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Equality Law Obligations in Higher Education: reasonable adjustments under the Equality Act 2010 in assessment of students with unseen disabilities

ABSTRACT

8% of UK students have an 'unseen disability': a specific learning difficulty, autistic spectrum condition, or mental ill health. A department with 1000 students has, on average, 80 students with such unseen disabilities. These students have a variety of potential sources of legal redress if they consider a university has failed properly to accommodate their disability. The most plausible is a claim under the Equality Act 2010. We have experienced a lack of clarity in understanding the nature and extent of those Equality Act entitlements, and the corresponding obligations that fall upon universities, and their staff. These confusions occur in many contexts, but the one that is most important to students is their entitlements where assessments are concerned. We set out to explain the relevant law, and to consider how it applies to some, perhaps typical, unseen disabilities in the context of a range of approaches taken by universities in assessing their students. Our principal and important conclusion is that there is no 'quick fix' approach according to which someone may say that they are Equality Act compliant. However, there are several considerations which will increase (or decrease) the likelihood of compliance. In brief, these constitute effective communication; procedures that secure individual decisions, rather than blanket policies or approaches; and what amounts to no more than good inclusive educational practice for all students.

Key words: Education law; discrimination law; legal education

INTRODUCTION

Let us imagine Dr James, an ordinary academic member of staff, in an ordinary department, in an ordinary UK university in the 21st century. Let's be sufficiently generous to that group

of people and also imagine that she is sympathetic to equality agendas.[1] One of the dozens of emails she receives each day reads something like this:

> Aidan has provided the Disability Support Unit with evidence that he has a Specific Learning Difficulty. Aidan's Specific Learning Difficulty means he has difficulty with visual processing and in the production of accurate written work. His reading comprehension speed is slow. Aidan is likely to benefit from copies of PowerPoint slides and lecture notes being made available in advance (if not already available on the VLE); reading lists which distinguish between core and secondary reading and clearly state if students are required to read a text in its entirety; coursework hand-in dates being spread out; academic staff taking into account the potential for his Specific Learning Difficulty to have an impact on his studies when considering the form and content of assessments. Aidan will be permitted 25% extra time in all formal examinations.

What is Dr James supposed to do about this email?

Of course, the answer is context-dependent. If Aidan's course is one which involves research and analysis of data presented visually; or where written accuracy is important; or significant amounts of reading, including skimming, scanning are required; or where independent research is expected before a lecture takes place; or where ability to complete tasks in a tight timeframe is essential; or a host of other things that are recognisable and undisputed qualities of graduates, according to QAA benchmarks, then Dr James, however sympathetic she may

[1] An admittedly small scale study, reported here, suggests that the majority of academics are indeed so supportive: L Kendall, 'Supporting students with disabilities within a UK university: lecturer perspectives' *Innovations in Education and Teaching International* (2017) http://dx.doi.org/10.1080/14703297.2017.1299630; as does the larger scale study reported by M Smith, 'Participants' attitudes to inclusive teaching practice at a UK university: Will staff "resistance" hinder implementation?' (2010) 16 *Tertiary Education and Management* 211.

be to equality agendas, may baulk a little at the implication of the email that Aidan be treated differently to others in his cohort through the adjustments she is implicitly being asked to make. All graduates in my discipline, she might think, need to demonstrate these skills. What if my friend in industry or a profession relies on my assessment in deciding whether to give one of our graduates a job? It is not reasonable, therefore, she might feel, to expect Aidan to be treated any differently from anyone else.[2]

On the other hand, if the courses on which Dr James teaches do not need to assess ability to engage with written materials, and complete successive assessments, within a particular timeframe, Dr James might feel that it would be reasonable to ensure that neither Aidan nor indeed anyone else on the course is inadvertently expected to do so. Timeframes within which such assessments must be completed are there for practical and administrative reasons; Dr James and her colleagues need to complete the marking and processes the marks in time for departmental examination boards to consider them. There is no need to make assessment timeframes tighter than those practical considerations require, especially if someone like Aidan were to be disadvantaged by so doing. Or, to the extent that the course assessments involve processing of written material, Dr James may understand that 25% extra time in assessments is a reasonable way to make sure that Aidan's abilities and competencies *in the subject matter of the course*, as opposed to his reading abilities, are what is being tested. There might be some things about which Dr James is unsure what would be reasonable. For instance, Dr James may be sure that her course is not testing the ability of students to follow lectures without being able to see and reflect on the associated PowerPoint slides before each lecture. If that is so, is it reasonable to expect her to adjust her normal practice, and ensure

[2] Similar concerns are reported on in Smith, above n 1.

that her PowerPoints are available in advance of each lecture? And if it is, must that be four days before each lecture, or would 24 hours do?

OUR RESEARCH AGENDA

The tensions between the approach of the imagined university's Disability Support Unit, the expectations of Aidan and Dr James, and the legal obligations of their university, particularly under the Equality Act 2010, encapsulate the primary motivation behind the project on which we report in this article. We believe that the legal position is currently misunderstood by university staff and students alike.[3] In reaching this view, we are drawing on our experiences working in Higher Education institutions: in the case of Cameron, 17 years working in Higher Education, 12 of which researching and teaching specific learning difficulties, in an English language teaching unit and academic department in one pre-92 and one post-92 university in the North of England; Coleman's 22 years at every level of the disabled students support sector in England, including 6 years as the Head of a Disability and Dyslexia Support Service in a pre-92 university; and Hervey's 27 years as a member of academic staff and external examiner with a research agenda in equality law in pre-92 and post-92 universities in the North and Midlands of England.[4] We are also drawing on the results of a small pilot

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[4] Although the government has gone some way to redressing this (see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/587221/Inclusive_Teaching_and_Learning_in_Higher_Education_as_a_route_to-excellence.pdf), this lack of understanding is compounded by the available literature. For instance, some discussions of adjustments under the EqA in this context (such as O Konur, 'Teaching Disabled Students in Higher Education' 11 *Teaching in Higher Education* (2006) 351-363; Smith above n 1) although discussing general concerns about implications of EqA compliance for academic standards, fail to even mention "competence standards" (see below), a key element of the EqA obligations.

study, undertaken by Rahman in summer 2016.[5] The pilot involved 18 semi-structured interviews with people within a Northern pre-92 (Russell Group) university who either have insights as someone with particular professional expertise or who self identify as a disabled person, with mental ill-health, autism spectrum conditions, and/or specific learning difficulties, or both. Participants were approached by email or word of mouth, using a snowballing effect, beginning from Cameron's and Coleman's networks. The data was anonymised and analysed to create fictional scenarios, which encapsulated the key themes arising from the experiences of those interviewed.[6] Our impression, confirmed in the literature,[7] is that the misunderstandings that pervade universities concerning the legal position of students with these kinds of disabilities may be leading to pressures and emotive responses. Consequently, the ensuing policies and practice lack rigour. .

We should begin by being explicit about our positions and therefore the assumptions which inform our research agenda. All of us are positive about equality in higher education. We each have expertise in the field of equal treatment of people with disabilities: Cameron as Senior Lecturer in Education with a specialism in SpLDs and ASCs, and former Academic Director of a specialist specific learning difficulties tutorial service; Hervey as a Professor of

[5] This project was cleared by the University of Sheffield Research Ethics Process, Application 009619, June 2016. We are grateful for the support of the University of Sheffield's SURE programme: https://www.sheffield.ac.uk/sure.

[6] The fictional scenarios were the basis of Rahman's final year UG dissertation, entitled 'Does the Equality Act 2010 and the UK legal system sufficiently accommodate the needs of students with unseen disabilities in higher education?'. We draw on Rahman's scenarios *indirectly* to inform our analysis in this article.

[7] Kendall, above n 1, found academic staff 'feeling overwhelmed, under pressure and fearful of being accused of discrimination' and that 'the issue of reasonable adjustments was an emotive area for the participants [academic staff in a northern English university], associated with doubt and fear regarding what they needed to do and how they could do it.', at p 9. See also S Riddell and E Weedon, 'Disabled students in higher education: discourses of disability and the negotiation of identity' 63 *International Journal of Educational Research* (2014) 38-46.

Law with expertise in equality law; Rahman as a student intern on the project; Rostant as an Employment Judge; and Coleman as Head of a Disability Support Service. We set out to understand and explain the Equality Act 2010's obligations on reasonable adjustments for students with what are known as 'unseen disabilities', and the implications for university policy and practice, and thus for student experience. In so doing, we consider some broader legal and theoretical contexts, in particular the legal relationships between students and universities,[8] and understandings of disability in contemporary UK society, including the narratives of human rights activism.

By 'unseen disabilities', we mean mental health conditions, autism spectrum disorders, certain long term physical illnesses, and specific learning difficulties (SpLDs, including dyslexia, ADHD, dyspraxia)). This project focuses on assessments, as the area of academic life of perhaps the utmost concern to students. The effects of university assessments on people with unseen disabilities are difficult to measure, experienced differently by different individuals, and are therefore easily open to dispute.

STUDENTS WITH 'UNSEEN DISABILITIES'

As higher education in the UK metamorphoses through the current era of rising student fees, global marketisation, and ever more attention to metricised 'success' in both teaching and

[8] For a detailed discussion, see N Harris, 'Students, Mental Health and Citizenship' 24 *Legal Studies* (2004) 349-385.

research,[9] it is accompanied by subtle and not-so-subtle shifts in the make-up of the student body, and the proportion of the student body comprising disabled students.[10]

While there was a small rise in overall first-year student numbers between 2013 and 2016, there was a notably larger rise in the numbers of disabled students, both in absolute terms and as a proportion of the total.[11] Of the body of disabled students (enrolled in the first year of their course), those diagnosed with specific learning difficulties (SpLDs, including dyslexia, ADHD, dyspraxia) continue to make up the largest percentage (just under 50% of disabled students and about 5% of the entire student body). Over the past three academic years, the proportion of the disabled student body made up by students with SpLDs has dropped slightly, whilst the proportion of students diagnosed with mental health conditions and with autism spectrum conditions (ASCs) has grown. This pattern may be connected to the broader public familiarity with and acceptance of ASCs and mental health conditions; that is, there has been a period of catch-up for these two populations in comparison to public familiarity with SpLDs like dyslexia. It may also be connected to the shifting criteria for particular diagnoses governed by the American Diagnostic and Statistical Manual of Mental

[9] See, eg S Collini, *What are Universities For?* (Harmondsworth: Penguin, 2012); L Back, *Academic Diary* (London: Goldsmiths Press, 2016); S Collini, *Speaking of Universities* (Verso, 2017); F Furedi, *What's Happened to the University?* (Abingdon: Routledge, 2017).

[10] While in employment contexts, the preferred term is 'person with a disability', certainly in the UK, in the context of Higher Education, 'disabled students' is preferred.

[11] See the HESA data available from https://www.hesa.ac.uk/data-and-analysis/students/overviews?keyword=All&breakdown%5B%5D=581&year=620 (last visited 14 December 2017). HEFCE data from 2013/14 shows that 10% of all students in the UK have disclosed a disability, although in many HE providers these disclosure rates sometimes are close to 20%. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/587221/Inclusive_Teaching_and_Learning_in_Higher_Education_as_a_route_to-excellence.pdf (last visited 14 December 2017).

