

Guidance for post-16 providers on implementing the  
Disability Discrimination Act Part 4

# Disclosure, Confidentiality and Passing on Information

October 2003



Learning+Skills Council

The Learning and Skills Council have produced this guidance on Disclosure, Confidentiality and Passing on Information. This guidance is not intended to be a substitute for taking legal advice before reaching a decision on your individual problems or before drafting relevant policies. The framework for developing and reviewing procedures and policies and the skeleton policies attached as Appendix A and B are intended only as examples of guidance and not finalised versions.

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I would also like to thank Paul Jenkinson, Solicitor - Bond Pearce, for kindly allowing us to reproduce his article in this publication and for commenting on the guidance. Finally, I am extremely grateful to the many people who read drafts, offered comments and suggestions, all of which have helped shape this guidance.

We hope you will find this guidance to be a valuable resource for developing your responses.

Sally Faraday, project manager, Learning and Skills Development Agency.

Earlier guidance was produced by the Department for Education and Skills in 'Finding out about peoples' disabilities: A good practice guide for Further and Higher Education Institutions" (2002) Ref DfES/0023/2002. This document builds on this in light of the *Special Educational Needs and Disability Act 2001*.

# Introduction

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The *Disability Discrimination Act* (DDA) Part 4 raises many issues about the ways in which Further Education (FE) colleges and Local Education Authorities (LEAs) encourage students to disclose a disability, the procedures they have in place for passing on relevant information, and the ways in which they can respect a student's desire for confidentiality. This Guidance addresses these issues.

Individual organisations vary enormously, for example between a large college, a specialist residential organisation and a small adult education provider. Each one will need to work out its own best ways of ensuring that DDA Part 4 legislation with regard to disclosure, passing on information and confidentiality are adhered to. Organisations will need to establish their own policies and procedures, ensure that all staff understand and adhere to them and then make sure that they are embedded throughout the whole organisation.

They will also need to ensure that any procedures they develop are workable and really do benefit individual learners. Organisations may have excellent written procedures which, on paper, make them compliant with the legislation. However, unless these are proved to work in practice, individual learners can still be disadvantaged.

Finally, organisations will need to ensure they have procedures in place for monitoring their policies and be prepared to change and improve them when the need arises.

This Guidance is based very firmly on the experience of the learner. To help you establish procedures which really will benefit the learner we have given a number of scenarios (fictionalised but based on fact) which show the effect on the learner if correct procedures are not in place or are not followed through.

# Format of the Guidance

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The first part of the Guidance looks briefly at what DDA Part 4 duties are in relation to disclosure, passing on information and confidentiality.

The second part looks at each of these areas in turn and examines the issues which they raise. Each subsection begins with a brief scenario pointing out the difficulties which students can encounter when correct procedures are not in place or adhered to. This is followed by a discussion on what needs to be in place to ensure that disabled students are able to discuss and receive the support they require. Finally, each sub section is followed by a series of questions. If organisations follow through these questions they will be able to establish practices which are both student centred and also reflect DDA Part 4 requirements.

Appendix A of this document summarises all the questions included in this Guidance into a framework for you to draw up your own procedures.

Appendix B contains skeleton Disclosure and Confidentiality policies

Appendix C contains relevant extracts from the Code of Practice.

Appendix D reprints a recent article from Skill Journal on the relationship between the DDA and the *Data Protection Act 1998*.

# What DDA Part 4 says

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DDA Part 4 acknowledges that there may be instances when a student has been given several opportunities to disclose a disability but has not done so. In such an instance, if the student then makes a complaint under DDA Part 4, the college or LEA might not be liable. However, the college or LEA would have to prove that they have taken reasonable steps to encourage disclosure. It is unlikely that simply relying on questions on an application or enrolment form would be sufficient.

DDA Part 4 states that once one member of an organisation knows about a student's disability and the student is happy for this information to be shared, then the whole organisation is deemed to know. It is then the duty of the organisation to pass on appropriate information to all relevant staff and not leave it to the student to disclose to each member of staff.

Students have the right to confidentiality. Under the *Data Protection Act 1998* information about a student's disability cannot be processed, that is passed on without the student's explicit consent. DDA Part 4 reinforces this right.

DDA Part 4 states clearly that its duties are anticipatory. Organisations do not just have a duty to disabled learners who are already attending education programmes, but also a duty to anticipate the likely requirements of all disabled learners. This means that staff should be planning, in advance, for the likely requirements of disabled learners.

## Section A: Disclosure

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### Scenario 1

Jane is a very able young woman. She has dyslexia which makes certain aspects of understanding written information and writing and spelling particularly difficult for her. She received very good support at school and achieved good GCSE results. Jane wanted to go to college to study A levels. The college prospectus contained a general sentence welcoming students with disabilities but had no further specific information about what students needed to do if they required additional support. The application form had a box you could tick if you felt you had a disability or learning difficulty but no information as to the kind of disabilities or learning difficulties this might include, and nothing about what the college would do with this information. Jane did not tick this box. She was embarrassed by her dyslexia and did not really consider it as a 'disability'. She was also anxious that ticking the box might mean she was less likely to be accepted onto the course.

Jane was accepted onto the A level programme and in her initial meeting with her tutor she told him that she was dyslexic and was likely to require some support. Her tutor merely looked at her GCSE results and said that they were very good and he was sure she would manage fine. She assumed that he would pass on information to other tutors.

Three weeks into the course she had to hand in her first assignment. The tutor she had given this assignment to read out parts of her assignment to the whole class ridiculing her spelling mistakes and telling her that she had obviously spent very little time on the piece of work. He ended his harangue by saying 'Are you dyslexic or something?' Jane went home extremely upset and told her parents that she wanted to leave the College.



## Issues arising from this scenario

### i. Initial information

Prospectuses, websites and any other marketing materials (for example, course leaflets) need to have clear and welcoming statements about the support that can be offered to any student who might have a disability or an additional learning need. This needs to be accompanied by the name and contact details of the member of staff who co-ordinates support. It should include details of how a prospective student can receive a copy of the organisation's Disability Statement.

Learners and prospective learners do not receive information solely from written marketing materials. They also gain it from the whole ethos and ambience of an organisation. You will need to look at the extent to which you feel your organisation gives positive messages about disability which will make a learner feel more confident in disclosing any additional needs. Some of these signals might be overt (for example, having Braille signs in lifts etc.). Others are less overt but equally important and can be apparent in the ways in which all staff approach and welcome the full range of learners.

*Do all your marketing materials clearly state the support which can be offered to disabled students?*

*Is it clear whom the student should contact and how they should do this?*

*Are your marketing materials available in alternative formats?*

*Have you explored alternative verbal and non-verbal ways of marketing, for example, posters, advertising on local radio etc.?*

*Do you feel the culture and ethos of your organisation is one which makes students feel confident in disclosing a disability?*

### ii. Application and enrolment forms

These need to have a space for students to disclose any disability or additional learning need they may have. It is important to realise that many students (for example those with dyslexia, a medical condition or a mental health difficulty) will not necessarily see themselves as having a 'disability'. Forms need to give clear examples of the kinds of disability and learning difficulty which could be declared on the form. They should also state clearly the reasons for asking for this information, how it will be used and that it will not in any way jeopardise the student's chances of gaining a place. You should emphasise that you are asking for information about a student's disability in order to provide additional support that will benefit the learner.

*Is there a question on your application and enrolment forms which encourages students to disclose a disability and gives them the confidence to do this?*

*Do the forms make clear:*

- *why the organisation is asking for this information;*
- *what it will do with it and who is likely to see it and/or use it;*
- *that it will not affect a student's chances of being offered a place; and*
- *how the organisation will use it to provide additional support if required?*

*Do the forms have examples of what might be included under the terms 'disability' and 'learning difficulty'?*

### iii. What happens to this information

Exactly what is done with this information will vary from one organisation to another. What is

important is that this information acts as a trigger for follow up support. All staff who see application forms need to be aware of what to do when a student has declared a disability. Organisations need to ensure that information is passed on to relevant people and that any support needs are discussed when the student first comes into college, whether this is at interview or during their first meeting with their tutor. It is good practice to ensure that an appropriate member of staff can be available at this time to discuss support needs. Whilst it is important that everyone in an organisation accepts ownership of responsibility, all organisations should have a member of staff who has a coordinating role for disabled learners. In some organisations a specialist member of staff attends the interview. In others a separate interview is arranged with them.

*Have you clear procedures in place for what happens to any information received from application or enrolment forms?*

*Does your organisation have a member of staff who has specific responsibility for disabled students?*

*Have you procedures in place to ensure that this member of staff can talk to the student at the time of their interview?*

#### **iv. At interview or initial meeting with tutor**

It might be that students do not declare a disability on the initial application form. They might be afraid that declaration at this stage might jeopardise their chances of a place. The tutor who first has contact with them will need to ensure that they give individual students the opportunity to discuss any additional support needs they have in confidence and will then be able, with the student's consent, to ensure that this information is passed on to a relevant member of staff who can then set up a separate meeting with the student to ensure that requirements are met and appropriate support is put in place.

*Are all tutors aware that disabled students may not have declared a disability on the initial application form and of the need to check, in an appropriate way, whether an individual student has additional learning needs at interview and during induction?*

*Does the information you give out to tutors who are interviewing include a prompt reminding them to do this?*

*If a student does declare a disability at interview stage do all tutors know what to do with this information?*

*Have all staff had some initial training in appropriate ways of responding to disabled learners?*

## Scenario 2

Bob is very keen to study French at his local adult education centre. He has a medical condition which means that he can at times get very tired. He feels that in general he will be able to manage in the two hour sessions, but is worried that he might have to miss some classes and also that there may be times when he cannot stay in the class for the whole two hours and might need to have a short break.

He hands in his enrolment form to the reception staff and tries to raise the issue of his condition. However the member of staff is very busy and says her job is just to take in the forms and any individual needs must be discussed with the class tutor.

Bob goes along to his first class. The tutor gets straight onto the business of teaching French and at the end she leaves very quickly. Bob has no opportunity to discuss things with her in private.

