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**Disability Advocate**

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3 September 2020

Review of the Disability Standards for Education2005

I refer to my previous submission to the Review of the Disability Standards for Education (“the Standards”) and attach it.

The submission is valid, because regrettably, the Federal Government chose to take no action upon the last review of the Standards, and the review before that. In addition, I respond to the three questions posed in the Review.

1. Are the **rights, obligations and measures of compliance** set out in the Standards (and its Guidance Notes) **clear and appropriate**?

No. In fact they conflict with the Disability Discrimination Act (“DDA”), to which they are meant to be subordinate legislation. For example, the definition of reasonable adjustments is far more benevolent in the DDA than it is in the Standards.

In terms of the obligations of education providers, given the poor manner in which the Standards have been drafted, there are barely any.

2. Do students, families and carers, educators, education providers and policy makers **know about, understand, apply and comply with** the rights, obligations and measures of compliance in the Standards?

Education providers know about the Standards, and because complying with them requires them to do almost nothing, they mostly do comply with the Standards. Whether students, families and carers know about the Standards is irrelevant, because the evidence is, that the Standards are ineffectual.

3. In the 15 years since the Standards were developed, **have the Standards contributed towards students with disability being able to access education and training opportunities** on the same basis as students without disabilities?

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There is not one shred of evidence that the Standards contribute towards students with disability being able to access education and training opportunities on the same basis as students without disabilities.

There is significant evidence however, that the Standards are an abject failure. I refer to my attached submission and the case law it refers to. I refer to the following reviews/reports that have occurred since 2015, supporting this claim.

### Victoria

Review of Program for Students with Disabilities 2016

[www.education.vic.gov.au/Documents/about/department/PSD-Review-Report.pdf](http://www.education.vic.gov.au/Documents/about/department/PSD-Review-Report.pdf)

Report on Students with Disabilities in Victorian Schools Analysis Paper 2017

Victorian Equal Opportunity and Human Rights Commission

<https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/reports/item/1602-held-back-the-experiences-of-students-with-disabilities-in-victorian-schools-analysis-paper>

Parliamentary Report on Services for People with Autism Spectrum Disorder 2017

<https://www.parliament.vic.gov.au/fcdc/inquiries/article/2588>

Victorian Ombudsman's Investigation into Victorian Government School Expulsion 2017

<https://www.ombudsman.vic.gov.au/getattachment/57d918ec-fee0-48e0-a55e-87d0262d3c27/publications/parliamentary-reports/investigation-into-vic-gov-school-expulsions.aspx>

Victorian Equal Opportunity and Human Rights Commission Submission to the Review of the Education and Training Reform Regulations 2017

<https://www.humanrightscommission.vic.gov.au/policy-submissions/item/1546-submission-to-the-education-and-training-reform-regulations-2017>

Improving Educational Outcomes for Children with Disability in Victoria, Castan Centre for Human Rights Law 2018

[https://www.monash.edu/\\_data/assets/file/0016/1412170/Castan-Centre-Improving-Educational-Outcomes-for-Students-with-Disability.pdf?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=read\\_our\\_landmark\\_report\\_into\\_the\\_education\\_of\\_children\\_with\\_disability&utm\\_term=2018-06-28](https://www.monash.edu/_data/assets/file/0016/1412170/Castan-Centre-Improving-Educational-Outcomes-for-Students-with-Disability.pdf?utm_source=newsletter&utm_medium=email&utm_campaign=read_our_landmark_report_into_the_education_of_children_with_disability&utm_term=2018-06-28)

School Compliance with Victoria's Child Safety Standards, Victorian Auditor General's Office 2019

[https://www.audit.vic.gov.au/sites/default/files/2019-06/200619-Child-Safe-Standards\\_0.pdf](https://www.audit.vic.gov.au/sites/default/files/2019-06/200619-Child-Safe-Standards_0.pdf)

## Queensland

Review of education for students with disability in Queensland state schools -

Department of Education and Training 2017

<http://education.qld.gov.au/schools/disability/docs/disability-review-report.pdf>

## ACT

An overview of restrictive practices, and the key issues for consideration in relation to the establishment of an Office of the Senior Practitioner 2017

