



**Submission on the Disability  
Standards for Education 2005**

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## INTRODUCTION AND EXECUTIVE SUMMARY

The Disability Discrimination Legal Service Inc (“**DDLS**”) is an independent, community organisation that supports individuals in disability discrimination matters. It is a not-for-profit association that provides free support to persons with disabilities. The DDLS also provides community legal education and undertakes law and policy reform projects in the areas of disability discrimination.

A committee of volunteers manages the DDLS. The DDLS Management Committee is comprised of persons with disabilities, and those that work within the disability sector. In addition to this, the DDLS’s work is supported by the efforts of volunteers, some of whom also have disabilities.

The DDLS is an active member of the community legal sector, particularly in respect of matters concerning people with disabilities. It is a member of the Federation of Community Legal Centres, and is primarily funded by the Federal Attorney General’s office.

We are a Victorian organisation that has assisted people with disabilities for over a decade in disability discrimination matters. Consistently over this period, the two main areas of discrimination in which our assistance is sought are employment and education.

Since 2005 the DDLS has been able to use the Standards, and observe their effectiveness. We are only able to comment on the effectiveness of the Standards in relation to the state of Victoria.

Most of the education complaints brought to our attention are in relation to primary and secondary school education through the Department of Education & Early Childhood Development (“DEECD”). Therefore the main focus of this submission is that education system.

In summary, we believe that the Standards have been completely unsuccessful in improving the existing restricted opportunities for students with disabilities to gain equal access to an education.

The conduct of the DEECD, which we have observed through the families of children with disabilities in multiple mainstream and special schools, is of a serious nature and has had significantly negative and far-reaching outcomes for students and their families. This conduct has not changed since the Standards have come into effect.

The said conduct, in our view, breaches not only the *Standards/Disability Discrimination Act 1992*, but also several international conventions to which Australia is a party including but not limited to:

- *Convention on the Rights of Persons with a Disability*
- *Convention on the Rights of the Child;*
- *Convention against Discrimination in Education; and*
- *International Covenant on Economic, Social and Cultural Rights.*

and Australian domestic law, including but not limited to:

- *Charter of Human Rights and Responsibilities Act (Vic) 2006 ;*
- *Equal Opportunity Act (Vic) 1995.*

Further, as demonstrated by Part 10 of this submission, the litigation engaged in by the DDLS and other law firms in an effort to remedy this situation, has not resulted in an overall improvement in respect of how students with disabilities are treated by the Victorian education system. In fact the situation has worsened as enumerated further in our submission.

The material contained in this submission is drawn not only from the experience of the DDLS itself, but that of some of its individual staff as disability advocates, and from information that we receive from other individuals and organisations in Victoria.

Aside from the DEECD, discriminatory conduct in schools (that is non-adherence to the Standards), is also found in schools administered by the Catholic Education Office, and independent schools.

We also receive, and are aware of, complaints against kindergartens and tertiary institutions. However primary and secondary schools are the environments which generate the most complaints.

## **Overall Recommendations in Relation to the Standards**

A number of recommendations that we believe need to be enacted to ensure that the Standards have the impact that Parliament intended, are included in this submission. Some of our recommendations are repeated in different sections throughout this document. Most of the recommendations are for a change in the wording or content of the Standards themselves, however others are intended to compel educational institutions and authorities to meet their obligations under the Standards and would be contractual between the Commonwealth and the State.

Due to our belief that the Standards has failed to ensure adequate educational outcomes for students with disabilities, we believe a prescription is required in the Standards that has previously been absent .

However the three overarching recommendations are as follows.

Due to the failure of the Standards to achieve positive outcomes for children with disabilities, we strongly recommend:

- A. That the Standards are re-written to include a high level of detailed prescription. This will alleviate the need for students and their associates to argue over the definitions of the detail within the Standards, which currently provide an “out” for educational authorities
- B. That all educational authorities that receive government funding in order to deliver education services are required to fund their respective educational institutions adequately, in order that the Standards may be implemented.
- C. That the term “reasonable adjustments” be struck out and replaced with “optimal adjustments”, particularly in Part 3.

## **A. HAVE THE STANDARDS PROVIDED CLARITY AND SPECIFICITY FOR EDUCATION AND TRAINING PROVIDERS AND FOR STUDENTS**

The DDLS believes that the Standards have NOT provided clarity and specificity for education and training providers, or for students. The reasons for this are as follows:

- a) most teaching staff are unaware of the Standards. Government funded organisations and the relevant government departments have not ensured that the Standards have been dispersed and prioritised.
- b) if they are aware of the Standards, they are generally not aware of the detail within the Standards.

*Recommendation. That all staff of educational authorities and educational institutions be required to read and be trained in the Standards.*

- c) Most students and their parents are unaware of the Standards.

*Recommendation. That the Standards require that all educational authorities provide every student and/or their associate with a copy of the Standards.*

- d) Many of the terms in the Standards are broad and open to interpretation. We cite the following examples from observation:

- i. the term "reasonable" is far too broad. It allows lawyers to make numerous spurious arguments about what the term "reasonable" should mean. The definition of "reasonable" pursuant to part 3.4.1 as being something that "balances the interests of all parties affected" is something that is unhelpful to the student as "balancing interests" can be incessantly argued with no resolution. While the new Act defines "reasonable adjustments" in section 4, the more detailed explanation in the Standards sets a low threshold, and needs to be altered to reflect the intention of the changes to the Act
- ii. The word "consultation" has been used by the DEECD to simply describe a one-way communication process where students/parents/medical practitioners who provide their views, their views are rejected, and the educational authority claims that it has "consulted" by virtue of the fact that conversations have taken place. There is insufficient value or priority in the Standards placed on the view of the student themselves (or their representatives) in relation to the "consultation".

- iii. Similarly, in relation to the student's "associates", medical reports from treating practitioners are often provided to an educational authority with recommendations on what is required to support the student, and the authority claims to have "consulted" simply by claiming to have read the reports and "taken them on board".

A good example of how this fails to achieve positive outcomes for students with disabilities is the recent decision in *Walker v State of Victoria* [ 2011] FCA 258. Tracey, J states:

*"The Disability Standards require no more of a government agency such as the Department than that, when necessary, it be alert to the need to adjust its normal practices when dealing with a disabled student; to consider, in consultation with the student or his parents, what reasonable adjustments to normal practice should be made to assist the student, and then to decide whether a particular adjustment is necessary and, if so, to implement it." [274]*

*"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 programs offered by the school. **The school is not bound, in making these decisions, by the opinions or wishes of professional advisers or parents.**" [284] [emphasis added]*

Already it is clear, that with the conflicts of interest that schools experience such as a lack of funding, if one decides to apply the Standards as enumerated in the above decision, students with disabilities will rarely receive a reasonable adjustments, as at the end of the day, there is no expectation that anyone have great influence on those adjustments other than the school.

This cannot be the intention of the consultation process.

*Recommendation. That the definition of "consultation" be reworded, putting greater priority on the views and opinions of the student and/or their associates. Recommendations on reasonable adjustments should be required to be enacted upon, unless they would cause unjustifiable hardship.*

- e) Teaching staff are generally unaware of what is best practice, or even only good practice, in the provision of education to students with disabilities. The

Standards do not make this any clearer, as they deal in generalities. The following are examples:

- i. a child with ADHD, or conduct disorder, may not be able to participate in their education pursuant to Part 5 of the Standards, without a Positive Behaviour Plan. It is our experience that employees of the DEECD do not know what such a plan is, and rather behaviour plans, if it ever developed, are based on "zero tolerance" or punishments, such as loss of privileges, detentions, and suspensions. The formal position of the DEECD is that zero tolerance and punishment based behaviour plans are appropriate approaches to deal with children with disabilities experiencing behavioural problems (often caused by a lack of appropriate support in the first place). Their formal position is also that such plans do not need to be documented and can simply remain in staff members' "heads".

These positions by the DEECD are documented and have been used in court to defend discrimination complaints. This being the case, unfortunately it is clear that the DEECD cannot be given the responsibility of addressing challenging behaviours in students without prescriptive direction.

Positive Behaviour Plans are not mentioned in the Standards.

*Recommendation. That the Standards include the requirement for Positive Behaviour Plans, developed using best practice principles, if a student is engaging in problem behaviour which affects their participation in an educational setting.*

- ii. a child with multiple disabilities may require a heavily modified curriculum and many teaching adjustments. The standard best practice manner by which such a curriculum and adjustments is provided is through a multidisciplinary team developing a formal Individual Education Plan. Such a plan should be case managed, monitored and evaluated. Not only do many DEECD employees not know how to draw up such a plan, but the formal position of the DEECD is that such a plan does not need a collaborative approach, and in fact does not even need to be documented and can simply be in people's "heads".

These positions by the DEECD are documented and have been used in court to defend discrimination complaints, even though it is a position at odds with their own policies and guidelines. This being the



case, unfortunately it is clear that the DEECD cannot be given the responsibility of professionally implementing Individual Education Plans for students with disabilities without prescriptive direction.

Individual Education Plans are not mentioned in the Standards.

*Recommendation. That the Standards include the requirement for Individual Education Plans for all students with disabilities, such plans not to be put into effect without the signed consent of the student or their representative.*

- iii. Educational authorities do not know the difference between providing qualified Auslan (Australian Sign Language) Interpreters, and people who can sign, who they choose to label as "interpreters". The descriptor in the Standards "appropriately trained" sheds no light on the subject, and some educational authorities argue that particular levels of certificate are acceptable, when industry-standard states they are not.

There is no mention in the Standards of what constitutes an "appropriately trained" interpreter.

*Recommendation. That in relation to Part 7, the Standards prescribe that interpreters be NAATI qualified.*

- f) Even when teaching staff are aware of the Standards, students and parents are commonly advised that the educational institution does not have funding to implement the standards. Therefore students/parents are confused with what the Standards are able to provide them with in terms of specificity. Examples of these problems are below.
  - i. Children with disabilities in kindergartens rely on what is described as KISS funding from the commonwealth government. Strangely, the funding regulations state that such funding is not allowed to be applied to the individual child, but to the institution itself to assist them in meeting the child's needs. Therefore children who need one to one assistance (for example, deaf children who require a signing staff member; children with little or no speech who need one to one assistance to use communication devices) cannot receive the individual assistance they need due to the funding guidelines.

This is an example of Commonwealth guidelines being at odds with Commonwealth legislation..

- ii. Students with disabilities in primary and secondary state schools rely on funding from the DEECD for individual assistance. While the theory of the DEECD is that schools must provide reasonable adjustments whether they receive external funding or not, schools routinely and directly advise students and their parents that unless they receive external funding they cannot provide the adjustments required. The Program for Students with Disabilities (“PSD”), already found by Victorian courts to be discriminatory, is the mechanism which controls funding for students with disabilities. Many disabilities requiring intensive assistance are not even contained within the eligibility criteria, such as ADHD or Dyslexia. Students with Language Disorders cannot get funding unless they have a disability three standard deviations from the mean. In summary, what this means is that many children with disabilities who need assistance cannot receive it.

Therefore on one hand the Standards are trying to provide certainty and specificity, but on the other hand, the reality is that reasonable adjustments are almost always linked to funding, and educational authorities are advising students and their families that they will not be making the reasonable adjustments due to funds.

*Recommendation. That all parties who receive government funding in order to deliver education services are required to fund their respective educational institutions adequately in order that the Standards may be implemented.*

**B. HAVE THE STANDARDS ASSISTED PEOPLE WITH DISABILITY TO ACCESS AND PARTICIPATE IN EDUCATION AND TRAINING OPPORTUNITIES ON THE SAME BASIS AS THOSE WITHOUT DISABILITY.**

The Standards have NOT assisted people with a disability in Victoria to access and participate in education and training opportunities on the same basis as those without a disability.

Not only have the Standards not assisted people with disabilities to access their education, but structures in place for that access have deteriorated since the Standards came in to effect. This is explained in detail below.

## 1. Framework

The State of Victoria administers public education through the governmental authority known as the Department of Education and Early Childhood Development (“**DEECD**”).

