

Education

A guide for disabled students and learners

Part 4 of the Disability Discrimination Act 1995
– Post-16



The Disability Rights Commission

The Disability Rights Commission (DRC) is an independent body, established by Act of Parliament to eliminate the discrimination faced by disabled people and promote equality of opportunity. When disabled people participate – as citizens, students, customers and employees – everyone benefits. So we have set ourselves the goal of “a society where all disabled people can participate fully as equal citizens”.

The DRC has offices in England, Scotland and Wales. For further details of how we can help you, please contact our Helpline – contact details are featured at the back of this publication.

Addendum

Introduction

On 1 September 2006 new legal duties concerning disability discrimination in respect of post-16 education came into force. These duties are set out in the Disability Discrimination Act (DDA) 1995 (Amendment) (Further and Higher Education) Regulations 2006 (SI 2006/1721) which amend the post-16 education provisions contained in Part 4, Chapter 2 of the DDA.

As a result of these changes, the Disability Rights Commission revised the contents of the DDA post-16 education statutory Code of Practice. This revised Code of Practice can be found on the DRC website:

<http://www.drc.org.uk/post16>. This addendum summarises the new duties.

1 To whom do the new duties apply?

These new legal duties apply to all the education providers covered by the old Part 4 DDA post-16 education duties – ie those in existence before 1 September 2006 – **except** the following providers (who are still only covered by the old duties):

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

For further information about the separate and distinct DDA duties in respect of those education providers listed in a to c above please see Appendix A of the revised DDA post-16 education statutory Code of Practice.

2 What is the scope of the new legal duties?

The new anti-discrimination legal duties not only arise in the context of admissions and exclusions, teaching, learning and the provision of student services, but also apply to ex-students (in relation to matters connected to the former relationship) and apply to education institutions conferring qualifications to both students and non-students.

3 What constitutes discrimination and harassment under the new legal duties?

Unlawful discrimination under the new duties can occur in four ways, as described below. In addition to the four forms of discrimination, disability-related harassment is also unlawful.

Direct disability discrimination is a new form of unlawful discrimination. This is less favourable treatment by an

education provider of a disabled person on the ground of that person's disability which, once proven to have occurred, cannot be justified. Determining if unlawful direct disability discrimination has occurred is established by undertaking a comparative exercise between the treatment experienced by the disabled complainant with that experienced by a person not having that disability (actual or hypothetical) in the same, or not materially different, relevant circumstances. Chapter 4 of the revised DDA post-16 education statutory Code of Practice provides further information on direct disability discrimination in this context, including examples of such discrimination.

Another form of unlawful disability discrimination is an education provider's **failure to make reasonable adjustments**. Although the education provider's duty to make reasonable adjustments already existed before 1 September 2006 it has subsequently changed in some important

ways. The duty is now triggered by an education provider's provisions, criteria and practices (not just admission arrangements and teaching, learning and other student services) placing a disabled person at a substantial disadvantage. However, the duty does not apply in relation to competence standards (see below for more information on competence standards). Under the new duties, as opposed to the old, a failure to make proven reasonable adjustments can no longer be justified.

Less favourable treatment for a reason related to a person's disability that cannot be justified is retained as a form of unlawful discrimination under the new duties; this is referred to as **disability-related discrimination** in the revised DDA post-16 education statutory Code of Practice. Whilst the justification defence generally remains the same under the new duties, an important change has occurred in respect of justifying disability-related discrimination in

respect of the application of competence standards (see the paragraph below concerning competence standards for further information).

Under both the old and new duties, disabled and non-disabled people were, and still are, protected from being **victimised** because they have carried out a protected act in good faith, such as alleging disability discrimination has occurred or helping someone who makes such allegations.

Disability-related harassment is made unlawful under the new duties. This is defined as 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/her. Under the new duties this is not defined as a form of discrimination.

Competence standards are defined as an academic, medical or other standard

applied by, or on behalf of, a post-16 education institution covered by the new duties for the purpose of determining whether or not a person has a particular level of competence or ability. Two particularly important points should be noted in this regard: first, that the duty to make reasonable adjustments does not apply to the application of competence standards by post-16 education providers; secondly, where the application of a competence standard leads to disability-related discrimination, such discrimination can be justified if it is a proportionate means of achieving a legitimate aim.

