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# **The best education money can buy? Disabled university students and the Equality Act 2010**

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## **Abstract:**

In amidst the financial cuts in the public sector and changing academic environment, this article considers key aspects of the legal and regulatory framework within which a university is obliged to make ‘reasonable adjustment’ for a disabled student. In particular, we examine the scope of the 2010 Equality Act for promoting inclusive higher education, focusing on the duty to make reasonable adjustments and the public sector equality duty. At the same time, it is pertinent to consider the relationship between the equality framework and alternative mechanisms whereby students can challenge the reasonableness of university procedure and decision-making, in particular the role of the Office of the Independent Adjudicator for Higher Education. Finally, the paper considers the potential for consumer protection legislation to provide an additional focus on achieving an inclusive educational environment for disabled university students.

**Key Words:**

Equality, disability, higher education, reasonable adjustments, public sector equality duty, consumer protection, inclusive education

**Introduction**

The Equality Act 2010 ('EA2010') imposes obligations on higher education institutions ('HEIs') in England and Wales not to discriminate against students with disabilities. This article developed from reflections of a junior lecturer upon his responsibility in relation to his employer's legal duty, under section 20 of the EA2010, to reasonably accommodate several present and past university students with disabilities. The main purpose of the paper is two-fold: first, it examines the scope of the duty to make reasonable adjustments in the context of higher education, with discussion of how HEIs may discharge their obligations under the EA2010; second, there is consideration of the advantages and limitations of alternative forms of action which may be available to a student seeking redress for a university's failure to make accommodation.

There are a number of themes within both the legal framework and government higher education policy which merit a brief discussion in order to set the context for the subsequent discussion and analysis of the section 20 duty. First, the relationship between a student and her university reflects the dual public/private nature of universities. For example, most universities in England and Wales are regarded as public bodies, as highlighted by the EA2010 public sector equality duty ('PSED'), which imposes an obligation on universities to have a due regard to the need to advance equality of opportunity. On the other hand, the steep rise in

the cost to the student of higher education, and the developing relationship between the student as consumer and the university as seller of education services, place the spotlight on the private contract between the student and her university. Indeed, the student-consumer may be more focused on whether the university is providing ‘the best education money can buy’ than on the university’s obligations under the EA2010. Universities may fear the burden of increased costs in complying with the expanded legal and regulatory framework while, from the student’s perspective, there is also uncertainty surrounding the provision of the Disability Students’ Allowances (‘DSA’).<sup>1</sup> The DSA are, at the moment, still available whereby individual students may seek financial assistance to help them to meet the additional costs they may incur because of their disabilities.

Finally, the section 20 duty of reasonable adjustment can be linked with the concept of ‘inclusive education’ enshrined in Article 24 of the United Nations Convention on the Rights of Persons with Disabilities (‘UNCRPD’).<sup>2</sup> According to educationalists Topping and Maloney (2005: 2), the social-engineering agenda of inclusive education started its life with special educational needs (‘SEN’). Under the influence of human rights (particularly through the overarching concepts of equality and diversity (Hammarberg 2011)), the new educational model of inclusion (for disabled students to integrate into mainstream secondary education) has gradually replaced the previous segregated one (special schools). During the transformation of this discourse, particularly in the UK, the US, Canada and Australia, equality legislation such as the EA2010 in the UK has played an integral part in changing society (Hepple 2014). Topping and Maloney (2005: 5) affirm that ‘[a]ll commentators now agree that inclusion should mean much more than the mere physical presence of pupils with special educational needs in mainstream schools’.

According to Harris (2007: 17-18), the role of education is to provide students with ‘an education that equips them for later life and reflects the principal common values, social and moral of the nation’. Following this logic, an inclusive education has to be democratic. So how exactly does education correlate with the ‘common’ social and moral values of a nation? More specifically, why is inclusive education important to the fee-charging and historically elitist universities?<sup>3</sup> Australian scholars Nunan et al (2000/2005) argue that inclusive education is important because it determines the type of person and the type of society we want to create through education.<sup>4</sup> Focusing on the social-economic inequality prevalent in modern societies generally and the gradual privatisation of higher education particularly in the Anglo-Saxon countries, they illustrate that:

‘For example, an educational system can reproduce existing economic power structures by excluding those who cannot afford to attend; it can bring together future networks which become the economically advantaged elite; it can reproduce non-representational forms of power to advantage the already advantaged.’

Their point is particularly poignant in today’s public budget-cutting and private fee-raising exercises within higher education in England and Wales. If all educators (including administrators and decision-makers working in higher education) treat students merely as ‘human capital’ and education as a ‘transaction’ then of course students (and their parents) feel justifiable to ask for the best value for their investment.<sup>5</sup> Indeed, students may well view the section 20 duty as one aspect of the ‘transaction’, rather than reflecting ‘inclusive education’.

In the next section we examine the anti-discrimination framework, focusing on the section 20 duty before reflecting upon the PSED. Drawing on relevant case law under both the Disability Discrimination Act 1995 and the EA2010, the article considers the relevant factors in

determining what is a 'reasonable' adjustment and assesses the role and responsibility of higher education providers, staff and students in promoting 'equal access to educational opportunities' (Quality Assurance Agency for Higher Education, 2014: B2, 1). This section concludes with practical examples of the accommodation which can be made for students with particular impairments.

