THE CENTRE FOR INCLUSIVE EDUCATION

Submission in response to the
2020 Review of the Disability Standards for Education 2005

Evidence attests to the ongoing presence exclusionary practices, which restrict the participation of students with disability in Australian schools. Exclusionary practices contravene the aim of the Disability Standards for Education 2005 (DSE; Australian Government [Department of Education, Employment and Workforce Relations], 2012), which is to ensure all students with disability can access education and training opportunities on the same basis as students who do not have a disability. In this submission, researchers from QUT's Centre for Inclusive Education (C4IE) discuss a range of these exclusionary practices and observe potential limitations in the protective scope of the DSE. We provide recommendations on how the DSE, and knowledge and implementation of the DSE, can be improved.

Gatekeeping refers to the exclusion of students with disability by denying, discouraging, or limiting their enrolment, participation, or access. The DSE aim to clarify the rights of students with disability, yet previous reviews of the DSE (Australian Government [Department of Education, Employment and Workforce Relations], 2012; Urbis, 2015) have highlighted that students with disability continue to face systemic barriers to accessing and participating *on the same basis* as their peers. Both previous reviews also raised strong concerns regarding the lack of accountability frameworks to ensure that education providers meet their legislative obligations. Federal government investments in DSE awareness-raising materials for educators have not addressed these concerns, with recent research finding ongoing gatekeeping issues (Duncan et al., 2020; Graham et al., 2016; Poed et al., 2020).

Gatekeeping can be reduced by amending the meaning of *reasonable adjustments*. Adjustments are deemed reasonable if they have been determined in consultation with the student (or their associate), do not diminish the academic integrity of the credential awarded on completion of study, and consider the impact of providing the adjustment on the student, their peers, and staff. Clause 3.4.2 of the DSE (Australian Government [Department of Education, Skills & Employment], 2020) notes the effects, costs and benefits are significant considerations in determining reasonableness. Examination of judicial decisions shows limited attention is given to the benefits an adjustment would confer to a student with disability (Poed, 2016). However, considerable weight is given to the costs of providing adjustments, or the impact the inclusion of a student with disability might have on staff or peers, leading some educators to argue a student might be "better off" at another school, "safer" if they did not attend an excursion or camp, or that it would be "in their best interests" to attend school part-time.

The DSE serve as the domestic interpretation of our obligations as a signatory to the United Nations CRPD (United Nations [Department of Economic & Social Affairs: Disability], 2008) and our obligations in relation to General Comment No. 4 (United Nations [Committee on the Rights of Persons with Disabilities], 2016). Therefore, to align with these obligations, we recommend replacing Clause 3.4.2 of the DSE and redefining *reasonable adjustments* as "necessary and appropriate measures to support the *inclusion of a student with disability*" thereby requiring educators to proactively focus on the benefit of providing adjustments when considering enrolment, access, and participation. The separation of costs from the definition of reasonable would reduce gatekeeping as the inclusion of students with disability would be given priority in considerations of reasonableness. Educators who continue to gatekeep would then need to argue costs as part of a more difficult unjustifiable hardship claim, thereby removing the burden of proving gatekeeping from families.

Segregation through homeschooling and other forms of alternative education provision may include special schools, distance education, flexi-schools and programs, and home schooling. Macro exclusion occurs when parents and/or caregivers are placed in a position where they feel they must seek out alternate education placements for their child or young person with a disability, because "mainstream" schools have failed their child/ren (Graham, 2020). Such failure is often due to the presence of unaddressed attitudinal, curricular, instructional, academic and assessment barriers, which exclude students from participating on the same basis as their peers who do not have a disability, and can mean students become disengaged from school. Unaddressed barriers can also result in students experiencing suspension or exclusion (Moffatt & Riddle, 2019).

Alternative education provisions prevent students with disability from enjoying the same opportunities and choices in their education as their peers. They can also limit the social, economic, and cultural choices available to students and their families in the short term, and lifelong success in the long term. It is estimated that over 70,000 students are accessing alternative education in Australia, and while there is no publicly available data disaggregating for disability, research points to an overrepresentation of students with disability, especially in relation to students with language and mental health disorders (Snow et al., 2019). Work with industry partners and research end-users identifies anecdotally that the numbers are increasing rapidly Australia wide. Home education is accessed by approximately 20,000 Australian students. Numbers continue to rise, with some of the largest growth being in families who identify as being forced to "choose" home education (English, 2019). A recent report highlighted that there are approximately 50,000 students unaccounted for across Australia with students with disability overrepresented among them (Watterston & O'Connell, 2019).

Exclusion from extra-curricular activities such as camps, excursions, extra-curricular activities, and school events/carnivals can occur due to lack of accessibility, limiting participation, or placing special conditions on participation. Often exclusion is based on a deficit perception of the student, leading to assumptions about their inability to participate. Evidence from CYDA (2019) shows that "40.5% of parents reported that their child had been excluded from events or activities at school in the last year" (p. 10), which is an increase of 2.5% from CYDA's 2017 survey.