4 How do the new legal duties affect the burden of proving discrimination has occurred?

Since 1 September 2006, the court is obliged to consider whether the burden of proof has been transferred to the education provider to prove that unlawful discrimination did not occur. These decisions on reversal of burden of proof

do not apply to the type of education provider listed in a to c above.

The burden of proof transfers to the education provider when the person who alleges that disability discrimination has occurred proves facts from which a court could infer that unlawful discrimination has taken place. If the burden does then transfer and the education provider cannot provide a cogent and persuasive non-discriminatory reason for the treatment complained of, a court will be obliged to infer that unlawful discrimination has taken place.

Do note, however, that the burden of proving that an individual complainant satisfies the definition of a disabled person remains upon the complainant and that this is unaffected by the new burden of proof provisions.

Introduction

If you are a disabled student or prospective student and think you have been discriminated against, you may be able to challenge this under the Disability Discrimination Act 1995 (DDA).

The DDA gives disabled students rights in their access to colleges, universities and other providers of Post-16 education. Your rights in education have been introduced in three stages:

- since 1 September 2002 it has been against the law for education providers to treat you less favourably for a reason related to your disability or to fail to make reasonable adjustments to prevent you being placed at a substantial disadvantage
- since 1 September 2003 education providers have had to provide auxiliary aids and services as part of the reasonable adjustments duty
- since 1 September 2005 education providers have had to make reasonable adjustments to their premises where there are physical features that are placing you at a substantial disadvantage.

The DRC have produced a Code of Practice for Post-16 education providers about the DDA. It is taken into account by the courts and it guides disabled people and service providers on how reasonable adjustments should be made. It is available from the DRC Helpline 08457 622 633 in a range of formats and on the DRC website www.drc-gb.org

The DRC Helpline can give you more advice and information. The DRC also offers advice and information to students and providers of Post 16 education to help in sorting out disputes. A booklet about 'How to make a claim' is available from the DRC Helpline or Website. In very limited circumstances the DRC may be able to provide legal support.

How do I know if I have a disability under the DDA?

The DDA defines disability as a physical or mental impairment, which has a substantial and long-term adverse affect on a person's ability to carry out normal day-to-day activities. This would include many long-term or fluctuating health conditions.

For example, if you have problems with mobility, seeing or hearing, a learning disability, mental illness, epilepsy, Aids, asthma, diabetes or a condition that gets progressively worse such as multiplesclerosis, then you may be covered under the DDA. Further information about the definition of disability is available on the DRC website.



How can the DDA help me?

It is against the law for providers of Post-16 education and related services to discriminate against you in three areas:

- admissions
- teaching and learning and other student services which are provided wholly or mainly for students - including student outings, leisure facilities and canteen, libraries and learning centres, work experience and student accommodation
- by excluding you from the course or institution.

Is my education provider covered by the Post-16 duties in Part 4 of the DDA?

The duties cover:

- universities and other institutions in the higher education sector
- colleges of further education and other institutions in the further education sector
- local education authorities or education authorities securing further education, including adult and community education
- schools providing further education for adults
- local education authorities providing the statutory youth service and, in Scotland, education authorities securing community education
- some other specific institutions listed in regulations.

If your education provider is not included in this list of institutions then it does not have duties under the Post-16 Duties of Part 4 of the DDA. Schools providing sixth form education

are covered by the schools duties under Part 4. Further information is available from the DRC Helpline and website.

What does 'discriminate' mean?

According to the DDA there are two main types of disability discrimination:

- (a) unjustified **less favourable treatment** for a reason related to a person's disability and
- (b) unjustified **failure to take reasonable steps**.



Less favourable treatment

An education provider discriminates against a disabled person if it treats him or her less favourably than other people (for a reason related to his or her disability) and cannot justify the treatment.