Disorders.[12] Overall, in 2015/16, students labelled with SpLDs, ASCs, or mental health conditions made up 65% of disabled students and just under 8% of the whole student body (up on just under 7% in 2013/14), although fewer students appear to be applying for Disabled Students' Allowances (DSA) than these figures suggest.[13]

On average, then, for each group of 50 students, there will be at least 4 students who experience SpLDs, ASCs, or mental health conditions. A university department with 1000 students has, on average, 80 students who have declared unseen disabilities, and probably more if we add in students with certain invisible long-term physical conditions such as epilepsy or Crohn's Disease. There may also be students who experience characteristics of SpLDs, ASCs or mental health conditions, but whose conditions are either undiagnosed or undeclared.[14] This is not a small issue.

Students with SpLDs, ASCs, and mental health conditions can experience certain shared challenges to educational participation; including difficulties with organisation of study and

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[12] American Psychiatric Association (APA), *Diagnostic and Statistical Manual of Mental Disorders*. 5th ed. (Arlington, VA: American Psychiatric Publishing, 2013).

[13] See Table C - Percentage of UK domiciled students in receipt of Disabled Students' Allowance by location of HE provider and academic year 2000/01 - 2016/17: https://www.hesa.ac.uk/news/01-02-2018/widening-participation-summary which shows 6.6% of full time first degree students in receipt of DSA 16/17, compared to 1.5% in 2000/01.

[14] For a discussion of the complexities in over and under-representation of women and girls, and particular ethnic groups in particular subcategories of Special Educational Need, see, e.g., G Lindsay, S Pather, and S Starand, *Special Educational Needs and Ethnicity: Issues of Over- and Under-Representation* Research Report No. 757 (2006) Department for Education and Skills, Centre for Educational Development, Appraisal and Research Institute of Education, University of Warwick ISBN 1 84478 746 X available at: https://www.naldic.org.uk/Resources/NALDIC/Research%20and%20Information/Documents/RR757.pdf.

of life,[15] difficulties in developing effective learning or participation strategies in the higher education context,[16] difficulties with some forms of assessment,[17] difficulties meeting expectations of written or spoken English, which impacts upon essay writing skills, or participation in seminars and other spaces where spoken participation is expected,[18] difficulties with particular aspects of cognition, such as working memory,[19] experience of high levels of stress and anxiety and/or lack of confidence in certain environments,[20] and

[15] T Mortimore and W R Crozier, 'Dyslexia and Difficulties with Study Skills in Higher Education' (2006) 31 *Studies in Higher Education* 235; V Hees, T Moyson and H Roeyers, 'Higher education experiences of students with autism spectrum disorder: challenges, benefits and support needs' (2015) 45 *Journal of Autism and Developmental Disorders* 1673.

[16] D Jansen, K Petry, E Ceulemans, S van der Oord, I Noens and D Baeyens, 'Functioning and participation problems of students with ASD in higher education: which reasonable accommodations are effective?', (2017) 32 *European Journal of Special Needs Education* 71; E Murphy, 'Responding to the needs of students with mental health difficulties in higher education: an Irish perspective, (2017) 32 *European Journal of Special Needs Education* 110; M Madriaga and D Goodley, 'Moving beyond the minimum: Socially just pedagogies and Asperger syndrome in UK higher education' (2009) 14 *International Journal of Inclusive Education* 115; L Hartrey, S Denieffe, J S G Wells, 'A systematic review of barriers and supports to the participation of students with mental health difficulties in higher education' (2017) 6 *Mental Health and Prevention* 26; Mortimore and Crozier, above n 15.

[17] D Jansen, K Petry, E Ceulemans, S van der Oord, I Noens and D Baeyens, 'Functioning and participation problems of students with ADHD in higher education: which reasonable accommodations are effective?' (2017) 32 *European Journal of Special Needs Education* 35-53.

[18] H E Cameron, 'Beyond cognitive deficit: the everyday lived experience of dyslexic students at university', (2016) 31 *Disability & Society* 322-329; C Collinson and C Penketh. ' "Sit in the Corner and Don't Eat All the Crayons", Postgraduates with Dyslexia and the Dominant 'Lexic' Discourse' (2010) 25 *Disability & Society* 7.

[19] R I Nicolson and A J Fawcett. *Dyslexia, Learning, and the Brain* (Massachusetts: Massachusetts Institute of Technology Press, 2008).

[20] F Knott and A Taylor, 'Life at university with Asperger syndrome: a comparison of student and staff perspectives', (2014) 18 *International Journal of Inclusive Education* 411; M Madriaga, 'Enduring Disablism: Students with Dyslexia and Their Pathways into UK Higher Education and beyond' (2007) 22 *Disability & Society* 399; J M Carroll and J E Iles, 'An Assessment of Anxiety Levels in Dyslexic Students in Higher Education' (2006) 76 *British Journal of Educational Psychology* 651; T Glennon, 'The stress of the university

concerns about what the label means and how it will be viewed by peers and tutors.[21] Students with these 'unseen disabilities' may experience one, two, or more of these difficulties, as well as difficulties specific to their 'condition'. They may also experience difficulties inconsistently. It is common for students to experience certain environments as particularly disabling, and others as less so,[22] and it is also expected that students' experience of disability may fluctuate for a number of different reasons. The accuracy of diagnoses of dyslexia, for sub-types of ASCs, and for some mental health conditions have been put into

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experience for students with Asperger syndrome' (2001) 17 *Work: A Journal of Prevention, Assessment and Rehabilitation* 183.

[21] H Cameron and T Billington, ' "Just Deal with It": Neoliberalism in Dyslexic Students' Talk about Dyslexia and Learning at University' (2017) 42 *Studies in Higher Education* 1358; H Cameron and T Billington, 'The Discursive Construction of Dyslexia by Students in Higher Education as a Moral and Intellectual Good' (2015) 30 *Disability & Society* 1225.

[22] The concept that the location of disability is the environment, and not the person, is well-known in disability studies. It has entered into the law through the UN Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entry into force 3 May 2008) 2515 UNTS 3, which adopts a 'social model' of disability. The 'social model' points to the interaction between impairment and barriers erected by society which create the disability. For instance, a person with a mobility impairment is disabled by some aspect of society (say, the built environment) which makes it difficult or impossible to mobilise without the ability to walk. An early use of the term 'social model' is found in P Hunt, *Stigma: The Experience of Disability*, (London, Geoffrey Chapman, 1966). For further discussion, see G Quinn, M. McDonagh and C Kimber, (eds), *Disability Discrimination Law in the US, Australia and Canada* (Dublin: Oak Tree Press 1993); M Oliver, *Understanding Disability: From Theory to Practice* (Basingstoke: Palgrave Macmillan 1996 and 2009); M A Stein, 'Disability Human Rights' (2007) 95 *California Law Review* 75; J L Roberts, 'Healthism and the Law of Employment Discrimination' (2014) 99 *Iowa Law Review* 571, pp 584-587; I Solanke, 'Stigma: A limiting principle allowing multiple-consciousness in anti-discrimination law' in D Schiek and V Chege, (eds), *European Union Non-Discrimination Law* (Abingdon: Routledge, 2009); C Heißl and G Boot, 'The application of the EU Framework for Disability Discrimination in 18 European countries' (2013) 4 *European Labour Law Journal* 119; L Waddington, ' "Not disabled enough": How European Courts filter non-discrimination claims through a narrow view of disability' (2015) *European Journal of Human Rights* 11; C O'Brien, Union citizenship and disability: restricted access to equality rights and the attitudinal model of disability' in D Kochenov, ed, *Citizenship and Federalism in Europe: The Role of Rights* (Cambridge: CUP, 2016).

question by various academics in related fields.[23] Moreover, although the use of certain labels is changing, SpLDs, ASCs and mental health conditions are often described as varying in degree and type. It is possible for a student to receive a diagnosis of 'borderline', 'mild' or 'severe' dyslexia; to experience 'mild' depression, and to be diagnosed as on a particular point on the autistic 'spectrum'. Here, the 'spectrum' should not be understood as linear, but multi-dimensional, and context-bound.[24] In practice, this means that two individuals who have been given the same broad diagnosis may experience very different educational challenges which differ in type, degree of difficulty, and which may depend upon the environmental barriers present in a particular context.[25] These differences have implications for legal redress. Identical diagnoses would not necessarily lead to the same outcome in litigation. When it comes to what duties apply under the Equality Act, what may be 'reasonable' for one student given a particular diagnosis may not be so for another given the same diagnosis. Our analysis below, having explained why other types of legal claims are likely to be less useful, charts a course through the complex obligations of the Equality Act, taking account of duties to the disabled student, as well as the position of universities and the staff who work within them, and the wider student body.

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[23] For SpLDs, see, for example, J G Elliott and E Grigorenko, 'The end of dyslexia?' (2014) 27 *The Psychologist* 576; for autism spectrum conditions, see, for example, E Schopler, 'Are autism and Asperger syndrome (AS) different labels or different disabilities?' (1996) 26 *Journal of Autism and Developmental Disorders* 109; and for mental health conditions, see, for example, A V Horwitz and J C Wakefield, *The loss of sadness: how psychiatry transformed normal sorrow into depressive disorder* (New York: Oxford University Press, 2007).

[24] See L Beardon, *Autism and Asperger Syndrome in Adults* (Sheldon Press, 2017).

[25] For example, a recent review of the literature on students with ADHD concluded that effective support for such students takes into account characteristics of the individual student, and not only of the environment, see Jansen, et al above n 11.

Evidence suggests that it is likely that current provision of reasonable adjustments for students with unseen disabilities is inconsistent. Other than a fairly uniform provision of 25% extra time in exams for many students with unseen disabilities, different universities approach the provision of reasonable adjustments differently, and there are also differences between and within departments within the same university.[26] For instance, some universities or departments employ a sticker-system to highlight assessed work submitted by disabled students, and others do not.

Universities also differ in the model for support worker services they adopt: some universities have in-house support worker services, whilst others outsource this support to agencies; some offer financial support for diagnostic assessment, others do not.

Some universities are more willing to 'underwrite' support for students who are in the process of applying for Disabled Students' Allowances (DSA), while others will wait until they receive the DSA Needs Assessment report (which can take up to 14 weeks)[27] before putting support in place. Recent cuts and other changes to DSA[28] have also increased the

[26] For examples, see H Cameron and K Nunkoosing, 'Lecturer perspectives on dyslexia and dyslexic students within one faculty at one university in England' (2012) 17 *Teaching in Higher Education* 341-352; Murphy, above n 16; Kendall, above n 1; W Hall, 'Supporting students with disabilities in higher education, in A Campbell and L. Norton (eds), *Learning, teaching and assessing in higher education: Developing reflective practice* (Exeter: Learning Matters, 2007), pp 130-139.

[27] https://dsa-qag.org.uk/students/faqs (last visited 14 December 2017).

[28] Disabled Students' Allowances: Written statement - HCWS347, 2 December 2015 http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2015-12-02/HCWS347/ (last visited 14 December 2017); Department for Business Innovation and Skills, *Government Response: Consultation on Targeting Funding for Disabled Students in Higher Education from 2016/17 onwards*, December 2015 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/481399/bis-15-657-targeting-funding-for-disabled_students-in-higher-education-government-response.pdf (last visited 14 December 2017). For discussion of the effects of funding reductions, see Riddell and Weedon, above n 7.

inconsistency of provision for disabled students across the sector. For instance, DSA is no longer available to fund 'non-specialist' support workers such as note-takers or personal assistants – leading to some universities arranging alternative provision while others continue to fund such support. Overall, the changes to DSA have increased the onus on universities to ensure equal access for disabled students.[29]

All of these changes raise the question of whether greater care is needed when considering the adjustments required during exams and other university assessments in order for universities to fulfil their legal obligations. And – along with the overall changes to higher education, including increased 'marketisation', conceptualising the relationship between university and student as an 'investment', an increasing language of 'service' culture – all of these changes affect the likelihood of litigation[30] to enforce legal entitlements.