We then consider the role of the Office of the Independent Adjudicator for Higher Education ('OIA'), to which a student may bring a complaint if she feels her university has not acted reasonably. It will be argued that it is unwise to consider the rights and responsibilities under the EA2010 in isolation, as the decisions of the OIA highlight some of the common challenges encountered during the provision of reasonable accommodation in higher education. This is because students often raise allegations of failure to comply with the section 20 duty in their complaints to the OIA (the rules of the student complaints scheme specify that it is not limited to hearing complaints about an act or omission of a Member Higher Education Provider in respect of a consumer contract). The complaints scheme is also significant in assessing the type of remedies which may be afforded a student in the event that she feels insufficient accommodation has been made by her institution. It will be argued that, in practical terms, the most relevant forum may appear to be that of the OIA, not least because it is free for students to use. However, it will be seen that one practical issue is the lack of clarity as to the jurisdiction of the OIA in matters of equality.

The final part considers the potential for consumer legislation to play a part in encouraging universities to meet their obligations under the equality framework. Consumer regulation may not appear closely connected to securing the objective of inclusive education. However, it will

be argued that there is scope for the consumer legislation to provide an alternative means by which students with disabilities can challenge the failure of HEIs to make reasonable accommodation. For example, if a university provides information that financial assistance is available to meet additional costs, or that certain IT software is already in place, failure to make such provision will almost certainly be a breach of the Consumer Rights Act 2015.

### **Equality Act 2010**

Since 2005 universities have been subject to the disability discrimination legislation and the EA2010 sets out the scope of the prohibition of discrimination in further and higher education, which includes the duty on universities to make sure they do not discriminate against students who have a disability.<sup>6</sup> Section 91(1) provides that the responsible body of the university must not discriminate against a student by subjecting them to a detriment and this covers the admissions process, the way in which education is provided to the student, the terms on which a student is granted access to a benefit, facility or service, and the arrangements made for the awarding of qualifications (sections 90-94). Section 91(3) prohibits discrimination by HEIs against a disabled person in relation to arrangements for, and conferment of, qualifications and section 96 makes similar provision in respect of qualifications bodies. With regard to the duty to make reasonable adjustments, section 96 permits the appropriate regulator, in connection to certain qualifications bodies, to provide that the duty to make reasonable adjustments does not apply to certain provisions, criteria or practices, as specified by the regulator, or that specified adjustments should not be made (s 96(7)). Section 91(9) confirms that the duty to make reasonable adjustments applies to the responsible body of HEIs and it is the scope of this provision to which attention now turns, before examining the relevance of the public sector equality duty.

*Duty to make reasonable adjustments.*

Schedule 13 of the EA2010 provides that a higher education institution must comply with each of the three requirements set out in section 20, with which failure to comply will amount to discrimination (s20-21). Thus, a university must take reasonable steps to avoid any substantial disadvantage which would otherwise be faced by a disabled student as a result of a provision, criterion or practice or physical feature in respect of various relevant matters which mirror closely those referred to in section 91. Similarly, a university must take reasonable steps to provide an auxiliary aid if, without such aid, a disabled student would be put at a substantial disadvantage when compared with students who are not disabled.

It is important to note the section 20 duty does not apply to competence standards, whether academic, medical or other, which are applied to determine whether a person has a particular level of competence or ability (Schedule 13(4)). A distinction needs to be drawn between such standards and the assessment process, to which the duty does apply, though the Equality and Human Rights ('EHRC') Technical Guidance notes that, on occasion, the assessment process may be 'inextricably linked to the standard' (EHRC 2014a: 99). The few reported cases involving disability discrimination in the HEI field, such as *Burke v The College of Law & Anor* [2012] EWCA Civ 37, have arisen within the overlap between assessment and competency standards on vocational courses. Mr Burke's failure, on three attempts, of the Business Accounts paper on the Legal Practice Course ('LPC') meant that he failed the LPC. In view of the impact on his pursuit of a legal career, it is perhaps not surprising that Mr Burke persisted with his unsuccessful claim of disability discrimination. However, the Employment



Tribunal found the College of Law had acted always with courtesy, respect and an open mind to Mr Burke's suggestions of possible further adjustments.

Depending upon the context, Schedule 13(3) provides that the phrase 'disabled person' in section 20 is to be read as 'disabled persons', 'disabled students' or 'interested disabled person'. It is only in relation to conferring qualifications that the duty is specifically reactive, arising in relation to an individual 'interested disabled person'; for the main part, the duty is anticipatory, meaning that the duty arises when a group of 'disabled persons' or 'disabled students' would otherwise face a substantial disadvantage. However, it is clear that education providers, in addition to anticipating whether a provision, criterion or practice may put disabled students at a disadvantage, may well need to consider the individual student. This was noted by Lawson (2008: 98), in relation to the corresponding provisions in the Disability Discrimination Act 1995 ('DDA1995'), where she suggested that:

'in view of the proximity and duration of the connection between education-provider and student...it is likely to be reasonable for [universities] to have to go to greater lengths to provide individualised adjustments in response to needs of which they have become aware than it would be for other types of service provider.'