### Issues arising from this scenario

#### i. Initial contact with any member of staff

A student's first point of contact is often with a front line member of staff, for example reception staff, advice and guidance staff or a member of the administration team. Students may well not be aware of the varied roles of different members of staff and some may want to discuss any needs they may have with the first person they meet. Front line reception staff need to be aware of this and be sensitive to the fact that students may need to pass on personal information to them. They need to listen carefully to the information the student is giving them, check that they have permission to pass this information on, accord to their organisation's procedures for recording information and pass on information to relevant staff.

*Have your front line staff had any training on how to encourage disclosure and respond sensitively to individual requests?*

*Are they aware of the need to respect confidentiality?*

*Do they know who to pass information on to if the student agrees to this?*

#### ii. Initial contact with tutor

Individual students may well wish to discuss issues relating to their disability with their tutor. A tutor may be part time and may well be rushing from one class to another. However, it is important to ensure that they are aware that students need to have a time when they can discuss any additional needs they may have in a confidential setting.

*Are your tutors aware of the need to let students know that they can have a time when they can meet them individually to discuss any particular concerns they may have?*

## Scenario 3

Daniel has just started on an NVQ programme at college. Prior to this he has been attending a comprehensive school. Because he has a statement of special educational needs the Connexions Service have to co-ordinate an assessment for him under Section 140 of the *Learning and Skills Act*. Daniel has already started on his course by the time a copy of this assessment arrives at college. The member of staff who receives it places it in his file, but the information it contains is not passed on to his course tutor.

### Issues arising from this scenario

#### i. Information received from schools and the Connexions Service

The consequence of the scenario above is that important information about Daniel's requirements does not reach the people who are working most closely with him and a valuable opportunity of responding immediately and specifically to his individual requirements is lost.

There are many occasions when there is the opportunity for information to be passed on from a referring agency. Students who attend special schools will have had the opportunity to attend transitional reviews where discussion takes place about possible future placements. School leavers with a statement of special educational needs are required to receive an assessment co-ordinated by the Connexions Service which should spell out their individual requirements when they move on to their next place of learning. Although there is no legal duty to carry out such an assessment for students who have learning difficulties or disabilities but who do not have a statement, many of these learners will also have had such an assessment. These reviews and assessments provide a valuable opportunity to collate a range of information about a particular learner

that can then form the basis of any support which needs to be put in place by a college.

*Do your staff have the opportunity to attend transitional reviews and to liaise closely with referring agencies whether these are special schools or mainstream schools?*

*Do you have a close relationship with your Connexions Service and are Connexions staff fully aware of the support that you offer at your college?*

*Do you have clear procedures in place for receiving any assessments or reviews which may be sent from these referring agencies and for ensuring that the information in them is passed on to all relevant staff?*

## Scenario 4

Fatima is keen to learn pottery and arrangements are made for her to attend a pottery class one afternoon a week at a local adult education centre. On other days she attends a social services day centre. Fatima has very little formal speech. However, at the day centre she has been supported in developing her own ways of signing and can communicate basic wishes in an effective way. This information never reaches her tutor who finds himself increasingly frustrated by the difficulties he has in communicating with Fatima. This communication block results in Fatima getting very little satisfaction from the course and after a while she says she no longer wants to attend the class.

### Issues arising from this scenario

*Do individual tutors have time, where relevant, to meet with referring staff and share information?*

#### i. Liaison between providers of adult education and other organisations

Staff who work for Social Services or the Health Authority will often arrange for people they work with to attend adult education classes. Often these staff have considerable knowledge of the people they are referring to education. They will understand their particular requirements and will have established ways of working with them which enable them to maximise their skills. However, too often this specialist knowledge is not passed on to the tutor who is teaching the particular student. Tutors are often part time and have no additional time to liaise with staff from other organisations. This can result, as it did in Fatima's case, in a wasted opportunity for the learner.

*Does your organisation have a close working relationship with agencies who might refer adult learners?*

*Are there clear procedures laid down for transferring relevant information from these agencies, with the learner's consent, to appropriate tutors?*

## Scenario 5

Carla is attending a business studies course at a further education college. She has a medical condition which has the effect of making her tire easily and making it difficult for her to concentrate for periods longer than an hour. However, she does not declare this on her initial application form as she does not feel it will affect her ability to follow the course.

Although she does sometimes have to miss her early morning class generally she manages all right for the first part of the course. When it comes to her work placement at the end of the second term she is allotted a work placement one hour's journey away from her home. She attempts to attend this but is unable to continue. She tells her tutor about her condition and asks her to change her work placement. The tutor refuses saying that the college have many requests to alter work placements, for example from women with young children, and, as work placements are very hard to find, they have a policy of insisting that all students must take the place they are given.

When it comes to examinations in the third term the woman asks, a few days before the exam, for extra time so that she can take a short break during the two hour paper. The college say that if she had disclosed her disability at the beginning of the course she would have received support from the disability co-ordinator who would have made special arrangements for her. However, as they have no record of her doing this it is too late now to make any special arrangements. Staff also question the validity of Carla's claim that she has a disability and say that they have received no proof of this.

Later on Carla hears that she has failed her course because of poor attendance at her work placement and low marks in her exam.

## Issues arising from this scenario

### i. Ongoing opportunities for disclosure

As we have seen there are many reasons why students might not disclose a disability at the beginning of their learning programme. They might feel that to do so would jeopardise their

chance of a place. They might feel embarrassed to mention it. Or they might, like Carla, quite simply believe that it will not have an effect on their learning. This means that organisations need to ensure that there are ongoing opportunities for students to speak about any additional needs which they feel they have. These opportunities need to occur as a matter of course and may well form part of the individual tutorial process. If the class is a part time adult education class which has no



formal tutorial time, tutors need to ensure that there are key points in the course when they give individual members of the group the opportunity to discuss in private any support needs they might have.

It is particularly important to ensure that students have opportunities to disclose a disability before key events such as work experience, a trip or outing or examinations. This opportunity needs to be in good time before the events so that staff are able to put in place any adjustments.

It is important that these ongoing opportunities for disclosure are carried out sensitively. If they are seen as merely a checklist activity, students will understandably become irritated by being asked yet again whether they have a disability. Staff will need to find a balance between encouraging students to talk about any individual support needs which might arise at different times in a course and avoiding an approach which could be seen as repetitive and intrusive.

*Have you built in ongoing opportunities for students to disclose a disability throughout their learning programme?*

*Are procedures in place to ensure that students can discuss any particular needs they may have during key events such as trips or outings, work experience or exams?*

*Are staff aware of how they can raise issues around possible support needs while avoiding being intrusive or 'over asking'?*

## ii. Flexible arrangements

However good your procedures are there may still be students who do not tell you about their needs until the last minute. Even in these cases you need to try and ensure that you can make arrangements to support them.

*How well are you able to respond flexibly to the need for last minute adjustments?*

## iii. Evidence of disability

The question of whether and when one requires evidence of a disability is a difficult

one and has no easy answers. There is a tension between not wanting an individual student to be disadvantaged and, at the same time, not wanting the system to be abused.

The concepts behind inclusive learning lead to good practice of accepting what is disclosed. However, evidence is likely to be required when there is a:

- suspicion of a false claim;
- need for evidence to support a funding claim;
- need for further information for application of adjustment; or
- dispute.

If a student takes a case to the courts there would certainly need to be formal evidence of disability, such as medical and psychological assessments. Also, examination boards require evidence if they are to allow for special arrangements, and organisations may need to demonstrate formal evidence of a disability during internal audits of examination procedures. Finance auditors may request evidence of support need when looking at additional learning support. Organisations will need to establish at what point they require evidence of a disability, and whether there are occasions when it is possible to make a last minute adjustment prior to obtaining evidence.

*Have you discussed the issue of whether and when you might require evidence of a disability?*

*In obtaining evidence, for example in allowing someone extra time in an assessment, have you thought of ways you might be able to obtain it quickly, for example through a phone call rather than waiting for information to be mailed to you?*

## Section B: Passing on Information

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### Scenario 6

Rashid has just started studying for 2 A levels at a further education college. He is partially sighted and needs to read print in font size 18. He is going to be taught by four tutors, one of whom is his personal tutor. At his first meeting with his personal tutor Rashid tells her about his need for large print. She says it shouldn't be a problem and says she will tell his other tutors. She does tell two of them but doesn't get around to informing the third who works on a different site. When Rashid has his first lesson with this third tutor he is given handouts in standard size which he cannot read, but he informs her of his sight difficulty and she agrees to produce large print handouts in the future.

During lunch hour on his first day Rashid visits the library. He tells the member of staff on duty that he will need some help reading the catalogue and enlarging articles. She responds that she is very busy and asks him to come back at 2 o'clock but Rashid has a class at that time. Rashid then makes his way to the canteen but cannot read the menu which is in small print. He asks the member of staff to help him which she does eventually but very grudgingly saying that this is not really a part of her job.

### Issues arising from this scenario

#### i. Effective means of passing on information

Rashid's personal tutor should have informed the person responsible for co-ordinating learning support who then should have had procedures in place for meeting with Rashid and discussing with him which staff in the college needed to be informed about his

requirements. She should have contacted all of his tutors. It would also have been good practice for her to have spent some time on an induction programme with Rashid making sure that he had a chance to meet relevant staff in the library and discuss his needs with them. She should also have checked with him whether he might need additional support in other parts of the college, for example in the canteen.

Different organisations will have different ways of ensuring that relevant information is passed



to relevant staff. Many organisations have procedures in place but they are not always correctly followed. Organisations also need to have mechanisms for checking that their procedures are working effectively. They will also need to ensure they have procedures in place for gaining consent (see Section Three).

*Do you have a named person responsible for co-ordinating support for disabled students?*

*Are all staff aware of the need to pass information on to the person responsible for co-ordinating support if a student declares a disability to them?*

*Do all staff know they have a responsibility to pass information on?*

*Do you have procedures in place, once a student has declared a disability and given consent, for assessing individual student needs in the whole organisation and passing on necessary information to relevant staff?*

*Have you got ways of checking that these procedures are the most effective?*

*Are you able to arrange, if relevant, an induction programme for particular disabled students?*

## **ii. Anticipating requirements in advance**

This scenario also raises issues about the anticipatory duty of educational organisations. Even if they had not had prior information about Rashid, staff in the library and the canteen should have anticipated that they might well be catering for students with a disability. They should have received training on their duties under DDA Part 4 and on how to respond to disabled students in an appropriate and supportive way.