[file:///C:/Users/Julie/Documents/oldpc/Legal/DET%20ACT/An\\_overview\\_of\\_restrictive\\_practices\\_and\\_the\\_key\\_issues\\_for\\_consideration\\_in\\_relation\\_to\\_the\\_establishment\\_of\\_a\\_n\\_Office\\_of\\_the\\_Senior\\_Practitioner\\_January\\_2017.pdf](file:///C:/Users/Julie/Documents/oldpc/Legal/DET%20ACT/An_overview_of_restrictive_practices_and_the_key_issues_for_consideration_in_relation_to_the_establishment_of_a_n_Office_of_the_Senior_Practitioner_January_2017.pdf)

## New South Wales

New South Wales Ombudsman Inquiry into Behaviour Management in Schools 2017

[https://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0018/47241/NSW-Ombudsman-Inquiry-into-behaviour-management-in-schools.pdf](https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0018/47241/NSW-Ombudsman-Inquiry-into-behaviour-management-in-schools.pdf)

## Australia

Parliamentary Report On Educational Attainment for Students with Disabilities 2016

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/students\\_with\\_disability/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/students_with_disability/Report)

Time for change: The state of play for inclusion of students with disability, Children and Young People with Disabilities Australia 2019

The purpose of building a five-year review into the Standards, with respect, was not simply to provide a consultant with something to do. The intention was to examine the effectiveness of the Standards, which are not simply a collection of information sheets, but legislation.

The appropriate way to examine the effectiveness of the Standards, is to look at the case law, and the evidence of any improvement in the outcomes of students with disabilities. The answer is clear. The question is, whether the Commonwealth Government is going to act in response, quickly and efficiently, or whether it is in fact disinterested as to whether the Disability Standards assist the DDA, and students with disabilities. As of 2020, the evidence is that the Commonwealth Government is not interested in whether the Standards are achieving their purpose. Their lack of response to date is that evidence.

Those of us who are genuinely interested in the Standards and students with disabilities respectfully urge the Commonwealth to respond to this third review and revoke the Standards completely, and commence work on new legislation in collaboration with the disability community and representatives of their choice.

Yours sincerely

A handwritten signature in black ink, appearing to read "Julie Phillips". The signature is fluid and cursive, with "Julie" on top and "Phillips" below it.

Julie Phillips

## **Submission to the Commonwealth Department of Education and Training**

# **Review of the Disability Standards for Education 2005**

**30 May 2015**

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### **A. Introduction**

I am a Disability Advocate in Victoria who assists people with disabilities and their family members to make complaints of discrimination. The majority of my work is voluntary.

While I am available to assist people with disabilities to make complaints of discrimination in all areas of life, 95% of my work is in the education sphere due to the fact that this is, and has been, the area of greatest dissatisfaction.

In addition to direct non-legal advocacy, I assist law firms who have little experience of people with disabilities and the education system to run cases under the *Disability Discrimination Act 1992* ("the DDA").

Since 2000, but mostly since 2006, I have assisted approximately 40 families to make complaints of discrimination in education under discrimination legislation. Since the *Disability Standards for Education 2005* ("the Standards") came into force, the law firms I have worked with have incorporated these into their legal complaints.

### **B. Conduct of the Review of the Disability Standards for Education**

It is hard to understand the decision to give stakeholders four weeks, and then an extension of one week, to provide comment to this review. Putting aside that many organisations and individuals were only just finding out about the review when there was only 2-3 weeks before the closing date, there was no strategy that was in evidence as to how students with complex disabilities were going to be able to respond in the time given.

Education is one of the most vital of our human rights. The Standards are in theory designed to assist in the realisation of that right. Yet the review seems designed to limit input from those most relevant - students with disabilities themselves.

This is disturbing.

### C. Importance of the Disability Standards for Education

It is salient to be cognisant of the purpose of the Standards, which is as follows:

*The Standards are subordinate legislation and are subject to the objects of the Act. They clarify and elaborate the legal obligations in relation to education.<sup>1</sup>*

"The Act" being referred to is the *Disability Discrimination Act 1992*.

