

Content Service Providers and the Disability Discrimination Act 1995 - ARCHIVED



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A Briefing Paper on the legal implications under the Disability Discrimination Act 1995 of provision by education service providers of digitised materials to colleges and universities - 15 March 2004

By Martin Sloan

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1 Introduction

In the education sector, various projects and services are set up and funded to provide a particular service to the community, but not necessarily to the general public as a whole. Much of this service provision revolves around providing digitised materials for downloading by teaching staff and students for teaching and research purposes. In some cases, the students themselves may also directly access the materials if the institution has subscribed to the service.

Case study scenario

A typical scenario might be as follows: Digitise Limited takes old television programs and digitises them and then provides these materials to another company, Databases Limited. Databases Limited takes the materials created by Digitise Limited and compiles them into a database. This database and the materials contained therein is then made available, in the form of an online service, to colleges and universities who then use the database as course reference materials for students and to provide teaching and research materials for staff.

The legal background

Under the Disability Discrimination Act 1995 (DDA), as amended by the Special Educational Needs and Disability Act 2001 (SENDA), Parts III and IV provide that

service providers (Part III) and educational institutions (Part IV) (1) should not discriminate in the services, or student services, that they provide. In providing a digitised service such as that described above, accessibility problems for disabled students will clearly exist and it is the purpose of this briefing paper to set out whether or not any obligations exist in relation to such a service under the DDA and on which parties these obligations will fall.

2 What obligations does the digitising service have under the DDA?

As the digitising service, Digitise Limited, is not a 'responsible body' for a higher or further educational institution within the meaning of Part IV of the DDA, it is not subject to the new obligations covering educational institutions by the SENDA. However, if Digitise Limited is providing a service to the public, it will be covered by the duties applying to access to the provision of goods, facilities, services and premises under Part III.

Discrimination under Part III of the DDA

In determining whether a service provider is providing a service to the public, the Code of Practice on Rights of Access to Goods, Facilities, Services and Premises (2) (the Part III Code) makes it clear that the Part III obligations also cover a service provided exclusively to or aimed at other businesses. It is noted at para 2.16 of the Part III Code that a disabled person may be accessing services on behalf of an organisation, for instance as an employee. The service provider will therefore have to ensure that in providing its service that it does not discriminate against the disabled employee by denying that person access or providing a lower standard of service than it would offer a person without that disability.

Is the provision a 'product' or a 'goods and service'?

In practice, this means that Digitise Limited should ensure that it follows the Part III Code to ensure that the way in which it provides access to the materials it creates does not discriminate against a disabled person. However, this duty is unlikely to extend to ensuring that it provides the materials themselves in an accessible format. The Part III Code states at para 2.40 that the DDA does not cover actual products, but rather the provision or access to that product or service. During the DDA's passage through Parliament, the incumbent Minister of State, Lord Mackay, stated that:

"This is the case even where the product could be regarded as 'information'; for example, newspapers, books and television programmes. There will therefore be no requirement for those items to be made available in an accessible format." (3)

Advice for service providers providing digitised materials

This would therefore suggest that there is no requirement under the DDA for the digitised materials being provided by Digitise Limited, whether the provision is on conventional media, such as video tape, CD-ROM or DVD, to be in an accessible format, although the Part III Code recommends such an approach as good practice. However, the service or method of provision of these materials is subject to the requirements of Part III of the DDA. This therefore leads to a slightly blurred situation where the provision of these materials is through a website (see below).

3 What obligations does the database provider have under the DDA?

As with Digitise Limited, Databases Limited is not a responsible body for an educational institution covered by Part IV of the DDA. However, the access that it offers to its online database (whether paid for or for free) will be a service covered by Part III of the DDA, as it is a service offered to the public. Again, as with Digitise Limited, even though 'conventional' members of the public may not access the service, lecturers, academic staff and students will access the service in the course of their employment or studies.

As the service is subject to Part III of the DDA, the service provider must therefore ensure that it does not discriminate against a disabled person in the course of this service provision. As Databases Limited provides its service online through a website, it is important that this website is accessible to disabled people in order that the user can access, request or order the materials et cetera.

A website as a service

What is unclear at present is how this duty to make the provision of the service accessible interacts with the lack of a requirement under the DDA to make the goods themselves accessible. As an analogy, if Databases Limited were to provide the digitised materials on CD-ROM and sell these materials from a conventional bricks and mortar shop, the duties in relation to the provision of a service would extend only as far as accessing and entering that shop and the physical process of purchasing the materials.

