



**Disability Rights
Advocacy Service Inc**

**Safeguarding and promoting the rights and interests
of people with a disability, their families and carers.**

**THE DISABILITY STANDARDS FOR EDUCATION 2005
AND THEIR OPERATION IN SOUTH AUSTRALIA –
SUBMISSION TO THE DISABILITY ROYAL
COMMISSION**

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Acknowledgement of Country



[Image Description: Aboriginal flag and Torres Strait Islander flag]

The Disability Rights Advocacy Service Inc acknowledges that this report was completed on Kaurua Land. We pay our respects to Elders past, present and emerging. We recognise the continuing relationship with the lands and seas and connection to culture.

Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

On behalf of the Disability Rights Advocacy Services (DRAS) we submit the following report to the Disability Royal Commission to outline experiences of violence, abuse, neglect and exploitation of students with disability during their schooling years. We have heard from families, advocates, community organisations, teachers and the relevant trade union about the experiences of students with disability. We have identified systemic issues facing students with disability during schooling including exclusionary practices, a lack of access and breaches of the *Disability Discrimination Act 1992* (Cth).

Methodology

The scope of the report is focused primarily on primary and secondary school providers in South Australia.

In writing this report, relevant literature was reviewed and interviews were conducted with advocates, families and students, the relevant trade union, and community organisations.

This report is formatted in a style accessible for persons with disability.

Statement from the Department of Education

The South Australian Department of Education provided the following statement in response to an interview request in the formulation of this report:

In regards to the Commonwealth Government's recommendations from the Final Report - 2020 Review of the Disability Standards for Education 2005, the department is working with the Australian Government and representatives from other states and territories on the implementation of these recommendations.

The department's obligations under the Standards are reflected in the [Children and Students with Disability Policy](#). Department staff are aware of the Standards and have access to national Disability Standards for Education e-learning courses.

Representatives from the Disability Rights Advocacy Service have met with representatives from the Department for Education South Australia to discuss this report, wherein Department representatives accepted the findings and recommendations.

Background

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) sets out the standards that States must follow to recognise the rights of persons with disabilities. Article 24 of the CRPD sets out the right to inclusive education, including prohibition of exclusion based on disability and the right to reasonable accommodations. The Convention on the Rights of the Child (CROC) also sets out standards that States should follow regarding the rights of children. The CROC and CRPD are largely drawn from the United Nations Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). Australia has signed and ratified the ICCPR, CRPD and CROC so is bound by these rights and obligations.

The *Disability Discrimination Act 1992* (Cth) (*DDA*) is Australia's Federal legislation aiming to implement its CRPD obligations. The *DDA* is a complaints-based mechanism rather than a compliance-based mechanism. This means that while there are legal obligations that organisations must comply with, there is a focus on individuals bringing complaints to get a just outcome if they believe there has been a violation of their rights. The Disability Standards for Education (the Standards) sit under the *DDA* as subordinate legislation. The Standards clarify the rights of students with a disability in the education sector and the obligations that education providers (schools, universities, or vocational training providers) must meet to assist students.

Under the Standards students have a right to participate in education programs on the same basis as students without a disability. Students are entitled to reasonable adjustments to meet their individual circumstances as outlined under a behavioural management or learning plan. Persons who believe an education provider has breached their obligations can take their case to either the Australian Human Rights Commission or Equal Opportunity Commission in SA for investigation or conciliation. Under the *Equal Opportunities Act 1984* (SA), South Australia also has a prohibition of discrimination on the ground of disability. This statute contains similar provisions in protecting the rights of persons with disabilities.

Children must have their rights protected in the education system throughout the admission process, in the classroom, and during transition periods. We must also consider how the intersection of race, culture, class, family make-up, gender and sexuality impact on children with disabilities. We hope to have reflected this in the following report.

