

Submission to:
Commonwealth Department of Education and
Training

Review of the Disability Standards for Education 2005

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Introduction

The DDLS is a state wide independent community legal centre that specialises in disability discrimination legal matters.

Our goal is to work towards the eradication of unlawful disability discrimination; and to facilitate and promote justice for people with disabilities. We do this through casework, advice and community legal education to professional and community groups to raise disability awareness and provide information on the *Disability Act 1992 (Cth)* and the *Equal Opportunity Act 1995 (Vic)*.

The impact of the current legislative framework on the level of participation and educational attainment by students with disabilities is determinative of their successful inclusion. Limited participation and constant struggles to access education are recurring themes raised by the young people, parents and carers that access our service for legal assistance.

A large part of DDLS casework relates to claims of exclusion and failed education against public, religious or independent schools, with the State of Victoria being the most common respondent

This submission is part of our broader commitment to working with students, families, carers, schools, government and disability advocates to eradicate discrimination in education.

The Review – Opportunity to Participate

DDLS is of view that the effectiveness of the Standards is critical not only in preventing unlawful discrimination but also in ushering in progressive approaches to providing education to students with varying types of disabilities. Hence, we consider the review of the Standards quite crucial and find that the manner in which the Review has been conducted is regrettable.

We are concerned at the short time lines provided to students with disabilities and those representing them, to provide feedback on the Review. The provision of a period of one month, subsequently extended by one week, is grossly inadequate. The short time frame provided could be seen to be discriminatory for students with disabilities who may need time and support to respond.

The Standards comprise a 28 page document which form federal anti-discrimination legislation applicable to education, an area which has the most significant effect on a person's life,

A Review which is hurried and does not seek a comprehensive and balanced response does people with disabilities an injustice . They are the primary stakeholders, however the review process itself display elements of them being indirectly discriminated against through the imposition of an unreasonable time frame for meaningful participation.

We are concerned that despite this being raised with the Reviewers, and despite the impact of this notification, the date for submissions was merely extended by one week.

We are also concerned with what appears to be a given premise of the review, which is that the standards have been successful. The submission template asks:

"To what extent (and in what ways) do the Standards support access and participation in education by people with disability on the same basis as others?", as opposed to "Have the Standards supported access and participation of students with disabilities?"

There is little attempt to pose questions in a manner that engages with all the objects of the Standards, or that may elicit negative responses.

Questions focusing on community awareness, such as:

How aware do you think people in the education community are of the barriers faced by people with disability who want to access education?

are irrelevant as to whether the Standards are operating in the manner intended, which is:

- (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the area of education and training; and*
- (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law in the area of education and training as the rest of the community; and*
- (c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.*¹

¹ Disability Standards the Education 2005 p6

Have the Standards succeeded in achieving participation for students with disabilities?

Our clients report that their experience accessing/participating in education and training is often frustrating, stressful, and very difficult. The Standards have raised expectations for our clients, their parents and carers, that schools will take steps to make reasonable adjustments to ensure that participation and educational attainment is available to all students..

Our clients describe a range of barriers and challenges that prevent them from accessing and participating in education. Specifically, these relate to:

- Having their disability recognised as such by the school.
- Accessing appropriate assessments that identify appropriate adjustments required for the student's participation and educational attainment.
- Receiving appropriate adjustments required to enable participation in the established curriculum and progress academically.
- Not being supported to pursue the established curriculum and progress towards educational attainment.
- Being subjected to disciplinary standards and processes that do not take into account behaviours that are symptoms of or manifestations of the disability.

For a significant number of our clients, their experience of being denied the opportunity for education in primary, secondary or tertiary schools settings has substantially disadvantaged them in regard to attaining the education and skills necessary for them to participate in the workforce or higher education.

Children and young people are frequently denied access and opportunity to receive a robust education and attain qualifications due to the inability or refusal of the education provider to make adjustments that make such attainment possible. Yet the mathematics does not seem complicated, The infusion of the resources they require at school level guarantees their future productivity instead of on going reliance on social services and benefits.