No university *wants* to enter into litigation, particularly not litigation involving its own students. Every university needs to balance litigation risk against other matters, including reputational damage.[31] Decisions about equality policies and practices are made not only on legal grounds. They also express the moral duties universities understand themselves as

[29] The changes to DSA are explicitly recognised as a driver for improvements in the approach to the duty to make reasonable adjustments by the Department of Education in its guidance document "inclusive Teaching and Learning in Higher Education as a route to Excellence" (Disabled Students Leadership Group, DoE, January 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/587221/Inclusive_Teaching_and_Learning_in_Higher_Education_as_a_route_to-excellence.pdf (last visited 14 December 2017).

[30] There is some evidence, albeit anecdotal at present, of a growing willingness by students to litigate against universities. See for example https://www.buzzfeed.com/rosebuchanan/heres-why-more-and-more-students-are-suing-their?utm_term=.wcQ721NVP#.htlGmvN0b and http://www.telegraph.co.uk/education/2017/08/07/students-sue-oxford-discrimination-amid-surge-mental-health/ (both last visited 14 December 2017).

[31] For further discussion of managing litigation risk by universities see Harris, above n 8.

holding towards their student bodies,[32] as well as being driven by external factors such as government policy and the requirements of professional bodies.

But the law matters. In offering this analysis, we are seeking to enhance understanding of the legal position of students with unseen disabilities when it comes to their assessments. Our analysis is aimed at university senior management teams and their advisors, ordinary academic staff, and students. At the moment, we think lack of rigour in approach (and even downright muddle) currently pervades both understanding and practice.

DISABILITY DISCRIMINATION IN HIGHER EDUCATION: THE LEGAL POSITION

What then is the source of legal redress for a student with an unseen disability who considers that her or his university has failed to take into account the disability in designing or administering assessments? There are four possible causes of action: a claim under s 7 of the Human Rights Act 1998; a claim in contract; a negligence claim; or a claim under the Equality Act. In fact, as far as we have been able to determine, there has so far been almost no litigation of any type concerning unseen disabilities and university assessments. That is probably because students who seek to resolve a dispute that has not been resolved by the university's internal complaints processes tend to use the Office of the Independent Adjudicator (OIA).

The OIA is the ombudsman service for university students in the UK. It reviews student complaints against individual higher education providers. The recommendations of the OIA

[32] See Smith, above n 1.

are not legally enforceable, although they carry a moral authority and the risk of reputational damage if ignored. Part 2 of the Higher Education Act 2004 requires that all universities in England must join this scheme, which is independent and free for students. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 drastically reduced the availability of legal aid, and even if legal representation is not employed, court fees must be paid and the procedure is drawn out and demanding.[33] The cost-free nature of the OIA scheme (to students), coupled with its relative speed and informality, makes it an attractive route for remedy compared to the courts.

But bringing a complaint to the OIA does not preclude litigation.[34] Students with no income or low income, with less than £3000 savings, would get remission on County Court fees.[35] If the OIA does not give the desired outcome, and the stakes are ever higher in the context of changes to contemporary Higher Education (seen, for instance, as an 'investment' of 3 x £9000 fees to be lost if the student does not graduate), then court proceedings look more appealing. In what follows, we consider the likelihood of the success of the four possible routes to legal redress outlined above. As the Equality Act route is by far the most likely, we consider that in detail in the remainder of the article.

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[33] As Mummery LJ put it, in *Maxwell* [2011] EWCA 1236, para 7, 'Litigation in the courts against Higher Education Institutions … is not, except in very special circumstances, a course that anyone fortunate enough to be accepted for a course of higher education should be encouraged to take up. Most people would agree it is not in the interests of students … to engage in a stressful and expensive activity like litigation …'.

[34] Indeed under s 118 (2) EqA, the time limit for bringing a claim to the County Court is extended from 6 to 9 months if a complaint is referred to the OIA within 6 months of the act that is being the subject of the complaint. Time can also be extended to 8 weeks after the conclusion of Alternative Dispute Resolution proceedings (s 140AA EqA 2010).

[35] Under The Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015 2015 No. 576 (L. 7).

The Human Rights Act 1998 (HRA) gives effects to the rights guaranteed by the European Convention on Human Rights (the Convention). It places an obligation upon public authorities to act compatibly with the Convention[36] and an obligation of consistent interpretation upon courts.[37] This obligation of consistent interpretation[38] applies also to other human rights instruments guaranteeing the right to education of which the UK is a signatory.[39] Universities are public authorities for the purposes of the HRA.[40] Section 7 of the HRA permits the bringing of proceedings against a public authority for breach of the obligation to act compatibly with the Convention. The Convention includes a right to education.[41] The right is "not to be denied" an education. That right must be secured without discrimination.[42] Conceivably, a student who considers that insufficient accommodation for

[36] Section 6.

[37] Section 3.

[38] *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116 (CA); *Ghaidan v Mendoza* [2004] 3 WLR 113 (HL); *R v Gul* [2013] UKSC 64; see M Waibel, 'Principles of Treaty Interpretation: Developed for and applied by national courts' in H Aust and G Nolte, eds, *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016).

[39] The Universal Declaration of Human Rights, Article 26; International Covenant for Economic, Social and Cultural Rights, Article 13; Convention to Eliminate Discrimination Against Women, Article 10; Convention on the Rights of the Child, Article 28-30 (though only for those few students under the age of 18); Convention on Rights of Persons with Disabilities, Article 24; European Social Charter, Article 17; EU Charter of Fundamental Rights, Article 14. The UK must also comply with the EU CFR when implementing EU law, see Case C-167/10 *Fransson* ECLI:EU:C:2013:280. For discussion of the EU CFR's right to education, see, eg, G Gori, 'Article 14' in S Peers et al, eds, *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014); C Wallace and J Shaw, 'Education, Multiculturalism and the Charter', in T Hervey and J Kenner, eds, *Economic and Social Rights Under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart 2003).

[40] *R (Douglas)* v *North Tyneside Metropolitan Borough Council* [2003] All ER (D) 375.

[41] Article 2 of Protocol 1 in Pt II HRA.

[42] Article 14.

her disability had been made in the manner in which her degree is being assessed, may assert that her right to an education is being breached in a discriminatory manner. A successful claim of this nature could result in injunctive relief or damages or both.[43] However, the cases so far pursued in the UK courts under Article 2 of Protocol 1 of the ECHR and Article 14 ECHR have concerned only exclusion from education.[44] Moreover, the judgments have adopted a restrictive view of the Convention right, regarding it as a weak right requiring evidence of a systemic failure of the national educational system denying access of an individual to a minimum level of education within it. It is difficult, therefore, in the light of the approach adopted by the UK courts, to imagine that a student is better equipped to pursue a successful claim under the Human Rights Act than she would be in seeking to rely upon the provisions of the Equality Act.

A second basis for litigation may be the common law. It is now established that a student's relationship with a university is contractual in nature, albeit with a public law element.[45] It follows that breaches of express or implied terms of that contract on the part of the university may give rise to litigation and, indeed, such claims have been brought and have succeeded.[46]

Furthermore, claims in tort, where a university's actions in its role as a provider of education gives rise to reasonably foreseeable harm to a student, are also possible. They depend upon the now well established principle that a duty of care exists on the part of education

[43] Section 8 HRA.

[44] *Simpson* v *United Kingdom* [1989] 64 DR 188, *Ali* v *Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, [2006] 2 AC 363 and *A* v *Essex County Council* [2010] UKSC 33, [2010] WLR (D) 184.

[45] *Clark v University of Lincolnshire and Humberside* [2000] 3 All ER 752.

[46] For example, *Buckingham et al* v *Ryecotewood College*, Warwick Crown Court, 28 February 2003 (unreported) cited in Harris, above n 8.

professionals to their students (and, presumably, vicarious liability on the part of their employers).[47]

Both of these possibilities are discussed at length by Harris.[48] In the context of the issues on which we focus in this article, however, neither seems the most likely way for a student to litigate where a university has failed to make an appropriate adjustment to a method of assessment. It is difficult to imagine an express contractual term binding the university to take steps beyond those guaranteed by the Equality Act. An implied term to that effect is even more unlikely. As to a claim in negligence (for example), as Harris points out with some force, such claims suffer from the need to show that the education professional has failed to act 'in a way in which reasonably competent teacher…would have acted'.[49] The requirement of reasonable foreseeability is also a difficulty here. It would have to be shown that it was reasonably foreseeable that a particular method of assessment would cause the precise damage claimed to the student in question. That might be particularly difficult if the academic was unaware of the existence of the disability or the way in which it impacted on that student's ability to carry out certain tasks. Again, it is difficult to see in what way our putative student with a disability would be better placed to pursue her claim by this route, especially because, as we will see, the Equality Act duties apply whether a disability is declared or not.

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[47] *Phelps* v *London Borough of Hillingdon* [2000] 3 WLR 776, as recently applied in *Siddiqui* v *Chancellor, Masters & Scholars of the University of Oxford* [2018] EWHC 184 (QB).

[48] Harris, above n 8.

[49] *Bolam* v *Friern Barnett Hospital Management Committee* [1957] 1WLR as applied in *Liennerd* v *Slough Borough Council* [2002] All ER (D) 239.

Of the four causes of action above, the Equality Act 2010 is by far the most realistic source of justiciable legal rights for students with disabilities seeking adjustments to assessments.

The Equality Act 2010 (EqA) outlaws discrimination against students with a disability[50] by universities, and any other institutions within the higher and further education sector, in the 'arrangements it makes for deciding upon whom to confer a qualification'.[51] Section 91(9) places upon those bodies a positive duty to make reasonable adjustments. To put it plainly, if a student with a disability is assessed in order to determine whether they are allowed to progress to a later part of their course of study or to decide whether they are awarded a degree and if so of what class, the relevant institution must make 'adjustments' to the assessment process – but, as we will explain below, only those 'adjustments' which are 'reasonable'. Failure so to do would render the institution liable to an action in damages in the civil courts,[52] and would expose the institution to the potential for reputational damage.

What is 'disability'?

The Equality Act 2010 defines the protected characteristic of "disability". There is no legal duty upon a university to make adjustments for students are not disabled within the meaning of the Act. Section 6 adopts a "medical model" to define disability. This model seeks to identify the extent to which a mental or physical "impairment" limits the student's ability to carry out day to day activities. In other words, it is the effect of impairment upon function that creates the disability. The medical model stands in contrast to the "social model" of

[50] Defined in s 6 (see below).

[51] S 91(3)(a) and (10).

[52] S 114. There is also scope for an EqA claim to form part of a judicial review of a decision of a university.

disability adopted by a number of instruments but most notably the United Nations Convention on the Rights of People with Disabilities (UNCRPD).[53]

This article does not seek to critique the choice of a medical model by the framers of the Equality Act and its predecessor legislation, the Disability Discrimination Act 1995.[54] There is a great deal in the literature already on this topic.[55] Nor is there any scope for an argument that EU law requires that the social model, particularly as enshrined in the UNCRPD[56],

[53] UNCRPD (adopted 13 December 2006, entry into force 3 May 2008) 2515 UNTS 3. The UNCRPD is not itself directly enforceable in UK law, see *R (on the application of SG and others (previously JS and others))* v *Secretary of State for Work and Pensions* [2015] UKSC 16, although note the dissenting opinions of Hale and Kerr (in the minority).