School life encompasses more than classroom learning. Extra-curricular activities are associated with: better academic and social self-concept and self-worth (Blomfield & Barber, 2009); the development and practice of critical skills and behaviors such as self-determination, leadership skills, problem-solving; opportunities for building friendships (Vinoski et al., 2016); and lower chances of experiencing bullying victimization among children and adolescents with disability (Bills, 2020; Haegele et al.,2020). Carter et al. (2010) reported that for some students, participation in extracurricular activities was their "most memorable and enjoyable" (p. 275) experience of school. Opportunities for social inclusion and experiences in the community are particularly important for students with disability who are often socially isolated, with few friends and activities outside of school (Carter et al., 2010). Exclusion from extracurricular activities denies students with disability opportunities that are taken for granted for their peers without disability. If an activity is deemed worth doing for some students, it is worth doing for all.

The DSE clearly state that education providers must ensure that students with disability are able to fully participate in all aspects of the course or program that the student is enrolled in (clause 5.3) without discrimination and on equal terms with others. Yet, examples of exclusion from extra-curricular activities reported in research with parents in Australia include: (i) choosing inaccessible locations for camps/excursions/extra-curricular activities for students with physical or sensory impairment, (ii) not

providing reasonable adjustments in extra-curricular activities, (iii) excluding or limiting a student's participation in an event/activity or requiring a parent to provide supervision, and (iv) preventing a child from participating out of concerns for the school's image ("My child was excluded from the drama group, the choir, sport, and a talent quest just in case he embarrassed the school – Parent" [CYDA, 2016, p. 6]). This can occur when educators make decisions on limited perceptions of a student's "capacity to be included" based on diagnosis and/or assumptions about inclusion being conditional on funding (Graham & Spandagou, 2011).

Failure to implement inclusive practices and reasonable adjustments. To ensure that students with disability can participate in education on the same basis as their peers without disability, students must be provided with high-quality accessible teaching and assessment practices, and receive reasonable adjustments. Failure to provide these practices can mean that students might be enrolled and be present in the classroom but are in fact *excluded* from full participation and is a breach of the DSE. Some authors have referred to this as "mainstreaming", which is not equivalent to inclusion (Graham, 2020). Accessible pedagogy, curriculum and assessment require that educators work to dismantle possible barriers during the planning phase. Barriers may exist in instructional practices (e.g., pace, complexity or cognitive load imposed by instruction), classroom activities and/or assessments (inaccessible task sheets are one example; Graham et al., 2018), as well as the school/classroom environment.

The Nationally Consistent Collection of Data on School Students with Disability (NCCD) makes a distinction between Quality Differentiated Teaching Practices (QDTP) and supplementary, substantial and extensive adjustments (Australian Government, 2020). QDTP describes a process of active monitoring and minor adjustments that are equivalent to the high-quality teaching and assessment practices all students require to participate at school (Swancutt et al., 2020). Higher-level adjustments are required for some students, where additional barriers to access and participation are not sufficiently minimised through QDTP. The presence of high-quality accessible teaching practices is especially important for students who experience multiple disadvantages (e.g., Indigenous students with disability; see Avery, 2018).

The DSE obligate education providers to consult the student, or their associate, about whether the adjustments that are designed and implemented are reasonable and appropriate for the student (clause 3.5). Importantly, the DSE foreground *student* consultation; consultation with associates (parents and/or caregiver/s) is subordinate. The central nature of student consultation aligns with international human rights conventions (United Nations, 1989; 2008) and positions students with disability as experts in their education experience. Consultation has also been shown to have practical benefits (Tancredi, 2020a). In practice, however, consultation with adults is often privileged, and student consultation is an afterthought or inaccessible when it does take place (Gillett-Swan et al., 2020). For consultation to be accessible, it must be regular and carefully prepared, using language that is easily comprehended by the student (Gillett-Swan et al., 2020).

Unfortunately, resources provided by the Australian government to support implementation of the obligation to consult reinforces consultation as an activity that takes place between adults or with secondary-school aged students only (Australian Government, 2014; 2016). A lack of consistency regarding the term "consultation" and how it applies to students versus associates, coupled with a lack of guidance about how to consult students sends inconsistent and inaccurate messages to education providers about what the obligation to consult *means*, and how this obligation can be *upheld*. Resources have been developed from Australian research to support education providers to design and enact accessible consultation processes (Tancredi, 2020a; Tancredi 2020b), and these have the potential to

support education providers to better understand the obligation to consult and to enact this obligation consistently, precisely, and for all students.

However, there are no accountability measures in place to ensure (i) that students and their associate are consulted during the design and implementation of adjustments, (ii) whether the adjustment/s implemented meet the student's requirements, or (iii) whether adjustment/s have been implemented. With reform, the NCCD could provide a mechanism to address this problem, however, a lack of accountability measures currently means that students and their parent/carer/s are often left not knowing whether education providers are upholding their obligations under the DSE.