In Victoria, the experiences of students with disabilities and the barriers they experience in accessing their education have already been well set out in quantitative and qualitative reports by the following statutory authorities:

- Victorian Equal Opportunity and Human Rights Commission in its 2012 report "*Held Back-the Experiences of Students with Disabilities in Victorian Schools*" ("Held Back")
- Victorian Auditor General's Office Report '*Programs for Students with Special Learning Needs*' 2012.

These reports provide the reader with significant detail regarding the issues that prevent full participation by students with disabilities in the Victorian education system. It is our view that these reports should inform f the Review of the Standards

While a cursory reading of the Standards reflects a broad intention that students with disabilities should be able to participate in their education on the same basis as others, the more salient points to be considered in any review is how effective they are when:

- a student with a disability attempts to use them to uphold their rights; and
- educators are seeking clarification on how to comply with the *Disability Discrimination Act*.

The Standards have not provided support for positive change or increased participation and attainment as reported to us, and as reported through statutory authorities.

Our clients are often attending or attempting to attend public primary and secondary schools, and have sought assistance and adjustments to support their participation through the school directly, and when there is dispute, through the Department of Education and Training.

The Standards have been in place for 10 years. During the last decade, the deficiency in the current approach to supporting participation and education for people with disabilities has been well documented.

There has, and continues to be, frequent formal complaints of discrimination in school settings. There has, and will continue to be, reports that identify the shortcomings of the current education system, including those reports mentioned above. The level of education participation, attainment and outcomes for people with disabilities remains substantially less than people without disabilities.

In 2012 the Australian Bureau of Statistics reported in their *Disability, Ageing and Carers, Australia* report that there was a significant difference in the educational attainment for people with a disability compared to people without a disability. Completion of Year 12 was achieved by 36 per cent of people with a disability, compared with 60 per cent of people without a disability. The Standards had been in place for 7 years at the time this data was collected. The students would have been in Year 7 when the Standards were introduced and only 36 % achieved Year 12. This difference increases markedly for higher education, with 15 per cent of people with a disability attaining a bachelor degree or higher, compared with 26% of people without a disability.

Whilst there have been marked improvements in access for students with physical disabilities following the introduction of the Standards. However, there has not been the same level of improvement in access for students with cognitive, sensory or intellectual disabilities, and education providers are struggling to, or refuse to, make appropriate adjustments to ensure that students with cognitive or intellectual disabilities can access their education. This is lamentable as the latter are the type of disabilities that are often less understood, at times subjected to misguided assumptions, and yet the sophistication of their specific needs become boundaries for support. On the other hand, the Disability Standards on Access to Premises

provide additional means to people with physical disabilities. It is not our intention to compare disabilities but it is apparent that inclusion is needs driven.

The lack of options and support provided for students with intellectual and cognitive disabilities is very concerning and seems undeterred by the Standards. Educational providers are opting to respond to the unique challenges of these disabilities with punitive and disciplinary responses that focus on the behaviours that occur as a result of frustration, rather than providing adjustments to facilitate engagement with education. Significant work needs to occur and investment in specialists that can design appropriate education models and train teachers to respond appropriately and not exclude students from learning opportunities due to the behaviours associated with their disability. This emerging area of need and the mismanagement of students with challenging behaviours often culminate in restrictive practices². The Standards do not seem to have had any effect in ameliorating a serious problem which can cause, and has caused, injury or death to people with disabilities .³

The Standards, due to their broad nature, do not assist education providers who do not have the specialist skills or resources to understand how to provide adjustments and access to education for students with disabilities

The Provision of Reasonable Adjustments/Consultation

The heart of the Standards is the positive duty of education providers to consult and to provide reasonable adjustments to a student whose disabilities make them unable to participate substantially in their education. The ways by which schools have interpreted these provisions and carried out their mandate legitimise discriminatory conduct. .

