Equality & Justice
for people with disabilities

Disability Discrimination Legal Service Inc

The Advocate

Autumn 2016

Villamanta Disability Rights Legal Service Inc.

In this edition

ACCESS – if you need this in an alternative format, please let us know

Editorial

One of the benefits of an election is that it gives us an opportunity to tell government what is important to us as a community.

A number of very serious issues relevant to the disability community have been raised in the last 12 months.

Is there going to be a Royal Commission into the abuse of people with disabilities?

Are the recommendations of the last two Federal Senate Reports into abuse and education of people with disabilities in Australia going to be implemented?

Why has there been no legal review of the Disability Standards for Education?

This is an opportunity for individual people with disabilities to tell their local representatives what is important to them, and for disability organisations to develop policy/election platforms to assist in clarifying exactly where their representatives stand.

Take advantage!

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What do you think of what DDLS does?

DDLS is interested in your views.
You may know that community legal centres around Australia are facing significant cuts. We are no exception. Regardless, we continue with our strategic planning and looking at how we can use our services best to help you. It is important we get community views in an environment where government is increasingly expressing a view of one-size-fits-all approaches to service provision, and valuing cutting costs over quality.

We would really appreciate only a few minutes of your time to tell us what sort of things are important for you. Person with a disability? Tell DDLS what we can do for you ……..
If you could respond by 7 June 2016, we would appreciate it.

https://www.surveymonkey.com/r/GMVQQSGhttps://www.surveymonkey.com/r/GMVQQSG

How do we view people with disabilities?

Treatment or Torture

An American school uses electric shock treatment as a part of its Treatment Program for disabled children and adults.

The Judge Rotenberg Educational Center (JRC) is a special needs day and residential school serving “emotionally disabled” students from the age of five through to adulthood. According to their website they will accept almost any student, including those expelled by multiple other schools, with no waiting period. Where appropriate JRC believes in minimising the use of psychotropic medication, instead substituting their own highly structured behavioural program. They also claim to offer state of the art educational software for all their students.

Clinicians at the school, with doctoral and masters level training, direct treatment plans allegedly based in behavioural psychology. Problematic behaviours are identified and their frequency charted. The students are then offered powerful rewards as an incentive to sign a behavioural contract. These contracts usually involve an arrangement not to exhibit specific problem behaviours, with specified rewards and punishments. Rewards for success include classroom rewards, movies, field trips, dances, internet café and money.

In addition to the rewards system there is a Loss-of-Privilege (LOP) procedure which is put in place if a student displays certain major inappropriate behaviours. The LOP may last from minutes to several weeks.

Self-management Procedures

Self-management procedures include pin-pointing both outer and inner behaviours and charting their frequency. The students then select and arrange their own rewards or penalties.

Psychotropic medications are believed to be toxic and undesirable. Many students are weaned off their medications allowing them to become responsible for their own behaviours and self-management, without feeling out of control or deadened by the drugs.

All counselling is behaviourally oriented and is coordinated with the student's ongoing behavioural treatment. The student learns how to avoid problem behaviours, for example, random pulling of the fire alarm. The student will be walked past fire alarm boxes and either rewarded or punished depending upon their exhibited behaviour.

The same educational and treatment systems are utilised in the residences, in the classrooms, during transportation and during field trips by the same carefully trained and monitored staff members.

Components of the Treatment System

The JRC philosophy is that the student is not considered wrong for exhibiting inappropriate behaviours, rather it is the current set of interventions. The clinician supervising the treatment team is responsible for making the necessary changes.

Violent and aggressive behaviours are claimed to be dealt with in a safe and carefully supervised manner by the employment of emergency manual restraint.[1]

Shock aversives, food deprivation and mechanical restraint

Originally treatment at the JRC (founded in 1971 and previously known as the Behaviour Research Institute (BRI)) involved different forms of punishment for example, spraying children in the face with water, forcing them to smell ammonia, pinches, slaps, painful muscle squeezes, spanking, forcing them to put hot peppers on their tongues and forcing them to wear a "white-noise helmet" that emitted static.