The Disability Standards for Education

The Standards are reviewed every five years and in the most recent 2020 review there were several systemic issues outlined. Many of these issues are mirrored in the experience in South Australia. These include:

1. A lack of awareness, understanding and implementation of the Standards across the education sector.
2. Minimal training and professional development for teachers and support staff.
3. Minimal funding for schools and families to access support services, reasonable adjustments and facilities they need.
4. The use of restrictive practices such as use of restraints, isolation and exclusion.
5. The onus on students and their parents or carers to self-educate and self-advocate when navigating a complex system.
6. The intersectional needs of students not being catered for leading to greater marginalisation.
7. A lack of transition-planning within school year-levels and between primary school, secondary school and onto higher education or the workforce.
8. Minimal accountability under the complaints-based mechanism.

Furthermore, in 2017 the Select Committee on Access to the South Australian Education System for Students with a Disability released a report with several findings and recommendations similar to the national review, including the rights and obligations for students, families and schools; increased support in transition periods; developing inclusive school cultures; proactive planning support; performance monitoring and audit reviews; increased student support services and funding particularly for rural and regional areas; training for school leadership and teachers; and better management of challenging behaviours.

This report will outline many of the issues raised and provide recommendations to address these systemic issues.

Awareness, understanding and implementation of the Standards

In South Australia, supports and funding for students with disabilities including Learning Disabilities are attached to the Negotiated Education Plan (NEP), also known as a One Plan, which is a learning support plan that describes the support that will be provided to a student at preschool and school. Students must be verified by an education psychologist or speech pathologist as living with autism spectrum disorder (ASD), global developmental delay, intellectual disability, physical disability, sensory disability (including hearing or vision) or a speech or language disability. Department of Education policy states that the NEP must be prepared at a school with input from families, a Special Educator, other support services and the child where possible. The plan is supposed to be reviewed annually.

There are systemic issues surrounding a lack of knowledge of the Standards and, as a result, failures to implement NEPs or reasonable adjustments. Furthermore, there does not appear to be awareness of different disability types and the diverse needs of students. This means that often reasonable adjustments for students are not understood or implemented effectively in schools. Advocates and families say that a lack of knowledge is the biggest issue.

“There is not much awareness and the senior staff, principals and supporting staff often don’t have any idea. My child has autism spectrum disorder and global delay. Many staff have no idea what that entails and what that’s about. Mainstream teachers just don’t know”

“In about November last year all of the special educators (disability advisers from regional offices) did a week’s training on the Disability Standards for Education. A lot of them had never heard of them at that stage. The biggest issue is that lack of knowledge.”

“The One Plan is a school plan which is supposed to incorporate information from all the people in the child’s life. They are supposed to do the plans every year towards the beginning of the year. We find that often they don’t do them at all or if they do them often they will do them in November. They are really good to refer to. They are a great idea if any schools did them. Some schools are better at doing them than others. Generally when I have found there is a problem the teacher has been overwhelmed and hasn’t completed the One Plan. This might in October/November.”

“I have asked have you heard of this? No is the response. I say if a child comes to a school with an NDIS positive behaviour support plan you must follow it because that student is coming with evidence with what their needs are. I find that those are ignored all the time.”

“There are islands of understanding. There is generally more understanding of the DDA as opposed to the Standards. Some schools are across it and work hard to collaborate with families and students. Across the education sector it varies but if a school does not understand their obligations they are reduced in their understanding.”

“At the higher levels [in the Education Department] they are more aware of their requirements. So they say to schools and teachers, go and execute this. But if I am at the grassroots level without the training or practical application, how do I know what is a reasonable adjustment? The practical is missing. For me to execute it as a teacher, if the whole school is not behind it, or they don't have the resources or interpretation of the Standards, especially for an invisible disability like autism for example, that is really difficult. So we see islands of practice. This is combined with rights – what is a reasonable adjustment and sometimes the way it is executed means they are infringing on what is fair and what is right. It comes down to being aware but also intent, ability to interpret it in a practical way, and the culture of the school”

A lack of NEP implementation has been an issue for students during transition phases.