The Program for Students with Disabilities (“PSD”) supports the education of more than 19,000 primary and secondary school students with disabilities. This is estimated to be just over 3% <sup>1</sup>of the government school population. However an estimate of students within the system who have disabilities/learning difficulties is approximately 15 per cent of the total student population in Victorian government schools.<sup>2</sup>

In 2005, the number of students with disabilities supported by the PSD was over 23 000<sup>3</sup>. The number of students receiving funding through the PSD grew by 10,000 between 2000 and 2005<sup>4</sup>. The DEECD achieved a significant reduction in the number of students supported by the PSD in 2006 by making it more difficult for students to meet the selection criteria that is necessary to access PSD support. Such acts are an attempt to control the PSD budget, rather than address the issue of giving equal access to education to students with disabilities. In spite of this deliberate attempt to frustrate the purpose of the PSD, student disability numbers increased by 2000 students in the next three years.

Even though there are a number of other programs that claim to be available to benefit students with disabilities, the PSD is the primary program through which funding is provided.

The importance of the PSD cannot be overemphasised as a crucial factor in determining whether schools are able to meet their obligations under the Standards.

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<sup>1</sup> Summary Statistics for Victorian Schools March 2010

<sup>2</sup> Victorian Auditor General, ‘Program for Students with Disabilities: Program Accountability’ Page 1

<sup>3</sup> Report of the Ministerial Working Group Program for Students with Disabilities April 2005 Page 29

<sup>4</sup> Report of the Ministerial Working Group Program for Students with Disabilities April 2005 Page 29

## 2. Program for Students with Disabilities (“PSD”)

### a. Outline

The PSD provides a limited amount of funding, for a limited number of disabilities. Students are allocated a Level of funding, from 1 – 6.

At 2011, the levels of funding were set at:

|         |              |
|---------|--------------|
| Level 1 | [AU]\$5,894  |
| Level 2 | [AU]\$13,632 |
| Level 3 | [AU]\$21,519 |
| Level 4 | [AU]\$29,368 |
| Level 5 | [AU]\$37,158 |
| Level 6 | [AU]\$44,991 |

These funding allocations are not provided to the student directly. Instead the funding is provided to the school as part of the Student Resource Package of the school, which is a global funding amount.<sup>5</sup> In some cases, such funding procures the services of an unqualified Teacher’s Aide. However, what often occurs when that person is recruited, is that the Teacher’s Aide will then not only assist the student with a disability who has secured the funding, but will often assist other students with disabilities who did not secure funding. This is documented repeatedly by DDLS in their file notes on open cases.

This is understandably the way schools try and cope with supporting the other 12% of students with disabilities/special needs who are not funded through the PSD. However this is hardly an ideal outcome. It means that the student who applied for funding on the basis that they needed certain reasonable adjustments which would require a specific expenditure, is often unable to receive those adjustments as the funding has been reallocated to others.

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<sup>5</sup> Program for Students with Disability Guidelines 2010, p. 19

The use of teacher's aides in the classroom has no evidence base, and is a way in which children with disabilities can be assisted cheaply, as wages for aides are much cheaper than those with higher qualifications, such as teachers, and Special Education Teachers. In Victoria, there is no qualification required to apply for the job of Teacher's Aide. While the formal position of schools is that a qualified teacher always supervises the education of a child with a disability, on the other hand their formal position is that Individual Education Plans do not need to be written, reviewed, monitored or evaluated (despite their own policies, procedures and guidelines). Therefore, the student with the most complex needs is often receiving their instructions directly from a person with little or no experience.

*Recommendation. That education authorities receiving government funding be required to set a minimum qualification for Teacher Aides that is professionally appropriate for the teaching of children with disabilities.*

How one's child funding is used is ultimately the decision of the Principal. Therefore the use of funding is ad hoc, and parents are often not told that the funding they may have spent hundreds of dollars procuring through the obtaining of expert reports, may be shared with other children who failed in their funding submissions. The funding may also be used to support salaries of Integration Co-ordinators and other staff, such as class "helpers" who assist the teacher with photocopying and general assistance.

Some schools refuse to tell parents how their child's money is being spent.

*Recommendation. That education authorities be required under the Standards to advise students/parents as to how funding is being allocated to their child*

Allocations of Level 5 and 6 funding are quite rare, with the majority of students receiving Level 1 and 2 funding<sup>6</sup>.

## **b. Categories & Criteria**

The PSD will only consider individual funding for the following disabilities:

- Physical Disability
- Visual Impairment

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<sup>6</sup> Report of the Ministerial Working Group Program for Students with Disabilities April 2005, p. 29

- Severe Behaviour Disorder
- Hearing Impairment
- Intellectual Disability
- Autism Spectrum Disorder
- Severe Language Disorder with Critical Educational Needs

Criteria for each of the above headings have changed at times and are specified below. The eligibility criteria are thus:

**Physical disability**

- A. A significant physical disability;  
**AND/OR**
- B. A significant health impairment;  
**AND**
- C. Requires regular paramedical support .

**Visual impairment**

- A. Visual acuity less than 6/60 with corrected vision;  
**OR**
- B. That visual fields are reduced to a measured arc of less than 10 degrees.

**Hearing impairment**

- A. A bilateral sensori-neural hearing loss that is moderate/severe/profound and where the student requires intervention or assistance to communicate.

**Severe behaviour disorder**

- A. Student displays disturbed behaviour to a point where special support in a withdrawal group or special class/unit is

required;

**AND**

B. Student displays behaviour so deviant and with such frequency and severity that they require regular psychological or psychiatric treatment;

**AND**

C. The severe behaviour cannot be accounted for by: Intellectual Disability, Sensory (vision, hearing), Physical and/or Health issues, Autism Spectrum Disorder or Severe Language Disorder;

**AND**

D. A history and evidence of an ongoing problem with an expectation of continuation during the school years.

### **Intellectual disability**

A. Sub-average general intellectual functioning which is demonstrated by a full-scale score of two standard deviations or more below the mean score on a standardised individual test of general intelligence;

**AND**

B. Significant deficits in adaptive behaviour established by a composite score of two standard deviations or more below the mean on an approved standardised test of adaptive behaviour;

**AND**

C. A history and evidence of an ongoing problem with an expectation of continuation during the school years.

### **Autism spectrum disorder**

A. Significant deficits in adaptive behaviour established by a composite score of two standard deviations or more below the mean on an approved standardised test of adaptive behaviours;

**AND**

B. A score of two or more standard deviations below the mean for the student's age in expressive and receptive language skills;

**AND**

C. The severity of the language disorder cannot be accounted for by hearing impairment, social emotional factors, general intellectual disability or cultural factors;

**AND**

D. A score above the cut-off for diagnosis of autistic features on an approved standardised test (CARS) for the presence of autistic features in current behaviour;

**OR**

E. Moderate and severe abnormalities in items 1, 3, 5 and 6 on an approved standardised test (CARS) for the presence of autistic features in current behaviour;

**AND**

F. A history and evidence of an ongoing problem with the expectation of continuation during the school years.

**Severe Language Disorder with Critical Educational Needs**

A. A score of three or more standard deviations below the mean for the student's age in expressive and/or receptive language skills on TWO of the recommended tests;

**AND**

B. The severity of the disorder cannot be accounted for by hearing impairment, social emotional factors, low intellectual functioning or cultural factors;

**AND**

C. A history and evidence of an ongoing problem with the expectation of continuation during school years;



**AND**

D. A non-verbal score not lower than one standard deviation below the mean on one comprehensive intellectual test, with a statistically significant ( $p < 0.05$ ) difference between verbal (VIQ/VCI) and non verbal (PIQ/PRI) functioning (VIQ/VCI < PIQ/PRI);

**AND**

E. Demonstrated critical educational needs equating to Program for Students with Disabilities funding levels three and above as determined by the validated results of the Educational Needs Questionnaire.

The above criteria can be found in the Program for Students with Disabilities Guidelines 2010.

It should be noted that the criteria for some of the categories are extremely onerous, and therefore are quite effective in ensuring the numbers of students with disabilities receiving funding through the PSD are limited. In theory, those who do not meet the criteria are able to receive other services, such as Visiting Teachers or Special Education Teachers, however according to DEECD employees and families of children with disabilities, these services have also been cut over the years and are extremely difficult to procure. Parents have received letters from schools advising them that due to not qualifying for funding, they are not eligible to receive any services.

*Recommendation. That all educational authorities are required to offer allied health services to all students with disabilities, whether or not they receive individualised funding.*

**c. Disabilities Not Catered For**

The seven disability categories are more interesting for what they leave out. Students with the disabilities below do not qualify for funding through the PSD:

- Acquired Brain Injury
- Attention Deficit Hyperactivity Disorder (“ADHD”)

- Learning Disorder
- Dyslexia
- Psychiatric Illness
- Multiple disabilities where one of the disabilities is not severe enough to meet any one criteria
- Any one disability that is named above, but does not have the severity of symptoms to meet the PSD criteria
- Other - there are a multitude of different disabilities that are less common than those mentioned. If they do not fit into the criteria, they are not funded.

Case Study 1.

'Steven' is 13 years old. He has been diagnosed with a Severe Language Disorder, ADHD, Developing Dysthymic Disorder, Anxiety Disorder and a Learning Disorder by a range of independent medical professionals.

When applying for funding through the PSD, the DEECD was also aware that despite being in secondary school, Steven had the literacy levels of a student in Grade 1.

He did not qualify for funding.

The DEECD claim that PSD funding is not the only way that children with disabilities are supported in schools financially. However the reality is that schools are limiting attendance of children with disabilities due to lack of funding and cannot afford to take money out of their budgets to provide support.

An example is that a child with dyslexia and ADHD may require:

- an extra staff person to assist them in staying on task;
- specialist training for their teachers;

- an individual program, which may require that particular evidence based programs to be purchased and so on.

Just a full-time aide would cost between \$30,000 and \$40,000 in salary per annum. This money is not found in the regular school budget and presupposes that there is only one unfunded child who requires extra assistance in one school. If there are two in different grades, that could be \$80,000 per annum spent on only two children. Judging from the number of complaints, it is likely that many schools may have between 5 and 15 unfunded children with disabilities. It is not viable for schools to find \$30,000-\$600,000 annually from their budget, and it does not occur.

Case 2. In 2011, in *X v State of Victoria (Department of Education and Early Childhood Development)* \*, the DEECD argued that one of the reasons they could not educate a student with multiple disabilities adequately was because of his ADHD, which caused him so much disruption that they could not teach him to read and write. On the other hand, the DEECD did not fund the student for two years because ADHD is not a disability attracting funding.

\* The Victorian Federal Court of Australia has made an order suppressing the name of this child

*Recommendation. That all parties who receive government funding in order to deliver education services are required to fund their respective educational institutions adequately in order that the Standards may be implemented.*

The Dyslexia is a good example of a disability where serious consequences will occur if intensive assistance is not provided. A recent report to the Parliamentary Secretary for Disabilities and Children's Services from the Dyslexia Working Party<sup>7</sup> outlines these consequences and urges the government to implement a number of proposals to address the learning needs of children with this disability. In the meantime, in Victoria, one cannot even apply for funding for dyslexia – it is not on the list of acceptable criteria. It is therefore unsurprising that despite being a well developed country, Australian levels of literacy are extremely poor, particularly so

<sup>7</sup> "Helping people with dyslexia: a national action agenda" Report to the Hon Bill Shorten, Parliamentary Sec to Disabilities and Children's Services. 10 January 2010

for children with disabilities. Dyslexia is the primary cause of learning difficulties and literacy.

Almost half of Australian adults do not have the basic reading and writing skills needed for everyday living, have difficulty finding information in newspapers, using a bus timetable or understanding directions on medicine labels. The Australian Bureau of Statistics adult literacy and life skills survey found the worst literacy problems were in school leavers aged 15 to 19. The survey tested nearly 9000 people aged between 15 and 74 on their ability to deal with the literacy demands of everyday life. 46 - 70% of Australian adults had poor or very poor skills across one or more areas of literacy. They had not attained the level of literacy skills regarded as the minimum required to cope with modern life.<sup>8</sup>

**The Standards have not influenced the categories of disabilities that attract funding. Funding affects the ability of schools to enact Parts 4 – 7 of the Standards.**

*Recommendation. That all educational authorities are required to have in place systems to allocate funding and resources to students with disabilities that do not discriminate against any particular disability. Preferably, these systems should be uniform across Australia.*

### **3. Lack of Policies and Best Practice governing Service Provision**

Within the PSD, and/or the DEECD itself, there are no detailed policies governing best practice in respect of service provision to children with particular disabilities. Accordingly, principals of schools are able to individually decide what is best practice service provision, despite having little or no knowledge of disabilities.

