

Identifying and Accommodating Learning Disabled Students and Employees: A Comparative Analysis

1 Introduction

I would like to begin by thanking you very much for introducing me. I am really pleased that you have enabled me to be a visiting scholar for a period of two months at your university. This has promoted my disability rights research very much.

I would like to explain one problem connected with using a sign language interpreter. Sign language, like spoken and written languages, is not international. Thus my native language, Swedish Sign Language is very different from British Sign Language. It would be too expensive to send a sign language interpreter from Sweden to the U.K. Instead, we are using an interpreter from London who knows American Sign Language, i.e. Oliver. I know this language because I have studied four years at the world's only university for the deaf in the U.S., i.e. Gallaudet University. However, I have not used this language for almost 17 years. To minimise any risk of misunderstanding, the interpreter has been provided with my lecture paper. Moreover, I am using a power point file so that you can read at the same time as you are listening to what the interpreter says. It should be noted that there are no signs for some academic concepts. Therefore, I will need to fingerspell a great deal. Anyway, if you find anything puzzling, please stop me so I can repeat what I earlier signed.

Finally, I will start my lecture on learning disabled persons. As you perhaps understand disabled persons are a heterogenous group with different experiences and needs. The reason I have chosen to focus on learning disabled persons is that research shows that mentally disabled persons including the learning disabled are considered to be one of the most vulnerable groups in society. The rate of unemployment is much higher among the learning disabled than it is among other disability subgroups including people who are physically disabled. I find this unacceptable because the basic idea of a democratic society is that no group should be disadvantaged in relation to other groups. On closer inspection, there are two possible reasons for this social exclusion:

- Learning disabilities are an invisible disability in contrast to many physical disabilities. It is easy to identify symptoms but not their underlying cause. If a person behaves or thinks in a different manner from what is considered to be normal, then he or she will probably be regarded as aggressive, lazy, strange or stupid. Such prejudices and stereotypes cause the person to be socially isolated. To avoid this problem, most learning disabled people try very hard to hide their impairments.
- Appropriate accommodations for learning disabled persons are often more difficult to identify than accommodations for physically disabled persons. Nobody denies that a deaf person needs a sign language interpreter to be able to communicate with hearing people or that a blind person needs course materials in an alternative format (e.g. Braille) to be able to read. If a learning disabled person needs a computer to be able to study at home, suspicions will be roused. Does it give the disabled person an unfair

advantage over fellow students and employees? Does it lower academic standards by enabling him or her to miss lectures, group discussions and social events?

The problem is a very real one in the modern knowledge society. Research shows that, since the early 1990s, there has been a rapid increase in the rate of learning disabled people applying for places in tertiary education. One reason for this is that schools have become more supportive and responsive to the particular needs of individual pupils. As a result, more learning disabled people are qualified to apply for tertiary education than ever before. Another reason is that professionals are now more skilled in diagnosing learning disability than ever before.

If an education provider appropriately accommodates the needs of a learning disabled student with the result that he or she successfully completes his or her academic degree, there may be another problem. What would happen if his or her potential employer denies a request for a similar type of accommodation measure to that with which he or she was provided in education? If that happened, there would be a risk that his or her education would be a waste of time and money because he or she could never succeed in working life without appropriate accommodation. Therefore, it is necessary to consider both tertiary education and professional employment together in order to determine the extent to which the education provider and employer are obliged to accommodate the learning disabled person.

This is why I am interested in comparing the British and Swedish approaches to this problem. The most important legal material is the national anti-discrimination legislation, i.e.:

- The U.K.'s special legislation, i.e. Disability Discrimination Act 1995
- The Swedish patchwork of statutes with a limited scope, two of which are particularly relevant:
 - The Prohibition of Discrimination in Working Life on Grounds of Disability Act 1999 and
 - The Equal Treatment of Students at Universities Act 2002.

