Disability Standards for Education: the obligation to make reasonable adjustment and ramifications for schools

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Standards authorised by *DDA*

- Enacted under the authority of *Disability Discrimination Act 1992 (Cth) (DDA)* s 31.
- Binding upon education providers in all Australian states and territories: *DDA* s 14; s 32.
- Education providers include educational authorities and educational institutions: pre-school to post-compulsory, public, private and not-for-profit. Standards 1.5, 2.1
- Compliance with the Standards amounts to compliance with the *DDA*: s 34 – "theoretical" protection against being sued
- Will override state discrimination legislation to the extent of any inconsistency (eg *Anti-Discrimination Act 1991 (Qld))
What is Disability? *DDA s 4; Standards 1.4*

- (a) total or partial loss of the person’s bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person’s body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

- (h) presently exists; or
- (i) previously existed but no longer exists; or
- (j) may exist in the future; or
- (k) is imputed to a person.

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.
Effect of the Standards

- Cover a number of key aspects of the delivery of education services:
  - enrolment (Part 4)
  - participation (Part 5)
  - curriculum development, accreditation and delivery (Part 6)
  - student support services (Part 7)
  - elimination of harassment and victimization (Part 8)
Effect of the Standards

• For each aspect, the Standards set out
  – student rights, ‘consistent with the rights of the rest of the community’
  – the legal obligation of education providers – to take ‘reasonable steps’ to ensure students with disabilities enjoy those rights ‘on the same basis’ as other students
  – ‘measures of compliance’

• The overarching obligation is to make ‘reasonable adjustment’
Consultation

- Before the education provider makes an adjustment for the student, the education provider must consult the student, or an associate of the student, about:
  - (a) whether the adjustment is reasonable; and
  - (b) the extent to which the adjustment would achieve …[inclusion] in relation to the student; and
  - (c) whether there is any other reasonable adjustment that would be less disruptive and intrusive and no less beneficial for the student.

Standards 3.5

- ‘[The Standards] 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.’ [284]
What is a *reasonable* adjustment?

1. For these Standards, an adjustment is *reasonable* in relation to a student with a disability if it balances the interests of all parties affected.

Note  Judgements about *what is reasonable* for a particular student, or a group of students, with a particular disability *may change over time*...
Who decides what’s reasonable?

- ‘Once consultation has occurred it is for the school to determine whether any adjustment is necessary in order to ensure that the student is able, in a meaningful way, to participate in the programmes offered by the school.
- The school is not bound, in making these decisions, by the opinions or wishes of professional advisers or parents.
- The school is also required to determine whether any reasonable adjustment is possible in order to further the prescribed aims.
- There may, therefore, be cases in which an adjustment is necessary but no reasonable adjustment is able to be identified which will ensure that the objectives contained in the relevant Disability Standards are achieved.’ [284]
Timing of adjustments

- Standards 3.7
- **Adjustments to be provided in reasonable time**
- (1) The education provider must take reasonable steps to ensure that any adjustment required to be made is made within a reasonable time.
Limits on reasonable adjustment

- An adjustment will not be required
- if it is not ‘reasonable’
- if it would cause unjustifiable hardship [Standards 10.2]
- if it would be inconsistent with an act authorized by law [Standards 10.3]
- if it would jeopardize the health of a student with disabilities or the health of other students [Standards 10.4]
- Special measures [Standards 10.5]
Reasonableness

(1)...

(2) In assessing whether a particular adjustment for a student is reasonable, regard should be had to all the relevant circumstances and interests, including the following:

(a) the student’s disability;

(b) the views of the student or the student’s associate, given under section 3.5;

(c) the effect of the adjustment on the student, including the effect on the student’s:

(i) ability to achieve learning outcomes; and

(ii) ability to participate in courses or programs; and

(iii) independence;

(d) the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students;

(e) the costs and benefits of making the adjustment.
Unjustifiable Hardship

• The provider must comply with the Standards to the maximum extent not involving unjustifiable hardship.

