



**Submission to the Federal Department of Education**  
[DisabilityStandardsConsultation@education.gov.au](mailto:DisabilityStandardsConsultation@education.gov.au)  
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## **Review of the Disability Standards for Education**

Inquiries to:  
Julie Phillips  
CEO  
Disability Discrimination Legal  
Service

Disability Discrimination Legal  
Service Inc  
c/o Ross House Association, Inc.  
247 Flinders Lane  
Melbourne, 3000 VIC  
Ph: 03 9654 8644  
Website: [www.ddls.org.u](http://www.ddls.org.u)

ABN 36 079 687 722

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## **Introduction**

The Disability Discrimination Legal Service (DDLS) is a disability led community legal centre that specialises in disability discrimination legal matters. DDLS provides free legal advice in several areas including: information, referral, advice, casework assistance, community legal education, and policy and law reform.

The long-term goals of the DDLS include the elimination of discrimination on the basis of disability, equal treatment before the law for people with disability, and to generally promote equality for those with disability.

### **A. Executive Summary**

The Disability Standards for Education (“the Standards”) are not fit for purpose and need to be immediately repealed.

This situation will only deteriorate in response to amendments to the DDA which we assume will flow from the Disability Royal Commission recommendations and the recent review.

Subordinate legislation supporting people with disabilities and education institutions in relation to discrimination in education is required without doubt, however the current Standards weaken and undermine the DDA and therefore should not remain active while any replacement legislation is drafted.

Given the high numbers of education complaints and the fact that many education discrimination cases deal with the same types of allegations repeatedly, it is clear that they are insufficient to protect students with disabilities, and do not provide clarity for duty holders.

New legislation needs to be developed in consultation with the disability community, through their representative organisations (as per the Commonwealth’s obligations pursuant to the Convention on the Rights of Persons with Disabilities), in addition to their advocate/legal advocates. That process needs to be undertaken appropriately, ensuring that all sectors of the disability community are able to access that process, and in particular, ensuring that sufficient time is allocated to the task.

It is essential that the community is meaningfully engaged in the development of new Standards, particularly so due to the nature of education being a multiplier human right. If a student’s right to education is meaningfully realised it has beneficial flow-on impacts in the student’s later life. This idea is just as applicable to students with disability as it is to their peers without disability. If Australian students with disability receive a meaningful education it has a marked positive impact on the opportunities available to them as adults, their quality of life, and their inclusion within the community. Moreover, it can reduce the supports they require in later life.

This submission has been formulated with the input of the disability community.

## **B. Errors in the Standards which undermine the DDA**

1. Removal of the any subjective element in favour of education providers in determining whether a reasonable adjustment is required and what constitutes a reasonable adjustment. Eg Part 5.2 (1)(2)
  - a. While the responsibility remains with education providers to determine what constitutes a reasonable adjustment, the DDA is not viable legislation through which to make a claim of reasonable adjustments in the education context.
  - b. By continuing to endorse educators as the decision-makers on reasonable adjustments, the Standards further empower those who have already been found around Australia to commonly discriminate against students with disabilities (education institutions). If the Standards are intended to further support the objects of the DDA, they fail here. This situation is anomalous to benevolent human rights legislation and will be in further non-compliance with the DDA if changes are made to the substantive legislation, such as mandating interpretation of the act through the United Nations Convention on the Rights of Persons with Disabilities and changing the reasonable adjustment provisions.

It is noted that duty holders in other areas in the DDA (for example goods and services or employment) do not have the same imposition in relation to reasonable adjustments and people with disabilities can take advantage of the beneficial interpretation of reasonable adjustments through the DDA itself

- c. In relation to the definition of reasonable adjustments, the decision in *Watts*<sup>1</sup> in terms of how a reasonable adjustment is defined is at odds with the definitions in Part 3 of the DSE.

[21] *This approach is important when the breadth of the statutory definition of “reasonable adjustment” is considered. Section 4 of the DDA defines “reasonable adjustment” in the following terms:*

***an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person.***

[22] *Thus, s 4 has effect as a deeming provision. The word “adjustment” is left undefined by the statute and is to be given its ordinary meaning as “an alteration or modification”: Oxford English Dictionary (online edition). However, unlike other aspects of the DDA*

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<sup>1</sup> *Watts v Australian Postal Corporation* (2014) FCA 370

*(see, for example, s 6) the statute does not leave it to the discriminator in the first instance and the Court in the second instance to determine whether an adjustment is “reasonable”. Although the word “reasonable” is used, it has no qualitative character in its context. It is simply part of a term defined by legislative declaration of what is outside the term. All that Parliament declares to be outside the term is a modification or alteration which imposes unjustifiable hardship on a person, taking into account the considerations applicable to identifying hardship of that nature, which are set out in s 11 of the DDA.*

- d. Compare this with the lengthy description of what a reasonable adjustment is and how to make such an adjustment in the Standards. No doubt the Standards intended to assist students with disabilities and duty holders, but missed the mark so significantly that they are in conflict with the DDA and have given decision-making power to educators.