“Especially if a child is transitioning to another class there needs to be proper plans in place so the child is properly supported in the transition. Any change is going to be difficult and if they don't have the input from the OT or the psychologist or anyone else who is providing support to the child this will be difficult for the child. When they are done well the school will organise a meeting with the class teacher, the principal, any support people the child has, parents and advocates. I have been to a few of those. That would often just get rid of any problems that might arise. A big issue for parents is when the class teacher is on sick or maternity leave and then the stand-in teachers, the relief teachers, don't have anything to refer to. They don't know what the signs are that the child's behaviours are escalating. That can all be in the one plan. If a child is on reduced hours at school, and a parent is doing some home-schooling, then a plan might incorporate that the parent will be told about what the children at school are learning that week so the parent can reinforce that learning. If they are done well they are really good.”

Sometimes there is a disconnect between the school leadership, the individual classroom teacher and what a student needs, according to their plan.

“A 6-year-old child was in a multi-class open space unit and they had a little tepee (a tent) in a quiet corner. His positive behaviour plan stated that when he was struggling, he could sit in the tepee. He was able to listen to the lesson while limiting his sensory input so he could self-manage his behaviour. He did not have as many distractions, such as things going on outside of the window, or other kids moving around the class for example. While the class teacher was happy to support the plan, the principal was unsupportive and they often came into the class to remove the child from the tepee. This would cause distress for the child and had a negative impact on them and their learning. As well as other students in the class.”

“A child with a wheelchair with Charcot-Marie-Tooth-Syndrome, also diagnosed with ASD, ADHD and learning disabilities had significant needs. The child’s mother requested SSO support based on the learning plan but was only provided three hours a week – one hour on Monday, one hour on Wednesday and one hour on Friday.”

Another issue is that because there are no overarching compliance obligations for schools the application of reasonable adjustments and accessible facilities will often come down to the discretion of an individual principal or staff member. For example:

“When we first joined the school there was a rainbow room and the school was really proud they had that. It was a big classroom also with a sensory area with soft play materials and a trampoline. Kids would be able to expel some of the energy they had and this would help them learn. The integration was great and there were kids coming and going. If a kid in a mainstream class was struggling that day, they would go into the rainbow room and the children would have a visitor for the day. None of that happens now. A new principal decided to change everything when our child entered junior primary. There are only seven kids now and the room is really small, the entrance to the room is out onto a playground, which is really noisy and horrible for our children when they are let out, and the sensory area is gone.”

“I have heard horrific stories about new principals removing the right of the family to access a disabled car park in the staff car park, all the way through to teachers not implementing one plans.”

“At one primary school a child with cerebral palsy had just had major surgery on his legs and could not use the stairs for over a term. Instead of moving the classroom downstairs for a term they excluded him by sending the child to work at a ‘special desk’ outside the Deputy Principal’s office. His class teacher also decided to trial him going up and down the stairs which affected his post-surgery recovery. The school later agreed they had made a mistake. Another issue raised was that while the student’s PE teacher accepted that he could not participate in sport for one term, he sent him back to the main building of the school to get sports equipment which was 300 metres each way. This was despite medical advice stating the student was not allowed to walk that far. The distance also additionally included walking out onto the field and then walking back to class afterwards.”

“An 8-year-old in a regional school is top of his class academically, but shows signs of ADHD. In Year 1 his teacher had him sit on an exercise ball, which calmed his behaviours and prevented any of the suspensions that had plagued his attendance in Reception. He was happier and felt positive about school, whereas in Reception it had frequently been a battle to get him out the door in the morning. In Year 2 there was a new principal, who declared the ball to be ‘new age bulls*t and a WHS hazard’ and refused to let the boy (and a couple of others) sit on one. His behaviours started again. He would get up out of his chair, interrupt, talk out of turn, break things – all the behaviours common to kids with ADHD. He was also suspended a number of times.

