

SCOTTISH DISABILITY TEAM

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DDA, Data Protection and Confidentiality

CASE STUDIES - ANSWERS



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Case Study 1

A University's disability policy states that it will make all adjustments possible to ensure that field trips are made fully accessible to disabled students. A student with a heart condition goes on a field trip as a compulsory part of her geography course. The student has not told the University about her condition. During the day, it becomes apparent to the tutor in charge of the field trip that she cannot complete the assignment for reasons that appear to relate to ill health.

1.1 What should the tutor's immediate course of action be?

Every University owes a duty of care to its students. Such a duty is measured by the test: what would a "reasonable" University have foreseen and done in the circumstances? Therefore, in the first instance the tutor should realise that there is a health and safety issue and should do everything reasonable to ensure the safety of the ill student and her fellow students. This may, for example, involve bringing the trip to an end and returning to the University and/or calling for medical assistance.

Under the Disability Discrimination Act 1995, "disability" is defined as "a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day to day activities". The Code of Practice defines "long-term" as lasting for twelve months or more. Whether or not a heart condition is a disability therefore depends on fact and degree. However, the cautious approach would be to treat the heart condition as being a disability, at least in the first instance.

From the moment the tutor becomes aware that the student has a disability, the University is deemed to be aware that the student has a disability. From that point (at the latest) the University requires to make "reasonable adjustments" to enable the student to participate as fully as possible in University life and in his or her course. It should also be remembered that some reasonable adjustments are anticipatory.

The tutor should therefore discuss or arrange for the University to discuss with the student her disability and any adjustments she feels may be required to enable her to complete her course, bearing in mind the future content of the course.

In relation to the uncompleted field trip, the University must go through a risk assessment and an exercise of considering whether the field trip *in that format* is essential to the course and be able to justify why. If the field trip is part of a course prescribed by an external examining body, the University should contact that examining body to ask whether the student may be

entitled to complete the assignment in an alternative way before excluding this possibility. If the field trip *in that format* is an essential part of assessment or has been prescribed by an external examining body, the University may have a defence in not offering the student to complete the assignment in an alternative way.

1.2 Has the University treated the student less favourably or failed to make reasonable adjustments?

In this case, the University has probably not treated the student less favourably for a reason relating to her disability as it did not know about and could not have reasonably known about her disability prior to the field trip.

However, unlike the duty not to treat a disabled student less favourably, the duty to make reasonable adjustments to services can be *anticipatory*. The University should design and deliver courses, to the extent reasonably possible and permissible (bearing in mind standards imposed by external bodies), which are accessible to all. However, if the University did not know and could not reasonably have known that the student had a heart condition, then failure to make a reasonable adjustment for that student may not be discriminatory. Lack of knowledge is of course not an absolute defence in failing to make reasonable adjustments because of the requirement to make anticipatory adjustments.

1.3 From a legal point of view, does it matter whether the University has taken steps to find out about the student's disability prior to the field trip?

Yes. The DRC Code of Practice makes it clear the onus is on the University to find out about a student's disability, so it does matter whether the University has taken steps to find out about the student's disability prior to the field trip.

Universities should encourage students to disclose any needs arising from their impairment or disability at key times and to relevant staff throughout their time at the University (admission, matriculation, first meeting with Head of Department or Supervisor, first meeting of a class, at any student induction events, prior to exams, before field trips and placements).

Universities should have a clear policy on how the information gathered will be used, and have students sign a standard form to authorise passing information on within/outwith the University as required in order to comply with the Data Protection Act 1998. In the absence of consent, the University may decide that there is an overriding health and safety issue involved in disseminating the information in an appropriately restricted

way.

Also, Universities should have procedures in place that will allow adjustments to be made without having to pass on details of an individual's disability if this is requested and there is no 'justification' to disclose.

1.4 Would there be any difference if the student had made the tutor aware of her disability prior to the field trip?

Yes and no: the University requires to make reasonable adjustments in either case. However, provided the University has taken steps to encourage disclosure as above, and that disclosure was not made by the student, it is unlikely that the University would be deemed to have discriminated by not making anticipatory adjustments in this case.

From a practical point of view, if it had known about the disability the University could have provided some sort of transport for the field trip or perhaps changed the type of field trip or enabled her to complete the assignment in a less active way. Failure to have investigated these possibilities may have amounted to discrimination.