Mr Matthew Israel (the founder) became interested in and purchased the Self-Injurious Behaviour Inhibiting System, a device which caused a shock of 2.02 milliamps lasting for 0.2 seconds. He then designed the Graduated Electronic Decelerator (GED). The GED is a remote-controlled backpack used to administer electric shocks of 15.5 milliamps lasting up to 2 seconds on the legs, arms, soles of feet, fingertips and torsos of the student. This can cause blistering and painful red spots on the skin. Mr Israel advanced the design which became the GED-4 which delivered stronger shocks of 45.5 milliamps. The GED and GED-4 are now used as a form of punishment at the JRC, along with food deprivation and mechanical restraint. Some students receive multiple shocks per day with one student receiving 5,000 shocks in one day (Ahern and Rosenthal 8).[2]

The students are forced to wear the electric shock devices on their home visits so they remain 'controllable'.[3]

Torture

The Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, written by Special Rapporteur Juana E. Mendez states that:

> "the rights of the students of the JRC subjected to Level III Aversive Interventions by means of electric shock and physical means of restraints have been violated under the UN Convention against Torture and other international standards" (85).

In 2011 the Massachusetts Department of Development Services (DDS) ruled that electric shock and other physical aversives cannot be used on *new* admissions to JRC. This ruling did not apply to students previously admitted to the Center.

In 2014 one-third of the approximately 240 children and adults living at JRC were still subjected to shock aversives as well as other reward and punishment techniques for behaviour modification. Education is by way of self-instructional computer program where students are expected to teach themselves.[2]

Some families of former students have filed lawsuits against the JRC alleging mistreatment. For example, Mrs McCollin's son Andre, diagnosed with intellectual disability, was a student at JRC. She removed her son and sued the school when she discovered that her son had been strapped spread-eagled to a restraint board and shocked multiple times while screaming for staff to stop as punishment for not taking his coat off in class. Andre remained in a catatonic state for days which resulted in permanent damage. The case was settled for an undisclosed sum.[4]

Life-saving treatment

In 2005 Samantha (aged 12) was placed at JRC by her parents' Dr and Mrs Shear, who credit the school with saving her life. Samantha has a diagnosis of autism and was expelled from four schools for severe behaviours of concern – biting, scratching, kicking, hitting, pinching and head-butting anyone within range. At one time Samantha hit her own head so hard that both retinas were detached, becoming virtually blind. She needed to wear a helmet, neck brace and arm splints for her own protection.

The JRC's controversial behavioural treatment program stopped the self-abuse within weeks. As Samantha stopped her other violent behaviours she was weaned off her psychotropic medication.

> "Sam is now a completely different person – happy, beautiful, and often singing… We had our daughter back. Unless you have lived in our shoes and seen your kid practically blind themselves, you can't judge."[5]

Ban of controversial treatment under consideration

The U.S. Food and Drug Administration (FDA) is responsible for protecting the public health by assuring the safety, efficacy and security of medical devices, among other things. The FDA's own advisory panel has made a unanimous finding that there is no other option in existence for this group of people with dangerous behaviour disorders.

However the FDA is now considering a ban on this controversial treatment.
A treatment which allegedly allowed control of Samantha Shear's self-abusive behaviour and, according to her parents, saving her life. A treatment which exacerbated Andre McCollin's condition leaving him with permanent damage.