[54] On the history of the DDA, see B Doyle, 'Enabling Legislation or Dissembling Law? The Disability Discrimination Act 1995' (1997) 60 *Modern Law Review* 64.

[55] An early use of the term 'social model' is found in P Hunt, *Stigma: The Experience of Disability*, (London, Geoffrey Chapman, 1966). For further discussion, see M Oliver, *Understanding Disability: From Theory to Practice* (Basingstoke: Palgrave Macmillan 1996 and 2009); M A Stein, 'Disability Human Rights' (2007) 95(1) *California Law Review* 75; I Solanke, 'Stigma: A limiting principle allowing multiple-consciousness in anti-discrimination law' in D Schiek and V Chege, (eds), *European Union Non-Discrimination Law* (Abingdon: Routledge, 2009); A Lawson and D Schiek, eds, *European Union Non-Discrimination Law and Intersectionality* (Ashgate, 2011); M Oliver, 'Defining Impairment and Disability: Issues at stake' in E Emens and M Stein, (eds) *Disability and Equality Law* (Ashgate 2013); C Heißl and G Boot, 'The application of the EU Framework for Disability Discrimination in 18 European countries' (2013) 4 *European Labour Law Journal* 119; J L Roberts, 'Healthism and the Law of Employment Discrimination' (2014) 99 *Iowa Law Review* 571, 584-587; L Waddington, ' "Not disabled enough": How European Courts filter non-discrimination claims through a narrow view of disability' (2015) *European Journal of Human Rights* 11; L Waddington, 'Saying All the Right Things and Still Getting It Wrong: The Court of Justice's Definiton of Disability and Non-Discrimination Law' 22 *Maastricht Journal of European and Comparative Law* (2015) 576-591; C O'Brien, Union citizenship and disability: restricted access to equality rights and the attitudinal model of disability' in D Kochenov, ed, *Citizenship and Federalism in Europe: The Role of Rights* (CUP, 2016).

[56] Article 1 of the UNCRD defines disability thus:

> 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.'

should displace, or at least supplement, the narrower definition in Section 6, for the purposes of litigation under the Equality Act. The EU's adoption of the UNCRPD in 2010[57] meant that an obligation existed, from that point on, to interpret EU law consistently with the UNCRPD. Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation (The Framework Directive).[58] It includes disability as a protected characteristic and the EU's approval of the UNCRPD meant that from that point onward the Directive had to be interpreted as applying to people who met a the UNCRPD's social model definition of disability.[59] Arguably, this might require UK courts, when interpreting the Equality Act (the UK legislation which implements the Directive) to disapply Section 6, in whole or in part, to the extent that it is incompatible with a broader social model definition.[60] The Framework Directive, however, is confined to employment. A proposed extension of protection to all other areas of EU competence (including education)[61] has thus far not been adopted and there remains no EU law outlawing disability discrimination in education. Although the UK is itself a signatory to the UNCRPD,[62] as already noted above, the

[57] Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities OJ 2010 L 23/35.

[58] OJ 2000 L 303/16.

[59] See for example Cases C-335/11 and 337/11 *HK Danmark, acting on behalf of Ring* v *Dansk Almennyttigt Boligselskab; HK Damark, acting on behalf of Werege* v *Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S* ECLI:EU:C:2013:222.

[60] In fact we doubt even this is required. For a fuller exploration of this point, see T Hervey and P Rostant, ' "All About That Bass"? Is non-ideal-weight discrimination unlawful in the UK?' 79 *Modern Law Review* (2016) 248-282.

[61] COM(2008) 426 final, 2008/0140 (CNS).

[62] See n 53 above.

obligation of consistent interpretation that imposes does not extend to adopting interpretations which are *contra legem*.[63]

Under Section 6 EqA, three elements – the existence of an impairment (which may be mental or physical), the requirement that that impairment be 'long term' and finally that, for that long term,[64] it has had a substantial adverse effect on the student's ability to carry out day to day activities – must be proved before the right to complain of discriminatory treatment is established. We examine each of the elements of the definition of disability in turn, focussing on the impairments caused by unseen disabilities.

'IMPAIRMENT'

Any tendency to equate 'impairment' with 'illness' was dealt with firmly by the Scottish Court of Session, Inner House in *Miller v Inland Revenue Commissioners*[65] (a case brought under the Disability Discrimination Act 1995 (DDA) but of continuing authority). The leading opinion of Lord Penrose, at paragraph 23, makes it clear that 'physical impairment can be established without reference to causation and in particular, without any reference to any form of illness'. Thus, for example, there is no requirement that students with a SpLD need show that the difficulty is, or is caused by, an 'illness'.

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[63] See n 38 above.

[64] There are some exceptions to this broad rule. For examples, conditions which fluctuate or recur are also covered as a certain conditions such as cancer where disability is 'deemed' from the point of diagnosis and even after cure.

[65] [2006] IRLR 112.

In *J* v *DLA Piper*,[66] the Employment Appeal Tribunal (EAT) made the point that there may be difficult medical questions in deciding the nature of an impairment. Where there might be a dispute as to the existence of an impairment, it would be sensible to identify whether the claimant's ability to carry out day-to-day activities was adversely affected and to draw 'commonsense' inferences about the existence of impairment from the results of that enquiry. The courts' pragmatic approach, which dispenses with the complications of causation and even precise identification, focuses on the question of function. Does some aspect of the claimant's condition, physical or mental, impair their functioning?

Guidance to the interpretation of the EqA is to be found in the EHRC Equality Act 2010 Technical Guidance on Further and Higher Education (the Technical Guidance)[67] and the Equality and Human Rights Commission (EHRC) Code of Practice on Employment 2011 (the Code). Appendix 1 of the Code deals with the meaning of disability. Paragraph 6 of the Appendix makes it clear that mental impairment is a term which is intended to cover mental illness, SpLDs and ASCs. Further insight can be found in government's own Guidance on Matters to be Taken Into Account In Determining Questions Relating to the Definition of Disability (the Guidance).[68] Paragraph A5, setting out a non-exhaustive list of impairments which can give rise to a disability mentions developmental impairments 'such as autistic spectrum disorders (ASD), dyslexia and dyspraxia; learning disabilities; mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias….; mental illness such as depression and schizophrenia'. There must however be an impairment. The

[66] [2010] ICR 1052.

[67] https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-feandhe-2015.pdf (last accessed 14 December 2017).

[68] Available https://www.equalityhumanrights.com/en/publication-download/equality-act-2010-guidance-matters-be-taken-account-determining-questions (last accessed 14 December 2017).

EAT in *J* v *DLA Piper*[69] pointed out that low mood or anxiety caused by a reaction to adverse circumstances is not a mental impairment, as distinct from clinical depression. So a student who is suffering low mood or anxiety, for instance because of a bereavement, but is not suffering clinical depression, does not have a 'disability' under the EqA.

'SUBSTANTIAL ADVERSE EFFECT'

Mere possession of the impairment is not sufficient on its own to establish a disability. The EqA requires that an impairment must have a substantial adverse effect on a person's ability to carry out day-to-day activities. Substantial merely means more than minor or trivial.[70] The phrase 'day-to-day activities' is not defined. The DDA did define the phrase and limited it to a consideration of a closed list of 'activities' which included, for example, mobility, physical dexterity and the ability to lift and carry 'everyday' objects.[71] The Guidance invites a consideration of time taken to carry out an activity,[72] the way in which an activity is carried out as compared to how someone without the impairment might carry out the same activity[73] and the cumulative effects of an impairment[74] or impairments.[75]

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[69] [2010] ICR 1052.

[70] S 212(1) EqA.

[71] DDA Sch 1, Art 4.

[72] The Guidance, B2.

[73] The Guidance, B3.

[74] The Guidance, B4 and B5.

[75] The Guidance, B6.

The approach of the UK courts to the issue has been to focus the enquiry on things that a person cannot do or can only do with difficulty.[76] It is a 'functional deficit test'. This approach is supported by the Guidance which gives the following example:

> 'A person has mild learning disability. This means that his assimilation of information is slightly slower than that of somebody without the impairment. He also has a mild speech impairment that slightly affects his ability to form certain words. Neither impairment on its own has a substantial adverse effect but the effects of the impairment taken together have a substantial adverse effect on his ability to converse.'

A university assessment per se is not a 'day-to-day activity'. But aspects of an assessment may be. So, for instance, an ability to take a patient's history, as part of an assessment on a medical degree, is close to (if not identical to) an ability to have an ordinary conversation in a professional context, in order to elicit information. That latter ability is a 'day-to-day activity'. A student whose ASD meant that she had difficulty understanding what people mean, unless they are very direct and explicit, and who finds it hard picking up on nuance during conversations might have an impairment which has a substantial adverse effect on day-to-day activities.

'LONG TERM'

The adverse effect must be long term, which means that it has either already lasted for 12 months, is likely to last for a total of 12 months, or is likely to last for the rest of the person's

[76] *Goodwin* v *The Patent Office* [1999] IRLR 2 (EAT), *Aderemi* v *London & South Eastern Railway Ltd* [2013] ICR 591.

life.[77] The focus is not on how long the impairment has existed but for how long it has, or is likely to have, the relevant adverse effect. In cases involving developmental delay or SpLDs, this is unlikely to pose a problem. The disabling aspects of mental health conditions can more difficult to predict or retrospectively 'fit' into the description of 'long term' since they can fluctuate and may cease altogether for periods of time only to reappear. The EqA makes specific provision for this in Sch 1 Para 2(2) by providing that if a condition has previously had a substantial, adverse and long-term effect but has now ceased to do so, it is to be treated as continuing to have that effect if the effect is likely to recur. Likely means 'could well happen'.[78] Most episodes of mental ill-health could well recur, so the majority of students with mental health impairments under the EqA meet the 'long term' criterion.

The duty to make adjustments

Once a student meets the definition of disability, there is a duty upon the university to make reasonable adjustments to its assessments of that student, where the assessments put the disabled student at a disadvantage. The duty is contained in Section 20 EqA and for our purposes the relevant parts of the Section are Section 20(3) and (4):

> '…where a provision, criterion, or practice of A's *[here the university]* puts the disabled person at a substantial disadvantage[79] in relation to a relevant matter in

[77] Sch 1 Art2 EqA.

[78] The Guidance, C3.

[79] 'Substantial disadvantage' means a disadvantage that is more than merely trivial, see EqA, s 212 (1).

comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.'

'... where a physical feature puts a disabled person at a substantial disadvantage .... in comparison to persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.'

Sch 13 para 2(4) provides that relevant matters include the provision of education, deciding on whom a qualification is conferred, and the qualification conferred.

However, and importantly, Sch 13 Para 4(2) provides that a provision, criterion, or practice does *not* (our emphasis) include the application of a competence standard. Para 4(3) describes a competence standard as 'an academic…..standard applied for the purpose of determining whether or not a person has a particular level of competence or ability'.