One problem with the anti-discrimination legislation is that it is often vaguely drafted. In an attempt to reduce this problem, authoritative interpreting materials have been produced:

- The U.K provides detailed materials in the form of Codes of Practice issued by the Equality and Human Rights Commission.
- Sweden does not provide any equivalent material. The problem is that the Swedish Disability Ombudsman does not have the relevant authorisation. Instead, courts and government agencies use legislative preparatory works as an important means of interpretation. These works are generally accessible to the public and are often pedagogically drafted. Obviously, however, it is impossible for the legislative bodies to predict and provide for all the legal problems which may arise in the future.

A survey of the relevant law shows that U.K courts have considered many cases on discrimination problems but very few of these have concerned tertiary education or the professional employment of learning disabled persons. The situation is worse in Sweden because domestic courts and boards of appeals only have considered less than ten cases, only one of which is relevant to learning disability.

For this reason I will also consider the legal developments in another country. A general survey shows that the U.S has the world's oldest anti-discrimination legislation, i.e. Section 504 of the Rehabilitation Act 1973 and the Americans with Disabilities Act 1990. This legislation is supplemented by several detailed codes of regulations and non-legally binding guidelines issued by government agencies. Many Americans love to litigate so it has resulted in many hundreds of thousands of American cases within the context of disability discrimination. American law students, lawyers and researchers have been deeply engaged in this issue by debating energetically in law reviews and journals.

My examination will focus on the following major issues:

- Who are learning disabled students and employees?
- What is reasonable accommodation?
- A list of academic and professional measures
- Case-law
- Some concluding remarks

2 Who are learning disabled students and employees?

According to the national anti-discrimination legislation, a person must satisfy two major criteria before they will be able to benefit from reasonable accommodation duties:

- He or she must have a learning disability and be disabled within the meaning of the legislation
- He or she must possess the appropriate academic and professional qualifications

I will consider these criteria in this order. However, I first need to clarify the meaning of learning disability. The difficulty is that it has different lexical and scientific meanings in the three countries.

2.1 The scientific concept of learning disability

There is no universally recognised definition of the phrase learning disability. Nevertheless, most American experts, generally agree upon the following characteristics:

- Learning disabilities cause significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities: some examples are dyslexia, dyscalculia, dysgraphia and aphasia.
- Learning disabilities are presumed to be caused by central nervous system dysfunction. This is a medical issue.
- Most learning disabled people tend to have average or above average intelligence; see e.g. Albert Einstein who was considered to have a learning disability.

- People with learning disabilities have a dramatic discrepancy between their educational aptitude and their actual educational achievement: The problem is that many learning disabled persons need more time to finish a certain task due to their brain dysfunctions. For those of you without a great deal of relevant experience, the following example may help:
- Assume that you are driving a car. If the weather is bright and clear, it is easy for you to get to a certain place. But if it is beginning to rain, your wide screen will probably be foggy. You will have to spend more time wiping away fog to see where you are driving so that you can get to the same place. This example can be compared with how much effort is required for learning disabled people to succeed in academic and professional life. Research shows that if they are granted more time for exams, they will achieve much better results than others who are also provided with corresponding amounts of additional time. It can be understood by the fact that it will take a long time for them to organise their thoughts so that they can provide answers to questions.
- People whose aptitude-achievement discrepancies are caused primarily by visual, hearing, or motor disabilities, mental retardation, emotional disturbance, or environmental, cultural, or economic disadvantage are not learning disabled,
- Learning disabilities are chronic, although their manifestations may vary somewhat throughout a person's life. One example is that a person with dyslexia may work very hard to overcome his or her impairment so that he or she can read better than an average person. This coping mechanism is known as self-accommodation.
- Scientists do not technically include ADD and ADHD in the concept since these impairments are primarily psychiatric. However, they recognise that those who have such impairments face similar problems in education and employment due to their attention problems. This is because their brain activity is often interrupted by irrelevant factors that inhibit their ability to concentrate, to structure answers and to recall and remember. It is not easy to have full control over brain functions.
- The U.K prefers to use the concept of learning difficulty rather than learning disability. The former has a wider meaning than the phrase preferred in the US – learning disability - because it also includes mental retardation.
- In Sweden neither learning disability nor learning difficulty is used. Instead the country uses a general concept such as mental or psychiatric disability. There is a specific name for ADD/ADHD, Aspergers syndrome and Tourette syndrome, i.e. neuropsychiatric disability.
- In my forthcoming article, I will use a broad definition that includes all mental and psychiatric impairments apart from mental retardation. This means that I will take into account the American concept and include it with other psychiatric impairments such as ADHD/ADD, Aspergers syndrome, chronic fatigue syndrome, schizophrenia and addiction to substances such as alcohol and nicotine. These impairments can to different degrees impair the person's learning ability.