• *Note* Section 11 of the Act provides that, for the purposes of the Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

  • (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
  • (b) the effect of the disability of a person concerned; and
  • (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
  • (d) in the case of the provision of services, or the making available of facilities — an action plan given to the Commission under section 64 of the Act.
In summary, adjustment required if...

- It is reasonable taking into account
  - Disability
  - views of student
  - Effect on student
  - Effect on others
  - Cost and benefits

- And, it does not impose unjustifiable hardship
  - Benefit/detriment to anyone concerned
  - Effect of disability
  - Financial circumstances of provider of service
Cost

• Early cases (Qld):
  – If financial viability of small, independent school at risk
    – *K v N School* (1996) 1 QADR 620
  – But State can ‘reallocate resources’ and ‘raise extra revenue’ – *P v Qld* (1995) 1 QADR 755

• Recent cases (Vic)
  – Resources even of State not unlimited
  – State must fund its obligations to *all* students
  – Flow on effect of providing for one student relevant
  – Schools must be prepared to show EVIDENCE of hardship
  – See *Turner* (2009) and *Sievwright* (2012)
Case law guidelines

• Only three cases so far which considers in any detail the effect of the Standards
  – *Sievwright v State of Victoria* [2012] FCA 118
  – *Abela v State of Victoria* [2013] FCA 832

• Can also look at past discrimination cases for guidance
  – If a court considering a discrimination claim found an adjustment was unreasonable or would have caused unjustifiable hardship then it is likely it would be treated the same way in the context of the Standards.
Direct Discrimination

- *Direct discrimination* arises when there is ‘less favourable treatment’ of the complainant.

- Classic example of ‘less favourable treatment’:
  - student with disability not enrolled/excluded, student without disability enrolled/not excluded.

- See, for example, *Hills Grammar School v Human Rights and Equal Opportunity Commission* [2000] EOC ¶93-081
Indirect discrimination

• Indirect discrimination is also called ‘facially neutral’ or ‘hidden’ or ‘institutional’ discrimination. It occurs when treating people in the same way has a discriminatory effect on those with a protected attribute.

1. Condition placed upon the inclusion of the person with disability [usually inferred from the facts]; and

2. The person with disability cannot comply with the condition; and

3. The requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability; and

4. The condition is ‘not reasonable’

Limit: proof that the condition is reasonable will defeat a claim of direct discrimination.
Indirect discrimination

- **Classic example**
  - Condition: you must be able to use steps to attend this school
  - A student with a mobility impairment cannot use steps
  - Students without a mobility impairment can use steps/condition will disadvantage the student with the disability impairment
  - The term may or may not be reasonable depending on the circumstances

- **eg Kinsela v Queensland University of Technology [1997] HREOC No H97/4**
Enrolment rights

• ‘The effect of the following Standards is to give prospective students with disabilities the right to enrol in an educational institution on the same basis as prospective students without disabilities, including the right to reasonable adjustments that are necessary to ensure that they are able to so enrol on the same basis as prospective students without disabilities’

• Standards 4.1
Ramifications of enrolment Standards

• Focus of Standards is on a ‘right’ to reasonable adjustment to enrolment protocols rather than on a ‘right’ to enrolment:
  – Information about the school and about its enrolment processes, entry requirements, courses and programs are to be accessible by people with disabilities
    • may simply mean that staff are available to talk through the process
    • when preparing promotional materials consider accessibility issues
  – Forms and procedures can be completed by people with disabilities or an associate
    • again, may be enough to provide assistance to complete forms
    • again, consider accessibility issues
Ramifications of enrolment standards

- Consider adjustments which are sought by the student and adjustments which can ‘reasonably’ be provided by the school
- Consider how the student may be accommodated in terms of curriculum, participation and assessment and accreditation Standards
- Time consuming as disability is unique
Participation rights

- ‘The effect of the following Standards is to give students with disabilities the right to participate in the courses or programs, and to use services and facilities, provided by an educational institution, on the same basis as students without disabilities, including the right to reasonable adjustments, where necessary, to ensure they are able to participate in education and training, on the same basis as students without disabilities.’