As far as we can tell, the meaning of these provisions is untested in the courts,[80] but it seems to us that they can be summarised thus. Students with a disability are entitled to a reasonable adjustment to a method of assessment, or the physical circumstances in which that assessment is carried out, if the assessment is used to decide upon the conferring or classification of a degree, or on progressing to the next stage of study. This is so *unless* the method of assessment itself tests a particular competence, for example, the ability to work within certain

[80] Indeed, one of the few decisions of the OIA to reach the courts in judicial review proceedings, *Maxwell* [2011] EWCA 1236, concerns whether the OIA was reasonable to fail to make a "finding" on the question of whether disability discrimination had taken place. It was held both at first instance (Case No CO/2778/2009, Foskett J) and at appeal that it is not irrational for the OIA to refuse to do so in resolving a student complaint.

time constraints.[81] Students with disabilities are not entitled to have a lower standard of attainment expected of them as compared to non-disabled students.[82]

The duty applies *whether or not* a university knows that a student has a disability.[83] This aspect of the EqA means that higher education institutions are worse placed than employers, who benefit from a specific exception to the application of the duty in cases where they do not know, or could not be expected to know, of the existence of the disability.[84]

Conceivably, a court might take the view that an adjustment cannot be a 'reasonable' adjustment unless the university knew that it was needed. But that does not appear to be the effect of Section 20 EqA, which instead situates the consideration of what is reasonable in the context of what a university can be expected to do to avoid the disadvantage caused by the 'provision, criterion, or practice' or the 'physical feature'. The Technical Guidance, without explaining why, implies that the duty appears to be divided into an 'anticipatory duty'[85] (imposing an obligation to consideration and action in relation to 'barriers that impede all disabled people'), and a further 'responsive' (our term) duty, once appraised of an individual

[81] See EHRC Equality Act 2010 Technical Guidance on Further and Higher Education (the Technical Guidance) para 7.35 https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-feandhe-2015.pdf (last accessed 14 December 2017).

[82] Kendall, above n 1, reports examples of students challenging their mark, on the basis that the fact that the students had 'learning support plans' in place entitled them to higher marks in their assessments.

[83] See the Technical Guidance, para 7.21 https://www.equalityhumanrights.com/en/publication-download/equality-act-2010-technical-guidance-further-and-higher-education (last accessed 14 December 2017).

[84] EqA Sch 8, Para 20.

[85] See also Smith, above n 1.

disabled student's needs.[86] These two separate duties should have implications for universities' policies and practices.

The Section 20 duty exists towards *all* students with a disability, whether declared or not. Failure to take basic common-sense steps, like adopting a dyslexia-friendly font as standard in printed examinations or seeking to avoid last minute changes to arrangements (particularly difficult for people with an ASD), might well result in a successful complaint of a breach of Section 20, even by a student who, for instance, had not declared her/his dyslexia. Universities are obliged to behave appropriately, given that 8% of their students have an unseen disability. Universities can be expected to anticipate the common types of such disabilities and the common adjustments without which a student cannot be said to be experiencing university assessments without a disadvantage compared to other non-disabled students. Not to make the obvious adjustments would be unreasonable.

However, without detailed knowledge of an *individual* student's particular disability and resulting needs, it is not practically possible to ensure that *all* correct adjustments are made. Especially where a university has taken reasonable steps to ensure that students have the opportunity to disclose disability,[87] but the student has not done so, a court might not conclude that a particular step in relation to that particular individual would be a reasonable

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[86] The Technical Guidance, paras 7.19 to 7.25 https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-feandhe-2015.pdf (last accessed 14 December 2017).

[87] See Disability Rights Commission, *Finding Out About People's Disabilities- A good practice guide for further and higher education institutions*, published by the Department of Education and Skills, Dfes/0023/2002, http://dera.ioe.ac.uk/7937/1/Understanding%20the%20DDA.doc (last accessed 14 December 2017).

adjustment. In other words, students should not assume they can rely on the Section 20 duty if they have not declared their disability.

What is clear at any rate is that for the duty to bite there must be a provision, criterion, or practice, or a physical feature which places the student in issue at a disadvantage compared to other non-disabled students in relation to a relevant matter. In the context of an assessment, the provision, criterion, or practice might be a matter inherent to the assessment itself, for example the setting of a three hour time limit, or about the circumstances in which the assessment is carried out, for example, sitting the examination in a large room alongside 100 other candidates. For a student whose SpLD means that she is slower at processing written text, the disadvantage as compared with students who do not have that impairment is that a time limit of three hours impacts upon her ability to complete the examination to a degree not experienced by students with processing speeds within the 'normal' range. For a student who has impaired concentration, consequent upon a depressive illness, sharing a hall with 100 other candidates represents challenges not experienced by students whose powers to shut out extraneous stimuli are not similarly impaired.

Once the disadvantage, which must be substantial, is established, the university is required to do what is reasonable to remove the disadvantage.

WHAT NEEDS ADJUSTING?

The first issue to be addressed is whether the 'provision, criterion, or practice' is really a competence standard.

Competence standards in university assessments are, in essence, what is being tested for. If an assessment process is aimed at testing the student's knowledge and understanding of a particular topic, then the competence standard is how well she performs against an established mark scheme calibrated to reflect levels of knowledge and understanding from the inadequate (fail) to the exceptional (starred first). Assessment processes in universities also seek to assess students' skills. Skills typically being assessed in universities include reasoning and analytical skills, categorisation and structuring of thought, written or verbal communication skills, and time management. Indeed, the distinction between 'knowledge' and 'skill' in this context is disputed.[88] Any part of the assessment process which is a competence standard cannot by definition be a provision, criterion, or practice *and need not be adjusted*.

The distinction between competence standard and provision, criterion, or practice therefore requires an intense focus on what is being tested. If a law lecturer designs a module on international commercial law and sets, as an assessment, a mock arbitration in which students must form syndicates and debate a problem against each other, a student with a mental illness who, for example, when under stress, experiences paranoia and anxiety and a need to withdraw, might well be placed at a significant disadvantage. If the method of assessment is merely a more interesting way of finding out how much the students have understood about the *substance* of international commercial law ('knowledge'), there would be a requirement to consider an adjustment for that student. If, on the other hand, the assessment was also to assess the ability of future lawyers to work in teams, to express themselves well verbally, and

[88] There is (obviously) a significant body of literature on effective assessment in higher education contexts. For some examples, see S Bloxam and P Boyd, *Assessment in Higher Education: A Practical Guide* (Milton Keynes: Open University Press, 2007).

to think quickly ('skills'), then the method of assessment is inextricably associated with a competence standard. There would no Section 20 EqA obligation.[89]

To what extent universities may find themselves called upon to justify their decision to set certain competence standards, particularly where they place students with disabilities at a disadvantage, is a moot point. It is not difficult to imagine a claim before a court in which it is alleged that a university failed to make a reasonable adjustment to an assessment. If the defence were to be that no adjustment was required since the chosen method of assessment was, in the words of the Technical Guidance 'inextricably linked to the standard itself',[90] doubtless the university would consider it prudent to adduce evidence that that was indeed so. If there was little or no evidence that there had been a serious consideration of why that particular method of assessment had been chosen,[91] or that that particular competence was one which was really one which required testing, the university might face difficulty. To choose a ridiculous example for illustrative purposes, it is difficult to imagine an university persuading a court that ability of a student to sing answers to a question in perfect tune was really a competence standard unless the examination was a practical for voice students in the Department of Music. On the other hand, however, an ability to organise complex thoughts or concepts quickly and communicate them effectively in written or verbal form; or even an

[89] The Equality Challenge Unit, a HEFCE funded charity has produced a very useful guidance paper, "Understanding the interaction of competence standards and reasonable adjustments" (ECU July 2015) https://www.ecu.ac.uk/publications/understanding-the-interaction-of-competence-standards-and-reasonable-adjustments/ (last accessed 14 December 2017). The authors recommend it as further reading on this issue.

[90] The Technical Guidance, para 7.36 https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-feandhe-2015.pdf (last accessed 14 December 2017).

[91] For a detailed discussion of the implications of choices of different higher education assessment approaches, in the Irish context, see J Hanafin, M Shevlin, M Kenny and E McNeela, 'Including Young People with Disabilities: Assessment Challenges in Higher Education' (2007) 54 *Higher Education*, 435.

ability to operate under pressure, instrumentalised in a time limit for an examination, could all potentially constitute competence standards associated with degrees. The need to show that there is a link between the competence standard and the particular form of assessment chosen should encourage individual academic staff to consider carefully *what* they are testing ('knowledge', 'skills', a combination); *how* they are testing it; and *why* it is being tested in that way. It should also encourage universities to consider, at programme level, *what* the 'competencies' or 'qualities of graduates' of that particular university programme are, and *how* the form of assessments associated with particular degree programmes are necessary to demonstrate those competences or qualities. In our experience, neither practice happens uniformly across the board in higher education institutions. There are many good reasons for universities and their academic staff to think carefully about these questions: EqA compliance is just one of them, but an important one.

Once competence standards are excluded, every other aspect of the assessment process is a potential provision, criterion, or practice: length and location of examinations; whether the examination paper is printed in 12 point font; whether the examination is written or oral; what are the consequences of a fail or a low mark for overall degree classification, or ability to resit; and so forth. At this point, the sole remaining consideration is what it is reasonable to expect the university to do.

WHAT IS REASONABLE?

As far as we can tell, there is no appellate jurisprudence on this question available from the civil courts. The reason for this, as noted above, is that, at present, once internal processes

have been exhausted, students wishing to complain about a failure by a university to make reasonable adjustments tend to use the Office of the Independent Adjudicator (OIA).

Once all internal procedures have been exhausted, a student may submit a complaint to the OIA. If the OIA finds that a reasonable adjustment has been denied, it will find the complaint justified and will make a recommendation to the university. The recommendations are not however legally binding. Neither are they published.[92] Quite what criteria are employed by the OIA in reaching its decisions thus remains opaque.

It follows that our analysis here can only be by analogy. There is existing jurisprudence in this area. It derives exclusively from the jurisdiction of the Employment Tribunals to hear complaints in relation to work, under Chapter 5 of the EqA. We assume for the purposes of our analysis that the same approach would be adopted by the civil courts should a claim against a higher education institution be brought before them. It is unlikely that the civil courts will want to reinvent the wheel, particularly as that would run the risk of creating contradictory or inconsistent approaches to concepts which the entire structure of the EqA demands be treated as common across the various areas of application of the Act.

[92] The OIA publishes some of its decisions in the form of summary 'case studies' on its website, see http://www.oiahe.org.uk/news-and-publications/recent-decisions-of-the-oia/case-studies.aspx (last accessed 14 December 2017). From these, we can learn that the OIA has taken the view that universities are sometimes obliged to adjust degree classifications where they have failed to take into account a disability (see eg Case Studies 79, 78); but sometimes there is no obligation to adjust marks (see eg Case Study 60). A rule to the effect that a disability must be disclosed within three months of the date of the assessment may sometimes have to be adjusted for a student with unseen disabilities (see eg Case Study 31). Failure on the part of a university to consider retrospectively the effects of an unseen disability in the light of further information that emerged about the effectiveness of various adjustments was unreasonable (Case Study 14). But any reasoning behind these decisions is not published and they lack the specificity of judicial proceedings.

The general approach to the question of reasonableness is that the test is an objective one for the court.[93]

The predecessors to the EqA in the area of disability were the Disability Discrimination Act (DDA) 1995, the DDA (Amendment) Act in 2005 and the Special Educational Needs and Disability Act (SENDA) 2001. Helpfully, Section 18D(1) DDA set down a list of matters to be taken into account when considering the reasonableness or otherwise of an adjustment. Although they have not been repeated in the EqA, the framers of the legislation preferring not to limit the matters that a tribunal could take into account, they have almost all found their way into the EHRC Employment Code[94] and into the Technical Guidance[95] and remain a helpful guide. We will adopt the list, adapted for the purposes of this article, as a useful way of addressing the general topic of reasonableness.

