **for a reason relating to his disability**. This chapter examines this duty and the circumstances in which disability-related discrimination can be justified.
- 6.2 The expression ‘disability-related discrimination’ distinguishes less favourable treatment which is for a **reason related to** a person’s disability from direct discrimination which is less favourable treatment on the **grounds** of a person’s disability.

### What does the Act say?

- 6.3 The Act says that an education provider’s treatment of a disabled person amounts to discrimination if:
- it is for a reason related to his disability
  - the treatment is less favourable than the way in which the education provider treats (or would treat) others to whom that reason does not (or would not) apply, and
  - the education provider cannot show that the treatment is justified (after taking into account the reasonable adjustments duty – see Chapter 5).

s 28S(1)

6.4 Although the Act itself does not use the term 'disability-related discrimination', this expression is used in the Code when referring to treatment of a disabled person which:

- is unlawful because each of the conditions listed in paragraph 6.3 is satisfied; but
- does not amount to direct discrimination under the Act (see Chapter 4 for more details of direct discrimination).

### Identifying comparators for disability-related discrimination

6.5 In determining whether disability-related discrimination has occurred, the education provider's treatment of the disabled person must be compared with that of a person **to whom the disability-related reason does not apply**. This contrasts with direct discrimination, which requires a comparison to be made with a person without the disability in question but whose relevant circumstances are the same. The comparator may be non-disabled or disabled – but the key point is that the disability-related reason for the less favourable treatment must not apply to him. As with direct discrimination the comparator can be a real person or a hypothetical person.

A student with a mental health condition carries medication related to her condition. The college she attends, however, has a strict policy that does not allow any drugs on the premises. The correct comparator would be a person attending the same institution who does not carry drugs with them.

A disabled person who uses crutches is not allowed to participate in a site visit that forms part of their construction course, because the tutor judges that the student may have difficulties moving around the site. The correct comparator would be a person who does not have any mobility difficulties and so can move around the site without difficulty.

A student who is deaf and uses an assistance dog is not allowed into the library at his university, because the library does not allow dogs on the premises. The correct comparator is a person who does not bring a dog with them to the library and so can go onto the premises.

### **Reason for the treatment**

- 6.6 In order to identify an appropriate comparator it is necessary to first identify the treatment and the reason for the treatment.
- 6.7 There must be a connection between the reason for the less favourable treatment and the person's disability for the treatment to be discriminatory.

A student with sickle cell anaemia has been asked to leave the university's residential accommodation because of the number of noisy parties he has been holding which have been disturbing other students. The reason for asking him to leave is his disruptive behaviour and is not related to his disability, and so is not likely to amount to discrimination.

- 6.8 It is then necessary to compare the treatment with the way someone to whom the reason does not apply has been treated. A disabled person does not have to show that others were actually treated more favourably than he or she was. He or she needs only to show that others would not have been treated less favourably.

A student with cerebral palsy which affects her speech, is working on her thesis for her research degree. Her personal tutor avoids supervision sessions for individual discussion with the disabled student because the sessions take longer than with other students due to her slow speech. Although there is no other student undertaking the same course, the department's protocols for research degrees suggest that all personal tutors should hold regular supervision sessions with research degree students. The student can point to this policy as an example of how other research degree students would be treated.

- 6.9 The comparison may be between the way one disabled person is treated and the way people with other disabilities are treated. There does not need to be an actual comparator, the comparison can be with a hypothetical person if an actual comparator does not exist.

A community education tutor tells a woman who is blind that she cannot join the singing group because she cannot read the sheet music. A man with chronic asthma is allowed to join the group. Although the tutor has accepted a disabled person onto the course, the blind woman has been treated less favourably for a reason relating to her disability and this is likely to be unlawful.

- 6.10 Once an appropriate comparator is identified, it is clear that the situations described in the examples at paragraph 6.5 could amount to less favourable treatment for a disability-related reason.

In the example about the student with a mental health condition who carries medication related to her condition, if she is not allowed to attend the college, whilst someone who does not carry drugs is allowed to attend, this would be less favourable treatment of her for a reason (carrying drugs) which relates to her disability (she requires the medication because of her condition).

In the example about the disabled person who uses crutches and is not allowed to participate in a site visit that forms part of their construction course, this would be less favourable treatment of him for a reason (his use of crutches and limited mobility) which related to his disability.

In the example about the deaf student with an assistance dog being denied access to the library, this would be less favourable treatment as someone without a dog would be allowed access. The reason for the treatment is that she has a dog with her and that reason is related to her disability.

### **Must an education provider know that a person is disabled?**

- 6.11 There is no requirement for an education provider to know that a person is disabled in order to be liable for unlawful less favourable treatment.

A student has a mental health condition and, because of her medication, finds it difficult to get to her first morning class. After several weeks during which she has missed all her morning classes, and without approaching the student to find out why she has not turned up, the college decides to remove her from the course. Although the college did not know that she was disabled it will still be liable for unlawful discrimination as it has treated the student less favourably for a reason related to her disability.

A man with a medical condition that causes fatigue and subsequent loss of speech control applies to a university for a postgraduate degree. The application form does not ask whether he has a disability nor whether he would have any particular needs when attending interview. He attends an interview, during which he is very listless and his speech is very slurred because he is tired from the journey, and the selectors turn him down because of this. He mentioned at the interview that he felt tired but the panel ignored this. The selectors' treatment of the applicant is likely to be unlawful.

### **Justification of disability-related discrimination**

- 6.12 An education provider's conduct towards a disabled person does not amount to unlawful disability-related discrimination if it can be justified. The following paragraphs explain the limited circumstances in which this may happen.

6.13 There are only two circumstances when less favourable treatment for a reason related to a person's disability can be justified:

- when the reason for the treatment is both material to the circumstances of the particular case and substantial, or
- when it is the application of a competence standard.

### **When does the Act permit justification for a material and substantial reason?**

6.14 Where less favourable treatment of a disabled person other than the application of a competence standard is capable of being justified (that is, where it is not direct discrimination), the Act says that it will, in fact, be justified if, but only if, the reason for the treatment is both material to the circumstances of the particular case and substantial. This is an objective test. 'Material' means that there must be a reasonably strong connection between the reason given for the treatment and the circumstances of the particular case. 'Substantial' means, in the context of justification, that the reason must carry real weight and be of substance.

A blind man is not accepted on a gas welding course as it is a practical course which requires the students to weld pieces of metal together. The only way to tell if the metal is melted sufficiently to weld to another piece is by looking at its consistency and colour. There is no reasonable adjustment that would enable the blind man to do this analysis of the metal. Refusing him entry to the course is likely to be lawful as the reason he is rejected is a substantial one and is clearly material to the circumstances.

- 6.15 Before disability-related less favourable treatment can be justified for a material and substantial reason it is necessary to consider whether or not the education provider is also under a duty to make reasonable adjustments in relation to the disabled person but fails to comply with that duty. If the education provider has failed to comply with the reasonable adjustments duty it may not be able to justify the disability-related less favourable treatment even if there is a material and substantial reason.
- 6.16 Where the education provider has a duty to make a reasonable adjustment, it is necessary to consider not only whether there is a material and substantial reason for the disability-related discrimination, but also whether the treatment would still have been justified even if the education provider had complied with its duty to make reasonable adjustments. In effect, it is necessary to ask the question ‘would a reasonable adjustment have made any difference?’. If a reasonable adjustment would have made a difference to the reason that is being used to justify the treatment, then the disability-related discrimination cannot be justified.

An applicant for a course in administration skills appears not to be suited to the course, but only because her typing speed is too slow as a result of arthritis in her hands. If a reasonable adjustment – perhaps an adapted keyboard – would overcome this, her typing speed would not in itself be a material and substantial reason for not allowing her onto the course. Therefore the education provider would be unlawfully discriminating if, on account of her typing speed, it did not allow her onto the course or provide that adjustment.



## How does the 'material and substantial' justification apply in practice?

- 6.17 Reasons, such as health and safety implications, may appear to be 'material' and 'substantial' reasons which are capable of justifying the disability-related discrimination. However, assumptions about the health and safety implications of disability should be avoided as further investigation may show that there are no material or substantial health and safety reasons to justify the treatment. The fact that a person has a disability does not necessarily mean that he represents an additional risk to health and safety.

A person with epilepsy applies for a catering course at his local further education college. He provides information from his GP that he has regular seizures. The college refuses to accept him on the course as they are concerned that he will have a seizure during a practical session and injure himself. In fact, the student is always aware when a seizure is imminent and goes to a safe environment. If the college had investigated the implications of his disability further it would have been apparent that there was no real health and safety risk.

- 6.18 Genuine concerns about the health and safety of anybody (including a disabled person) may be relevant when seeking to establish that disability-related less favourable treatment of a disabled person is justified. Conducting a risk assessment is often necessary to show whether or not there are any genuine health and safety issues. It is prudent for an education provider to have a risk assessment carried out by a suitably qualified person in circumstances where it has reason to think that the effects of a person's disability may

give rise to an issue about health and safety. An education provider which treats a disabled person less favourably without having a suitable and sufficient risk assessment carried out is unlikely to be able to show that its concerns about health and safety justify the less favourable treatment.

- 6.19 Nevertheless, an education provider should not subject a disabled person to a risk assessment if this is not merited by the particular circumstances of the case.

A man with diabetes applies for a distance learning MBA that occasionally involves residential sessions at the university. The man's condition is stable and he has successfully managed it for many years. He provides medical evidence from his GP to confirm this. Nevertheless, the university says that it has concerns about health and safety during the residential elements of the course and that they want to undertake a risk assessment. This is likely to be unlawful, as the circumstances of the case do not indicate that there would be any health and safety risk.

- 6.20 A risk assessment must be suitable and sufficient. It should identify the risks associated with a particular activity; taking account of any reasonable adjustments put in place for the disabled person, and should be specific for the individual carrying out a particular task. It is therefore unlikely that an education provider which has a general policy of treating people with certain disabilities (such as epilepsy, diabetes or mental health problems) less favourably than other people will be able to justify doing so – even if that policy is in accordance with the advice of an occupational health adviser.

- 6.21 A 'blanket' policy of this nature will usually be unlawful as it cannot be material to the facts of the individual case. This is because it is likely to amount to direct discrimination (which cannot ever be justified) or to disability-related discrimination which is not justifiable in the circumstances.
- 6.22 Reasonable adjustments made by an education provider may remove or reduce health and safety risks related to a person's disability and therefore remove the material and substantial reason which would otherwise make the disability-related discrimination lawful. A suitable and sufficient assessment of such risks therefore needs to take account of the impact which making any reasonable adjustments would have. If a risk assessment is not conducted on this basis, then an education provider is unlikely to be able to show that its concerns about health and safety justify less favourable treatment of the disabled person.
- 6.23 In addition, where medical information is available, education providers must weigh it up in the context of the actual situation, and the capabilities of the individual. An education provider should also consider whether reasonable adjustments could be made in order to overcome any problems which may have been identified as a result of the medical information. It should not be taken for granted that the person who provides the medical information will be aware that education providers have a duty to make reasonable adjustments, what these adjustments might be, or of the particular circumstances. It is good practice, therefore, to ensure that medical advisers are made aware of these matters. Information provided by a medical adviser should

only be relied on if the adviser has the appropriate knowledge and expertise.

An agricultural college offers a practical course in tree surgery. A medical questionnaire shows that an applicant has a medical condition which might mean that it is unsafe for him to do the course. Because of this, further medical evidence is obtained and a risk assessment conducted and this confirms that he would not be able to complete many elements of the course. It is likely to be lawful to reject this applicant if in fact it is necessary for him to complete all the elements of the course and if there are no reasonable adjustments that could be made.

A university receives advice from an occupational health adviser stating simply that an applicant for a teaching course is 'not fit to teach'. The university should ask for further information on why this decision has been reached so that the university can make its own decision and if necessary consider whether there are reasonable adjustments which should be made in order for the applicant to meet the 'fitness criteria'.

### **What is a competence standard?**

- 6.24 The Act defines a 'competence standard' as an academic, medical, or other standard applied by or on behalf of an education provider for the purpose of determining whether or not a person has a particular level of competence or ability.

s 28S(11)

## When can less favourable treatment be justified in relation to competence standards?

- 6.25 Less favourable treatment of a disabled person can never be justified if it amounts to direct discrimination (see paragraph 4.20). The application of a competence standard may, depending on the circumstances, result in disability-related discrimination of a disabled person. s 28S(9)
- 6.26 Where the application of a competence standard to a disabled person amounts to disability-related discrimination, that treatment is justified if, but only if, the education provider can show that: s 28S(6)
- the standard is (or would be) applied equally to people who do not have his particular disability; and
  - its application is a proportionate means of achieving a legitimate aim.

An education provider refuses to accept a disabled student onto a course in classical ballet because he fails to pass the audition for the course (for a reason related to his disability). This does not amount to direct discrimination because anyone, disabled or non-disabled, failing the audition would be treated in the same way. But it may be less favourable treatment for a reason related to the man's disability. The treatment could be justified if the criteria were applied equally to all applicants and the criteria were a proportionate way of showing that the person could fulfil the essential requirements of the course.

Suppose that in the above situation, the education provider had not reviewed the criteria to see if they were proportionate to the requirements of the course. If it had done so, it would have found that the criteria were of a much higher level than the course demanded (even though other applicants had achieved that standard at the time of their auditions). In these circumstances, the education provider would be unlikely to be able to justify the criteria.

- 6.27 The effect of these provisions is that less favourable treatment which is disability-related and which arises from the application of a competence standard is capable of justification on an objective basis. Justification does not depend on an individual assessment of the disabled person's circumstances, but depends instead on an assessment of the purpose and effect of the competence standard itself. For a competence standard to be objectively justifiable, the education provider would have to show that it was appropriate and necessary and that it was a proportionate means of achieving a legitimate aim.
- 6.28 To demonstrate that the application of a particular competence standard is a proportionate means of achieving a legitimate aim, the education provider must show:
- that there is a pressing need that supports the aim which the treatment is designed to achieve and thus amounts to a 'legitimate' aim, and
  - that the application of the competence standard is causally related to achieving that aim, and

- that there was no other way to achieve the aim that had a less detrimental impact on the rights of disabled people.

6.29 These special rules about justification are only relevant to the actual application of a competence standard. If an education provider applies a competence standard incorrectly, or applies a standard which is not a genuine competence standard then these rules do not operate. Instead, the more usual test of justification operates (assuming, of course, that the incorrect application of the standard is not directly discriminatory, but that it is disability-related less favourable treatment).

### **How can education providers avoid discrimination in relation to competence standards?**

6.30 If unlawful discrimination is to be avoided when the application of a competence standard results in less favourable treatment of a disabled person, the education provider concerned will have to show two things. First, it will have to show that the application of the standard does not amount to direct discrimination – if it does it is not a genuine competence standard. Second, it will be necessary to show that the standard can be objectively justified.

6.31 This is more likely to be possible where an education provider has considered the nature and effects of its competence standards in advance of an issue arising in practice. It would be advisable for education providers to review and evaluate competence standards. This process might involve:

- identifying the specific purpose of each competence standard which is applied, and examining the manner in which the standard achieves that purpose
- considering the impact which each competence standard may have on disabled people and, in the case of a standard which may have an adverse impact, asking whether the application of the standard is absolutely necessary
- reviewing the purpose and effect of each competence standard in the light of changing circumstances – such as developments in technology
- examining whether the purpose for which any competence standard is applied could be achieved in a way which does not have an adverse impact on disabled people; and
- documenting the manner in which these issues have been addressed, the conclusions which have been arrived at, and the reasons for those conclusions.

### **What happens if disability-related discrimination occurs?**

6.32 Where an education provider treats a disabled person less favourably for a reason related to his disability and cannot justify that treatment, it will be committing an act of unlawful discrimination. A disabled person will be able to make a claim based on this (see Chapter 13 for more details about claims).



## What evidence is needed to prove that unjustifiable disability-related discrimination has occurred?

- 6.33 Paragraph 3.38 explains that claims of disability discrimination under the Act's provisions on post-16 education take place in the county court (England and Wales) or sheriff court (Scotland). A person who brings a claim for unlawful discrimination must show that discrimination has occurred. He must prove this on the balance of probabilities in order to succeed with a claim in court.
- 6.34 However, the Act says that when such a claim is heard by a court, the court **must uphold the claim** if:
- the claimant proves that he is covered by the definition of disability, and
  - the claimant proves facts from which the court could conclude in the absence of an adequate explanation that the person against whom the claim is made (the defendant) has acted unlawfully, and
  - the defendant fails to prove that he did not act in that way.
- 6.35 Consequently, where a disabled person is able to prove on the balance of probabilities, facts from which an inference of unlawful discrimination could be drawn, the burden of proof shifts to the defendant. This means that the education provider must show cogent and persuasive reasons that it is more likely than not that its conduct was not unlawful. Its practical effect in relation to **disability-related discrimination** can be summarised as follows:

s 28V(1A)

- To prove an allegation of disability-related discrimination, a claimant must prove facts from which it could be inferred in the absence of an adequate explanation that, for a reason relating to his disability, he has been treated less favourably than a person to whom that reason does not apply has been, or would be, treated.
- If the claimant does this, the burden of proof shifts, and it is for the defendant to show that the claimant has not received less favourable treatment for a disability-related reason. Even if the defendant cannot show this, however, the claim will not succeed if the defendant shows that the treatment was justified.

6.36 However, as has already been explained in paragraphs 6.15 and 6.16, if there has been a failure to make reasonable adjustments, this will have an impact on the question of whether less favourable treatment for a disability-related reason can be justified. The practical effect of this in relation to disability-related discrimination can be summarised as follows:

- To prove an allegation of unjustifiable disability-related discrimination, a claimant must prove facts from which it could be inferred in the absence of an adequate explanation that:
  - for a reason related to his disability, he has been treated less favourably than a person to whom that reason does not apply has been, or would be, treated, and
  - a duty to make a reasonable adjustment has arisen in respect of him and the education provider has failed to comply with it.