The key cases which interpret the extent of the reasonable adjustments duty in its anticipatory guise have arisen in the wider context of service provision, or exercise of public functions, rather than the specific context of higher education. However, it is pertinent to examine these cases, given that the anticipatory aspect applies also to universities. In *Finnigan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191, the claim of disability discrimination was based upon the absence of a British Sign Language interpreter on any of the three occasions the police lawfully searched the home of the claimant who was profoundly

deaf, a fact known to the police. There was common ground that there was no material difference between the DDA1995 and the EA2010 provisions - thus indicating the cases arising under the DDA1995, on the reasonable adjustments duty in the context of provision of services to the public and exercise of public functions, may be relied upon in relation to the EA2010. A number of issues arose which may be relevant to the education context. For example, Lord Dyson MR stressed that it 'is important to distinguish between a [provision, criterion or practice ('PCP')] and the adjustments made to a [PCP] to alleviate the detrimental effects to which a disabled person may be subjected by it' (at 29). The PCP 'includes all practices and procedures which apply to everyone, but excludes the adjustments'. In *Finnigan*, the PCP did not include the use of BSL interpreters and the use of lip reading and sign language by trained police officers - both of which are measures taken to avoid the detriment that would otherwise be suffered by deaf persons. On the facts, the PCP included communicating in spoken English during the course of police searches of premises.

Furthermore, Lord Dyson found that the judge had erred to the extent that he focused on how the Chief Constable had failed to make reasonable adjustments by reference to Mr Finnigan's needs, rather than the needs of deaf persons as a group (para 31). This emphasises the anticipatory nature of the duty which cannot be discharged 'by treating everyone as individuals and adopting communication styles to suit the circumstances of the particular case on an ad hoc basis' (para 33). What does this mean for universities? That, while they may expect to react to the needs of the individual student whose impairment is known to them, they must ensure they anticipate the needs of disabled students as a group, and pro-actively consider whether policies may substantially disadvantage such a group and, if so, what measures should be adopted in general. In *Roads v Central Trains* [2004] EWCA Civ 1541 Sedley LJ said service providers 'cannot be expected to anticipate the needs of every individual who may use

their service, but what they are required to think about and provide for are features which may impede persons with particular kinds of disability’ (para 11). *Finnigan* confirmed that this applies also in relation to public functions.

As already indicated, it has been noted that universities are required to consider accommodating the particular needs of disabled students and may be required to go to ‘greater’ lengths than other service providers, in light of their closer relationship (Lawson, 2008: 109). For example, Lawson (2008: 110) suggests that universities will be expected to actively create ‘an open, welcoming and supportive atmosphere in order to encourage disclosures of disability and to invite such disclosures on an on-going basis’. EHRC (2014b) non-technical guidance highlights that universities need to consider first the level of disadvantage which would be faced by a student if adjustments were not made. In considering whether the disadvantage would be substantial, attention should be focused on various factors, including the ‘time and effort that might be expended by a disabled student’ and the reduced opportunity for a disabled student when compared with her fellow students who are not disabled (EHRC 2014b: 20).

Turning to the question of what steps would be reasonable, the Quality Assurance Agency (‘QAA’) Quality Code for Higher Education (2014: Chapter B4) stresses the importance for HEIs ‘to work in partnership with students to understand the implications of their specific needs’ (QAA 2014: Chapter B4, 10). Thus, it would be good practice to involve the individual student in discussion of possible steps, as occurred in *Burke v The College of Law*. What is a ‘reasonable’ adjustment will depend upon a range of factors, including the effectiveness of taking particular steps in overcoming the relevant disadvantage, health and safety issues, the effect on other students and the financial resources available to the education provider (EHRC 2014a: 105-113). There are no specific factors listed in the EA2010, unlike in the DDA 1995,

but the EHRC Guidance very much reflects the cases under the DDA1995, such as *Cordell v Foreign and Commonwealth Office* [2012] ICR 280. In *Burke* the College of Law had made various adjustments, including: extra time for examinations, breaks of 15 minutes per hour in each examination, specific accommodation and adjustment to the exam timetable. The Court of Appeal noted that it was appropriate for the Employment Tribunal to consider the adjustments as a whole and to conclude that the adjustments made were reasonable in addressing the disadvantage Mr Burke faced as a result of the effect of his disability.

In the context of higher education, the payment of fees by students may well be a relevant factor, in addition to the cost of making an adjustment. Many steps, such as the provision of text to speech software, may not be too costly, particularly in view of a university's overall IT budget. As mentioned above, some students may be eligible for funding under the DSA for additional assistance and equipment. EHRC Guidance suggests that it is unlikely to be reasonable to expect an HEI to pay for the same help and aid for which DSA are available (2014a:110). Thus, while the EA2010 prevents universities from passing on the cost of the adjustment on to the individual student, the availability of the DSA is a relevant factor in determining what is a reasonable adjustment.

### *Challenges and adjustments for students with visual, hearing and psycho-social impairments*

Having considered the principles arising from cases such as *Finnigan*, and noted the guidance of both the EHRC and the QAA, we turn now to consider a number of scenarios with the purpose of illustrating the challenges and options available. The first refers to the challenge for a student with a visual impairment. According to Anna Lawson (dubbed by media as 'the first blind female law professor in the UK'), she completed her postgraduate legal study during the 1980s with transcription and tape-recorders. At one time, 'we had about 20 people giving up

their time to read. They never asked for anything in return, but I kept them supplied with meals and cups of tea.’<sup>7</sup> Fortunately, today’s higher education students are able to rely on technology such as universal designs (e.g. the screen-reading function provided by VoiceOver (for Mac) or Jobs Access With Speech (‘JAWS’ for Windows) to generate spoken and brailled descriptions of items from the computer screen. While investment in such technology involves allocation of monetary resources,<sup>8</sup> it is hard to see how this cannot be part and parcel of standard university-wide systems. Indeed, there is an argument that, unlike the case of *Finnigan*, the provision of technology *includes* such universal designs, and these should not be described as ‘adjustments’.

