

Addendum to post-16 education guides

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?

If a post-16 education DDA claim is heard by a court on or after 1 September 2006, the court

will be 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

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 has 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>. In addition, the DRC has produced this addendum summarising 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.