

Submission on 2020 Review of the *Disability Standards for Education 2005*

Canberra Community Law, September 2020

Introduction

Canberra Community Law (CCL) welcomes the opportunity to provide a submission as part of the Australian Government's 2020 Review of the *Disability Standards for Education 2005* (the **Standards**).¹ Our submission:

1. highlights some of the barriers that students with disability have faced in accessing education;
2. outlines how students and parents of students with disability have responded to possible non-compliance of the Standards;
3. provides a broad assessment of the Standards and offers recommendations to clarify the rights of people with disability and the obligations of education providers under the Standards and the *Disability Standards for Education 2005 Guidance Notes* (the **Guidance Notes**);² and
4. presents options for raising awareness about the Standards.

About Canberra Community Law

CCL is a community legal centre that provides free legal advice, assistance and representation to people in the ACT on low incomes or facing other disadvantage, for matters relating to tenancy, public housing, social security and disability discrimination law. CCL also operates:

- the Disability Discrimination Law Service which provides legal advice and representation on disability discrimination;
- Dhurrawang Aboriginal Human Rights Program which provides services in housing, social security and race discrimination law to Aboriginal and Torres Strait Islander communities in Canberra through a human rights framework;
- the Socio-Legal Practice Clinic which combines legal assistance with intensive social work support to maximise the prospect of a successful outcome;
- the Street Law outreach program which provides legal advice, assistance and representation on relevant areas of law to people who are experiencing or at risk of homelessness; and
- the Night Time Legal Advice Service which provides legal advice to any member of the public on most areas of law from 6 to 8pm on Tuesday nights.

In the 2019-20 financial year, 20% of DDLS clients sought legal assistance in relation to disability discrimination in the area of education.

¹ *Disability Standards for Education 2005* (Cth) < <https://www.education.gov.au/disability-standards-education-2005>>.

² *Disability Standards for Education 2005 Guidance Notes* < <https://docs.education.gov.au/node/16352>>.

Our commitment to supporting people with disability, and parents and carers of people with disability is detailed in our [Disability Action Plan](#). Further information about how CCL helps people with disability, as well as parents and carers of people with disability, is available at <https://www.canberracommunitylaw.org.au/brochure-help-for-people-with-disabilities.html>.

Barriers for students with disability in accessing education

Reasonable adjustments to enable participation

CCL has assisted many parents of students with disability, and students with disability negotiate reasonable adjustments to enable participation in education. The experiences in seeking reasonable adjustments to improve participation in education have varied. The matters we have assisted with reflect:

- the diverse needs of people with disability in accessing education;
- the challenges in advocating for reasonable adjustments, particularly for students with complex needs or multiple disabilities; and
- in some cases, a limited understanding of disability which has in turn limited the scope of support provided to students with disability from education providers.

A common issue that our clients have expressed has been communication barriers between education providers and students. This has included delays in making reasonable adjustments or meeting with students and families, to ensure that they understand what adjustments are required and would be appropriate. In some cases, there have also been misunderstandings as to what adjustments will or will not be made due to inconsistent messaging to students regarding their reasonable adjustment plans.

In relation to tertiary education, we have directed students to the disability and inclusion policies of universities and vocational education providers, to clarify processes and available support for students with disability. We have found that despite the availability of such policies, there have been occasions where established processes within these policies have not been followed by education providers. This has particularly been the case in relation to consultation and review of individual learning plans.

A barrier that several of our clients have faced has been around the delivery of courses and meeting requests for reasonable adjustments. In some cases, smaller tertiary education providers have been less willing to make adjustments on the basis that resourcing issues would impose unjustifiable hardship on the provider. Case Study 1 provides an example of this, highlighting the need for clarity as to when an adjustment would in fact impose unjustifiable hardship.

Case Study 1

██████████ was enrolled to attend a university. Maria had a disability which affected her hearing and eyesight and resulted in some fatigue. As part of Maria's Education Inclusion Plan she requested some adjustments from the university, including having mandatory readings provided in an enlarged format, having instructions from her lecturer provided in writing, having a larger screen to work on, and ensuring lectures were placed online in a timely manner. Enlarged materials took at least one month to arrive, the audio quality of the online lecture recordings was poor, or lectures were not uploaded within a reasonable time, and an enlarged screen was not provided by the university. Maria was required to do weekly quizzes despite not having had access to the weekly reading materials. The university cited resourcing issues as a reason for not providing reasonable adjustments. Due to the challenges Maria had experienced, she ultimately withdrew from university.

Unfavourable treatment and exclusion in schools

We have come across issues where the primary education providers have made assumptions about the needs of students with disability or have been insensitive to the disability needs of students, which has resulted in exclusion. Unfortunately, a limited understanding or appreciation of disability

rights and the needs of people with disability among other students within the school setting has resulted in some students with disability not feeling safe to attend school. For example, a parent of a child with an assistance animal disclosed to us that their child did not feel safe attending school, because another student had taunted and threatened to kill her assistance animal. The school did little to support the student or educate other students and staff about the role of assistance animals in this instance.