There has been a misleading claim by the DEECD for some years now that its eligibility criteria for the PSD is developed from the World Health Organisation definitions of disabilities.<sup>9</sup> This is false but continues to be written in DEECD literature. In fact, the World Health Organisation (“WHO”) does not have its own definitions per se, but refers to the ICD-10 (International Statistical Classification of Diseases and Related Health Problems 10th Revision) which is simply a diagnostic

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<sup>8</sup> Australian Bureau of Statistics. (2008).

<sup>9</sup> Program for Students with Disability Guidelines 2010 page 3

manual. Moreover, the PSD criteria have very little in common with the ICD-10 classifications.

The ICD-10 gives users an etiological framework for the classification, by diagnosis, of diseases, disorders and other health conditions. The focus here is on mortality and the physical aspects of any disease. WHO states the ICD 10 should be used mainly to classify causes of death; which makes the using of it as an initial assessment tool nonsensical – if one were to accept that it has been used by the DEECD, which it has not.

An example of how the PSD criteria are far removed from the ICD-10 is the PSD's severe language disorder category, which requires a disorder to be 3 standard deviations from the mean. Such a high standard deviation is not reflected in the ICD-10, and in fact experts have given evidence in Australian courts that the DEECD's criteria are completely out of step with domestic and international norms. Despite such evidence, and a legal finding against the DEECD which highlights this anomaly, the DEECD has continued to publish this false claim<sup>10</sup>.

When pushed to explain their claims, the DEECD has formally advised parents that their criteria is based on the International Classification of Functioning ("ICF"). This again is completely false. ICF is WHO's framework for health and disability. It provides a universal classification for functioning and disability associated with health conditions. It was designed for use in health and health related sectors, forming the conceptual basis for the definition, measurement and policy formulations for health and disability.

The ICF is a flexible framework which relies on a range of matters to inform responses to people with disabilities/illness. In direct opposition, the PSD's rigid criteria must be met by children **prior** to any discussions taking place in relation to support which relies on funding through the PSD.

WHO states that the ICF is to be used in combination with the ICD -Pg 3 "*Towards a Common Language for Functioning, Disability and Health ICF*", and that failure to meet the criteria of one should not discount the use of the other. The use of both, regardless of an existing medical diagnosis, is encouraged by WHO as it creates a broader and more meaningful picture of the experience of health of individuals and populations.

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<sup>10</sup> Turner v State of Victoria (VCAT 2007) VCAT 873

The purpose of the ICF is to remove the labeling of a disability, however the DEECD requirement of children with disabilities to meet a fabricated disability category with supporting evidence defeats the purpose of the ICF.

**The Standards have not influenced the DEECD to adopt best practice policies and procedures in their support of students with disabilities, preventing Parts 4 – 7 of the Standards to be effected in many instances.**

*Recommendation. That all educational authorities are required to have in place systems to allocate funding and resources to students with disabilities that do not discriminate against any particular disability. Preferably, these systems should be uniform across Australia.*

### **3.1 Deaf Education**

Currently, there is no legislative right for a deaf student to have access to the curriculum in their native sign language, which in Australia, is Auslan. This omission in itself breaches the *International Covenant on Economic, Social and Cultural Rights*, articles 13 and 2(2); *Convention on the Rights of the Child*, article 2(1), and the *UN Convention of the Rights of Persons with Disabilities* article 21.

In *Beasley v State of Victoria [2006] VCAT 187* it was revealed in evidence from the DEECD that throughout the many Victorian schools which were either schools for the deaf, or had deaf units/facilities, the Principal had the responsibility of making a decision on which sign language or sign system was used. This was regardless of any knowledge that the Principal may have about the deaf community and its language. There is only one recognised sign language in Australia, which is Auslan (Australian Sign Language).

*Beasley v State of Victoria* revealed that the school in question, Pearcedale Primary School, had decided as an official position to use what they called ‘Sign Supported English’, which was part Auslan but was used in English word order. In other words it was not a language, simply a sign system someone had made up. During the hearing, academics and experts criticised the use of this ‘system’ and supported the right of deaf people to access their native language. The complainant, Dylan Beasley, was a fluent Auslan user from a deaf family who

used Auslan, so the logical sign language would have been Auslan. Despite Beasley being successful, the DEECD has not implemented a policy enshrining the rights of deaf students to access their education in Auslan, and continues to allow schools individually to make decisions about the sign language or sign system to be used – despite the Federal Government only recognising one sign language in Australia.

In addition, parents making enquiries in relation to the education of their deaf children continue to be told that schools do not have the funding to pay for full time interpreting for a deaf student.

There is no relationship between academics who specialise in the area of deaf education and the DEECD, and in fact approaches made to the DEECD by these experts are ignored.

During the hearing in *Beasley*, it was noted that there had been a review of deaf education by the DEECD, but none of its recommendations had been enacted upon. Reviews continue.

***The Standards have not influenced the DEECD to give effect to the rights of Deaf students pursuant to Parts 4 – 7 of the Standards, in particular Part 7.***

*Recommendation. That the Standards particularise the right of deaf students to their native language, that is Auslan (Australian Sign Language) in the subjects/classes of their choosing*

### **3.2 Students with Language Disorders**

In relation to the section below on students with language disorders, there are a number of eminent Speech Pathologists who are academics in leading Universities in Victoria. They have been critical of the changes in support to students with language disorders, as has the professional peak body for speech pathologists, Speech Pathology Australia. Despite this wealth of knowledge being held locally, no attempts have been made by the DEECD to accept the advice of eminent professionals in this field.

Speech Pathologists working directly for the DEECD are prevented from working using best practice methods due to workforce issues and funding restrictions.

**The Standards have not influenced the DEECD to give effect to the rights of students with Language Disorders, especially those that are Severe, pursuant to Parts 4 – 7 of the Standards, in particular Part 7.**

*Recommendation. That the Standards require educational authorities to develop policies and procedures in relation to the delivery of education to students with language disorders in collaboration with Speech Pathology Australia.*

### **3.3 Autism Spectrum Disorder (“ASD”)**

Positive behavioural support and best practice in behaviour management of children with ASD is set aside in many autistic schools in favour of old-fashioned and illegal methods such as isolation and physical and chemical restraint.

**The Standards have not influenced the DEECD to give effect to the rights of students with Autism Spectrum Disorder, especially those that are Severe, pursuant to Parts 4 – 7 of the Standards, in particular Part 7.**

*Recommendation. That the Standards require educational authorities to develop policies and procedures in relation to the delivery of education to students with Autism Spectrum Disorder that reflect evidence-based research and best practice.*

*Recommendation. That the Standards specifically preclude the use of physical restraint in relation to the “behaviour management” of children with Autism Spectrum Disorder.*

*Recommendation. That the Standards specifically preclude the use of “Time out” rooms in relation to the “behaviour management” of children with Autism Spectrum Disorder, unless such a room is established and used in line with international best practice standards.*

### **3.4 Remedial literacy and numeracy**

The DEECD makes no distinction between evidence-based literacy and numeracy programs, and commonly available literacy and numeracy programs. No matter what the severity of academic delay, the severity of a learning disability, or a student’s potential, the DEECD routinely respond with the same



literacy and numeracy programs despite little evidence of their success, and/or despite little evidence of a child's progress.

There are a number of evidence-based programs available, but we infer that due to the intensity of teaching required to implement those, they are largely rejected by schools. For example Dyslexia, a disability that does not include intellectual disability but severely affects the ability to learn, does not attract individual funding. Therefore, evidence-based programs which require one-to-one intensive instruction are not used. They are rejected by virtue of the fact that they will require significant resourcing.

*Recommendation. That the Standards require evidence-based teaching practices and programs to be used in the teaching of students with disabilities.*

### **3.5 General**

In discrimination complaints lodged against the DEECD, all of the complainants have a range of medical reports to support their requirements to have their individual needs met. Most of these reports include opinions from that student's independent medical practitioners. In spite of the weight of such material, the recommendations contained in the reports are routinely not accepted by the DEECD. Instead the DEECD wastes valuable resources in attempting to discredit these experts and their diagnosis and recommendations in the event of a complaint against it. Consequently, there is a huge difference in the supporting measures, if any, the DEECD implements to assist a student, when compared to those that have been recommended by that student's medical practitioners.

The DEECD systematically reject the recommendations of practitioners who have treated the student over some time, when the DEECD itself allegedly has very limited resources to devote to developing support plans that are appropriate to each individual child's needs. It is particularly curious that the DEECD has no policies requiring that a disability be addressed in a certain way, that a particular method of teaching be employed, or that specific professional people should be contacted (eg recommendations that behaviouralists or behavioural psychologists should develop Positive Behaviour Plans rather than general teachers).

While the DEECD employs a minimal number of psychologists and speech pathologists, their services are mostly used for assessment for eligibility to the PSD rather than treatment, they do not tend to specialise in a particular area, and long waiting lists can and do apply. While some families can afford private practitioner assistance, many cannot. In any event, disabilities that affect a child's

access to education require programming, planning and therapy in the educational setting rather than, or in addition to, outside it. Intensive assistance is not provided by DEECD allied health professionals. Many parents have been advised that no direct assistance is available.

As more litigation occurs involving different external professionals, the number of these professionals disenfranchised with the treatment of students with disabilities in Victoria grows.

Internal DEECD procedures and guidelines are being discarded as families actually call the DEECD to account in relation to the following of its own protocols. Individual Education Plans, the basic backbone of designing individual education supports for children with disabilities, are rejected by teachers who when called upon to produce them, reject their necessity. Behaviour Support Plans, to address behavioural challenges of children with disabilities, are drawn up by teachers whose expertise relegates such plans to "zero tolerance" or a list of punishments for non-compliance. Parents who ask for behavioural psychologists or behaviouralists to assist in the development of such plans are refused such assistance. DEECD psychologists are controlled by internal policies, procedures, and workforce shortages which do not allow them to put in place the required therapies and support. Consultation with professionals also mentioned in DEECD documents as important in the support of children with disabilities, is being rejected by teachers, who claim that they have the necessary expertise in a variety of disabilities, and are not required to consult other advisors. So, in practice the DEECD is abandoning its own policies and procedures and instead is investing all of its efforts and resources in defending its failure to successfully provide education to students with disabilities in the courts.

Reasonable adjustments for a student with a disability are not really reasonable when the following factors in subsection 3.4(2) are weighed;

- a) student's disability
- b) the views of the student /associate
- c) the effect on the adjustment on the student including the effect on the student's
  - i. ability to achieve learning outcome; and
  - ii ability to participate in course or course; and

iii independence;

d) the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students;

e) the costs and benefits of making the adjustment.

The balancing act of reasonable adjustment appears fair at first glance, however there is no guidance as to what weight the student and their associates' views should have versus those of others involved. Looked at equally, one could infer the section gives the student with the disability only 25 % consideration in his/her favour, when taking into account and balancing the other interests, represented by the education provider(25%) the staff(25%) and other students(25%). The factors to be considered need to favour much more strongly the student with a disability and their associates, whose only interests are those of the child, as opposed to others who have conflicts of interest

**The requirement in the Standards to make “reasonable adjustments” is insufficient and an inadequate response to the education of a child with a disability or multiple disabilities. To simply “balance the interests” of all parties as defined in the Standards is a lacklustre and inadequate approach, and is failing students with disabilities.**

*Recommendation. That the Standards impose a positive obligation on educational authorities to implement the recommendations of experts on the child’s disabilities, and/or the treating practitioners of the child.*

*Recommendation. That the term “reasonable adjustments” be struck out and replaced with “optimal adjustments”.*

## **4. Students with a Language Disorder**

### **4.1 Change to the Criteria**

In 2005, the DEECD instituted certain changes to the PSD. As a result of this, students with a severe language disorder will only be provided with funding for support if their disorder could be categorised as falling three or more standard

deviations below the mean.<sup>11</sup> This is not the only criteria to be met, but the most overarching criteria.

