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# A submission

*to the Disability Standards for Education 2020 Review*



SUBMITTED BY

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*Rita Jabri Markwell  
Parent, former teacher &  
lawyer*

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DEDICATED

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*To my beautiful  
daughter and all the  
families who've been  
on this path*

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## Review of Disability Education Standards 2020

### Submission

25 September 2020

1. This submission was authored by a professional with a background in human rights law, public policy and a former secondary school education. The author is the parent of a child who has a diagnosed disability of Autism and a severe speech and language disorder.
2. This submission reviews the Standards directly and therefore follows the structure of the Standards.

*There was a child who was vivacious and full of joy, who turned out to have a severe speech and language delay. When she began school, her parents were worried about how she'd go, but such special efforts were made, especially by the permanent teacher aide in her preppie classroom, to connect her socially, that this little girl grew to love school. She was proud to go to big school. When the family moved, this little girl started out at another big school, that made all the promises that care would be taken of her. But they broke these promises, and that little girl went into a psychological downward spiral – she was barely 7 years old.*

*It began with the reports that she was withdrawing in the classroom, sleeping on the desk and emotional outbursts. On the walk home, she showed signs of being very unregulated and anxious. It took her the whole night to recover. Towards the end of the week, she would be completely frayed and begging not to have to go to school - in tears each morning. It got to the point that her mother felt like she was abusing her child by simply sending her to school.*

**Figure 1**

### Objects of the Standards (1.3)

3. This submission will argue these Standards provide a slippery slope for the well-being, security and education of a disabled child, as their needs are just one of many interests considered.

4. A person's right to self-determination and security of person – both fundamental human rights – are part of the *International Covenant on Civil and Political Rights*. When a child or adult with a disability is placed in jeopardy by an unsafe educational environment this can erode their sense of security and self. **See figure 1**

5. The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* provides that restrictions on these rights in the name of public health, safety, morale and order be strictly necessary, proportionate and the least intrusive available.

6. The restrictions placed by the Disability Discrimination Act and subordinate Disability Education Standards enable, legitimise and normalise a derogation from the fundamental human rights of disabled children and adults by supporting scenarios where that person's security or self-

determination may be lawfully jeopardised on the basis of avoiding 'unreasonable adjustments' or 'unjustifiable hardship', including economic hardship, on an education provider.

7. This submission contends that the only lawful limitation on the safety, security and self-determination of a disabled child or adult in the area of education and training, can be to secure the health and safety of other students within that system – and any limitation must be strictly necessary, proportionate and the least intrusive available to reach that objective.
8. This framing problem is a corollary of a negative rights-based framework, of penalising discrimination, rather than upholding human rights – the latter which naturally supports the balancing of competing human rights considerations. These issues have been

acknowledged by the Australian Human Rights Commission in their *Free and Equal* consultations.

9. This submission argues that short of introducing a positive rights-based framework at the federal level, similar to the Queensland version, the objects of this Act should be strengthened to add the following as the first objective:
  - a) To ensure education providers uphold the principle that persons with disabilities have the same fundamental rights as the rest of the community.

### **Part 3 Making Reasonable Adjustments (3.4)**

10. The standards rely on the concept of ‘adjustment’ to place a positive obligation on education providers to take measures to assist a student with a disability to apply for admission or enrolment; to participate in a course or program; or to use the facilities or services, on the same basis as a student without a facility (s3.3).
11. However, the Standards also seek to limit this positive obligation. Section 3.4(1) of the instrument provides that ‘an adjustment is reasonable in relation to a student with a disability if it balances the interests of all parties affected.’
12. As per 3.4(2), the assessment of what constitutes a ‘reasonable adjustment’ may take into account ‘the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students’ and ‘the costs and benefits of making the adjustment.’
13. This submission contends that this definition is too broad and supports departure from the fundamental rights of disabled persons beyond what is ‘strictly necessary’ or ‘proportionate’ to the aim of securing public health, safety or morale, as per the *Siracusa Principles*. Nor do the Standards articulate the legitimate aims as per international law that may justify such departure.
14. Additionally from a policy perspective, this framework encourages individualised ‘add-on’ responses by education providers to bridge gaps between mainstream education settings a disabled person rather than using a ‘safety by design’ planning perspective to organise the original distribution of classroom resources. This enables an enormous variation of interpreted standard for ‘reasonable adjustment’, meaning some students with engaged school leadership, experienced teachers and parent advocates will secure excellent adjustments – and others will not. A framework that puts a greater emphasis on systemic performance rather than individual ‘accommodation’ is needed.
15. The corollary of this individual focused framework is that it is left to individuals to stand up to transgressions of discrimination law – transgressions which are usually created by systemic issues. The disabled student and their advocates must then see if a court will discern the adjustment to be reasonable, and also survive any defence from the state on the basis of unjustifiable hardship. The enforcement of rights by disabled persons under this regime is significantly compromised.
16. The Standards themselves involve layers of sections concerning reasonable adjustment, Standards, and the corresponding discrimination provisions of the Act, and is not user friendly for community or advocates.
17. One recommendation is to delete 3.4 in regard to ‘reasonable adjustment’ entirely. The legal obligations in the standards already outline what disabled students and their associates can expect from education providers. This is comparable to recommendations in the online safety law environment to social media companies to adopt standard expectations about how they will mitigate the realisation of harm on users. By analogy, education providers have minimum expectations to demonstrate

how they are mitigating the risk of discriminatory treatment of disabled students. This could be complimented by transparency report requirements on schools, which this submission also supports.