2.2 The legal definition of learning disability

There is no specific definition of the concept of learning disability in the national anti-discrimination legislation. Instead persons must rely on a general definition of disability. This definition differs in scope across the three national schemes:

- A physical or mental impairment that substantially limits one or more of the major life activities of such individual (the U.S)
- A physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities (the U.K)
- Permanent physical, mental or intellectual limitation of functional capacity as a consequence of an injury or an illness that existed at birth, has arisen thereafter or which may be expected to arise (Sweden).

At this point, I need to explain some of the criteria which operate to limit the number of persons who can rely on the anti-discrimination legislation.

2.2.1 Impairment

There is no legal definition of impairment but the American and British interpreting materials provide good guidelines. These materials make it clear that 'impairment' excludes personality traits such as normal irritation, fatigue, chronic lateness and stressful. To avoid borderline problems, the U.S requires that mental impairment including learning disability must be clinically recognised by authorised professionals. This requirement was removed in the U.K two years ago.¹ According to the U.K it would be unfair to put a burden on mentally disabled persons to provide a diagnosis while there is no equivalent requirement for physically disabled persons. Such a problem has never happened in Sweden. According to the Swedish legislative preparatory works, there is no requirement that the impairment is well recognised. It does not matter whether a certain impairment is controversial among scientists or not.

2.2.2 Severity of learning disability

The Swedish anti-discrimination legislation, unlike the American and British legislation, includes no criterion relating to the severity of impairment. This means that minor and trivial impairments are covered. According to the Swedish legislative preparatory works, it is not the degree but the impairment per se that needs to be protected by the anti-discrimination legislation. Both the U.S and the U.K have chosen to focus on those who are truly disabled. The American case-law shows that the courts have interpreted the phrase "substantially limit" very restrictively. They have held that the assessment of severity should take into account medication, rehabilitation, technical aids and self-coping mechanisms that reduce the negative effects of an impairment. This may be illustrated by an American case in which a court found that a group of students with ADHD who requested that they be given additional time for an

¹ See e.g. Morgan v. Staffordshire University [2002] IRLR 190.

exam and allowed to take it in a separate room were not disabled.² These students had spent a great deal of time on their reading and writing in an attempt to overcome their impairments. The case thus concerned the so called issue of self accommodation (or the self-coping mechanism). The court did not consider the fact that they had a diagnosis of ADHD/ADD. Instead it compared these students with an average person from the general population and found that the students' reading and writing abilities were better than those of the average person. The problem was that the court did not use students with similar educational qualifications as the comparator group. As a result, this judgment has been criticised. The Court, it is argued, penalised the ambitious students for their hard work.

Luckily enough the U.K has no similar problem since the code of practice makes it clear that treatment including counseling should not be taken into account while assessing the severity of an impairment. The U.K Code of Practice states, however, that the assessment should take the claimant's behaviour into account in so far as it would be reasonable to expect them to modify their behaviour in order to prevent or reduce the effects of an impairment on normal day-to-day activities. If a case such as Price came before a British judge, the decision would thus probably be that the student was disabled.