*Have all staff throughout your organisation been made aware of the requirements of DDA Part 4 and had appropriate disability awareness or disability etiquette training?*

*Are all staff now planning how to respond to requirements of the DDA in their own area of work?*

## Scenario 7

Susan is a learning support co-ordinator in a large college with several sites. She deals with a large number of disabled students. When she has discussed their needs with them and agreed with them the information which they are happy to share with other members of staff she has procedures in place to inform a student's course tutor to tell other members of the course team what adjustments a particular student requires. In most cases this works well but in the past year she has realised that in some instances the information is not getting through to all tutors and students are not being appropriately supported. When she talks to the course tutors involved they say that they do email on the relevant information but that part time tutors do not always pick up their emails.

### Issues arising from this scenario

#### i. An approach which reaches everyone

For DDA Part 4 to be effective the whole organisation needs to be involved in its implementation. In Susan's college it is clear that internal communication is not as effective as it should be, especially where there are part time staff who do not always pick up their emails. Susan needs to discuss with other staff how this might be improved. Each organisation will need to establish its own procedures for passing on information effectively. It might be that other means of communication, such as letters placed in the register of part time tutors, or setting up a 'reply requirement' with the email, might be more effective. (NB. If email is to be used you need to ensure that the student is happy about this as email is an 'open' means of communication. For more details on this see Scenario 14).

*Are you confident that the procedures you have in place for passing on information are the most effective ones for all staff or do you need to develop others?*

*What, in your organisation, are the most effective ways of communicating with part time staff?*

#### ii. Effective monitoring

This scenario also reveals the need for effective monitoring. Both Susan and the course tutors have a duty not just to pass on information, but to ensure that this information is reaching the right people and is being acted upon effectively. It is not sufficient merely to pass on information. There also need to be procedures for checking the effectiveness of the systems which are in place. Ways in which this could happen could be checking in team meetings and following up any staff who do not attend. The co-ordinator for learning support might wish to draw up a checklist with the tutor of staff who need to be informed, and then monitor, through regular student reviews, that the student is receiving appropriate support.

*Do you have systems in place to monitor the effectiveness of your procedures to ensure that relevant information about individual student's support needs is reaching the right people?*

## Scenario 8

Judith has started an art class at her local adult education centre. She uses a wheelchair but access to the room is not a problem as the art class is held in an accessible ground floor room. Judith's tutor is very happy to accommodate Judith's needs in class and ensures that a bench the right height is cleared so that Judith can have ready access to the materials she needs. The difficulty comes one coffee break when Judith needs to use the toilet. The building has an accessible toilet but this particular day she finds it is out of order. The canteen staff says that this is because it was vandalised by a group of teenagers coming in off the street.

## Issues arising from this scenario

### i. Up to date information on specialist facilities

The duties under DDA Part 4 are anticipatory which means that organisations should be anticipating the likelihood of disabled people using their facilities whether or not there is a particular disabled student enrolled on a course. In this particular instance no one has thought through the consequences of the toilet being out of order. The person who put the 'out of order' sign up should have checked whether there was any current student who might need to use the toilet. This being established, Judith then should have been telephoned in advance or, at the very least, informed on her arrival.

*Are any changes to specialist facilities you have for disabled people passed on to all staff as a matter of course?*

*What arrangements are in place for informing staff and students of any necessary alterations to availability of accessible facilities?*

*How effective is your organisation's communication both between staff and from staff to students?*

## Scenario 9

Gladwin is highly intelligent and excellent with computers. He is the star on his IT programme, where he often helps out others. He is severely dyslexic and dislikes anyone knowing about it. After a while he gained enough confidence in his tutor to take him aside after a class and explain about his dyslexia. The tutor listened and as it didn't seem to be a problem he took no further action.

The course included a work placement and once again Gladwin did extremely well. Towards the end of the placement, Gladwin was told to take a turn at the help desk where he would need to write down telephone enquiries. He refused point blank, ended up having a row with the supervisor and said he was going to leave. The employer telephoned the college to complain about him.

### Issues arising from this scenario

#### i. Passing on information internally

When learners disclose a disability or learning difficulty part way through a course, especially if there has been no obvious difficulty to date, it is still necessary for all staff to follow the procedures and seek the consent of the student to pass the information on.

When learners are reluctant to disclose a disability it is particularly important to reassure them by explaining clearly to whom the information will be passed on and for what purpose, and to do so only when informed consent has been obtained. It is also important that confidentiality is respected if requested.

In this case Gladwin told his tutor about his dyslexia, despite the fact that he normally prefers to keep it to himself, but the tutor chose to do nothing. He did not ask Gladwin explicitly if he could pass the information on or explain that it could be kept confidential if Gladwin wanted. As a result nobody explored

with Gladwin if there were likely to be any difficulties with any aspect of the course. Nor did anyone anticipate that the demands of the work placement might be different from learning in college or consider any potential difficulties that might arise.

Had the tutor gained permission and passed the information on to the co-ordinator, she would have been in a position to assist the tutor to check out all elements of the course and anticipate any potential difficulties which could be discussed with the learner. She would also have been able to identify who else might need to be informed and to talk this through.

*Are all staff aware of the need to pass information on to the person responsible for co-ordinating support if a student declares a disability to them?*

*Are all staff aware that they should consider all aspects of a learning programme, such as practical activities, visits and work placements and anticipate any potential requirements that might arise?*

## **ii. Passing on information to those outside the organisation**

It is important when gaining consent to make it clear when it might be helpful to pass information on to those outside the organisation and the reasons for doing so. It is also important that employers (and other external organisations) are aware of any requirements for confidentiality and that they also abide by them. Had Gladwin been asked, he might have given his consent to the employer being informed. If he was unhappy with this, he might have agreed for his supervisor to be informed that he was only to do IT based activities. This would have avoided the situation which led to the conflict. The format for passing information on to employers should be agreed with the student.

*Do your procedures include specific arrangements for passing on information to those outside your organisation?*

## Section C: Confidentiality

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### Scenario 10

Katie has enrolled on a course at an adult community college. She explains to a member of staff during enrolment that she has a visual impairment but would prefer that the other students were not made aware of this. The member of staff enrolls Katie and emails the lecturer about Katie's disability and the need to produce course notes in font 16, but neglects to inform him about Katie's request for confidentiality. In the first class, this lecturer starts to hand out notes, and in front of all the other students asks who 'Katie' is, and then tells Katie that he has produced her notes in font 20 to make extra sure that she has no difficulty in reading them. Katie becomes visibly upset and leaves before the class finishes. She later writes a letter of complaint to the Principal.

### Issues arising from this scenario

#### i. Agreeing adjustments

In order for attention not to be drawn to Katie's disability, the member of staff who enrolls Katie should have clearly established how adjustments might be made that would be consistent with her request for confidentiality. It might have been appropriate to produce the notes in large font in advance of the class, for example, so that Katie can look at them before the lesson but would not have to be seen reading them in front of the other students. Or Katie might have been happy to have had the enlarged font version (not font 20) to be given out in class, provided attention wasn't drawn to the fact that she had a set of notes in a different format. What seems to be missing is a clear discussion with Katie on what adjustments could be made and how those adjustments might be made to ensure Katie's request for confidentiality is preserved.

*Do your staff know how to explore options with a student to ensure that the adjustments are made in a way that preserves a student's request for confidentiality?*

*How do you record the outcomes of such discussion?*

*How do you pass this information on?*

#### ii. Confidentiality and consent

You need to have a clear mechanism in place in order to obtain a student's consent to pass information about their disability on to other staff. Under the *Data Protection Act* you are required to process personal data fairly and lawfully in accordance with the principles contained within the Act. Information on a student's disability is classified as 'sensitive' and cannot be processed without the specific consent of the student. Implicit within the *Disability Discrimination Act Part 4* is the right of a student to request that the existence or

nature of his or her disability be treated as confidential. This express ability to request confidentiality reinforces the requirement for explicit consent to be obtained in order to process sensitive data.

*Are your staff aware that a student has the right to request that the existence or nature of his or her disability is treated as confidential?*

*Are students made aware of their rights to confidentiality?*

*Are students made aware that disclosure of information relating to a disability to other staff can only be made with their explicitly informed consent?*

*How is information recorded and consent obtained to pass information on to relevant staff?*

*Do you have a procedure for obtaining written consent from a student to enable processing of the information and allow you to pass information on?*

*Have all your staff been trained in the use of these procedures?*

### **iii. What a consent form should include**

A consent form should be simple, clear and easy to understand. It should explain what will happen to the information and what the information will be used for. It should include a list of who will have access to the information. It should also contain any other information as necessary to enable the student to make a fully informed decision. The form should make clear that by signing the consent form, the student is consenting to this processing. Not all organisations have consent forms and those that do are often not particularly student friendly or explicit.

Some students will need help, even when the wording is clear, to understand fully what signing a consent form actually means.

Ideally, written consent should only be obtained once. However, if a situation arises where it would be beneficial to the student for information to be disclosed to someone not in

the 'agreed persons' list, the permission of the student must be sought and written consent obtained. If the nature of the disability changes, or the nature of the information to be passed on changes, the permission of the student must be sought and written consent obtained.

*Do you have a consent form in place?*

*How student friendly is the wording?*

*Have you consulted with students on the wording?*

*In obtaining consent, do you make explicit what information will be passed on, to whom, and the reasons for passing on information, so that the process of signing a consent form helps a student to feel secure and comfortable that the information will be used appropriately*

*Are all staff aware of how to use a consent form in an appropriate manner? How do you monitor this?*

*Do you have a procedure in place for renewing consent following a change in the nature of the information that is to be passed on, or a change in who can have access to the information?*

### **iv. Appropriate response**

The response of the lecturer in this scenario was unhelpful. Staff should understand that they have a responsibility to respond in a discrete and sensitive manner when a student discloses information about their disability.