Prior to the 2005 changes, which were implemented in 2006, support was available for students with a disorder that placed students two or more standard deviations below the mean in the relevant areas.<sup>12</sup> These changes resulted in funding being discontinued in respect of 6,500 Victorian students and, as noted by Speech Pathology Australia in its report on the changes, had the effect of limiting funding to fewer than 0.1% of the student population.<sup>13</sup>

The DDLS asserts that the review which led to this change was improper. It bases this assertion on the following facts:

- the review was conducted by the Royal Children’s Hospital “Education Institute”;
- the Education Institute is funded almost entirely by the DEECD;
- DEECD members were on the Education Institute’s board, indeed the Education Institute’s CEO was an ex DEECD employee;
- the independent and senior Speech Pathologist involved in the review objected strongly to the change, and was ignored.

As a result of this “review”, the standard deviation was raised and the words “Critical Educational Need” were added to the criteria. This phrase is not defined in any DEECD material, and therefore it is impossible to know how it can be met. As a result of this criteria, the student listed in Case Study 1 did not have a language disorder as is defined by the DEECD. This result seems absurd when the student in Case Study 1 is approximately six years below his peers in language capabilities due to his Severe Language Disorder.

Immediately upon implementation of the new criteria, students eligible for PSD funding dropped from 6,760 in 2005 to 208 in 2006. That is, approximately 90% of students lost their funding.

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<sup>11</sup> DEECD *Program for Students with Disabilities 2006*, Language Disorder Program Handbook to women Page 11.

<sup>12</sup> DEECD *Program for Students with Disabilities Handbook 2005* p 12

<sup>13</sup> Speech Pathology Australia, *Briefing Paper: Students with Severe Language Disorder in Victorian Government Schools* (2006), p. 1.

**a. Substitute 'Language Support Program'**

Predictably, the change of criteria and consequent loss of funding to approximately 6,500 students resulted in a massive protest from parents, professionals and disability organisations.

To placate these groups and individuals, the DEECD announced a Language Support Program. The DEECD proposed that this would result in teachers being taught how to work with students with oral language difficulties. The purpose of the new program was contradicted by the following facts:

- No Speech Pathologists were involved in the reference group that was established to implement the new program.
- The new program is voluntary.
- The program did not provide training on how to work effectively with students with severe language disorders, and did not provide for any extra resources such as extra staff in the classroom or speech therapy.
- The funding available in this program was allocated to schools based on their geographic location, rather than how many students with language disorders attended each school.
- The funding, although labelled by the DEECD as “language disorder” funding, is in fact not required to be spent on students with language disorders at all – it is simply part of a school’s global funding package.
- The program is only targeted at children with oral language difficulties.
- There is no requirement that schools account for this money.

**b. Students requiring Alternative and Augmentative Communication (“AAC”).**

Despite the rights of people with complex communication needs to AAC being enshrined in the UN *Convention on the Rights of Persons with Disability*, there is no such right in Victorian schools. There is no right to the equipment required to assist a student to access their education, and if the parents pay for such

equipment, there is no right to the one-to-one assistance and training required to use the equipment.

**The Standards have not enabled students with complex communication needs to access their education pursuant to Parts 4-7.**

*Recommendation. That the Standards specifically set out the rights of students with complex communication needs to communication devices, adequate training of themselves and staff to use those devices, and the ongoing assistance and professional support required to use those devices*

**c. Impact of the changes**

The policy encapsulated in the PSD restricts the access of children with a language disorder not only to education at both the primary and secondary levels, but also at the tertiary level due to the flow-on effect that is experienced as a result of these children failing to meet educational outcomes at earlier stages.

No other category in the PSD requires a disability to be more than 3 standard deviations from the mean to enable extra resources to be allocated to a student. This strict criteria is not replicated in any other state in Australia.

A number of students with language disorders have lodged discrimination complaints against the DEECD in relation to their inability to access the required supports, and their subsequent academic failure and distress throughout school.

The Speech Pathology Australia Briefing Paper, '*Students with Severe Language Disorder in Victorian Government Schools (2006)*' was given to the Minister for Education at the time in an attempt to apprise her of the risks inherent in not providing children with language disorders appropriate assistance. Speech Pathology Australia's advice was ignored by the Minister, as was the advice of any speech pathologist and disability group. A greater group of children are now at risk of mental health issues and involvement in the juvenile justice system as a result.

In many cases, the policy simply renders any meaningful access to education impossible for children with severe language disorders. On this basis, the policy manifestly discriminates against children with a language disorder and, accordingly, amounts to an infringement of Australia's obligation at international

law to ensure that education is accessible to all on a non-discriminatory basis.<sup>14</sup> It is also in breach of Australia's affirmative obligation under Art 23(2) of the *Convention of the Rights of the Child* to extend "assistance for which application is made and which is appropriate to the child's condition", of which one aim is "to ensure that the disabled child has effective access to and receives education".<sup>15</sup>

The policy further runs counter to the spirit of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, which at art 13 (1) states that education shall be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society".

The ramifications of the operation of the PSD are grave. As Speech Pathology Australia observed in its report, empirical research clearly demonstrates that a deviation of only 1.5 standard deviations below the mean is the threshold beyond which there is high risk of long-term negative outcomes associated with not attaining a minimum level of educational achievement, including psychiatric illness and unemployment.<sup>16</sup>

The PSD therefore places a large number of students (at least over 6,000) whose language disorder places them between 2 and 3 deviations below the mean at high risk of these outcomes. The likelihood that a bar on access to education will have broad-ranging negative social consequences such as these is widely recognised, and was specifically contemplated by the Committee on Economic, Social and Cultural Rights ('CESCR') in its comment on art 13 in which it stated:

*'As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-*

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<sup>14</sup> *International Covenant on Economic, Social and Cultural Rights*, arts 13 and 2(2); *Convention on the Rights of the Child*, art 2(1).

<sup>15</sup> Note that while this obligation is made "subject to available resources", the obligation to provide education free of discrimination is not conditioned in this way: see note 30 and accompanying text.

<sup>16</sup> *Ibid.*

*educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.*<sup>17</sup>

**The Standards have had no impact on access by students with language disorders to the education system in Victoria. Access for this group has declined since 2006 despite the Standards coming into effect.**

*Recommendation. That the Standards require educational authorities to develop policies and procedures in relation to the delivery of education to students with language disorders in collaboration with Speech Pathology Australia*

*Recommendation. That all educational authorities are required to have in place systems to allocate funding and resources to students with disabilities that do not discriminate against any particular disability. Preferably, these systems should be uniform across Australia.*

## **5. Changes to the Autism Spectrum Disorder category**

It was disappointing to see the DEECD target children with Autism Spectrum Disorder (“ASD”) by making the criteria more difficult to meet in September 2009. The DEECD, having been roundly criticised due to its changes to the language disorder program, went about this exclusion in a different way. A new guidance note was sent out for speech pathologists advising them on future requirements for children to meet the criteria. The guidance note raises the bar for the diagnosis of pragmatic language disorders, and now many children who previously met the criteria for ASD, presently do not do so.

This most recent change has angered and shocked not only speech pathologists, children and their families, but also school staff who have contacted us for advice.

The change was made, again, without consultation with Speech Pathology Australia, and reflects yet another DEECD strategy to exclude children from appropriate funding. Sadly, it seems that the DEECD is wasting significant resources on deciding how to restrict the amount that is spent on disability areas rather than devoting such resources to the areas which need it most. This is not

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<sup>17</sup> Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 13 – The Right to Education* (E/C.12/1999/10), 8 December 1999, para 31.



an appropriate response to the improved diagnosis of disabilities or the increase in children with particular disabilities. An increasing number of parents have contacted us in relation to their children not being able to receive funding due to this recent change.

From observation in recent years, when the numbers of students receiving PSD funding rises, the DEECD then responds by devising a way in which they can be excluded from the program.

**The Standards have had no impact on access by students with Autism Spectrum Disorder to the education system in Victoria. Access for this group has declined since 2009 despite the Standards coming into effect.**

*Recommendation. That all educational authorities are required to have in place systems to allocate funding and resources to students with disabilities that do not discriminate against any particular disability. Preferably, these systems should be uniform across Australia.*

## **6. Bus Travel to Special Schools**

In Victoria, parents of students with disabilities have the choice between sending their children to a mainstream school, or either a 'Special School' or 'Special Developmental School' (collectively "**Special Schools**"). Special Schools are for students with disabilities who meet certain low IQ criteria.

Due to Special Schools being located in geographically dispersed locations throughout the state, transport to and from them is more difficult, as opposed to a student with a disability attending their local school.

The DEECD contract private bus companies to provide a pick up and drop off service for students with disabilities who attend Special Schools.

However, as is the case in all other DEECD programs, the resources in this program are scarce. As a result, students can be (and often are) subjected to up to 4 hours of travel on such buses per day. This lengthy travel is not caused by the fact that the students live far away from their Special School, but because such buses make frequent stops, and in order to save money, the numbers of buses is kept at a minimum.

Consequently it is common place for a 15 minute car trip to take 2 hours on the bus.

This appalling situation is exacerbated by the fact that, whilst on the bus, children have no activities to keep them occupied and importantly, no access to trained staff, toilet facilities, toilet stops, food or drink. Moreover, it makes the situation particularly untenable for children with disabilities who as a result of their disability cannot communicate verbally. DEECD policies do not require the supervisors on the bus to undertake any meaningful professional development in order that they may cater for or communicate with the children on the bus. They may have a First Aid certificate.

Children are expected to urinate or soil their pants if they need to go to the toilet.

Under pressure in 2008 from parents raising the matter publicly, the Premier of Victoria promised a review of these arrangements. The public are still awaiting the outcome of the review.

The consequences of spending 3-4 hours on a bus in addition to attending school, children can:

- a) miss out on family/leisure time and sufficient sleep;
- b) become dehydrated;
- c) suffer humiliation and inhumane treatment by not being able to access a toilet and defecating/urinating in their pants;
- d) be physically restrained for a significant period of time;
- e) endure boredom and frustration, often resulting in self injurious behaviour and forced restraint.
- f) acquire medical conditions such as constipation and other bowel problems; contracture development resulting in pain, bone deformity and reduction in functional ability, all can result from long periods in fixed seating and/or exacerbate them.
- g) experience exacerbation in physical conditions which are best ameliorated by not sitting for extended periods of time.

In addition, parents of these children need to ensure they can get to a drop off point, (which can be difficult if they do not have a car and/or have other young children to take care of).

Case Study 3 Alan is an 8 year old boy attending a special school and was required to travel in a bus 3 hours per day, when he only lived 10 kilometres from the school. Due to his communication difficulties, he was unable to effectively communicate with the supervisor, and ultimately urinated in his pants one day. It was suggested to the parents that they put a nappy on their son, who is fully toilet trained, to address this situation. On another day he had a physical altercation with another student – behavior which was completely out of character for him. After months of negotiating unsuccessfully with the SOV, his parents withdrew him from the special school and enrolled him in a local mainstream school. The parents were advised that it was their choice as to whether their son travelled on the bus.

**The Standards have not prevented inhumane and degrading treatment of students with disabilities attempting to access schools.**

*Recommendation. That the Standards specifically preclude any school bus trip for students with disabilities taking more than 30 minutes.*

*Recommendation. That the Standards require staff who are responsible for children with disabilities on buses to undertake training that ensures they are able to communicate effectively with all children on the bus, and that efforts are made to ensure that the conditions on these buses are humane.*

**7. Non attendance at school.**

Under the *Education and Training Reform Act 2006 (s2.1.1)*, parents can be in breach of the Act if they do not ensure their child attends school every day.

Unfortunately, when a child with a disability has been forced to leave a school, the DEECD has no equal responsibility under the Act. The DEECD's formal position is that the requirement for children to attend school every day is only a requirement in relation to parents, and the DEECD has no requirement to educate children every day. Parents can often spend months requesting the DEECD assist them in enrolling or re-enrolling their child in a school – without assistance. In particular, where a student with a disability has a poor experience in a school due to the school not being able to meet their needs, the DEECD is not helpful in assisting them re-integrate.

It is common that schools do not allow children with disabilities to attend school full time due to the lack of funding the individual school receives through the PSD.