In Victoria, the barriers to education have been raised anecdotally by families and students themselves, through advocacy agencies, through media and through various submissions relating to the human rights of people with disabilities.

These barriers have been set out quantitatively and qualitatively through reports from statutory authorities in 2012. The reports referred to are "*Programs for Students with Special Learning Needs*" from the Victorian Auditor General's Office ("VAGO")<sup>2</sup> and "*Held Back - the experiences of students with disabilities in Victorian schools*"<sup>3</sup> from the Victorian Equal Opportunity and Human Rights Commission ("VEOHRC").

Apart from broad findings which are not in and of themselves discriminatory, (for example VAGO's conclusion that the Department of Education and Training, (previously Department of Education and Early Childhood Development), did not know whether individual funding for students with disabilities was being used effectively and efficiently) there were a number of findings, shared by both statutory authorities, that clearly affect only students with disabilities and raise issues of discrimination.

The main findings of VEOHRC, in a report over 200 pages long, included the following:

#### General

*Despite 30 years of equal opportunity legislation in Victoria, discrimination still exists in Victorian schools. Half of the students and parents in our survey reported discrimination at school. One in four educators had witnessed discrimination.<sup>4</sup>*

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<sup>1</sup> *Disability Standards for Education 2005* Introduction p 4

<sup>2</sup> August 2012

<sup>3</sup> September 2012

<sup>4</sup> *Held Back - the experiences of students with disabilities in Victorian schools*, Main Findings p1

*Barriers include funding limitations, lack of specialist supports, inadequate knowledge and training in disability among teachers, lack of time for teachers to provide an individualised approach for students with disabilities, and discriminatory attitudes.<sup>5</sup>*

### Specific

Areas where there was evidence of non-compliance with antidiscrimination laws included<sup>6</sup>:

- ❖ Enrolment
- ❖ Participation
- ❖ Curriculum development, accreditation and delivery
- ❖ Student support services
- ❖ Harassment and victimisation

VEOHRC singled out in particular the following problem areas:

- Students Support Groups
- Individual Learning Plans - regarding both quality and existence
- Part-Time Schooling, Suspension and Expulsion
- Restraint and Seclusion
- Inadequacy of School Transport
- Transition Points
- Complaint Systems

VAGO findings mirrored that of VEOHRC in that out of five recommendations it made<sup>7</sup>, these included improvements required relating to:

- ➡ Student Support Groups
- ➡ Individual Learning Plans (making them meaningful and effective)
- ➡ Restraint and Seclusion

**Since these reports were published, little has changed for students with disabilities in Victoria.**

Rather than Student Support Groups being clarified and their establishment and operations being improved, the formal position of the Department of Education and Training ("DET") since 2012 is that:

- it is acceptable if schools schedule Student Support Group meetings at times knowing parents cannot attend (Regional Director Peter Greenwell correspondence 29 January 2015).
- that DET guidelines encapsulating individual learning plans and student support group meetings are only "guidelines". In other words they place no

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<sup>5</sup> *Held Back - the experiences of students with disabilities in Victorian schools*, Main Findings p1

<sup>6</sup> *Held Back - the experiences of students with disabilities in Victorian schools*, Main Findings p1-2

<sup>7</sup> *Programs for Students with Special Learning Needs* VAGO pages xi, xii

obligations on DET employees. (Regional Director Peter Greenwell correspondence 29 January 2015).

- DET does not require Individual Education Plans "to be in a particular format" (Deputy Sec Nicholas Pole correspondence 22 September 2014).
- Individual Education Plans do not require parent approval " (Deputy Secretary Nicholas Pole correspondence 22 September 2014).

Given that the formal position of DET is that none of their publications actually need to be followed, their report to VAGO in 2015<sup>8</sup> that they had implemented VAGO's recommendations regarding Student Support Groups and Individual Learning Plans through revising guidelines and developing online professional learning programs, makes a mockery of these recommendations.

Likewise, the DET claim to review guidelines for restraint and seclusion may have literally been met, as there may have been a review, but they remain the same. The Restraint Policy is unchanged, and recommendations by VEOHRC to prohibit the seclusion of students with disabilities continue to be rejected.