- Standards 5.1
Ramifications of participation Standards

- Courses and activities designed to be inclusive – incorporate activities which can be engaged in by ALL students including those with disabilities (but NB academic standards exception – later)
- Support provided to allow participation – eg teacher aide support, equipment
- ‘Reasonable substitutes’ provided where participation not possible
- Extra curricular activities (eg excursions) designed to be inclusive
Travers v State of NSW [2001] FMCA 18
(spina bifida, incontinence)

• Complainant girl needed access to a toilet within 12 seconds range
• Student toilets out of range
• ‘Disabled’ toilet was within range but complainant was denied access – ‘reserved’ for a boy who required catheterization and school feared ‘contamination’ by the complainant
• Held that the school had not behaved reasonably; school exaggerated risk of contamination
Curriculum rights

‘The effect of the following Standards is to give students with disabilities the right to participate in educational courses or programs that are designed to develop their skills, knowledge and understanding, including relevant supplementary programs, on the same basis as students without disabilities’

Standards 6.1
Ramifications of curriculum Standards

- Reasonable adjustment likely to require:
  - adjustment to the format and delivery of course materials
  - adjustment to the format, time allowed for and scheduling of assessment items
  - course materials delivered in a supportive setting with access to both academic staff, and expert counsellors
Integrity of the program and the Standards

- Standards 3.4(3):

- In assessing whether an adjustment to the course of the course or program in which the student is enrolled, or proposes to be enrolled, is reasonable, the provider is entitled to maintain the academic requirements of the course or program, and other requirements or components that are inherent in or essential to its nature.

- Note: In providing for students with disabilities, a provider may continue to ensure the integrity of its courses or programs and assessment requirements and processes, so that those on whom it confers an award can present themselves as having the appropriate knowledge, experience and expertise implicit in the holding of that particular award.
Assessment

Most discrimination in assessment claims are likely to be indirect discrimination claims because the discrimination is alleged to flow from the fact that students with disabilities are treated the same as students without disabilities. They cannot comply with an ‘unreasonable’ condition that

- They have to finish an exam/assignment in a set time
- They cannot take a break in the middle of an exam
- They have to be able to read/ hear/write/write quickly
- They have to rely on an exam paper printed on white paper in 12 point font
- They cannot eat during an exam
- They cannot use a computer during the exam
- They cannot have an assistance animal with them in the exam room
- They have to speak in public to demonstrate their knowledge
Reasonable adjustment…

They have to finish an exam/assignment in a set time
  • Allow extra time
They cannot take a break in the middle of an exam
  • Allow a supervised break
They have to be able to read/ hear/write/write quickly
  • Allow an alternative format; eg computer
They have to rely on an exam paper printed on white paper in 12 point font
  • Adjust formatting of exam paper
Reasonable adjustment...

They cannot eat/take medication during an exam
  • Allow a supervised food/medication break
They cannot have an assistance animal with them in the exam room
  • Organize a separate venue where assistance animal okay
They have to speak in public to demonstrate their knowledge
  • Allow a ‘private’ performance
Beanland v State of Queensland & Anor
[2008] QADT 5
(physical and visual impairment)

- The complainant could not read or write.
- He was commencing Year 11 at Corinda State High and wanted to study English and German. Alleged that he was discriminated against in that the school insisted that he would have to be able to read and write to complete assessment.
- Before the matter was settled, complainant left the school and enrolled at another school.
- Held no discrimination in that the school were willing to work out special consideration arrangements that would have allowed the complainant to study English and German.
- Tribunal said it was unsatisfactory, however, that someone be expected to commence study of a subject without knowing what special consideration would be available.
Hinchliffe v University of Sydney [2004]
FMCA 85
(vision impairment)

• Claimed University of Sydney had failed to provide course materials to her in an accessible form in a timely fashion.