2.2.3 Duration of learning disability

Both the British and Swedish anti-discrimination legislation explicitly require that the impairment must be of a certain duration. The U.K legislation specifies that it must be of at least 12 months duration. If the effects of a particular impairment are fluctuating or recurring, then the recurrence must be likely to happen within a one year period. Within the learning disabled community, fluctuating or recurring symptoms are typical of conditions such as bipolar disorder and schizophrenia. There is no discussion in the Swedish legislative preparatory works of how to assess the duration of such an impairment. Therefore, there is a risk that future Swedish courts will exclude many learning disabled people from the scope of anti-discrimination legislation. The American legislation does not contain any explicit requirement. Instead the issue of duration is integrated into the requirement that the impairment be sufficiently severe – the "substantially limits" requirement. The more permanent a certain impairment is, the higher are the chances that it will satisfy the severity requirement.

2.2.4 Status of learning disability and association

As most of you know, there are two models to describe the experiences of disabled people (including, of course, those of learning disabled people). These are the medical model of disability and the social model of disability. These models are reflected, in varying degrees, in the legislation of the three countries.

- Current disability: (all three countries recognise this as it is based on a current medical condition)

² Price v. National Board of Medical Examiners 966 F. Supp. 419 S.D.W Va 1997.

- Past disability: Both the U.S and the U.K recognise that a person who has had a disability is covered such as a person with a medical document that shows that he or she has been hospitalised for psychiatric problems.
- Future disability: In the U.S it is somewhat debatable whether the ADA protects a person who has a genetic predisposition for disability such as ADHD/ADD.
- Imputed disability: Only the U.S protects a person who is erroneously regarded as having a disability – where, for instance, a person is wrongly thought to be a learning disabled person. It should be noted that American courts are split on the question of whether such persons should be entitled to reasonable accommodations or not.
- Association: Both the U.S and Sweden protect those who have a personal or economic relationship to disabled persons such as parents, children, partners and friends. In the U.K the legal situation is unclear until the European Court of Justice has considered the case, i.e. Coleman v. Attridge Law 2007.

2.3 Certain activities

A learning disabled person must demonstrate that they have they fall within the ambit of the legislation by demonstrating, for instance, that they are an employee or a student or an applicant for a job. This categorisation appears to be rather absurd in some circumstances. If a person is studying for a doctorate and teaching, he or she will be both an employee and a student at the same time. The question is which provision is most appropriate for him or her, i.e. education or employment. In Sweden there is a special provision that states that if a doctoral student is employed he or she should be regarded as an employee because the employment relationship is the determining factor. Since the employment and education provisions offer different levels of discrimination protection, it would be unfair if one doctoral student in receipt of direct pay from the education provider were entitled to claim auxiliary aids while another doctoral student who is externally financed were not so entitled. The problem is that the substantial scope of reasonable accommodation is more limited for students than it is for employees in Sweden (see below Section 3). In the U.S a disabled person would generally prefer to be categorised as a student than as an employee if the employer has less than 15 employees. The problem is that the legislation does not apply to small companies. In the U.K, a doctoral student is regarded as a student for the purposes of the DDA because he or she is currently enrolled at university.

If a person is neither a student nor an employee nor an applicant for a job, he or she is not entitled to rely on the education and employment provisions. One example is visiting scholars like me here at the University of Leeds. Instead, he or she can rely on service provisions since education providers and employers can be regarded as a provider. However, the problem is that these provisions only apply where the education provider or employer provide services to the public. It is not always the case since courses and seminars are often only open to registered persons, i.e. students. This problem arises where the provider refuses to provide accommodations for a visiting scholar on the basis that he or she is not a student. Consequently, the disabled scholar will experience a disadvantage in relation to a non-disabled scholar who can attend any class to which a professor invites him or her.