For lecturers, at least what we can provide is the delivery of electronic hand-outs in advance (EHRC 2014b: 20). In our experience, this anticipatory preparation proves to be crucial for students with various degrees of visual impairment. Electronic format with adjustable font sizes is useful for those with lesser degree of impaired eyesight. In addition, the use of large fonts and colour-blind friendly colour schemes is also worth consideration when preparing pedagogies. Again, widespread changes in practice may result in a permanent change to a PCP, rather than being viewed as an accommodation. Such an approach would not disadvantage disabled students, as universities remain subject to the section 20 duty. Instead, it demonstrates how the pursuit of inclusive education benefits all students, not just those with particular impairments. Certainly access to recorded lecture materials may well alleviate disadvantage to students with visual impairments, but may also be beneficial to students without that particular impairment (Wasserman 2013).

Turning to students with a hearing impairment, whether it is teaching or learning, the use of British Sign Language ('BSL') in a British classroom is equivalent to the use of any minority language (e.g. Welsh) in an inclusive and bilingual educational environment. For Deaf students or students with any hearing impairment (Ladd 2005), the provision of designated BSL interpreters, the use of induction loop or visual aid can be deemed as a reasonable and anticipatory duty for any duty-bearer to remove the substantial disadvantage for the disabled students (Lawson 2008: 98-99).

Nevertheless, with the internationalisation of the British higher education sector, it can be anticipated that other forms of sign language other than BSL, e.g. American Sign Language ('ASL'), are also required.<sup>9</sup> In light of the lack of professional ASL/BSL interpreters in the UK, an alternative response is to rely on professional palantypists instead to provide instant speech-to-text interpretation.<sup>10</sup> However, such provision cannot be sustained without adequate resources, pre-class communication and cooperation from all relevant departments. In addition to limited resources, the lack of understanding of the social model of disability and more importantly the lack of interdepartmental collaboration also appear to be obstacles (Ladd 2005).

Since the case of *A v Essex County Council* [2010] UKSC 33,<sup>11</sup> the mental wellbeing of students has become an increasingly important issue which deserves Parliament's attention and the last but certainly not least scenario focuses on the student with a psycho-social impairment.<sup>12</sup> According to Caleb (2015), the number of students who declared mental health issues increased from 5.9% in 2007-2008 to 9.6% in 2011-2012 (from 0.4% to 0.8% in total student population).

As noted by Nicola Dandridge, the Chief Executive of Universities UK, HEIs are after all 'academic, not therapeutic, communities' (Universities UK 2015: 3-4). The challenge for all HEIs is to balance the inevitable stress accompanied by competitive academic activities with the HEI's legal 'duty of care' towards student's mental wellbeing under the EA2010. Dandridge further suggests that 'university wellbeing services, however excellent, cannot replace the specialised care that the NHS provides for students with mental illnesses.' (Universities UK 2015: 3-4). Despite these top-to-bottom educational policies and guidelines, mental health is perhaps the most challenging area of teaching and learning in higher education. Stress relief requires time: in-class and out-of-class access, pastoral care, student service and professional counselling all require time but time is the most precious resource as any experienced teacher could profess. Despite the existence of professional counselling services, limited resources can only cope with a certain level of the increasing demand. The result is: these students are normally left to the hands of the untrained lecturers or administrative staff. It can be anticipated that there will be more disputes concerning student's mental wellbeing and the failure of universities to provide timely and reasonable accommodation.

#### *Public sector equality duty*

As listed in Schedule 19 of the Equality Act 2010, governing bodies of most HEIs in England and Wales are public authorities for the purpose of the section 149 public sector equality duty ('PSED'). Thus, universities must have 'due regard' to the need to eliminate unlawful discrimination, to advance equality of opportunity and foster good relations between people who share particular protected characteristics and those who do not (section 149). It is beyond the scope of this article to discuss in depth the general principles developed in the judicial review claims to date (see Fredman (2011) and McColgan (2015)). However, from the

perspective of HEIs, it is relevant to consider the relationship between the PSED and the section 20 duty. In addition, this section highlights the significance of the PSED in the wider context of public expenditure cuts which may well have a direct impact on individual students with disabilities.

Section 149(4) provides that the steps involved in meeting the needs of disabled persons that are different from the needs of those who are not disabled include, in particular, steps to take account of disabled persons' disabilities. Thus, there is a clear cross-over between the section 20 and the PSED. It does not appear as if publicly funded universities are about to be relieved of their obligations as public authorities, notwithstanding the increased marketisation of the higher education sector. The EHRC suggests that compliance with the general equality duty not only fulfils the legal duty but also makes 'good business sense' as the relevant public authority should be able to 'carry out core business more effectively' (EHRC 2014c: 9). From a university's perspective, in a competitive market, it may also make it a more attractive destination.

