

DISABILITY DISCRIMINATION IN EDUCATION

By Jane McNeill QC and Bella Morris

1. Statutory Framework

1.1 The statutory framework which regulates disability discrimination in the field of education is to be found in Part IV of the Disability Discrimination Act 1995, as amended (“the DDA”). Part IV Chapter 1 applies to schools and the residual duties of the local education authority (“the LEA”) and Part IV Chapter 2 applies to further and higher education and certain statutory youth and community services. This paper will focus on the duty not to discriminate against disabled persons as it applies to schools and further and higher education institutions in England and Wales¹. It will also consider the LEA’s obligation to prepare accessibility strategies and plans.

1.2 Education generally is subject to extensive regulation, and the DDA provisions are only part of a much wider framework. Many cases involving a disability issue will require reference to the wider framework, including the special needs framework in the Special Educational Needs and Disability Act 2001, the Special Educational Needs Code of Practice and DfES Circulars and Guidance.

1.3 Whilst many children entitled to special educational needs provision will not be disabled within the meaning of the DDA, in many instances there will be a substantial overlap between the two frameworks, particularly in relation to

¹ The DDA also applies to Scotland and refers, as appropriate, to the different regulatory framework applying to education in Scotland

specific educational requirements. Both sets of provisions will need to be consulted.

- 1.4 The duties under the DDA are owed by schools to disabled pupils and prospective pupils and by further and higher education institutions to disabled students and prospective students. LEAs, as providers of certain statutory youth and community services owe a duty to disabled users and potential users of the services. The duty is placed upon the “*responsible body*” for the school or educational institution.
- 1.4 In contrast to other discrimination provisions, the DDA does not outlaw discrimination following termination of a relevant education relationship.
- 1.5 The policy behind the legislation is that mainstream education in both schools and the further and higher education sectors should be available to disabled persons. The statutory provisions are aimed at inclusion and entail a proactive approach on the part of schools and other educational institutions. The duties owed to prospective pupils and students, in particular, entail forethought and preparation so that, for example, potential pupils and students with varying disabilities may compete for admission without disadvantage. It is likely that the provisions of the DDA will be given a purposive interpretation when considered by the Courts.

2. Codes of Practice

2.1 There are two relevant Codes of Practice, issued under section 53A of the DDA, which have been prepared by the Disability Rights Commission (“the DRC”) and have been approved by Parliament:

- i. the Schools Code of Practice; and
- ii. the Post 16 Code of Practice.

2.2 A responsible body must have regard to the relevant provisions of the Codes of Practice (sections 28C(4) and 28T(2)).

3. Who is protected?

3.1 In relation to schools, the protection extends to existing pupils and those seeking admission to the school as pupils. Where a disabled person is seeking admission to a school, depending upon the status of the school, it may or may not be able to select on the basis of any general or special ability. As a general guide, maintained schools, other than grammar schools, may not select², grammar schools may select and independent schools may select.

3.2 Further and higher education institutions may not discriminate in relation to existing and prospective students. Less favourable treatment will be justified if it is necessary to maintain academic standards.

² Schools Standards and Framework Act sections 100 to 102

4. The “responsible body”

- 4.1 The responsible body for any school or educational institution can be identified by reference to Schedules 4A and 4B of the DDA. In general, the LEA is the responsible body in relation to maintained schools and the proprietor in relation to independent schools. The governing body will normally be the responsible body in the further and higher education sector (including the universities).

5. Scope of Discrimination in Education Sector

- 5.1 In both the schools and further and higher education sectors, discrimination includes:
- i. less favourable treatment for a reason relating to the person’s disability;
 - ii. a failure to take reasonable steps to ensure that a disabled person is not placed at a substantial disadvantage; and
 - iii. victimisation³.
- 5.2 As in other areas of discrimination, the definition of discrimination does not define the cause of action. The potential causes of action (the alleged unlawful acts of discrimination) are defined by sections 28A, 28C, 28R and 28T of the DDA. They include discrimination in:
- i. arrangements for admission;
 - ii. the terms on which admission is offered;

³ Sections 28B, 28S and 55 of the DDA

- iii. refusing or deliberately omitting to accept an application for admission;
- iv. education or associated services provided for or offered (schools);
- v. student services (further and higher education);
- iv. temporary or permanent exclusion;
- v. failing to make reasonable adjustments to the detriment of a disabled person.