In summary, the writer believes it is appropriate to conclude that little has changed since the original findings of both VEOHRC and VAGO. It is self-evident that students with disabilities will not be able to rely on government to ensure they have access to their education, unimpeded by discrimination - this is why we have the DDA and the Standards.

In terms of the Australian context, anecdotal evidence aside, reports continue to reflect that people with disabilities continue to experience high rates of poverty, and one of the contracting factors to that is a lack of education.<sup>9</sup>

In recent weeks the Opposition Leader Bill Shorten has called for a national inquiry into the education of children with disabilities, a call that is being supported by people with disabilities and disability advocacy agencies.

It is clear that students with disabilities in Australia need strong legislation to ensure they have full access to education.

#### **D. The Success of the Standards in the Courts**

The writer understands that most of the case law has emanated from Victoria.

DET control case law in Victoria by running cases only in front of judges of their choice, and settling those that are listed before judges they feel may not apply sufficiently rigid interpretation of the law.

Therefore, the greatest number of cases (to the writer's knowledge) heard at the Victorian Federal Court of Australia have been run before Justice Richard Tracey.

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<sup>8</sup> Responses to 2012-13 Performance Audit Recommendations Victorian Auditor General's Office February 2015

<sup>9</sup> Disability Expectations Investing in a Better Life a stronger Australia' 2011 Price Waterhouse Cooper

There is also a decision by Justice Shane Marshall, who relies upon Justice Tracey's previous decision in his own.

Putting aside the inappropriateness of a model litigant to conduct human rights cases in this fashion, the result is that we currently have an interpretation of the Standards that renders them unusable.

### Consultation

The requirement to consult is contained within Participation (Part 5); Curriculum Development, Accreditation and Delivery (Part 6); and Student Support Services (Part 7).

The typical clause in relation to consultation is as follows:

*If a student is enrolled in the course or program, the provider must:*

- (a) *consult the student, or an associate of the student, about whether the disability affects the student's ability to participate in learning experiences of the course or program, or any relevant supplementary course or program; and*
- (b) *in the light of that consultation, decide whether an adjustment is necessary to ensure that the student is able to participate in those learning experiences on the same basis as a student without a disability who is enrolled in the course or program; and*
- (c) *if:*
  - (i) *an adjustment is necessary to achieve the aim mentioned in paragraph (b); and*
  - (ii) *a reasonable adjustment can be identified in relation to that aim; make a reasonable adjustment for the student in accordance with Part 3.<sup>10</sup>*

The first rigid interpretation of the Standards is the nature of consultation. This is the current position from the Federal Court after submissions from DET

*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.<sup>11</sup>*

Consultation which is "informal" or through a "telephone conversation" cannot be proven to have occurred. Given the failure by DET to uphold its own consultation processes (through its Student Support Group Guidelines which are optional) the consequence of this decision is that no formal consultation needs to occur, and to

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<sup>10</sup> Disability Standards for Education Part 6 .2 (2)

<sup>11</sup> Walker v State of Victoria [2011] FCA 258 decision [284]

date, it will be (and has been) enough for an educator to claim consultation without any evidence of consultation actually occurring.

This broad interpretation of "consultation" would never be accepted in the community as being appropriate or adequate. One can only imagine indigenous Australians being told that they will be consulted on certain matters, and accepting that such consultation may be in reality, so "informal" that it cannot even be proven to have occurred.

The final nail in the "consultation" coffin, however, is the following:

*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<sup>12</sup>. [Emphasis added]*

Therefore regardless of whether the "consultation" was a telephone call, a chat over the school fence, or a formal meeting, school staff may ignore completely the recommendations of the student themselves, the student's family, and medical practitioners. In fact it is school staff who determine whether a reasonable adjustment is possible.

***The school** is also required to determine whether any reasonable adjustment is possible in order to further the prescribed aims<sup>13</sup>. [Emphasis added]*

There are a number of reasons why this interpretation/practice will not, and has not, been successful in determining reasonable adjustments.