Looking at the EHRC case studies on how public authorities have used the PSED, there is a note of the Open University's response to equality monitoring information collected in 2011 which revealed that disabled students were three times more likely to raise a complaint or appeal, in comparison with non-disabled student, as well as more likely to be less satisfied with their overall study experience.<sup>13</sup> Having due regard to the PSED, the Open University committed to increasing the satisfaction of disabled students from 82% (2010/11) to 84% in 2014/15 as part of its equality objectives. Qualitative research undertaken by the Open University to identify the underlying factors revealed that a 'significant proportion of its services and reasonable adjustments were made retrospectively once courses started'.<sup>14</sup> This



creates uncertainty for students and increased costs for the Open University. Steps taken in response to the research findings included: the allocation of overall responsibility for individual faculties to named associate deans; the appointment of accessibility specialists for each faculty to promote accessibility in course development; the creation of a website providing a central source of advice; and guidance to all staff members. The Open University reached their target in 2013 and accordingly set a new objective aimed at reducing the gap in satisfaction between disabled and non-disabled students from 3% in 2013 to 2% by 2016. Whilst it may be argued that such objectives are not over-ambitious, it is perhaps not surprising that the university sets what it might view as an achievable goal.

Given that there is no private remedy in respect of the PSED, the individual student will be more interested in the section 20 duty. However, the Open University case study provides an example of the over-lap between the duty to make reasonable adjustments and the PSED - and perhaps illustrates that discharge of the reasonable adjustment duty will provide evidence of compliance with the PSED. In addition, the PSED is also significant in reminding us of the public role of universities at a time of increased focus on the student as consumer.

Having considered the obligations on universities to comply with the PSED, what is the significance of the PSED to government cuts in funding? In order to highlight the potential for the PSED to play a part in any future decision on the DSA, we will discuss two similar applications for judicial review, both of which relate to ministerial decisions to close the Independent Living Fund ('ILF') and which involved arguments that the secretary of state had failed to discharge the PSED. In *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, it was found that the minister had failed to have due regard to the PSED in reaching his decision to close the ILF. In particular, there was

insufficient evidence to show that the minister had paid due regard to the ‘potentially very grave impact’ upon individuals within the relevant group of disabled persons (at 61). In *Bracking* Elias LJ provided a note of caution in over-emphasising the impact of the PSED: ‘Any government, particularly in a time of austerity, is obliged to take invidious decisions which may exceptionally bear harshly on some of the most disadvantaged in society. The PSED does not curb government’s powers to take such decisions, but it does require government to confront the anticipated consequences in a conscientious and deliberate way in so far as they impact upon the equality objectives for those with the characteristics identified in section 149(7) of the Equality Act 2010’ (at 72).

Another application for judicial review was made, in respect of a second ministerial decision to close the ILF and to transfer funding to local authorities in England and to devolved administrations in Wales and Scotland, in *R (Aspinall) v Secretary of State for Work and Pensions* [2014] EWHC 4134 (Admin). On this occasion the minister was found to have discharged his PSED. Reference was made to sufficient information having been obtained and considered by the minister, before he proceeded with ‘requisite thoroughness, conscientiousness and care’ (at 123). The court rejected the argument that in order to discharge the PSED it was necessary to undertake a detailed assessment ‘of how many current ILF users would be financially worse off, and to what extent, if the ILF were closed’ (at 92). This suggests that a similar argument might fail if a challenge were to be brought in relation to any future closure of the DSA. Instead, the focus should be on whether the minister had sufficient information to make a proper assessment of the impact of the proposals on the substantial group of disabled persons benefitting at the time from ILF funding (at 128).

## Office of the Independent Adjudicator

In terms of dispute resolution, the OIA administers the independent complaints schemes set up by the Higher Education Act 2004. The OIA does not have a regulatory function and has no powers over universities (Ashtiany 2011: para 5). The role of the OIA is to determine ‘the extent to which a qualifying complaint is justified’ (Schedule 2, para 5(1)(1) of the Act). In reaching its conclusion, the OIA ‘may consider whether or not the HEI properly applied its regulations and followed its procedures, and whether or not a decision made by the HEI was reasonable in all the circumstances’ (rule 7.3).<sup>15</sup> Thus, the OIA determines whether the HEI acted reasonably towards the complainant in light of its own procedures. The OIA may make recommendations as to appropriate action to remove the cause of complaint, but the conclusion and recommendations are not legally binding. Although the OIA does not pronounce on issues of law, its conclusions and recommendations cover much the same ground as remedies that could be ordered by a court and one of the aims is that the complaints scheme should afford a remedy to a student without the need for legal action. In this section we examine the relationship between the equality legislation and the OIA, highlighted in particular by the case of *R (Maxwell) v OIA* [2011] EWCA Civ 1236.

In *R (Maxwell) v OIA* Shelley Maxwell filed a judicial review request to the Court of Appeal in regard to the Final Decision made by the Independent Adjudicator for Higher Education as to whether the University had breached its statutory obligations to provide reasonable adjustments under the Disability Discrimination Act 1995, the relevant legislation at the time. Ms Maxwell was a mature student who suffered from the sleep disorder narcolepsy. In terms of fact, it should be clarified that Salford University did provide her with reasonable accommodation. However, in the view of the applicant, these adjustments (such as facilities

for her naps and one free year of courses) were either inadequate or made too late to make a difference. In addition, she specifically requested a legal clarification on the issue of the breach of Salford University's duty to make reasonable adjustment. Focusing on the informal, expeditious, economic, inquisitorial (rather than adversarial) procedure of the OIA student complaints scheme, Mummery LJ first clarified that:

‘Litigation in the courts against Higher Education Institutions (HEIs) for more favourable outcomes than those obtained in the special internal and external complaints procedures is not, except in every special circumstances, a course that anyone fortunate enough to be accepted for a course of higher education should be encouraged to take up’ (at 7).