5.3 Where the alleged discrimination is discrimination by victimisation, the cause of action may arise where the person making the claim is not disabled.

5.4 A defence of justification remains available both where the complaint is of less favourable treatment and where the complaint is of a failure to make reasonable adjustments. The specific and different meanings of justification in the context of the education provisions will be considered below.

5.5 In relation to the duty to make reasonable adjustments, a responsible body does not discriminate if it did not know or could not reasonably be expected to have known that the person was disabled and its failure to take a particular step was attributable to that lack of knowledge.

5.6 The provisions as to knowledge do not enable the responsible body to bury its head in the sand. Both the Schools Code of Practice and the Post 16 Code of Practice encourage a proactive approach. The Schools Code of Practice recommends that schools should positively encourage a culture which enables

parents and pupils to disclose and discuss issues relevant to a pupil's disability. The Post 16 Code of Practice recommends that institutions should consider asking people to disclose their disabilities in their application forms and should publicise the provisions which they make for disabled people, including provision for confidentiality. In relation to further and higher education institutions, the government has issued guidance addressing the enquiries that should be made in relation to disability⁴

6. Comparator

6.1 Discrimination by less favourable treatment requires the definition of a comparator. In one of the few reported cases in the DDA (education) field⁵, the well-established comparison set out in *Clark v. Novacold* [1999] ICR 951 was held to apply. The comparison is between the disabled person and a person who does not have the disability-related characteristics of the disabled person. In the *VK v. Norfolk* case, a boy with learning difficulties, who was a disabled person within the meaning of section 1 of the 1995 Act, received only a minimum amount of teaching and educational support over a period of months whilst his LEA was seeking a school placement for him. His mother lodged a disability discrimination claim. It was held on appeal that the appropriate comparison was not between the boy and other children who were not at school but who were receiving the visiting teacher service. The appropriate comparison was with pupils who were receiving a mainstream education at school.

⁴ Finding Out about People's Disability: Good Practice Guide for Further and Higher Education Institutions DES/0024/2002

⁵ *VK v. (1) Norfolk County Council and (2) Special Educational Needs and Disability Tribunal* (17/12/04) QBD Admin

7. Education and Associated Services (schools) and Student Services (further and higher education)

- 7.1 There is no definition in the DDA of “*education and associated services*”.
- 7.2 The Schools Code of Practice advises that “*education and associated services*” cover all aspects of school life⁶. School life includes not only the curriculum, teaching and learning, but also access to school facilities, sports, breaks, school discipline and sanctions and school trips. In all these areas (and doubtless many more), schools may not treat disabled pupils less favourably, and are under a positive duty to make reasonable adjustments.
- 7.3 “*Student services*” are defined in section 28R(11) of the DDA as “*services of any description which are provided wholly or mainly for students*”. This definition is broad enough to include not only curriculum and teaching matters but also placement finding services, leisure facilities, car parking, residential accommodation and facilities such as childcare facilities⁷.

8. The Duty to Take Reasonable Steps

- 8.1 A school’s duty to take reasonable steps to avoid disadvantage to the disabled person is set out in section 28C of the DDA:

“The responsible body for a school must take such steps as it is reasonable for it to have to take to ensure that –

⁶ Schools Code of Practice para 4.2.3

⁷ See Post 16 Code of Practice para 3.14 for list of examples

(1) *The responsible body for a school must take such steps as it is reasonable for it to have to take to ensure that –*

(a) *in relation to the arrangements it makes for determining the admission of pupils to the school, disabled persons are not placed at a substantial disadvantage in comparison with person who are not disabled; and*

(b) *in relation to education and associated services provided for, or offered to, pupils at the school by it, disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled.”*

8.2 Section 28T makes similar provision in relation to further and higher education institutions. The principal difference between schools and further and higher education institutions, is that the responsible body for schools is not required to remove or alter physical features or to provide auxiliary aids or services.

8.3 This part of the legislation requires a focus not only upon practices, policies and procedures but upon the impact and potential impact of the schools’ arrangements upon disabled pupils, and how those arrangements may be managed so as to eliminate disadvantage for such pupils. The duties arise before any particular pupil (existing or prospective) has experienced detriment although an unlawful act will only occur when detriment is experienced. The duty is to prospective pupils as well as to existing pupils, and the school will need to be proactive in considering what adjustments should be made at the

application stage. It cannot simply react to individual circumstances as and when they arise.