Firstly, we have teaching staff taking the liberty of rejecting the advice of the people who know most about the student with a disability (the student themselves, their family, their treating practitioner, experts in that particular disability) and making decisions themselves when they are under qualified to do so, and have not to date even established a track record that demonstrates their abilities to effectively teach.<sup>14</sup>

Secondly, an inherent conflict of interest, given the paucity of individual funding available for students with disabilities puts teachers in a position where if they decide not to provide a reasonable adjustment, they will save their school money, and be protected by the Standards. Currently, the disabilities that are not covered by individual funding in Victoria include, but are no means limited to:

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<sup>12</sup> Walker v State of Victoria [2011] FCA 258 decision [284]

<sup>13</sup> Walker v State of Victoria [2011] FCA 258 decision [284]

<sup>14</sup> Asia-Pacific Journal of Teacher Education, 33(1), 65-76

Australian Journal of Learning Disabilities, 10(1), 3-8

Future directions in literacy: International conversations 2007. University of Sydney

From New Directions to Action: World class teaching and school leadership Department of Education and Early Childhood Development. (2013).

Issues paper - Education and Training Workforce: Schools Workforce Study Australian Government Productivity Commission. (2011).

- Dyslexia
- Learning Disabilities
- Attention Deficit Hyperactivity Disorder
- Opposition Defiant Disorder
- Mental Illness
- Language Disorders that are not 3 standard deviations from the mean, which covers the majority of language disorders
- Autism Spectrum Disorder, high functioning
- Any combination of the above.

Therefore, if it is the case that a child has two or three of the above disabilities, which is not uncommon, and it is for example recommended that they have a full-time aide, a decision to provide this adjustment will result in a school having to find approximately \$45,000 per annum out of its budget.

If a teacher decides that no reasonable adjustment is necessary, then Part 3 of the Standards is not even engaged, according to current case law.

‘Neither s 5 nor s 6 imposes an obligation on an education provider to make reasonable adjustments to produce a given outcome. What the education provider is bound to do by ss 5.2(1) and 6.2(1) is to *take reasonable steps* to ensure that the stipulated outcome is achieved. In order to achieve this end the education provider is obliged to do a number of things including, in the light of consultation with appropriate persons, deciding whether some adjustment is necessary to achieve the objective. If it is decided that an adjustment is necessary and a reasonable adjustment can be identified in accordance with Part 3, *then and only then* is the education provider bound to make that reasonable adjustment.’<sup>15</sup>

Therefore the case law is that the substantial Parts of the Standards **do not** impose an obligation to make a reasonable adjustment. Once the educator, without any requirement to **meaningfully** consult, decides there is no adjustment required, there the matter rests.

The Standards currently, therefore, are unworkable due to poor drafting around consultation.

#### General Vagueness/Lack of Specificity

The fact that reasonable adjustments, as demonstrated above, are entirely optional, (and are in the hands of education providers), it is clear that the concept of interested parties coming together to collaboratively discuss and decide upon these things, is flawed.

As the issue of consultation affects almost the entirety of the Standards, it is clear that a different approach must be taken.

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<sup>15</sup> Abela v State of Victoria [2013] FCA 832 [148]

There are examples of discrimination/education legislation which have been significantly further developed than that in this country, and should be examined.

It follows that the broader and more open to interpretation legislation is, the more easily it can be manipulated and interpreted, and the less helpful it is to students with disabilities.

## E. Model Legislation

A superior piece of legislation is the *Individuals with Disabilities in Education Act* ("IDEA") (previously known as the *Education for All Handicapped Children Act* first enacted in 1970). The recently re-authorised Act, the *Individuals with Disabilities Education Improvement Act of 2004*, P.L. 108-446 provides Australian legislators with an example of how the maturing of this legislation has encapsulated greater detail in order that it is more difficult for education providers to avoid their obligations, and more difficult for courts to "interpret" legislation.

Examples of the detail of this legislation and how it contributes to protecting the rights of students with disabilities in accessing their education are as follows.