Schools effectively decide what consultation and reasonable adjustment means and the meaning given to these terms are quite convenient for their purposes. Educators are not experts in disabilities, yet are the arbiters in relation to the extent of the consultation necessary, students with disabilities need any adjustments at all, and if they do need them, what those adjustments should be. They have an inherent position of conflict of interest. The conflicts arise where adjustments may require funding, and therefore compete among the business priorities of the head of school.

While funding is not always required to enable a student with a disability to fully participate in their education, there are many supports/adjustments that do require funding. These include, but are not limited to:

- communication devices;
- training for staff to use communication devices;

² *Held Back-Experiences of Students with Disabilities in Victorian Schools*, Chapter 10

³ State of Victoria, Office of Senior Practitioner, *Physical Restraint Direction Paper* 2011 p9

- equipment such as Radio Frequency Units;
- Auslan interpreters;
- Integration Aides;
- Computer programs such as voice-activated software, software which expands text or speaks text;
- Speech Pathology, Occupational Therapy, Physiotherapy support to undertake assessments, write student programs, monitor and evaluate them;
- payment for consultants to attend Student Support Group meetings

Current commonwealth case law⁴ accepts this interpretation of the duty to consult under the Standards as follows:.

"The first is that both provisions require a school to consult a student or his or her parents about prescribed matters. They do not, however, require that such consultation take any particular form or occur at any particular time. Those involved may meet formally or informally. Discussions can be instigated by either the school or the parents. Consultation may occur in face-to-face meetings, in the course of telephone conversations or in exchanges of correspondence."

Walker v State of Victoria [2011] FCA 258 decision [284]

To compound the problem, and notwithstanding that the Standards specifically provide and reiterate the defence of unjustifiable hardship under the *Disability Discrimination Act*, there is at least one Victorian decision that states that reasonable adjustments do not need to work⁵.

DDLS is of the view that adjustments in the provision of education, (which includes participation, curriculum and assessment) that are not effective, cannot be considered reasonable. If the adjustments are not effective, then they have not levelled the playing field or given the student equitable services. The duty is not unlimited, but the limit to the provision of reasonable adjustments as clearly stated under the *Disability Discrimination Act* and the Standards, is that providing the same may constitute unjustifiable hardship.

If this view is incorrect and if the Tribunal's decision is the law on the matter, then there is a serious drafting anomaly which requires a prompt and tacit clarification that schools cannot evade their common law, statutory or contractual duty to provide services that are fit and proper to the needs of a person with a disability or disabilities.

In the same case, the Tribunal held that an:

*"Adjustment may be considered reasonable even if it is not in writing"*⁶.

⁴ Walker v State of Victoria [2011] FCA 258 decision [284]

Abela v State of Victoria [2013] FCA 832 [147]

⁵ *USL obo her son v Ballarat Christian College (Human Rights)* [2014] VCAT 623

⁶ Paragraph 214, Ibid

We find that the most common causes of tension between schools and parents are the contents and the implementation of Individual Learning/Education Plans. These Individual Learning Plans document the recommended measures following a well informed consultation between and among the school, teachers, parents, health practitioners and/or disability experts. They are also intended to be a living document, subject to review and revision. Thus, the proposition that any formal setting of education can be deemed compliant with the Standards on the basis of an arrangement, the terms and purposes of which are subject to misunderstanding as they are unwritten, deprives students of an important tool. It is more the case than not that, heads of schools, integration coordinators, teachers and aides take a united position when making claims about what constituted an "unwritten" plan. In contrast, the child or the parent find themselves alone, struggling to find corroboration.

In the same vein, if the Standards do in fact exclude recording as a requirement in the determination of what constitutes reasonable adjustments, then the law needs urgent amendment in order to amplify and better promote the best interests of a student with a disability.

The fact that such amendments would simply rectify good educational practice would be a bonus for students with disabilities.