8.4 A disabled person may make “*a confidentiality request*”, asking for the nature or existence of his/her disability to be treated as confidential. If a request is made, it may be taken into account in considering whether the responsible body has complied with its duty to take reasonable steps to ensure that a pupil/student is not placed at a substantial disadvantage. In particular, regard must be had to whether taking the step in question is consistent with compliance with a confidentiality request. This ensures both that a request for confidentiality is given proper respect and consideration, and that a school or educational institution does not find itself in breach of duty when its potentially wrongful act or omission to act has been dictated by its compliance with a request for confidentiality.

8.5 The cause of action for a failure to take reasonable steps is only complete where there is “detriment”. The meaning of detriment is broad. It is likely to be interpreted in the same manner as in the other discrimination statutes as any justified sense of grievance⁸. It is not necessary that disadvantage should be physical or financial.

8.6 The exemption in section 28C(2) of the DDA, which applies to schools only, provides that a responsible body is not required to remove or alter a physical feature of premises; and is not required to provide auxiliary aids and services.

⁸ Where “*a reasonable worker would or might take the view that in all the circumstances it was to her detriment*”: *Shamoon v. Chief Constable of Royal Ulster Constabulary* [2003] IRLR 285

In contrast to the position in relation to schools, there is no exemption in relation to auxiliary aids and services or for physical features for further and higher education institutions. Physical features are likely to be treated as including not only the construction of the building but also items such as fixtures, fittings and furnishings. The DDA does not, however, take precedence over planning law and regulations.

- 8.7 Physical features, in both schools and further and higher education institutions, may need to be adapted in order to ensure accessibility to premises in accordance with planning regulations. The duties on a school are solely of a public law nature and do not give rise to individual causes of action. However, a school may be required to take steps which mitigate the effects of a physical feature (e.g. installing a lift in premises where access to essential teaching facilities is only by staircase).
- 8.8 The requirement to provide educational aids and services falls within the remit of the Special Educational Needs framework so that there is no separate obligation under the DDA. There is, however, some uncertainty as to what would amount to “auxiliary aids and services”. It appears that services which would normally be provided by a school will fall within the DDA; so that where additional pastoral care was required by a pupil with an autistic spectrum disorder, it was held that this fell within the duty to take reasonable steps and not in the exceptional category⁹.

⁹ *McAuley Catholic High School v (1) CC (2) PC and Special Educational Needs and Disability Tribunal* [2003] EWHC 3045 (Admin)

8.9 In determining what is reasonable for the purpose of taking reasonable steps, the particular matters a school should look at will include the time and effort that a disabled child might need to expend, the inconvenience, indignity or discomfort that a disabled child may suffer; and the loss of opportunity or diminished progress which a disabled child might make in comparison with his or her peers who are not disabled¹⁰.

8.10 Schools must have regard to the Code of Practice applicable to Schools. This provides guidance on the relevant factors to be taken into consideration as:

- the need to maintain academic, musical, sporting and other standards
- the financial resources available to the responsible body
- the cost of taking a particular step
- the extent to which it is practicable to take a particular step
- the extent to which aids and services will be provided to disabled pupils at the school under Part IV of the Education Act 1996 or sections 60 to 65G of the Education (Scotland) Act 1980
- health and safety requirements
- the interests of other pupils and persons who may be admitted to the schools as pupils.

The Code sets out a number of examples which provide helpful guidance to schools.

8.11 In relation to further and higher education institutions, reasonable steps will be assessed looking at the nature of the particular institution as well as the

¹⁰ Schools Code of Practice para 6.11

effect of the particular disability upon the individual disabled student. Relevant factors in determining whether a reasonable adjustment has been made may include the nature of the institution and its size and resources, any grants or loans available to the disabled student, the cost of taking any particular step, health and safety requirements and the relevant interests of other people including other students¹¹

9. Disability-related discrimination

- 9.1 The concept of discrimination for a reason relating to disability is familiar from other areas of the DDA. The types of circumstances where it may arise in the education field are, for example, where a child is rejected from a school because she has epilepsy; or a child is taught on her own in a separate classroom because she has athetoid cerebral palsy involving uncontrolled movements, which the school considers will frighten other pupils and distract them from their work. In both cases, the reason for less favourable treatment is a reason which relates to the pupil's disability.