Essentially, there are two broad aspects to the reasonableness test: effectiveness and practicability. An adjustment that will not be effective in mitigating the disadvantage suffered by the student is not a reasonable adjustment. Equally, it is not reasonable to require a university to do everything a student requests, however impractical that is.

EFFECTIVENESS

Section 20 requires that the university do what is reasonable to 'avoid the disadvantage' caused to the disabled student by the particular aspect of the assessment that creates

[93] *Smith v Churchill's Stairlifts plc* [2006] ICR 524.

[94] The Code, Para 6.28.

[95] The Technical Guidance, Para 7.61.

difficulties. It follows that a university is not required to make adjustments that are ineffective, although any particular adjustment need not be completely effective in removing the disadvantage in order to be considered reasonable.[96]

In order to establish what adjustment or adjustments might be effective, the university must understand the way in which the impairment which underlies the disability interacts with the process of assessment to create the disadvantage in the case of the student with the disability. In employment, this is most often done by a process of workplace assessment. In the context of higher education, there is obviously a role to be played by any disability support teams, such as in specialist units operating as part of the general university student support structures. Universities cannot simply assume that one size fits all with a particular label when deciding on adjustments for assessments. Specialist units will need to understand the individual student and how their disability impacts on the ability to undertake specific assessments associated with their degree programme. Given the points we make above, concerning competence standards, it will *also* be necessary for specialist units to understand the assessments at issue, and what the relevant academic staff or programme are seeking to test in a particular assessment. All of this means effective and detailed/sufficiently specified communication[97] between specialist units, students, and academic and professional services staff (eg charged with QA).

[96] *Noor* v *Foreign and Commonwealth Office* [2001] ICR 695.

[97] The importance of communication between all parties when reasonable adjustments in this context are discussed has been stressed in the literature, see, eg, K Elcock, 'Supporting students with disabilities: good progress, but must try harder' (2014) 23 (13) *British Journal of Nursing* 758.

The danger of 'one size fits all' is perfectly illustrated by the case of *Project Management Board v Latif*.[98] That case arose out of the jurisdiction for Employment Tribunals to hear complaints against qualification bodies.[99] Ms Latif was registered blind. Her membership of the Project Management Institute (PMI) required her to take an examination set by the PMI. The PMI had had examination candidates who were registered blind in the past. They therefore agreed to allow Ms Latif double the time permitted to non-disabled candidates and the use of human 'reader/recorder' as they had with other such candidates. It did not, however, permit Ms Latif to use her own laptop or to use a computer supplied by the test centre onto which certain specialist software had been loaded. Ms Latif's preferred method of taking the examination was to use a computer she operated herself and she was placed at a disadvantage by having to use a method of working which was alien to her. She brought a claim of breach of Section 20 and succeeded. The EAT, upholding the Tribunal, noted that the Tribunal had remarked upon the PMI's treatment of blind people as 'a generic class rather than focussing on Ms Latif's individual needs'.[100]

University policies or practices, such as automatic blanket application of extra time in an examination, or automatic extensions for assignments, or a signalling system for students' work to be marked 'sympathetically' with regard to grammatical or spelling error, or that in any other way adopt a 'one size fits all' approach are unlikely to be reasonable adjustments in the case of *every* individual student. As we noted above, however, universities are likely to want to adopt some blanket policies (such as use of certain fonts in examination papers). But

[98] [2007] IRLR 579.

[99] Qualification bodies are defined in s 54 EqA and the definition excludes institutions in higher Education (s 54(4)d).

[100] Para 27, p 582.

they will need to go further. Effective adjustments take into account the requirements of *each* student. They consider how the impairment, interacting with the provision, criterion, or practice, or physical feature of the university, creates disadvantage, and how that provision, criterion, or practice, or physical feature, might be adjusted to remove or alleviate the disadvantage.

Some students apply for Disabled Student Allowance (DSA). Those eligible for the benefit have a DSA Needs Assessment, carried out by an assessor independent of the higher education institution. Our focus here is on the relationship between the DSA Needs Assessment and the EqA duties. We do not consider here whether there are any other consequences for a higher education institution of not complying with a DSA Needs Assessment recommendation. In theory, a DSA Needs Assessment is supposed to make recommendations for the university aimed at meeting the individual needs of the student in question. In practice, however, the recommendations in DSA Needs Assessments are often minimal and generic. For example, it is common to see a recommendation that a student with a SpLD receive 25% extra time for an assessment. But if the ability to complete the task in the assessment within a set time is a competence standard, that is, it is (part of) what is being assessed, as we have explained, at least as far as liability under the EqA is concerned, a failure to comply with that recommendation will have *no consequences* for the university. Conversely, a university may believe that compliance with a DSA Needs Assessment recommendation is *all* that it is required to discharge its obligations under the EqA. That may not be the case. It may be that other adjustments are required.

PRACTICABILITY

The other element of the reasonableness standard is what is practicable for the university to do. Students may *request* any adjustment under the EqA: they are only *entitled* to those

adjustments which are reasonable. The point of the qualifying term 'reasonable' is to exempt universities from having to make *every* adjustment that might mitigate or obviate the disadvantage. The assessment of reasonableness is a question of balancing a number of competing interests. There can be no 'one size fits all' in this aspect of the reasonableness test either. But there are some practices which are more or and some which are less likely to be held by a court to meet the test. We consider some of the main elements of the practicability side of the reasonableness test below.

(i) The safety and health of other students or staff

At one end of the spectrum, a situation where a requested adjustment puts at risk the health and safety of other students, university employees, or even the general public, suggests that the adjustment would not be reasonable.

A breach of health and safety *legislation* can never be a reasonable adjustment. Imagine a student with ADHD and associated impaired coordination and motor skills. Following a risk assessment required under health and safety law, it has been agreed that he will undertake certain laboratory practicals only under supervision. The student subsequently asks for the supervision to be removed during assessment practicals, because the presence of the supervisor is making him anxious and affecting his ability to concentrate. He considers that his concentration difficulties are part of his ADHD and he thinks that it would be reasonable to make an adjustment by removing them for practicals which are part of his assessment. The university refuses, because of the perceived risk to the student and others in permitting him to do potentially dangerous practicals without supervision. If the university can show that its decision is necessary to secure compliance with relevant health and safety legislation, the requested adjustment would not be reasonable. If, on the other hand, a more general health

and safety risk assessment is at issue, an adjustment might be reasonable if the increased risk to other students or staff is small and manageable.

(ii) The cost of the adjustment, in the context of the available resource

The next two elements of reasonableness interact with each other: cost against available resource. The Technical Guidance makes the simple point that the simpler and cheaper an adjustment is to make, the more chance that it will be considered reasonable. But it is not just the cost in the abstract: what is relevant is the cost in the context of the resources available to the entity being asked to make the adjustment. The case of *Cordell v Foreign and Commonwealth Office*[101] confirms that a tribunal is entitled to take into account a variety of considerations when assessing the cost factor. In Cordell's case, these included the size of the budget set aside for reasonable adjustments, what the employer had spent in similar situations in the past, what other employers were prepared to spend, and policies set out in collective agreements. It also included the salary of the employee. To put it plainly, an adjustment for employees costing £50,000 would not be reasonable for a small bakery, but it might be for ICI or Virgin.

Applying similar principles to the higher education sector, a court might consider the overall university budget or turnover, the budget for reasonable adjustments, the last annual spend on reasonable adjustments, the cost of adjustments made for students in similar circumstances in the past, what other similarly-resourced universities provide, and any surplus made by the university from the presence of that particular student. A court might also consider the terms of the university's policies on disabled students, and how the university holds itself out to future students with disabilities, in terms of what resources it offers in the way of support.

[101] [2006] ICR 280.

The implication is that larger, better-resourced universities are held to a different standard when it comes to what is reasonable than smaller, less-well-resourced universities. This is something that students might wish to bear in mind when choosing their university.

Relevant resources include both internally and externally available resources. In addition to financial resources, internal resources include available staff time (of both academic and professional services staff), staff competence (for instance, in terms of administrative expertise), and physical resources (such as rooms, equipment). External resources include externally available funding, and also resources owned or controlled by the student. So cost is unlikely to be a successful defence to a claim if the university has failed to consider to what extent other sources of funding may be available to take up some or all of the burden of a requested adjustment. Similarly, if the student is prepared, for instance, to use a specialist piece of equipment they already own to facilitate the adjustment, or there is an external source of such equipment,[102] that ought to be considered. Equally, an unwillingness of a student to do so would also be factored into an assessment of reasonableness.

An adjustment to an assessment may be impracticable for a range of reasons related to cost and available resources. Adjustments which make significant demands on the university in terms of limited resources such as staff time, or other resources such as physical space, are less likely to be reasonable than those which do not. For example, large scale written examinations, with many candidates in the same room at the same time, are so arranged because of the cost and administrative and logistical difficulties of timetabling and invigilating the same examination taken in several smaller spaces at the same time. If

[102] For the 2017/18 academic year, full time eligible students under the Disabled Students' Allowance scheme may receive a specialist equipment allowance of up to £5238 for the whole course, see https://www.gov.uk/disabled-students-allowances-dsas/what-youll-get (last accessed 14 December 2017).

candidates did not all sit the same examination at the same time, this would create the need for complex quarantining arrangements or the setting of multiple examinations in the same topic for each cohort in order to protect the integrity of the assessment. Such an arrangement would have inevitable consequences for administrative staff time in supervising the quarantine; or academic staff time in devising examinations and marking them. If a university found itself simply unable to accommodate a large number of students at any one time demanding total or relative isolation when sitting an examination, because of lack of availability of rooms either in the university itself or anywhere in the relevant location, the issue of practicability might well be deployed to defend a claim of failure to make an adjustment. As pressures increase on academic staff being expected to teach larger cohorts, coupled with other managerial changes to UK higher education,[103] what is reasonable to expect a member of academic staff to do to adjust an assessment will also change.

Equally, if the disadvantage to the student could be mitigated in another way, less costly to the university, a more costly adjustment would not be reasonable. So, for instance, a policy to the effect that students must complete an examination within three hours in a large hall with all the other candidates might disadvantage a student with anxiety, who has a limited concentration span, especially in large groups of people. The student might request that the exam is broken up into three one hour time periods, with 20 minute breaks in between, and to sit in a room with fewer people, or alone with an invigilator. But if the student were to sit at the back of the room, so that s/he is not in the sight-line of others, or at the front, so they do not have others in their sightline, might that mitigate the disadvantage at lower cost to the

[103] See, on the effects of increased managerial pressures on academic staff on equality agendas for students with disabilities, Kendall, above n 1; Smith, above n 1; Hanafin et al, above n 91; T Tinklin, S Riddell, and A Wilson, 'Policy and provision for disabled students in higher education in Scotland and England: The current state of play' (2004) 29 *Studies in Higher Education* 637.

university, in terms of invigilation and room resources? If so, the requested adjustment would not be reasonable.

(iii) The time available to make the requested adjustment

A third element of practicability to be considered in determining whether a requested adjustment to a university assessment is reasonable is the element of time. It is relatively common for universities to encourage students to declare unseen disabilities *before* they sit an examination, to allow relevant adjustments to be put in place. A student who discloses an unseen disability and asks for an adjustment the day before the examination would find it more difficult to persuade a court that the requested adjustment is reasonable than one who gives the university several months to put the requested adjustment in place. However, refusal to adjust a temporal rule, for instance a rule to the effect that disabilities must be disclosed within a certain time-frame,[104] could be unreasonable. This would be the case, for instance, if a student with an unseen disability such as dyslexia, dyspraxia, a medical condition such as fibromyalgia, or mental ill-health, found it more difficult than a student without such a disability to make a timely disclosure.