Ensuring compliance with the DSE. There is presently no data to confirm educators' degree of knowledge about their obligations under the DSE. However, QUT Master of Education (Inclusive Education) students and educators undertaking professional development through QUT often report that they did *not* know about their obligations under the DSE until embarking on their study with QUT. The lack of a mandated requirement for practising teachers to undertake training about the DSE means that access and participation in training (such as the training available on the NCCD website) is left to chance.

There have been very few successful disability discrimination in education cases brought before the federal courts since the DSE came into force in August 2005. One explanation might be that the DSE have been so successful in eliminating discrimination that litigation to enforce a right to reasonable adjustment is unnecessary. However, given findings from multiple inquiries, audits and reviews that have documented failures nationally over the last two decades (Graham, 2020), a more likely explanation is that deficiencies in the protective scope of the DSE prevent disadvantaged families from advancing legitimate claims.

While the DSE impose an obligation on schools to make reasonable adjustments for students with disability in enrolment, participation, curriculum design and assessment, there is no penalty for breach of the obligation by schools, nor is there any external monitoring of schools' compliance with the obligation (Dickson, 2014). At minimum, a reporting obligation could be imposed on schools whereby detail of reasonable adjustments made for individual students is recorded and reported to the Commonwealth Department of Education, Skills and Employment and made publicly available through the establishment of an independent statutory body, modelled on the Office of Special Education Programs (OSEP) in the United States. Such an obligation would encourage schools to take care in the implementation of their obligations to students with disability and would usefully supplement the basic level of adjustment data collected for the NCCD. As schools should already be collecting and collating this information for use internally, a reporting system would not be unduly onerous and would enable independent monitoring of breaches and trends in the education of Australian students with disability.

Breach of the DSE triggers a right to take action under the DDA for either direct or indirect discrimination. Because Commonwealth anti-discrimination legislation is complaints-based legislation, it is up to the victim to take legal action to bring about the elimination of discrimination. This is a classic 'David and Goliath' situation, with an already disadvantaged individual pitted against the State or well-resourced independent school, or school system. Ironically, the DSE cases that have been litigated suggest that some schools or school systems are more willing to fund expensive legal defences than to fund support of the complainant child with disability. Of course, if the complainant loses, they must pay their own costs as well as the costs of the respondent – an added disincentive to sue. Furthermore, implications of courts' interpretation of the DDA and DSE since *Purvis v NSW* [2003] 217 CLR 92 make it more difficult for a

student with disability to bring a successful discrimination action than students with other protected attributes such as race or sex, and even when unlawful discrimination is proved, schools have recourse to a defence that it would cause 'unjustifiable hardship' to eliminate the discrimination (Dickson, 2014; 2018). Unjustifiable hardship can be raised, even by the State, as a result of the cost of eliminating discrimination.[1] This defence is not available in respect of any other protected attribute. A survey of relevant case law indicates that it is difficult for a student with disability to prove that they have been discriminated against because of disability. These barriers reinforce the importance of establishing a system that shifts the burden of proof from the student to education providers.

A reverse onus system, where there is a presumption of breach of the DSE and DDA which must be disproved by the respondent may assist in giving complainants confidence to sue, and would bring the system into greater alignment with the intent of the DSE and international human rights obligations by shifting the burden of ensuring education rights are respected from the student to education providers (Dickson, 2014). So too would the availability of proper government funding of disability agencies to support complainants to take legal action.

Recommendations

1. We recommend **replacing Clause 3.4.2** of the DSE and redefining reasonable adjustments as "necessary and appropriate measures to support the inclusion of a student with disability".
2. We recommend a **mandated requirement for teachers to undertake training** about their obligations under the DSE (such as the training available on the NCCD website). This training should be completed at regular junctures (e.g. every three years) with annual refresher courses available. Training should also cover the obligation to enable students to participate in extracurricular activities.
3. We recommend a **campaign to raise parents' awareness** of and advocacy for their children's education entitlements and education providers' obligations.
4. We recommend that the **resources** provided by the Australian government to support implementation of the obligation to consult are updated so that they foreground the requirement to consult the student.
5. We recommend **accountability measures** be adopted to confirm that students and their associate (i) are consulted during the design and implementation of adjustments, (ii) indicate whether the adjustment/s implemented meet the student's requirements, and (iii) have the opportunity to confirm whether the adjustment/s have been implemented. This could be done through a reporting obligation, imposed on schools, whereby details of reasonable adjustments made for students is recorded for and reported to the Commonwealth Department of Education, Skills and Employment. This could be enacted through NCCD and would help to improve the NCCD.
6. We recommend **implementation of a reverse onus system** requiring education providers to disprove breach of the DDA and DSE, and **availability of adequate government funding** for disability agencies to support complainants (students and/or their associate/s) to take legal action to enforce compliance with the DSE.

[1] See the Federal Court case *Sievwright v State of Victoria* [2011] FCA 258.

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