18. In a scenario where s3.4 does not exist, this would mean that when a discrimination complaint is lodged, it is up to the education provider to establish that the discriminatory conduct (whether direct discrimination or indirect discrimination through an implied term) against a disabled student, demonstrated by falling short on any of these standards, was strictly necessary, proportionate and the least intrusive option to achieving a legitimate aim – such as the public health and safety of other students. If this cannot be established, the case for discrimination is made.
19. Under this scenario, it might be prudent to specify the exemption, which would replace s 3.4 (reasonable adjustment) and s 10.2 (unjustifiable hardship). The exemption could simply state that:

An act by an education provider is not unlawful discrimination if it was strictly necessary, proportionate and the least intrusive option available to achieve the public health or safety of other students and staff.

20. Another alternative is to amend the ‘reasonable adjustment’ provision as follows:
  - a. Delete s3.4 (1) regarding definition of reasonable.
  - b. Amend s3.4 (2) so it reads ‘In assessing whether a particular adjustment for a student is ~~reasonable~~ **necessary** regard should be had to
    - i. The student’s disability
    - ii. The views of the student
    - iii. The views of the student’s associate, given under s3.5 **before the adjustment is made, or after it is made**
    - iv. The effect of the adjustment on the student, including the effect on the student’s:
      1. Ability to achieve learning outcomes; and
      2. Ability to participate in courses or programs; and
      - 3. Sense of security, safety and wellbeing; and**
      4. Independence;
    - v. The effect of the proposed adjustment ~~on anyone else affected, including the education provider, staff and other students~~ **on the public health and safety of staff and other students**
    - ~~vi. The costs and benefits of making the adjustment~~
21. If a parent wishes to challenge a school for discrimination, the argument will often be won or lost at the question of whether adjustments were reasonable.
22. A change to this substantive threshold would likely lead to more favourable outcomes for disabled students and their families, but as evidence from the sector demonstrates, significant increases in accountability are needed to address current inequalities.

## The Standards

23. In terms of the Standards contained in Parts 4-8, it is recommended that it be required that proposed ‘measures in compliance with standards’ be communicated with the disabled person’s associates (especially parents of children) in writing.
24. All references to ‘reasonable adjustment’ should be replaced with ‘necessary adjustment’ as per this submission’s premise.

## Enrolment

25. Specifically in relation to 4.3, the student or student’s associates should be also entitled to
  - a. access transparency reports about the education provider’s previous performance on relevant indicators to assist in making an informed decision about whether the provider has capacity and the track record to deliver on its commitments;
  - b. advice about whether supports at a prior education provider will be matched to ensure continuity of care;
  - c. information about requesting additional quality review mechanisms (for example visiting Autism Advisory Teams, SALDA School Support Service)
  - d. advice about any independent expert reports that need to be sought to understand a student’s learning style and challenges posed by the education or training environment (for example an education psychologist assessment).

*‘The new school promised the world. ‘I have over 20 years of experience,’ said the Special Needs director. ‘We’ll make sure we look after her.’*

*We felt like were walking in blind. We had to believe them. They were our catchment school.*

## Participation

26. Specifically in relation to 5.3, ‘measures for compliance with standards’ on participation, these amendments are recommended so it reads as follows
  - a. The course of program activities **and learning environment are designed to enable the student to participate; and [see figure 2]** ~~are sufficiently flexible for the student to be able to participate in them; and~~
  - b. Course or program requirements are reviewed, in light of the information provided by the student, or an associate of the student, to include activities in which the student is able to participate; and
  - c. **The learning environment is reviewed, in light of the information provided by the student, or an associate of the student, to enable an appropriate learning environment for that student; and [see figure 2]**
  - d. Appropriate programs necessary to enable participation by the student are negotiated **with the student or student’s associate, and necessary specialists,** agreed and implemented; and

*‘It got to the point that I didn’t want to report her outbursts because I knew the school only had one way of dealing with it, which was suspension. I knew she needed a quieter classroom with fewer students and more support, but the school said they had done enough to show a ‘reasonable adjustment’ had been made.*

*Primary school SEP teacher  
Figure 2*

- e. Additional support is provided to the student where necessary, to assist him or her to achieve intended learning outcomes **and to enjoy social participation on the same basis inside and outside the learning environment [See figure 3 ]**; and
- f. where a course or program necessarily includes an activity in which the student cannot participate, the student is offered an activity that constitutes a ~~reasonable~~ **substitute that is appropriate to the student’s needs and overall aims of the course or program**; and
- g. **staff delivering and managing courses and programs are equipped to identify and mitigate the triggers that may adversely impact on the student being able to learn on the same basis as a student without that disability; and**
- h. **education providers will ensure that the supports needed for a student to participate on the same basis are adequately understood, including through arranging independent expert assessments where needed; and**
- i. any activities that are not conducted in classrooms, and associated extra-curricular activities or activities that are part of the broader educational program, are designed to include the student.