The Victorian Equal Opportunity and Human Rights Commission in its Held Back report found that:

*Despite considerable investment by the Victorian Government, there continues to be significant unmet need for support services for students with disabilities, including integration aides, occupational therapists, speech therapists, other specialist staff and assistive technology. If these are not provided when required, students with disabilities **cannot participate effectively** in education. p60 [emphasis added]*

Having the ultimate decision-makers on adjustments for students with disabilities being those who may experience detriment through the making of such decisions (due to underfunding by the Department of Education and Training), is not in the best interests of students with disabilities. While the Standards remain as they are in this respect, it is unlikely that participation of students with disabilities in schools will improve.

Awareness of the Standards

Teachers and staff associated with our clients do not demonstrate an understanding that in many cases the school itself presents the most significant barrier to participation and attainment for students with a disability.

The Held Back reports in its Executive Summary⁷ that 40 per cent of educators were unaware of the Disability Standards for Education 2005 and their obligation to comply with the Standards.

The study revealed that despite the intent of the Standards, students with disability are still:

- Refused enrolment in schools based on the schools inability to accommodate for the students needs
- Denied participation in external assessments and do not receive the necessary adjustments to participate fully in exams and assessments
- Denied equal access to attend excursions, school camps and other extracurricular activities

In addition to this, the report identified that education providers are taking a haphazard approach to supporting students, developing individual learning plans and sharing information with students and their families.

The report also identified that restraint and seclusion are still being used as a behaviour management tool, with no reporting or accountability requirements and lack of independent professional oversight, (such as the involvement of the Office of the Senior Practitioner), when these interventions are being considered.

These findings are consistent with the experiences of our clients and the lack of expertise and capability demonstrated by education providers.

It would be a mistake, however, to conclude that an increased awareness of the Standards will effectively address these issues.

⁷ *Held Back-Experiences of Students with Disabilities in Victorian Schools*, Executive Summary p8

Lack of Detail in the Standards

While the Standards make it clear that students with disabilities have rights, as an enforcement tool, they fail due to their lack of specificity.

The Standards are too broad to be effective. It is important to remember that the Standards are part of discrimination legislation, being the *Disability Discrimination Act 1992*. They should not be viewed simply as guidelines or education tools. Their purpose is to assist education providers comply with their legal obligations under the *Disability Discrimination Act 1992*. If they cannot achieve that aim, or do not greatly assist that aim, they fail.

Australians with disabilities rely solely on anti-discrimination legislation, standards and policies to eliminate disability discrimination by education authorities and providers. While the Standards aimed to impose a positive obligation on education providers to make 'reasonable adjustments' to accommodate the needs of students with disabilities, this has often not occurred due to their broad nature and drafting errors.

The last 10 years has highlighted that to be effective, the Standards need to be supported with expertise and resources that:

- enable students to access assessments and recommendations from specialists relating to their disability.
- require education providers to implement reasonable recommendations provided by the professionals and not to rely on their own judgement (as is currently supported by the Standards).
- provide for regular review and assessment by a professional regarding the efficacy of the support and adjustments provided, with flexibility to adapt further to the students needs.
- require outcomes measurements for education institutions relating to educational attainment and post school outcomes for students with disabilities.

Unless the Standards explicitly require the specific measures that need to be taken to achieve the above, they will continue to be ineffective.

Despite what at first blush seems a clear intent to provide access for students with disabilities, the Standards, when used as a legal instrument, provide all decision-making powers to the education provider as set out above.

Achieving the aims of the Standards and eliminating discrimination in education requires an evidence based approach that is responsive to the diverse characteristics, challenges and strengths of people with different physical, mental, intellectual or sensory impairments. To achieve the aims of the Standards, education providers need to draw on expertise specific to the disability of the student, recognise and pro-actively address the physical, cognitive and social

barriers that prevent students with different impairments and disabilities from taking part in education and learning communities on an equal footing with others. The Standards do not require this.

The Standards have proven themselves to be challenging and unworkable for families, individuals, and education providers. It is our position that case law demonstrates that the Standards have been applied contrary to their stated aims and have prevented people with disabilities from accessing their education.