10. Justification

- 10.1 The statutory provisions in relation to justification differ as between schools and further and higher education institutions.
- 10.2 In relation to schools, less favourable treatment of a disabled person is justified, if it is the result of a permitted form of selection (section 28B(6)). Less favourable treatment may be justified if the reason for it is “*both*

¹¹ Para. 6.2 of Post 16 Code of Practice

material to the circumstances of the particular case and substantial” but cannot be justified if there is/ has been an unjustified failure to take reasonable steps, unless treatment could have been justified even if the reasonable steps duty had been complied with. In relation to a failure to take reasonable steps, discrimination is only justified if the reason is material and substantial

10.3 There is helpful authority in the employment jurisdiction in relation to the more familiar (“material” and “substantial”) type of justification. The circumstances of the case are likely to include the circumstances of both school/education institution and pupil: see, by analogy, *Baynton v. Saurus Ltd* [2000] ICR 491. A “substantial reason” must be more than minor or trivial: *Heinz v. Kenrick* [2000] ICR 491. “Material” means that there must be a reasonably strong connection between the reason and the circumstances of the individual case: *Jones v. Post Office* [2001] EWCA Civ 558.

10.4 The authority of *Collins v. Royal National Theatre Board* [2004] EWCA Civ 144 was followed in *The Governing Body of PPC v (1) DS (2) CAS (3) A O Davies (Chairman of the Special Educational Needs and Disability Tribunal (5/5/05) QBD (Admin)*. The appellant governing body of an independent mainstream school appealed against a decision of the Special Educational Needs and Disability Tribunal that the permanent exclusion of the son of the first and second respondents was discriminatory. The child had been excluded for his disruptive behaviour at school. The day before his exclusion, the head teacher learnt that the child had been diagnosed as suffering from Asperger's Syndrome. The tribunal found that reasonable steps could have been taken by

the school as an alternative to exclusion, but were not, and that the exclusion amounted to unjustified less favourable treatment on the ground of disability, namely Asperger's Syndrome. It was held that:

- (1) By contrast with s.28A, s.28C did not expressly refer to exclusions. However, it would have been surprising if Parliament had intended that the requirement of reasonable adjustments should not apply as an alternative to exclusion. The requirements not to discriminate in the provision of education, and to take reasonable steps to ensure that disabled pupils were not placed at a substantial disadvantage in relation to the provision of education, embraced taking reasonable steps to avoid exclusion.
- (2) There was no need to separate the failure to carry out reasonable adjustments as a cause of action in its own right from the anticipatory reply to a justification defence in relation to a cause of action for less favourable treatment.
- (3) In a case such as the instant, where failure to make reasonable adjustments and less favourable treatment were alleged, it was for the tribunal itself to decide the issue. *Collins v Royal National Theatre Board Ltd (2004) EWCA Civ 144*, (2004) 2 All ER 851 applied. The tribunal's interference was not dependent upon the decision of P having been outside the range of reasonable responses.

10.5 In one reported authority, *D v S* [2004] ELR 591 Admin 13/7/04, a pupil failed to fill in a medical declaration in an application for a work placement. She had a visual impairment of which her school was aware. She was unsuccessful in obtaining a placement because the medical declaration had not been completed. The court held (overturning the decision of the tribunal) that

discriminatory treatment could not be justified under s.28B(1)(b) of the DDA by a failure to fill in a medical declaration on an application form for a work placement in circumstances where the student's school were in possession of and could have supplied the relevant information. If it were the case that the failure to disclose the required information was wholly the individual's fault, it might be possible to justify a conclusion that the discrimination was justified. However, that was not the case on the facts.

10.6 In another reported authority, *T v (1) OL (2) Special Educational Needs and Disability Tribunal* (18/4/2005) QBD (Admin) the Appellant's daughter had special educational needs arising from global development delay and associated behavioural problems. Her behaviour included biting, hitting and head-butting other children. She was subject to a series of fixed periods of exclusion by the school. Before the tribunal it was agreed that she had a disability and that by reason of the exclusions she had been treated less favourably pursuant to the Disability Discrimination Act 1995. The tribunal's decision that less favourable treatment was justified on health and safety grounds in order to protect other children and maintain discipline under the terms of s.28B(1)(b) and s.28B(7) of the Act was upheld on appeal. There were no further reasonable adjustments that the school could make under s.28C.

