

# Disability Legislation and ICT in Further and Higher Education - Overview



## JISC Legal Overview

15 August 2007

**Please note:** this guidance has been prepared by **JISC Legal** for information purposes only and is not, nor is intended to be, legal advice. This information is not intended to constitute, and receipt of it does not constitute, a contract for legal advice or the establishment of a solicitor-client relationship.

1. General Introduction.....	1
2. What Institutions Need to Do.....	2
3. Legislation and Guidance.....	2
4. The Legal Definition of Disability .....	2
5. Discrimination Defined in Law .....	3
6. The Provision of Educational Services .....	5
7. Conclusion .....	10

### 1. General Introduction

The scope of The Disability Discrimination Act 1995 (DDA) was extended to include education services by The Special Educational Needs and Disability Act 2001 (SENDA). Part III and now Part IV of the DDA apply to education services such as those provided by the further education, higher education and specialist education sectors.

This overview paper will focus on disability discrimination in respect of ICT and the provision of educational services in UK publicly-funded further and higher education. However, it should be noted that an educational establishment has similar duties with regard to its employees and to third parties to whom it provides non-educational services (for example, conference hosting, and vacation accommodation letting). Colleges and universities should be familiar with these duties which have been in force for some time now and are contained in Part II (Employment) and Part III (Service Provision) of the DDA and will be discussed briefly here.

In relation to Northern Ireland, the DDA applies as with the rest of the UK. However, subsequent amendments to the DDA are a matter for the Northern Ireland Assembly which may enact equivalent legislation (for example the Special Educational Needs and Disability (Northern Ireland) Order 2005, available online at <http://www.opsi.gov.uk/si/si2005/20051117.htm>). However, it is also possible that the law may diverge in some areas or may be introduced at different times from the rest of the UK. The Department of Education and Skills Northern Ireland has information on its website at <http://www.deni.gov.uk/index.htm>. This paper is based on the law as enacted by the UK Parliament.

## 2. What Institutions Need to Do

- Have procedures in place to ensure compliance with both the general and specific Disability Equality Duty
- Have in place a published Disability Equality Scheme
- Ensure staff in all areas of the institution are aware of their obligations and duties

## 3. Legislation and Guidance

In addition to the legislation in this area, reference must be made to guidance, standards and codes of practice. Foremost of these, are the following:

- **Disability Discrimination Act 1995 (DDA)** - This lies at the core of UK disability discrimination legislation. The main section of relevance for this paper is Part IV, dealing with educational services.  
<http://www.opsi.gov.uk/acts/acts1995/1995050.htm>
- **The Special Educational Needs and Disability Act 2001 (SENDA)** - This legislation amended the DDA to include education services as Part IV of the DDA. <http://www.opsi.gov.uk/acts/acts2001/20010010.htm>
- **Disability Discrimination Act 2005 (DDA 2005)** - This places a duty on public sector bodies to promote disability equality in all aspects of their work and also broadens the definition of disability.  
<http://www.statutelaw.gov.uk/AZIndex.aspx>
- **The Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006** (the 2006 Regulations) - These regulations prohibit harassment, prohibit direct discrimination, impose a duty to make reasonable adjustments, and amend the definition of reasonable adjustment.  
[http://www.opsi.gov.uk/si/si2006/uksi\\_20061721\\_en.pdf](http://www.opsi.gov.uk/si/si2006/uksi_20061721_en.pdf)
- **Code of Practice; Post 16 Education (Revised) (the revised Post 16 Code)** - This code incorporates amendments made by the 2006 Regulations and was laid before Parliament in accordance with s53A(4) of the DDA and came into force with effect from 4 Dec 2006. As with many such codes, it is not a legally binding statement of the law, but it is admissible in evidence and a court will look to it for guidance in a dispute situation -  
[http://www.equalityhumanrights.com/uploaded\\_files/code\\_of\\_practice\\_revised\\_for\\_providers\\_of\\_post-16\\_education\\_and\\_related\\_services\\_dda.pdf](http://www.equalityhumanrights.com/uploaded_files/code_of_practice_revised_for_providers_of_post-16_education_and_related_services_dda.pdf).