*Have your staff had specific training in responding appropriately to students with learning difficulties and disabilities, particularly in terms of preserving confidentiality?*

### **v Use of email**

Email may not be an appropriate mechanism to pass on information about a person's disability, unless they have specifically given consent to this method of communication, as email is an open (email that is, non-secure) means of communication. Recording, storing and processing sensitive information in a secure manner is discussed further in scenario 14.



## Scenario 11

Sarah has a disability which is controlled by medication. She enrolls on a course and during the first term, she explains her situation to Jim, her personal tutor. She says that she is happy for Jim to know about her condition but does not want any other member of staff knowing about this. Jim explains that, ideally, it would be helpful if other members of staff were made aware of her condition, so that they can respond appropriately to her requirements. However, Jim respects her right to ask for the information to remain confidential.

By the end of the first term, Jim is very worried about how Sarah is progressing, and decides to discuss the situation with Rashid, the programme leader. Jim explains to Rashid, in the strictest confidence, that Sarah has a disability and he is very worried about her progress.

### Issues arising from this scenario

#### i. Breaching confidentiality

Under the *Disability Discrimination Act Part 4*, Sarah has the right to request that the information she has disclosed to Jim remains confidential. As Sarah has explicitly asked for this information to be kept confidential, Jim should not have passed that information on in any way. In addition, passing on this information without Sarah's consent is likely to be in breach of the *Data Protection Act 1998*. Jim probably acted with the best of intentions, but he did not have the right to discuss Sarah's disability without her explicitly informed consent. If a student requests confidentiality under the *Disability Discrimination Act*, information may not, from that point, be passed on for the purposes of making reasonable adjustments

*Do your staff know that if a student insists on complete confidentiality, they must not pass on information about that student's disability to any member of staff?*

*Do you have procedures in place for when a student requests complete confidentiality?*

*Are students made aware that requests for confidentiality may impact on the adjustments that can be made?*

#### ii. Policies, procedures and practice

A student has the right to know that the information they disclose about their disability will be dealt with in an appropriate and confidential manner. In this scenario, it is not clear if policies and procedures are in place but are not being followed properly, or if appropriate policies and procedures have not been put in place. It is essential that you have clear and appropriate policies and procedures on disclosure and confidentiality, and the processes to ensure that all staff, including part time staff, are aware of these policies and procedures and abide by them. An organisation may have very good policies and procedures on paper but the real issue is that they are put into practice.

*Do you have a confidentiality policy and procedure?*



*How do you ensure that all staff are kept aware of college policies and procedures, including part time staff?*

*Are applicants and students informed of the organisation's confidentiality policy so that they can be assured that information they disclose will not be misused?*

*How do you monitor practice to ensure that all staff follow these procedures?*

*How do you encourage students and staff to comment on the effectiveness of your policies and procedures? How do you use this feedback?*

## Scenario 12

A personal tutor discusses an arranged trip to Calais with a group of AVCE Leisure and Tourism students. The tutor gives an opportunity for students to talk to him on a private basis if there are any support arrangements or disabilities that it would be helpful for him to know about in advance of the trip. Two days later, Permjeet asks to speak to his personal tutor and explains that he has epilepsy, but does not want anyone to know about his condition. The tutor is concerned as this could be a health and safety issue and wants to talk about the situation with the other staff. Permjeet is upset and repeats that he does not want anyone to know. His tutor explains that, in that case, Permjeet cannot go on the trip.

## Issues arising from this scenario

### i. Being sensitive to the issue of confidentiality

It was helpful for the tutor to provide an opportunity for students to disclose any disabilities prior to the trip and also supportive in that he provided an opportunity for students to talk to him on a private basis. This indicates that he was sensitive to the issues of confidentiality as he did not simply ask the question and expect a response in an open group. Disabled people or students should be provided with a confidential setting in which to disclose their disability, even if this has not been requested.

*Do you have arrangements in place to ensure that students and prospective students can disclose a disability in private?*

*Are all staff aware of the need to provide opportunities for students to disclose in a confidential setting?*

### ii. Health and Safety

The health and safety issue appears to have been dealt with inappropriately, and with a 'knee-jerk' reaction. *The Disability Discrimination Act* does not override health and safety legislation, but there is a real danger that health and safety can become a 'fear smoke screen'.

You should have a health and safety policy in place and carry out a risk assessment with a view to including the student rather than

anticipating problems that could be used as a justification for exclusion. You should also involve the student in the discussion of the potential risks and what could be arranged to reduce these risks. For example, in exploring options it is possible that Permjeet would accept just one other member of staff being made aware of his epilepsy. A trip of this nature is likely to be covered with at least one member of staff who is a qualified first aider. The tutor should discuss the likelihood of Permjeet having an epileptic fit while on the trip and what action Permjeet would like taken in this eventuality. A broader issue is about ensuring that all staff have basic first aid awareness. If a risk assessment reveals few or no grounds for refusing a place to Permjeet on the trip, the tutor would not have a valid reason for refusing a place to Permjeet.

In the majority of cases where health and safety becomes a consideration, adjustments can be made following appropriate risk assessment procedures. Health and safety should not be used spuriously to avoid making reasonable adjustments.

*Do you have a health and safety policy and procedure that anticipates the requirements of students with a full range of disabilities?*

*Are your staff aware of these, and do they know how to carry out a risk assessment?*

*Do you fully involve the student (and other relevant parties, such as parents) when carrying out a risk assessment?*

there is a substantial chance that non disclosure would be likely to prejudice the prevention or detection of crime).

However, it is important to stress that these are likely to be rare and exceptional circumstances.

### **iii. Exceptional circumstances for breaching confidentiality**

Certain exceptional circumstances **may** allow for the release of sensitive personal data, such as: -

- When there is an immediate and serious threat to personal safety.
- When there is an immediate and serious threat to the safety of others.
- When there is a legal requirement to disclose that information (e.g. where

## Scenario 13

Jenny enrolls on a part time evening class in pottery. On her enrolment form, she ticks the 'yes' box for the question 'do you have a disability, and she ticks the box for 'mental ill health'. The information, which is in small print at the bottom of the enrolment form, explains that her rights are covered by the *Data Protection Act 1998*. It further explains that the information will be held on the college data base and will be passed on to the Learning and Skills Council for collection and statistical analysis in order to monitor the college performance and improve quality and future provision. She is not sure what this means or who the Learning and Skills Council are, but she is happy to sign the form. She does not want her lecturer or the other students on her course knowing about her disability, but does not have an opportunity to say to anyone that she wants this information to remain confidential. No one tells her that college staff will have access to this information.

Four weeks after the course starts, a member of the teaching staff talks to Jenny and says 'I didn't realise that you suffered from mental ill health until I was on my computer and looked at the college data base for information on the group. How are you?'

## Issues arising from this scenario

### i. Obtaining meaningful consent

In a previous scenario, we discussed the requirement that for sensitive personal data, explicit consent must be obtained for processing information. For day to day processing, some organisations may argue that explicit consent is given when a student provides information about their disability on an application or enrolment form and signs that document. However, this depends on precisely what information is provided by the student and what information the organisation has given regarding how, and for what purpose, the data will be used. Appropriate wording on the relevant documents could provide the explicit consent needed for processing to take

place. However, you should take particular care to ensure that a student is fully informed and meaningful consent is obtained before processing information about a disability.

It is essential to check with students that they are clear on exactly what happens to the information they disclose and who will have access to it, both inside and outside the organisation, as well as checking the wording on your documents with legal advisors to ensure compliance with legislation. A student has the right to confidentiality even if he or she does not specifically request it. Consent cannot be inferred by silence.

*How do you ensure that students know how the information they disclose will be processed and who will have access to it?*

*Have you checked the wording on your application, enrolment and other relevant forms*

*that explains to a student what happens to information that they disclose on their disability?*

*Have you asked a broad range of students if this information is clear and easily understood?*

*Are there mechanisms in place to ensure that misuse of personal data can be identified and remedied?*

## **ii. What happens to information**

An organisation will normally have arrangements in place to protect the security of data on a Management Information System (MIS). However, your organisation may have purchased software to help staff access course and student information from a central MIS. Software that interfaces with a database and which allows staff accessibility to the data may not have limited access rights in place. This could mean that information on a student, including information about a disability, can easily be accessed by teaching

staff. If this is the case, you must have a mechanism in place for explaining to a student what happens to the information, who can see it, what it is used for, and a mechanism for obtaining a student's consent to this. Again, the emphasis here should not only be about ensuring compliance with the *Data Protection Act 1998* and the *Disability Discrimination Act Part 4*, but also about having a transparent and clear process so that a student understands and feels 'in control' of the information they disclose.

*Does software allow access by staff in general to information regarding a student's disability?*

*Do you clearly explain to a student exactly what happens to information that they disclose, particularly on application and enrolment forms?*

*Are your processes for obtaining consent open and transparent so that students are able to give fully informed consent?*

## **Scenario 14**

During a one-to-one tutorial review, Sadique, an adult on an Access to HE programme, discloses to his tutor that he has a disability. Although this is affecting his ability to complete assignments on time, he does not, under any circumstances, want his tutor to say anything to anybody. His tutor explains that this may have consequences and they explore these together. Sadique remains adamant that the information is to remain confidential, at least for the time being. The tutor respects this and makes a note of their conversation on the tutorial review paperwork which is kept in Sadique's student file.

Eight weeks later, during the next one-to-one tutorial review, another member of staff comes into the review to conduct a tutorial observation. As part of the observation process, the observer reads through the student file. Sadique makes a formal complaint.

## Issues arising from this scenario

### i. Recording, storing and processing confidential information

The *Data Protection Act* covers personal data held electronically (including most computer files and databases) and data held in paper-based files. Information gathered in the course of your duties, for example hand-written notes or opinions recorded in an email are covered by the Act. The Act refers to the processing of data; processing covers almost anything which is done with or to the data, including obtaining data, recording or entering data onto files, holding data, or keeping it on file without doing anything to it or with it, organising, altering or adapting data in any way, using the data, disclosing data either by giving it out, by sending it on email, or simply by making it available.