Universities often also have a policy to the effect that students have at most two (or sometimes three) attempts at each element of a university assessment. Often the second (and third) attempts are 'capped' as resits, with marks being recorded only as pass marks, rather than the actual grade achieved. But that policy itself may breach Section 20 EqA. The question of time plays differently here. For instance, a student might delay undertaking a dyslexia test, fearing that the label implies laziness or lack of ability. If that student fails an examination, or a set of examinations, they might overcome that fear, take a test, and

[104] It is common for universities to require, for instance, that disability or other mitigating circumstances be disclosed within two or three months of the date of an assessment.

discover that they are indeed dyslexic. A university policy that required the notification of the dyslexia in advance of the first sit examinations, otherwise resit marks would be capped at the pass mark, whatever the achievement in an adjusted resit examination, is potentially a breach of Section 20 EqA. The student could request an adjustment of that policy. In assessing the reasonableness of that adjustment, a court would note that there is no time (or other resource) involved in adjusting the policy in the case of the individual student, and allowing the 'resit' to count as a 'first sit'. It is merely a matter of recording the marks achieved, rather than the pass mark. Such a policy would not be justified by reference to resources or time available to make the requested adjustment.

(iv) Confidentiality

Students are entitled to have the existence of any disability kept confidential.[105] The EqA specifically provides that the university must have regard to the extent to which a proposed adjustment is consistent with the request for confidentiality.[106] There may well have to be a discussion over the trade-off between making very public alterations to an assessment for a student and the way in way such an adjustment will compromise confidentiality.[107] If the student insists on confidentiality and there is no practical way of making the adjustment without singling them out, the adjustment is less likely to be reasonable.

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[105] Sch 13 Para 8 EqA.

[106] Sch 13 Para 8(2) EqA.

[107] For a discussion of the benefits of disclosure, see, Kendall, above n 1; W Cunnah, 'Disabled students: Identity, inclusion and work-based placements' (2015) 30 *Disability & Society* 213. Reasons a student may choose not to disclose include perceptions of stigma and not identifying as disabled, see, eg, Riddell and Weedon, above n 7; T Mortimore and W R Crozier, 'Dyslexia and difficulties with study skills in higher education' (2006) 31 *Studies in Higher Education* 235-251, either of which may be associated with class or nationality-based cultures.

(v) *Disadvantage to other (non-disabled) students, or other students with different disabilities*

The Employment Tribunals have recognised that the effect of an adjustment for one employee upon other employees is obviously a relevant factor in assessing reasonableness.[108] Disadvantaging other students in an assessment, for example, by keeping an examination hall at an uncomfortably warm temperature for non-disabled students, would be an important consideration.

In the context of unseen disabilities, we might imagine an assessment which calls for a group project. A student with an ASD finds himself in a group with three other students, all from countries other than his own. Because of his ASD and their varying cultural approaches, he finds it almost impossible to get along with this group and, after working with that group for 6 weeks, applies to be transferred as a reasonable adjustment. It is proposed that he is transferred to another group which has already worked out what it wants to do, how it will be done and who will do it, in the remaining 4 weeks before the group project is due to be handed in. The second group considers that the new student will disruptive and difficult, and will jeopardise the excellent mark that the second group can show (from formative assessment marks) it is headed for. In these circumstances, the adjustment requested might not be reasonable, partly because of the time available, but partly because of disadvantage to other students.

In our view, less likely to be a powerful consideration would be a *perception* of unfair advantage for the disabled student harboured by other students. The court might well ask what had been done to manage that perception and what difficulties it caused the university in

[108] See for example *Jelic* v *Chief Constable of South Yorkshire Police* [2010] IRLR 744.

any case. Educating non-disabled students about the effects of disabilities, and reasonable adjustments,[109] and effectively managing any reputational fallout from student complaints or dissatisfaction would be within the capacity of the university, and it would not be unreasonable to expect a university to take such steps.

(vi) Existence of a university policy of which students have notice

We noted above that one factor in the cost/resources aspect of reasonableness is the university's policies on disabled students, in particular the support offered by a university to disabled students. In addition, a reasonableness assessment would take into account other university policies or practices of which the student has notice.

One element of university practice that might be requested to be adjusted is what is colloquially known as a 'fit to sit' policy. These policies differ in their detailed application, but the essence of each is that, if a student presents herself as 'fit to sit' the assessment, no subsequent adjustment will be made for disability (or ill-health, or other compassionate reason). So, taking an example from outside the EqA context, a student who suffers a bereavement of a close family member, but chooses nonetheless to sit an examination shortly thereafter may not subsequently have the examination deemed 'not-sat' for the purposes of re-sitting in the event of a fail or a poor mark. Universities might argue that 'fit to sit' policies embody competence standards. By presenting as ready to sit the examination, the student warrants that she is able to undertake the stringencies of the assessment as it stands.

[109] Incidentally, such an activity would go some way to meeting the duty to 'foster good relations between persons who share a relevant protected characteristic and persons who do not …', EqA 2010, s 149 (1) (c).

The existence of the policy, and the fact that students knew, or could be deemed to have known, of its existence, would be one element a court would take into account when assessing reasonableness. But it would not be decisive.

A student with a diagnosis of clinical depression and anxiety, who experiences panic attacks, might decide to manage those without disclosing them to the university. That student might present for an examination, but find she was unable to complete it, having suffered a panic attack during the examination. She might request as a reasonable adjustment to be permitted to sit the examination *de novo*, as if she had not yet sat it, without penalty. In such circumstances, she might be successful in arguing that the university's unwillingness to disapply its 'fit to sit' policy is unreasonable.

(vii) Existence of a 'learning agreement' or practice between the university and the individual student

Finally, courts would also take into account any individual arrangements, agreements, or practices in place between the university and the relevant student. For instance, a student with an ASD and associated social anxiety who is comforted by 'stimming'[110] (which could, for instance, constitute hand-flapping or producing guttural noises), might be concerned that the stimming would impede their ability to undertake a practical examination, for instance a medical student taking a patient's history. The university and the student might agree that the student would access support to develop strategies to manage her social anxiety. If the student failed to access the support, but nonetheless requested an adjustment to the assessment (for instance, in the form of being allowed to retake a failed assessment as if for the first time), the court would take into account the reasonableness of that request, given that

[110] L Wing, *The Autistic Spectrum* (Oxford: Pergamon 1997).

the student had not kept her 'side of the bargain' in accessing the support provided to accommodate her disability.

Overall, what is important is that the question of reasonableness is a multi-factoral consideration. A reasonable adjustment is an adjustment which addresses the specifics of an individual student in the context of the specifics of an assessment. Attempts at making adjustments to assessments are unlikely to be robust unless all of the following are addressed. First, adjustments must be based on a properly informed understanding of the student's disability. Second, there must be a clear consideration of the way in which the chosen method and/or physical circumstances of assessment (the 'provision, criterion, or practice', or 'physical feature') may disadvantage the student as compared to non-disabled students. Third, a consideration of what adjustments would mitigate or relieve that disadvantage altogether is required. Finally, thought must be given to what factors might make it unreasonable to expect the university to make the adjustment or adjustments.[111]

CONCLUSIONS

What might Dr James, with whom we began our analysis, make of all the above? What might the senior management team in her university? What would be helpful to them would be a clear answer to the question 'what must I/my university do to secure EqA compliance for students with unseen disabilities?' From Aidan's point of view, the question is similar: 'what are my legal entitlements under the EqA?'

[111] *Environment Agency* v *Rowan* [2008] ICR 218.

We hope that it is plain from this analysis is that the best that can be done in terms of the answer to the questions that our imaginary characters would like to have answered is to say that the structure of the law suggests a process or series of processes that will make decisions more or less robust in terms of EqA compliance. We cannot definitively advise that a particular approach will fulfil the requirements of the EqA. There is no 'quick fix'.[112] All that can be done is to suggest the *relative* likelihood of different policies or processes being EqA compliant. This is our first – and in some ways most important – conclusion. Where students, academic staff, or members of university management bodies do not understand this aspect of the EqA and its obligation to make reasonable adjustments to assessments for students with unseen disabilities, the confusion (or muddle) which motivated our project ensues.

Secondly, though, there *are* some points of relative clarity.

Some things are so known and so common-sense and so straightforward to do that a failure on the part of a university to do them would almost certainly breach section 20. We mentioned some of these 'anticipatory duties' above: the use of dyslexia-appropriate fonts in examination papers is a candidate example.

General policies about the administration of assessment, articulated clearly and in a timely manner to all students, may well be defensible in the event of a request for an adjustment to such policies, so long as there are procedures in place to depart from those general policies where individual circumstances dictate. In other words, compliance with anticipatory duties does not exculpate universities from responsive duties.

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[112] Smith, above n 1, reported that 'Teaching staff preferred a 'quick fix' to solve current problems rather than more general or background information that might feed into their practice.'

Some things are *not* required under the EqA – although there may be a belief by some that they are – particularly adjustments to competence standards.

Thirdly, a university reduces the risk of litigation (and reputational damage) if it follows certain approaches indicated by the EqA. Even if litigation is rare, we can expect its 'shadow' to shape behaviour.[113] A key approach is to have policies, procedures, and resources through which *individual* assessment of *individual* students, in the light of *specific* assessments, in consultation with academic and other relevant staff, take place. Within a complex organisation like a university, there will be a variety of actors contributing information and their interpretations of that information to the questions of whether there is a impairment, with a substantial long-term adverse effect on the ability to carry out day to day activities, whether an assessment in its unadjusted form places the student at a disadvantage, if so whether what is requested to be adjusted is actually a competence standard, and if not, what adjustments would have the effect of reducing or removing the disadvantage, and finally what is reasonable in the circumstances. Universities therefore run a risk of being non-compliant with the EqA, unless there is some way of synthesising the various elements feeding into a decision to produce an institutionally-owned outcome *for each student*. One way of reaching such a synthesis is to ensure meaningful dialogue between the constituent units within a university, each of which has knowledge and understanding of the various aspects that need to feed into the decision for an individual student.[114]

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[113] The phenomenon of 'bargaining in the shadow of the law' is well-known in (socio)legal studies: see R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: the case of divorce' 88(5) *Yale Law Journal* (1979), 950-997.

[114] In its January 2017 guidance paper (footnote 23) the Disabled Students Sector Leadership Group recommends the adoption of a strategic approach to the duty to make reasonable adjustments. In general terms, the guidance emphasises the importance of inclusive teaching practices (in order to meet the anticipatory duty) and recommends a corporate policy which ensures that all the relevant considerations contribute to a decision to

Assessments that are specifically tailored to assess the relevant competence standards are more likely to be EqA compliant. Of course, every form of assessment carries some element of practical limitation, be that temporal or material, and so it is not possible to assess *solely* on the basis of competence standards. But whether the competencies being assessed are skills or knowledge or a blend of both, it is both sound pedagogical practice and good for equality when academic staff think clearly and explicitly about how and why they are assessing the way they are assessing, and communicate that to their students. The EqA does not go so far as to require this kind of good practice within its 'anticipatory' duties, but universities who ensure that their staff adopt these practices are more likely to be compliant with the EqA. There is a challenge here for academic staff who remain within a mind-set of 'standard practice' university assessments (3 hour unseen examination, 4000 word assessed essay) without giving much thought to why they are doing so.