It should be noted that the above links to legislation are links to the original and do not incorporate any subsequent amendments. This will be rectified in time when the legislation has been uploaded into the UK Statute Law Database - <http://www.statutelaw.gov.uk/>. Further codes, guidance, and legislation, are listed at the end of this paper.

## 4. The Legal Definition of Disability

S.1 of the DDA defines disability in the following terms:

“a person has a disability for the purposes of this Act 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.”

It should be noted that there are additional conditions and exceptions in the DDA and the definition has also been extended by later amendments contained in the DDA 2005 and now includes illnesses such as HIV, cancer and multiple sclerosis from the time they are diagnosed.

Some disabilities are also excluded from the definition of disabled. These include: lifestyle choices such as tattoos and piercings, exhibitionism, physical or sexual abuse, and addiction to alcohol, nicotine or any other substance.

Finally, a student may come under the definition of 'learning difficulty' (and thus be entitled to support) in terms of other legislation such as the Learning and Skills Act 2000 and the Further and Higher Education (Scotland) Act 1992. However, this does not necessarily mean that the student is disabled under the definition as stated in the DDA.

## **5. Discrimination Defined in Law**

Discrimination under the DDA for the purposes of education institutions can be divided into three areas:

- (1) Discrimination in respect of employees
- (2) Discrimination in respect to goods and services other than educational services
- (3) Discrimination in respect to the provision of educational services

### **(1) Discrimination in respect of employees**

This is covered by Part II of the DDA and the meaning of discrimination with regard to employees is defined in s.3A as

“a person discriminates against a disabled person if-

- (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and
- (b) he cannot show that the treatment in question is justified..”

The obligation not to discriminate against disabled employees has been in place since 1996. Educational institutions as employers are likely to be familiar with the Code of Practice Employment and Occupation (08/09/2004), available on the DRC website at - [http://www.drc-qb.org/library/publications/employment/code\\_of\\_practice\\_-\\_employment.aspx](http://www.drc-qb.org/library/publications/employment/code_of_practice_-_employment.aspx). This Code cites an accessible website as an example of a service provision to employees or prospective employees which would fall within the scope of the DDA. Institutions should ensure, for example, that 'lecturer only' materials are accessible, as should reference and instruction materials including those for online learning technology and environments and of course that the employee has appropriate ICT equipment.

Employers may also ask other members of staff to assist a disabled employee or may reallocate tasks to another member of staff in order to comply with Part II duties.

A recent case supported by the DRC confirms this with regard to paper materials. A visually impaired teacher was found to have been discriminated against where her employer failed to provide timetables in an enlarged format. It was decided that such provision would have been a reasonable adjustment to make ([Nottinghamshire County Council v Meikle \[2004\] EWCA Civ 859, 8 July 2004](#), available on the DRC website at [http://www.drc-gb.org/docs/102\\_15\\_MeiklevNottinghamshireCC.doc](http://www.drc-gb.org/docs/102_15_MeiklevNottinghamshireCC.doc)).

## **(2) Discrimination in Respect to Goods and Services Other Than Educational Services**

This is covered by Part III of the DDA, and this discrimination is defined in s.20(1) in the following terms

- “a provider of services discriminates against a disabled person if--
- (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and
  - (b) he cannot show that the treatment in question is justified.”

In addition,

- “(2) For the purposes of section 19, a provider of services also discriminates against a disabled person if -
- (a) he fails to comply with a section 21 duty [*to make adjustments*] imposed on him in relation to the disabled person; and
  - (b) he cannot show that his failure to comply with that duty is justified...”