When information is recorded manually, there is an issue for you to consider in terms of where that information is stored, how secure that storage is, and who can have access. In this situation, the college did not have the correct procedures and protocols in place to ensure confidential data is kept secure during a tutorial observation.

*Do you have procedures, protocols and other security measures in place to ensure information about a student's disability is not inadvertently disclosed to other staff?*

### ii. Use of email

The increasing use of email is an issue for organisations to consider as email is not a secure method of communication. If you wish to pass on information regarding a student's disability by email, it is therefore important to explain the open nature of this method of communication to a student, and to get the student's consent to this method of passing information on to other staff.

*Do staff appreciate that email is not a secure means of communication?*

### iii. Centralising and secure handling of information

You may also need to consider how information on a student's disability that is recorded manually, is coordinated and possibly centralised to ensure that adequate support for a student is provided. If information is not centralised in some way, it may be difficult for you to check with individual students that adjustments have been put in place and are appropriate in meeting all identified requirements. Centralising information may also help ensure that records are held in an appropriate manner.

Secure information handling is a key principle of the *Data Protection Act*. This means that the information recorded manually on a student's disability must be kept in a secure manner, for example in filing cabinets which can be locked or in rooms which can be locked when unoccupied. Data could be disclosed unwittingly, for example, if staff leave their desks with paper documents left on view, or data displayed on their computer screen, or if data that they have discarded is not disposed of correctly.

*Are your staff aware of the principles of the Data Protection Act 1998?*

*Do you have procedures in place to ensure that information on a student's disability that is recorded both manually and electronically are kept secure?*

### iv. Monitoring and evaluation

Different ways of storing information in different places could give rise to a difficulty for an organisation attempting to carry out effective monitoring and evaluation of the quality and consistency of support provided for students with disabilities.

*What steps do you take to ensure that adjustments and support for students with disabilities are appropriate and consistently provided?*

*To what extent are the views of students with disabilities regularly asked for in respect of the service and support that you offer?*

*How do you use student feedback to improve performance?*

*How do you assess and evaluate your performance and effectiveness in making adjustments for students with disabilities?*

## Scenario 15

Harry has depression and his medication is affecting his progress and performance on an A level programme at a sixth form college. Harry speaks about this in confidence to a senior tutor at the college. The senior tutor discusses possible adjustments that the college could make to support Harry, but these all involve other members of staff being made fully aware of Harry's condition. Harry does not want anyone to know. The senior tutor explains that, under these circumstances, it is college policy to ask a student to sign a disclaimer form, which he passes to Harry for completion. Harry asks why, and the senior tutor explains that this is to protect the college should Harry turn around later and accuse the college of failing to make reasonable adjustments.

### Issues arising from this scenario

#### i. Disclaimers

Firstly, a 'disclaimer' would be likely to have little or no standing in a court case and so getting the student to sign this would be a pointless exercise (see appendix C, section 8.11). Secondly, the approach is extremely unhelpful. It seems that the concern to protect the college against potential court action overrides the concern in meeting the student's requirements.

#### ii. Exploring options with the learner and creating a climate of trust.

It would have been far more helpful for the senior tutor to explain the benefits if adjustments were made, the potential consequences of not making any adjustments,

and to explore possible options. For example, it may not be necessary for staff to know the full details of Harry's condition but merely to say that there are disability related reasons for a particular adjustment. It could be made clear that only relevant staff will be given the agreed information. Discussing possible alternatives with Harry, whilst at the same time making it clear that you respect Harry's rights to confidentiality, would make it far more likely that Harry would be receptive to exploring ways for adjustments to be made whilst preserving his request for confidentiality.

A student may be reluctant to give consent because of a fear that their personal life will become a subject of gossip. It is important that you create a climate of trust so that the student is secure in the knowledge that any information passed on will only be used for their benefit.



*Are staff aware of the need to respond with sensitivity and confidentiality to information relating to a student's disability?*

*What do you do to help create and promote a climate of trust?*

*To what extent is the ethos of the organisation welcoming and supportive to learners with disabilities?*

### **iii. Reviewing requests for confidentiality**

If Harry still wanted to keep the information completely confidential, the senior tutor could make a note agreeing this which he asks Harry to sign, with a possible date for a review of the situation. It's not about getting a student to 'sign on the dotted line' but about ensuring that a student is fully informed, feels 'in control' of the information, knows what has been agreed, knows that his or her request for confidentiality will be respected and feels happy with the process.

*Do you have a procedure to allow you to review a student's request for confidentiality?*

# Conclusion

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The culture and atmosphere at an organisation can play a vital part in encouraging a student to disclose a disability. Students are far more likely to disclose information on their disability if they feel that they are in an organisation that has a welcoming atmosphere, an ethos that supports disabled people, and a value base that ensures that all disclosures will be treated with sensitivity and respect and used only for the benefit of students. Effective marketing materials, positive views of disability, visible signs that diversity is valued, staff training and transparent processes are all factors that influence the atmosphere at an organisation.

This document has inevitably focused on the need for clear and coherent policies and procedures, and the need to engage the learner in establishing these. But however good policies and procedures are, they mean nothing if they are not implemented in practice. You can only be assured that practice matches policy and procedure if you systematically monitor and evaluate that practice.

Successful implementation of the *Disability Discrimination Act Part 4* is a challenge for us all, but we can achieve this if we are willing to change the way we work and accept individual responsibility. Encouraging disclosure, effective mechanisms to pass information on and respecting confidentiality are central to ensuring that all students with disabilities have access to successful learning opportunities.



# Appendix A

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## A framework for developing and reviewing procedures and processes on disclosure, passing on information and confidentiality

### Disclosure

#### Initial information

- *Do all your marketing materials clearly state the support which can be offered to disabled students?*
- *Is it clear whom the student should contact and how they should do this?*
- *Are your marketing materials available in alternative formats?*
- *Have you explored alternative verbal and non-verbal ways of marketing, for example, posters, advertising on local radio etc.?*
- *Do you feel the culture and ethos of your organisation is one which makes students feel confident in disclosing a disability?*

#### Application and enrolment forms

- *Is there a question on your application and enrolment forms which encourages students to disclose a disability and gives them the confidence to do this?*
- *Do the forms make clear:*
  - *why the organisation is asking for this information?*
  - *what it will do with it and who is likely to see and /or use it?*
  - *that it will not affect a student's chances of being offered a place?*

- *how the organisation will use it to provide additional support if required?*

- *Do the forms have examples of what might be included under the terms 'disability' and 'learning difficulty'?*

### Responding to this information

- *Have you clear procedures in place for what happens to any information received from application or enrolment forms?*
- *Does your organisation have a member of staff who has specific responsibility for disabled students?*
- *Have you procedures in place to ensure that this member of staff can talk to the student at the time of their interview?*

### At interview or initial meeting with tutor

- *Are all tutors aware that disabled students may not have declared a disability on the initial application form and of the need to check, in an appropriate way, whether an individual student has additional learning needs at interview and during induction?*
- *Does the information you give out to tutors who are interviewing include a prompt reminding them to do this?*
- *If a student does declare a disability at interview stage do all tutors know what to do with this information?*

- *Have all staff had some initial training in appropriate ways of responding to disabled learners?*

### **Initial contact with front line staff**

- *Have your front line staff had any training on how to encourage disclosure and respond sensitively to individual requests?*
- *Are they aware of the need to respect confidentiality?*
- *Do they know who to pass information on to if the student agrees to this?*

### **Initial contact with tutor**

- *Are your tutors aware of the need to let students know that they can have a time when they can meet them individually to discuss any particular concerns they may have?*

### **When information is received from schools or Connexions staff**

- *Do your staff have the opportunity to attend transitional reviews and to liaise closely with referring agencies whether these are special schools or mainstream schools?*
- *Do you have a close relationship with your Connexions Service and are Connexions staff fully aware of the support that you offer at your college?*
- *Do you have clear procedures in place for receiving any assessments or reviews which may be sent from these referring agencies and for ensuring that the information in them is passed on to all relevant staff?*

### **Liaison between providers of adult education and referring agencies**

- *Does your organisation have a close working relationship with agencies who might refer adult learners?*
- *Are there clear procedures laid down for transferring relevant information from these agencies, with the learner's consent, to appropriate tutors?*
- *Do individual tutors have time, where relevant, to meet with referring staff and share information?*

### **Ongoing opportunities for disclosure**

- *Have you built in ongoing opportunities for students to disclose a disability throughout their learning programme?*
- *Are procedures in place to ensure that students can discuss any particular needs they may have during key events such as trips or outings, work experience or exams?*
- *Are staff aware of how they can raise issues around possible support needs while avoiding being intrusive or 'over asking'?*

### **Being flexible**

- *How well are you able to respond flexibly to the need for last minute adjustments?*

### **Evidence of disability**

- *Have you discussed the issue of whether and when you might require evidence of a disability?*
- *In obtaining evidence, for example in allowing someone extra time in an assessment, have you thought of ways you might be able to obtain it quickly, for example through a phone call rather than waiting for information to be mailed to you?*

## Passing on Information

### Effective means of passing on information

- *Do you have a named person responsible for co-ordinating support for disabled students?*
- *Are all staff aware of the need to pass information on to the person responsible for co-ordinating support if a student declares a disability to them?*
- *Do all staff know they have a responsibility to pass information on?*
- *Do you have procedures in place, once a student has declared a disability and given consent, for assessing individual student needs in the whole organisation and passing on necessary information to relevant staff?*
- *Have you got ways of checking that these procedures are the most effective?*
- *Are you able to arrange, if relevant, an induction programme for particular disabled students?*

### Anticipating requirements in advance

- *Have all staff throughout your organisation been made aware of the requirements of DDA Part 4 and had appropriate disability awareness or disability etiquette training?*
- *Are they now planning how to respond to requirements of the DDA in their own area of work?*

### An approach which reaches everyone

- *Are you confident that the procedures you have in place for passing on information are the most effective ones for all staff or do you need to develop others?*

- *What, in your organisation, are the most effective ways of communicating with part time staff?*

### Effective monitoring

- *Do you have systems in place to monitor the effectiveness of your procedures to ensure that relevant information about individual student's support needs is reaching the right people?*