- If the claimant does this, the claim will succeed unless the education provider proves that:
  - the reason for the treatment is both material to the circumstances of the particular case and substantial; and
  - the reason would still have applied if the reasonable adjustment had been made, or the reasonable adjustment would not have made any difference, or
  - the less favourable treatment was the result of the application of a competence standard that was applied equally to people without his disability and was a proportionate means of achieving a legitimate aim.

For the purposes of disability-related discrimination claims, the test to determine upon whom the burden of proof lies should in practice comprise a two-stage process, but the court hearing does not have to be split into two similar stages. Instead, these matters should be addressed in the court judgment after the respective parties have given evidence and made submissions.

6.37 If a provision of this Code appears to a court to be relevant it must take that provision into account when determining whether there has been discrimination or harassment (see paragraph 1.13).



# 7 Victimization and harassment

## Introduction

7.1 One of the ways in which an education provider discriminates under the Act is where it victimises a person (whether disabled or not). Separately the Act also makes it unlawful for an education provider to subject a disabled person to harassment, which is not technically classed as a form of discrimination, but is nevertheless unlawful under the Act. These are two specific concepts under the Act and have distinct and separate meanings. This chapter examines victimisation and harassment.

## What does the Act say about victimisation?

- 7.2 Victimization is a special form of discrimination which is made unlawful by the Act. It applies whether or not the person victimised is a disabled person. Victimization is unlawful if it occurs in relation to the provision of post-16 education or other related services covered by Part 4.
- 7.3 The purpose of the victimisation provisions are to protect individuals (whether disabled or not), who make or support a claim, from reprisal.
- 7.4 It is unlawful for one person to treat another ('the victim') less favourably than he treats or would treat other people in the same circumstances (regardless of disability) because the victim has:

s 55

- brought, or given evidence or information in connection with, proceedings under the Act (whether or not proceedings are later withdrawn)
- done anything else under or by reference to the Act, or
- alleged someone has contravened the Act (whether or not the allegation is later dropped),
- or because the person believes or suspects that the victim has done or intends to do any of these things.

A disabled student complains of discrimination, having been refused access to a number of college facilities. Another student on the disabled student's course gives evidence at the hearing on his behalf. As a result, the facilities staff at the college start to ignore the requests made by the student who gave evidence and in some cases refuse to let him have access to the facilities. This is likely to be victimisation and therefore unlawful.

A non-disabled student acts as a witness in a complaint by a disabled student against a college lecturer. Later, in retaliation, other lecturing staff at the college begin to 'lose' the non-disabled student's work, and hand assignments back later than for other students. This is likely to be victimisation, and therefore unlawful.

7.5 It would also be unlawful to subject a person to less favourable treatment where he attends the hearing, not to give evidence but purely to offer

support to the claimant – because this would be something which is done by reference to the Act.

- 7.6 It is not victimisation to treat a person less favourably because that person has made an allegation which was false and not made in good faith.
- 7.7 However, the fact that a person has given evidence on behalf of a claimant in a claim which was not successful does not, of itself, prove that his evidence was false or that it was not given in good faith.

A disabled man makes a series of allegations claiming that his tutor is discriminating against him. The allegations are without any foundation, and are part of a personal grudge that the young man has against the tutor. The education provider decides to suspend the man from the course. Because of the particular circumstances, this is not likely to be victimisation and is therefore likely to be lawful.

- 7.8 Unlike the other forms of discrimination which are made unlawful by the Act, a claim of victimisation may be made by people who are not disabled as well as by those who are.

### **What evidence is needed to prove victimisation has occurred?**

- 7.9 Paragraph 3.38 explains that claims of discrimination under the Act's provisions on post-16 education take place in the county court (England and Wales) or sheriff court (Scotland). A person who brings a claim for unlawful discrimination must show that it has occurred.

s 55(4)

s 28R(4)

## s 28V(1A)

He must prove this on the balance of probabilities in order to succeed with a claim in the court.

7.10 The Act says that, when such a claim is heard by a court, the court must uphold the claim if:

- the claimant proves facts from which the court could conclude in the absence of an adequate explanation that the person against whom the claim is made (the defendant) has acted unlawfully, and
- the defendant fails to prove that he did not act in that way.

7.11 Where a disabled person is able to prove on the balance of probabilities facts from which an inference of discrimination could be drawn, the burden of proof shifts to the defendant. This means that the education provider must show that it is more likely than not that its conduct was not unlawful. Its practical effect in relation to victimisation can be summarised as follows:

- To prove an allegation of unlawful victimisation, a claimant must prove facts (from all the evidence before the court) from which it could be inferred in the absence of an adequate explanation that he has carried out the protected act and that he has been treated less favourably as a consequence of the protected act.
- The burden then shifts to the defendant to prove that the reason for the behaviour complained of is not related to the claimant having carried out the protected act.

For the purposes of victimisation claims, the test to determine upon whom the burden of proof lies should in practice comprise a two-stage process,



but the court hearing does not have to be split into two similar stages. Instead, these matters should be addressed in the court judgment after the respective parties have given evidence and made submissions.

- 7.12 The fact that there has been a failure to comply with a relevant provision of the Code must be taken into account by a court, where it considers it relevant, in determining whether there has been discrimination or harassment (see paragraph 1.13).

### **What does the Act say about harassment?**

- 7.13 The Act says that harassment occurs where, for a reason which relates to a person's disability, an education provider engages in unwanted conduct which has the purpose or effect of:

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

A student with HIV eats his lunch in the college canteen. A member of the catering staff refuses to collect his plate, which is not something he would do if any other student had finished with their plate. He also makes offensive comments about the cleanliness of plates that have been used by people with HIV. This is likely to amount to harassment.

- 7.14 If the conduct in question was engaged in with the purpose or intention that it should have either of these effects, then it amounts to harassment irrespective of its actual effect on the disabled person.

s 28SA(1)

s 28SA(2)

A student with a learning disability is often called 'stupid' and 'slow' by staff at a community learning centre. This is harassment, whether or not the disabled man was present when these comments were made, because they were said with the intention of humiliating him.

7.15 In the absence of such intention, however, the conduct will only amount to harassment if it should reasonably be considered as having either of these effects. Regard must be had to all the circumstances in order to determine whether this is the case. Those circumstances include, but are not restricted in particular to, the perception of the disabled person.

A student with a stammer feels he is being harassed because his lecturer makes constant jokes about people with speech impairments. He asks his lecturer to stop doing this, but the lecturer says he is being 'oversensitive' as he habitually makes jokes about many different sorts of people. This is likely to amount to harassment because making remarks of this kind should reasonably be considered as having either of the effects mentioned above.

A tutor of a performing arts course makes it clear that he feels that people who have physical impairments do not make good actors. A student in the class who uses a prosthetic leg hears the comment and finds it offensive. This is likely to amount to harassment.

A student with depression considers that she is being harassed by her tutor who constantly asks her if she is feeling all right, despite the fact she has asked him not to do so in front of other students. This could amount to harassment.

A disabled student on a social work course is offended by a lecturer referring to disabled people as she feels he is picking on her. The comments made by the lecturer are purely factual, are not derogatory and are appropriate for the lecture. The disabled person's perception that any reference to disability is aimed at her and is offensive is unlikely to be sufficient to amount to harassment.

- 7.16 Harassment can occur without the education provider being aware of a person's disability. Whether or not it has occurred will often depend on the effect it has on the disabled person. Unlike direct discrimination and disability-related discrimination there is no requirement to compare the treatment to that received by another person.

A lecturer teaching a course in medicine repeatedly makes derogatory remarks about people with progressive health conditions, such as cancer. A student in the class who has cancer finds the repeated remarks offensive. This is likely to amount to harassment even if the lecturer did not know that any students in the class had progressive health conditions. This is because the conduct has the effect of creating an offensive environment and is conduct which could reasonably be considered to have such an effect.

7.17 Conduct which amounts to harassment may also amount to either direct discrimination or disability-related discrimination depending on the circumstances. In order to claim direct discrimination or disability-related discrimination, the disabled person must demonstrate that they have suffered a detriment. There is no such requirement in relation to harassment.

### **What evidence is needed to prove harassment has occurred?**

7.18 Paragraph 3.38 explains that claims of harassment under the Act's provisions on post-16 education take place in the county court (England and Wales) or sheriff court (Scotland). A person who brings a claim for unlawful harassment must show that it has occurred. He must prove this on the balance of probabilities in order to succeed with a claim in the court.

7.19 The Act says that, when such a claim is heard by a court, the court **must uphold the claim** if:

- the claimant/pursuer proves that he is covered by the definition of disability; and
- the claimant/pursuer proves facts from which the court could conclude in the absence of an adequate explanation that the person against whom the claim is made (the defendant, or in Scotland, the defender) has acted unlawfully; and
- the defendant/defender fails to prove that he did not act in that way.

7.20 Where a disabled person is able to prove on the balance of probabilities facts from which an inference of harassment could be drawn, the burden of proof shifts to the defendant/defender.

This means that the education provider must show that it is more likely than not that its conduct was not unlawful. Its practical effect in relation to **harassment** can be summarised as follows:

- To prove an allegation of unlawful harassment, a claimant or, in Scotland, pursuer must prove facts (from all the evidence before the court) from which it could be inferred in the absence of an adequate explanation that he has been harassed by the defendant for a reason relating to his disability.
- The burden then shifts to the defendant/defender to prove that the reason for the behaviour complained of is in no sense whatsoever related to the claimant's disability.
- If the behaviour complained of is proved to be disability-related, the defendant/defender must then prove that this behaviour was not engaged in for the purpose of violating the dignity of the claimant/pursuer, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him.
- If the treatment complained of is proved to be disability-related and the defendant/pursuer has demonstrated it was not engaged in for that purpose, the court should ask whether the conduct concerned should reasonably be considered to have the effect of violating the dignity of the claimant/pursuer, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him taking into account all of the circumstances of the case, including in particular the claimant's/pursuer's perception.

For the purposes of harassment claims, the test to determine upon whom the burden of proof lies should in practice comprise a staged process, but the court hearing does not have to be split into similar stages. Instead, these matters should be addressed in the court judgment after the respective parties have given evidence and made submissions.

7.21 If a provision of this Code appears to a court to be relevant it must take that provision into account when determining whether there has been discrimination or harassment (see paragraph 1.13).

# 8

## Discrimination in the admission of students

### Introduction

8.1 It is unlawful for an education provider to discriminate against a disabled person because of the person's disability:

- in the arrangements made for determining admissions to the institution
- in the terms on which it offers to admit the disabled person to the institution, or
- by refusing or deliberately omitting to accept an application for his admission to the institution.

8.2 This chapter examines these principles in more detail. In order to do so, it is necessary to look at the various stages of the admissions and enrolment process, from designing the course and advertising it, to the process of assessing applicants, interview, selection, enrolment and induction.

8.3 The 'acts' which can constitute unlawful conduct in relation to admissions are:

- Direct discrimination (see Chapter 4).
- Failure to make reasonable adjustments (see Chapter 5).
- Disability-related discrimination which cannot be justified (see Chapter 6).

s 28R(1)

- Victimization (see Chapter 7).
- Harassment (see Chapter 7).

## **General considerations**

- 8.4 An education provider should assess an applicant's merits as they would be if any reasonable adjustments required under the Act had been made. If, after allowing for those adjustments, a disabled person would not meet the competence standards for the course, the education provider does not have to offer a place to that person. Competence standards are explained in more detail at paragraphs 5.71 to 5.78 and 6.24 to 6.31.
- 8.5 The Act does not prevent courses being advertised as open only to disabled applicants, or to an applicant being preferred for the course because of his disability, although there may be other legal obligations that affect this. Education providers will also need to bear in mind their obligations under sections 49A-49F of the Act and associated regulations (known as the disability equality duties), including the requirement to have due regard to the need to take steps to take account of disabled people's disabilities, even where this means treating them more favourably than non-disabled people.

### **What are 'arrangements' for determining admissions to the institution?**

- 8.6 The meaning of 'arrangements' – that is arrangements for determining who should be admitted to the institution – is wide. Such arrangements are not confined to those which an education provider makes in deciding who should be offered a place on a specific course, but also



include arrangements for deciding who should be offered places more generally and how courses are designed. So participation in any pre-course activities such as taster sessions could be 'an arrangement' if its completion is a necessary step along the road to obtaining a place on the course.

## **Course requirements**

### **How does the Act affect the way in which course criteria and requirements are applied?**

- 8.7 The inclusion of unnecessary or marginal requirements for entry to a course can lead to discrimination.

The entrance requirements for a postgraduate diploma in management stipulate that the application process will assess whether applicants are 'active and energetic', when in fact the course is predominately classroom-based. The requirement could unjustifiably exclude some people whose impairments result in them getting tired more easily than others.

The entrance requirements for a GCSE French course state that applicants 'must be able to speak clearly'. This requirement could unjustifiably exclude some people whose impairments result in a significant effect on their speech.

- 8.8 Blanket policies (ie policies which do not take account of individual circumstances) can also lead to discrimination. Indeed, such policies are likely to amount to direct discrimination and so be incapable of justification (see paragraph 4.5).

A higher education institution states that many of its courses require a high level of commitment and that applicants with a history of mental health conditions should not consider applying, believing that such applicants would not be able to cope with the demands of the course. The institution rejects an applicant solely because he has a history of mental health conditions, without checking the individual's history of educational progress. This is likely to amount to direct discrimination and therefore will be unlawful.

A college states that anyone with an infectious disease cannot take part in a practical cookery course. The college refuses to admit someone with AIDS onto the course, believing him to be a health and safety risk. This action is likely to amount to direct discrimination and be therefore unlawful, as the education provider has not considered the actual circumstances of the case.

- 8.9 Stating that a certain personal, medical or health-related characteristic is necessary or preferable can lead to discrimination if the characteristic is not necessary for the course. An education provider would therefore need to ensure that any such requirements were genuine competence standards essential for the course.

A university requires all applicants for the sports science degree course to have a certain level of fitness. However, this level of fitness is not actually essential in order to complete the course so it is not a genuine competence standard.

If the university refused to admit a disabled student because he does not have this level of fitness it is likely that the university will be acting unlawfully.

- 8.10 Likewise, although an education provider is entitled to specify that applicants for a course must have certain qualifications, it will have to show that these are genuine competence standards required for the course and that the application of the competence standard is a proportionate means of achieving a legitimate aim.
- 8.11 If an education provider has a genuine competence standard for entry onto a course it should show flexibility in accepting different qualifications which show an individual meets the necessary competence standard. In some circumstances it might be more legitimate and proportionate to waive the requirement for a particular qualification, if an individual applicant has alternative evidence of the necessary level of competence.
- 8.12 An education provider may have to justify rejecting a disabled person for lacking a qualification if the reason why the disabled person lacks it is related to his disability. Justification will involve showing that the particular qualification is either a genuine competence standard (which is applied equally to everyone and which is proportionate and legitimate), or, where it does not concern application of a competence standard, showing that there is a material and substantial reason for the rejection.

A university specifies that the entrance criteria for its degree courses are usually three A levels and one AS level or an equivalent level of qualifications. The university rejects a disabled applicant who has five GCSEs, but has no qualifications at A level or equivalent, due to periods of disability-related absences. If the level of qualification required fairly reflects the level of study of the course, and the course cannot be reasonably altered, it is likely that the university will be justified in rejecting the disabled applicant.

An adult education college states that it requires a level of English language fluency for entrance onto its courses and specifies a particular test of language fluency that it will accept. An applicant with a speech impairment found that this particular test did not allow for additional time to be given, and as a result she scored much lower than she should have done on the test. It is likely that the college would be unable to justify rejecting her for not having the required test result if she could show through an alternative test that she had the relevant level of fluency required.

- 8.13 When designing a course, an education provider should consider the anticipatory nature of the reasonable adjustments duty (see Chapter 5) and design the course and any assessments to be as accessible as possible. In addition, education providers should regularly review the way courses are delivered and assessed. Providers will also need to consider these in light of their disability equality duties.

A university designs a new religious studies degree course and specifies that a student's performance can be assessed through a number of different assessment methods including written course work, oral presentations and timed examinations. This enables students to choose the assessment method which suits them best and therefore reduces the number of reasonable adjustments required.

## **Marketing the course**

### **Can a course advertisement encourage applications from disabled people?**

- 8.14 The Act does not prevent a course advertisement saying that the education provider would welcome applications from disabled people. This would be a positive and public statement of the education provider's policy and may also reflect its obligations under the Disability Equality Duty. More information about good practice in relation to attracting disabled applicants is given at paragraphs 2.25 to 2.27.

### **What about discriminatory advertisements?**

- 8.15 The Act says that, when advertising a course, it is unlawful for the education provider offering the course to publish an advertisement (or cause an advertisement to be published) which indicates, or might reasonably be understood to indicate:
- that the success of a person's application for the course may depend to any extent on his not having any disability, or any particular disability; or
  - that the person determining the application is reluctant to make reasonable adjustments.

s 28UC(1)

s 28UC(3)

An education provider advertises a course in accountancy, which states 'We are sorry, but because our classrooms are on the first floor, they are not accessible to disabled people'. This is likely to be unlawful. It would be preferable for the advertisement to state 'Although our classrooms are on the first floor, we welcome applications from disabled people and are willing to make reasonable adjustments'.

8.16 This applies to every form of advertisement or notice, whether to the public or not, for any course or student service. However, an advertisement may still be lawful even if it does indicate that having a particular disability will adversely affect an applicant's prospects of success. This will be the case where, for example, because of the nature of the course in question, the education provider is entitled to take the effects of the disability into account when assessing the suitability of applicants.

It is likely that it would be lawful for a practical course in electrical component repair to suggest in the prospectus that applicants should have a certain level of manual dexterity.

s 28UC(4)  
and s 28VA

8.17 The Act does not give individual applicants the right to take legal action in respect of discriminatory advertisements. Such action may only be taken by the DRC or the Commission for Equality and Human Rights (CEHR) (see paragraphs 13.11 and 13.12).

8.18 In addition, the content of the advertisement could be taken into consideration by a court in

determining a claim brought by a disabled person under the Act.

A man who is a wheelchair user applies for the accountancy course above and is rejected. He could ask the court to take the content of the advert into account when determining whether he was not accepted onto the course for a disability-related reason.