Universities will want to have clear and *evidenced* consideration of what aspects of assessment constitute competence standards, and why they are so. That is likely to be within the expertise of the academic department setting the assessment, though might rest with a central unit charged with oversight of assessments in the context of programme specifications and QA. Disability units are likely to be able to interpret and advise on any medical evidence, and provide information on how the impairment interacts with the form, place, or time of the assessment, creating disadvantage. They might thus be well-placed to make suggestions about what adjustments might help. In the final analysis, unless an individual or a body within a university is charged with taking all of these things into account, for each student, and then making a final decision as to whether the duty to make reasonable

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make (or not to make) an adjustment. One specific suggestion is that of a named, senior, individual with responsibility for ensuring compliance with the duty to make adjustments (para 35).

adjustments applies, and if so how it ought to be complied with, it is hard to see how the rigour that the EqA demands can be present.

Fourthly, from the point of view of students, those students who have an understanding of their legal rights are likely to find it easier to navigate their higher education experience. As reasonableness in requested adjustments includes consideration of the resources available to a university, prospective students with unseen disabilities may want to consider carefully which university is best for them: on the whole, larger, older, universities are better-resourced than smaller, more recently established universities. On the other hand, post-92 universities may have progressed further with inclusive learning and teaching, and have more standardised, agreed practice across the university, because of the managerial models that pertain in that context. Students are advised to make timely notification of any disabilities, and to have explicit discussions about requested adjustments, explaining why the adjustment is effective in mitigating the disadvantage as well as practicable, and – if necessary – explaining or exploring why what is being requested to be adjusted is not a competence standard. Such discussions can include concerns about confidentiality, bearing in mind the confidentiality obligations of the university under the EqA, and noting this may be a difficult call for many students. Students who keep to their 'side of the bargain' in terms of accessing available support, or making available resources which they own or control, are more likely to be successful in showing reasonableness of a requested adjustment.

The obligations which we outline in this article, although focused on assessment, of course also apply in other contexts. Some of the same disciplines that our analysis suggests make EqA compliance more likely in the context of assessment apply also whenever a university is requested to make an adjustment for a student with a disability. Universities should focus closely on what a student's disability is, and in what way it is disabling, because of the

application of a ‘provision, criterion or practice’ of the University, or a ‘physical feature’, in order to determine what will be reasonable in the circumstances.

The DDA obligations to make reasonable adjustments were first introduced in 1995. Before that, any adjustments that were made were voluntary: there was no underpinning legal obligation. Over those last 13 years, the Higher Education sector in the UK has changed quite significantly. Some of those changes have made it easier for students with unseen disabilities to access higher education, as we saw when considering the data on the proportion of disabled students (although some of the change may also be accounted for in greater public awareness and acceptance of unseen disabilities over the relevant period). In the context of massification of Higher Education, it is probably easier for universities to secure the policies and practices suggested by the ‘anticipatory’ obligation under the EqA than the ‘responsive’ obligation. Size and scale increase pressure to have policies and processes that apply institution-wide: where those are attentive to the needs of disabled students, the EqA can be said to have done its job.

But scaling up of any institution makes it more difficult for it to deal with individuals. Particularly where academic staff:student ratios worsen, and/or where student-facing administrative staffing is cut, or reorganised/centralised, or both, in the name of ‘efficiency’, the individual-focused ‘responsive’ duties of the EqA become more difficult to achieve. Along with massification has come marketization and competition, which also change the nature of relationships between students and universities, and make universities more attentive to reputational damage. There is also – at least among some parts of the student population, and the UK population more generally – an increasing acceptability of disability rights narratives. This can lead to the desires and claims of an individual disabled student

becoming articulated as human rights entitlements, with all the cachet that comes with 'rights talk'.[115]

These interlocking phenomena may lead to a tendency towards a 'line of least resistance' when universities respond to those students who request adjustments on the basis of a claimed disability: a university which gives a student what she wants is unlikely to be sued, criticised on social media, or marked down in a NSS questionnaire. Our inclination, however, is to caution against such 'gold-plating' of the EqA duties. The legislative settlement is a balance between various different competing interests, including of future employers of students, and indeed society more generally. In the long run, if carried to its extreme, a 'line of least resistance' approach could have the effect of devaluing degrees, and the associated reputational damage to the sector. We wonder also whether it might also have a detrimental effect on people with disabilities who are *genuinely* put at a substantial disadvantage by a particular form of assessment. If it becomes an open secret that a student need only *claim* the need for an adjustment in order to access special treatment in assessment contexts, it becomes more difficult to single out those who actually need special treatment, and to focus resource on making sure that that treatment is tailored to adjusting for the disability at issue. However appealing a claim to individual human rights may sound to our autonomy-focused Western 21st century ears, human rights claims are not unproblematic when it comes to questions of allocation of resource. Not least, this is because human rights allow those individuals who are sufficiently powerful and articulate to claim them to effectively bypass democratically

[115] "Rights talk buys ten minutes of their attention. I use it like a magic wand." J Osborn, Human Rights Program Harvard Law School and Francois Xavier Bagnoud Centre for Health and Human Rights Workshop, *Economic and Social Rights and the Right to Health* September 1993, appears to be unpublished and no longer available on the internet, cited in T Hervey, 'The "Right to Health" in EU Law' in T Hervey and J Kenner, *Economic and Social Rights Under the EU Charter of Fundamental Rights* (Hart, 2003).

legitimated processes, such as the adoption of legislation.[116] In the final analysis, we would therefore suggest that universities seek to comply with Equality Act requirements but also seek to make sure that they are not going further than is necessary to do so.

Appendix: Summary of the practical considerations flowing from the implications of our analysis.

Practical Considerations for a Higher Education Institution

- What are our policies and procedures for determining whether a student is disabled, and are they transparent?

Disability is defined in law, according to objective criteria. There must be a long term (mental or physical) impairment, which has a substantial adverse effect on the student's ability to carry out day to day activities. The description of the legal position on the definition of disability set out above is, perforce, a brief summary of the law. In fact, the case law on the definition of disability is extensive and the statutory provisions even more complex than we have space to deal with here.

[116] D Beetham, 'What Future for Economic and Social Rights?' in R McCorquodale, *Human Rights* (Taylor & Francis, 2017); K Young, 'The Minimum Core of Economic and Social Rights: a concept in search of content' 33 *Yale Law Journal* (2008) 113; J L Cavallaro and E Schaffer, 'Less As More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas' 56 *Hastings Law Journal* (2004-05) 217; A Eide C Krause and A Rosas, eds, *Economic, Cultural and Social Rights* (The Hague: Kluwer, 2001); M Craven 'A View from Elsewhere: Social Rights, International Covenant and the EU Charter of Fundamental Rights' in C Costello, ed, *Fundamental Social Rights* (Dublin: Irish Centre for European Law 2001); H Steiner and P Alston *International Human Rights Law in Context* (OUP 2000); D Beetham, 'What Future for Economic and Social Rights?' 43 *Political Studies* (1995) 41.

What is clear, however, is that merely claiming to have a disability does not attract to a student protection under the EqA or impose upon a university an obligation to make adjustments. A university need not accept a student's assertion that s/he is disabled under the EqA. Ultimately, it is for the university to form its own view, based upon whatever evidence it regards as useful and practicable to obtain. Universities may, for instance, decide to require medical certification of 'impairment'. In light of the anticipatory duty the EqA places upon them, universities may adopt policies or procedures which err on the side of caution in the face of equivocal or limited evidence. That approach may avoid complaints or litigation. But it also carries some risks: in particular it does little to support the robustness of assessment methods or perceptions of unfairness among other students, academic staff or future employers of students. A more robust approach to what constitutes disability may pay dividends in that it is easier to attract 'buy-in' for adjustments for those students who meet the EqA definition.

- What are our policies and procedures for determining whether the requested adjustment is reasonable?

Under the EqA, universities need only make reasonable adjustments to a 'provision, criterion, or practice', or 'physical feature' which 'puts the disabled person at a substantial disadvantage' in relation to assessment 'in comparison with persons who are not disabled'. Is what is being requested actually an adjustment to a 'competence standard'? Universities may find that policies or practices that fail to distinguish carefully between the two are less effective in terms of staff (and student) support than those which do not.

That said, universities will want to be sure that they have clearly articulated statements of what knowledge and skills are being assessed in a particular assessment, and why they are being assessed in a particular way. At institutional level, these usually find expression in

programme regulations or other statements of compliance with QA benchmarks. Regular consideration of the extent to which such statements address the question of what 'competencies' are being tested, how, and why, could be an important procedural aspect of assessing reasonableness of requested adjustments.

Universities will also want to be sure that their procedures take into account the various elements that feed into a reasonableness decision: in terms of both effectiveness and practicability of a requested assessment. Universities must also have a process whereby, ultimately, a decision weighing all the relevant factors is made. Decisions that explicitly state the elements taken into account, and articulate the reasons for a decision that a requested adjustment is – or is not – reasonable will provide more protection against possible litigation than those which do not. By explaining clearly to a student why a particular decision is being made, particularly if that decision is made in dialogue with the student, they may also avoid future conflict between the university and the student, even if the student does not get everything they request.

- Are our general policies adequate to meet obligations under general anticipatory duties under the EqA?

Given that 8% of their students have an unseen disability, universities should consider what general policies will meet their 'anticipatory duties' under the EqA. Universities can be expected to anticipate the common types of such disabilities and the common adjustments without which a student cannot be said to be experiencing university assessments without a substantial disadvantage compared to other non-disabled students. Not to make the obvious adjustments would be unreasonable. An obvious example is the use of dyslexia-friendly fonts.

Practical considerations for an individual member of academic staff

- What is my assessment testing, how, and why?

The key practical consideration for individual members of academic staff is to be clear about *what* knowledge and skills their assessment is testing, *how* those skills are being tested, and *why* this is the case. This is, of course, nothing more than good pedagogical practice, and therefore ought not to be viewed as onerous. Determining what constitutes a 'competence standard' is a matter for academic staff who set and mark the assessment. Once this is clear, and if it has been effectively communicated to all students, a discussion with a student, and a disability support unit (or member of professional service staff located elsewhere in a university) administering a procedure by which it is determined whether a requested adjustment is reasonable should be relatively straightforward.

Practical considerations for a student

- Am I disabled?

Disability is defined in law, according to objective criteria. A declaration of disability is insufficient to bring someone within the protection of the EqA: there must be a long term (mental or physical) impairment, which has a substantial adverse effect on the student's ability to carry out day to day activities. The university will not necessarily accept a student's assertion that she is disabled. Students may need to show how they fall within the EqA definition.

- Does the university know of my disability?

While universities formally have a duty to make reasonable adjustments for students with disabilities whether the disability is declared or not, a student who does not declare a

disability is likely to find it more difficult to show that a requested adjustment is ‘reasonable’ than a student who declares it.

Difficult questions of privacy arise. Individual students will reach their own conclusions on the balance between the university maintaining confidentiality and making adjustments to assessments.

- What am I asking to be adjusted?

A request to adjust a competence standard cannot be successfully made under the Equality Act. Such a claim would have to be brought under the Human Rights Act, contract, or tort, with all the difficulties outlined above. A request which clearly distinguishes between elements of the assessment which are a ‘competence standard’ and those which are not; which explains why the requested adjustment will be effective in mitigating their specific disadvantage; and which is practicable, taking into account health and safety, cost, resources, time-relevant elements, any disadvantage to other students, is more likely to be successful than a request which does not.