

**Scottish
Disability
Team**

**GUIDANCE ON INTERNATIONAL COURSES
AND DISABILITY ISSUES**

April 2007

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Team**

Legal Note

These Guidance Notes are intended to provide general advice only, and are not an authoritative treatment of the law. Professional advice should be sought before acting on any of the material contained in these Guidance Notes as it may not be appropriate to your circumstances. These Guidance Notes are intended to relate primarily to the law as it applies to Scotland, however colleagues from other countries and elsewhere in the UK may find it useful to refer to the information contained herein.

Acknowledgements

The Scottish Disability Team would like to thank Martin Ingram, Solicitor, Thorntons Solicitors, (mingram@thorntons-law.co.uk) who devised and wrote this document.

Note on Language

In this document we use the language of “impairment” and “disability” as defined by the social model of disability. It is also the preferred language of the disabled peoples’ movement. Whilst people have impairments, e.g. deafness, blindness, muscular dystrophy etc, disability is the outcome of the interaction between a person with an impairment and the environmental and attitudinal barriers s/he may face. The Disability Discrimination Act 2005 (DDA), however, uses the term “disability” to mean what the social model defines as “impairment”, so it occurs in this way in these Guidance Notes when direct quotations from either the DDA or its associated Codes of Practice are used.

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Introduction

This guidance relates only to the specific obligations placed upon universities under the Disability Discrimination Act 1995, as amended, ("DDA") in relation to the provision by universities of international courses to students, and disability discrimination issues which may arise as a result. They do not cover any other obligations which a university may have under the DDA or other statutory enactments or the common law.

For the purposes of this Guidance, where a university is placing a student on an "international course", this may constitute one of the following situations:

- Where the university has set up a campus outwith the UK, and the students are matriculated students of the "home" university; or
- Where the university allows its students, to undertake a period of study abroad at an independent institution outwith the UK, and the student is still matriculated to the "home" university.

Under both of these circumstances, the "home" university shall have certain obligations under the DDA to those students which it places on such "international courses".

This guidance is aimed at providing assistance for Senior Managers with responsibility for international courses, Disability Co-ordinators/Advisers, international liaison officers and admissions officers of the university. This guidance assumes knowledge of the DDA. More detailed information is available from the website of the Disability Rights Commission (www.drc-gb.org), the Codes of Practice for providers of Post-16 Education and Related Services (which can be found at <http://www.drc-gb.org/thelaw/practice.asp>), as well as previous guidance issued by the Scottish Disability Team (www.sdt.ac.uk).

This guidance covers the following issues: -

- General requirements of the DDA.

- Obligations of universities in relation to students on international courses under the DDA.
- Management of risks involved in respect of providing international courses to students in compliance with the DDA.

General requirements of the DDA

Under Part 4 of the DDA, a university must not discriminate against disabled students (including prospective and former students). Discrimination will arise where a university treats disabled students less favourably than non-disabled students, where they are placed at a substantial disadvantage in comparison with someone who is not disabled. A university has to take such steps as it is reasonable for it to have to take in all the circumstances to prevent to disadvantage to a disabled student - in other words the university has to make a reasonable adjustment. There is no defence in law to a failure to make a reasonable adjustment. If the adjustment is "reasonable" it is required to be made. Note 1: The way in which discrimination occurs under Part 4 of the DDA has now been changed by the Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006, which implement the European Employment Framework Directive (2000/78/EC). The Regulations introduce the concept of "direct" and "indirect" discrimination, as well as an amended duty to make reasonable adjustments. There are also new provisions relating to discrimination which arise through harassment.

The duty not to treat a disabled student less favourably and the duty to make reasonable adjustments shall apply to students of a university who are studying on international courses. As this guidance deals primarily with disability issues which are most likely to fall under the duty to make reasonable adjustments, it is this element of the DDA that is more likely to be relevant in relation to students of a university studying on an international course.

The DDA contains three elements to the duty of "reasonable adjustment":

- The provision of education services to students in general.
- The provision of aides and services (such as interpreters for deaf students, personal assistants etc).
- Physical features of premises where there are barriers to access.