This seems to be a particular problem for children with Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder, who the DEECD finds most difficult to cater for due to the lack of funding provided and refusal to adopt best practice service provision. Instead of offering appropriate integration assistance to such children, the DEECD's usual method of managing such children is to direct them towards the Distance Education program. This occurs in spite of the fact that the Distance Education is a program that is ostensibly for students who either do not live within reasonable distance from a school, or because of some long term debilitating illness are unable to physically attend school. In spite of this, anecdotal evidence reflects a large number of students with Autism Spectrum Disorder receiving services from Distance Education due to schools failing in their obligations to them. Distance Education programs are not designed for children with disabilities and therefore more pressure is put on parents to assist in the process or eventually home school their children

Case Study 4. Charlie is a 15 year old boy who has multiple disabilities including Autism Spectrum Disorder. He was enrolled in a special school for 2 days before being asked to leave because he didn't 'fit the criteria'. His mother refused to return him to the mainstream school where he had been bullied, and had attracted such little funding that he had not made any significant academic progress since Year 1. Charlie's mother advocated for her son to return to school unsuccessfully from January 2008 to October 2008 including approaches to the Minister for Education. After a discrimination complaint was lodged, Charlie eventually was able to return to schooling in November, having missed most of the year.

In practice the *Education and Training Reform Act 2006* only applies to students without disabilities.

***The Standards have failed to give students with disabilities the right to attend school full-time.***

*Recommendation. That the Standards give students with disabilities the right to attend school full-time.*

## **8.Participation in all levels of school life**

Students with disabilities are routinely excluded from numerous aspects of school life.

In *Walker vs State of Victoria*, Federal Court of Australia, the Court found that the school had not discriminated against a child with multiple disabilities by banning him from the school bus, attending at lunchtimes, and a camp, citing “safety” concerns. The Court also found that it was reasonable for the child to Miss out on a term of schooling while his school organised funding

The DEECD claimed that sending the student home at lunchtimes (rather than providing a supervised and structured social skills program) was a “strategy” to respond to his behaviour.

This was in the absence of a behavioural psychologist being involved in any Positive Behaviour Plan, or any expert designing a social skills program. Rather, it was in the context of the school staff writing up a “zero tolerance” behaviour management plan, and staff claiming that they would teach the child with Autism Spectrum Disorder social skills by correcting him when in their view; he said or did the wrong thing.

Therefore, the formal and official position of the DEECD is that exclusion from school activities is a first response rather than a last response, and can be made in the absence of any professional assistance from experts in the field of the child’s disabilities.

This decision sets in concrete the exclusion and marginalisation of children with disabilities from numerous aspects of school life. It is clear that the DEECD has no intention of putting in professional supports to address children’s disabilities, but rather simply exclude them.

***The Federal Court decision in Walker vs State of Victoria could have been different if the Standards had been more proactive in their expectations of inclusion and participation of children with disabilities. The decision reflects the approach of the DEECD to the inclusion, or lack thereof, of children with disabilities.***

***The expectation that such inclusion and participation is only required if such expectation is “reasonable”, (that is “balancing the interests of all parties”), sets up students with disabilities up to fail. There will always be “parties” who find the inclusion of children with disabilities too hard, or undesirable for numerous reasons. There should be no expectation that we***

**should balance their requirements, (often being State government with billions of dollars of revenue) with the rights of children with disabilities to an education and other aspects of school life.**

**The expulsion of children with disabilities is a useless endeavour, designed to move children whom one school regards as a “problem” to another school. The Standards have not protected students with disabilities from being suspended/expelled from school as a response to their disabilities. Rather than being suspended or expelled, students with disabilities that are experiencing significant difficulties require professional analysis of their situation, and the appropriate expert support supplied.**

*Recommendation. That the term “reasonable adjustments” be struck out of the Standards and replaced with “optimal adjustments”.*

*Recommendation. That the exclusion of students with disabilities from schools, or school activities, only be allowable while the investigation of best practice measures are taking place. Examples of these best practice measures would be seeking the advice of independent experts in the child’s disabilities as to how to include that child in the school or school activity, best practice Positive Behaviour Plans, social skills programs for students with Autism Spectrum Disorder, best practice Individual Education Plans, appropriate equipment purchased to support the child. Any such temporary standing down of the student should have a maximum amount of time attached to it, such as one month, to allow best practice planning and program is to be developed. The educational authority should provide an alternative education program for this period.*

## **9. Special Schools**

### **9.1 Inclusion**

Officially, the policy of the DEECD is to promote the inclusion of children with disabilities in mainstream schools. These rights are articulated in the Standards. However, in practice the lack of support the DEECD provides mainstream schools in assisting students with disabilities causes such schools to accept such admissions with extreme reluctance. In fact, parents are often advised that the child would be better off in a special school where they could receive a greater amount of assistance. As a result, parents often transfer their children to special schools, against their better judgement.

Case Study 5. Mr Smith received this e-mail from the local primary school. The quotes are verbatim, except for the names. "In our conversation we discussed the possibility of applying for an increase of funding. I have spoken with Jane Brown and there has been an appeal made in the past that was rejected. The issue is basically one of integration for Timmy into a mainstream setting." **"We have serious concerns around the question of whether we have the skills, knowledge or resources to provide the best education for him."** (Emphasis added.) In this case the school was limited by the funding they received and therefore requested that the child be transferred to a special school.

The correspondence illustrates that the current criteria for the PSD has very little concern for the best interests of the child. In this instance, the PSD did not accommodate either the needs of the school for expert support, nor the needs of the child to receive education in a mainstream setting. Unfortunately this example is more the norm than the exception for students with disabilities in Victoria. The result of this lack of support is that a greater number of students with disabilities end up being enrolled in special schools than is truly appropriate or desirable. As special schools tend to teach a "life skills" curriculum rather than academic curriculum, this has resulted in many students with disabilities not reaching their academic potential.

***The Standards have not resulted in greater inclusion in mainstream schools for students with disabilities.***

## **9.2 Inhumane and Degrading Treatment**

The DDLS has access to evidence that shows that a number of special schools still believe it is appropriate to use physical restraint as a primary behavioural technique rather than one of emergency resort. This belief is so deeply ingrained within certain special schools, that a martial arts instructor <sup>18</sup>promotes himself as a trainer for staff in special schools.

As a result of this rough treatment, parents report a number of significant injuries being experienced by children at certain special schools, with a lack of proper explanation as to how those injuries occurred. Some of them have kept photographic evidence of these injuries which can be made available if required.

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<sup>18</sup> Download of Mr James Sumerac, Martial Arts Instructor

In 2007 Bulleen Heights Special School decided it would employ an “Assault Response Therapist”. When parents asked the Principal for an explanation of this position, they were refused answers to their questions.

There are numerous reports by parents of disturbing incidents involving children sustaining injuries and experiencing inhumane and degrading treatment in a number of special schools, including “cages” for difficult children.

Another unacceptable "behaviour management" technique is the common use of solitary confinement, or "time out". Such treatment can in fact be harmful to children with disabilities as it further distresses and frustrates them – as it would any other human being.

Investigations into such treatment are found by parents to be completely inadequate. The DEECD accepts such injuries to children as merely a symptom of dealing with children with disabilities. This is the case, whether such injuries are justified as being due to "safety" reasons, or due to self harm. Formal DEECD Investigations brought to our attention have not questioned the appropriateness of children experiencing injuries in a school situation.

Case Study 6. Tom is a six year old boy attending a special school. One day his father arrived to pick him up and found both his arms splinted. The explanation given was that this was an attempt to stop Tom sucking on his fingers. No parental permission had been received for such restraint.

**The Standards have had no effect in protection from inhumane and degrading conditions for children with disabilities in some special schools.**

*Recommendation. That the Standards specifically preclude the use of physical restraint in relation to the “behaviour management” of children with Autism Spectrum Disorder or any other children with disabilities.*

*Recommendation. That the Standards specifically preclude the use of “Time out” rooms in relation to the “behaviour management” of children with Autism Spectrum Disorder, unless such a room is established and used in line with international best practice standards.*



*Recommendation. That the Standards specifically preclude the use of splinting children with disabilities, or any other harmful physical restriction, without the written permission of a parent and accompanying letter supporting such action from an independent medical practitioner.*

### **9.3 Academic results**

Parents complain that many special schools expect very little in terms of academic achievement, and goals whilst in school are often centred around life skills rather than literacy and numeracy. This is regardless of the potential of the individual child. Children transferred out of special schools to mainstream schools often show significant and immediate improvements in literacy and numeracy.

### **9.4 Availability of therapies**

In earlier years, there was a definite advantage to sending children with disabilities to special schools. This was the ready access that such schools had to expert services. Recently the DEECD has changed its philosophy surrounding the provision of these services, which are now provided through a "consultancy model". This means that instead of children receiving direct therapy from allied health professionals, those professionals now speak to aides and teachers about what is required and those aides or teachers are expected to provide direct therapy. The claim by the DEECD is that as a consequence, children receive therapy "throughout the day". Unfortunately, the framework by which such a program may assist children is rarely if ever present - that is a formal program devised by the allied health professional setting out goals and strategies, and being monitored and reviewed by that professional.

This is a significant downgrade in the quality of therapeutic services to children with disabilities. DEECD aides are not required to hold any qualifications whatsoever. Teachers in special schools are not required to be Special Education Teachers. Services such as speech therapy, if a therapist ever does work with a child directly, are often given in groups. While this may be cost-effective, each child may have a different severity and type of language disorder, and therefore does not necessarily benefit from the "one size fits all" model provided.

The "consultancy model" is also now provided in mainstream schools.

Despite this, the official position of the DEECD is that students have supports from a range of experts both within and external to the DEECD itself. The reality however, is that these supports are rarely provided, and are linked to the ability of each school to pay for them, which is again linked to funding provided by the DEECD. The DEECD's position at law when defending itself against complaints of discrimination is often contradictory to its stated policies and guidelines.

**The Standards have not ensured that students receive special supports as set out in Part 7.**

*Recommendation. That the Standards require educational authorities to develop policies and procedures in relation to the provision of therapies to children with disabilities approved of by the relevant allied health peak association bodies.*

### **9.5 Pooling of Funds**

In mainstream schools, applications are made for funding, and if a child with a disability is fortunate enough to meet the criteria of the PSD, then DEECD policy allows that such funding may be directed solely to the child that was awarded that funding. Nonetheless, in special schools (and at times in mainstream schools) the funding is always pooled, meaning that a child with disabilities so severe that they attract the highest level of funding, will have his or her funding given to the school who simply use it for general education purposes. As a result, the child that is awarded the PSD funding does not receive the full benefit of such an award.

Similarly, one-to-one does not occur in special schools. Instead a lower staff ratio is provided. Some children do require constant one-to-one assistance. A good example is children who require augmentative and alternative communication ("AAC"). Such children rely on a competent adult at all times to be able to communicate. Low staff to student ratios are unable to provide this level of assistance, and in fact in this situation the child would receive higher levels of support in a mainstream school, where on some occasions the totality of the funding is assigned to the child.

Children do not have the right to use AAC in government schools.

***The Standards have not had an effect on the opportunities for children with disabilities to access adequate funding and support in Special Schools.***

## **10 History of litigation against the DEECD Due to Non-Compliance with the Standards/*Disability Discrimination Act 1992***

Publically, the DEECD endorses the fact that “teachers and school leaders are required to comply with the Disability Standards for Education 2005, which clarify the obligations on schools and the rights of students under the *Disability Discrimination Act 1992*.”<sup>19</sup>

As described above, however, such compliance is often neither successful, nor even attempted. Even where the relevant school is aware of its obligations under the Standards, without the appropriate resources compliance is rarely possible.

As a result of this lack of training and lack of funding, the number of complaints made under both the *Equal Opportunity Act 1995* (“EOA”) and the *DDA* to the relevant human rights commissions has tripled in the last ten years.<sup>20</sup>

Only a small percentage of complaints go on to trial, as many are settled prior to hearing, ensuring confidentiality surrounding the circumstances of the complaint.

The former Disability Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, Ms Elizabeth Hastings made the following comments regarding how government departments of education in Australia handle claims against it under discrimination laws:

*“This pattern of late settlement is noteworthy and indicates that some education authorities are keen to avoid setting precedents in this area. In my opinion this ad hoc solution of individual cases is not the best way to make decisions: the important issues are not aired, discussed or determined, and our case law remains impoverished and unhelpful as to how to eliminate discrimination and thereby avoid complaints.”*<sup>21</sup>

These sentiments can be applied today, particularly in the State of Victoria.