However, in giving examples of services covered by Part III, the DDA lists 'access to and use of information services' (4). It is unclear at present how far one can interpret this category. Arguably, every single website on the Internet is an 'information service', in that it ostensibly is a service that provides information to the person accessing it. Further, it is possible to argue that the 'use' of an information service includes accessing the actual information that that service provides, as opposed to simply using the service that provides the information. If this interpretation is correct, it is possible to argue that the DDA requires that service providers must make materials and information available in an accessible form, rather than just that the mechanism for accessing this information is accessible.

Unfortunately, the guidance offered by the Part III Code does not provide assistance in answering this question. In that respect, it is unfortunate that the website used for an example of a service is that of an airline's booking website. For the purposes of this briefing paper, it is also difficult to reach a definite conclusion. Whilst for the majority of websites Part III will set out a definite accessibility requirement, those that are a mechanism for delivering content could arguably only be subject to the DDA to the extent that the site is a service for accessing the material. Ultimately, it is likely that a definitive answer on this will only be reached when a court is asked to rule on the issue.

Advice for service providers providing online services

In the meantime, service providers, such as Databases Limited in the example, should ensure that the website providing access to the materials is as accessible as possible. This includes the method of subscribing, logging in, searching for and requesting materials. Service providers can achieve this by complying with

guidelines such as those issued by the World Wide Web Consortium (5) and by having the site audited for accessibility by one of the many consultancy services that are available.

Service providers may also wish to ensure that the materials that they deliver through their service are also as accessible as possible in order to protect themselves from possible future legal action and to comply with the Code's 'good practice' recommendations. This may simply be a case of providing textual content in a variety of formats (such as HTML as well as PDF format) or by captioning audio and video content. Whilst the former is a far easier task to achieve than the latter, service providers can also take comfort from the 'reasonableness' tests contained within Part III. In considering such measures, service providers should also have regard to copyright issues and licensing of the materials provided by the service and the degree of flexibility that the service provider may have in this regard.

If a court finds that the DDA does cover materials provided by such a service, it is likely that the court will take into account factors such as time and cost when considering the progress of a service provider in making available its materials in an accessible format. In light of the present lack of clarity in the law, this is a risk management issue and service providers should seek independent legal advice as to whether or not such precautionary steps are necessary in their particular circumstances.

4 What obligations does the college/university subscribing to the service have under the DDA?

If students or staff subscribe or access a service directly (for instance on his or her own accord), the service will be covered by Part III of the DDA and the college or university will not incur any liability in the course of the provision of this service. However, if students access the service through the college or university's institutional subscription, the service will be covered by Part IV of the DDA. Educational institutions should also bear in mind their responsibilities under Part II of the DDA (Employment) should an employee need to access a service in the course of his or her employment.

4.1 Student Services under Part IV of the DDA

Under the amendments made to the DDA by the SENDA, educational institutions are under a duty not to treat disabled students less favourably without justification and to make reasonable adjustments so that students are not at a substantial disadvantage compared to those who are not disabled. This includes an obligation not to discriminate against a disabled person in the 'student services' that it provides or offers to provide.(6)

Definition of 'student services'

'Student services' are not defined in the DDA, but examples are given in the Code of Practice for Providers of Post 16 Education and Related Services (the Part IV Code) (7). The extensive list includes:

- * Teaching, including classes, lectures, seminars and practical sessions
- * Curriculum design
- * Examination and assessments
- * Distance learning
- * Independent learning opportunities, such as e-learning
- * Learning equipment and materials, such as laboratory equipment, computer facilities and class handouts et cetera
- * Information and communication technology and resources (8)

It is therefore possible that learning and resource services provided by third parties through an educational institution will come within the scope of several student services. For instance, the digitised materials database that Databases Limited provides access to could, if provided to students through their institution's subscription be considered as part of the teaching process, distance learning (if remote, off-campus access is possible), an independent learning opportunity or as course materials.

Accessibility of student services

In subscribing to such services, educational institutions therefore need to take into account the accessibility of the service. This includes whether the course design and use of the resource will result in the less favourable treatment of a disabled student without justification. Justifications are extremely limited and generally apply only where it is necessary to maintain academic standards or to comply with prescribed standards (for instance by an external body such as the Law Society in relation to a law degree).