### **Does an education provider have to provide information about courses and student services in accessible formats?**

- 8.19 Where an education provider provides information about a course or student service, it is likely to be a reasonable adjustment for it to provide information in a format that is accessible to a disabled applicant. Accessible formats include email, Braille, Easy Read, large print, audiotape and computer disc. A disabled person's requirements will depend upon his impairment, but on other factors too. For example, many blind people do not read Braille but prefer to receive information by email or on audiotape. As the duty to make reasonable adjustments is an anticipatory one, an education provider would be expected to have most general information such as prospectuses and course leaflets available in a number of formats.

A woman with a visual impairment asks for a prospectus to be sent to her in a commonly-used electronic format, so that it is compatible with her screen reading software. This is likely to be a reasonable adjustment for the education provider to make.

A further education college advertises course details on its website. The website does not allow for text to be enlarged. A man with a visual impairment notifies the education provider that he would like to apply for a course, but that he cannot read the course details on the website. It is likely to be unlawful for the college to refuse to make the website accessible to the disabled man, unless it is prepared to provide him with the same information in an accessible format.

## **Recruitment activities**

- 8.20 The Act covers all recruitment activities, whether aimed at 'home' or international students. Education providers are expected to ensure that all front-line staff (including any agents involved in recruiting overseas and office staff answering telephone enquiries) are aware of the need to make reasonable adjustments for disabled people and have been trained in communicating with a wide range of disabled people.
- 8.21 It is also good practice to ensure that all front-line staff know what provision the education provider already makes for disabled students, and the process for ensuring that reasonable adjustments are made.
- 8.22 Where an education provider holds recruitment fairs and other recruitment activities, it is the education provider's responsibility to ensure the venue is accessible and the materials handed out are available in alternative formats.
- 8.23 The duties also cover open days, campus tours, summer schools, taster courses and mentoring schemes with local schools.



## **Does an education provider have to accept applications in accessible formats?**

- 8.24 Where an education provider invites applications by completing and returning an application form, it is likely to be a reasonable adjustment for it to accept applications which provide the necessary information in accessible formats. However, a disabled person might not have a right to submit an application in his preferred format (such as Braille) if he would not be substantially disadvantaged by submitting it in some other format (such as email) which the education provider would find easier to access. Where applications are invited by completing and returning a form on-line, that form should be accessible to disabled people (or an accessible alternative should be provided).

An applicant for a course asks to submit his application in audio format rather than using the standard application form. It is likely to be a reasonable adjustment for the education provider to allow this.

A college requires all applicants to fill out an application form by hand. It does not allow disabled students to type the form or another person to fill the form in for them. This is likely to be unlawful.

- 8.25 Whether or not an application is submitted in an accessible format, education providers and their staff or agents must not discriminate against disabled people in the way that they deal with their applications.

## **Admissions process**

### **When must an education provider make adjustments to its selection, assessment and interview arrangements?**

- 8.26 An education provider is required to make changes in anticipation of applications from disabled people in general. When an education provider becomes aware of an individual disabled person's need for reasonable adjustments, these should be put in place in the admissions process.

### **When should an education provider offer a disabled person a pre-course assessment?**

- 8.27 An education provider that uses pre-course assessments such as interviews or auditions will need to consider whether it should make reasonable adjustments when deciding to whom to offer a pre-course assessment. This will be the case if an education provider knows or ought to know that an applicant has a disability and is likely to be at a substantial disadvantage because of its recruitment arrangements or the premises in which any pre-course assessments are held. In these circumstances, the education provider should consider whether there is any reasonable adjustment which would remove the disadvantage. Any such adjustment should be taken into account when shortlisting applicants. If the education provider cannot make this judgement without more information it would be discriminatory for it not to put the disabled person on the shortlist for pre-course assessment if that is how it would normally seek additional information about applicants.

## **What adjustments might an education provider have to make when arranging or conducting pre-course assessments?**

- 8.28 Education providers should think ahead for pre-course assessments. Depending upon the circumstances, changes may need to be made to arrangements for the assessments or to the way in which assessments are carried out.

An applicant with a hearing impairment informs the university who has asked him to interview that he lip-reads and will need to be able to see the interviewer's face clearly. The interviewer ensures that her face is well lit, that she faces the applicant when speaking, that she speaks clearly and is prepared to repeat questions if the candidate does not understand her. These are likely to be reasonable adjustments for the university to make.

A further education college arranges a British Sign Language (BSL) interpreter to attend a portfolio session with a deaf candidate who uses BSL to communicate. This is likely to be a reasonable adjustment for the education provider to make.

A college allows a person with autism to bring a supporter with him to facilitate the dialogue at the interview by rephrasing questions where necessary to make them clearer and to help the applicant understand what the interviewer wants to know.

- 8.29 It is a good idea to give applicants the opportunity to indicate any relevant effects of a disability and to suggest adjustments to help overcome any disadvantage the disability may cause at an assessment. This could help the education provider avoid discrimination in the assessment and in considering the application, by clarifying whether any reasonable adjustments may be required. However, an education provider must not assume that no adjustments need to be made simply because the applicant has not requested any (see paragraph 5.11).
- 8.30 The practical effects of an education provider's duties may be different if a person whom the education provider previously did not know, and could not reasonably be expected to have known, to be disabled arrives for an assessment and is substantially disadvantaged because of the arrangements. The education provider should have anticipated reasonable adjustments that might be required by disabled people in general and therefore should be able to put them in place very quickly if necessary. The education provider will still be under a duty to make a reasonable adjustment from the time that it first learns of the disability and the disadvantage. However, the education provider might not be required to do as much as might have been the case if it had known (or if it ought to have known) in advance about the disability and its effects.

An applicant for a course at a university does not tell the university in advance that she uses a wheelchair and the university does not know of her disability. On arriving for interview she discovers that the room is not accessible. Although the university could not have been expected to make the necessary changes in

advance, it would be a reasonable adjustment to hold the interview in an alternative, accessible room if one was available. In order to comply with the anticipatory duty the university should always use accessible rooms for interviews.

### **What about tests in the admissions process?**

8.31 The Act does not prevent education providers carrying out tests. However, routine testing of all applicants may still discriminate against particular individuals or substantially disadvantage them. In those cases, the education provider would need to revise the tests – or the way the results are assessed – to take account of a disabled applicant. This does not apply, however, where the nature and form of the test is necessary to assess a competence standard. The following are examples of adjustments which may be reasonable:

- allowing a disabled person extra time to complete the test
- permitting a disabled person the assistance of a reader or scribe during the test
- assessing a disabled person by a different method.

The extent to which such adjustments might be required would depend on how closely the test is related to the course in question and what adjustments the education provider might have to make if the person was on the course.

A college sets applicants for a higher level language course a short oral exercise. A person with a speech impairment is given additional time to complete the exercise. This is likely to be a reasonable adjustment.

8.32 Where education providers rely on the results of tests conducted by external bodies, they should discuss with the external body the need to make reasonable adjustments for disabled students. Refusing a place to a disabled applicant who performed badly on tests that were conducted without any necessary reasonable adjustments required is likely to be unlawful.

### **Less formal admissions processes**

8.33 Not all students are admitted through a formal admissions system. Many are taken on by individual departments or may even just turn up to one-day courses or taster days. Education providers need to ensure that all staff responsible for admissions and enrolments are aware of the education provider's duties towards disabled people. It is good practice to encourage disabled people to let the education provider know about any reasonable adjustment requirements in advance. However, the education provider should have anticipated the need for reasonable adjustments and therefore be able to respond to many reasonable adjustment requests immediately.

### **European and other international students**

8.34 European and international students have the same rights under the Act as home students. Education providers need to ensure that they have

in place the necessary systems to identify the needs of disabled students coming from overseas.

## **Professional and vocational courses**

- 8.35 Some courses which lead to professional or trade qualifications are validated by professional qualification bodies which require particular entrance requirements. Education providers also have duties under Part 4 to ensure that they have clearly identified, with the qualifications body, which entry requirements are genuine competence standards and which are not and therefore subject to the reasonable adjustments duty. Qualifications bodies have duties under Part 2 of the Act not to discriminate against disabled people. (For more details see the **Code of Practice for Trade Organisations and Qualifications Bodies** – see Appendix C for further details.)

## **Enrolment and induction**

- 8.36 Enrolment and induction are important opportunities for education providers to gather useful information from disabled students about their support needs. It is important that such events are held in accessible venues and disabled people are provided with an opportunity to discuss their disability and any reasonable adjustment requirements in confidence.

## **Knowledge of students' disabilities and confidentiality**

- 8.37 There is no duty on a student to disclose a disability. However, education providers are expected to take steps to find out about a student's disability. Even when an education provider does not know that a student or applicant is disabled, it can still be liable for direct

discrimination or disability-related discrimination. Once a student has disclosed a disability, or once an education provider might reasonably be expected to know about a student's disability (for example, if it is visible to others), the institution has a responsibility to make reasonable adjustments. Students do have a right to confidentiality but should be made aware of this, but also that this may place restrictions on the reasonable adjustments that an education provider can make (see paragraphs 5.26 to 5.28). For some courses there may be other legal requirements that students disclose certain disabilities or conditions.

- 8.38 Applicants should be encouraged to disclose a disability and any reasonable adjustment requirements both when applying for a course and when offered a place. This requires a confidentiality policy which ensures the information will not be misused and gives applicants confidence in the system. It is important to provide students with an ongoing opportunity to disclose a disability. This ensures that people who develop a disability during their time as a student or people with changing needs have reasonable adjustments.

### **When can an education provider ask questions about a disability?**

- 8.39 The Act does not prohibit an education provider from seeking information about a disability. However, disability-related questions must not be used to discriminate against a disabled person. An education provider should only ask such questions if they are, or may be, relevant either to a disabled person's reasonable adjustments requirements or to the person's ability to do the



course – after a reasonable adjustment, if necessary.

An applicant with a visual impairment is asked at interview whether or not she was born with that condition. This is irrelevant to her ability to do the course and may upset the applicant, potentially preventing her from performing as well as she would otherwise have done. This is likely to be unlawful.

An applicant who is a wheelchair user is asked whether any changes may be needed to the teaching and learning arrangements or physical environment at the university to accommodate him. This would not be unlawful.

8.40 Asking a basic question as to whether or not a person is disabled is unlikely to yield any useful information about that individual for the education provider. In addition, making decisions about who to offer places to on the basis of an applicant's responses to questions about disability may be discriminatory if the education provider has not ascertained the likely effects of a disability or medical condition on the applicant's ability to do the course, or whether reasonable adjustments would overcome any disadvantage it causes.

An application form includes the statement 'Please let us know if you require any reasonable adjustments, due to disability, to enable you to attend any pre-course assessment (such as interviews or auditions), or which you wish us to take into account when considering your application. Reasonable adjustments are things

like sign language interpreters, altering times of pre-course assessments, or making the rooms in which pre-course assessments are held accessible for you. If you would like to discuss your disability requirements further, please contact the Admissions Office'. This will not be discriminatory and is acceptable as it will help the education provider to comply with its duties under the Act.

8.41 In addition, once a decision has been made to offer a place on a course to a disabled person, it is good practice for an education provider to discuss reasonable adjustments with him before he starts the course and provides opportunities for further discussion whilst he is on the course.

8.42 An education provider will also need to gather information on disabled applicants in order to comply with the Disability Equality Duty. More information about requirements in relation to gathering information is given in paragraphs 2.14 to 2.24.

### **Can a disabled person be required to have a medical examination?**

8.43 Although the Act does not prevent an education provider from asking a disabled person to have a medical examination, an education provider will probably be acting unlawfully if, without justification, it insists on a medical check for a disabled person but not for others. The fact that a person has a disability is, in itself, unlikely to justify singling out that person to have a health check – although this might be justified in relation to some courses. As explained in paragraph 6.23 the education provider should ensure that anyone

carrying out a medical assessment is aware of the specific circumstances. An education provider should not follow the recommendation of a medical report if it is based on generalised assumptions about disabled people.

- 8.44 An education provider may, however, ask a disabled person to undergo an assessment of their reasonable adjustment requirements. This may be as part of the process of applying for Disabled Students' Allowance.

### **Offers of admission**

- 8.45 Terms of admission should not discriminate against a disabled person. In general, an education provider should not offer admission to a disabled person on terms which are less favourable than those which would be offered to other people.

An adult education centre informs a student with epilepsy that he may not enrol on a course unless he has an assistant with him at all times in case he has a seizure. In the past the student has only had seizures during the night. The centre's demand is likely to be unlawful.

A university has many applications for a popular course. In order to cut down the numbers that the admissions tutor has to look through, the administrator sets to one side all applications from disabled students. These applicants are considered only if places remain after all other applicants have been considered. This is likely to be unlawful.



# 9

## Discrimination against students

### Introduction

- 9.1 It is unlawful for an education provider to discriminate against a disabled student because of that person's disability:
- in the student services it provides, or offers to provide; or
  - by excluding him from the institution either permanently or temporarily.
- 9.2 This chapter examines these principles in more detail. In order to do so, it is necessary to look at various aspects of student services and the arrangements for excluding students.
- 9.3 The 'acts' which can constitute unlawful conduct in relation to student services and exclusions are:
- Direct discrimination (see Chapter 4).
  - Failure to make reasonable adjustments (see Chapter 5).
  - Disability-related discrimination which cannot be justified (see Chapter 6).
  - Victimisation (see Chapter 7).
  - Harassment (see Chapter 7).

s 28R(2) and (3)

## Student services

9.4 'Student services' are any services that an education provider provides, or offers to provide, wholly or mainly for students.

9.5 Student services will vary from one provider to another, but might include, for example:

- teaching, including classes, lectures, seminars, practical sessions
- curriculum design
- examinations and assessments
- enrolment and induction
- field trips and outdoor education
- arranging study abroad or work placements
- outings and trips
- research degrees and research facilities
- informal/optional study skills sessions
- short courses
- day or evening adult education courses
- training courses
- distance learning
- independent learning opportunities such as e-learning
- learning facilities such as classrooms, lecture theatres, laboratories, studios, darkrooms, etc
- learning equipment and materials such as laboratory equipment, computer facilities, class handouts, etc
- libraries, learning centres and information centres and their resources

- information and communication technology and resources
- placement-finding services
- careers advice and training
- careers libraries
- job references
- job shops and employment-finding services
- graduation and certificate ceremonies
- leisure, recreation, entertainment and sports facilities
- the physical environment
- chaplaincies and prayer areas
- health services
- counselling services
- catering facilities
- childcare facilities
- campus or college shops
- car parking
- residential accommodation
- accommodation-finding services
- financial advice
- welfare services.

9.6 However, educational providers often make provision that is wholly or mainly for other groups of people, not students. These are not covered by Part 4 of the Act. Examples might include:

- commercial conference facilities (these would be covered by Part 3 of the Act)

- commercial research or consultancy services (these are likely to be covered by Part 3 of the Act)
- services and facilities for staff (these would be covered by Part 2 of the Act).

The following paragraphs look in more detail at what might have to be done in relation to certain aspects of student services.

## Induction

- 9.7 Education providers must not discriminate in their induction procedures. The education provider may have to make adjustments to ensure a disabled person is introduced into an institution in a clearly structured and supported way, with an individually-tailored induction programme if necessary.

A further education college distributes written copies of course details and contact information as part of the induction process for new students. A student with a visual impairment requests that the information is made available in large print. This is likely to be a reasonable adjustment.

A university library holds a series of induction sessions for each course group on how to use the library services. A disabled student is unable to attend the session for her course group because of the scheduling of her personal care arrangements. She informs the relevant library staff of this, and they invite her to attend an alternative session. This is likely to be a reasonable adjustment.



## Teaching and learning

- 9.8 Education providers must ensure that all aspects of teaching and learning do not discriminate against disabled students. This includes classes, lectures, seminars, practical sessions, individual tutorials, field trips and work placements. The purpose of the legislation is to enable disabled people to gain access to learning opportunities. Course leaders and course developers need, therefore, to be precise about what is, and what is not, a competence standard (see paragraphs 5.71 to 5.78 and 6.24 to 6.31), so that they can assess where adjustments to teaching practices may be introduced. Wherever possible courses and teaching practices should be designed to be accessible so that only minimal adaptations need to be made for individuals. This will also help education providers to ensure they are complying with the anticipatory aspect of the duty.
- 9.9 Staff need to know what is expected of them and to be resourced to respond appropriately to students' needs. This might include ensuring that staff have had appropriate training in making teaching and learning more accessible to disabled students, ensuring that staff know how to put reasonable adjustments in place and ensuring that staff are aware of the advice and support services which are available within the institution for disabled students.
- 9.10 Some very simple adaptations by tutors and lecturers to their teaching practice can help to ensure disabled students are not substantially disadvantaged.

A lecturer reads out what he writes on the board and verbally describes any pictures or illustrations he uses to ensure that a visually impaired student is able to access the visual material displayed in lectures.

- 9.11 Some adjustments may be necessary to ensure that disabled students can fully contribute to, and benefit from, group projects. This may require supporting and advising other students within the group to ensure that the necessary adjustments are made and assessing group work to ensure that every student's contribution is appropriately measured.

Students on a course which involves group work are given a short lesson on how to communicate effectively with a student who lip-reads.

- 9.12 There is no reason why most practical sessions should not be accessible to disabled students. Specific adjustments may need to be made to meet the needs of particular individuals.

A student with a hearing impairment finds it hard to hear instructions given in a noisy workshop. The tutor provides her with written instructions in advance of each class.

### **Work placements, field trips and study abroad**

- 9.13 Study beyond the confines of the institution is increasingly important for many courses, and required by some. With careful planning and

monitoring, most work placements, field trips and study periods abroad can be accessible to most disabled students. Where a student is undertaking practical work experience as part of their vocational training the work placement provider will have duties under Part 2 of the Act. Where a student is studying at another education institution, that institution may have duties under Part 4 of the Act. This is explained in more detail in Chapter 11.

As part of a life skills course, students attend a centre for outdoor activities. The college ensures that the centre has the necessary expertise of working with disabled students and is aware of any requirements that the students may have. They also ensure that risk assessments are carried out where necessary and give the disabled students the opportunity to raise any issues with them relating to the trip.