### Individual Education Plan/Individual Learning Plans

In 2012, VEOHRC concluded:

*Individual learning plans (ILP) are the lynchpin in the government school system for setting and delivering on learning goals for students with disabilities. However, not all students who should have a plan have one. The development, quality and monitoring of these plans is inconsistent and there is no systemic monitoring to ensure these plans are of a reasonable quality and are being implemented<sup>16</sup>.*

Simultaneously, VAGO concluded:

*While schools can use PSD funding as they see fit, DEECD requires them to provide two specific types of support:*

- **establish a Student Support Group (SSG)**—responsible for identifying the student's needs, planning their educational program and reviewing the student's progress
- **develop an Individual Learning Plan (ILP)**—used to identify and record the needs of students, their desired educational outcomes and strategies to support them.

*While the intent and purpose of having SSGs is sound, not all audited schools used them in a manner that maximised their value. Similarly, few of the ILPs reviewed clearly detailed student needs or their educational goals and strategies. DEECD does not monitor the practices of SSGs or the quality of*

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<sup>16</sup> Held Back - the experiences of students with disabilities in Victorian schools VEOHRC 2012 p82

*ILPs, even though these practices are potentially compromising the quality of support provided to PSD students.*<sup>17</sup>

Despite the Standards having been in place since 2005, the "lynchpin" for setting and delivering on learning goals for students with disabilities, Individual Learning Plans, are reported in Victoria as being:

- inconsistent
- unmonitored
- at times, non-existent
- often lacking detail on students needs, educational goals and strategies

This finding was in 2012, and in 2015 parents are being told that guidelines or the development of Individual Learning Plans are only "*guidelines*"<sup>18</sup>. It should be noted that this DET response was in answer to a parent complaint that the Individual Learning Plan amongst other things, did not contain any strategies.

In 2013, in the case *Abela v State of Victoria [2013] FCA 832*, the position of DET continued to be that Individual Education Plans do not need to follow any form, and indeed did not even need to physically exist. The Federal Court was happy to accept this submission from DET and found at [129]:

*Mr Allison, the principal of Panton Hill gave evidence, which I accept, that, at all stages, Beau's teachers at that school had formal or informal education plans for him.*

It has also been found by the Federal Court, after submissions from DET, that unless one is able to articulate the strategies one claim are required to be included in an Individual Education Plan, one cannot claim that such a plan can be a reasonable adjustment for the purposes of the DDA<sup>19</sup>. Therefore all DET has to do, is fail to obtain the necessary medical and academic assessments; fail to follow its optional guidelines regarding the convening of a Student Support Group where the students, family members, consultants can come together to undertake formal educational planning; and there will never be any strategies available to be identified for the purposes of pleadings.

In other words, all DET must do is nothing in relation to educational planning, as is often the case, and the ability to successfully use the DDA and the Standards is significantly diminished. This is putting aside the problems canvassed above with such elements as consultation.

In comparison, the IDEA not only requires "Individualised Education Programs", but goes into this in detail:

- `` (d) Individualized Education Programs.--
  - `` (1) Definitions.--In this title:
    - `` (A) Individualized education program.--
      - `` (i) In general.--The term 'individualized

<sup>17</sup> *Programs for Students with Special Learning Needs VAGO page x*

<sup>18</sup> Regional Director Peter Greenwell correspondence 29 January 2015

<sup>19</sup> Sievwright v State of Victoria [2013] FCA 964

'education program' or 'IEP' means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes--

``(I) a statement of the child's present levels of academic achievement and functional performance, including--

[[Page 118 STAT. 2708]]

``(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

``(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

``(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

``(II) a statement of measurable annual goals, including academic and functional goals, designed to--

``(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

``(bb) meet each of the child's other educational needs that result from the child's disability;

``(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

``(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child--

``(aa) to advance appropriately toward attaining the annual goals;

``(bb) to be involved in and

make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other non academic activities; and  
``(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;  
``(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV) (cc);  
``(VI) (aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district wide assessments consistent with section 612(a) (16) (A); and<sup>20</sup>

While the entire section is relevant, it is worth pulling out elements of this description to compare what could only be described as good educational practice, and comparing such requirements to the current DET practice of Individual Education Plans that are not even in physical existence, and are simply in teachers "heads" - Individual Education Plans that don't need strategies.