Colleges and universities have for some time been obliged to comply with the DDA in respect of services provided to third parties where facilities are made available for purposes other than provision of educational services. Examples of this include the hiring out of premises and computer facilities for conference purposes, the renting out of accommodation to tourists during vacation periods, provision of library facilities to public or external students from other institutions, or where the catering department of a college runs a restaurant. The college or university external website could also fall under this service provision, where promotion, timetabling, payment etc of non-educational activities to the public are all provided online. These activities all fall within Part III of the DDA. A revised Code of Practice on the provision of services under Part III of the DDA is available on the DRC website at [http://www.drc-gb.org/the\\_law/legislation\\_codes\\_regulation.aspx](http://www.drc-gb.org/the_law/legislation_codes_regulation.aspx).

It is not currently thought that content provided to a university is required under the DDA to be provided in an accessible format. However, the duty is on the university to then provide the materials in a format which would ensure that the disabled student is not discriminated against. For more on this see the paper on the JISC Legal website titled Content Service Providers and the Disability Discrimination Act 1995, by M Sloan at <http://www.jisclegal.ac.uk/publications/legalimplicationsDDA.htm>.

### **(3) Discrimination in Respect to the Provision of Educational Services**

Discrimination in respect of the provision of educational services is covered by the DDA Part IV, which was introduced by SENDA and has recently been further amended by The Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006 (the 2006 Regulations).

## **6. The Provision of Educational Services**

It is unlawful for an education provider to discriminate under the DDA against any **disabled person**

- In admissions arrangements
- In admission terms
- In refusal to accept an application

It is unlawful for an education provider to discriminate under the DDA against a **disabled student**

- In relation to student services provided or offered
- By exclusion from the educational establishment

Student services has a broad meaning but will include teaching, assessment and access to learning resources and includes areas of concern such as teaching and learning, course materials, websites and VLEs, and computer facilities.

The following papers may be of use in expanding on the law in respect of these areas and also in providing practical help and tools:

**Accessibility Law and e-Learning Authors**, JISC Legal - <http://www.jisclegal.ac.uk/>

**Developing a Holistic Approach for E-Learning Accessibility**, Kelly, B., Phipps, L. and Swift, E. Canadian Journal of Learning and Technology, Vol. 30, Issue 3, Autumn 2004. ISSN: 1499-6685 -<http://www.ukoln.ac.uk/web-focus/papers/cjtl-2004/>

The DDA 1995 as amended defines four types of discrimination in respect of educational services:

- (1) Direct discrimination
- (2) Failure to comply with the duty to make reasonable adjustments
- (3) Disability related discrimination
- (4) Harassment and victimisation (harassment is unlawful under the DDA but is not strictly speaking classed as discrimination)

### **(1) Direct Discrimination**

S.28S(10) states

“a responsible body directly discriminates against a disabled person if ... it treats the disabled person less favourably than it treats or would treat a person not

having that disability whose relevant circumstances, including his abilities are the same as, or not materially different from those of the disabled person.”

The discrimination must be due to the fact that the person is disabled or has the disability. Examples of what is meant by direct discrimination can be found in the revised Post 16 Code in section 4 and include where the treatment received is based on stereotypical assumptions about the disability rather than individual abilities. There is no defence of justification for this discrimination (s.28S(9)).

In a claim of direct discrimination, a claimant must prove facts and if he does so, the claim is likely to succeed unless the defendant can prove that disability was not any part of the reason for the treatment – Tudor v Spen Corner Veterinary Centre Ltd and another [2006] ET/2404211/05 (transcript available from the DRC website at [http://www.drc-qb.org/the\\_law/transcripts\\_of\\_key\\_judgments.aspx](http://www.drc-qb.org/the_law/transcripts_of_key_judgments.aspx)). This is an Employment Tribunal case but the principle behind the decision is likely to be relevant.

## **(2) Discrimination Due to Failure to Comply with the Duty to Make Reasonable Adjustments**

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

The duty to make reasonable adjustments is contained in s.28T of the DDA. In essence it places a duty on FE and HE institutions to take reasonable steps in all the circumstances of the case to avoid placing disabled persons at a substantial disadvantage in comparison with persons who are not disabled.