Case Study 2 provides an example of exclusion faced by a student with Autism Spectrum Disorder as a result of assumptions made by their school about the student's disability needs:

Case Study 2

██████████ is a young Aboriginal person with Autism Spectrum Disorder. Simon has had increased disability needs over time. Simon's school was for children with unique learning needs. The school told Simon's mother that Simon needed to wear nappies while at school, because the school lacks the toilet facilities. Simon can toilet himself. It seems that Simon's school requested that he wear a nappy because they assumed that Simon's needs were similar to the needs of other children at the school. This undermined Simon's dignity and was not receptive to his individuality. Simon's mother withdrew Simon from this school and enrolled him in a different school which is supportive of Simon's independence.

We have had several parents of students with behavioural needs seek assistance after mainstream primary schools have been unable to adequately support their children, and in some cases resort to disciplinary action such as suspension due to behavioural issues connected with their disability. Case Study 3 provides an example of this:

Case Study 3

██████████ is a primary school student with epilepsy, anxiety and Post-Traumatic Stress Disorder. Chen required the support of a teacher's aide. His individual learning plan provided for a full-time teacher's aide, but this was not provided for five weeks. Instead, his parent was expected to attend school during this period. The school also sought to reduce Chen's hours at school to one hour a day due to his behavioural issues, which impacted on his learning and engagement with other students. When Chen was at school, he occasionally accessed the roof of the building. The school's response to this was to bolt the doors to Chen's classroom closed and provide him with an iPad to play games on all day, with minimal supervision. This impacted the quality of Chen's learning.

COVID-19 impacts

COVID-19 has had an impact on students with disability who have not been able to return to face-to-face learning due to COVID-19 related changes. Case Study 4 provides an example of the challenges that some students with disability have faced with remote learning and seeking specific support to meet their disability needs.

Case Study 4

██████████ have Multiple Chemical Sensitivity (MCS) which means that they require adjustments at their school to avoid and minimise exposure to certain chemicals and fragrances. As COVID-19 related health advice is changing, there are uncertainties around how to manage COVID-19 and the use of cleaning and other hygiene products in the school environment. Mary and Nick have not been able to return to school yet and continue with remote learning. Nick also has Autism Spectrum Disorder and was in the process of transitioning to high school. Nick has not been able to attend the new high school physically due to delays in finalising adjustments at the high school, and now COVID-19 related changes. Nick has found remote online learning extremely challenging due to his Autism Spectrum Disorder and social isolation. While Nick had initially been provided limited resources that are specific to his disability needs, the school is becoming more actively engaged with his learning.

Responding to non-compliance

Student and parent responses to non-compliance

CCL's Disability Discrimination Law Service has been approached by many parents and students in the event of non-compliance by educational providers. In seeking legal advice, students and parents have been informed of their legal options for addressing alleged non-compliance under the *Disability Discrimination Act 1992 (Cth) (DDA)* and the Standards. We have assisted students and parents with making disability discrimination complaints.

Unfortunately, we have come across numerous cases of students with disability being treated in a degrading and humiliating way by educators. We are also aware that some parents of students with disability have feared unfavourable treatment if they were to seek reasonable adjustments in school. In some cases, parents have been reluctant to make a formal complaint due to fear of victimisation. For example, in Case Study 5 below, the parent of the child with disability was offered support to pursue a disability discrimination complaint, but they had concerns that making a complaint would lead to ongoing unfavourable treatment.

Case Study 5

██████████ is a young girl in primary school with epilepsy, a hearing impairment and slow transit constipation. Given Lauren's numerous health issues, she frequently attends specialist medical appointments, which has been met with resistance from the school when some appointments have been scheduled during school hours. Lauren was also asked not to wear her hearing aid by a teacher and embarrassed by a staff member when she could not participate in physical education because of her medical condition. There have been delayed responses to her seizures which has been distressing for Lauren. Lauren's parents are concerned that making a formal complaint will further deteriorate the relationship with the school. They are also concerned that Lauren would have limited alternatives to attending that school as there are no vacancies at other schools in their local area.

Assessment of the Standards and Guidance Notes

Benefits of the Standards

CCL's Disability Discrimination Law Service regularly refers to the Standards when providing legal assistance to people with disability. Through the provision of legal advice and representation, we have helped students with disability understand their rights under the DDA and the Standards. In our experience, the Standards have provided helpful clarification by:

- specifying who to make a complaint to if the Standards are not being complied with;
- requiring any adjustments to be made within a reasonable timeframe;³
- providing measures for compliance with the Standards, so that education providers can be aware of whether they are meeting their obligations;⁴ and
- defining the exceptions to requirements in detail, and specifically noting that 'the application of unjustifiable hardship *should take account of the scope and objects of the Act and the Standards, particularly the object of removing discrimination as far as possible*'.⁵

Broad application

The Standards broadly apply across a wide group of institutions including pre-schools, schools and tertiary education providers across all Australian jurisdictions. Having one Standard which can be applied to numerous levels of education providers is beneficial because it requires educators who may work across multiple levels of education or across multiple jurisdictions to meet the same standard. It also ensures the same standard is required across the entire education sector, which provides clarity for students throughout the duration of their education.