*Based on what she could tell me in our home conversations, school was bearable when she had someone to play with at lunchtime. But she also showed that often she struggled to maintain social connections and play in the school yard. I heard that she would be wandering around befriending trees and witnessed her regularly hanging out in out of bound areas when I came to pick her up early for appointments.*

*When I asked the teacher why she was doing these things, she said she thought ASD children liked alone time.*

**Figure 3**

## Curriculum

*She was awarded a mix of Ds and Es on her report card as a result of some differentiated assessment, precluding her from more substantial intervention according to the teacher. The school leadership told the teacher that a student must receive Es for 2 years before an individual curriculum plan could be considered. It didn't matter that she was in Grade One and would be falling further behind due to a lack of focused speech and language development.*

*I have since learned that other schools use education-based speech and language therapists to develop appropriate materials and modify curriculum where necessary. We took her to a private special school that specialises in speech and language development that has adapted the curriculum and provided her with space to work at her level, incorporating intensive speech and language, occupational and physiotherapy. If we hadn't taken her there we would just be running another experiment with another mainstream school. She had been through enough,*

**Figure 4**

27. In relation to standards for curriculum development and accreditation and delivery in s 6.2,

a. Replace 'reasonable steps' with 'necessary steps' in subsection (1).

b. Replace 'reasonable adjustment' with 'necessary adjustment' in subsections (2) and (4).

## Standards for support services

*Despite being verified for ASD, the school disregarded the speech and therapy reports showing she had a severe speech and language disorder. The school blanketly refused external therapists to attend and deliver therapy on site or observe her in the classroom, arguing it imposed too much of an administrative impact on the school. At the same time, they failed to provide the little girl with specialist support from department-based therapists. In her 3 terms at that school, they did not arrange a single speech or occupational therapy visit, despite her having the speech of a 3 to 4 year old child, and being in the bottom one percentile of children her age for fine motor skills.*

*Her mother wasn't sure of whether it was worth lodging a discrimination complaint. 'The exceptions are large enough to drive a truck through,' said the lawyer.*

**Figure 5**

**28.** In relation to s7.2, amend subsections (1) – (3) replace the words ‘reasonable steps’ with ‘**necessary steps**’.

**See figure 5.**

**29.** In relation to s7.3 amend measures for compliance with standards subsection (a) so it reads ‘staff of education providers, **students and student’s associates**, are aware of the specialised services available for a student and are provided with information that enables them to assist the students to access the services that the student needs.’

## Part 10 – Exceptions

30. If an education provider cannot afford the cost or inconvenience of making necessary adjustments, it is not the student with a disability and their associates that should bear the impact. The provider should be able to advise what service and facilities will be provided before enrolling. These exceptions provide more off-ramps for education providers in discharging their duty of care to disabled students, rather than incentivising them to factor the necessary costs into their service model. As such, this law not only critically dilutes fundamental human rights by disabled people at law, but contributes to chronic disparities in inclusive education provision. Regrettably, these Standards as they stand reinforce discrimination.
31. As such it is recommended that the ‘unjustifiable hardship’ provision (s10.2) be deleted.
32. As argued earlier in this submission, it might be prudent to specify the exemption, which would replace s 3.4 (reasonable adjustment) and s 10.2 (unjustifiable hardship). The exemption could simply state that:

An act by an education provider is not unlawful discrimination if it was strictly necessary, proportionate and the least intrusive option available to achieve the public health or safety of other students and staff.

## **Conclusion**

33. The purpose of standards is to set a benchmark that encourages continual improvement and best practice, not complacency and minimum effort. This submission has argued that the ‘reasonable adjustment’ and ‘unjustifiable hardship’ provisions work in concert to focus education providers on the wrong questions, thereby entrenching discriminatory design and practice. Together they also work to dilute the fundamental rights of students with disabilities at law, discouraging students and their associates from taking action to enforce their rights – again entrenching complacency amongst education providers.
34. Furthermore, reflecting on commonplace issues arising within schools, this submission outlines amendments to more broadly and precisely enunciate the ‘standards’ and ‘measures for compliance’.
35. While it is commendable that education providers are moving towards ‘inclusive education’ in policy and intent, the compromised legal frame provided by these standards will persistently undermine the design, leadership, and systemic changes that are required to bring that policy into reality.

### Author’s details

Rita Jabri Markwell | 