### **Where does the duty arise?**

The duty to make reasonable adjustments is a continuing duty and arises in relation to a provision, criterion, or practice in any of the following areas

- Admissions arrangements
- Student services
- Determining the conferring of qualifications
- Physical features

The 2006 Regulations close a loophole in the previous law and s.28T now applies to disabled persons who have had a relevant relationship which has come to an end: for example, former students seeking access to sports facilities or seeking a reference.

### **What are ‘reasonable’ steps?**

What constitutes ‘reasonable’ depends on many factors including cost and effectiveness, the nature of the institution and its size and resources. However, as these factors have to be balanced against the rights of disabled people, it may prove difficult to allege that the cost was not reasonable. The revised Post 16 Code has useful information on this at section 5.37 – 5.54.

### **When is the duty to make reasonable adjustments breached?**

The duty is breached if a disabled person suffers a ‘substantial disadvantage’, in other words, a disadvantage that is not minor or trivial. Whether there is ‘substantial disadvantage’ will need to be decided on the facts of each particular case.

In order to comply with the duty, an institution will need to anticipate what disabled persons require in general, since failing to anticipate what might be a reasonable adjustment for disabled persons in general may result in an actual breach of the duty with regard to a particular disabled person at a later stage.

The duty to make reasonable adjustments should be revisited at regular intervals, as it is an ongoing duty, and further reasonable adjustments made in the light of experience gained and new forms of assistance (for example, the availability of new software).

It will not be discrimination under this head where the institution, having fulfilled its duty to anticipate what reasonable adjustments should in general be made, still discriminates against an individual but did not know, or could not have been expected to know, that an individual person had a disability. However, there is a corresponding duty on the education provider to proactively encourage disclosure.

If a request for confidentiality is made by the disabled student, this may mean that no reasonable adjustment can be made, or the reasonable adjustment which can be made respecting confidentiality is less beneficial.

The DDA also makes it clear at s28T that there is no duty to make reasonable adjustments to a competence standard i.e. there is no duty to alter a competence standard. Therefore, for example, the level of knowledge which must be shown by a medical student in a particular course need not be altered due to a student’s disability. However, the requirement to write legibly in an exam will very likely not be defined as a competence standard as the duty to make reasonable adjustments does apply to the **process** of showing that a person meets the standard. Care will therefore need to be taken in defining competency standards, as education providers will often have various requirements and conditions applied to courses which may not amount to a genuine competency standard as defined in s28S(11).

A competence standard is a level of attainment required for the student’s progression or eligibility for an award. The DDA at s28S(11) defines a competency standard as

‘ ..an academic, medical or other standard applied by or on behalf of a responsible body for the purpose of determining whether or not a person has a particular level of competence or ability.’

The revised Post 16 Code at section 5 provides examples of how this definition might be applied in practice.

In conclusion the duty to make reasonable adjustments will be breached only if the adjustment is one which it is deemed reasonable to have been made in the first place, so consideration of what constitutes reasonable is paramount. It must be

looked at from both the perspective of the disabled person and the institution. Failure to make a reasonable adjustment amounts to an act of unlawful discrimination under the DDA.

The revised Post 16 Code of Practice gives examples of reasonable practice. These include producing handouts in electronic form to make conversion into alternative formats easier when required; lecture notes hosted on the institutional intranet, and procedures introduced to ensure those materials meet established accessibility guidelines.

### **(3) Disability Related Discrimination**

S.28S(1) of the DDA states

“a responsible body discriminates against a disabled person if :-  
(a) for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply;  
and  
(b) it cannot show that the treatment ... is justified.”

The treatment of the disabled person must be compared to treatment of a person to whom the disability related reason does not apply. Examples of comparators are given in the revised Post 16 Code in sections 6.5-6.10.

#### **Can less favourable treatment be permitted in any circumstances?**

Less favourable treatment can be justified in two limited circumstances. First, where the justified treatment is material to the particular case and also substantial (s.28S(5)), for example, for material health and safety reasons), or second, where the less favourable treatment is in the application of a defined competence standard (s.28S(6)).