Following the precedent of *R (Siborurema) v OIA* [2007] EWCA Civ 1365, Mummery LJ then considered the role of the OIA and noted that it did not have a judicial function, thus the determination of legal rights rests with ordinary courts. Accordingly, it does not fall to the Independent Adjudicator to determine whether there has been a discriminatory breach of the adjustments duty. However, Mummery LJ suggested that as long as the OIA decisions are ‘reasonable’, the courts ‘will be slow to interfere with’ OIA’s decisions and recommendations (at 23). There is clearly scope for confusion over the appropriate route a student should follow in the event of a discrimination dispute. While students may be encouraged to pursue the free option of lodging a request with the OIA into whether the HEI acted reasonably, it is clear from *Maxwell* that the OIA has no jurisdiction to consider discrimination claims. (Ms Maxwell had initiated such a claim, but then suspended and pursued the OIA route, seeking a declaration from the adjudicator that the university had discriminated.) However, there does appear to be possible judicial confusion in terms of the role of the Independent Adjudicator. In the recent

case of *R (Echendu) v School of Law, University of Leeds* [2012] EWHC 2080 (Admin), HHJ Jeremy Richardson QC suggested that ‘if [Mr Echendu’s] comments are about injustice and discrimination in relation to the conduct of the university, he had an opportunity ages ago to make a reference to the Adjudicator for Higher Education’, under Part 2 of the Higher Education Act 2004 (at 26). While this comment highlights the overlap between claims of discrimination and procedural failure on the part of the University, it does seem to miss the point that in *Maxwell* the Court of Appeal decided that the adjudicator had no jurisdiction in disability discrimination claims. Darwin (2013) points out that the OIA fails to provide a suitable alternative to litigation for students who have been discriminated against and thus students should be cautioned against relying solely on the complaints scheme.

The scope for misunderstanding in terms of the options available - and a ‘mismatch of expectations’ for students with disabilities - has been identified by Ashtiany (2011: para 8), who notes that, although the conclusions and recommendations are not legally binding, ‘universities always implement the recommendations made and so conduct themselves as bound’. Furthermore, she suggests that the OIA undertakes a ‘finely balanced task’ in which conclusions on the ‘reasonableness’ of the HEI’s conduct may be well be viewed, in one sense, as overlapping with concepts within the Equality Act 2010, notably the statutory duty to make reasonable adjustments (para 9). As the Independent Adjudicator does not have a role within the enforcement of the Equality Act 2010, it does not pass judgment on whether a student has been discriminated against, but rather adjudicates on reasonableness, as outlined above. Ashtiany describes this as a ‘sophisticated and important distinction which is not always easy for the student to understand or for the OIA to articulate’ (para 13).

Notwithstanding areas of confusion, the decisions of the Independent Adjudicator provide a rich source of evidence as to the challenges and typical situations which arise in the context of the section 20 duty and whether the adjudicator considers the university to have acted reasonably. For example, in a case very similar to the first scenario mentioned above, the OIA considered a complaint against the University of Northumbria from a student with a severe visual impairment.<sup>16</sup> The OIA found that the university had failed to ensure timely electronic provision of core textbooks and that feedback had been handwritten, rather than produced electronically. The OIA, in finding the complaint partly justified, recommended compensation to the student for distress and that the University should review its structure for the provision of reasonable adjustments. Conversely, it is clear from the cases that there is a responsibility on the individual student to inform her university of difficulties she is experiencing, if they cannot be anticipated, and students are obliged to follow a university's procedure and to supply the necessary medical evidence.

### **The way forward? Consumer protection legislation**

Section 12(2) of the Higher Education Act 2004 excludes matters of academic judgment from the definition of qualifying complaints and thus the OIA is unable to consider such matters. This issue has arisen also in contractual disputes, to which we now turn briefly before considering consumer protection. In *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, the privileged position of universities may be seen in Sedley LJ's comment that 'there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate' (at 12). Similarly, Lord Woolf noted that '[t]he courts are far from being the ideal forum in which to resolve the great majority of disputes between a student and

his or her university' (at 39). Nevertheless, the Court of Appeal confirmed that, in the absence of a university visitor, the courts could adjudicate on allegations of breaches of contractual rules which are not matters of academic judgment. Mawji has suggested that a university that provides details in its regulations of the assistance given to students with disabilities 'is potentially creating a contractual right to access to reasonable adjustments to disabled students' (Mawji 2013: 23). In *Clark* the University also argued, unsuccessfully, that the public nature of the university meant that the student should not be permitted to continue with the ordinary contractual claim.

In addition to the contractual relationship between the university and student there is now an added dimension, that of the consumer protection legislation. The Consumer Rights Act 2015 consolidates and updates the legislation, including the provisions on unfair terms, while the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) prohibit traders from adopting unfair commercial practices towards consumers. A university is recognised as a 'trader' or 'seller or supplier' of education services for the purposes of the consumer protection legislation while students are seen as 'consumers' (Competition and Markets Authority, 2015: paras 2.16-2.17). The Competition and Markets Authority ('CMA') has provided compliance advice covering: the supply of information, ensuring fair terms, and ensuring institutions' complaints procedures are 'accessible, clear and fair to students' (at 51). As the CMA (2015: para 1.5) notes, the advice it provides

'is particularly important at a time when a greater share of HE providers' funding is coming directly from students, which has highlighted particular expectations of providers when it comes to, for example, information they provide about degrees and courses available, the choices on offer, students' rights as consumers, and how complaints by students will be handled. Consumer protection law is therefore an

important aspect of an HE provider's relationship with students, together with the existence of a supportive learning and pastoral environment within an academic community.'