Case Study 2

A partially sighted student can only read clearly if he has text enlarged. He is embarrassed by his disability. He has disclosed his disability to his tutor but has requested strict confidentiality. Normally his tutor would give a visually impaired student large print handouts at the beginning of each class but the student does not want this as he does not want to be seen reading them during the class. The tutor tells the student that he would like to make a note of their conversation for his records but the student refuses.

The tutor is also aware of a field trip coming up which he thinks the partially sighted student might have some difficulty participating fully in. The student also has end of year assessments coming up but insists that he does not want any adjustments made which will make his disability apparent to his fellow students.

2.1 What should the tutor do/say following the student's disclosure?

In relation to confidentiality, the law provides that where information is of a confidential nature and/or is disclosed in "circumstances which imply a duty of confidentiality", such information must not be used and/or disclosed other than for the "limited purpose for which it was given". On the other hand the tutor acting for the University has a duty of care towards the student and the University has a duty to comply with the DDA.

The tutor should therefore take the following steps:

- (1) discuss the required level of "confidentiality" and encourage the student to allow him to pass the information on to relevant staff members in the University in order to enable the University to provide support;
- (2) record in writing his conversation with the student and, if possible, get the student to sign a copy of his notes regarding the conversation. Even if the student is not happy with the fact that the tutor is recording the conversation in writing, it is essential that the tutor does so so that there is some record in the event that the student alleges at a later date that the University has discriminated against him by failing to act on information provided. The tutor must advise the student that the information will be used/further disclosed if the University considers this essential at any point where health and safety or public policy is concerned;
- (3) advise the student that the effect of keeping the information confidential to the extent of not disclosing to the relevant University

departments may be that the student may be treated less favourably by the University and that the University may fail to make all the adjustments that it perhaps could if the information was to be disclosed to relevant members of staff;

- (4) consider whether and what adjustments can be made without further disclosure of information about this student and implement these as appropriate;
- (5) consider, with his department head, whether the student will be able to complete the course with this disability taking account of the specific contents and requirements of the course. If there is likely to be a problem, this should be specifically discussed with the student. The tutor should inform the student that he must always be in a position to discuss the student's disability with his supervisor and to this extent confidentiality cannot be maintained.

2.2 Does the University require to make reasonable adjustments in relation to the handouts?

The University may still have a duty to make reasonable adjustments in relation to the handouts which has to be balanced against the student's request for confidentiality. For example, the tutor concerned could make a large text version of the handout available to the student to read before the lecture. This could be made available to the student for collection from the department office or posted to him prior to the lecture.

In relation to anticipatory reasonable adjustments, the University should establish policies which will be made for all students and publicise these in course handbooks, (e.g. permission to tape lectures, availability of handouts in advance, presentation of course information in a variable format and/or on an accessible website).

The steps which are reasonable for the University to take depend on all circumstances and will vary according to:

- the type of service provided;
- the nature of the institution or service, its size and resources;
- the effect of the disability on the disabled person;
- the need to maintain academic or prescribed standards;
- financial resources (difficult to determine but budgets and how they are allocated or spent will be relevant);
- grants or loans already available to disabled students enabling them to receive support services;
- the cost of taking a particular step and the extent to which it is

- practicable to take a particular step;
- health & safety - the DDA does not override health & safety legislation or building control regulations;
- the needs of other students.

2.3 What should the tutor do in relation to the forthcoming field trip and assessment?

Where a student discloses information about his/her disability to a member of staff, the University is deemed to know about the disability. However, where the student asks the member of staff not to disclose details of the disability to anyone else in the University, the confidentiality of the student will be taken into account in relation to the reasonable adjustments that require to be made.

The tutor should therefore consider potential difficulties that the student may face in relation to the forthcoming assessment and field trips and discuss these with the student. Again, the tutor should record in writing his discussions with the student (and request the student to sign a copy of such written record) and encourage the student to allow him to make this information available to other members of staff in order that reasonable adjustments can be made for the field trip and the assessment. If the student continues to refuse to allow his information to be disclosed, the tutor must consider whether there are any overriding health and safety or public policy considerations in relation to the field trip and also explain to the student that he may not do as well in assessments because no adjustments will be made for him.