## 2. Comparator

While it is hoped that the comparator test is taken out of the DDA, there is a further misalignment between the Standards and the DDA.

The DDA makes it clear that the comparator can be someone with a different disability:

- a) s5 (1) For the purposes of this Act, a person (the *discriminator*) *discriminates* against another person (the *aggrieved person*) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without **the disability** in circumstances that are not materially different. [Emphasis added]
- b) On the other hand, the Standards are drafted differently, limiting the comparator to somebody who does not have a disability at all.

### 5.2 Participation Standards

*(1) The education provider must take reasonable steps to ensure that the student is able to participate in the courses or programs provided by the educational institution, and use the facilities and services provided by it, on the same basis as a student without a **disability**, and without experiencing discrimination.*

- c) We submit that this difference between the DDA and the Standards is unsustainable.

## 3. Thousands of students in segregated schools are currently not covered by the Standards.

We again refer to the participation standards:

## 5.2 Participation Standards

*(1) The education provider must take reasonable steps to ensure that the student is able to participate in the courses or programs provided **by the educational institution**, and use the facilities and services provided by it, on the same basis as a student without a disability, and without experiencing discrimination.*

The wording above only allows a comparison to students within the same institution (that is, school). This means, and has already been argued (but not yet decided upon by a Court), that the Standards do not cover students attending segregated settings, because the comparison can only be made within the same school. Therefore if all of the students with disabilities in the school are being treated equally as poorly, there is no case to answer utilising the Standards.

Some of them **may have** been able to use the Standards if it were not for the drafting error that does not allow a student with one disability to be compared to a student with a different disability. The treatment of a student with cerebral palsy attending a segregated school could have been compared to the treatment of a student with Autism Spectrum Disorder. However, these compounding drafting errors mean that students with disabilities in segregated schools are entirely cut out from many of the areas in the Standards. While this would not matter if the Applicant was making a claim only through the DDA, all a Respondent has to do is bring in the Standards itself and prove that they have acted in accordance with them.

The Standards also affect the application of state legislation. Under the *Victorian Equal Opportunity Act*.

The Standards are incorporated as a defence with respect to education under section 40(4).

*(4) An educational authority is not required to make an adjustment under subsection (2) to the extent that the educational authority has complied with, or has been exempted from compliance with, a relevant disability standard made under the Disability Discrimination Act 1992 of the Commonwealth in relation to the subject matter of that adjustment.*

Therefore, an Applicant cannot escape the Standards. The weaker the Standards, the weaker the DDA, and state discrimination laws that adopt them. A Respondent who is well-versed in the Standards and the DDA will bring them into a claim, even if the Applicant has not raised them, as they provide protections for Respondent education providers, that the DDA does not.

In terms of scope, the same lack of protection for students in segregated schools occurs in the enrolment standard where if a segregated school has an enrolment practice which disadvantages all its students, one cannot compare the enrolment practice to that which occurs in a mainstream school, despite the education provider being the same (Part 4.2 (1)). The same issue arises in standards for support services (Part 7.2 (1)).

### **C. Developing new education standards or subordinate legislation that is fit for purpose**

The North American *Individuals with Disabilities in Education Act* (IDEA), while focusing on the provision of a free and public education rather than being specific antidiscrimination legislation per se, provides an example of comprehensive and detailed requirements for duty holders to ensure that students with disabilities can access their education equally.

The USA has been decades ahead of Australia with the first disability specific education legislation enacted in 1975, being the *Education for All Handicapped Children Act*. This law was re-authorised numerous times, most recently in 2004, to become the IDEA.

Even if the DDA is not reformed to include a positive duty for duty holders, the current Standards do not provide guidance in sufficient detail as to how to provide a student with disabilities an education on an equal basis to others – putting aside the significant flaws mentioned above.

Members of the Victorian disability community and advocates/legal advocates have identified the following omissions that contribute to students with disabilities being unable to access their education, or worse, leaving their education traumatised after the application of damaging restrictive practices, and harsh disciplinary responses to their disabilities.