"(d) (1) (A) (i) *a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section*

(d) (1) (A) (i) (I) *a statement of the child's present levels of academic achievement and functional performance*

(d) (1) (A) (i)(III) *a description of how the child's progress towards meeting the annual goals described in subclause (II) will be measured.... [emphasis added]*

(d) (1) (A) (i)(IV) *statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable ....[emphasis added]"*

It is crystal clear that the requirements for students with disabilities to receive formal educational planning is contained within the IDEA in sufficient detail that government departments of education such as DET would simply not be able to avoid their obligations if subjected to such a law, by claiming that Individual Education Plans are not required to physically exist, do not need strategies, or measurable outcomes.

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<sup>20</sup> IDEA 1414(d)

It is the writer's submission that this level of detail is required in education discrimination legislation, and without such detail, the spurious and academically embarrassing practices of education departments such as DET claiming to have planning in people's heads and so on, will continue.

Section 615 (k) (1) (D)

*A child with a disability who is*

*removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall--*

*``(i) continue to receive educational services, as provided in section 612(a)(1), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and*

*``(ii) receive, as appropriate, a **functional behavioral assessment, behavioral intervention services** and modifications, that are designed to address the behavior violation so that it does not recur.* [emphasis added]

Such a requirement can be compared with findings from the Federal Court, at the submission of DET, that behaviour management plans can be "written on a whiteboard"<sup>21</sup> (therefore unable to be produced), or alternatively be found to have existed and been "formal" despite there being no evidence whatsoever of the plan except an individual's claim that there was one<sup>22</sup>.

Again, it is clear that at least in Victoria, students with disabilities not only are denied 'best' practice in education, they cannot even receive educational services which are 'good' practice. Meanwhile, with there being virtually no requirement under law to respond to challenging behaviours in a professional manner (despite behaviours that are symptoms or manifestations of a disability being included in the definition of disability pursuant to s 4), students continue to be suspended "*nearly always in connection with behaviour related issues*"<sup>23</sup>.

Once again, there is little redress under the DDA and the Standards.

The writer suggest that the reviewers read the IDEA thoroughly to have a more thorough understanding of the differences between the DDA/standards and legislation that has been around for a significantly that time and therefore progressed through evolutions in order to meet its aims.

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<sup>21</sup> Kiefel v State of Victoria [2013] FCA 1398 at [86]

<sup>22</sup> Kiefel v State of Victoria [2013] FCA 1398 at [87]

<sup>23</sup> Held Back - the experiences of students with disabilities in Victorian schools VEOHRC 2012 p82

## **F. Conclusion on the Effectiveness of the Standards**

The Standards are ineffective and grossly inadequate to the task, being:

- (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*<sup>24</sup>.

## **G. Reasons for the Ineffectiveness of the Standards**

There is no contention by the writer that the Standards are ineffective due to the fact that teachers are unaware of them. The Standards have been included in DET's Program for Students of Disabilities Handbook's since 2007, with an explanation that they are required to be complied with<sup>25</sup>.

Regardless of whether education providers are aware of the Standards, it is clear that it is the drafting of the Standards and their broad nature that prevents them having any legal effectiveness.

A contributing factor in Victoria, is that DET have taken advantage of broadness of the Standards by controlling case law to set precedents relying on narrowing rigid interpretations of the DDA and the Standards. This would not be possible if the Standards had specificity.

### **Recommendation:**

1. The Standards are completely re-drafted, and modelled on the IDEA.
2. This needs to happen as a matter of urgency given thousands of students with disabilities move through the education system each year, often without receiving an education that is sufficient for them to obtain tertiary qualifications, or obtain employment.

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<sup>24</sup> Part 1.3 Objects, *Disability Standards for Education 2005* p 6

<sup>25</sup> Program for Students with Disabilities Handbook 2007 Introduction p4

**Abbreviations:**

DDA	<i>Disability Discrimination Act 2005</i>
DET	Department of Education and Training (Victoria)
IDEA	<i>Individuals With Disabilities Education Act</i>
VAGO	Victorian Auditor General's Office
VEOHRC	Victorian Equal Opportunity and Human Rights Commission