3 The concept of reasonable accommodation

All three countries recognise that failure to make reasonable accommodation constitutes discrimination. The objective is not to give disabled people an advantage but to neutralise the disadvantage by removing current obstacles. Therefore it is not synonymous with positive action. The countries recognise that the duty to make reasonable accommodation is not absolute but relative. It means that an individual assessment of all relevant factors is necessary in order to find out whether an education provider or employer is obliged to make a particular accommodation. Such factors include the following:

- The type and severity of the impairment, including learning disability
- the type and duration of the program/ employment
- the effect and cost of a certain accommodation measure
- the financial and administrative circumstances of the education provider/ employer
- The availability of government funds

An accommodation will not be required if it would:

- Cause a fundamental alteration in the nature of the program or the employment. This means that neither the education provider nor the employer is obliged to lower their academic/ professional standards. Instead they are obliged to waive or alter marginal functions.
- Cause a disproportionate burden to be placed on the education provider or the employer.
- Constitute a direct threat to the health and safety of any person. The education provider or employer is not obliged to change their health and safety policy if it would jeopardise any person's life and health.

The education provider and employer are obliged to make reasonable accommodations during the entire process from marketing/ recruitment/admission to dismissal. The requirement is that a measure must be related to the education provider's/ employer's activities. In other words, the duty does not extend to the provision of personal aids such as medication.³ As I earlier mentioned, in Sweden the scope of the duty is limited within tertiary education in that education providers are only obliged to make alteration to physical features of their premises. This may be illustrated by a Swedish case where a deaf student claimed an interpreting service to be able to attend a course.⁴ However, the University Board of Appeals found that the University was not legally obliged to provide such a service. This limitation will probably be removed next year provided that the Swedish Parliament approves a proposal by the Government Commission of Inquiry. It should be stressed, however, that even now there are

³ See e.g. *Kenny v. Hampshire Constabulary* [1999] IRLR 76.

⁴ Decision 2003-02-14, reg. nr 46-899-02, <http://www.onh.se>.

some disability support services at Swedish universities. The Swedish Government issues to education providers, on an annual basis, conditions for its funding of programs. According to these conditions, the providers are obliged to spend a certain percentage of their funding on disability-related expenses, such as the hiring of interpreters or readers and the purchase of technical aids. The difficulty with this approach is that it is not possible for a disabled person to sue an education provider who fails to provide such measures.

Against this background, I would like to describe some of the types of accommodation measure which will be needed by most learning disabled people. It should be noted that the question of whether a particular measure is reasonable or not will vary from case to case.

a) Schedule modification:

- Flexible study/work hours: some learning disabled persons may experience difficulty in waking early due to poor sleep. They may therefore need to start studying or working later than others.
- More frequent breaks or prolonged lunch break: Some need rest due to low stress tolerance.
- Part time study or work

b) Academic and professional modification:

- course substitution: e.g. foreign language and mathematics for persons with dyslexia and dyscalculia.
- reassigning tasks among other students and employees: e.g. client contact for persons with Aspergers syndrome.
- re-assignment to a vacant position

c) Modification of the physical environment

- enclosed exam room, study room or office for persons with ADD/ADHD
- blocking noise
- Light wall for persons with bipolar disorder.

d) Changes in policy:

- Leave for medical treatment or similar treatment.
- extended deadlines
- private space to rest, cry, or talk with supportive persons
- home work
- Information to students, employees, instructors etc
- Sitting rule
- flexible health and safety policy

e) Provision of personal support and assistive technology:

- contact person to help those who have social problems, particularly persons with autism spectrum.

- reader and proofreader to enable the learning disabled, particularly those who have dyslexia, to write and read properly.
- tutor and job coach to help the learning disabled to study and work effectively. They may need more instruction than others.
- computer to enable the learning disabled to study or work at home.

5 Case-law

A general survey of the Swedish case-law shows that there is only one relevant case in terms of learning disabled persons.⁵ This case deals with an applicant with dyslexia who was denied access to veterinary education. The problem is that the university found that he did not have the highest grades in all subjects. Therefore, the applicant challenged this decision before the University Board of Appeals. The Board found that the decision did not violate the anti-discrimination legislation because the university was not obliged to lower its academic standard. Thus the decision was based on the merit principle. However, I am very critical of this judgment because there were only two courses in which the Applicant did not have the highest grades and these, being foreign language courses, were likely to have been affected by his impairment. Accepting these grades would not have lowered the academic standards because the veterinary training was in Swedish.