1. The right to access the curriculum in your language of choice/necessity.
  - a. Auslan interpreters (accredited) continue to be the subject of education discrimination complaints, particularly when educators with no relevant expertise decide that due to other disabilities, the native and natural language of the deaf person is not required.
  - b. Students who cannot rely on speech to communicate, particularly in segregated schools for students with disabilities, routinely:
    - i. have little opportunity to use high or low tech communication devices;
    - ii. are required to learn in the absence of any lesson planning/communication plan/access to curriculum plan involving them learning a language through Augmentative and Alternative Communication;
    - iii. do not have their language acquisition overseen by an expert in Augmentative and Alternative Communication.

2. In Victoria, Student Support Group meetings, designed to carefully support the education of a student with a disability including the use of multidisciplinary teams, occur in a haphazard fashion if at all, as, staff are not mandated to read any disability policy or procedure.
3. Staff supporting students with disabilities during class time and assessments are often not trained appropriately, the minimum being a working with children check.
4. There are no mandated requirements to provide evidence-based programs to address learning difficulties/language disorders/specific learning disorders such as dyslexia. If schools wish to respond to these disabilities using programs that have been completely discredited, they may do so. The Victorian Government has recently mandated structured synthetic phonics for the early years only. Given the link between illiteracy and juvenile justice, the fact that there are no minimum mandated approaches is deeply disturbing.
5. Students with disabilities are often forced to abandon VCE pathways or other chosen educational pathways due to schools coercing parents as soon as possible to change over to a life skills focused program, regardless of choice.
6. There is no right to attend school full time - students with disabilities are routinely having their hours restricted in the guise of "transitions" which often occur in the absence of a transition plan, and with no end in sight.
7. There is no right to attend excursions/incursions.
8. Exclusionary discipline (suspension/detention/expulsion) is used routinely to respond to behaviours of concern that are manifestations of disabilities, or in many cases manifestations or disabilities being treated with incompetence.
9. Individual Education Plan/Individual Learning Plans have no mandated minimum quality and often are not provided at all.
10. There is no right to reasonable adjustments for students attending school from home or off-campus.
11. Physical restraint and false imprisonment of students (euphemistically referred to by departments of education as restrictive practices) is used thousands of times per year (in Victoria alone) to respond to behaviours of concern that are manifestations of disabilities, or in many cases manifestations or disabilities being treated with incompetence.

- a. There is no requirement to put in place proactive and preventative measures to address behaviours of concern when they initially arise. Due to the Standards and their allocation of decision-making to educators in relation to reasonable adjustments, such adjustments are commonly not provided to students with complex needs.
- b. Schools routinely do not engage a behavioural expert to provide intensive behavioural support to staff and the student.
- c. Once students begin being subjected to violence in the school system, as the research tells us, behaviours exacerbate and a circular cycle of violence can continue for years, causing students to acquire psychosocial disability and trauma - leaving school with more disabilities than they arrived with.

The evidence suggests that there are few positive mandated directives by departments of education to address the above. If departments of education are not going to mandate evidence-based approaches to effectively teaching students with disabilities, then the law must.

#### **D. INDIVIDUALS WITH DISABILITIES IN EDUCATION ACT**

This Act is so comprehensive, that excerpts from just a few sections are provided to indicate what established legislation to support students with disabilities to access their education can look like.

##### *Attachment A – Identification and Evaluation - IDEA*

This attachment represents excerpts from the IDEA sections 1412 and 1414. These sections focus on the identification and evaluation of students with disabilities and provide explicit directives on evaluation and individual education programs. Some of the content is simply best practice academically, however in Australia there is no requirement for teachers to provide best practice academic approaches by any department of education, despite many using the term “evidence-based” in their guidelines and information.

Assessments and support structures are detailed and clear. They appropriately do not leave room for too much interpretation.

However we suggest that any Australian equivalent go even further given the decades long failure to date in Australia to ensure students with disabilities have equal access to education. We note that any permissive language, such as “consider”, “may” and so on is extremely unhelpful, and requires little to be done.

For example, the tracked changes here suggest how the IDEA would be improved.