### Up to date information on specialist facilities

- *Are any changes to specialist facilities you have for disabled people passed on to all staff as a matter of course?*
- *What arrangements are in place for informing staff and students of any necessary alterations to availability of accessible facilities?*
- *How effective is your organisation's communication both between staff and from staff to students?*

### Passing on information internally

- *Are all staff aware of the need to pass information on to the person responsible for co-ordinating support if a student declares a disability to them?*
- *Are all staff aware that they should consider all aspects of a learning programme, such as practical activities, visits and work placements and anticipate any potential requirements that might arise?*

### Passing on information to those outside the organisation

- *Do your procedures include specific arrangements for passing on information to those outside your organisation?*

## Confidentiality

### Agreeing adjustments

- *Do your staff know how to explore options with a student to ensure that the adjustments are made in a way that preserves a student's request for confidentiality?*
- *How do you record the outcomes of such discussion?*
- *How do you pass this information on?*

### Confidentiality and consent

- *Are your staff aware that a student has the right to request that the existence or nature of his or her disability is treated as confidential?*
- *Are students made aware of their rights to confidentiality?*
- *Are students made aware that disclosure of information relating to a disability to other staff can only be made with their explicitly informed consent?*
- *How is information recorded and consent obtained to pass information on to relevant staff?*
- *Do you have a procedure for obtaining written consent from a student to enable processing of the information and to allow you to pass information on?*
- *Have all your staff been trained in the use of these procedures?*

### What a consent form should include

- *Do you have a consent form in place?*
- *How student friendly is the wording?*
- *Have you consulted with students on the wording?*
- *In obtaining consent, do you make explicit what information will be passed on, to whom, and the reasons for passing on*

*information, so that the process of signing a consent form helps a student to feel secure and comfortable that the information will be used appropriately?*

- *Are all staff aware of how to use a consent form in an appropriate manner?*
- *How do you monitor this?*
- *Do you have a procedure in place for renewing consent following a change in the nature of the information that is to be passed on, or a change in who can have access to the information?*

### Appropriate response

- *Have your staff had specific training in responding appropriately to students with learning difficulties and disabilities, particularly in terms of preserving confidentiality?*

### Breaching confidentiality

- *Do your staff know that if a student insists on complete confidentiality, they must not pass on information about that student's disability to any member of staff?*
- *Do you have procedures in place for when a student requests complete confidentiality?*
- *Are students made aware that requests for confidentiality may impact on the adjustments that can be made?*

### Policies, procedures and practice

- *Do you have a confidentiality policy and procedure?*
- *How do you ensure that all staff are kept aware of college policies and procedures, including part time staff?*
- *Are applicants and students informed of the organisation's confidentiality policy so that they can be assured that information they disclose will not be misused?*
- *How do you monitor practice to ensure that all staff follow these procedures?*

- *How do you encourage students and staff to comment on the effectiveness of your policies and procedures? How do you use this feedback?*

## **Being sensitive to the issue of confidentiality**

- *Do you have arrangements in place to ensure that students and prospective students can disclose a disability in private?*
- *Are all staff aware of the need to provide opportunities for students to disclose in a confidential setting?*

## **Health and Safety**

- *Do you have a health and safety policy and procedure that anticipates the requirements of students with a full range of disabilities?*
- *Are your staff aware of these, and do they know how to carry out a risk assessment?*
- *Do you fully involve the student (and other relevant parties, such as parents) when carrying out a risk assessment?*

## **Obtaining meaningful consent**

- *How do you ensure that students know how the information they disclose will be processed and who will have access to it?*
- *Have you checked the wording on your application, enrolment and other relevant forms that explains to a student what happens to information that they disclose on their disability?*
- *Have you asked a broad range of students if this information is clear and easily understood?*
- *Are there mechanisms in place to ensure that misuse of personal data can be identified and remedied?*

## **What happens to information**

- *Does software allow access by staff in general to information regarding a student's disability?*
- *Do you clearly explain to a student exactly what happens to information that they disclose, particularly on application and enrolment forms?*
- *Are your processes for obtaining consent open and transparent so that students are able to give fully informed consent?*

## **Recording, storing and processing confidential information**

- *Do you have procedures, protocols and other security measures in place to ensure information about a student's disability is not inadvertently disclosed to other staff?*

## **Use of email**

- *Do staff appreciate that email is not a secure means of communication?*

## **Centralising and secure handling of Information**

- *Are your staff aware of the principles of the Data Protection Act 1998?*
- *Do you have procedures in place to ensure that information on a student's disability that is recorded both manually and electronically are kept secure?*

## **Monitoring and evaluation**

- *What steps do you take to ensure that adjustments and support for students with disabilities are appropriate and consistently provided?*
- *To what extent are the views of students with disabilities regularly asked for in respect of the service and support that you offer?*
- *How do you use student feedback to improve performance?*



- *How do you assess and evaluate your performance and effectiveness in making adjustments for students with disabilities?*

## **Exploring options with the learner and creating a climate of trust**

- *Are staff aware of the need to respond with sensitivity and confidentiality to information relating to a student's disability?*
- *What do you do to help create and promote a climate of trust?*
- *To what extent is the ethos of the organisation welcoming and supportive to learners with disabilities?*

## **Reviewing requests for confidentiality**

- *Do you have a procedure to allow you to review a student's request for confidentiality?*

# Appendix B

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## Skeleton Policies

We have provided skeleton policies below that may assist you in drawing up appropriate documentation for your organisation. Policies are essential to ensure that all staff know what should happen and their role in making it happen. We recognise that these will need associated procedures that explain exactly how you will put these policies into practice.

A policy articulates your vision of what needs to be in place. A procedure identifies how you intend to implement the policy in the best interests of a learner. What actually happens when a learner discloses a disability, for example, and how you pass that information on in a confidential manner? Policies tend to be about 'why and who' whereas procedures tend to be about 'how, what, where and when'. You may therefore decide that some of the information we have suggested below fits better into a procedure. There are no clear dividing lines between the information that goes into a policy and the information that goes into a procedure. Individual organisations will need to make their own decisions as to what is included in each document. It is not possible to produce skeleton procedures as these will vary enormously between different organisations such as a large FE college, a specialist residential college, a sixth form college and an adult education provider.

### Skeleton Disclosure Policy

#### Policy statement

This section should contain the aims and values of the organisation in encouraging students to disclose a disability and making appropriate adjustments to meet requirements. For example, this section could

include the organisation's ethos in terms of a welcoming atmosphere, a climate of trust, visible signs that diversity is valued, an inclusive learning approach, etc

### Information and Communication

This section could include information on, for example: -

- Marketing and publicity materials, in a variety of formats, that encourage disclosure, communicate the support that is available, how to access it etc.
- Information on application and enrolment forms that encourage a student to disclose a disability.
- Information in staff handbooks.
- Information in student handbooks, diaries, student charter etc.
- Prompts at interview that encourage disclosure.
- How information is passed on from the point of disclosure.
- How the organisation ensures ongoing opportunities for disclosure particularly in good time before trips, visits, work experience, examinations etc.
- How you communicate with external referring agencies.

### Roles and responsibilities

This section could include information on, for example: -

- A recognition that all staff may be involved in the process of disclosure and will need to respond in appropriate ways.

- Roles and responsibilities of admissions staff during the application and enrolment process.
- Roles and responsibilities of marketing managers.
- Roles and responsibilities of tutors e.g. during induction, before events such as trips, exams etc.
- Roles and responsibilities of examination officers.
- Roles and responsibilities of staff responsible for work placements, coordinating work experience etc.
- Roles and responsibilities of learning support coordinators or a named coordinator, for example in terms of the interviewing process, assessing requirements and identifying appropriate adjustments, communication with relevant staff, obtaining and using feedback from students etc.
- Roles and responsibilities of front line staff and other support staff etc.
- Roles and responsibilities of teaching staff and support staff such as those in the learning resource centre, firstly in terms of their role when a student discloses, and secondly in receiving and acting on information from the learning support coordinator on the adjustments that are to be made etc.

## Staff development

This section could include information on, for example: -

- What staff development is planned to implement policy and procedure
- What staff development is planned for ongoing development (e.g. induction for new staff, new tutors, disability etiquette etc)

## Monitoring and evaluation

This section could include information on, for example: -

- How the organisation will monitor practice.
- Who will report to whom.
- How monitoring information will be published, and to whom.
- How monitoring information will be used to evaluate and improve practice.
- How learners will be involved in the monitoring and evaluation process.
- How information will feed into existing systems e.g. quality reviews, self assessment reports etc.

## Links with other policies

This section could include information on, for example, how this policy links with other policies and procedures such as: -

- Disability equality policy.
- Inclusive learning policy.
- Equal opportunities policy.
- Admissions policy.
- Marketing policy.

The aim here is to ensure a coherent framework of policies and procedures rather than isolated policies and procedures that have little bearing on one another

## Review date and responsibility

This section should identify who is responsible for reviewing the policy and by what date the review will take place.



## Skeleton Confidentiality Policy

### Policy statement

This section should contain the aims and values of the organisation in regard to students with disabilities and the issues of confidentiality. For example, this section could include the organisation's ethos in terms of respecting and preserving confidentiality, treating disclosure of a disability with sensitivity, enabling a student to 'feel in control' of the information they disclose, transparency and openness in what the information is used for, who sees it etc.

### Information and Communication

This section could include information on, for example: -

- Information in staff handbooks.
- Information in student handbooks, diaries, student charter etc.
- Consent forms, their use, if different forms are used for different disabilities etc.
- Information provided for students in order to obtain meaningful consent, particularly information provided on application and enrolment forms, and information provided during tutorial sessions etc.
- How information will be processed, including use of email etc to ensure requests for confidentiality will be preserved and data will be processed in a secure manner.
- Processes to review requests for complete confidentiality.
- Information provided to students on confidentiality policy e.g. through prospectus, website, student diary, student handbook, student charter etc.
- How the organisation provides the option for disclosure in a confidential setting etc.