Case Study 3

A physics student discloses to his tutor that he has a mental illness. The student advises that he takes a lot of medication for his illness which often makes him suffer from bouts of extreme fatigue. The student insists that the tutor keeps his disclosure confidential. The student then becomes increasingly disruptive in class and is often threatening towards other students and members of staff. The student is also missing an increasing number of classes and fails a number of assessments. The head of school advises the tutor that he is considering discontinuing the student's participation in the course.

3.1 What should the tutor's response be to the head of school?

The student has requested confidentiality and we assume up to this point that limited use and disclosure of the information has been made. However, there is now a real concern about health and safety of the student and other students and staff. The tutor must advise to the head of school (if he does not already know) that the student has a disability.

The University must investigate whether the disruptive behaviour of the student is linked to his disability and may also wish to establish whether the mental illness is one which comes within the meaning of "disability" under the DDA. If the disruptive behaviour is linked to his illness and the illness is covered by the DDA, the University must consider what "reasonable adjustments" it could make and should not automatically apply the same rules as are applied to other students. However, bearing in mind that the University has a duty of care to its staff and other students, and given that the behaviour is threatening, it may be justified in excluding the student pending further investigations.

If the behaviour is temporary, the University may be justified in asking for a medical certificate confirming that the student is medically fit to continue with the course. However, if the behaviour is not temporary, the University should consider other means of accommodating the student, e.g. asking whether the student copes better at a particular time of day etc.

If behaviour is likely to continue to be disruptive and there are no reasonably practical ways to accommodate the student without there being a real danger of substantial disruption and/or risk to staff and fellow students, exclusion may be the eventual outcome and it may be justified as a "material and substantial reason" under the Act. All deliberations and decisions should, however, be committed to writing.

3.2 If the student is not allowed to continue with his course, would this amount to discrimination?

If uninterrupted attendance was an essential part of the assessment or prescribed by external examining bodies, the University may be justified in failing the student on the basis of maintaining academic or prescribed standards. However, in that case, a reasonable adjustment would be for the University to approach the prescribing body to ask what reasonable adjustments it may be allowed to make in relation to attendance or, in the case of internal standards, assess whether these can be varied.

Otherwise, a less draconian solution, such as extending the period of completion of the course, may be appropriate.

3.3 If the student is not allowed to continue with the course, how would the University demonstrate to a court that it had not acted unlawfully?

If the University can show that less favourable treatment is justified, then it will not have acted unlawfully.

Less favourable treatment may be justified only in certain limited circumstances such as:

- where it is necessary to maintain academic standards;
- where it is necessary to maintain standards of any other prescribed kind (i.e. that of an external examining body);
- where it is in prescribed circumstances (mainly relates to courses which lead to a profession regulated by external bodies);
- the reasons are both material to the circumstances of the case and substantial.

For the University to demonstrate to a Court that it had acted lawfully by not allowing the student to finish the course, it would have to show that the action it had taken was justified on one or more of the above grounds.

In the circumstances, if the student's behaviour is likely to continue to be disruptive and there are no reasonable ways to accommodate the student without there being a real danger or substantial disruption to staff and fellow students, exclusion may be the eventual outcome and it may be justified as a "material and substantial reason". Alternatively, a failure to meet prescribed or essential academic standards may be the inevitable result of the disability. All deliberations and decisions must, however, be committed to writing.

Case Study 4

A University matriculation form has a space for students to disclose any disabilities which they may have. On the matriculation form a student discloses that he has dyslexia. The admissions office of the University on receiving the matriculation form has then passed this information on to tutors and various other personnel throughout the University. On the first day of his course, the student is approached from a tutor who immediately advises the student of the provisions that will be made for him because he has dyslexia. The student is very embarrassed by his disability and is horrified by the tutor's disclosure. He advises the tutor that he did not want this information to be passed on to the rest of the University and that he did not give them permission to do so. The student is so embarrassed by what has happened he feels unable to continue with his course. The student goes to see a legal advisor and the University receives a letter to say that it has breached the Data Protection Act 1998 and the student's right to confidentiality.

4.1 What is the University's response to the solicitor's letter?

The University would be considered a "Data Controller" for the purposes of the DPA. This means that there are strict controls upon the way in which the University processes personal data. Processing means obtaining, recording, disclosing, using, holding, adapting, altering, organising, retrieving, aligning, combining, erasing or destroying personal data.