Several years ago a petition calling for closure of the JRC gained 271,141 supporters.[6]

The Australian Experience

In November 2015, the Federal Senate Community Affairs Reference Committee release its report into the abuse of people with disabilities.[1]

The Executive Summary included the following observations:

> *The committee finds that violence, abuse and neglect of people disability is both widespread and takes many forms.*
>
> *Under the guise of 'therapeutic treatment', people with disability can be subjected to forcible actions that could be considered assault in any other context.*

In May 2016, an investigation into Bendigo Special Developmental School found a law firm engaged by the Department of Education and Training, finding pens in classrooms to put students in, appropriate. The training of staff in martial arts and pressure points, was not criticized. There was no condemnation of the school at all by the Minister for Education, despite contributors to the investigation alleging restraint, bruising, and seclusion in lockable "cages". [2]

It is important to note that the above two examples are contemporaneous - they reflect attitudes and practices that are happening as we speak.

[1] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report

[2] http://www.theage.com.au/victoria/bendigo-special-school-that-kept-student-in-pen-cleared-of-wrongdoing-20160323-gnp9mc.html

Reflection - What Is Wrong with Our Attitude Towards People with Disabilities?

Would parents of students without disabilities endorse the training of teachers at their schools in the use of pressure points - a technique which is designed to inflict pain and nothing else?
Would the community accept in mainstream schools, “pens” being erected in classrooms in order that [allegedly] students with epilepsy could be put in there post seizure?
Would we allow repeated electric shocks to be used on children without disabilities when wanting to address behaviours that needed changing?
Why is it that when children and adults with disabilities are locked up against their will it is “withdrawal” or “behaviour control”, and when the same practices are applied to children and adults without disabilities, it is “false imprisonment”?

What is it that allows us to accept all sorts of abusive treatment against people with disabilities without much disagreement or interest?

Why will there most likely be a Royal Commission into banking, but not into the abuse of people with disabilities - despite reports setting out the systemic problems of such abuse?

Perhaps the Senate Community Affairs Reference Committee provide somewhat of an answer in its report[3].

> *Throughout this inquiry, the evidence presented from people with disability, their families and advocates, showed that a root cause of violence, abuse and neglect of people with disabilities begins with the devaluing of people with disability. This devaluing permeates the attitudes of individual disability workers, service delivery organisations and most disturbingly, government systems designed to protect the rights of individuals.*

Until we address the devaluing of people with disabilities, it seems that there will be no respite from violence against them.

Websites cited:

1 http://judgerc.org/ (The Judge Rotenberg Center)

2 http://autisticadvocacy.org/2014/08/prisoners-of-the-apparatus-the-judge-rotenberg-center/ (Autistic Self Advocacy Network)

Ahern, Laurie and Eric Rosenthal. “Torture not Treatment: Electric Shock and Long-Term Restraint in the United States on Children and Adults with Disabilities at the Judge Rotenberg Center.” Mental Disability Rights International. 2010 Web. 10 Jun. 2014 http://abcnews.go.com/images/Nightline/HT_US_Report_4_30_10_100630.pdf

[3] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report Executive Summary

3 http://www.science20.com/countering_tackling_woo/judge_rotenberg_trial_ends_settlement_nothing_changes_jrc_though-89394

4 https://www.propublica.org/article/nyc-sends-30-million-a-year-to-school-with-history-of-giving-kids-shocks

5 https://www.washingtonpost.com/posteverything/wp/2014/06/24/the-fda-may-ban-the-treatment-keeping-our-daughter-alive/

6 https://www.change.org/p/judge-rotenberg-educational-center-please-stop-painful-electric-shocks-on-your-students

Report of the *Review of the Program for Students with Disabilities (April 2016)*

Review of the Program for Students with Disabilities

The results of the Review of the Program for Students with Disabilities (PSD) determined limitations to supporting Victorian students with disabilities. The Labor Government, in responding to the Review of the PSD, promoted a new strengths-based approach to supporting and funding the specific needs of students with autism and with dyslexia. It has accepted 21 of the recommendations. Unfortunately, the most important recommendations, relating to a new funding model, were not agreed to at this time.