## **Academic progression and transfer**

- 9.14 Education providers must ensure that arrangements for progression, or for transferring between courses, do not discriminate against disabled people. Education providers must not discriminate in the practical arrangements necessary to enable the progression or transfer to take place or, of course, in the new course itself. Reasonable adjustments may need to be made to the various stages in the progression or transfer process.

An adult education college offers a range of courses at different levels in music. At the end of the course, certain students who are thought to

be capable of progression onto the next level of study are told to apply for the next course. A student with dyslexia completes his level one course, but his tutor does not tell him to apply for the level two course, because he wrongly assumes that his dyslexia will mean that he cannot sight read music and he will not be able to cope with the course. This is likely to amount to unlawful discrimination.

A disabled university student opts to take an elective module in another department as part of his course. The department that delivers the elective module asks what reasonable adjustments the student will require, makes these adjustments to the application process and informs its staff of the adjustments they will need to have in place in advance of the student starting the course.

- 9.15 As with other aspects of student services, education providers will be better placed to ensure that progression and transfer arrangements do not discriminate against disabled people if they have established and implemented policies and practices to counter discrimination generally (see paragraph 2.13). These will help education providers to check, for example, that the requirements for progression or transfer are genuine competence standards for the course, and to monitor other arrangements – such as systems for determining competence standards – so that they do not exclude disabled people who may have been unable to meet those criteria because of their disability but who would be capable of completing the course.

## Assignments and assessments

9.16 Adjustments may be necessary to assignments and assessments to enable disabled students to fully demonstrate their learning. Adjustments may include:

- flexible deadlines for those with variable conditions
- support in researching booklists for those unable to 'browse' in the library
- adjustments to assignments, such as allowing a student to submit a piece of work on video rather than in writing
- provision of study skills support covering essay writing or dissertation skills
- comments on course work in alternative formats
- adjustments to the design or delivery of an examination
- altering the mode of an assessment if a particular method, for example an examination, sets up unnecessary barriers.

Further information about assessments, examinations and qualifications for students is provided in the following paragraphs. Chapter 10 concerns discrimination in relation to qualifications conferred by education providers upon non-students.

## Competence standards and qualifications

9.17 It is obvious that an education provider will differentiate between individuals when conferring, renewing or extending qualifications. However, in doing so, it should avoid discriminating against

disabled people because of that person's disability.

9.18 Identifying genuine competence standards will be crucial to avoiding discrimination in the area of qualifications. What the Act says about competence standards is explained in paragraphs 5.71 to 5.78 and 6.24 to 6.31.

9.19 A competence standard which results in direct discrimination is not a genuine competence standard and education providers who apply such standards will be acting unlawfully.

A further education college confers its own qualifications for a course in travel and tourism. One of the criteria for passing the course is 'speaking clearly in a customer services environment'. A disabled student whose impairment affects her speech does not achieve the qualification because of this criterion. Applying this standard may be unlawful.

9.20 Paragraphs 6.25 to 6.29 explained that disability-related discrimination which is the result of the application of a genuine competence standard can be justified but only if the education provider can show that:

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

A university has a set of criteria for awarding full-time honours degrees. These include 'the completion of all courses within a three-year period'. During the course of her study, a disabled student took a period of disability leave, and completed her degree over four years. As a result, the university awards her with a degree without honours because she did not meet all the criteria. Although this criterion is applied equally to all students, it is unlikely to be a proportionate means of achieving a legitimate aim because there is no necessity to complete the course within a three-year period in order to demonstrate the necessary ability. The treatment of the woman is for a disability-related reason (completing the course over four years due to her disability). The treatment is less favourable than the way in which someone who did not have the disability leave would have been treated. It would, therefore, amount to disability-related discrimination unless the university (in its role of conferring qualifications) can justify it.

- 9.21 An education provider has a duty to make reasonable adjustments to the way it confers, renews or extends qualifications (except in respect of competence standards). It owes this duty to a disabled person who holds a qualification conferred by it and to a disabled applicant or potential applicant for such a qualification.
- 9.22 Chapter 5 explained that this duty to make reasonable adjustments is an anticipatory duty owed to disabled people and students at large. It does not only arise when an individual student or applicant for a qualification presents himself to the education provider. This is particularly relevant in the assessment of students for qualifications as

it will often be too late to make reasonable adjustments to the assessment process if an education provider waits until the disabled student or applicant presents himself for assessment.

A further education college delivers a GCSE course in French. In advance of the date of the examination, the course tutor makes students aware of the permitted access arrangements and asks students individually whether they will require any reasonable adjustments. The tutor ensures that any modified test papers that are required are ordered and that the room that will be used for the examination is accessible and meets the access requirements of all disabled students who will be sitting the exam.

9.23 It is very important to ascertain whether a particular provision, criterion or practice of an education provider is a competence standard and, if so, whether the matter at issue concerns the application of that standard to the disabled person concerned. Although there is no duty to make reasonable adjustments in respect of the application of a competence standard, such a duty is likely to apply in respect of the process by which competence is assessed.

A student with a visual impairment asks to be provided with a desk lamp and a larger desk that can accommodate his large print test paper. These are likely to be reasonable adjustments.

A deaf student takes an examination in dance and drama. The examiner ensures that the deaf



student correctly understands any instructions he gives during the assessment and provides a palantypist to transcribe the questions. These are likely to be reasonable adjustments.

9.24 Where it applies, the duty to make reasonable adjustments is likely to affect arrangements in relation to, for example, taking tests and examinations, and renewing qualifications where it is necessary to do so. Where the duty does apply the education provider must take such steps as are reasonable to prevent the provision, criterion or practice, or the physical feature (as the case may be) from placing the disabled person in question at a substantial disadvantage.

A disabled student with a mental health problem is informed that an oral examination for her German course has been arranged for 8:30 am. The timing of the examination would substantially disadvantage the woman, because a side effect of her medication is extreme drowsiness for several hours after taking her morning dose – which prevents her from concentrating well. The university agrees to her request to take the examination later in the day. This is likely to be a reasonable adjustment.

A disabled man asks for twice as much time for a test in shorthand because his disability makes it impossible for him to write quickly. There is no requirement to make this adjustment because speed is an essential element of the shorthand qualification – in other words, it is likely to be a competence standard, and thus the duty to make reasonable adjustments does not apply.

9.25 There is no breach of the duty to make a reasonable adjustment for an individual student or applicant, or to avoid disability-related discrimination by an education provider if it does not know or could not reasonably have been expected to know, that the person is disabled or that they are an applicant, or a potential applicant, for a qualification which the education provider confers.

9.26 Where information is available which should alert an education provider to the fact that an individual may be disabled, or would be if it were reasonably alert, the education provider cannot simply ignore it. It is thus a good idea for education providers to have the necessary procedures in place to enable and encourage disabled people to let education providers know of their disability and of substantial disadvantages that are likely to arise. The earlier an education provider is told about a disability and its effects, the more likely it is to be able to make effective adjustments.

9.27 A system for gathering the necessary information could comprise the following steps:

- Well in advance of the examination or assessment in question, the education provider seeks information from candidates about whether they have disabilities which make reasonable adjustments necessary.
- Students may be given a contact within the education provider (or separate qualifications body if appropriate) with whom they can discuss their requirements further.
- The education provider (or qualifications body) uses the information it obtains to decide what adjustments should be made. It then

notifies the student/applicant of its decision, and discusses with them how such adjustments will be implemented.

In advance of an examination for a course module, a university tutor asks his students whether they require reasonable adjustments to be made in respect of their examination. A student who is blind informs his tutor that he requires a paper in Braille and that he will respond in Braille. The tutor relays the request to the exams office, which ensures that the student will be provided with a Braille paper and arranges for a Braille translation to be made so that the tutor can mark the student's paper.

9.28 Some education providers provide education, training or other services (such as facilities for taking examinations or assessments) which lead to the attainment of a professional or trade qualification, even though they do not confer the qualification. Although the education provider will still have duties under Part 4 in respect of the education, training or other services they provide, the professional body conferring the qualification will have duties under Part 2 of the Act. To ensure full compliance with the Act, it is advisable for such institutions or bodies to inform qualifications bodies at an early stage about an applicant's disability and its relevant implications – subject, of course, to obtaining the applicant's consent first.

9.29 Where the qualification is being conferred by another body, such as a professional body awarding a professional or trade qualification, or a general qualifications body awarding a general qualification, it is advisable for education providers to set up systems for working with such qualifications bodies. The education provider is

likely to have a crucial role in ensuring that such qualifications bodies obtain the information that they need to make adjustments for disabled students who are taking examinations or other assessments.

A partially sighted man on a course has always had course information provided to him in large print by the college as a reasonable adjustment (under Part 4 of the Act), and he has used a desk light when taking internal tests as part of his course. With the man's consent, the college informs the qualifications body that he needs an examination paper in large print for examinations set by this body. The college provides him with a desk light for such examinations.

### **Discrimination in qualifications in practice**

9.30 Generally, the purpose of an assessment is to determine a student's competence in a particular area. To do this, examinations and assessments must be rigorous regarding standards so that all students are genuinely tested against a benchmark. But, similarly, if they are to fulfil their purpose, they must also be flexible regarding the mode of measurement so that each student has an equal opportunity to demonstrate their competence. In some cases this may mean changing the existing examinations or assessment practices within an institution. In all cases it will mean being clear about precisely what is being assessed so that the necessary reasonable adjustments can be made without compromising the competence standards.

9.31 Making reasonable adjustments to the assessment process will not normally mean differential

marking, although this may be appropriate in some cases. Changing the delivery or mode of assessment to one that is accessible to as many students as possible will reduce the need to make numerous reasonable adjustments for individual students and should mean that the education provider will be complying with the anticipatory duty. There will, however, still be circumstances where reasonable adjustments are required for individual students. Each disabled student will have different needs and may need different reasonable adjustments. Adjustments need to be determined and administered on an individual basis.

A college discusses with three students with dyslexia their requirements for examinations. For one student the college sets additional course work in place of an examination. For another, the college provides additional time in the examination for the student to read and check answers. For a third, they allow the student to use a word processor in the examination.

9.32 Many examinations and assessments for qualifications are likely to be administered centrally, whilst some will be administered by individual departments and tutors. In order to comply with its duties under the Act, it is important that an education provider has a clear policy about adjustments to examinations and assessments for disabled students. Students should be aware that they can request adjustments to examinations and assessments and be aware of the process for doing so. This should be the case even if a student has not previously disclosed a disability or requested any reasonable adjustments. The system should be sufficiently flexible to respond to the needs of all

disabled students and not just those who need 'standard' adjustments. The system should allow time for the reasonable adjustments to be discussed with the individual disabled student to ensure that adjustments are appropriate for each individual's requirements.

## Written examinations

9.33 Many disabled students may be substantially disadvantaged in a traditional written examination because of the stamina required to continue writing or concentrating for a sustained period of time. In addition, the examination paper itself may present a barrier, because the language in which it is written may be easy to misinterpret by a student whose first language is Sign Language or who has dyslexia. The following list, whilst not exhaustive, provides some examples of steps an education provider may take to prevent a written examination placing a disabled student at a substantial disadvantage:

- Checking that the wording of the paper is as clear and straightforward as possible.
- Providing a reader or interpreter to read out or interpret questions.
- Providing the paper in large print, Braille or other formats.
- Allowing extra time for students who are deaf or dyslexic so that they can spend more time ensuring they understand the question, or checking their answers for spelling and grammar.
- Allowing rest breaks for students who experience fatigue or who have back problems and need to stretch.

- Providing an amanuensis to write the answers. Students may need some time to practice with an amanuensis before the exam.
- Allowing a student to submit scripts on a computer. This will also entail making sure there are technicians on hand to deal with any technical problems.
- Ensuring that those with extra time or other arrangements sit their exam in a separate, but suitable, room to prevent them disturbing, or being disturbed by others.

## **Vivas, orals and presentations**

9.34 Vivas, orals and presentations may place some disabled students at a substantial disadvantage, whereas for others they may remove the substantial disadvantage caused by a written examination. Where a viva, oral or presentation is essential to assess the necessary competence standards there is still a requirement to make reasonable adjustments to the process.

A university arranges a British Sign Language (BSL) interpreter for a deaf student who communicates in BSL to interpret questions at the deaf student's viva. The university also allows additional time to account for the time taken for the interpretation. These are likely to be reasonable adjustments.

## **Practicals and performances**

9.35 Many qualifications are assessed by the means of a demonstration of practical skills. Although the competence standard may require all students to demonstrate that they have the necessary

practical skills, there may still be reasonable adjustments that could be made to the process of assessment.

A student whose disability affects his manual dexterity is allowed to use an assistant to measure chemicals and set up apparatus under his instruction for an assessment in chemistry. This is likely to be a reasonable adjustment.

## **Dissertations and course work**

- 9.36 Some disabled students may be at a substantial disadvantage when producing course work. Although many courses require students to produce regular pieces of course work, and at times lengthy pieces of written work, the production of this work within a certain time period or a certain format is unlikely to be a genuine competence standard. Although allowing a student more time to complete course work may seem in some circumstances to be an appropriate reasonable adjustment it may disadvantage the student in other ways, for example, they are attending lectures on a new topic whilst still completing course work on an earlier topic. Discussion with the student will assist in ensuring the appropriate reasonable adjustments are being made.

A student with dyslexia is given flexibility in the deadlines for course work. To support the student, the disability office arranges for study skills support covering essay writing and dissertation skills.



## Work-based assessment

- 9.37 Some courses will require students to be assessed in the work place. The education provider should work closely with the work placement provider or employer to ensure that the necessary reasonable adjustments are in place to prevent the student being placed at a substantial disadvantage in the assessment. This may involve making alterations to the traditional assessment method, providing auxiliary aids or services and ensuring that the assessors in the work place are trained in assessing disabled people in alternative ways. Providers of work placements have duties under Part 2 of the Act.

A disabled student who is visually impaired and uses screen reading software is assessed in the office environment in which he is working as part of his qualification in administration. The course provider discusses with the student and the assessors the way to ensure that the assessment is fair and takes account of the screen reading software that the student uses.

## Alternative types of assessment

- 9.38 Examination and assessment methods should be considered for accessibility at the course planning and review stages as this will reduce the need to provide alternative types of assessment. However, where it is not possible to make adjustments to prevent disabled students being placed at a substantial disadvantage when undertaking the same assessment methods as other students, it may be appropriate to offer alternative assessment methods. It is important to separate the competence standard being assessed from the method of assessment.

An adult education college arranges for a student who experiences high levels of stress in a closed examination environment to produce an additional piece of course work rather than take a final exam.

## **Retention of disabled students**

- 9.39 An education provider must not discriminate against a student who becomes disabled, or who has a disability which changes in its effects.
- 9.40 If as a result of the disability the student is at a substantial disadvantage, the education provider must consider any reasonable adjustment that would resolve the difficulty. The nature of the adjustments which an education provider may have to consider will depend on the circumstances of the case, but the following considerations will always be relevant:
- The education provider should consult the disabled person at appropriate stages about what his needs are and, where the student has a progressive condition, what effect the disability might have in the future, so that reasonable adjustments may be planned.
  - In appropriate cases, the education provider should also consider seeking expert advice on the extent of a disabled person's impairment and on what might be done to change premises or study arrangements. Where a student has been absent, a phased return might be appropriate.

A student on a three-year degree course with a mental health condition has an episode which affects his attendance and submission of assessments. The student and the university discuss the most appropriate reasonable adjustments that can be made. As a result, the student takes a short period of disability-related leave and the university arranges a gradual return, with support from his personal tutor to manage his workload and from the disability office to support him with the other demands of university life.

- 9.41 It may be possible to modify a course to accommodate a student's changing needs. This might be by changing teaching methods, or by providing practical aids or adaptations to premises or equipment, or allowing the disabled person to study at different times or places. It may be that a change to part-time study or distance learning is appropriate.

### **Libraries and study facilities**

- 9.42 Education providers should ensure that disabled students are not discriminated against in accessing library and other study facilities. As well as ensuring that the buildings are physically accessible, they should also consider the other ways that students access the service and ensure that these procedures do not discriminate against disabled students.

A library at a higher education institution reviews its practices and procedures to ensure that it is accessible for disabled students. This includes making changes to the electronic catalogue so

that it is compatible with students using assistive technology or software; making short loan periods more flexible for students whose impairments mean that they read slowly; providing free photocopy cards to students who need to enlarge text books by photocopying them because of their visual impairment; stocking large-print books where available and introducing a priority booking system for individual study rooms and computer stations for disabled students who have greater need for these facilities than other students.

## **Centrally-provided services**

9.43 Centrally-provided services such as careers advice, counselling, academic advice, catering facilities and leisure facilities are all 'student services' for the purpose of the Act. Education providers should ensure that the way in which these services are provided does not discriminate against disabled students. This includes those services which are contracted out to a third party (for more details of third party relationships see Chapter 11).

The canteen at an adult education college provides non-sugar options for students who have insulin-dependent diabetes.

The sports hall at a university changes its lighting and introduces greater colour contrast and larger signage so that students with visual impairments can find their way around the facilities more easily.

## Accommodation

- 9.44 Many education providers also provide accommodation and accommodation-finding services for students. Where this is the case, education providers should ensure that disabled students are not discriminated against in the provision of accommodation. As well as ensuring that they have an appropriate number of accessible rooms, education providers also need to consider the distance of the residential accommodation from teaching areas, the procedure for allocating accommodation and the additional support a disabled student may require in finding off-campus accommodation. Where a disabled student is allocated a particular room for a disability-related reason the student should not then be charged at a higher rate than other students, as this is likely to amount to discrimination.

A disabled person who is visually impaired applies to a university. In providing her first year accommodation, the university allocates an appropriate room that allows space for her guide dog, discusses the particular requirements of the accommodation with the student and makes changes to colour contrast and signage in the halls of residence in advance of her arrival.

### Keeping adjustments under review

- 9.45 In some instances a disabled student's reasonable adjustment requirements will change during their time on the course. Education providers may need to explore different adjustments with a disabled student to see what works best. Different adjustments may be appropriate for different types of learning or teaching, and a student's

needs may change over time. Providing opportunities for individual disabled students to feed back on adjustments and keeping adjustments under regular review will assist an education provider in ensuring they are making the most appropriate reasonable adjustments.