The consumer protection legislation introduces yet another regulatory layer, to add to the existing public law and private law frameworks: judicial review, the OIA, contractual remedies and the EA2010.<sup>17</sup> If we consider the three scenarios mentioned earlier, what is the significance of the Consumer Rights Act 2015 (in force 1 October 2015), and its predecessors, for a student with a visual impairment or a psycho-social impairment? It is arguable that it supplements the frameworks we have already examined. For example, in terms of information to be provided to the student - if a student is led to believe that audio-visual technology is in place, the student may rely on section 50 of the Consumer Rights Act, 2015 which provides that information taken into account by the student-consumer when entering into the contract, will be included as a term of the contract. While this raises the possibility of a claim for breach of contract if there is no such equipment, this does not remove the potential claim for breach of the duty to make reasonable adjustments.

In relation to the CPRs, unfair commercial practices could cover conduct related to the promotion, supply or selling of goods or services. In general, the CPRs prohibit higher education providers from engaging in unfair practices in their relationships with students and prohibit misleading actions, misleading omissions and aggressive practices where they are likely to have an impact on students' decisions. It is important that students should receive the information necessary to make informed decisions in relation to products and services,



particularly in view of the fact that they are likely to be making ‘one-off’ decisions in respect of ‘what and where to study’ (CMA 2015: para 1.6).

Of potential significance to students with disabilities is the prohibition of unfair commercial practices ‘that are likely to distort the behaviour of the average person in a certain vulnerable group’, taking account of the characteristics of that group (CMA 2015: para 4.15). Consideration of the potential audience for the advertising practices should be given even where institutions do not specifically target their courses at such students. The CMA advises that practices should be changed where they could adversely affect the decisions of vulnerable individuals, giving the example of incorrect statements about accessibility to facilities or the failure to highlight restrictions on access to buildings where it has not been possible to make reasonable adjustments to provide access for people with disabilities (such as wheelchair users).

Similarly, when providing pre-contract information, universities should take account of the needs of prospective students accessing the information. At this point, universities should consider applicants who are particularly vulnerable because of a physical or psychological impairment. The CMA provides the example that some recipients of information may have sight impediments, thus HEIs should ensure that information is made available in an accessible format. In essence, the CMA guidance focuses on the provision of clear, accurate information in a timely manner, the provision of fair and balanced terms and conditions, together with ensuring that the process for dealing with complaints is ‘accessible, clear and fair to students’ (CMA 2015: para 2.6).

Remedies available under the Consumer Rights Act 2015 include the right to a price reduction (section 56) and the right to ask for a repeat performance (sections 54 and 55) if the service is not performed in accordance with information provided. Repeat performance has already been seen in response to complaints made to the OIA, for example in the case of *Maxwell*. In view of the cost to the student of university education, this is likely to be a particularly attractive option, assuming that the universities must bear the cost of the repeat performance. If a university sets out in regulations specific details of adjustments made, such as the provision of certain software or hardware, this would seem to create a contractual right to access to these provisions. The increased recognition of students as consumers will surely lead to an increase in contractual claims. It may be that the Consumer Rights Act 2015, which is intended to clarify the consumer protection framework, will be viewed as providing a more straightforward remedy than establishing discrimination under the EA2010. Whether action is pursued under consumer legislation or equality legislation, there seems little doubt that universities should brace themselves for increased litigation if they do not meet expectations of the consumer. It remains to be seen if this will further challenge the judicial ‘disapproval of students who chose to bring claims against [universities]’ (Darwin 2013: 49).<sup>18</sup>

## **Conclusion**

Legal practitioners such as Dixon (2014: 30) have suggested that claims for disability discrimination are an area in which there has been a particular growth in litigation in the higher education field, though there are few significant appellate decision in the higher education field in relation to the adjustments duty. However, as outlined above, relevant principles have been developed in relation to other parts of the equality legislation and are reflected in the guidance of the QAA and EHRC. Furthermore, the decisions of the Independent Adjudicator reveal

some of the common institutional failings in addressing the needs of disabled students, while the scenarios highlight typical adjustments for students with visual and hearing impairment and the particular challenge faced by students with a psycho-social impairment.

The QAA (2014: B2 1) notes that '[h]igher education providers, staff and students all have a role in and responsibility for promoting equality' and ensuring an inclusive environment. Equally accessible educational opportunities may be achieved through both 'inclusive design wherever possible and by means of reasonable individual adjustments wherever necessary' (QAA 2014: Part C, 1-2). Similarly, consultation, communication and co-ordination are essential aspects of the way in which universities should comply with the duty to make reasonable adjustments and this is reinforced by the PSED. It is also clear, from the equality framework and the findings of the OIA, that, while universities have a duty to take reasonable steps to find out about students' disabilities and to provide support, there is also a responsibility on students, both to engage with university procedures and to take steps to provide evidence which would then enable the university to respond to the student's individual circumstances.