In Year 3 his new teacher gave him quiet fidgets (ie: no ‘clicky’ or ‘whirry’ things that would distract other students). His behaviours again all but disappeared. Year 4 and his fidgets have been removed by a new teacher and behaviours of concern have emerged again. The father approached the school about the issue and their response was that he was just naughty and needed to learn self-control and that it couldn’t be claimed that he was being discriminated against because he had such good grades. What I pointed out to his Dad was that the boy could have a ‘clicky’ pen, that would serve the same purpose as a fidget and nobody would have a problem. Or he could get him a ring that he could twirl on his finger – you can even buy some that have rings within rings designed for exactly that purpose. So their argument was irrational.

The thing is, schools constantly say that their highest priority is the welfare and success of their students. There has been paper after paper published about the mental health and low self-esteem of kids with ADHD. I don’t understand why, when presented with a solution that works for an individual child, and costs them nothing, they persist in resisting it. They should be doing everything in their power to embrace individual quirks – that don’t impact other students – and that help the student be the best student and person they can be. Yet I hear the same story *everywhere* I go. I was a teacher for nearly twenty years and I just cannot understand this mentality at all.”

The onus on families to self-advocate when navigating a complex system

Families are largely on their own when learning about the rules of the system and figuring out how to navigate it. Families also note that schools often use very legalistic jargon, which can sometimes be obstructive.

“Less parents are aware of the Standards than schools. They might be aware it exists – but what does it mean to apply it? What parents might think is reasonable and what the school might think is reasonable can be poles apart. It goes back to the common language known – what does reasonable look like? There needs to be guidelines, examples, or scenarios to get that meeting of the minds”

“I went to a meeting last year with some parents whose nine-year-old child had been asked by another kid in his class to perform oral sex on him. I went into the school with the parents to support the parents. The school had four pages of stuff they had typed up and started using jargon. I had to ask them to stop using legal and education jargon and use layman’s terms so the parents could understand. Schools live in their own world of jargon. And no normal person understands it. They just obfuscate with jargon. So it makes it hard to distil down and parents walk out all the time from meetings with schools and don’t want to admit there is an issue with understanding what had gone on. The staff member sounds so clever and authoritative.”

“It is not helpful to put pressure on a parent about truancy and say it is your legal responsibility to get your child to school if the child is petrified going into school. They’re trying to get the child to school and then they’re getting expelled and suspended. Often the responsibility is put on the people with the least control. The student who has the disability, and the parent. Surely the student and the parent are not meant to have more capacity, capability and competency than the education system. But a lot of the responsibility is put back to the family and child – if you just take them home from the suspension and help them reflect and get them to learn. The parent will say, my child doesn’t do this at home. That is a common thing that we see. The responsibility ends up with the people with the least control to make any adjustments in the school environment.”

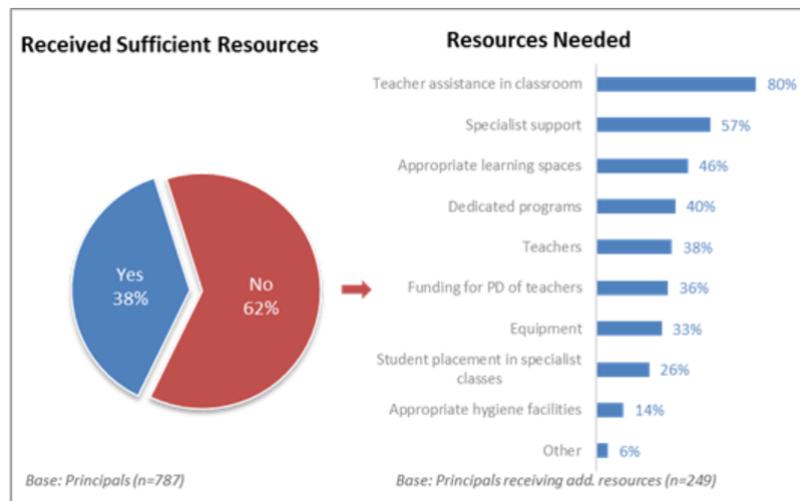
“A lot of parents of children with special needs don’t realise they have rights in the system and people are scared of making waves. Schools and teachers are there to do a job – that job is to work with your child. If families and students knew their rights it would be really beneficial. I have had to be really strong-willed to advocate for my child.”