## Exclusion

9.46 Where a disabled person is excluded from a course, the education provider must ensure that the disabled person is not being discriminated against. It is likely to be direct discrimination if the exclusion is on the grounds of disability (see Chapter 4). If the exclusion is not directly discriminatory, but is made for a reason related to the disability, it will amount to disability-related discrimination unless the education provider can show that it is justified. The reason would also have to be one which could not be removed by any reasonable adjustment.

A student acquires a physical impairment during his further education course. The student is unable to attend some of his lessons, because the buildings are not accessible, and cannot hand in his assignments on time because he requires longer to complete them due to his disability. The college removes him from his course because of his poor attendance record and for not handing in assignments. This is likely to be unlawful.

9.47 When drawing up disciplinary procedures education providers should consider whether any proposed criterion would adversely impact upon a disabled student. If so, it may be necessary for the education provider to make reasonable adjustments. For example, it is likely to be a

reasonable adjustment to discount disability-related sickness absence when assessing attendance as part of disciplinary procedures.

- 9.48 Where the exclusion of a disabled student is being considered for a reason relating to that person's conduct, the education provider should consider whether any reasonable adjustments need to be made to the disciplinary or exclusion process. In addition, if the conduct in question is related to the student's disability, that may be relevant in determining the sanction which it is appropriate to impose.

A student with learning disabilities asks if he can bring a friend to a disciplinary hearing. It is likely to be a reasonable adjustment for the education provider to allow this.

A student with autism shouts at his tutor and uses inappropriate language. The college would usually consider suspension as a sanction for such behaviour. However, the college takes into account that the tutor had missed a tutorial session and that this had distressed the student. As a result, the college does not suspend the student but decides to deal with the student in a different way. This is likely to be a reasonable adjustment to make.

### **After the termination of the relationship between a disabled student and education provider**

- 9.49 Where a disabled person's relationship with an education provider has come to an end, the Act

says that it will still be unlawful for his former education provider:

- to discriminate against him by subjecting him to a detriment; or
- to subject him to harassment

if the discrimination or harassment arises out of the relationship which has come to an end and is closely connected to it.

A disabled person who uses British Sign Language (BSL) to communicate is given an appointment to attend an appeal hearing relating to his permanent exclusion. The education provider arranges for a BSL interpreter to be present at the hearing. This is likely to be a reasonable adjustment for the education provider to make.

s 55 and  
s 28UA

9.50 It is also unlawful to victimise a person (whether or not he is disabled) after the relationship has come to an end (see paragraphs 7.2 to 7.8).

A disabled person gives the name of his university supervisor as a referee for a new job. The supervisor gives him a poor reference, referring to his disability as being a hindrance. This poor reference is an untrue reflection of the standard of work that the student produced whilst at university. The poor reference was given because he brought a claim of disability discrimination against the university. Consequently, this is likely to be unlawful.



9.51 An education provider's duty to make reasonable adjustments may also apply in respect of a former student who is a disabled person. This will be the case where:

- the disabled person is placed at a substantial disadvantage in comparison with other former students:
  - by a provision, practice or criterion applied by the education provider to the disabled person in relation to any matter arising out of his former relationship; or
  - by a physical feature of premises occupied by the education provider, and
- the education provider either knows, or could reasonably be expected to know, that the former student in question has a disability and is likely to be affected in this way.

A disabled person is invited to an alumni event at the university he attended. The invitation asks whether the attendee would require any reasonable adjustments to be made.

9.52 The former students with whom the position of the disabled person should be compared must be people who are not disabled, but who are former students of the same education provider. If it is not possible to identify an actual comparator for this purpose, then a hypothetical comparator may be used (see paragraph 4.15).

A further education college holds an appeal hearing against an exclusion in an inaccessible room. As a result, a disabled student who uses a wheelchair is not able to attend the hearing. The correct comparator would be an ex-student who is asked to attend a hearing who is not a wheelchair user and so can attend the hearing.

# 10 Discrimination in relation to qualifications (for non-students)

## Introduction

10.1 It is unlawful in relation to qualifications conferred by an education provider for an education provider to discriminate against a disabled person because of that person's disability:

- in the arrangements which it makes for the purpose of determining upon whom to confer a qualification
- in the terms on which it is prepared to confer a qualification
- by refusing or deliberately omitting to grant an application by him for such a qualification, or
- by withdrawing such a qualification from a disabled person or varying the terms on which he holds it.

10.2 This chapter examines these principles in more detail. These duties cover disabled people who are not students. The duties of education providers in relation to the conferment of qualifications to disabled students are described in Chapter 9.

10.3 The 'acts' which can constitute unlawful conduct in relation to qualifications are:

- Direct discrimination (see Chapter 4).
- Failure to make reasonable adjustments (see Chapter 5).

s 28R(3A)

- Disability-related discrimination which cannot be justified (see Chapter 6).
- Victimisation (see Chapter 7).
- Harassment (see Chapter 7).

10.4 This chapter deals with qualifications which are conferred by an education provider. There are occasions when a qualification is studied for at an education provider but the qualification is conferred by a professional body. Professional qualifications bodies have duties under Part 2 of the Act (see **Code of Practice for Trade Organisations and Qualifications Bodies**). In addition, general qualification bodies (those conferring qualifications of a general nature, such as GCSEs) will have duties in relation to general qualifications from September 2007.

### What is a qualification?

s 31A(6)

10.5 The Act says that a qualification is any authorisation, qualification, approval or certification conferred by an education provider.

### What is conferring?

s 31A(9)

10.6 The Act says that conferment of a qualification includes the renewal or extension of a qualification, and the authentication of a qualification awarded to him by another person. In this context 'conferment' has a narrow meaning and applies only in relation to people who are not students.

### Competence standards and qualifications

10.7 It is obvious that an education provider will differentiate between individuals when conferring, renewing or extending qualifications. However, in

doing so, it should avoid unlawfully discriminating against disabled people.

- 10.8 Identifying genuine competence standards will be crucial to avoiding discrimination in the area of conferment of qualifications. What the Act says about competence standards is explained in paragraphs 5.71 to 5.78 and 6.24 to 6.31.
- 10.9 An education provider has a duty to make reasonable adjustments to the way it confers, renews or extends qualifications (except in respect of competence standards). It owes this duty to a disabled person who holds a qualification conferred by it and to a disabled applicant or potential applicant for such a qualification.
- 10.10 It is very important to ascertain whether a particular provision, criterion or practice of an education provider is a competence standard and, if so, whether the matter at issue concerns the application of that standard to the disabled person concerned. Although there is no duty to make reasonable adjustments in respect of the application of a competence standard, such a duty is likely to apply in respect of the process by which competence is assessed.
- 10.11 There is no breach of the duty on an education provider to make a reasonable adjustment for an individual person if it does not know or could not reasonably have been expected to know, that the person is disabled or that they are an applicant, or a potential applicant, for a qualification which the education provider confers.
- 10.12 Where information is available which should alert an education provider to the fact that an individual may be disabled, or would be if it were reasonably alert, the education provider cannot simply ignore

it. It is thus a good idea for education providers to have the necessary procedures in place to enable and encourage disabled people to let education providers know of their disability and of substantial disadvantages that are likely to arise. The earlier an education provider is told about a disability and its effects, the more likely it is to be able to make effective adjustments.

- 10.13 Some education providers provide education, training or other services (such as facilities for taking examinations or assessments) which lead to the attainment of a professional or trade qualification, even though they do not themselves confer the qualification. Although the education provider will still have duties under Part 4 in respect of the education, training or other services that they provide, the professional body conferring the qualification will have duties under Part 2 of the Act. To ensure full compliance with the Act, it is advisable for education providers to inform qualifications bodies at an early stage about an applicant's disability and its relevant implications – subject, of course, to obtaining the applicant's consent first.

### **Formerly held qualifications**

- 10.14 The duty of an education provider not to discriminate against a disabled person, or to subject him to harassment, also extends to a disabled person who formerly held a qualification if the discrimination or harassment arises out of his having formerly held the qualification and is closely connected to it.

# 11 Who is liable for discrimination?

## Introduction

11.1 The legal responsibility for ensuring that discrimination does not take place lies with the responsible body for an education provider. The Act specifies the 'responsible' body for each type of education provider covered by the post-16 sections of Part 4. The responsible body is the body that is liable for fulfilling any legal duties under the Act and against whom any claims of disability discrimination are brought.

## England and Wales

11.2 In England and Wales the responsible bodies are as follows:

- the **governing body** of an institution in the further education sector (those conducted by further education corporations and those designated for the purposes of Part 1 of the Further and Higher Education Act 1992)
- the **governing body** of an institution within the higher education sector (publicly-funded universities, institutions conducted by higher education corporations and those designated for the purposes of Part 2 of the Further and Higher Education Act 1992)
- the **specified body** of any other institution designated by the Secretary of State (see paragraph 11.4)

Sch 4B

- the **local education authority** in respect of any further, higher or community education (including any recreational or training facilities) secured by it
- the **governing body** of any maintained school in respect of any further education it provides to people other than its pupils (under s 80 of the School Standards and Framework Act 1998)
- the **local education authority** in respect of any statutory youth services secured by it.

## Scotland

### Sch 4B

#### 11.3 In Scotland the responsible bodies are as follows:

- the board of management of a college of further education with a board of management within the meaning of section 36 of the Further and Higher Education (Scotland) Act 1992
- the **governing body** of an institution within the higher education sector within the meaning of section 56(2) of the Further and Higher Education (Scotland) Act 1992
- the **governing body** of a central institution within the meaning of section 135(1) of the Education (Scotland) Act 1980
- the **education authority** of any institution maintained by an education authority in the exercise of the further education functions within the meaning of section 1(5)(b)(ii) of the Education (Scotland) Act
- the **managers** of a school in respect of grants made under section 73(c) or (d) of the Education (Scotland) Act 1980



- the **specified body** of any other institution designated by the Secretary of State (see paragraph 11.4)
- the **education authority** in respect of further, higher or community education (including any recreational or training facilities) secured by it.

### **Responsible bodies and institutions designated by the Secretary of State**

11.4 There is an additional list of responsible bodies and institutions designated by the Secretary of State. This list is available from The Stationery Office (see Appendix C).

SI 2002/1459

### **Responsibility for the acts of employees**

11.5 The Act says that education providers are responsible for the actions of their employees in the course of their employment. However, in legal proceedings against an education provider based on the actions of an employee, it is a defence that the education provider took 'such steps as were reasonably practicable' to prevent such actions. Training for staff and developing policies on disability matters are likely to be relevant to such a defence. It is not a defence for the education provider simply to show that the action took place without its knowledge or approval. Chapter 2 gives guidance on the steps which it might be appropriate to take for this purpose.

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A tutor routinely turns his back on the class when he is teaching although he knows that one of the students has a hearing impairment and needs to lip-read. The tutor has been trained in how to work with hearing impaired students, but no one monitors his practice or asks students for

feedback on his lectures. The student is being substantially disadvantaged by the failure of the tutor to make a reasonable adjustment. Even though the governing body is not aware that discrimination is occurring, it is likely that the responsible body is acting unlawfully.

- 11.6 If the education provider is liable for the acts of an employee in this way, the employee might also be personally liable for aiding the unlawful act. (See paragraphs 11.13 to 11.17 for details of aiding an unlawful act.)

### **Responsibility for the acts of agents**

- 11.7 Education providers are also liable for anything done by their agents, if done with their authority. That authority may be express or implied and may have been given before or after the act in question.

The campus bars at a university are contracted out to a catering company. An employee of the company who works behind one of the bars refuses to serve a student with a facial disfigurement and is abusive to him because of the student's disability. The responsible body is likely to have been acting unlawfully because it has failed to ensure that the employees who work behind the campus bars do not discriminate against disabled students and they failed to have sufficient provisions in their contract with the catering company to address this. The person working behind the bar who was abusive to the student and/or the catering company who employ him may also be liable for aiding an unlawful act.

## Responsibility for the acts of third parties

- 11.8 In some cases, education providers may arrange for a third party to provide education, training or other related services for students. In some cases the third party will not be acting on behalf of the education provider and therefore not acting as an agent. However, the education provider will still have some responsibility to ensure disabled students are not discriminated against. The third party may also have duties under the Act.

A college arranges for the students on a course in archaeology to visit a museum for a day as part of the course. The college passes on information about reasonable adjustments that the students may require to the museum. However, the museum ignores their request. The museum rather than the college would be responsible for the failure to make reasonable adjustments. There is a potential claim under Part 3 of the Act against the museum.

As part of an Art History course at a university in Great Britain, students spend a month in Italy on a programme run by an Italian university. It is the British university's responsibility to check that the Italian university can provide access for a disabled student who uses a wheelchair; otherwise it may be liable for a claim of discrimination. However, if the Italian university does subsequently restrict access, despite assurances to the contrary, no claim against the British university may arise. There is no potential claim under the Act against the Italian university as it is not based in Great Britain.

Part of the independent living course for students with learning difficulties at a college includes going to the shops on the bus. Although this takes place outside the college, the college is responsible under the Act for doing what it can to ensure disabled students are not discriminated against. However, any treatment that a student receives from members of the public or others on the bus or at the shops is not covered by Part 4 of the Act because it is not made by, or on behalf of, the institution. There may be potential claims against service providers under Part 3 of the Act if they discriminate against students whilst on such a trip.

11.9 Where an education provider is aware that a discriminatory act has taken place, the education provider may be responsible under the Act for preventing the discrimination continuing or recurring.

Students on a language course spend two months studying at a partner institution in Europe. Despite the work that the British university has done with the European university to explain the needs of disabled students on the programme, disabled students continue to complain that they have been discriminated against during their stay. The British university is responsible for doing what it can to prevent the discrimination continuing or recurring. If the British university is unable to achieve this then it might decide to sever its links with that institution, and find an alternative partner.

11.10 Some aspects of provision may be the responsibility of bodies other than the education

provider. In such cases the education provider may still have responsibilities in liaising with the other body in an attempt to avoid discrimination. In particular, entry to some courses may be regulated by a professional body, and many examinations are the responsibility of external examining bodies.

A student at a further education college is studying for GCSEs. Modifications to the delivery of the examination have to be agreed by the examination board. The college has responsibility for finding out what modifications the student may need, for requesting these of the examination board and for making any adjustment needed to the administration of the examination in the college. The college is not responsible for deciding whether modifications are acceptable nor for any changes to the examinations themselves, which are covered by other provisions in Part 4 of the Act which come into force in September 2007.

### **More than one party responsible**

11.11 In some cases, more than one body may have responsibilities towards the same people under the Act. The fact that two bodies have responsibility does not diminish the individual responsibility of either of them.

As part of a History course, students at one institution spend a fortnight at another university in Britain which has copies of original historical documents. During that time, the students receive teaching from staff at the second institution and use other facilities there. Both the

home institution and the host institution have responsibilities towards disabled students under the Act. Whether either or both are liable for any discrimination will depend on the facts of the case.

A college arranges a visit to an open day for prospective students at a university. One of the students is deaf and needs a sign language interpreter. Both the university and the college may have responsibilities under Part 4 to ensure that the adjustment is made.

A disabled student studying at a FE college which is a partner college to a university claims that a failure to make reasonable adjustments has resulted in him failing his course. Both the college and the university have duties to him under Part 4 and may be liable for unlawful discrimination.

11.12 In other cases, disabled people may be protected by a number of different parts of the Act. In these cases, the individual might seek redress for discrimination under whichever part of the Act is most appropriate.

A disabled person is studying for an undergraduate degree in biomedical sciences which is accredited by the Institute of Biomedical Science. Both the university and the Institute have responsibilities towards the student. The Institute has responsibilities under Part 2 of the Act in respect of its role as a professional

organisation and the university has responsibilities under Part 4 of the Act.

A group of students with learning difficulties go on a theatre trip as part of the end-of-term celebrations at their college. The college, which has organised the trip, has responsibilities towards the students under Part 4 of the Act to the extent that it is reasonable for them to make appropriate adjustments. The theatre, as a service provider, has responsibilities towards the students under Part 3 of the Act (goods and services).

### **Aiding an unlawful act**

- 11.13 A person who knowingly helps another to do something made unlawful by the Act will be treated as having done the same kind of unlawful act. This means that, where an education provider is liable for an unlawful act of its employee or agent, that employee or agent will be liable for aiding the unlawful act of the employer.
- 11.14 Where an employee discriminates against or harasses a disabled student or applicant, it is the education provider who will be liable for that unlawful act – unless it can show it took such steps as were reasonable to prevent the unlawful act in question. But the employee who committed the discrimination or harassment will be liable for aiding the unlawful act – and this will be the case even if the education provider is able to show that it took reasonable steps to prevent the act.

s 57

An education provider has policies relating to harassment and disability. It ensures that all staff are aware of the policies and of the fact that harassment of disabled students is subject to disciplinary action. It also ensures that staff receive training in applying the policies. A woman with a learning disability is humiliated by a member of staff and disciplinary action is taken against the member of staff. In these circumstances the member of staff would be liable for aiding the unlawful act of the education provider (the harassment) even though the education provider would itself avoid liability because it had taken reasonably practicable steps to prevent the unlawful act.

- 11.15 Any person, whether or not they are an employee or agent, who knowingly aids someone else to do something that is unlawful under the Act is also acting unlawfully.
- 11.16 A person does not knowingly aid someone else to do something unlawful if:
- that other person makes a statement to him that it would not be unlawful because of any provision of the Act; and
  - he acts in reliance on that statement; and
  - it is reasonable to rely on the statement.
- 11.17 A person who knowingly or recklessly makes such a statement which is false and misleading in a material respect is guilty of a criminal offence.



# 12 Making reasonable adjustments to premises – legal considerations

## Introduction

- 12.1 In Chapter 5 it was explained that one of the situations in which there is a duty to make reasonable adjustments arises where a physical feature of premises occupied by an education provider places a disabled person at a substantial disadvantage compared with people who are not disabled. In such circumstances the education provider must consider whether any reasonable steps can be taken to overcome that disadvantage. Making adjustments to premises may be a reasonable step for an education provider to have to take. This chapter addresses the issues of how leases, building regulations and other statutory requirements affect the duty to make reasonable adjustments to premises. It considers the Disability Discrimination (Educational Institutions) (Alteration of Leasehold Premises) Regulations 2005.
- 12.2 The issues dealt with in this chapter largely concern the need to obtain consent to the making of reasonable adjustments where an education provider occupies premises under a lease or other binding obligation. However, education providers should remember that even where consent is not given for altering a physical feature, they still have a duty to make reasonable adjustments – which may involve them considering taking other steps to overcome the disadvantage which the feature causes in respect of the disabled person.