Factors which should be considered in determining what type of adjustment would be "reasonable" would include:

- The effectiveness and practicality of the adjustment;
- The financial resources available to the university;
- Grants or loans available to a disabled student;
- The extent to which aides or services will otherwise be provided to a disabled student;
- Health and safety requirements.

The provisions of the Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006, relating to the provision of Post-16 Education, came into effect in September 2006. Previously, a university could "justify" failing to make a reasonable adjustment if it could show that the reason for failing to make such reasonable adjustment was substantial (that is to say, not just minor or trivial); and was also material to the individual circumstances of the particular case.

However, one of the significant changes that has come with the new provisions is the removal of the "justification defence" previously available to a university for failure to make a reasonable adjustment. Under the new rules, there is no longer any justification defence for treating a student less favourably than someone else, or failing to make a reasonable adjustment in such circumstances.

Obligations of universities in relation to students on international courses under the DDA

Where a university either:

- sets up a campus abroad, with the students being matriculated students of the “home” university; or
- sends any of its students to study abroad on an international course while the student is still matriculated to the “home” university;

that university shall have certain obligations under the DDA to those students which it places on international courses.

Arrangements for providing international courses for students studying abroad will also be covered in Part 4 of the DDA. Therefore, the provision of less favourable treatment in education services must be avoided, and reasonable adjustments must be made where required.

General duty of care

Notwithstanding the provisions of Part 4 of the DDA, it is worth bearing in mind that a university has a duty of care to its students. In order for there to be liability, there must have been a breach of that duty of care. In assessing whether a breach has occurred, the test to be applied is whether a reasonable man would have been able to reasonably have foreseen that an individual would come to harm as a result of the fault or negligence attributable for that person.

The case of **Erin McLean v University of St. Andrews** gives an illustration of how liability may arise. The case involved a young woman who was a student at the University of St. Andrews. As part of her Russian language course, she was required to spend 6 months in full time education at Odessa University in the Ukraine. The University of St. Andrews were responsible for ensuring that Odessa University provided a safe and adequate hostel accommodation for any exchange students. When walking back to her hostel one night with her boyfriend, the student alleged that they were assaulted, and she was raped, by a group

of Russian seamen. On her return to Scotland, the student raised an action against the University of St. Andrews.

The University of St. Andrews admitted that it owed a duty of care towards its student to ensure that she was adequately and safely accommodated at the foreign placement. Given that the alleged crime had happened outwith the campus area controlled by the Odessa University Authorities, the university could not be held liable to the student under the circumstances – for instance, the student had been advised not to walk back to her hostel at night by way of the area where the alleged incident took place. The decision in this case made it clear, however, that had the alleged crime happened within the campus area which had been controlled by the Odessa University Authorities, the university may well have been liable to the student.

As we can see, the above case dealt specifically with student participation in a foreign exchange programme. The same principles of duty of care will apply to any situation where a university arranges a student placement outwith the home institution.

“Reasonable adjustments”

Where a student is studying at an educational institution outside of the UK, legal responsibilities for ensuring that discrimination does not take place during the period of the international course will still lie with the “home” university. While the university may arrange for the educational institution outside of the UK to provide education services for students, the university will still have a responsibility to ensure that any disabled students are not discriminated against. Also, were the university to become aware that a discriminatory act has taken place in relation to one of its students during a placement on an international course, the university may also be responsible under the DDA for preventing discrimination continuing or recurring. While these considerations will usually concern students studying abroad, it is also possible that such considerations will be applicable in relation to students who are studying in their home country. For example, if the student comes from the country where the university has set up a campus outwith the UK, but the campus

is still run by (and the student is matriculated with) the "home" university.

What will constitute a "reasonable adjustment" in this context will be influenced by a number of factors. The radical alternative of substituting some other activity for a study abroad may in some cases be judged by the university as inconsistent with core academic standards, and in other cases the matter may be subject to the requirements of an external professional body. Within these parameters, however, the university has the duty to seek adjustments which have the effect of alleviating what would otherwise amount to a "substantial disadvantage" for a disabled student.