The educational institution must consider whether any discrimination that arises from a disabled student being unable to access such a subscription service amounts to less favourable treatment and whether any reasonable adjustments should be considered. A duty to make reasonable adjustments exists where the disabled student is at a substantial disadvantage compared to that of other students. In assessing whether a student is at a substantial disadvantage, the institution should have regard to the time, inconvenience, effort or discomfort that the disabled student might encounter, compared to that of other students. The educational institution therefore needs to weigh up the actual effect of the disabled student being unable to access the service. As the reasonableness test is an objective test, what is reasonable in a particular scenario will depend on individual facts and circumstances.

For instance, if the service is required in order for the student to complete the course it is likely that being unable to access the service will place the student at a substantial disadvantage. However, if the service is simply auxiliary or an additional resource it may be that there is no substantial discrimination against the student. In the case of services offering access to materials and resources (such as those envisaged by this briefing paper) however, it is likely that an inability to access this will invariably place the disabled student at a substantial disadvantage.

Reasonable adjustments in practice

If this is so, the educational institution then has a duty to make reasonable adjustments. As the educational institution's control over the design and structure of the service is likely to be limited by the licensing conditions of the service, it is unlikely that the institution itself will be able to make the necessary changes without the consent of the service provider. For instance, if the disabled student encountered problems logging into the service or searching for and accessing the content, such accessibility problems will be caused by the design of the service provider's website which provides access to the service. As the service provider will invariably host this remotely on its own servers, the educational institution will be unable to make the necessary changes to ensure accessibility. In such situations, a reasonable adjustment is likely to mean choosing a service provider whose website is accessible.

If this is not possible, the institution should consider other possible adjustments. For instance, it may be possible to use the Copyright (Visually Impaired Persons) Act 2002 (CVIPA) to produce accessible copies of the materials published by the service provider for students with visual impairments. The CVIPA allows 'approved bodies' (which includes educational establishments) to make and supply accessible copies of a master copy which is in the possession of that approved body to people with visual impairments. However, the CVIPA only applies to literary, dramatic, musical or artistic works, not films, sound recordings. Whilst this would not be relevant to the particular example considered above (as the digitised TV programs would presumably come within the 'film' category), it may be possible to use the rights given by the CVIPA in relation to other text-based databases - for example Lexis Nexis, Westlaw etc.

Alternatively, in the case of the digitised TV service, the institution may wish to consider providing transcripts of the materials available through the service, providing a set of materials specifically designed for disabled students who cannot access the service or adjusting the particular element of the course or assessment that requires the student to access the service.

4.2 Employment duties under Part II of the DDA

(9)

Educational institutions also need to consider their duties towards employees under Part II of the DDA. Employers have a duty under s.4A(1)(a) to make reasonable adjustments where any provision, criterion or practice places a disabled employee at a substantial disadvantage compared to other employees.

Reasonable adjustments in employment

If an employee, such as a lecturer or administrative assistant, is required as part of his or her job to access an online based service that is inaccessible, it is likely that the employer will have a duty to consider reasonable adjustments to allow that employee to carry out his or her duties without any substantial disadvantage. In this particular scenario, if a member of teaching staff is unable to access Databases Limited's online service, which students are required to use as part of the teaching curriculum, it is likely that that member of staff will be unable to perform his duties and thus be at a substantial disadvantage.

In such a scenario, the employer must consider what reasonable adjustments it can make to the employee's working arrangements. It is unlikely that it would be reasonable to expect the employer to discontinue using the service, but instead it should consider practical, constructive, measures. The present Code of Practice for Part II of the DDA (10) and the DDA at s.18B(2) suggest examples of reasonable adjustments, including:

- * Allocating some of the disabled person's duties to another person
- * Acquiring or modifying equipment
- * Providing a reader or interpreter
- * Providing supervision

All of these may be appropriate depending on the extent of the accessibility problem and the nature of the service. For instance, if access is required simply for an administrative purpose, for example setting up access codes and accounts, there is no reason why another member of staff could not carry this out. Alternatively, if the employee is a member of teaching staff and needs to review the materials in order to assess a student's work, it may be that another member of staff could view the materials and then provide the necessary information or comments back to the examiner.