SI 2005/1070

## Building regulations and standards

- 12.3 Since 1985 building regulations in England and Wales have required reasonable provisions to be made for disabled people to gain access to and to use new buildings (and some extensions). These duties also apply to premises occupied by an education provider. Part M of the Building Regulations (originally called Access and facilities for disabled people) was extended in 1992, again in 1999 and it was modified in 2004 (and is now called **Access to and use of buildings**).
- 12.4 Guidance has also been issued to accompany the Building Regulations in the form of Approved Document M, which sets out a number of 'objectives' to be met, 'design considerations' and technical details of design solutions (called 'provisions').
- 12.5 Similar provisions to those in England and Wales were also introduced in Scotland in 1985 when 'facilities for disabled persons' were added to the Building Standards (Scotland) Regulations. As in England and Wales, there have been various versions with the latest system of building standards – based on the Building Standards (Scotland) Regulations – coming into operation in May 2005 as a result of the Building (Scotland) Act 2003. Guidance on compliance with the functional standards set out in the regulations is given in the SBSA Technical Handbooks.
- 12.6 Further guidance is available in the form of BS 8300 (see Appendix C). This British Standard Institute guidance explains how the built environment can be designed to anticipate, and overcome, restrictions that prevent disabled people making full use of premises and their surroundings. It provides guidance on good

practice in the design of domestic and non-domestic buildings (including premises occupied by schools, colleges and universities) and their approaches so that they are convenient to use by disabled people.

- 12.7 Compliance with Part M of the Building Regulations or Scottish Building Standards Regulations does not, in itself, mean that the duties upon education providers under the Act have been completely discharged.

### **Leases, binding obligations and reasonable adjustments**

- 12.8 Education providers should anticipate the need to obtain consent to make a proposed adjustment and allow sufficient time to obtain this. An application to a landlord may be necessary but there may also be a need to obtain statutory consent from elsewhere for some alterations. This might include:

- planning permission
- building regulations approval
- listed building consent
- consent to alter buildings in a conservation area
- consent to install a ramp onto a public highway.

The Act does not override the need to obtain such consents. It may be reasonable, therefore, to make an interim adjustment that does not require consent.

**SI 2005/1070  
Reg 6(2)(a)  
and (b)**

As part of its planned programme of access improvements, a university is installing a ramped entrance to its library. The university library is a listed building. The university has consulted the local planning authority and was told that consent was likely to be given but would take some weeks. In the meantime, as a temporary measure, the university arranges for disabled students unable to climb the steps to use an entrance at the rear of the building. Although this entrance is accessible, it is very inconvenient, requiring students to negotiate a series of pathways and wait in an unsheltered back yard. While this is not ideal, it is likely to be a reasonable adjustment for a limited period while statutory consent is being obtained.

12.9 If a lease requires a tenant to obtain permission from a landlord to alter a building, an education provider must apply in writing to its landlord for consent to make an alteration. The written application should state that the alteration is to comply with a duty to make reasonable adjustments under Part 4 of the Disability Discrimination Act. The application should also include plans and specifications of the intended works.

### **What happens if a lease says that certain changes to premises cannot be made?**

12.10 Where an education provider occupies premises under a lease the terms of which prevent it from altering the premises, special provisions apply. If the alteration is one the education provider proposes to make to comply with a duty of reasonable adjustment, the Act overrides the terms of the lease and entitles the education

s 28W  
SI 2005/1070  
Reg 3(3) and  
3(4)

provider to make the alteration with the consent of its landlord.

## Obtaining other consents

12.11 A superior landlord and immediate landlord may give their consent but this does not override the education provider's duty to obtain other appropriate consents. These might be from a statutory body or due to the terms of an agreement or other legally binding obligation, for example a restrictive covenant or a mortgage. It is likely that consent from a landlord or superior landlord would be given subject to such obligations.

A local authority holds some of its classes in a building purchased with the assistance of a bank loan. The terms of the loan require the bank's consent for any changes to the building. The local authority is proposing to alter the building to comply with its duty to make reasonable adjustments. It is reasonable for the local authority to have to seek the bank's consent but it is not reasonable for it to have to make the alteration if this consent is not given.

12.12 The Regulations detail the duties and the processes that apply in the relationship between the landlord and any superior landlord. The superior landlord has a duty to the education provider as if he or she was the immediate landlord.

SI 2005/1070  
Reg 7

## When are landlords deemed to be withholding consent?

SI 2005/1070  
Reg 3(2)  
s 28W Sch 4

12.13 If the application includes details of the alterations including plans and appropriate specifications (see paragraph 12.4), and indicates that the alterations are to comply with a Part 4 duty, the landlord must reply within 42 days of receiving the application. If the landlord fails to reply within this time, the education provider can assume that consent has been withheld. In such a case, the education provider can apply to the court. This procedure is explained in paragraphs 12.23 to 12.27.

SI 2005/1070  
Reg 3(4)

12.14 If the landlord needs to obtain the consent of another person, for example a superior landlord, the immediate landlord must advise the education provider of this and apply to any superior landlord within the 42-day period. If this is done, consent will not be deemed to have been withheld. If a landlord fails to seek this consent, consent will be deemed to have been withheld.

12.15 A superior landlord or other person whose consent is required also has 42 days from receiving the application (or from receiving plans and further details – see paragraph 12.12) to provide consent.

SI 2005/1070  
Reg 3(5)

12.16 A landlord will also be deemed to have withheld consent if he or she has obtained consent from a superior landlord but has failed to notify the education provider of this within 14 days.

SI 2005/1070  
Reg 3(3)

12.17 A landlord or superior landlord will not be deemed to have withheld consent if the education provider (or immediate landlord) fails to provide appropriate plans and specifications of the intended works with the application. In this

situation, the landlord may request them. The request must be made within 21 days of receipt of the initial application and the 42-day period begins from the date the landlord receives the appropriate details.

On 1 January a local education authority writes a brief letter to the landlord of one of the buildings it rents, requesting permission to refit a pottery room with low benches and wider doorways and aisles. On 22 January the landlord telephones asking the local education authority to send in detailed floor plans and estimated costs for the proposed changes. The local education authority has been preparing these and sends them to the landlord on 9 February. The landlord then has until 23 March to notify the authority of the decision.

- 12.18 While a landlord is seeking consent from a superior landlord or other person, he or she must give consent to the education provider conditional upon the other person's consent. If the education provider is not advised of this conditional consent, the immediate landlord will be deemed to have withheld consent.

### **When is a landlord withholding consent reasonably?**

- 12.19 In most cases whether withholding consent will be reasonable or not will depend upon specific circumstances.
- 12.20 If the lease requires a landlord to give consent to an alteration of the kind in question and the landlord does not do so, the landlord will be deemed to have withheld consent unreasonably.

**SI 2005/1070  
Reg 3(7)**

**SI 2005/1070  
Reg 4(2)**

12.21 The Regulations provide circumstances in which a landlord can reasonably withhold consent to the making of an alteration. For example, where:

- there is a binding obligation requiring the consent of any person to the alteration; and
- the landlord has taken steps to seek that consent; and
- consent has not been given, or is given subject to a condition which makes it reasonable for the landlord to withhold consent (see paragraph 12.19).

A college applies for consent to make a new doorway at ground floor level in the side of a building because the main entrance is up a set of steps. The landlord is willing to consent to the alteration but must obtain the permission of an adjoining landowner who has a restrictive covenant. This prevents the making of any openings in the side of the building. The neighbouring landowner will give consent but only if the landlord pays a substantial sum. Because of the size of the sum requested it is likely to be reasonable for the landlord to refuse consent.

12.22 It is also reasonable to withhold consent where the landlord or superior landlord does not know and could not reasonably be expected to know that the alteration is being proposed to comply with a duty to make reasonable adjustments.

12.23 If a landlord is withholding consent reasonably it may be necessary to consider an alternative (even if less effective) adjustment.



## Power of landlords to impose conditions on consent

12.24 Either the landlord or the superior landlord can give consent subject to the conditions prescribed in the Regulations. They may include an obligation:

- to obtain appropriate other consents including planning permissions
- to carry out the works in accordance with the plans and specifications submitted to and approved by the landlord or the superior landlord (such approval may not be unreasonably withheld)
- to allow the landlord or the superior landlord to inspect the work before and/or after it has been completed
- to repay to the landlord and the superior landlord any costs reasonably incurred in connection with giving the consent. (These costs might include building surveyors', architects' or legal fees incurred to provide documentary evidence for the consent.)

12.25 The landlord or superior landlord may also impose other conditions so long as these are reasonable.

### What happens if the landlord refuses consent or attaches unreasonable conditions?

12.26 If the education provider has written to the landlord for consent to make an alteration and the landlord:

- has refused consent unreasonably, or

SI 2005/1070  
Reg 6

SI 2005/1070  
Reg 7(5)

12

- has failed to respond (which is deemed as a refusal), or
- has attached conditions to his consent

the education provider or a disabled person who has an interest in the proposed alteration may make a claim against a landlord in a county court (in England and Wales) or in the sheriff court (in Scotland).

12.27 The court will decide whether the landlord's refusal or any conditions imposed are unreasonable. It may make a statement as to whether the landlord has been unreasonable and/or authorise the education provider to make the alteration under a court order. The court order may impose conditions on the education provider.

### **Bringing landlords into proceedings brought by disabled people**

s 28V Sch 4

12.28 In any legal proceedings under Part 4 of the Act that involve a failure to make an alteration to premises, the disabled person concerned or the education provider may make the landlord a party to the proceedings. This would mean that the claim could be made jointly against both the education provider and the landlord.

A college occupies premises under a lease, a term of which says that a staircase cannot be altered. The college wishes to alter the staircase to fit a chairlift for wheelchair users. The lease prevents the making of alterations and the landlord relies on this to refuse consent. The college takes no further action. A disabled student is unable to gain access to his classes on the first floor. The student may make a claim against both the college and the landlord.

12.29 The education provider should, therefore, consider whether to make an application for a declaration that a landlord has been unreasonable at the time the application for consent has been refused. Failure to do so may mean that the education provider has no defence to a claim by a disabled person.

In the example at 12.21, the college claims that its failure to make an adjustment was because consent was withheld. The court finds that discrimination has taken place. The landlord's consent is found to have been withheld unreasonably. The fact that the college did not make a claim against the landlord may prevent the college from having a defence because, when considering whether the college has taken reasonable steps to address the substantial disadvantage caused by the staircase, the court may consider that a reasonable step for the college to have to take would have been a claim against the landlord.

12.30 The court will grant a request to make a landlord a party to proceedings if the request is made before the hearing of the claim begins. It may refuse the request if it is made after the hearing begins. The request cannot be granted if it is made after the court has determined the claim.

12.31 Where the landlord has been made a party to the proceedings, the court may determine whether the landlord has unreasonably refused consent to the alteration or has consented subject to unreasonable conditions. In either case the court can:

- state whether the landlord was reasonable or unreasonable

- authorise the responsible body to make a specified alteration
- order the landlord to pay compensation to the disabled person.

12.32 The court may require the education provider to comply with any conditions specified in the order. If the court orders the landlord to pay compensation, it cannot also order the education provider to do so.

# 13 What happens if there is a dispute under the Act?

## **Introduction**

- 13.1 This chapter explains what happens if someone makes a complaint against an education provider, and what routes of redress exist. It also explains what action may be taken to put right any discrimination that is found to have taken place.

## **Resolving disputes**

- 13.2 It is good practice to attempt to resolve disputes without resorting to legal proceedings. Complainants may want to raise complaints directly with education providers. Many education providers will have complaints procedures which aid the speedy resolution of disputes. Complainants may raise an issue with education providers either before or after legal proceedings have started.
- 13.3 Education providers must make reasonable adjustments to any internal complaints procedures to prevent disabled people from being placed at a substantial disadvantage in comparison with people who are not disabled. Failure to do so will itself amount to a breach of the Act.
- 13.4 So, for example, it is likely to be a reasonable adjustment for an education provider to allow a disabled person who has communication difficulties some assistance to make a written statement of a complaint he wishes to make (such

as by providing him with assistance via a neutral party). Depending on the circumstances, it may be reasonable to allow a disabled person with learning disabilities to be accompanied to a meeting by a family member or friend, or to send written communications to a blind or visually impaired person in a format which is accessible to him.

- 13.5 Although, as stated above, it is good practice to try to resolve disputes internally wherever possible, there are occasions where this will not be practical or appropriate.

### **Conciliation**

- 13.6 The Disability Rights Commission is empowered by the Act to set up an independent conciliation service for disputes arising under Part 4 of the Act to promote the settlement of disputes without recourse to the courts and has done so. Conciliation is made available locally around the country, and disputes may be referred to conciliation by the Disability Rights Commission if both the complainant and the education provider agree. The conciliation service will be operated by the DRC until the Equality Act comes into force, when it will then be operated by the Commission for Equality and Human Rights (CEHR)
- 13.7 Agreeing to participate in the conciliation process does not prevent a complainant from pursuing a case through the courts. The time limit for bringing an action in court is extended by two months when a person is referred to the conciliation service by the Commission. No information disclosed to a conciliator during the conciliation process may be used in any subsequent court case without the permission of the person who disclosed it.

## Making a claim

13.8 The Act says that a person who believes that an education provider has discriminated against him or has subjected him to harassment, may bring civil proceedings. Those proceedings take place in a county court (in England and Wales) or the sheriff court (in Scotland). Similar proceedings may also be brought against a person who has aided someone else to commit an unlawful act. A claim must normally be lodged (and, in Scotland, served on the education provider) within six months of the alleged discrimination. Where there has been a continuing process of discrimination taking place over a period of time, the six months begins at the date of the last discriminatory act. Courts have the discretion to consider a claim brought outside the six-month period if they consider that it is just and equitable to do so.

s 28V

13.9 If a complaint cannot be resolved and is heard by a court, the court may:

s 28V(5)

- declare the rights of the disabled person (in England and Wales this is the claimant and in Scotland this is the pursuer) and the other person (the defendant in England and Wales and the defender in Scotland) in relation to the claim (ie make a declaration of discrimination)
- order the defendant/defender to pay the claimant/pursuer compensation, including compensation for injury to feelings; and
- impose an injunction (in England and Wales) or a specific implement, or interdict (in Scotland) requiring an education provider to take positive action or to prevent the education provider from repeating any discriminatory act in the future.

Sources of information about how to make a claim to the courts are listed in Appendix C.

## **Disability Rights Commission (DRC)**

### **General functions**

13.10 The DRC has statutory powers to work towards the elimination of discrimination and to promote the equalisation of opportunity for disabled people. In particular, the DRC:

- keeps the Act under review
- supplies assistance and support to disabled litigants under the Act
- provides information and advice to anyone with rights or obligations under the Act
- carries out formal investigations
- prepares new or revised Codes of Practice; and
- arranges independent conciliation of disputes under the legislation.

### **Enforcement of certain provisions under Part 4**

13.11 In addition, the DRC has a direct involvement in the enforcement of the provisions of Part 4 relating to:

- instructing or pressurising other people to act unlawfully (see paragraph 3.33); and
- discriminatory advertisements (see paragraphs 8.15 to 8.18).

13.12 Only the DRC (and in due course the Commission for Equality and Human Rights (CEHR)) may bring proceedings in respect of these matters. Where it



does so, the DRC (or its successor, the CEHR) may seek:

- a declaration from a county or sheriff court that a contravention has occurred; and
- an injunction from a county court (England and Wales ) or, an interdict from a sheriff court (Scotland) restraining further contraventions.

## **Where to go for information and advice**

13.13 Students or others wanting to make complaints under the Act against an education provider may get further information and advice about the process from the Disability Rights Commission. Further sources of information and advice are provided in Appendix C.

13.14 The Disability Rights Commission also provides advice and information to education providers about their legal responsibilities under the Act.

Website: [www.drc-gb.org](http://www.drc-gb.org)  
Telephone: 08457 622 633  
Textphone: 08457 622 644  
Fax: 08457 778 878

Post: DRC Helpline  
FREEPOST  
MID 02164  
Stratford upon Avon  
CV37 9BR



# Appendix A: Duties for other providers of post-16 education

**This appendix is only relevant to:**

- **Schools when providing further education for adults; and**
- **Local education authorities when providing recreational or training facilities (in England and Wales); and**
- **Education authorities when providing recreational or training facilities (in Scotland).**

**What does the Act say about discrimination in relation to post-16 education not affected by the changes from September 2006?**

## **Introduction**

- 1 There are a few education providers who are covered by the post-16 provisions of Part 4 of the Act who are unaffected by the changes from September 2006 which are described in the bulk of this Code. These education providers have the same duties as were set out in the previous Code and came into effect in September 2002 (with later provisions coming into effect in September 2003 – in relation to auxiliary aids and services – and September 2005 – in relation to physical features).
- 2 These education providers are:
  - **Schools when providing further education for adults; and**

**Sch 4C  
Paras 6 and  
13**

- Local education authorities when providing recreational or training facilities (in England and Wales); and
- Education authorities when providing recreational or training facilities (in Scotland).

Any references in this appendix to 'education provider' refer to those listed above and any references in this appendix to 'school' refer to a school providing further education for adults.

### **Effect of the Act**

- 3 The Act makes it unlawful for an education provider to discriminate against a disabled person in relation to the provision of education and related services.
- 4 The Act does not prevent education providers from treating disabled people more favourably than those who are not disabled, although there may be other legal obligations that affect this.

### **Forms of discrimination**

- 5 The three forms of discrimination which are unlawful are:
  - Failure to comply with a duty to make reasonable adjustments (explained in paragraphs 14 to 43)
  - 'Disability-related discrimination' (explained in paragraphs 44 to 64); and
  - Victimisation of a person (whether or not he is disabled) (explained in paragraphs 65 to 70).