One of the challenges for all stakeholders in higher education is the overlap of the various regulatory frameworks which govern the relationship between a student and her higher education institution. From the student's perspective, it can be seen that there is clear scope for confusion over the appropriate route she should follow in the event of a discrimination dispute. While students may be encouraged to pursue the free option of lodging a request with the OIA, it is clear from *Maxwell* that the OIA has no jurisdiction to consider discrimination claims. There is an added layer of complexity with the recognition that universities are subject to the consumer protection law. For HEIs, we would argue that they should not lose sight of the ideal

of inclusive education, which is reflected in the equality legislation and the duty to make reasonable adjustments, notwithstanding the CMA's focus on the competitive advantages of complying with consumer protection legislation (CMA 2015: para 1.3).

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## **Notes**

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<sup>1</sup> John Morgan, 'Disabled Students' Allowance cuts postponed', Times Higher Education, 12 September 2014.

A separate yet relevant issue is the proposed discontinuance of the Independent Living Fund ('ILF') which provides funding to disabled people to supplement the community care services available to them from local authorities. See *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345.

<sup>2</sup> Article 24 of the UNCRPD 2006, '... State Parties shall ensure an inclusive education system at all levels and lifelong learning directed to: the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity; the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; enable persons with disabilities to participate effectively in a free society.'

<sup>3</sup> According to the Higher Education Statistics Agency ('FESA'), since the HE privatisation suggested in the 1997 Dearing Report, tuition has been increasing its percentage in the total income of UK HEIs. In 2013/14 alone, tuition accounts for nearly 45% (£13.7 billion) of the total HEIs income of £30.7 billion. 2013/14 was the second year of the £9,000 undergraduate fee cap. The relative contribution of tuition fees to total income

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continued to grow, whilst funding body grants decreased in both relative and absolute terms. Available at:

<https://www.hesa.ac.uk/pr/3488-press-release-213> (accessed 10 June 2015).

<sup>4</sup> Nunan, George and McCausland (2005), at 250: 'The view of civil society behind our prescriptions is one that is best described by the term inclusive – that is, a society built upon ideals of social justice where participation and success are irrespective of "race", gender, socio-economic status, ethnicity, age and disability so that disadvantage is not reproduced.'

<sup>5</sup> Which Magazine, 'A Degree of Value: Value for Money from the Student Perspective', Which Magazine, November 2014.

<sup>6</sup> Equality Act 2010 Part 6, Chapter 2, section 91.

<sup>7</sup> Liz Day, 'Anna Lawson is first blind female law professor in the UK' Wales Online, 2 March 2014. In a separate news report, Lawson continues to add: 'However, I feel passionately that there should be systems in place which ensure that education (as well as health, transport and other services) should be accessible to disabled children and adults without the need for communities to have to rush to the rescue as, luckily for me, the Dolgellau community did – and using the law to help achieve that is pretty much the focus of my work now.' See BBC News, 'Blind law professor's gratitude for community support' BBC, 8 February 2014.

<sup>8</sup> Other non-technological or traditional provision such as personal reader, tutor and accommodation of guide dogs equally require resources.

<sup>9</sup> Disability Rights Commission (a predecessor of the Equality and Human Rights Commission), Disability Discrimination Act 1995 Code of Practice: Post-16 Education (London, Stationery Office, 2006) para 5.14: 'A university anticipates that some deaf students will require the use of [British Sign Language] BSL interpreters and ensures it has access to BSL interpreters at short notice. However, a student who arrives at the university uses American Sign Language (ASL) and had not previously notified the university of this fact. As soon as the university is aware of this it should make the necessary reasonable adjustment by seeking an ASL interpreter, even though it may not have been reasonable to have arrangements with an ASL interpreter before the student arrives.' See Lawson (2008: 98-99).

<sup>10</sup> Palantypists (or Court Recorders) are sometimes employed by courts to record legal proceedings. In addition to this traditional type of speech-to-text service, there is also computer-based software available, e.g., Dragon Dictation. However, like any technology, its efficiency depends on the user's familiarity with the software.

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<sup>11</sup> *A v Essex County Council* [2010] UKSC 33 which concerns an autistic boy, A, being shut out of the state educational system for over 18 months [violation of Article 2 of the First Protocol (A2P1) of the European Convention of Human Rights.]

<sup>12</sup> Hansard, 11 June 2015 Col. 1430.

<sup>13</sup> EHRC Public Sector Equality Duty Education Case Studies, ‘Securing greater accessibility for disabled students - the Open University’. Available at <http://www.equalityhumanrights.com/private-and-public-sector-guidance/public-sector-providers/public-sector-equality-duty/case-studies/education> (accessed 29 September 2015).

<sup>14</sup> Ibid.

<sup>15</sup> The Rules of the student complaints scheme are available at <http://www.oiahe.org.uk/media/100294/oia-rules-july-2015.pdf> (accessed on 30 December 2015).

<sup>16</sup> OIA Cases Studies are available at <http://www.oiahe.org.uk/news-and-publications/recent-decisions-of-the-oia/case-studies.aspx> (accessed on 30 December 2015).

<sup>17</sup> The OIA will be able to consider complaints from students on consumer issues; students may also have the right to take legal action in respect of unfair terms or misleading practices.

<sup>18</sup> With regard to Maxwell, it has been suggested that this attitude, which may have been understandable when higher education study was free, ‘hardly seems fair’ today, when pursuit of higher education ‘costs a small fortune’ (Darwin 2013: 49).

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