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<sup>19</sup> ‘Program for Students with Disability Guidelines 2009’ Page 4

<sup>21</sup> [http://www.hreoc.gov.au/disability\\_rights/speeches/1997/edspeech.html](http://www.hreoc.gov.au/disability_rights/speeches/1997/edspeech.html) , accessed 26 July 2005.

In the last five years, the DDLS has handled approximately 70 matters in relation to education (not including tertiary education). This represents 18% of our work, which is a significant portion. Taking into account the information we have received from other practitioners specialising in this area, it is our estimate that there would be approximately one new complaint per month lodged against the DEECD under disability discrimination legislation.

Such numbers need to be seen in the context of the size of the state of Victoria, and the desperation ordinary families are driven to, to take legal action against the State. Such actions reflect the fact that the Standards are not having effect.

## **11 Response by the DEECD to litigation against it – claims of breaches of the Standards.**

In Queensland in 2006, the Federal Court found against the State Department of Education in relation to the provision of Auslan (the native sign language) to deaf students. In response, the Queensland government made millions of dollars available for Auslan training throughout the State.

In contrast to this the DEECD vehemently defends itself against all complaints instead of looking to the cause of such complaints and attempting to address this. Moreover the DEECD defends itself by rejecting its own policies and guidelines.

### **11.1 Student Support Groups (previously referred to as Program Support Groups)**

11.1.1 The Student Support Group (“SSG”) is intended to support students with disabilities. It achieves this, in theory, through bringing teachers, parents and consultants together to plan for the young person’s educational pathway.

11.1.2 Parents report that their common experience in respect of SSGs is that the requests for support that are made during such meetings are unable to be met due to funding issues. For these reasons the input by parents is often redundant, if not outright unwelcome, and parents may spend years requesting the same supports for their children to no avail.

*“Taking legal action about this was certainly not my preferred choice. I just feel at the end of my tether with an education system that claims to cater for every child, but certainly does not. They have the knowledge to help kids with dyslexia and learning disabilities, they choose not to as it saves the government money.”* Parent 2010

11.1.3 While SSG meetings are included in the DEECD’s own documentation as an expected support and guidance resource for students with disabilities, the

groups are often convened on an ad hoc basis, and parents find their experience is one of marginalisation. Consultants are often deliberately not asked because their time to attend must be paid for, and their recommendations are not welcome if they include recommendations that cost money.

11.1.4 Presently, many schools claim to be unaware of the DEECD's guidelines for students with disabilities, and consequently hold no SSG meetings whatsoever. However, since 2005 the case of *Beasley v State of Victoria*, where the DEECD was found guilty of discrimination, the DEECD has made several steps to lessen the expectations contained in its documentation to avoid such a ruling in the future.

11.1.5 In the 2006 DEECD publication "*Program for Students with Disabilities Handbook*" under 'Aims of the Program Support Group' contained two aims:

- *Increase the participation of the student in the educational programs and social life of the school; and*
- *Provide ongoing support for teachers, parents/guardian/carer(s) and the student in educational program planning and direction as well as regular monitoring and evaluation of the student*<sup>22</sup>

11.1.6 The 2007 revision of that same document<sup>23</sup> replaces these two aims with:

- *Plan reasonable adjustments for the student to access the curriculum*
- *Monitor the progress of the student*

While the phrase "reasonable adjustments" is quoted directly from the *DDA*, it is a phrase that has practically meant very little, and as such is far less helpful in a handbook than the former aim. This unfortunately reflects the fact that the term in the Standards "reasonable adjustments" sets a low threshold.

The second substitution seems to water down the role of the group in terms of educational support, planning and direction.

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<sup>22</sup> Department of Education and Training, Victoria *Program for Students with Disabilities Handbook 2006*, p. 18

<sup>23</sup> Department of Education and Training, Victoria *Program for Students with Disabilities Handbook 2006*, page 18, p. 38

## 11.2 Rejection of Individual Education Plans

- 11.2.1 The DEECD has a handbook designed to support teachers with their planning for students with disabilities. It is called *“Measuring Academic Progress Against Each KLA – Students with Disabilities and Impairments”*<sup>24</sup>.
- 11.2.2 The handbook includes valuable information in relation to goal setting, planning, evaluating and measuring progress. The template towards the end of the document sets out how to mark entry skills, include goals and measure outcomes. Unfortunately, many teachers in the Victorian education system are unaware of this document, and therefore do not provide students with disabilities quality (or any) Individual Education Plans which can be used to measure that child’s progress within the education system. Individual Education Plans are also referred to in many other of the DEECD’s policies and procedures.
- 11.2.3 In practice what occurs is that school staff either do not draw up Individual Education Plans at all for students with disabilities, or they do so without having read the required material to understand how each child’s needs should be catered for. Individual Education Plans, if they exist, vary from school to school and can be as brief as a one page sheet with a few dot points.

Attached are a number of Individual Education Plans from state-run schools in Victoria. The first is a template from the DEECD, the rest have been put forward as Individual Education Plans by the DEECD. Ultimately, the actual format is not the issue, it is the inclusion of goals, strategies, and mechanisms for monitoring, evaluation and review.

*Recommendation. That the Standards include the requirement for Individual Education Plans for all students with disabilities, developed using best practice principles, such plans not to be put into effect without the signed consent of the student or their representative. A template should be attached to the Standards.*

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<sup>24</sup> Department of Education, Employment and Training, Victoria *Measuring Academic Progress Against Each KLA – Students with Disabilities and Impairments*, 2000

## 12 Attempts taken to remove or mitigate the discriminatory effect of the PSD and to enable the Standards to have force.

The DEECD's tactic of settling cases means that it is not possible to properly air the failure of the Standards to provide students with disabilities an education. Individual settlements all require deeds of release and confidentiality clauses. In spite of this, a number of bodies have attempted to address these systemic issues at the highest level, including the DDLS.

As mentioned above, the Speech Pathology Australia report, which was highly critical of the changes to the PSD involving language disorder and recommended that the threshold be lowered to 1.5 standard deviations below the mean to bring it in to line with international standards, was widely distributed and was brought specifically to the relevant Minister's attention. However, its findings have been disregarded by the DEECD and the Victorian government, and this new threshold has been retained.<sup>25</sup>

A number of cases arising out of the implementation of the PSD have been heard by the Victorian Civil and Administrative Tribunal ('VCAT'). Indeed, VCAT has now twice found that the PSD is inadequate and has criticised its ability to support children with disabilities appropriately (see *Beasley v State of Victoria*,<sup>26</sup> *Turner v State of Victoria*<sup>27</sup>). Despite such findings, there is no indication that the DEECD has any intention of improving the program. What is evidenced is a desire to provide even less support to children with disabilities, through the deliberate narrowing of acceptance criteria to these programs.

Numerous approaches from parents and advocacy organisations have been sent to both the Minister and to the DEECD requesting to have the PSD modified so as to remove or mitigate its discriminatory effect. However, these overtures have all been ignored.

Individuals, organisations such as ours, and the courts through the exhortations within their decisions, have had the effect of exhausting all domestic remedies. We have inferred that there is nothing further that can be done by the Victorian

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<sup>25</sup> Department of Education and Training, Victoria, *Program for Students with Disabilities 2009*, p. 36.

<sup>26</sup> [2006] VCAT 187, especially at [184].

<sup>27</sup> [2007] VCAT 873, especially at [504]-[544].

community to affect a change for students with disabilities in Victoria. Having said that, community groups continue to advocate on these matters - to date with no success. Therefore, there is no alternative in our view, until the first complaint to the UN CRPD Committee, to ensuring that the Standards are so prescriptive as to control the education of students with disabilities with great detail.

#### Evidence of non-compliance with Standards- Chronology

- 2005 State of Victoria, Department of Education & Early Childhood Development decide to refuse individual funding to any child with a language disorder unless their disorder is 3 standard deviations from the mean.
- Students receiving individual funding drop from 6,760 to 208 in 2006 as a result.
- 2005 Dylan Beasley sues the state of Victoria under State discrimination legislation. He is profoundly deaf.
- 2006 Rebekah Turner sues the State of Victoria under State discrimination legislation. She has a severe language disorder. The state cannot find one Speech Pathologist to testify on its behalf during the hearing.
- 2006 State found guilty of discrimination against Dylan Beasley. *Beasley v State of Victoria* [2006] VCAT 187
- [184]Second, although it has not been necessary for me to make detailed findings about the PSD program, there is a substantial body of evidence before me about the program, including evidence from Mr Claridge, some reports and two confidential exhibits. This material raises a number of shortcomings of the program including –***
- *how individual students with disabilities educational needs are assessed for the program's purpose;*
  - *the appropriateness of the method by which a level of funding is then allocated;*
  - *the adequacy of that funding and of the total budget of the program;*



- whether the program has led to inconsistencies in funding and expertise across the system;
- whether other strategies might be more effective to meet the educational needs of students with disabilities; and
- whether the circumstances in which the original funding models were adopted still apply.

[185] The deaf facility at Pearcedale is funded on a ratio model. The evidence indicates a ratio of one teacher of the deaf for every four hearing-impaired students or multiple of four, or part thereof. **This ratio should, in my view, be reviewed.**

[186] More importantly I cannot understand from the evidence why it has been decided that deaf facilities in primary schools are funded for teachers of the deaf but deaf facilities in secondary schools are funded for teachers of the deaf and Auslan interpreters. **It is difficult to understand why it has been decided, for funding purposes, that children at deaf facilities in primary schools need a teacher of the deaf only, but children in secondary schools need both teachers of the deaf and interpreters. It is hard to understand why the difference between Grade 6 and Year 7 should be considered so great that such different treatment is necessary.** One might have thought that a child might need both a teacher of the deaf and an interpreter just as much at the crucial foundation stages of primary school as in secondary schooling. **I urge the State to consider these matters and review the PSD program.**

[187] Third, the evidence suggests that there **may be a need to review the training available to teachers of the deaf with greater emphasis given to Auslan skills**, although this must, of course, be balanced against the recognition that not all settings in which teachers of the deaf will work will need such skills. [emphasis added]

2007 Decision in *Turner v Department of Education and Training* (Anti Discrimination) [2007] VCAT 873 (22 May 2007). State found to have discriminated against Rebekah Turner.

[594] Fourth, my findings indicate that there are a number of serious shortcomings in different aspects of the PSD, particularly the language disorder category of that program. **There seems to be an**

***urgent need for comprehensive and expert review of the program. I would urge the government to undertake that review.*** [emphasis added]

- 2008, Feb DDLS writes to the Federal Minister for Education the Hon Julia Gillard, now the Prime Minister of Australia, outlining the concerns of service organisations, children with disabilities and their families in relation to a lack of access to education in Victoria. Ms Gillard refers us to the Parliamentary Sec for Disabilities and Children's Services, Mr. Bill Shorten.
- 2008, May DDLS writes to Mr. Bill Shorten, who does not reply.
- 2009 DDLS writes to the Federal Attorney Gen Mr. Rob Hulls, outlining the discriminatory practices of the Department of Education in Victoria. Mr. Hulls declines to act.
- 2009 New guidance note issued by the Department of Education to speech therapists assessing children for the Program for Students with Disabilities in the Autism Spectrum Disorder category. As a result, new applicants to the Program with high functioning Autism fail to receive individual funding.
- 2009 Supreme Court upholds the finding of discrimination against Rebekah Turner by State of Victoria *State of Victoria v Turner* [2009] VSC 66 (4 March 2009).
- Continuous Representation to State of Victoria by disability service providers, disability advocacy organisations, people with disabilities, parent advocacy groups and parents in relation to lack of access to education system for children with disabilities.
- 1999 on Escalation in the lodgement of complaints against State of Victoria under State and Federal Discrimination laws to approximately 1 per month against State of Victoria. Most confidentially settled.

2011 To our knowledge, there are between 8 and 12 discrimination cases against the State of Victoria currently before the Federal Court/Federal Magistrates Court.

The population of Victoria is approximately 5.5 million.

It should be noted that the DDLS's knowledge of who has lodged a complaint against the State of Victoria is not exhaustive.

All attempts to engage with the State of Victoria and Commonwealth have failed.

Discrimination complaints against the State can take approximately 3 years from lodgement in the Australian Human Rights Commission to trial. Within this period of time, the State usually continues to withhold the support required. The consequence of this is that for many children, a positive finding or settlements on the doorsteps of the court comes too late.