- *IEP Team shall consider special factors:*
  - *(i) in the case of a child whose behavior impedes the child’s learning or that of others, ~~provide consider the use of~~ positive behavioral interventions and supports, and other strategies, to address that behavior;*
  - *(ii) in the case of a child with limited English proficiency, ~~meet consider~~ the language needs of the child as such needs relate to the child’s IEP;*
  - *(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines ... [otherwise]*
  - *(iv) ~~consider ensure~~ the communication needs of the child ~~are met~~, and in the case of a child who is deaf or hard of hearing, ~~consider ensure~~ the child’s language and communication needs ~~are met~~, opportunities for direct communications with peers and professional personnel in the child’s language and communication mode, academic level, and full range of needs ...*
  - *(v) ~~determine through consultation with experts consider~~ whether the child needs assistive technology devices and services, ~~and if they do, provide them~~.*

The last thing students with disabilities need in terms of legislation, is for duty holders to be able to meet their obligations simply by thinking about something (“consider”).

### *Attachment B – Procedural Safeguards – IDEA*

This attachment gives detailed directives on what supports should be provided to a student who demonstrates a severe behaviour of concern (“violates a code of student conduct”) and is removed by their school placement. The response is centred on support.

- the Act should better protect the right to learn by requiring that before using exclusionary discipline on students with disability, educational authorities should be required to:

*(a) consult with the student with disability and their supports;*

*(b) consider all available and appropriate alternative adjustments, measures or actions;*

*(c) consider the impact of exclusionary discipline on the best interests of the student and their right to education; and*

*(d) consider the student's disability, needs and age, and the particular effects of exclusionary discipline for young children.*

### **Recommendation**

Given the importance of education for all members of society, we urge the Commonwealth Government to repeal the Standards immediately, and begin planning a process for developing appropriate antidiscrimination education standards/subordinate legislation with the disability community and their allies.

This submission is endorsed by the following organisations.



Peak body for independent disability advocacy in Victoria



## ATTACHMENT A

### Identification and Evaluation of Children with Disabilities

- [Section 1412](#) (3) – all children with disabilities residing in the State, ... regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.
- [Section 1414](#) – Through parent’s consent, a State or local educational agency shall conduct a full and individual initial evaluation.
  - This is to create an ‘Individualized Education Program’ (IEP). A written statement for each child with a disability that is developed, reviewed, and revised. It includes;
    - (I) a statement of the child’s present levels of academic achievement and functional performance, including—
      - (aa) how the child’s disability affects the child’s involvement and progress in the general education curriculum;
      - (bb) for preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities; and
      - (cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
    - (II) a statement of measurable annual goals, including academic and functional goals, designed to—
      - (aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
      - (bb) meet each of the child’s other educational needs that result from the child’s disability;
    - (III) a description of how the child’s progress toward meeting the annual goals ...
    - (IV) a statement of the special education and related services and supplementary aids and services ... to be provided to the child, or OBO the child, and a statement of the program

modifications or supports for school personnel that will be provided for the child

- (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities.
- The IEP team can consist of:
  - (i) the parents of a child with a disability;
  - (ii) not less than 1 regular education teacher of such child
  - (iii) not less than 1 special education teacher
  - (iv) a representative of the local educational agency
  - (v) an individual who can interpret the instructional implications of evaluation results
  - (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child ...
  - (vii) whenever appropriate, the child with a disability.
- IEP Team shall consider special factors:
  - (i) in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;
  - (ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;
  - (iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines ... [otherwise]
  - (iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs ...
  - (v) consider whether the child needs assistive technology devices and services.

## ATTACHMENT B

### Procedural Safeguards

This is in relation to protecting children with disabilities and their parents with procedural safeguards “with respect to the provision of a free appropriate public education” by State educational agency, State agency or local educational agency.

- [Section 1415](#) (k) deals with situations where a student with disability violated a code of student conduct:
  - (A) Case-by-case determination -- School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.
  - (B) Authority -- School personnel ... may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days
  - (D) Services -- A child with a disability who is removed from the child’s current placement shall:
    - (i) continue to receive educational services ... to enable the child to continue to participate in general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP; and
    - (ii) receive... a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.
  - To determine whether the conduct (i.e. “behaviour of concern” which violated a code of student conduct) the local educational agency, parent and IEP team will review all information to determine:
    - (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or
    - (II) if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.
      - If both the above are applicable, it is a manifestation of the child’s disability.
  - If the behavior was a manifestation of the child’s disability: the IEP team shall:

- (i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement ...
  - (ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan ..., and modify it, as necessary, to address the behavior; and
  - (iii) return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.
- NOTE: if the child carried/possessed a weapon to or at school, etc.; or knowingly possesses or uses illegal drugs, etc.; or inflicted serious bodily injury upon another ... school personnel may remove the student to an interim alternative educational setting for 45 days max.
- Children not yet eligible for special education and related services and who have engaged in behaviour that violates a code of conduct may be protected if the local educational agency had knowledge that the child was a child with disability before the [violating] behaviour.