Model Legislation

The Standards rely, for the most part, on the provision of "reasonable adjustments". The concept of "reasonable adjustments" can be argued by lawyers and interpreted in a number of ways. This does not assist students with disabilities.

Given the case law around indirect discrimination⁸ and the restrictive interpretations about what can constitute a "*requirement or condition*", the concept of providing "reasonable adjustments" is heavily relied upon as a matter of necessity by students with disabilities making legal complaints.

Given the Courts to date concluding that decision-making regarding reasonable adjustments is the role of educational providers pursuant to the Standards, the Standards' reliance on the provision of reasonable adjustments as the manner in which discrimination in education might be eliminated, is flawed.

It is therefore, in our view, necessary to develop legislation which sets out some basic requirements in the support of students with disabilities. In other words, it is necessary to set out the rights of students in an unambiguous fashion.

The *Individuals with Disabilities in Education Act 2004* ("IDEA") has existed in North American legislation in some form or another since the early 1970s. It is an example of legislation that has had a significant number of years to be tested and tried, and as is commonly the case with legislation, has been the subject of law reform on a number of occasions. Such reform, we can assume, made improvements to the legislation in order that it could best meet its aims and objectives, and the intent of government.

The IDEA provides a stark contrast to the Standards. Where the Standards are broad, the IDEA is explicit. Such clarity should not only be seen to be supporting students with disabilities, but also education providers who are keen to understand their obligations.

Only one such example, but one that is critical, is the education planning process which is contained in the IDEA, but in a detailed fashion in order that neither teacher, student nor family member could be confused about their obligations/rights.

⁸ *Disability Discrimination Act 1992* Section 6

The IDEA sets out the requirements for planning and individualised education program, how meetings must be conducted regarding such a program, and who should attend.⁹ There is no requirement whatsoever in the Standards, (nor by the Victorian Department of Education and Training) for formal Individual Education Plans. In Victoria, such plan may not be in physical existence, the school may meet its obligations to consult by claiming to have had a telephone call with a parent, and this will satisfy the Standards. Excerpts from Sections 614 and of the IDEA covering individualised education planning are set out in Attachment A to this submission.

Individualised education planning is only one small part of this education antidiscrimination legislation, however the legislation tackles numerous important aspects of education of children with disabilities in similar detail.

Consideration of Other Issues

Tertiary Education

While the DDLS does receive complaints from tertiary institutions, access to education seems to improve markedly upon leaving primary and secondary schools. However we are cognisant of the fact that many students with disabilities will not have the opportunity to attend tertiary institutions due to the fact that they have not mastered basic literacy and numeracy skills in primary and secondary school.

Economic disadvantage and dispute

In many cases, the families and carers of people with disabilities experience significant economic disadvantage. In working with these families to try to assert a student's basic right of access to education, the imbalance in resources available to families in contrast with the education provider, usually the State, is significant. In these cases, the educational outcome and attainment of the young person has not appeared to be the education provider's/State's paramount concern.

Families do not have the limitless funding the State has to litigate. This is one, amongst a number of other more obvious reasons, why the Standards must be strong, informative and prescriptive.

Delays in educational participation due to litigation and long term implications

In some cases, a child or young person has been denied access to adjustments and participation in schooling while a legal complaint is resolved. Such a process results in months and in some cases years of lost opportunity for learning. This is particularly the case where families do not have the resources to move and find a

⁹ *Individuals with Disabilities in Education Act 2004* ss 614, 615

school that is willing to try to provide adjustments and work with the family and young person to achieve their educational goals. There should be recourse and accountability in this area in order that there is a mitigation of risk of the student's education being paralysed while legal proceedings take place.

Conclusion and Recommendation

While the aims of the Standards remain crucial, it is the view of DDLS that the Standards themselves do not give effect to their aims and need to be replaced with more robust and effective Standards/legislation with clear compliance requirements.

The DDLS believes that the Standards must be replaced with legislation that models itself on American anti-discrimination law –the *Individuals with Disabilities in Education Act 2004*. Reading of this legislation should form part of the Review.