A number of elements of the review were disturbing in that they highlighted flawed practices in the teaching of students with disabilities that had already been highlighted repeatedly in other reports, but continue year after year to be unaddressed. Therefore, for example the findings that Individual Education Plans are inconsistently developed, and lack of data collection and analysis, have already been areas that the Department of Education had committed to improving and addressing. Given that they were not improved and addressed, new commitments to do so again, without explaining why previous commitments failed, do not instil confidence.

It is also apparent that the Department of Education does not actually understand inclusive education. Continued focusing on special schools indicates that Victoria continues to defy worldwide trends in the full inclusion of students with disabilities. Overall, funding to schools directly in order that they can obtain the expertise or equipment they need to support students with disabilities seems to be lacking.

A list of the recommendations are in the review Report, which can be accessed here. http://www.education.vic.gov.au/Documents/about/department/PSD-Review-Report.pdf.

These recommendations remain under consideration:

A new approach to funding and support

Recommendation 14:
Design and implement a new funding model, based on functional needs to remove the requirement for the Year 6-7 review process.

Recommendation 21:
Develop a new tiered funding model based on a strength-based functional needs approach to meet the needs of all students with disabilities, including: base funding; teaching and learning loading; and targeting funding.

Recommendation 22:
Develop a formal relationship with the National Disability Insurance Agency to include alignment on consistency and sharing of information and professional insight where possible.

Recommendation 23:
Develop and implement a strengths-based functional needs approach to assessing student need, to support the achievement and participation of students with disabilities.

Sklavos v Australasian College of Dermatologists

***Sklavos v Australasian College of Dermatologists* (2016) FCA 179 (2 March 2016)**

Angelo Sklavos became a registered medical practitioner in Australia in January 1994. He wished to become a dermatologist, but to be able to do so he needed to gain entry into the Australasian College of Dermatologists (the College). The College's four year training program is accredited by the Australian Medical Council and is the only body in Australia that recognises practicing dermatologists.

Prerequisites to becoming a medical practitioner through the College as a trainee required Dr Sklavos to conduct work as an intern, resident and then registrar in the New South Wales public hospital system between 1994 and 1996.

Not all medical practitioners who apply to become a trainee at the College will be admitted. This is due to the high number of applicants. The selection procedure involves an examination and interview process. Mr Sklavos applied for entry into the College in 1996 and 1997, but failed the entrance examination. In 1999 he passed the examination but did not gain admission.
Dr Sklavos then enrolled at the University of Sydney as a doctoral (PhD) candidate in 2000, believing that this would help him to gain entry into the College. However, every year that Mr Sklavos applied for entry as a trainee at the College, he was unsuccessful. This was over a seven year period between 1999 and 2006.

Dr Sklavos always thought he was underprivileged compared to other applicants as he did not have any dermatology connections. This informed his belief that he needed to complete a PhD in order to obtain entry.

In 2007, Dr Sklavos was admitted as a trainee but was nervous the College would not treat him equally due to his discernment of the admission procedure.

In his third year of training in 2009, a number of issues were brought about whereby Dr Sklavos felt he was being treated unfairly. The main incident involved Dr Sklavos writing a letter to a general practitioner during his training program, stating that a patient had attended the clinic, when in fact the patient had not.

Dr Sklavos was later assigned a training position at a different hospital, but the supervisor had heard about the previous incident and was not willing to have Dr Sklavos as a trainee without interviewing him first. Due to this, Dr Sklavos felt he would not be treated fairly at the hospital and at his request, the College therefore arranged for him to undertake a training position at a different hospital.

Dr Sklavos had further problems with the College, including the College changing its final examination procedures which he perceived to be directed at him, a rejection of a publication of a case report, and the College accepting alternatives to case report publications, such as a letter to the editor, which Dr Sklavos was unaware of at the time. Despite not having completed the publication requirements, Dr Sklavos (and three other students) were permitted to sit for final examinations in June 2010.