## **Aspects of education and related services in respect of which discrimination is unlawful**

- 6 In relation to enrolment, the Act says that it is unlawful for the governing body of a school to discriminate against a disabled person:
- in the arrangements made for determining who should be enrolled on the course
  - in the terms on which it offers to enrol him on the course; or
  - by refusing or deliberately omitting to accept an application for his enrolment on the course.
- 7 The Act also says that it is unlawful for a local education authority or education authority to discriminate against a disabled person in the terms on which they provide, or offer to provide, recreational or training facilities.
- 8 In relation to 'provision for students', the Act says that it is unlawful for an education provider to discriminate against a disabled student:
- in the services it provides, or offers to provide.

Sch 4C

Sch 4C

### **Enrolment**

- 9 The Act does not prevent courses being advertised as open only to disabled applicants, or to an applicant being preferred for the course because of his disability, although there may be other legal obligations that affect this. Providers will also need to bear in mind their obligations under the Disability Equality Duty, including the need to have due regard to the need to take steps to take account of disabled people's disabilities, even where this means treating them more favourably than non-disabled people.

## **What are 'arrangements' for determining who should be enrolled on a course?**

- 10 The meaning of 'arrangements' – that is, arrangements for determining who should be enrolled on a course – is wide. Such arrangements are not confined to those which an education provider makes in deciding who should be offered a place on a specific course, but also include arrangements for deciding who should be offered places more generally and how courses are designed. So participation in any pre-course activities such as taster sessions could be 'an arrangement' if its completion is a necessary step along the road to obtaining a place on the course.

### **Services**

#### **Sch 4C**

- 11 'Services' are any services that an education provider provides, or offers to provide, wholly or mainly for persons enrolled on the course.
- 12 Services will vary from one provider to another, but might include, for example:
- teaching, including classes, lectures, seminars, practical sessions
  - curriculum design
  - examinations and assessments
  - field trips and outdoor education
  - arranging study abroad or work placements
  - outings and trips
  - informal/optional study skills sessions
  - short courses
  - day or evening adult education courses

- training courses
- distance learning
- independent learning opportunities such as e-learning
- learning facilities such as classrooms, lecture theatres, laboratories, studios, darkrooms, etc
- learning equipment and materials such as laboratory equipment, computer facilities, class handouts, etc
- libraries, learning centres and information centres and their resources
- information and communication technology and resources
- placement-finding services
- job references
- graduation and certificate ceremonies
- leisure, recreation, entertainment and sports facilities
- the physical environment
- catering facilities
- childcare facilities
- campus or college shops
- car parking.

13 However, educational providers often make provision that is wholly or mainly for other groups of people not enrolled on the course. These are not covered by Part 4 of the Act. Examples might include:

- commercial conference facilities (these would be covered by Part 3 of the Act)

- commercial research or consultancy services (these might be covered by Part 3 of the Act)
- services and facilities for staff (these would be covered by Part 2 of the Act).

## **Reasonable adjustments**

### **What is the duty to make reasonable adjustments?**

- 14 The duty to make reasonable adjustments is a cornerstone of the Act and requires education providers to take positive steps to ensure that disabled people can access education and related services. This goes beyond simply avoiding treating disabled people less favourably and in many cases it may also mean taking additional steps to which non-disabled people are not entitled.
- 15 Education providers have a duty to take such steps as it is reasonable for them to have to take in all the circumstances of the case in the situations described below. The duty to make reasonable adjustments arises where disabled persons are placed at a substantial disadvantage in comparison with people who are not disabled. An education provider has to take such steps as it is reasonable for it to have to take in all the circumstances to prevent that disadvantage – in other words the education provider has to make a ‘reasonable adjustment’.

A man who is disabled because he has dyslexia applies for a business skills course which involves writing letters. The education provider gives all applicants a test of their letter-writing ability. The man can generally write letters very well but finds it difficult to do so in stressful



situations and within short deadlines. He is given longer to take the test. This adjustment is likely to be a reasonable one for the education provider to make.

- 16 The duty applies in the following circumstances
- in relation to the arrangements an education provider makes for determining admissions
  - in relation to student services provided for, or offered to, students by an education provider.
- 17 The duty includes a requirement to provide auxiliary aids and services and to alter or remove physical features.

#### **What is a 'physical feature'?**

- 18 The Act says that the following are to be treated as a physical feature:
- any feature arising from the design or construction of a building on the premises occupied by the education provider
  - any feature on the premises of any approach to, exit from, or access to such a building
  - any fixtures, fittings, furnishings, furniture, equipment or materials in or on the premises; and
  - any other physical element or quality of any land comprised in the premises occupied by the education provider.

All these features are covered, whether temporary or permanent. Considerations which need to be taken into account when making adjustments to

**s 31A(10)**

premises are explained in Chapter 12 of the Code and apply to all education providers.

The design of a particular classroom makes it difficult for someone with a hearing impairment to hear, because it is a large room and has hard flooring which means that sound echoes. That is a substantial disadvantage caused by the physical features of the education provider's premises.

Clear glass doors at the end of a corridor in a college present a hazard for a visually impaired student. This is a substantial disadvantage caused by the physical features of the college.

- 19 Physical features will include steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, lighting and ventilation, lifts and escalators, floor coverings, signs, furniture, and temporary or movable items. This is not an exhaustive list.
- 20 It does not matter if a disabled person cannot point to an actual non-disabled person compared with whom he is at a substantial disadvantage. The issue is whether disabled persons are placed at a substantial disadvantage.

### **What disadvantages give rise to the duty?**

- 21 The Act says that only substantial disadvantages give rise to the duty. Substantial disadvantages are those which are not minor or trivial. Whether or not such a disadvantage exists in a particular case is a question of fact.

A school providing further education for adults has several sites and students are required to move between sites to attend different classes. This is likely to place students with mobility difficulties at a substantial disadvantage as they may find it difficult to move between sites and arrive late for classes.

### **To whom is the duty to make reasonable adjustments owed?**

- 22 An education provider's duty to make reasonable adjustments is an anticipatory duty owed to disabled people and students at large. It does not only arise when an individual disabled student presents himself to the education provider. Disabled people are a diverse group with different requirements that education providers need to consider strategically.

All teaching staff at a school providing further education for adults produce all their handouts in electronic form thus ensuring that they can easily be converted into large print or put into other alternative formats. The staff are anticipating reasonable adjustments that might need to be made.

A small education provider that is unable to employ a large number of specialist staff ensures it has close links with other organisations so that it is able to call on specialist support workers (for example, for learners who are dyslexic) when the need arises. It therefore anticipates reasonable adjustments that it might need to make if it has applications from dyslexic students.

- 23 The issue of anticipatory reasonable adjustments is particularly relevant in respect of buildings, whether these are owned, rented or leased.

An education authority ensures that its Building Works Department is thoroughly briefed on all aspects of physical access. Each time building works are undertaken an assessment is made of how the building can be made more accessible. For example, when an area is repainted the department ensures it is using colour contrasts, which will help students with a visual impairment. It also carries out an acoustic audit to ensure it is responding appropriately to deaf students. The education authority is anticipating reasonable adjustments that might need to be made.

**At what point does the duty to make reasonable adjustments arise?**

- 24 Education providers should not wait until a disabled person approaches them before they give consideration to their duty to make reasonable adjustments. Education providers should be planning continually for the reasonable adjustments they need to make, whether or not they have disabled students. They should anticipate the requirements of disabled people and the adjustments that may have to be made for them. In many cases, it is appropriate to ask students to identify whether they have any particular requirements and, if so, what adjustments may need to be made. Failure to anticipate the need for an adjustment may result in it being too late to comply with the duty to make the adjustment when a disabled person requires it and therefore fail to discharge the duty.

An HR department at a local education authority arranges for all its youth service staff to receive deaf awareness training, even though there are currently no users of the youth service who would be classified as deaf.

**Must education providers anticipate every barrier?**

- 25 Education providers cannot be expected to anticipate the needs of every prospective student, but what they are required to think about and take reasonable steps to overcome are features that may impede persons with particular kinds of disability – for example, people with visual impairments or mobility impairments.
- 26 When considering the provision of a reasonable adjustment, an education provider should be flexible with its approach. However, there may be situations where it is not reasonable for an education provider to anticipate a particular requirement. Education providers are expected to anticipate the reasonably foreseeable needs of disabled people but may not be able to anticipate the specific adjustments required by some individuals.
- 27 Once an education provider has become aware of the requirements of a particular disabled student or applicant, it might then be reasonable for the education provider to take a particular step to meet these requirements. This is especially so where a disabled person has pointed out the difficulty that he or she faces in accessing services, or has suggested a reasonable solution to that difficulty.

### **How can education providers identify possible adjustments to physical features?**

- 28 Education providers are more likely to be able to comply with their duty to make adjustments in relation to physical features if they arrange for an access audit of their premises to be conducted and draft an access plan or strategy. Acting on the results of such an audit may reduce the likelihood of successful legal claims against the education provider.
- 29 In carrying out an audit, it is recommended that education providers seek the views of people with different disabilities, or those representing them, to assist in identifying barriers and developing effective solutions. Education providers can also draw on the extensive experience of local and national disability groups or organisations of disabled people.

### **How long does the duty continue?**

- 30 The duty to make reasonable adjustments is a continuing duty. Education providers should keep the duty under regular review in light of their experience with disabled people applying for courses and using student services. In this respect it is an evolving duty, and not something that needs simply to be considered once and then forgotten. What was originally a reasonable step to take might no longer be sufficient and the provision of further or different adjustments might then have to be considered.
- 31 Equally, a step that might previously have been an unreasonable one for an education provider to have to take could subsequently become a reasonable step in light of changed circumstances. For example, technological developments may

provide new or better solutions to the difficulties faced by disabled people.

### **Which disabled people does the duty protect?**

- 32 The duty to make reasonable adjustments applies in admissions and in all student services.

### **What if the education provider does not know that the person is disabled, or is an actual or potential student?**

- 33 Although education providers have a duty to think ahead and to anticipate what reasonable adjustments may be needed for disabled people in general (see paragraphs 23 to 28), an education provider will only be found to be in breach of that duty where an individual disabled person brings a claim, if it knows, or could reasonably be expected to know, that the person has a disability and is likely to be placed at a substantial disadvantage. The education provider must, however, do all it can reasonably be expected to do to find out whether this is the case. The action that it is appropriate to take to find out about a person's disability may differ between different types of provision. The Government has issued guidance on the reasonable action an education provider should take to find out about people's disabilities (see Appendix C). If an education provider can show that it did not know, and could not reasonably have been expected to know, that the person was disabled, it can defend the failure to make reasonable adjustments for that individual person.

A school trains its staff who provide further education for adults to be aware of issues relating to disability, and specifically asks them

to give students an opportunity to notify their tutor in confidence of their disability and whether they are experiencing any difficulties relating to their disability that may cause them to be at a substantial disadvantage. This gives the school the opportunity to find out if a student requires any reasonable adjustments and the school should also give alternative opportunities for the student to disclose this information.

- 34 The principle stated in paragraph 33 applies equally to a disabled person who is an actual or potential applicant for a course.
- 35 If an education provider's agent or employee (such as an occupational health adviser or an admissions officer) knows, in that capacity, of a person's disability, the education provider will not usually be able to claim that it does not know of the disability, and that it therefore has no obligation to make a reasonable adjustment. The same applies in respect of actual or potential applicants. Education providers therefore need to ensure that where information about disabled people may come through different channels, there is a means – suitably confidential – for bringing the information together, to make it easier for the education provider to fulfil its duties under the Act. All staff should be aware of the action they should take if they become aware that a student or applicant is disabled.

An access officer is employed by a local education authority to provide it with information about health and safety arrangements within the youth service and the views of the users about the arrangements. The access officer becomes



aware of a person's disability, which the youth worker does not know about. The local education authority's arrangements put the user at a substantial disadvantage because of the effects of her disability and she claims that a reasonable adjustment should have been made. It would not be a defence for the local education authority to claim that it did not know of her disability. This is because the access officer is employed by the local education authority and has knowledge of the user's disability. The access officer's knowledge means that the local education authority's duty under the Act applies.

- 36 Information will not be imputed to the education provider if it is gained by a person providing services to students independently of the education provider. This is the case even if the education provider has arranged for those services to be provided.

An education provider arranges for students to be allowed to use a local careers service in addition to its own in-house service. The agreement states that the careers service is not acting on behalf of the education provider in allowing students to use the service. Any information about a student's disability obtained by a careers adviser during the student's use of the service would not be passed on to the education provider and so would not trigger the education provider's duty to make reasonable adjustments.

## Confidentiality and reasonable adjustments

- 37 A disabled person has a right to request that the existence or nature of his or her disability be treated as confidential. In determining whether it is reasonable to make an adjustment, the responsible body must have regard to the extent that making the adjustment is consistent with a disabled person's request for confidentiality.
- 38 In some instances this might mean that reasonable adjustments have to be provided in an alternative way in order to ensure confidentiality.

A student with a visual impairment can only read clearly if he has text enlarged into 16-point type. He has requested strict confidentiality. Normally his tutors would give a visually impaired student large-print handouts at the beginning of each class. However, because he has requested confidentiality, they agree to give him his handouts in advance so that he can look at them before the lesson but does not have to be seen reading them during the class.

- 39 In some cases a confidentiality request might mean that a less satisfactory reasonable adjustment is provided or that no reasonable adjustment can be provided.

A student with AIDS is on a chemical engineering course. He does not want other students to know of his condition. His condition means that he sometimes needs to have time off. His tutors have offered to arrange extra time in the laboratory for him after hours to make up for the time he misses. However, he has refused this because he thinks it would draw attention to him

and his condition. Instead they offer to provide him with extra lecture notes. Although this adjustment may be less effective, it is likely to be lawful.

- 40 Paragraphs 5.62 to 5.67 provide guidance on what adjustments an education provider might have to make and this guidance is relevant to all education providers.
- 41 Paragraphs 5.35 to 5.61 provide guidance on when it is reasonable for an education provider to have to make adjustments including factors to be taken into account and this guidance is relevant to all education providers.

**Can failure to make a reasonable adjustment be justified?**

- 42 The Act says that a failure to make reasonable adjustments will be justified if, but only if, the reason for the failure is both material to the circumstances of the particular case and substantial. This is an objective test. 'Material' means there must be a reasonably strong connection between the reason given for the treatment and the circumstances of the particular case. 'Substantial' means, in the context of justification, that the reason must carry real weight and be of substance. In practice it will be virtually impossible for an adjustment to be a reasonable one and for there then to be a material and substantial reason for not making it.

**What happens if the duty to make reasonable adjustments is not complied with?**

- 43 Where an education provider does not comply with the duty to make reasonable adjustments and

this failure cannot be justified it will be committing an act of unlawful discrimination. A disabled person will be able to make a claim based on this (see Chapter 13 for more details about claims).

## **Disability-related discrimination**

### **What is disability-related discrimination?**

- 44 The Act says that an education provider's treatment of a disabled person amounts to discrimination if:
- it is for a reason related to his disability
  - the treatment is less favourable than the way in which the education provider treats (or would treat) others to whom that reason does not (or would not) apply; and
  - the education provider cannot show that the treatment is justified (after taking into account the reasonable adjustments duty).
- 45 Although the Act itself does not use the term 'disability-related discrimination', this expression is used in the Code when referring to treatment of a disabled person which is unlawful because each of the conditions listed in paragraph 44 is satisfied.

### **Identifying comparators for disability-related discrimination**

- 46 In determining whether disability-related discrimination has occurred, the education provider's treatment of the disabled person must be compared with that of a person to whom the disability-related reason does not apply. The comparator may be non-disabled or disabled – but the key point is that the disability-related reason

for the less favourable treatment must not apply to him. The comparator can be a real person or a hypothetical person.

A student with a mental health condition carries with her medication related to her condition. The school she attends for further education, however, has a strict policy that does not allow any drugs on the premises. The correct comparator would be a person attending the same institution who does not carry drugs with them.

A disabled person who uses crutches is not allowed to participate in a site visit that forms part of a construction course, because the tutor judges that the student may have difficulties moving around the site. The correct comparator would be a person who does not have any mobility difficulties and so can move around the site without difficulty.

A student who is deaf and uses an assistance dog is not allowed into the library at his school because the library does not allow animals on the premises. The correct comparator is a person who does not need to bring a dog with them to the library and so can go onto the premises.

### **Reason for the treatment**

- 47 In order to identify an appropriate comparator it is necessary to first identify the treatment and the reason for the treatment.

- 48 There must be a connection between the reason for the less favourable treatment and the person's disability for the treatment to be discriminatory.

A person with sickle cell anaemia using the youth service has been asked to leave because he has been bullying other users. The reason for asking him to leave is his disruptive behaviour and is not related to his disability, and so is likely to be lawful.

- 49 It is then necessary to compare the treatment with the way someone to whom the reason does not apply has been treated. A disabled person does not have to show that others were actually treated more favourably than he or she was. He or she needs only to show that others would have been treated better.
- 50 The comparison may be between the way one disabled person is treated and the way people with other disabilities are treated. There does not need to be an actual comparator, the comparison can be with a hypothetical person if an actual comparator does not exist.

A community education tutor tells a woman who is blind that she cannot join the singing group because she cannot read the sheet music. A man with chronic asthma is allowed to join the group. Although the tutor has accepted a disabled person onto the course, the blind woman has been treated less favourably for a reason relating to her disability and this is likely to be unlawful, unless it can be justified.

## **Must an education provider know that a person is disabled?**

- 51 For an education provider to discriminate against someone by treating him or her less favourably for a reason relating to his disability, it needs to know about the disability. If the education provider did not know and could not reasonably have known that a person was disabled, then there will have been no discrimination. In order to claim lack of knowledge about a disability, the responsible body must have taken steps to find out about the person's disability. The action that it is appropriate to take to find out about a person's disability may differ between different types of provision. The Government has issued guidance on the reasonable action education providers should take to find out about people's disabilities (see Appendix C).