Litigation is unreasonably prolonged and is not effective relief for the thousands of children whose parents do not have the confidence to sue the State of Victoria.

**Strengthening of the Standards would remove the burden from students and parents to engage in litigation against the DEECD.**

### 13 Resource constraints of the State

The Victorian government has rationalised its policy on the basis that it is already investing a considerable amount of money in the PSD. This argument, however – premised on the availability of government resources – clearly does not discharge the State from its obligation to give effect to the right to education<sup>28</sup> without discrimination of any kind.<sup>29</sup> As the ICESCR observes in its comment on art 13, this prohibition on discrimination “*is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all*

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<sup>28</sup> *International Covenant on Economic, Social and Cultural Rights*, art 13.

<sup>29</sup> *International Covenant on Economic, Social and Cultural Rights*, art 2(2).

*aspects of education and encompasses all internationally prohibited grounds of discrimination.”*<sup>30</sup>

Even if it were accepted that State parties to the *ICESCR* were permitted at law to rely on resource constraints in order to justify infringements of art 2(2) of the Convention, this argument is not applicable to the State of Victoria.

In 2006, Victoria spent a total of AU\$904m on “Education and Training”.<sup>31</sup> The PSD represents approximately only 3.8% of total expenditure. The additional pecuniary burden of providing an equitable and non-discriminatory program must also be assessed having regard to the total financial resources available to the State. By 30 June 2008, the Victorian Treasury anticipated that Victoria would have an accumulated surplus of AU\$20.7b.<sup>32</sup> In the 2006-07 financial year, the Victorian government delivered a budget surplus of AU\$1.4b.<sup>33</sup> The Victorian government has a “AAA” credit rating<sup>34</sup> and has delivered over 10 consecutive budget surpluses.<sup>35</sup>

In addition to the strong financial standing of the Victorian government, to contradict its “cry poor” approach, there is also evidence of inappropriate and wasteful expenditure being undertaken. This further undermines the government’s position that resource constraints prevent it from providing education to all in a non-discriminatory manner, as is required of it by international law.

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<sup>30</sup> Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 13 – The Right to Education* (E/C.12/1999/10), 8 December 1999, para 1.

<sup>31</sup> Victoria, *Financial Report for the State of Victoria 2005-06*, p. 107.

<sup>32</sup> Victoria, *Statement of Finances 2008-09: Budget Paper No 4* (2008), p. 12.

<sup>33</sup> Victoria, *Financial Report for the State of Victoria 2005-06*, p. 9.

<sup>34</sup> Moody’s Investors Service, *Credit Opinion: Victoria (State of) Australia* (24 January 2007); Standard & Poor’s, *Victoria’s ‘AAA’ Rating: A Comparative Study of Financial and Economic Performance* (29 March 2006).

<sup>35</sup> For example, in addition to the AU\$1.4b surplus achieved in 2006-07 which is mentioned above, Victoria achieved surpluses of AU\$825m in 2005-2006, AU\$795m in 2004-05, and AU\$990m in 2003-04. Treasury has forecast a surplus of AU\$828m for 2008-09, although Treasury estimates (even once revised) have, on average, fallen short of actual surplus figures by 59% for each of the past four years. The trend for the Victorian Treasury to underestimate revenues has also been observed by other Victorian economic commentators: see, eg, Tim Colebatch, ‘Cruising on Easy Street’, *The Age* (Melbourne), 7 May 2008, p. 17.

By way of example, it is submitted that the previous government has committed an excessive amount of money to government advertising in the course of its time in office. A 2006 review of government advertising conducted by the Auditor-General estimated that Victorian government advertising and communications expenditure “was at least [AU]\$123 million for 2002-03, [AU]\$147.1 million for 2003-04, [AU]\$161.3 million for 2004-05 and [AU]\$88.4 million for the 6-month period to 31 December 2005”.<sup>36</sup> More importantly, however, the Auditor-General went on to find that six of the eight advertising campaigns in the sample under investigation did not meet the government’s own guidelines for reasons including the incorporation of party-political content through non-compliant authorisations.<sup>37</sup> This indicates that expenditure is likely to be surplus to requirements and a significant sum could be redirected to programmes such as a non-discriminatory successor to the PSD. In addition to manifestly inappropriate expenditure on government advertising that is non-compliant with the relevant guidelines, the Victorian government also commits substantial amounts of money<sup>38</sup> annually to major events which, while undoubtedly of value, do not necessarily deliver a return on investment<sup>39</sup> and, more importantly, should not be regarded on the same footing as providing for the basic human rights of Victorian citizens.

On the basis of the information set out above, it is clear that the Victorian government does not face resource constraints that would justify such a flagrant breach of its obligations towards children with disabilities as recognised by the international law community.

**It is clear that the State of Victoria can afford to implement the Standards.**

#### **14. Catholic Education Commission/Catholic Education Office**

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<sup>36</sup> Victoria, Auditor-General, *Government Advertising* (PP No 232, September 2006), p. 4.

<sup>37</sup> See, eg, Victoria, Auditor-General, *Government Advertising* (PP No 232, September 2006), p. 65.

<sup>38</sup> Approximately AU\$55m per annum: see Victoria, Auditor-General, *State Investment in Major Events* (PP No 14, May 2007). Examples of the events include the F1 Grand Prix and the 2007 FINA World Swimming Championships.

<sup>39</sup> Substantial negative externalities associated with hosting events are typically not costed in government economic assessments of potential events. By way of example the costs to the community of the use of Albert Park as a venue for the Grand Prix are discussed in Save Albert Park, ‘Costs of “Upgrading” Albert Park for the Grand Prix’, Factsheet 64/3, 20 November 1997.

Catholic Education systems in Victoria's suffer from the same vices as described above. One important difference is that when State of Victoria raised the bar in relation to eligibility for language disorder, the Catholic education system did not follow.

However perhaps more disturbingly, the Catholic system has attempted to avoid its obligations under the Standards by restructuring its organisations. These changes have the following effects.

The Catholic Education Commission/ Catholic Education Office claims not to be an education institution or authority as described under the Act. This is despite it providing property, services, curriculum, funding, staff, policy and procedure to Catholic schools. The legal entity for each Catholic school is the parish priest.

The net result of this is that if a student wishes to require their school to meet their obligations under the Standards, only a complaint against the parish priest is possible.

We infer that the restructuring of Catholic schools and Catholic education organisations in this regard, contrary to other Australian states, is simply to avoid their obligations and liability under the *Disability Discrimination Act* and the Standards.

The Catholic Education Commission is a signatory to the *Schools Assistance Act* 2008. It is through this that they receive money from the Commonwealth. Their formal position at law is that they are neither an educational institute nor an education authority. This would seem to disqualify them from being a signatory to this act. The fact that they do so in order to avoid their responsibilities to meet her Standards should be investigated

*Recommendation. That the Commonwealth review its funding relationship through the Schools Assistance Act 2008 with the Catholic Education Commission.*

**C. HAVE THE STANDARDS PROMOTED RECOGNITION AND ACCEPTANCE IN THE COMMUNITY OF THE PRINCIPLE THAT PEOPLE HAVE THE SAME FUNDAMENTAL RIGHTS AS THE REST OF THE COMMUNITY**

## 15. Conduct of the DEECD

In the continuous struggle by parents and professionals to advocate for the rights of students with disabilities, the DEECD has conducted itself in a manner that can at best be described as unfortunate, and non-compliant with its obligation to conduct itself as a model litigant. Parents are alienated, maligned and singled out in the DEECD's determination to portray parents of children with disabilities as bullies and haranguers. Expert witnesses – doctors, psychologists, psychiatrists, speech pathologists – who volunteer themselves as expert witnesses for their patients in legal cases, find themselves also to be targets of discredit. In many instances expert witnesses and advocates are defamed. This results in establishing a growing wedge between eminent professionals in the general and disability sector, and the DEECD.

Case 7. An advocate assisted the family of a child with autism spectrum disorder to make a complaint to the Australian Human Rights Commission. In the DEECD's response to the Commission, ostensibly, simply to reply to allegations of educational discrimination, the DEECD made inappropriate comments about the advocate (whose work is mostly voluntary) and implied she was assisting with the lodging of the complaint in order to make a profit. When the advocate objected to such comments and stated she would take the matter further, she was with threatened legal action.

Teachers are unavoidably caught in the middle of a battle between parents – who are seeing their children fail and become unwell, and the bureaucracy of the DEECD who will not give them the resources they need to meet the individual needs of children. Money gained by one child's successful application is often taken, unbeknownst to that child's parents, and partly re-allocated to others in the school's attempt to meet broader need. At times, teaching staff are urging parents to take discrimination complaints against schools in the knowledge that they are unable to support their students adequately.

The State of Victoria has the obligation to be a model litigant. In spite of this, hundreds of thousands of dollars, if not millions, has been spent in litigating complaints made by students with disabilities. Even though many cases are settled prior to being heard, this simply addresses the needs of those individual families rather than addressing any or many of the systemic issues which exist. The welfare and mental health of children, (ostensibly an area of concern to the body who is responsible for the education of children), seems to be of little concern to the DEECD. In some legal cases, the DEECD attempts to defend

itself by trying to prove the child does not even have a disability, or has one less severe than is claimed. This behaviour could be viewed as unfit conduct for the State.

Case study 8. In *W v State of Victoria* (Fed Ct 2009), the State refused to admit that the child had a disability at the first directions hearing. This was despite medical reports reflecting diagnoses of such disabilities. These recommendations were dated March 2009. Despite the child expressing suicidal ideation at the end of 2008 (reported to the State and linked with the stress of his education), and the recommendations of the Experts, the assistance sought by the complainant was not provided until the end of the 2009.

It is clear that the money spent on litigation will continue to be less than the money required to reform the system. Therefore it is cheaper for the DEECD to continue litigating and wait for the more courageous parents to lodge complaints against it and fight them or settle them one by one.

In the meantime, children with disabilities suffer.

The view of the DEECD's own employees can be summed up in the results of the 2010 Principals Survey, attached, which includes the following comments in relation to the support of students with disabilities.

- *"There is a lack of meaningful support schools with Aspergers/autism students". (Barwon South Western)*
- *"The new D and I (disability and impairment) funding requirements relating to autism are a farce. I have a severe behaviour Aspergers child and I can't get any support financially. Meanwhile he is a risk to other kids. He needs one-to-one supervision in the yard and has caused lock downs but he is ineligible for funding (because) he passed one of his five assessments. One test! In anything else this is still failing but for D and I (funding purposes) it is sufficient. RIDICULOUS!!!" (Gippsland)*
- *"Many students when tested are just above the funding cut off for integration (aide support) and take an enormous amount of extra effort so they can maximise their opportunities for success."*  
Grampians



- *"We have no speech support for our students. This is a real area of concern because it impacts greatly on student learning."* Southern Metropolitan
- *"We desperately need access to more speech pathology and psychologist staff. We cannot afford to pay felt resources required here."*
- *Parents of students with autism get very upset when told that their child is not eligible for funding. These children often need support because they don't get the social cues which causes problems in their interaction with other students."* Eastern metropolitan
- *"There is a lack of funding and/or agency support for students with challenging behaviour like ASD (autism spectrum disorder) or SBD (severe behaviour disorder)*
- *(extra funds would be spent on) support the educational, social and psychological needs of students with severely interrupted schooling.*
- *We are meant to have out of class school-based numeracy and literacy coaches (but) I cannot reasonably release teachers from classroom responsibilities without additional funding."* Western Metropolitan
- *"The Department has spruiked inclusion as a policy (but it) has also made it more and more difficult to access PSD (programs for students with a disability) money and services*
- *We take difficult students, refused by other schools with their eye on results, yet are staffed without recognition of this"* Northern Metropolitan

A further example of the deeply concerning manner in which children with disabilities are viewed by the DEECD is the manner in which they are described.

Attached as Attachment "C" is a chronology drawn up by the DEECD to describe the education of a boy with Severe Language Disorder-receptive and expressive, Dyslexia (Learning Disability), ADHD, Depression and Anxiety. Despite these disabilities, the student in question did not qualify for funding for two years, after having moved into the Victorian state secondary system six years behind his

peers. As can be seen, the descriptions of him reflect no sympathy or empathy for his multiple disabilities, indeed they are hardly mentioned, apart from efforts to encourage medicating him. Despite the manner in which he is described, his parents' request for a behavioural psychologist to be involved in his education was refused. Evidence based remedial programs designed and recommended to address his Dyslexia, were withheld.