### Roles and responsibilities

This section could include information on, for example: -

- Who has overall responsibility for data protection compliance and how this links with MIS.
- Roles and responsibilities of tutors e.g. during induction, before events such as trips, exams etc.
- Roles and responsibilities of learning support coordinators or a named coordinator, for example in coordinating support, assessing requirements and identifying appropriate adjustments, communication with relevant staff, obtaining and using feedback from students etc.
- Roles and responsibilities of front line staff, support staff, teaching staff, medical and welfare staff etc.

### Staff development

This section could include information on, for example: -

- What staff development is planned to implement policy and procedure.
- What staff development is planned for ongoing development (e.g. induction for new staff, new tutors, disability etiquette etc).

### Monitoring and evaluation

This section could include information on, for example: -

- How the organisation will monitor practice.
- Who will report to whom.
- How monitoring information will be published, and to whom.
- How monitoring information will be used to evaluate and improve practice.

- How learners will be involved in the monitoring and evaluation process.
- How information will feed into existing systems eg quality reviews, self assessment reports etc.

## **Links with other policies**

This section could include information on, for example, how this policy links with other policies and procedures such as: -

- Health and safety.
- Counselling.
- Disability equality policy.
- Inclusive learning policy.
- Equal opportunities policy.
- IT/data protection policy.

The aim here is to ensure a coherent framework of policies and procedures rather than isolated policies and procedures that have little bearing on one another.

## **Review date and responsibility**

This section should identify who is responsible for reviewing the policy and by what date the review will take place.

# Appendix C

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## Extracts from the Disability Discrimination Act Part 4 - Code of Practice for providers of Post 16 education and related services

(References are to the Act. For example, s 28R(1) means section 28R(1) of the *Disability Discrimination Act*)

student was disabled, then failure to make an adjustment for a disabled person or student is not discrimination. (s 28S(3)(a)).

### Disclosure and reasonable steps

5.10 If the organisation did not know and could not reasonably have known that the

#### Example 5.10A

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 college about her condition although she had been given the opportunity to do so in private on several occasions including when the field trip was announced. Part of the trip involves walking around the town counting shops and residential housing. During the day, it becomes apparent that she cannot complete the assignment although some last minute adjustments are made. Because it could not have known about the disability in advance, the college is unlikely to have been acting unlawfully.

5.11 The failure to make an adjustment and the lack of knowledge must be connected. (s 28S(3)(b)).

#### Example 5.11A

A man makes a written request to a college and asks for information about courses. He does not tell the college that he has no sight. Although the college produces its prospectus in electronic format, he is sent the print version, which he cannot access. The college's failure to make an adjustment for the enquirer is due to lack of knowledge about his disability. This is likely to be lawful.

5.12 However, in some cases, the knowledge might not be relevant because the responsible body should have made the reasonable adjustment in response to the anticipatory nature of the duty.

### **Example 5.12A**

A man with a visual impairment asks for information about courses at a college. He does not tell the college that he has a visual impairment. He can read type if it is of a reasonable size. He is sent a prospectus for the college, which is printed in very small type that he cannot read. The college does not produce information in any other format or even in reasonably sized type. The college's failure to make an adjustment for the enquirer with the visual impairment is not related to lack of knowledge about his disability, it is due to the college's failure to make anticipatory adjustments for disabled people. This is likely to be unlawful.

5.13 If the disabled person has told someone within the organisation or service about his or her disability, then the responsible body may not be able to claim that it did not know.

### **Example 5.13A**

A student declares her disability on her application form. Once she is enrolled on a course she receives none of the support or adaptations that she requires. The tutor claims she does not know that the student is disabled. However, because the student has disclosed her disability, the organisation cannot claim it does not know about it. The failure to offer support and adaptations is therefore likely to be unlawful.

5.14 If the responsible body might reasonably have known or found out about a person's disability, then it cannot claim that it did not know.

### Example 5.14A

An applicant does not declare his disability on his application form. When he calls up to confirm his attendance at a selection interview he talks to the admissions officer via Typetalk, the telephone service for deaf people. The admissions officer does not ask the applicant if he will need any adaptations to the selection interview and fails to alert the interviewers for the course that the applicant may be deaf. The interviewers do not realise that the applicant is deaf and do not take any steps to ensure that the interview is accessible to him. The responsible body might reasonably have known that the student had a disability. The failure to offer adaptations is, therefore, likely to be unlawful.

5.15 A responsible body needs to be proactive to encourage people to disclose a disability. This might involve asking people to declare their disabilities on application and enrolment forms. It may mean publicising the provision that is made for disabled people, and then providing opportunities for people to tell tutors, teachers or other staff in confidence. It might involve asking students when they apply for examinations whether they need any specific arrangements because of a disability. It means ensuring that the atmosphere and culture are open and welcoming so that disabled people feel safe to disclose a disability. The Department for Education and Skills has issued guidance covering the action responsible bodies might take to find out about a person's disability

### Confidentiality and reasonable steps

6.18 A disabled person has a right to request that the existence or nature of his or her disability be treated as confidential. (s 28T(3) and s 28T(5)). In determining whether it is reasonable to make an adjustment the responsible body must have regard to the extent that making the adjustment is consistent with a disabled person's request for confidentiality. (s 28T(4)).

6.19 In some instances this might mean that reasonable adjustments have to be provided in an alternative way in order to ensure confidentiality.

### Example 6.19A

A student with a visual impairment can only read clearly if he has text enlarged into 16-point type. He is very embarrassed by his disability and has requested strict confidentiality. Normally his tutors would give a visually impaired student large-print handouts at the beginning of each class. However, because he has requested confidentiality, they agree to give him his handouts in advance so that he can look at them before the lesson but does not have to be seen reading them during the class.

6.20 In some cases a confidentiality request might mean that a less satisfactory reasonable adjustment is provided or that no reasonable adjustment can be provided.

### Example 6.20A

A student with AIDS is on a Chemical Engineering course. He does not want other students to know of his condition. His condition means that he sometimes needs to have time off. His tutors have offered to arrange extra time in the laboratory for him after hours to make up for the time he misses. However, he has refused this on grounds of confidentiality. Instead they offer to provide him with extra lecture notes. Although this adjustment is less effective, it is likely to be lawful.

### Terms of agreements

8.11 Any term in an agreement is void (and therefore unenforceable) if its effect is to: (ss 28P and 28X).

- require someone to do something which would be unlawful under the Act;

- exclude or limit the operation of the Act; or
- prevent someone making a claim under the Act.

### Example 8.11A

A college requires a disabled student travelling on a field trip to sign an agreement stating that he does not hold the college responsible for making any adjustments to aspects of the trip because of his disability. This agreement is not legally binding.

8.12 An agreement to settle or compromise a claim brought under the Act is not affected by this rule. (s 28X).

## Links to other legislation and responsibilities

### The Data Protection Act 1998

10.2 The *Data Protection Act 1998* restricts the processing of personal data and 'sensitive' personal data about individuals, and particularly how and whether that information can be passed on to others. The use of sensitive personal data is particularly restricted. Information relating to an individual's disability is classified as sensitive personal data. In ensuring that disabled people and students are not discriminated against, and that reasonable adjustments are made, responsible bodies may need to pass data about disabled students on to members of staff and others including work placement providers. Even if students have not requested confidentiality under the *Disability Discrimination Act*, the use and transfer of information about them (including through job references) is restricted by the *Data Protection Act*. Such processing may often require students' explicit informed consent. In order to ensure that they are not in breach of either law, responsible bodies may need to:

- ask students' permission to pass on information necessary for making reasonable adjustments;
- alert students to the use that will be made of information when asking them to disclose disability on application, enrolment or examination forms; and
- ensure appropriate procedures are in place to keep sensitive and other personal information confidential.

10.3 However, should a student request confidentiality under the *Disability Discrimination Act*, information may not, from that point, be passed on for the purposes of making reasonable adjustments. (s 28T(4)).

## The Health and Safety at Work Act 1974 and related regulations

10.4 Health and safety legislation requires employers and persons concerned with premises to undertake risk assessments and produce a health and safety policy. The risk assessment should list any risks to staff or others, including students and users of services, and what control measures the employer will take to reduce those risks. Control measures may include:

- procedures for lifting people and equipment;
- guidance on visits to students in their homes;
- appropriate training and guidance for staff;
- keeping passageways and means of access and egress clear and hazard-free;
- minimising the risk posed by any machinery or hazardous substances (including any stored medicines);
- procedures for the safe disposal of waste and safe practices in first aid; and
- adequate procedures for monitoring and auditing to ensure that health and safety practices are operating properly.

10.5 The *Disability Discrimination Act 1995* does not require responsible bodies to place employees or others at inappropriate risk. However, in many cases, changes to procedures, the provision of training or the purchasing of equipment may mitigate any risks that arise in relation to disabled people and students. The risk assessment process carried out to comply with health and safety legislation may provide an opportunity to consider adjustments required by the *Disability Discrimination Act*.

The complete code of practice can be obtained from the Disability Rights Commission, (<http://www.drc.gov.uk>).



# Appendix D

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## Reasonable adjustments: data protection and the Disability Discrimination Act 1995

by Paul Jenkinson, Solicitor

### The Disability Discrimination Act 1995 – Part 4

The *Special Educational Needs and Disability Act 2001* (SENDA) has amended Part 4 of the *Disability Discrimination Act 1995* (the DDA), with new rights created for disabled people in education. Providers of education in England, Wales and Scotland (Northern Ireland is not covered by SENDA), are now either subject to these new Part 4 duties or will become subject to the provisions in Part 3. The principle behind SENDA is that disabled people should have the same opportunities as non-disabled people to benefit wherever possible from educational related provisions. The provisions apply to people who are 'disabled' according to the definition contained within the DDA.

A disabled person is someone who has a physical or mental impairment which has a substantial and long-term adverse affect on his/her ability to carry out normal day-to-day activities. A 'substantial adverse effect' is one which is more than minor or trivial, i.e. one that goes beyond the normal differences in ability which may exist among people. A 'long-term' effect of an impairment is one which has lasted or is likely to last for at least 12 months or for the rest of the life of that person. Both physical and clinically recognised mental impairments are covered. In assessing what is a 'normal day-to-day activity', account should be taken of how far it is normal for, and carried out by, most people on a daily or frequent and fairly regular basis. Schedule 1 to the DDA sets out a finite list of such activities.