U.K courts have considered many cases relating to the definition of mental impairment in the context of employment. In the context of education, although there are no relevant cases concerning tertiary education, There has been some caselaw on the secondary education of learning disabled people.⁶

The situation is totally different in the U.S where there are hundreds of cases that relate to learning disabled persons claiming reasonable accommodation in tertiary education and in employment. These cases deal with a range of issues, including flexibility of admissions tests, course substitution, reallocation of work duties, availability of home work and leave, flexibility of health and safety policies. It is not possible to consider all these cases in this lecture. Instead, I would like to bring your attention to one interesting case which shows how the American courts assess the relationship between reasonable accommodation and academic standards. This is the case of Guckenberger et al. v. Boston University.⁷

- Boston University was a leader amongst educational institutions in seeking to provide comprehensive services to learning disabled students. Learning disabled people could apply, amongst other things, for: notetaking assistance, additional time for examinations, private tutoring and support groups, course substitution for mathematics and foreign language classes.
- A new provost, Jon Westling, decided to review the university's policy. According to the revised policy:

⁵ Decision 2005-09-16, reg. nr 33-027-05.

⁶ See e.g. McAuley Catholic High School v. C and others [2003] EWHC 3045.

⁷ 974 F. Supp. 106 (D.Mass. 1997).

- Learning disabled students who are seeking accommodations have to provide medical documents not older than three years. These documents should be issued by physicians, clinical psychologists, and licenced psychologists.
 - All applications for accommodations should be reviewed by the Provost's office which had no expertise in learning disability
 - No course substitution in foreign language and Mathematics is allowed.
 - A speech on "Somnolent Samantha"
 - The provost declared, among other things, that the diagnosis of learning disability was a fake and that many persons who are lazy take advantage of accommodation measures. Accommodating learning disability would constitute a moral threat to hard and rigorous academic work.
- Ten learning disabled students brought a class action against the university, arguing that they had been unlawfully discriminated against when they were no longer provided with accommodation measures they had requested.
 - The Circuit Court held, among other things, that the requirement that medical documents had to be reviewed every three years was unreasonable unless it was medically necessary. However, its decision gave judicial deference to Boston University on the question of course substitution. It did impose the condition, however, that the University would be entitled to refuse course substitution only if it first underwent a 'deliberative procedure' for determining whether course substitution would substantially alter the university's academic program.
 - The Case has been subject to sharp criticism:
 - The court did not hire a group of impartial and objective experts to make a professional assessment of the eligibility of university program requirements#

6 Some reflections

I hope you have received a general idea of why learning disabled persons have not benefitted much from the anti-discrimination legislation in the U.S, the U.K and Sweden. One reason is that the legal definition of disability is too narrow in the sense that it has excluded many learning disabled persons from relying on the anti-discrimination legislation. The question is whether the requirements relating to severity and duration should be removed or not. It should be noted that the Australian anti-discrimination legislation (Disability Discrimination Act 1992) does not have such requirements. A second reason is that the provisions on tertiary education and employment are somewhat too technical and limited to cover some exceptional groups such as doctorate students, trainees and visiting scholars. A third reason is that American courts have interpreted the duty to make reasonable accommodation restrictively. This may be due to the fact that the American legal system largely rests on the neoclassical economic model. Consequently, a judge is very unwilling to deliver a judgement which will infringe the integrity and economic freedom of education provider's and employer's any more than is necessary. Luckily enough, the U.K's case-law shows that British courts are more willing to infringe this integrity. This is illustrated by the significant case of Archibald v. Fife Council where an employer was obliged to promote a disabled employee to prevent

dismissal.⁸ This case, unlike many of the American ones, places a heavy emphasis on the importance of social solidarity.

⁸ [2004] IRLR 651 House of Lords.