Dr Sklavos was then given an unsatisfactory performance review for the first half of his training at one of the hospitals. He was also informed by the College that he was invited to take the clinical examinations. The College, however, had made a mistake and did not believe his marks were sufficient to sit the examinations. This was unbeknown to Dr Sklavos, however the College decided not to tell him anyway, as they considered that if he passed the clinical examinations, he should be admitted irrespective of the written examinations.

Despite this, Dr Sklavos failed both the clinical and written examinations and was required to re-sit them the following year. Dr Sklavos experienced severe anxiety symptoms from all that had occurred at the College, and he did not pass the written examinations for a second time in 2011.

In July 2011, Dr Sklavos' solicitor had written to the College making multiple allegations against it and claiming that Dr Sklavos should not be required to undertake further examinations. These allegations were denied and the College refused to admit Dr Sklavos. This was again advocated in December 2011. Further, in January 2012, Dr Sklavos was diagnosed by a psychiatrist with a specific phobia relating to sitting the College's examinations. A copy of the psychiatrist's reports was given to the College, and Dr Sklavos' solicitor asked them to consider the report in relation to Dr Sklavos' request in December.

The College replied to Dr Sklavos' request, stating that they would consider any reasonable request for special conditions in the 2012 examinations. However, Dr Sklavos decided that he was unable to sit for the examinations (on the advice of his psychiatrist) and lodged a complaint with the Australian Human Rights Commission claiming direct and indirect disability discrimination by the College.
After that, Dr Sklavos' psychiatric condition has become more severe. He was unable to engage in any process involving the College's assessment of him and did not believe he would be able to do so in the near future. He worked casually as a locum general practitioner. Dr Sklavos'

complaint was terminated by the AHRC in April 2013 and proceedings commenced in June 2013.

The applicant's claims were:
1. The respondent engaged in direct or indirect disability discrimination contrary to the *Disability Discrimination Act 1992*;[4]
2. The respondent was in breach of contract; and
3. The respondent negligently breached a duty of care owed to him as trainee.

The applicant claimed that he suffered, from January 2012, from a disability as defined by s 4(1) *Disability Discrimination Act 1992,* being a recognised psychiatric illness known as specific phobia, situational type (the relevant situation being the undertaking of examinations required by the Australasian College of Dermatologists).[5]

The applicant had sought to be assessed by methods alternative to examination such as workplace-based assessment.[6] The court held that the respondent's refusal to waive normal examination expectations did not constitute unfavorable treatment as defined by s 5(1) of the *Disability Discrimination Act 1992* because a person in Dr Sklavos' position but without his disability would also be required to pass the examinations.[7]

Further, the court held that the respondent's refusal to make adjustments did not amount to unfavorable treatment and was not contrary to s 5(2) of the Act.[8]

The court held that altering the respondent's examination expectations was not a reasonable adjustment as the designing, organising and supervising of an individualised program solely for the applicant would impose unjustifiable hardship on the respondent.[9] The applicant had been assessed by other means to be not in possession of the practical skill and experience required to practice as a dermatologist. With reference to s 11(a) of the Act, the Court stated that the risk to patients and to the College with respect to the applicant's competency must be taken into account as a detriment and unjustifiable hardship.[10]

The court further held that no indirect discrimination existed with reference to s 6 *Disability Discrimination Act 1992* as the respondent had established that the examination requirement, at all material times was, and is reasonable having regard to the circumstances of the case. [11]

Outcome:
The Court found that although the nature of the disability directly related to the applicant's requirements in respect to the adjustments sought,[12] the respondent's refusal to waive examination requirements was not based on applicant's disability. No breach of contract found. No failure to fulfill duty of care found.

[4] SS5, 6 *Disability Discrimination Act 1992*

[5] *Sklavos v Australasian College of Dermatologists* [2016] FCA 179 [29]

[6] Ibid [84]

[7] Ibid [104]

[8] Ibid [102]

[9] Ibid [123]

[10] Ibid [121]

[11] Ibid [205]

[12] Ibid [138]

Our organisations

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