5 Conclusions

This briefing paper has highlighted that it is likely that different aspects of the service under consideration will be subject to different parts of the DDA and, accordingly, some duties may lie with the service provider itself whilst some may lie with the educational institution that subscribes to the service. It is also clear that certain parts of the service may be subject to duties under both parts of the DDA. For instance, whilst the service provider has duties in relation to the provision of the service to the general public, the educational institution is likely to have these duties in relation to the provision of the service to students at that institution.

5.1 Overlap of duties

This important distinction means that in terms of obligations towards a particular individual there will not be any overlap between the duties of the service provider and those of the educational institution. Any service that the service provider provided prior to the introduction of the SENDA and that was subject to Part III of the DDA will continue to be covered in relation to the provision of that service to members of the general public. However, any access that the educational institution provides to the service is likely to be a student service and covered by Part IV of the DDA. Accordingly, the duty here lies between the institution and the student.

5.2 Summary of obligations

In summary, the duties applying to the scenario are as follows:
Digitise Limited

Digitise Limited will have obligations in relation to the service that it offers. It will not have any obligations regarding the digitised products that it actually produces, as

these are products and not covered by the DDA. However, Part III of the DDA will cover the way in which it makes these products available (whether by a website ordering service or by a bricks and mortar shop). Digitise Limited will have to consider reasonable adjustments in relation to any accessibility problems that customers encounter.

Databases Limited

Databases Limited provides a service through a website allowing access to an archive of material. Part III of the DDA will cover the way in which customers use this service. Databases Limited will therefore have obligations to ensure that either its website, including search, ordering and access facilities, is fully accessible to people with disabilities. Databases Limited may also have obligations in relation to the material itself and it may wish to consider whether it should also try to ensure that the materials hosted in the archive are provided in an accessible form. It should also bear in mind that the universities and colleges subscribing to the service might request that it provide accessible materials.

The college or university

The college or university will have obligations in two respects: under Part II of the DDA towards its staff and under Part IV of the DDA towards its students. In relation to Part II, these duties may simply require ensuring that it does not allocate tasks to an employee who, because of his disability is unable to access the service. If access is necessary, it may wish to consider ways it can assist an employee in carrying his duties.

In relation to the obligations under Part IV, the extent of the adjustments that the college or university is required to make will depend on how important it is that the student access Digitise Limited's database. Whilst the ideal adjustment would be for the institution to subscribe to a fully accessible database, this may not be practical or possible. If so, the institution should consider alternative methods of access or other adjustments to ensure that it does not discriminate against the student.

About the author

Martin Sloan is one of the UK's leading authorities on Web Accessibility and the law. Following his Honours Dissertation on Web Accessibility and the DDA, Martin has written for several leading UK law journals and has spoken at conferences organised by the RNIB and the University of Edinburgh. Martin was supported in his original research by the Digital Media Access Group at the University of Dundee and periodically writes for their Web site. Martin also runs a Web site containing information on Web Accessibility and the law in the UK at <http://www.web-access.org.uk>. Martin is a trainee solicitor with Edinburgh commercial law firm Brodies and will be joining its Technology Group as a qualified assistant in August 2004.

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Notes

1. The DDA can be found on the HMSO website at <http://www.hmso.gov.uk/acts/acts1995/1995050.htm> and SENDA is available at <http://www.hmso.gov.uk/acts/acts2001/20010010.htm>

2 Disability Rights Commission, 2002. Available from the DRC website at <http://www.drc-gb.org>. Whilst the Code of Practice is not an authoritative statement of the law, the courts have a duty to consider the Code whenever it may be relevant to the case before the court.

3 Hansard vol. 566, col 251.

4 s.19(3)(c).

5 <http://www.w3.org/>

6 s.28R(2).

7 Disability Rights Commission, 2002. Available from the DRC website at <http://www.drc-gb.org>.

8 Para 3.14.

9 NB this section refers to the law as from 1 October 2004, when amendments made to the DDA by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 will come into force. These Regulations amend Part II of the DDA to require reasonable adjustments to be made to any 'provision, criterion or practice applied by the employer, rather than to any 'arrangements' made by the employer. It is expected that a revised version of the Code of Practice for Part II of the DDA (see note 8 below) will be made available in time for 1 October 2004, taking into account these amendments.

10 DRC 'Code of Practice: Elimination of discrimination in the field of employment against disabled persons or persons who have had a disability'. Available from the DRC website at <http://www.drc-gb.org>.

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