The DDA says that less favourable treatment may be unlawful in the following areas:

- arrangements for determining admission to an institution
- the terms on which admission is offered
- refusal or deliberate omission of an application for admission
- teaching and learning and other student services provided by an institution
- exclusion.

To show you have been treated less favourably for a reason related to your disability you need to show:

- what the treatment is
- what the reason for the treatment is

- that the reason is related to your disability
- that someone to whom the reason does not apply was not/would not be treated that way.

For example:

- A student with dyslexia applies to do a degree in English and is told by a university that it does not accept dyslexic students on English degree, other students with similar qualifications are offered places on the course.
- A student with a mobility impairment is told she cannot take part in a recreational trip because of her impairment.
- A student with a known history of bi-polar disorder is excluded from college because staff fears he may become disruptive in the future. There is no evidence to substantiate this fear and he has not broken any of the college regulations.

Failure to take a reasonable step

Education providers also discriminate if they fail to take reasonable steps to prevent a disabled person from being placed at a substantial disadvantage. This is commonly known as the duty to make 'reasonable adjustments'. This duty applies in the following areas:

- arrangements for determining admission to an institution
- teaching and learning and other student services provided or offered by an institution.

The duty to make reasonable adjustments includes a duty to provide auxiliary aids and services and a duty to remove or alter a physical feature.

Some examples of reasonable adjustments might be:

- a college provides a student with learning difficulties with additional support in her written work so that she can achieve her NVQ qualification
- a local education authority (local authority in Scotland) ensures that a partially sighted adult learner receives handouts in large print
- a university arranges for sign language interpretation in lectures for a deaf student
- a university installs a lift to enable students who are wheelchair users to access lecture rooms on the first floor.

These duties are anticipatory. This means that an education provider cannot just wait until it is approached by a disabled student but must be thinking ahead about what adjustments might be needed.

What is 'reasonable' when making adjustments?

The DDA does not define 'reasonable' and ultimately it will be up to the court to decide. However, issues such as the cost of the adjustment, the interests of other students, health and safety factors and whether academic standards are maintained will all be taken into account in deciding whether an adjustment is reasonable.

What is a 'physical feature'?

Physical features 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 should I do if I think I have been discriminated against?

The DRC Helpline should be able to help. Advisers will be able to guide you through the law and discuss your options. They may also be able to send you some helpful material that might support you in resolving an experience of disability discrimination. DRC Helpline colleagues can also signpost you to other relevant organisations who may be able to assist you.

In some circumstances we may be able to refer your dispute to the Disability Conciliation Service (DCS) and be able to get a satisfactory result without taking the case further. The aim is to reach an agreement that both sides accept. The conciliation service will be available in England, Scotland and Wales and disputes may be referred to conciliation if both sides agree.

However, please note that you will not be stopped from taking legal action if you are unhappy with the outcome of the conciliation. If your complaint is referred to the DCS, you will have extra time in which to take legal action.

How do I make a legal complaint?

You may be able to take your dispute further by going to court. This will be a civil action in a county court in England and Wales, or the Sheriff Court in Scotland. You need to take your complaint to court within six months of the date when the alleged discrimination took place (this time period is extended to 8 months if the case has first gone to the DCS). If you have been discriminated against over time, the six months begins at the date of the last incident.

If your court case is successful, you could be awarded compensation. You may also seek an injunction (in England and Wales) or an interdict (in Scotland) to stop further discrimination, or to make your educational institute take positive action to avoid discrimination.

The DRC have produced a 'How to make a claim' booklet to assist disabled students in making a claim against an education provider. This is available from the DRC Helpline or website. In very limited circumstances the DRC may be able to provide legal support.

Can I make an informal complaint?

You can complain directly to the body responsible for your education. They should have a complaints procedure to help solve disputes quickly. You can do this even if you have begun legal proceedings.



If you require this publication in an alternative format and/or language please contact the Helpline to discuss your needs. It is also available on the DRC website: www.drc-gb.org

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The DRC Language Line service offers an interpretation facility providing information in community languages and is available on the DRC Helpline by voice, text, post or by email via the website. You can speak to an operator at any time between 08:00 and 20:00, Monday to Friday.

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