10.7 Justification on the basis of a permitted form of selection is peculiar to schools. It includes the selective admission arrangements in grammar schools and the arrangements made in independent schools for selection by reference to special ability or aptitude, with a view to admitting only pupils of high

ability or aptitude. If a child with a learning difficulty is unable to meet a criterion based upon academic ability applied by a grammar or independent school for entry to the school, the school will be justified in refusing admission, even though the reason why the pupil is unable to meet the criterion is his learning disability. If, however, the pupil meets the academic criterion but is refused admission to the school because of a disability-related behavioural problem, the “permitted form of selection” type of justification will not apply.

- 10.8 In the further and higher education sectors, in addition to the “material” and “substantial” form of justification, there are two additional forms of justification. Less favourable treatment may be justified if it is necessary to maintain “*academic standards or standards of any other prescribed kind*”: section 28S(6). It is also justified if it is “*of a prescribed kind ... occurs in prescribed circumstances or... is of a prescribed kind and it occurs in prescribed circumstances*”: section 28S(7). No standards or other kinds of justification or circumstances have yet been prescribed.

11. Accessibility Strategies and Plans

- 11.1 Local education authorities have a residual duty pursuant to section 28F of the DDA. They also have responsibility pursuant to section 28D of the DDA to prepare, in relation to schools for which they are the responsible body, an accessibility strategy and must further such strategies at such times as may be prescribed.

- 11.2 An accessibility strategy is a strategy for increasing, over a prescribed period (initially 1 April 2003 to 31 March 2006), the extent to which disabled pupils can participate in the school's curriculum, improving the physical environment of schools for the benefit of disabled pupils, and improving the delivery of information to disabled pupils.
- 11.3 Independent schools, maintained schools and certain special schools have a duty to prepare accessibility plans. In maintained schools, the duty is that of the governing body.
- 11.4 Strategies and plans must be in writing and must be reviewed and, if necessary, revised. They must be implemented. They must include issues of access to the curriculum, the school environment and school communication.
- 11.5 Guidance has been issued on the contents of accessibility strategies, their form, consultation and implementation of the obligation to review and revise¹².

12. Enforcement

- 12.1 Claims under Part IV Chapter 1 (with limited exceptions) must be brought in the Special Educational Needs and Disability Tribunals. The claim must be brought by the child's parent against the responsible body. If the tribunal upholds a claim, it may declare that the pupil or prospective pupil was discriminated against (section 281 of DDA) and, if it does so, may make

¹² DfES: Accessible Schools: Planning to Increase Access to Schools for Disabled Pupils (England)
National Assembly for Wales: Planning to Increase Access to Schools for Disabled Pupils (Wales)

“such order as it considers reasonable in all the circumstances of the case”.

There is no power to award compensation but the scope of the orders which it can make are broad, and may include orders for an apology, for training of staff and for additional tuition¹³.

- 12.2 Claims under Part IV Chapter 2 must be brought in the County Court, in the same way as under Part III and the same remedies are available including compensation for injury to feelings.

Jane McNeill QC

Bella Morris

¹³ Schools Code of Practice para 9.11

SAMPLE PROBLEMS

1. A prospective pupil applies to a selective school. Selection is based on an exam and an interview. On the application form, the parents specify that the child has a mild autistic spectrum disorder. What steps should the school take?
2. An existing pupil, aged 14, has been involved in a road traffic accident and has suffered a brain injury. He is not impaired intellectually but has persisting cognitive difficulties including an inability to concentrate, some memory problems and moderate disinhibition which causes him from time to time to make inappropriate, personal comments to others. What steps should the school take?
3. An existing pupil has a progressive neurological condition which will increasingly affect his mobility. He has been a keen gymnast and his parents are keen that he should continue to be included in P.E. and sports lessons and want the school to provide equipment which will enable him to continue with those activities. What are the school's duties?
4. An applicant to a further education college is profoundly deaf and cannot lip read. He asks the college to fund a signer at a cost of £20,000 per year who will enable him to attend and participate in lectures and seminars. What are the college's obligations?