• Distinction, two credits and four passes in her first semester of OT and a high distinction, three distinctions, a credit and four passes in the second semester.

• Claim was, nevertheless, that her academic future had been compromised by what she presented as the University’s failure to provide her with course materials in a format which accommodated her disability.

• Driver FM found that the actions of University disability support staff were ‘sufficient and adequate’.

• Evidence that after initially requesting materials in an enlarged font on green paper she came to prefer taped materials. At first, did not communicate this change in preference to administration. Slower process to tape materials.
Support services rights

• ‘The effect of the following Standards is to give students with disabilities rights in relation to student support services provided by educational authorities and institutions, on the same basis as students without disabilities.

• The Standards also give students with disabilities rights in relation to specialised services needed for them to participate in the educational activities for which they are enrolled. These services include specialist expertise, personal educational support or support for personal and medical care, without which some students with disabilities would not be able to access education and training’

• Standards 7.1
Ramifications of support services Standards

• Three elements:
  1. Staff made aware of support services available to students with disabilities – ie staff training necessary
  2. Support services available to all students must be available to students with disabilities: eg careers guidance, general counselling
  3. Specialised support services and equipment must be made available to facilitate participation: eg ‘specialist teachers, interpreters, note-takers and teachers’ aides’; technology access equipment; external specialised support
Hurst and Devlin v Education Queensland [2005] FCA 405; Hurst v State of Queensland [2006] FCAFC 100
(hearing impairment)

• Hurst and Devlin alleged discrimination in the failure of Education Queensland to provide them with Auslan interpreters to facilitate their learning
• Education Queensland would provide only signed English interpreters
• Devlin won at first instance and Hurst on appeal
• Compare the similar ACT case Clarke v Catholic Education Office & Anor [2003] 202 ALR 340
Harassment and victimisation rights

‘The effect of the following Standards is to require strategies and programs to support the right of students with disabilities to education or training in an environment that is free from discrimination caused by harassment or victimisation on the basis of their disability.

• The Standards also support the right of students who have associates with disabilities to an educational environment free from discrimination, harassment or victimisation in relation to those disabilities.’

• Note  The exception set out in section 10.2, relating to compliance that imposes unjustifiable hardship on an education provider, does not apply to a requirement in this Part’
Harassment and Victimisation

- **Harassment:**
  - an action taken in relation to the person’s disability that is reasonably likely, in all the circumstances, to humiliate, offend, intimidate or distress the person

- **Victimisation:**
  - threat to subject, the person with disability to any detriment on the ground that he or she has made, or proposes to make, a formal complaint about a breach of DDA or Standards, proposes to bring or has brought proceedings for breach of DDA or Standards
Ramifications of harassment/vilification Standards

• Generate specific policies, procedures and codes of conduct for STAFF and STUDENTS which explicitly prohibit harassment and victimisation.

• Develop complaints procedures which are fair, transparent and accountable

• Regular staff training in policies, procedures and codes of conduct. Staff trained to ‘detect and deal with’ harassment and victimisation.

• Student (including student with disability) awareness of policies, procedures and codes of conduct and of ‘rights and responsibilities’: posters? assemblies? class time?

• Complaints dealt with promptly.
Murphy and Grahl v The State of New South Wales
[2000] HREOC NoH98/73
(mobility impairment)

• Complainant child was enrolled at mainstream primary school against the advice and wishes of the school’s principal

• Acts of discrimination which contributed to a ‘hostile’ environment and which could also fit the Standards definition of harassment include:
  • The placing of an industrial bin in the only accessible car park
  • Locking the only gate to the school accessible by wheelchair
  • Placing cartoons and comments disparaging of people with disabilities on the notice board in a staff room where community meetings were also held