³ *Disability Standards for Education 2005 (Cth)* s 3.7.

⁴ *Disability Standards for Education 2005 (Cth)* ss 4.3, 5.3, 6.3, 7.3 and 8.3.

⁵ *Disability Standards for Education 2005 (Cth)* s 10.2.

Similarly, the application of the Standards focuses on removing discrimination at all stages of education, including enrolment, participation, curriculum development, support services and harassment. In drafting the Standards this way, the Standards highlight that discrimination can happen in a multitude of ways and in relation to different aspects of a student's education.

Reasonable adjustment considerations

When considering what a reasonable adjustment entails, having consideration to the student's disability, the views of the student, and the effect of the adjustment on the student, places the student as the focus of decision making. Section 3.5 of the Standards correctly places the burden on the education provider to consult with the student about potential reasonable adjustments and whether an adjustment would meet the objects of the Standards. The education provider should be responsible for considering adjustments rather than the student being burdened with determining how the provider should make adjustments.

Options for improving the Standards and Guidance Notes

Clarifying the meaning of reasonable adjustments

While there is a requirement to consider the needs of the student when determining whether to make a reasonable adjustment, there is limited direction or guidance as to how to make the decision of whether reasonable adjustments should be made. The Standards list factors to consider, however do not expressly provide how a determination is to be made, or whether particular weight should be given to certain factors.

The Standards should make it clear whether certain considerations should be given more weight than others. While it is important to consider how any proposed adjustments may affect others and the costs of those adjustments, in our view, the needs of the student should be the primary consideration in determining what is reasonable.

Further, in our view additional guidance is required as to how to deal with reasonable adjustments in circumstances where requested adjustments would impose no resourcing burden on an education provider. Our Disability Discrimination Law Service has assisted in cases which have involved assignment extensions requests being denied, and assistance animals being refused access in education. In both instances, the requested adjustment placed no financial or practical burden on the education provider and did not compromise the course's academic integrity. However, in both cases the adjustment was denied. In circumstances where there is no hardship faced by the education provider, the adjustment should only be refused if an exception clearly applies, and should prioritise the benefit to a student in providing the adjustment.

Further examples of appropriate reasonable adjustments

We welcome the additional guidance on making reasonable adjustments through the *Exemplars of Practice*.⁶ While this document provides detailed examples of the types of adjustments that can be made in various educational settings for each of the 10 case studies, there are only two examples of case studies from post-compulsory education settings (i.e. one vocational education and one university example). We have received many requests for disability discrimination advice from tertiary education students, and the two case studies provided do not provide sufficient guidance for students and education providers in considering what adjustments would be appropriate.

There is a diverse range of tertiary-level courses on offer, as well as a broad range of disabilities that students may live with which could impact on their ability to participate fully if adjustments were not made. Accordingly, it would be highly beneficial for students, their associates and advocates, and education providers to have additional guidance on what would constitute a reasonable adjustment in a multitude of courses and in relation to a broader range of disabilities.

⁶ Australian Government Department of Education, Skills and Employment, 'Exemplars of Practice' <<https://docs.education.gov.au/node/40601>>.

Further, additional guidance on what types of adjustments would *not* be considered reasonable adjustments. This should take into account and make clear that in assessing whether an adjustment would be 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.'⁷

Raising awareness about the Standards

We are aware that there are several resources in relation to the Standards available, including the Guidance Notes, several fact sheets, the *Exemplars of Practice*, and the [Disability Standards for Education: A practical guide for individuals, families and communities](#).⁸ We note that:

- these online resources are not available in accessible formats, such as Easy English formats to ensure that people with different levels of literacy are aware of and understand the Standards; and
- some people with disability from culturally and linguistically diverse backgrounds would not be able to readily access most of these listed resources due to language barriers.

To improve awareness in relation to the Standards, we recommend that:

- a full review of resources relating to the Standards be conducted to evaluate their accessibility, and implement changes to improve accessibility where gaps are identified; and
- more community education, targeted at education providers, students with disability, and parents and carers of students with disability, be implemented in relation to the Standards.

We recognise the value of ensuring that disability education is informed and where possible led by people with lived experience of disability as well as disability advocates. We would welcome any engagement from government in supporting and providing funding for community education in relation to the Standards.

Conclusion

Thank you for the opportunity to provide input as part of the 2020 Review of the Standards. We appreciate the opportunity to draw on the experiences of our clients with disability and their supports, as well as our centre's experiences in advocating for people with disability when sharing our perspectives and recommendations. We look forward to the outcomes of the review.

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⁷ *Disability Standards for Education 2005* (Cth) s 3.4(3).

⁸ Australian Government Department of Education, Skills and Employment, 'The Disability Standards for Education 2005' <https://www.education.gov.au/disability-standards-education-2005>.