#### **Material and substantial justification**

Before deciding whether the less favourable treatment is justified for a material reason, the education provider must first have complied with the duty to make reasonable adjustments i.e. if it had made a reasonable adjustment at the outset, it may not now be treating the disabled student in a discriminatory manner. For example, reasonable adjustments may reduce the health and safety risks to such a level that they are neither material nor substantial.

#### **Competency standards justification**

The treatment with regard to competency standards is only justified where it is applied equally to persons who do not have the disability and where applying it is proportionate to its legitimate aim. The specific purpose of the competence standard needs to be looked at objectively as it may be possible to apply the standard in another way to achieve this legitimate purpose whilst also avoiding an adverse impact on a disabled person. Once again, the revised Post 16 Code at sections 6.12-6.31 expands in more detail on this.

#### **Victimisation and Harassment**

S.55 of the DDA states that it is an offence for a responsible body to discriminate by victimising a person whether they are disabled or not.

It is unlawful to treat a person less favourably than others because the victim has brought or given evidence or information in connection with court actions under the DDA, or has done anything else under or referencing the DDA or made allegations that someone else has contravened the DDA or because the person believes that the victim has done or intends to do so.

Harassment for a reason which relates to a disability is not classed as discrimination under the DDA but is an offence where the responsible body acts in a manner “violating the disabled person’s dignity or creating an intimidating hostile humiliating or offensive environment for him” If actions take place with intention of achieving these effects, it is irrelevant what the actual effect is on the disabled person, it amounts to harassment. If there is no intent, the actual effect will be looked at to ascertain whether the conduct has amounted to harassment.

### **Disability Equality Duty**

The Disability Equality Duty was introduced into UK law by the DDA 2005 and came into effect in relation to most public bodies on 4 Dec 2006. It applies to public sector organisations including those in UK further and higher education. It places both general and specific duties on colleges and universities.

The general duty requires each public authority to be proactive in looking at ways of making sure that disabled people are treated equally and have equal opportunity with non-disabled people. The DRC guidance on the duty states “educational bodies need in particular to consider the effect of their policies and practices on the educational opportunities and achievements of disabled learners. They are also likely to want to gather evidence about the extent to which their services more generally meet the needs of disabled people”.

Institutions must therefore consider the needs of the disabled person (including the disabled learner) with regard to all their activities and functions, including when proposing the introduction of new courses, costing and procuring new equipment etc.

The specific duty requires all colleges and universities to have published a Disability Equality Scheme by 4 December 2006. Disabled people should be involved in the development of the scheme and it should state:

- How institutions intend to fulfil their duties (specific and general)
- How disabled people were involved in the scheme development
- The methods the institution will use for impact assessment
- an action plan of the steps to be taken to fulfil the disability equality duty
- how the institution will gather information on the effect of its policies and procedures on disabled people and how this information will be used especially in reviewing the action plan and in preparing future schemes
- the scheme should be reviewed and a revised version produced at a minimum of every three years

An annual report should be published on the progress of the agreed actions.

The Disability Equality Duty is an ongoing duty which requires regular review. Useful information in greater detail, including the statutory codes of practice relating to this duty, and sector-specific guidance including the procurement aspects can be found on the DRC website at [http://www.drc-gb.org/employers\\_and\\_service\\_provider/disability\\_equality\\_duty.aspx](http://www.drc-gb.org/employers_and_service_provider/disability_equality_duty.aspx).

### **Disability Discrimination and Copyright**

Although not within the scope of the DDA, it had long been argued that the Copyright, Designs and Patents Act 1988 required amending in order to cater for disabled persons trying to access materials but being impeded by copyright restrictions. The result so far has been the Copyright (Visually Impaired Persons) Act 2002, which came into force in 2003.

This permits limited copying (including digital copying), for those with a visual impairment. The definition does not cover all disabled persons as defined in the DDA, only those with a visual impairment and those with a physical disability resulting in an inability to focus or to hold a book. However, dyslexia and hearing impairments, for example, are not covered by this provision.