"Less favourable treatment"

Universities will also have an obligation placed upon them not to treat any disabled students less favourably for reasons relating to their disability. Where a university is seeking to give an equal opportunity to all of its students in relation to offering placements on international courses, this may often prove problematic.

Refusing to admit a disabled student on the grounds of their disability, for example, would be considered direct discrimination and cannot be justified by a university. In addition, refusing to admit a student on grounds "relating to a disability" could be considered less favourable treatment on the grounds of this being disability-related discrimination, and might also be considered unlawful under the DDA.

If the university offers students the opportunity to study abroad, it would be unlawful for the university to directly discriminate against any of its students on the grounds of their impairment, for example, by excluding a wheelchair user from studying abroad if this was only on the basis that it would be more difficult for staff to accommodate the specific needs of that student.

Management of risks involved in respect of providing international courses to students in compliance with the DDA

Having already outlined above that a “home” university will have obligations, both under its general duty of care to its students as well as under the DDA, how should these obligations be managed by the university?

Contractual arrangements

Where a university is contracting a lot of the running of its own foreign campus to an organisation abroad, or where the host institution itself is responsible for the provision of an international course, the university should ensure that it has suitable contractual arrangements in place with the organisation/host institution clearly defining the responsibilities of each party in relation to making provisions for any disabled students.

Considerations should include:

- outlining the responsibilities of each party for making reasonable adjustments for the student during their time at the foreign campus/host institution;
- outlining the responsibilities that will be placed upon the organisation/host institution for providing (and maintaining) aides for the student - together with any additional services which may be required by the student – during the study period abroad;
- assessing whether there may be any physical barriers at the foreign campus/host institution which may cause difficulties for any of its students who may have certain physical impairment;
- establishing which parties will be responsible for funding any reasonable adjustments (including aides, services, and necessary amendments to physical attributes of the campus) in advance of any students being allocated study placements abroad.

Universities should bear in mind, however, that any contractual arrangements which may be in place between the parties shall

not in any way negate their continuing obligations to their students in relation to both the DDA and the general duty of care which they owe to all of their students.

Making "reasonable adjustments"

Under Part 4 of the DDA, if the university might reasonably have been expected to know that a student might need adjustments to be made before studying abroad, it may not be able to claim that it did not know that the student required such adjustments - even if the student did not choose to tell the university that s/he had an impairment. The development of an environment in which disabled students are encouraged to make such disclosures, and in which students are invited to disclose prior to non-standard teaching elements, is therefore highly recommended in order to encourage as much prior disclosure as possible and assist the university in assessing what reasonable adjustments may be necessary.

The duty to make reasonable adjustments is anticipatory. This means making adjustments in advance, insofar as is possible. In the context of arranging study abroad for students, this will also mean ensuring that diverse student requirements are taken into account by the university. This could involve:

- gathering relevant information about the foreign campus/institution;
- assessing the suitability of the foreign campus/institution for disabled students; and
- assessing the facilities provided by the foreign campus/institution.

Disclosure of information by students and the DDA

Where possible, any information disclosed by a disabled student to a "home" university, which is necessary for making reasonable adjustments for study abroad, should be used to inform external providers of the international course. An institution must be aware, however, that the use and transfer of information about disabled students is restricted by the provisions of the Data Protection Act 1998. Universities should seek permission from

the student to pass on information necessary for making reasonable adjustments, and should inform students what use will be made of the information they disclose and ensure that procedures are in place to keep personal information confidential.

Confidentiality and the DDA

Where a disabled student requests confidentiality under Part 4 of the DDA, then information should not be passed on to the institution outside of the UK, even for the purposes of making reasonable adjustments. This might lead to a lesser adjustment, or no adjustment at all, being made for the student. Where a student agrees that disclosure may be made to certain staff at the institution outside of the UK, it will be more likely that an adjustment, or a lesser adjustment, can be made for the student. However, Part 4 of the DDA does not override the general duty that a university has to protect its students. There may therefore be exceptional circumstances in which the university comes under a duty to disclose information, even against the student's expressed desire for confidentiality.

Date: 24 April 2007