A student has a mental health problem and, because of her medication, finds it difficult to get to her first morning class. After several weeks during which she has missed all her morning classes, and without approaching the student to find out why she has not turned up, the school decides to remove her from the course. Although the school did not know that she was disabled the school could reasonably have been expected to find out that the student was disabled and therefore cannot rely on the fact it did not know and is likely to be acting unlawfully.

In the same situation the tutor approaches the student and asks her in private if there is any reason preventing her from coming in to her first class. The student denies that there is any particular reason for her non-attendance. The

school decides to remove her from the course. This is likely to be lawful as the school could not have been expected to know that the student was disabled.

- 52 An education provider should be proactive in encouraging people to disclose a disability. This might involve:
- asking applicants to courses to declare their disabilities on application and enrolment forms
  - publicising the provision that is made for disabled people, or providing opportunities for students to tell tutors/teachers or other staff in confidence
  - asking students when they apply for examinations whether they need any specific arrangements because of a disability
  - explaining to students the benefit of disclosure and how this information will be kept confidential
  - ensuring that the atmosphere and culture at the institution or service is open and welcoming so that disabled people feel safe to disclose a disability.
- 53 If the education provider might reasonably have been expected to know or find out about a person's disability, then it cannot rely on the lack of knowledge defence.

A man with a medical condition that causes fatigue and subsequent loss of speech control applies to a school for a further education



course. The application form does not ask whether he has a disability nor whether he would have any particular needs when attending interview. He attends an interview, during which he is very listless and his speech is very slurred because he is tired from the journey, and the selectors turn him down because of this. He mentioned at the interview that he felt tired but the panel ignored this. The admissions office made no attempts to find out whether the applicant had a disability. Because this information might reasonably have been known, the selectors' treatment of the applicant is likely to be unlawful.

- 54 If a disabled person has told someone within the institution or service about his or her disability, then the education provider may not be able to claim that it did not know.

A student declares that he is disabled on his application form for his part-time further education course and notes that due to his hospital appointments, he may not be able to attend all elements of the course. Although the admissions office knows that the student might have a disability under the Act, it does not pass this information on to the tutors who teach the course. The school cannot claim that it did not know about the disability and so is likely to be acting unlawfully if it takes any disciplinary action resulting from the student's non-attendance for the course.

- 55 In some cases, the disabled person may have told someone in confidence about their disability. Information will not be imputed to the education

provider if it is gained by a person providing services independently of the education provider. However, if an education provider's agent knows, in that capacity, of a disabled person's disability, the education provider will not usually be able to claim that it does not know of the disability. Staff should be aware of how to deal with confidential information about a student's disability and should explore ways of making reasonable adjustments that would not breach confidentiality.

### **Justification of disability-related less favourable treatment**

- 56 An education provider's conduct towards a disabled person does not amount to unlawful disability-related less favourable treatment if it can be justified. The following paragraphs explain the limited circumstances in which this may happen.
- 57 Disability-related less favourable treatment may be justified if one of the following conditions is fulfilled:
- it is necessary to maintain academic standards, or
  - the reason for the treatment is both material to the circumstances of the particular case and substantial.

### **The maintenance of academic standards**

- 58 The Act does not require an education provider to do anything that would undermine the academic standards of a particular course. An education provider may be able to justify disability-related less favourable treatment if it is necessary to maintain these standards.

- 59 The academic standards reason should not be used spuriously. Where elements are not central or core to a course, they are unlikely to provide a reason to justify discrimination based on academic standards. Nor can academic standards be used as justification for barring whole groups of disabled people from courses or services. Any justification has to be relevant to the academic standards of a particular course and to the abilities of an individual person.

A severely dyslexic student applies to take a course in Journalism. She does not have the literacy necessary to complete the course because of her dyslexia. The school rejects her, using the justification of academic standards. This is likely to be lawful.

The school now introduces a policy of rejecting all dyslexic applicants to Journalism. The policy does not allow course selectors to consider different levels of dyslexia, the ability of individual applicants or the range of possible adjustments. This is likely to be unlawful.

### **Reasons that are material and substantial**

- 60 Disability-related less favourable treatment may also be justified as long as the reasons for the treatment are both material to the circumstances of the particular case and substantial.
- 61 This is an objective test. 'Material' means there must be a reasonably strong connection between the reason given for the treatment and the circumstances of the particular case. 'Substantial' means, in the context of justification, that the

reason must carry real weight and be of substance.

- 62 Before disability-related less favourable treatment can be justified for a material and substantial reason, it is necessary to consider whether or not the education provider is also under a duty to make reasonable adjustments in relation to the disabled person but fails to comply with that duty. If the education provider has failed to comply with the reasonable adjustments duty it may not be able to justify the disability-related less favourable treatment even if there is a material and substantial reason.

A blind man is not accepted on a gas welding course as it is a practical course which requires the students to weld pieces of metal together. The only way to tell if the metal is melted sufficiently to weld to another piece is by looking at its consistency and colour. There is no reasonable adjustment that would enable the blind man to do this analysis of the metal. This may be lawful as the reason he is rejected is a substantial one and is clearly material to the circumstances.

- 63 Where the education provider has a duty to make a reasonable adjustment it is necessary to consider not only whether there is a material and substantial reason for the disability-related less favourable treatment, but also whether the treatment would still have been justified even if the education provider had complied with its duty to make reasonable adjustments. In effect, it is necessary to ask the question 'would a reasonable adjustment have made any difference?' If a reasonable adjustment would have made a difference to the reason that is being used to

justify the treatment, then the disability-related less favourable treatment cannot be justified.

### **The maintenance of other prescribed standards, prescribed types of treatment and treatment in prescribed circumstances**

- 64 The Act allows for future regulations to list any standards, treatments or circumstances that may also provide reasons to justify less favourable treatment. At the time of writing this Code there are no regulations.

## **Victimisation**

### **What is victimisation?**

- 65 Victimisation is a special form of discrimination which is made unlawful by the Act. It applies whether or not the person victimised is a disabled person. Victimisation is unlawful if it occurs in relation to the provision of post-16 education or other related services covered by Part 4.
- 66 The purpose of the victimisation provisions are to protect individuals (whether disabled or not), who make or support a claim, from reprisal.
- 67 It is unlawful for one person to treat another ('the victim') less favourably than he treats or would treat other people in the same circumstances (regardless of disability) because the victim has:
- brought, or given evidence or information in connection with, proceedings under the Act (whether or not proceedings are later withdrawn)
  - done anything else under or by reference to the Act, or

- alleged someone has contravened the Act (whether or not the allegation is later dropped),

or because the person believes or suspects that the victim has done or intends to do any of these things.

A disabled student complains of discrimination, having been refused access to a number of school facilities. Another student on the disabled student's course gives evidence at the hearing on his behalf. As a result, the facilities staff at the school start to ignore the requests made by the student who gave evidence and in some cases refuse to let him have access to the facilities. This amounts to victimisation.

A non-disabled student acts as a witness in a complaint by a disabled student against a lecturer. Later, in retaliation, other lecturing staff begin to 'lose' the non-disabled student's work, and hand assignments back later than for other students. This is likely to be victimisation, and therefore unlawful.

- 68 It is not victimisation to treat a person less favourably because that person has made an allegation which was false and not made in good faith.
- 69 However, the fact that a person has given evidence on behalf of a claimant in a claim which was unsuccessful does not, of itself, prove that his evidence was false or that it was not given in good faith.

A disabled young man makes a series of allegations claiming that his tutor is discriminating against him. The allegations are without any foundation, and are part of a personal grudge that the young man has against the tutor. The education provider decides to suspend the young man from the course. Because of the particular circumstances, this is not likely to be victimisation and is likely therefore to be lawful.

- 70 Unlike the other forms of discrimination which are made unlawful by the Act, victimisation may be claimed by people who are not disabled as well as by those who are.





## **Appendix B: The meaning of disability**

This appendix is included to aid understanding about who is covered by the Act. A Government publication 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' is also available.

### **When is a person disabled?**

A person has a disability if he has a physical or mental impairment, which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

### **What about people who no longer have a disability?**

People who have had a disability within the definition are protected from discrimination even if they no longer have a disability.

### **What does 'impairment' cover?**

It covers physical or mental impairments; this includes sensory impairments, such as those affecting sight or hearing.

### **Are all mental impairments covered?**

The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities and mental health conditions.

## **What is a 'substantial' adverse effect?**

A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

## **What is a 'long-term' effect?**

A long-term effect of an impairment is one:

- which has lasted at least 12 months; or
- where the total period for which it lasts is likely to be at least 12 months; or
- which is likely to last for the rest of the life of the person affected.

Effects which are not long-term would therefore include loss of mobility due to a broken limb which is likely to heal within 12 months and the effects of temporary infections, from which a person would be likely to recover within 12 months.

## **What if the effects come and go over a period of time?**

If an impairment has had a substantial adverse effect on normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur; that is if it is more probable than not that the effect will recur.

## **What are 'normal day-to-day activities'?**

They are activities which are carried out by most people on a fairly regular and frequent basis. The

term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or a sport, to a professional standard or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition. The test of whether an impairment affects normal day-to-day activities is whether it affects one of the broad categories of capacity listed in Schedule 1 to the Act. They are:

- mobility
- manual dexterity
- physical co-ordination
- continence
- ability to lift, carry or otherwise move everyday objects
- speech, hearing or eyesight
- memory or ability to concentrate, learn or understand or
- perception of the risk of physical danger.

### **What about treatment?**

Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if substantial adverse effects are not likely to recur even if the treatment stops (ie the impairment has been cured).

## **Does this include people who wear spectacles?**

No. The sole exception to the rule about ignoring the effects of treatment is the wearing of spectacles or contact lenses. In this case, the effect while the person is wearing spectacles or contact lenses should be considered.

## **Are people who have disfigurements covered?**

People with severe disfigurements are covered by the Act. They do not need to demonstrate that the impairment has a substantial adverse effect on their ability to carry out normal day-to-day activities.

## **Are there any other people who are automatically treated as disabled under the Act?**

Anyone who has HIV, cancer or multiple sclerosis is automatically treated as disabled under the Act. In addition, people who are registered as blind or partially sighted, or who are certified as being blind or partially sighted by a consultant ophthalmologist are automatically treated under the Act as being disabled. People who are not registered or certified as blind or partially sighted will be covered by the Act if they can establish that they meet the Act's definition of disability.

## **What about people who know their condition is going to get worse over time?**

Progressive conditions are conditions which are likely to change and develop over time. Where a person has a progressive condition he will be covered by the Act from the moment the condition

leads to an impairment which has some effect on the ability to carry out normal day-to-day activities, even though not a substantial effect, if that impairment is likely eventually to have a substantial adverse effect on such ability.

### **Are people with genetic conditions covered?**

If a genetic condition has no effect on the ability to carry out normal day-to-day activities, the person is not covered. Diagnosis does not in itself bring someone within the definition. If the condition is progressive, then the rule about progressive conditions applies.

### **Are any conditions specifically excluded from the coverage of the Act?**

Yes. Certain conditions are to be regarded as not amounting to impairments for the purposes of the Act. These are:

- addiction to or dependency on alcohol, nicotine, or any other substance (other than as a result of the substance being medically prescribed)
- seasonal allergic rhinitis (eg hayfever), except where it aggravates the effect of another condition
- tendency to set fires
- tendency to steal
- tendency to physical or sexual abuse of other persons
- exhibitionism
- voyeurism.

Also, disfigurements which consist of a tattoo (which has not been removed), non-medical body piercing, or something attached through such piercing, are to be treated as not having a substantial adverse effect on the person's ability to carry out normal day-to-day activities.

## Appendix C: Further information

### Disability Rights Commission publications

A range of information and guidance on the Disability Discrimination Act 1995 is available free of charge from the Disability Rights Commission:

Telephone: 08457 622 633  
Textphone: 08457 622 644  
Fax: 08457 778 878  
Website: [www.drc-gb.org](http://www.drc-gb.org)  
You can email the DRC Helpline from our website

Post: DRC Helpline  
FREEPOST  
MID 02164  
Stratford upon Avon  
CV37 9BR

Disability Rights Commission documents are available in alternative formats and/or languages.

### Codes of Practice

Codes of Practice and accompanying guidance for Part 2, Part 3, Part 4 and Part 5 are available through the DRC website (in electronic form) and through The Stationery Office on:

Telephone: 0870 600 5522  
Fax: 0870 600 5533  
Email: [customer.sevices@tso.co.uk](mailto:customer.sevices@tso.co.uk)  
Website: [www.tsoshop.co.uk](http://www.tsoshop.co.uk)

## **Disability Equality Duty**

The DRC has produced two statutory Codes of Practice entitled **The Duty to Promote Disability Equality Statutory Code of Practice (England and Wales)** and **The Duty to Promote Disability Equality Statutory Code of Practice (Scotland)** concerning the duty upon public authorities to promote disability equality which came into force on 4 December 2006. Further guidance for specific sectors (including the education sector) affected by these duties has also been produced. The Codes, guidance and further information on discharging these duties can be found on the DRC website: [www.drc-gb.org](http://www.drc-gb.org)

## **Guidance about making a claim**

The Court Service has booklets providing advice on how to bring a case to court in England and Wales. This is available at county courts or from the Court Service website:

[www.courtservice.gov.uk](http://www.courtservice.gov.uk)

The DRC also produces a guide to making a claim.

Information is also available from the Scottish Court Service about the court process and bringing a case to court:

Telephone: 0131 229 9200  
Fax: 0131 221 6890  
Email: [enquiries@scotcourts.gov.uk](mailto:enquiries@scotcourts.gov.uk)  
Website: [www.scotcourts.gov.uk](http://www.scotcourts.gov.uk)



## **Government publications**

### **Guidance on matters to be taken into account in determining questions relating to the definition of disability**

Available from The Stationery Office (see above).

### **Providing Work Placements for Disabled Students: A Good Practice Guide for Further and Higher Education Institutions (DfES/0023/2002)**

### **Finding Out About People's Disability: A Good Practice Guide for Further and Higher Education Institutions (DfES/0024/2002)**

These two publications are available from the Department for Education and Skills:

Telephone: 0845 602 2260  
Textphone: 0845 605 5560  
Fax: 0845 603 3360  
Email: [dfes@prolog.uk.com](mailto:dfes@prolog.uk.com)  
Website: [www.dfes.gov.uk](http://www.dfes.gov.uk)

Post: DfES Publications  
PO Box 5050  
Sherwood Park  
Annesley  
Nottingham  
NG15 0DJ

## **Guidance on building design**

Copies of BS8300 **Designing buildings and their approaches to meet the access needs of disabled people** can be obtained from the British Standards Institute:

Telephone: 020 8996 9001

Fax: 020 8996 7001  
Website: [www.bsi-global.com](http://www.bsi-global.com)

## Access audits

The National Register of Access Consultants provides a database of registered access auditors.

Telephone: 020 7735 7845  
Fax: 020 7840 5811  
Email: [info@nrac.org.uk](mailto:info@nrac.org.uk)  
Website: [www.nrac.org.uk](http://www.nrac.org.uk)

## Making websites accessible

Disabled people use a wide range of specialist hardware and software to access computers. It is important that websites are designed to be compatible with this. Websites can also have 'access features' built into their design, such as a choice of font sizes or colour schemes.

More detailed guidance on making websites accessible has been developed by the British Standards Institution (BSI) and sponsored by the DRC. This is called **PAS 78: A guide to good practice in commissioning accessible websites** and is for those responsible for commissioning or maintaining public-facing websites and web-based services. More information can be obtained from the DRC website: [www.drc-gb.org](http://www.drc-gb.org)

RNIB's online Web Access Centre can also provide more information on designing and evaluating websites.

Telephone: 020 7391 2178  
Email: [webaccess@rnib.org.uk](mailto:webaccess@rnib.org.uk)  
Website: [www.rnib.org.uk](http://www.rnib.org.uk)

## **The Office of the Independent Adjudicator for Higher Education (England and Wales)**

A person wanting to make a complaint about a higher education institution in England or Wales can use the Student Complaints Scheme established by the Office of the Independent Adjudicator for Higher Education. This scheme is available for complaints about a higher education institution made by a student at that institution or a student at another institution undertaking a course of study, or programme of research, leading to the grant of one of the higher education institutions awards. A complainant must have first exhausted the internal complaints procedure of the higher education institution concerned before bringing a complaint to the Office of the Independent Adjudicator. Generally, a complaint will not be considered by the Office of the Independent Adjudicator unless it is received within three months of the date upon which the internal complaints procedure were exhausted.

Making a complaint to the Office of the Independent Adjudicator does not prevent a complainant from pursuing a case through the courts. The time limit for bringing an action in court is extended by two months if a complaint is made to the Office of the Independent Adjudicator within six months of a discriminatory act.

## **The Learning and Skills Council (England)**

A person wanting to make a complaint about a further education provider in England funded by the Learning and Skills Council can complain to the Learning and Skills Council. A complainant should have first exhausted the internal complaints procedure of the education provider concerned before bringing a complaint to the

Learning and Skills Council. Making a complaint to the Learning and Skills Council does not prevent a complainant from pursuing a case through the courts. The time limit for bringing an action in court is **not** extended if a complaint is made to the Learning and Skills Council.

### **Welsh Assembly Government**

A person wanting to make a complaint about a further education provider in Wales funded by the Welsh Assembly Government can complain to the Welsh Assembly Government. A complainant should have first exhausted the internal complaints procedure of the education provider concerned before bringing a complaint to the Welsh Assembly Government. Making a complaint to the Welsh Assembly Government does not prevent a complainant from pursuing a case through the courts. The time limit for bringing an action in court is not extended if a complaint is made to the Welsh Assembly Government.

### **The Scottish Public Services Ombudsman (Scotland)**

A person wanting to make a complaint about a further or higher education institution in Scotland can complain to the Scottish Public Services Ombudsman. A complainant should have first exhausted the internal complaints procedure of the institution concerned before bringing a complaint to the Scottish Public Services Ombudsman. Generally, a complaint will not be considered by the Ombudsman unless it is received within twelve months of the date upon which the complainant became aware of the matter being complained about. Only in exceptional circumstances will the Ombudsman

consider a complaint that could be taken to court  
and it will not consider complaints where  
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You can also contact the DRC Helpline between 08:00 and 20:00, Monday to Friday.

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