The copying is restricted to literary, dramatic, artistic and musical work not accessible to a visually impaired person in its original form. If there is a commercially available copy suitable for the visually impaired person's use (such as a Braille or large print version) then this must be used. Performed or recorded music, film and sound recordings and databases are not covered. A single accessible copy may be made for a visually impaired student if the college or university has a legal copy of the original. Multiple copies may also be made but where there is a licence available which covers this then the copying must be done under the licence. Examples of such licences are the Copyright Licensing Agency (CLA) licences for FE and HE details of which are available on the CLA website at - <http://www.cla.co.uk/>.

The RNIB offers a good explanation of the extent and limits of the Act at [http://www.rnib.org.uk/xpedio/groups/public/documents/publicwebsite/public\\_cvipsact2002.hcsp#P26\\_2025](http://www.rnib.org.uk/xpedio/groups/public/documents/publicwebsite/public_cvipsact2002.hcsp#P26_2025).

### **7. Conclusion**

Disability discrimination law covers the provision of educational services, as well as other services and also includes an institution's relationship with its staff. The law is framed in general terms and is not intended as a barrier to innovative use of technology. Neither was it intended to mandate use of ICT as being appropriate in all circumstances. Reasonable adjustments and workarounds, will vary as required in order to prevent substantial disadvantage arising in particular circumstances. The new Disability Equality Duty reinforces the requirement that colleges and universities need to be anticipatory and proactive in allowing disabled persons to access and participate in tertiary education activities.

### **JISC Legal**

**15 August 2007**

Additional Relevant Legislation, Standards, and Codes of Practice:

- **Copyright (Visually Impaired Persons) Act 2002** - available at - <http://www.opsi.gov.uk/acts/acts2002/20020033.htm> - This Act permits some limited copying for those with a visual impairment where otherwise copyright law may not permit the copying.
- **BSI; PAS 78: (2006)** - A Guide to Good Practice in Commissioning Accessible Websites - available at - [http://www.drc-gb.org/library/website\\_accessibility\\_guidance.aspx](http://www.drc-gb.org/library/website_accessibility_guidance.aspx)
- **Disability Rights Commission** (October 2004); **Code of Practice on Employment and Occupation** - available at [http://www.drc-gb.org/the\\_law/legislation\\_codes\\_regulation.aspx](http://www.drc-gb.org/the_law/legislation_codes_regulation.aspx). This code relates to part II of the DDA in relation to employment including that in colleges and universities.
- **Disability Rights Commission** (December 2006); **Code of Practice on Rights of Access: services to the public, public authority functions, private clubs and premises** - available at [http://www.drc-gb.org/the\\_law/legislation\\_codes\\_regulation.aspx](http://www.drc-gb.org/the_law/legislation_codes_regulation.aspx). This revised code is relevant to the DDA Part III and to educational establishments when providing services to third parties.
- **Disability Rights Commission** (December 2006); **Disability Equality Duty Codes of Practice** - available at [http://www.drc-gb.org/the\\_law/legislation\\_codes\\_regulation.aspx](http://www.drc-gb.org/the_law/legislation_codes_regulation.aspx). There are separate codes for England and Wales and for Scotland, together with guidance.
- **RNIB** (September 2006) **Copyright (Visually Impaired persons Act) 2002** - available at [http://www.rnib.org.uk/xpedio/groups/public/documents/publicwebsite/public\\_c\\_vipsact2002.hcsp](http://www.rnib.org.uk/xpedio/groups/public/documents/publicwebsite/public_c_vipsact2002.hcsp) This provides a clear explanation of both the limits and extent of this legislation.
- **W3C** - available at <http://www.w3.org/WAI>. The W3C Web Accessibility Initiative website offers resources and help on web accessibility.

(all accessed 08/08/07)

© JISC Legal - [www.jisclegal.ac.uk](http://www.jisclegal.ac.uk)