### Who is responsible?

As a result of the amendments made by SENDA, there is now a responsibility on educational organisations not to discriminate against disabled people. The legal responsibility for ensuring discrimination does not take place rests with the 'responsible body' as defined in SENDA. Responsible bodies are also liable for the actions of their employees, and in some cases, individuals may also be legally liable for their own actions.

Quite clearly therefore, in order to ensure that an organisation does not discriminate against a disabled person, steps may need to be taken in certain cases to find out whether a prospective or existing student is a disabled person, and if so, what adjustments need to be made to ensure that the disabled person is not treated less favourably. In addressing this issue the provisions of the *Data Protection Act 1998* then become relevant.

### The Data Protection Act 1998

The *Data Protection Act 1998* (the Act) requires organisations to process personal data fairly and lawfully and in accordance with principles contained within that Act. It regulates the use of personal data and gives effect in UK law to the European Directive on data protection. Its provisions cover both manual, i.e. paper-based, as well as computerised records.

It is important to remember that the Act applies to almost anyone who processes or stores personal data, and to the subjects of that information.

The Act has its own terminology and in order to understand the Act it is necessary to understand the terminology used.

**'Data'** means information which:

- is processed by equipment operating automatically in response to instructions given for that purpose;
- is recorded with the intention that it should be processed by such equipment;
- is recorded as part (or with the intention that it should form part) of a 'relevant filing system' (i.e. any set of information relating to individuals which is structured either by reference to those individuals (e.g. a name-based filing system) or by reference to criteria relating to individuals (such as enrolment numbers), and in such a way that specific information relating to an individual is readily accessible); or
- forms part of an 'accessible record', which includes a health record or educational record (local education authorities and special schools only).

**'Personal data'** means:

- data which relates to a living individual who can be identified from those data; or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller. This includes any expression of opinion about the individual.

**'Processing'** means:

- obtaining, recording or holding the data or carrying out any operation or set of operations on the data, including organisation, alteration, retrieval, disclosure or general use of that data.

**'Sensitive personal data'** is another specific category of data consisting of information as to:

- racial or ethnic origin;
- political opinions;

- religious beliefs or 'other beliefs of a similar nature';
- membership of a trade union;
- physical or mental health or condition;
- sexual life; or
- the commission or alleged commission of any offence or any proceedings relating to the commission or alleged commission of any offence.

**'Data controller'** means:

- a person (or organisation) who either alone, jointly or in common with other persons determines the purposes for which, and the manner in which, any personal data are, or are to be, processed.

**'Data processor'** means:

- any person other than an employee of the data controller who processes the data on behalf of the data controller.

**'Data subject'** means:

- the person who is the subject of the personal data.

### The data protection principles

Schedule 1 to the Act sets out eight principles governing the processing of personal data. In brief, they say that personal data must be:

- processed fairly and lawfully;
- processed for limited purposes and not in any manner incompatible with those purposes;
- adequate, relevant and not excessive;
- accurate;
- not kept for longer than is necessary;
- processed in line with data subject's rights;
- secure; and
- not transferred to countries that do not protect personal data adequately.

With regards to the first principle above, in particular, data should not be processed unless:

- (a) at least one of the conditions set out in Schedule 2 to the Act is met; and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

### **The relevance of the Act to reasonable adjustments**

In finding out whether a person is disabled and what adjustments may need to be made, the organisation would, in the first instance, either need to ask the individual themselves or consider any data already held, such as details on an application form. These details may provide the organisation with all the information it needs, but more likely further steps will be needed to either assess the individual to find out if they are disabled, or to clarify what adjustments will be most applicable in each particular case. The organisation may wish to have its own doctor/welfare advisors or alternatively external advisors assess the written information in order to provide more informed (medical) advice.

Any attempt to pass that data to advisors will be 'processing' under the Act and information about the individual's physical or mental condition will be sensitive personal data for the purposes of the Act.

It should also be noted that irrespective of data being passed to any advisors, the organisation will itself be processing the data simply by virtue of holding it or using it for any purpose.

To process this data fairly and lawfully, one of the Schedule 2 conditions must be met, but in addition, being sensitive personal data, one of the Schedule 3 conditions must also be complied with.

### **Schedule 2 and 3 conditions**

One of the Schedule 2 conditions that an organisation could rely upon is that the individual has given his or her 'consent' to the

processing. Consent is not always easy to achieve, however, and is not even defined in the Act. Understanding what may amount to consent in any particular case can be aided by referring back to the original European Directive, which defines a data subject's consent as '*any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed*'. Even if consent cannot be obtained, it may be possible for an organisation to rely on one of the other Schedule 2 conditions. For example, that the processing is 'necessary to comply with any legal obligations to which the data controller (i.e. the organisation) is subject'. An organisation may well be able to argue that in order to ensure that an individual is not discriminated against, and so that reasonable adjustments are able to be considered, the data about the individual must be able to be processed, i.e. forwarded to its (medical) advisors for comment.

However as stated above, given that health-related data is sensitive personal data, a Schedule 3 condition must also be complied with. This creates potential problems.

One of the Schedule 3 conditions relating to sensitive personal data is that the individual has given his or her 'explicit consent' to the processing of the data. Again, there is no definition within the Act of what constitutes 'explicit consent'. However, given that it is *explicit* consent, as distinct from the Schedule 2 condition, it suggests that the consent must be absolutely clear and should cover the specific details of the processing, the type of data to be processed, the purposes of the processing, and any special aspects of the processing which may affect that individual.

The problem arises however, that unless such explicit consent is obtained from the individual, there is seemingly no other Schedule 3 condition which an organisation can rely upon to be able to process the health-related data. The only comparable provision in Schedule 3 to the 'legal obligation provision' in Schedule 2 cited above, relates specifically to

legal obligations imposed 'in connection with employment'. This will therefore not apply to the student-organisation relationship.

For day-to-day processing of such data, it is arguable that explicit consent is inherently given by virtue of the student providing that data to the organisation on any application, enrolment or other documentation. However, this will depend on what information is provided by the individual and what information has been given to that student/applicant regarding how, and for what purposes, the data will be used.

Failure to obtain explicit consent means that the relevant data cannot be processed and so cannot be forwarded by the organisation to its advisors. This may then have an impact upon what reasonable adjustments can be made.

### **Confidentiality**

It is also the case that a disabled person has a right to request that the existence or nature of his or her disability is treated as confidential. This provision is contained within sections 28T(3) and (5) of the DDA and amended by SENDA. This express ability to request confidentiality reinforces the possibility that explicit consent may not be able to be obtained to process the relevant data by forwarding it to the appropriate advisors. It is an idiosyncrasy that another Schedule 3 condition refers to situations where processing is '*done by health professionals and is necessary for medical purposes*'. This condition is, of course, of great use to enable the medical advisor to process the data, but does not enable an organisation to actually forward the data to that medical advisor in the first place.

### **So what about reasonable adjustments?**

Where confidentiality has been expressly requested and/or consent cannot be obtained by the organisation to enable the data to be processed, it may mean that reasonable adjustments must be provided in an alternative way in order to ensure confidentiality and/or compliance with the provisions of the DDA. In some cases this may

even mean that a less satisfactory adjustment is provided or that no reasonable adjustment can be provided at all. However, an organisation faced with the situation of not being able to obtain specific medical (or other) advice does still need to consider whether any alternative adjustment can be made.

There may be occasions where an organisation could try to justify any decision not to make adjustments because it was not able to obtain appropriate advice about the matter. However, it is unlikely that the organisation could successfully claim that it did not know, and could not reasonably have known, that the student was disabled in order to justify not making any adjustment. This is simply because it was trying to obtain medical advice in the first place. The organisation, quite clearly, would be on a degree of notice that it had a situation requiring further advice and therefore should at least have considered some form of adjustment(s) even if not the most satisfactory ones.

Each situation will depend upon the facts of the case and there may be a particular circumstance which could justify not taking any lesser steps, for example on health and safety grounds. However, an organisation cannot assume that this is the case and so should at least consider some form of adjustment. For example, where an otherwise excellent student is performing very poorly in written work and the organisation believes the matter should be investigated. If the individual does not consent to the forwarding of any sensitive personal data to the organisation's advisor, the organisation may nonetheless need to consider adjustments on the basis of the evidence it already knows; in this example the individual may be provided with an extra one hour's private tuition by the lecturer each week. More informed advice may have indicated that the individual was in fact hard of hearing or dyslexic and required certain specific adjustments, but even without informed advice, the organisation is on notice from the poor performance, that the student is having problems and may have a disability. Consequently adjustments should at least be

considered pending clarification of the situation if possible.

### **A proactive approach**

Each organisation should be proactive to encourage people to disclose a disability. This might involve asking candidates to declare their disabilities on application and/or enrolment forms. It may also include publicising any provisions that are made for disabled people, and ensuring that the organisation has an open and welcoming environment.

It is advisable for an organisation to inform the individual student/applicant as early as possible in the application/enrolment process what data it will hold about him/her and what processing of that data, including the purposes of the processing, may take place. Appropriate wording on the relevant documents could provide the explicit consent needed for processing to take place.

If an organisation wishes to obtain medical or other advice about an individual then the reasons and benefits of doing so should be fully explained to that individual. If the student then still refuses to give permission to the disclosure of the data, it is sensible for the organisation to write to him/her in more formal terms reiterating the benefits of allowing the disclosure of the data and the purpose for doing so. If at that stage consent is still not obtained, then again it would be wise for an organisation to confirm this refusal in writing and then consider what adjustments can be made in the absence of more expert advice.

It does seem strange that on the one hand in the employment field for example, a Schedule 3 condition other than consent can be relied upon in order to process sensitive data, but that outside of employment the only condition available to process sensitive personal data is explicit consent of the data subject. The disparity may well be as a result of the employment provisions of the DDA having been in force when the Act was drafted. Now that the Part 3, and more particularly the

Part 4 provisions are in force, amendment to the Act may be needed. However, at the present time it would appear that an organisation can only process sensitive personal data relating to the physical and mental health or condition of the student with that individual's explicit consent. Failure to obtain this prevents processing and defeats the purpose of the DDA protection for students.

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# Notes

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