Where the University intends to process "sensitive personal data", which includes data relating to physical or mental health, there are further conditions.

Under Schedule 3 of the Act, the University can only process sensitive personal data in the following cases: when the individual concerned has given his explicit consent; where the processing is required for the purposes of complying with employment law; where the processing is necessary to protect the "vital interests" of the individual and the consent of the individual cannot be obtained; where it is done on behalf of non-profit organisation which is established for political, philosophical, religious or trade-union purposes; where it is necessary to establish, exercise or defend legal rights or in connection with legal proceedings or prospective legal proceedings; where the data has already been made public by the individual; where the processing is necessary for medical purposes and is undertaken by a health professional; where the data relates to racial and ethnic origin and is processed to ensure equality of opportunity. If none of the conditions can be met, processing cannot lawfully continue.

The University is probably entitled under the DPA to use the information in this way on the basis of prospective legal proceedings and establishing, exercising and defending legal rights by making reasonable adjustments.

However, confidentiality is a greyer area and the University will need to show that it did not agree to any restrictions on its use or the tutor's further disclosure of the information and indeed that it took steps to advise the student of the use and disclosure that would be made. The University's written policies, information packs and forms will be relevant here.

4.2 Does the University require to consider amending its matriculation form?

The University must provide applicants with an opportunity to advise the University their disability on the matriculation form. This will allow the University to make advance provision for reasonable adjustments and ensure the student is not treated less favourably. The University may wish to amend the matriculation form to make provision to advise the student why the University is asking for information about disability and how this information will be used. The form should have a facility for the student to sign his consent but also make clear that the University reserves the right to use and disclose information to meet other essential obligations and requirements upon it.

4.3 What other procedures should the University have in place in order to ensure that it complies with the Data Protection Act 1998?

The University must ensure that it complies with Data Protection Principles: Data Controllers must ensure they obtain and process information fairly (which includes notifying individuals about any "non-obvious" processing of their data); ensure information collected/held is adequate, relevant and not excessive; have procedures to keep the information accurate and up to date; hold the information only for specified and lawful purposes; not retain the information for longer than is necessary; hold data securely; and restrict transfer of the data. The University should also carry out an audit of its processing activities. The University may also find it useful to appoint a data protection officer for each category of record. Non compliance with data protection principles can result in financial penalties being incurred.

4.4 Would it have made any difference if the student had made the disclosure to a tutor instead of on the matriculation form?

Not really. Confidentiality and data protection issues would still apply. However, without any written record of the conversation, it would be difficult to prove necessary grounds for processing under the Data Protection Act 1998 or to evidence the confidentiality request. This is why

it is essential that there is a written record of verbal disclosures.

Case Study 5

As part of a University course in biochemistry, students are given the opportunity to participate in work placements in various local biotechnology companies. One student on the course has learning difficulties and her adviser of studies has concerns in putting the student on placement. The student has requested that her placement company is not made aware of her disability. The adviser of studies on the course is also fairly certain that another student on the course who is due to go on placement has a mental illness.

- 5.1 What should the adviser of studies do in relation to each of the students with regard to the placements? Is the advisers of studies entitled to break the students' confidentiality?

The University should try to persuade the first student that the placement company should be advised of her disability. The University also has a duty of care to the placement company to consider and should therefore assess her suitability for the placement. If the student is adamant that the information should not be disclosed, the University should consider whether it is putting the placement company or the student at risk in not doing so. Remember that the placement company may also be obliged to make reasonable adjustments by law. If the University is not satisfied that there is no risk, the safest course of action would be to refuse to allow the student to take up the placement and perhaps consider an alternative placement. If the University does decide to place the student without advising the placement company regarding her disability, it must monitor the situation carefully.

In relation to the second student, the University requires to make reasonable adjustments even where a disability is not disclosed but ought to be apparent from observation. Observed information can also be protected by the law of confidence. Clearly, discussions with the student are required because it is unlikely that adjustments can be made in this case without discussion, especially where a third party is involved.

Reasonable adjustments which a University could make would be to consider an alternative placement, or, preferably, with the student's consent, discussions with the placement company with a view to providing additional support while on placement.