The chronology includes criticism of the parent, and no mention of the school's struggles to obtain funding for the student from the DEECD, or the trauma faced by the student at being in a class where his literacy levels are half those of his peers. There is no mention of the widely available research which links behavioural problems to a lack of literacy and numeracy. There is no mention of a refusal to provide a Speech Pathology Program to address the student's Severe Language Disorder.

Attached as Attachment "D" is a further chronology drawn up by the DEECD to describe the education of a boy with Asperger's Syndrome, Severe Pragmatic Language Disorder, Dyslexia, Auditory Short Term Memory Difficulties, and ADHD. Throughout his entire primary school, he did not qualify for any individual funding. Despite his superior IQ, he was placed on a table with children with intellectual disabilities in order to share aide time. Again, the manner in which he is spoken about reflects an organisation that has little empathy with his disabilities. Again, in the face of the behavioural challenges, a behavioural psychologist was not involved and he was given a "zero tolerance" regime throughout primary school. No Social Skills Program developed by an expert in Autism Spectrum Disorder was provided. No evidence based remedial literacy programs were provided to address his literacy. He is now 15 years old and the last educational psychology assessment put his spelling at the level of a seven-year-old.

There seems to be no connection the DEECD is able to draw between the challenges posed by a child's disabilities and their obligations to support them. The judgemental, condemning, unforgiving manner with which they describe children with disabilities in the absence of appropriate support is extremely disturbing. We observe this is particularly relevant to male students with ADHD and/or Autism Spectrum Disorder. The maligning of parents who are desperately attempting to organise the appropriate support for their children is callous and unnecessary.

In our view, it is not possible for the DEECD to meet their obligations under the Standards due to the fact that they have little goodwill or empathy towards

students with disabilities or their families. This is why the Standards need to be particularised in order that there is no room for moralistic, judgemental approaches to children with disabilities – requirements for their support need to be detailed and evidence based.

As a result of the DEECD continuously fighting students and parents, and being prepared to spend significant amounts of money on defending themselves in relation to the non-compliance with the Standards, ( rather than spending money on children with disabilities) the community, who would normally be led by government as a role model can only come to the view that students with disabilities do not have the same rights or worth as others in the community.

It is difficult to see why private sector educational institutions and authorities would bother to comply with the Standards, when the largest provider of education to children with disabilities does not do so, and chooses to allow children to become so unwell from their school experience that they self harm, rather than put in the adjustments they require.

We believe that the community in general is unaware of the Standards, but in relation to the principles of treating people with disabilities equally and with dignity, the behaviour of the DEECD can only lead people to the view that students with disabilities do not have the same rights as to an education as others.

**D. HAVE THE STANDARDS ASSISTED TO ELIMINATE DISCRIMINATION INCLUDING HARASSMENT AND VICTIMISATION OF PEOPLE WITH DISABILITY IN EDUCATION AND TRAINING**

Presently, the Standards seem to have had no effect on the prevention of such victimisation or harassment in a general sense.

However, unfortunately, we have observed that students and/or their parents asserting their rights under the DDA either directly or through their parents have suffered a number of detriments in retaliation for doing such.

The difficulty is proving that the detriment in relation to victimisation is linked with the making of the complaint, or the advocating of rights under the DDA. Unless the agent of an educational authority actually make submissions to the victimisation, it is almost impossible to prove.

## 16. Conclusion

The DDLS and its staff and board as individuals, are part of both formal and informal networks comprising community legal centres and pro bono law firms, disability service providers, disability advocacy organisations and parent groups and individuals. Our views are informed therefore not only by our own practice, but by the community in general.

The inability of many students with disabilities to obtain the varying individual supports they require, and the often subsequent legal action that this leads to, has a number of extremely disturbing and pernicious effects. These include:

- the failure of students to acquire basic literacy and numeracy skills, when they have the potential to do so;
- the bullying of students with disabilities due to their failure to achieve academically and their appearance of being “stupid”;
- the development of mental health problems in students including loss of self esteem, depression and suicidal ideation;
- the development of mental health problems in parents of students with disabilities in trying to cope with their educational needs and being involved in constant battles with the DEECD;
- the inability of these students to undertake tertiary education, or the inability of those students to undertake tertiary education at a level which they desired;
- the subsequent inability of those students to pursue career options that may have been open to them, and to earn a decent living;
- the increased number of people with disabilities on government pensions;
- the isolation and marginalisation of people with disabilities;
- the deterioration of family finances when parents have to pay for educational supports in the absence of the state system providing it;
- the involvement of some students in the juvenile justice system, as predicted by research and supported by Australian Bureau of Statistics figures.

While this submission has the intention of addressing the effectiveness of the Standards and the impact on children with disabilities, it is worth also mentioning the consequence of the lack of compliance on teachers. Teachers do not have control over the funding that schools receive to support children with disabilities. It is often school staff who encourage parents to pursue legal action in order to address the needs of the child. Teachers are placed in the unenviable position by the State or CEO of having to defend the lack of accommodation for children with disabilities in the face of parent advocacy and complaint.

Teachers are experiencing stress and putting in claims against their employers in relation to illness and occupational health and safety due to their inability to be provided with the supports they require to adequately meet the needs of their pupils with disabilities. In litigation, it is the teachers who are expected to be witnesses for the State and try and explain and defend the lack of a supports provided to children. Teachers are encouraged to malign children with disabilities and their families in the court procedure, while officers of the State who bear the responsibility for these decisions are markedly absent.

Even when legal cases settle, the child, family and teaching staff have suffered unacceptably and may not fully recover.

It is absolutely urgent that the current situation in relation to children and their access to education is dramatically altered. It is crystal clear that the situation in Victoria is not going to be altered voluntarily by educational institutions themselves. The only solution is stronger laws.

## **17. Comparative legislation**

We refer to the North American *Individuals with Disabilities Education Act* and attach relevant sections. We submit this as an example of educational legislation containing significant detail, in order that the requirements of educational institutions and authorities are unambiguous.

Individual Education Plans are enumerated in great detail. "Peer-reviewed research" is used to describe best practice services.

We submit that this is exactly the level of detail that is required in the Standards.

## 18. Recommendation Summary

1. *That the Standards are re-written to include a high level of detailed prescription that will alleviate the need for students and their associates to argue over the definitions of the detail within the Standards which currently provide an “out” for educational authorities*
2. *That all parties who receive government funding in order to deliver education services are required to fund their respective educational institutions adequately in order that the Standards may be implemented.*
3. *Recommendation. That all staff of educational authorities and educational institutions be required to read and be trained in the Standards.*
4. *Recommendation. That the definition of “consultation” be reworded, putting greater priority on the views and opinions of the student and/or their associates. Recommendations on reasonable adjustments should be required to be enacted upon, unless they would cause unjustifiable hardship.*
5. *Recommendation. That the Standards include the requirement for Positive Behaviour Plans, developed based on best practice principles, if a student is engaging in problem behaviour which affects their participation in an educational setting.*
6. *Recommendation. That the Standards include the requirement for Individual Education Plans for all students with disabilities, developed using best practice principles, such plans not to be put into effect without the signed consent of the student or their representative. A template should be attached to the Standards*
7. *Recommendation. The education authorities receiving government funding be required to set a minimum qualification for Teacher Aides that is professionally appropriate for the teaching of children with disabilities.*
8. *Recommendation. That education authorities under the Standards be required to advise students/parents as to how funding is being allocated to their child*
9. *Recommendation. That all educational authorities be required to offer allied health services to all students with disabilities, whether or not they receive individualised funding.*

10. *Recommendation. That all educational authorities are required to have in place systems to allocate funding and resources to students with disabilities that do not discriminate against any particular disability. Preferably, these systems should be uniform across Australia.*
11. *Recommendation. That the Standards particularise the right of deaf students to their native language, that is Auslan (Australian Sign Language) in the subjects/classes of their choosing*
12. *Recommendation. That the Standards require educational authorities to develop policies and procedures in relation to the delivery of education to students with language disorders in collaboration with Speech Pathology Australia*
13. *Recommendation. That the Standards require educational authorities to develop policies and procedures in relation to the delivery of education to students with Autism Spectrum Disorder that reflect evidence-based research and best practice.*
14. *Recommendation. That the Standards specifically preclude the use of physical restraint in relation to the “behaviour management” of children with Autism Spectrum Disorder.*
15. *Recommendation. That the Standards specifically preclude the use of “Time out” rooms in relation to the “behaviour management” of children with Autism Spectrum Disorder, unless such a room is established and used in line with international best practice standards.*
16. *Recommendation. That the Standards impose a positive obligation on educational authorities to implement the recommendations of experts on the child’s disabilities, and/or the treating practitioners of the child.*
17. *Recommendation. That the term “reasonable adjustments” be struck out and replaced with “optimal adjustments”.*
18. *Recommendation. That the standards specifically preclude any school bus trip of students with disabilities taking more than 30 minutes.*
19. *Recommendation. That this Standards require staff who are responsible for children with disabilities on buses to undertake training that ensures they are able to communicate effectively with all children on the bus, and that efforts are made to ensure that the conditions on these buses are humane.*

*Recommendation. That the Standards give students with disabilities the right to attend school full-time.*

*20. Recommendation. That the Standards specifically preclude the use of physical restraint in relation to the “behaviour management” of children with Autism Spectrum Disorder or any other children with disabilities.*

*21. Recommendation. That standards specifically preclude the use of splinting children with disabilities, or any other harmful physical restriction, without the written permission of a parent and accompanying letter supporting such action from an independent medical practitioner.*

*22. Recommendation. That the Standards require educational authorities to develop policies and procedures in relation to the provision of therapies to children with disabilities approved of by the relevant allied health peak association bodies.*

*23. Recommendation. That the Standards specifically set out the rights of students with complex communication needs to communication devices, adequate training of themselves and staff to use those devices, and the ongoing assistance and a rural professional support required to use those devices*

*24. Recommendation. That the exclusion of students with disabilities from schools, or school activities, only be legal, if a series of best practice measures have taken place. Examples of these best practice measures would be seeking the advice of independent experts in the child’s disabilities as to how to include that child in the school or school activity, best practice Positive Behaviour Plans, social skills programs for students with Autism Spectrum Disorder, best practice Individual Education Plans.*

*25. Recommendation. That the Standards require evidence-based teaching practices to be used in the teaching of students with disabilities.*

*26. Recommendation. That the Standards require that all educational authorities provide every student and/or their associate with a copy of the standards.*

*Recommendation. That the exclusion of students with disabilities from schools, or school activities, only be allowable while the investigation of best practice measures are taking place. Examples of these best practice measures would be seeking the advice of independent experts in the child’s disabilities as to how to include that child in the school or school activity, best practice Positive Behaviour Plans, social skills programs for students with Autism Spectrum Disorder, best practice Individual Education Plans, appropriate equipment purchased to support the child. Any such temporary standing down of the student should have a*



*maximum amount of time attached to it, such as one month, to allow best practice planning and programs to be developed. The educational authority should provide an alternative education program for this period.*

27. *Recommendation. That the Commonwealth review its funding relationship through the Schools Assistance Act 2008 with the Catholic Education Commission.*

## **19. Attachments**

- A. Individual Education Plans
- B. Principals Survey 2010
- C. First educational record
- D. Second educational record
- E. Individuals with Disabilities Education Act s614

## **20. Index of Abbreviations and Acronyms**

|               |   |
|---------------|---|
| CEO           | Catholic Education Office   |
| CESCR         | Committee on Economic, Social and Cultural Rights                     |
| DEECD         | Department of Education & Early Childhood Development                 |
| <i>EOA</i>    | <i>Equal Opportunity Act 1995</i>                                     |
| <i>DDA</i>    | <i>Disability Discrimination Act 1992</i>                             |
| DEECD         | Department of Education and Early Childhood Development               |
| <i>ICESCR</i> | <i>International Covenant on Economic, Social and Cultural Rights</i> |
| <i>PSD</i>    | Program for Students with Disabilities                                |
| VCAT          | Victorian Civil and Administrative Tribunal                           |
| SSG           | Student Support Group   |