“You are scared, fatigued, despondent and you actually have been almost driven to become compliant as the parent because the process is too hard. We have a saying here that where at the end of the day it’s about – everyone should have the same opportunities. Why is it if you have a disability you have to go through a lot harder, stringent and convoluted processes when that means they are already a carer but for some reason you have to jump through a lot more barriers. That process makes it combative and that’s not what the parent wants, they just want their child to have the same opportunities as someone else. People don’t want to complain out of fear, fatigue, despondency and you’re almost made to comply. We hear many stories and

people just go I just need to get through another day. At least if I didn't complain, Johnny was at school for 6.5 hours. Every student should be able to go to their local school and know that their needs will be supported."

Funding and supports

There are concerns about delays in the assessment and response rate for children to have access to an individualised learning plan. This can impact on student wellbeing and overload teaching staff. The time taken by the Education Department for assessment and response is a major concern. According to the Australian Education Union's 2020 *State of our Schools* survey, nationally 93% of public primary school principals and 87% of public secondary school principals use funds from other budget areas to cover funding shortfalls for students with disability.¹ This is highlighted in the below graph.



These issues are reflected in the experience in South Australia.

"The frustration for our members has been that it has taken a long time to get access to the 1st assessment and then even longer to get a response from the Department. In some cases that waiting time has been 2 years - 2 years is 1/3 of the child's life either at primary or secondary school. Two years is too long."

"Our concern is fundamentally a systemic one about the assessment and response rate, and the downgrading. It is not a 5 minute exercise to write a one plan. Every child with a disability gets an individual plan. Those plans take upwards of 30 hours to put together. When you've got six kids in your class of 30 students you can see how that becomes a fairly significant piece of your working life."

¹ *State of our Schools survey, 2020*, Australian Education Union, accessed: <
<https://www.aeufederal.org.au/news-media/media-releases/2020/december/031220>>

There are concerns about a perceived 'head-count' policy on special option classes in mainstream schools and special schools, in which children and families have been told there are no available places for the child.

"A child in one regional area instead has been in special options classes all throughout primary school and is about to transition to high school next year. The Education Department have informed the child there is not enough places in the special options class in high school. In another region, the family of a child who received SSO support throughout his primary school years has been told there will be no allocation of support hours when he transitions to high school."

In some cases, this has interacted with the WISC 5 test (Wechsler Intelligence Scale for Children version 5) in which children have been removed from special options classes. Children are usually placed in special options classes if they have an IQ on the WISC 5 test and score below 70.

"A child had an IQ below 70 but she had been with a speech therapist since she had been an infant. Therefore, her communications domain under the WISC 5 test was above average. The Education Department did not accept a psychological report from the psychologist who had been working with the child since she was an infant. The Department got an assessment with their education psychologist who claimed that the report was too inconclusive and therefore the child could not receive a rating. The child was removed from her special options class with devastating results."

Advocates and families have raised concerns about the issue of the 'head-count' policy.

"We are hearing from parents, teachers and SSOs that the Education Department have a head-count on special options and special classes in schools. It doesn't matter if a child deserves to be there. Until recently I had never seen this head count business regardless of the child needing that level of that support... They seem to be arbitrarily saying that this child no longer qualifies for special options or disability support or special school based on there not being room in the service and there being children with more severe needs. How do they suddenly not need it?"

Another issue that has been raised is that as students are re-assessed across their schooling life funding and supports are reduced.

"Students are re-assessed at preschool, reception time, again perhaps halfway through, going into secondary school. At those particular points the experience has been that the funding has either been withdrawn or downgraded where they receive less funding, where the needs of the student are the same."

"There are lots of cases where applications have been made for students or on behalf of students as part of the One Plan and that funding has been decreased even though the need has not changed or the child has not made some miraculous advancement in their capacity. Money is always the thing."

There is also a reluctance from schools to apply for discretionary funding when there is a small pool to access, and schools have competing priorities.

“The big issue is when the school is advised that the child needs more SSO hours – sometimes this might even be by the class teacher saying this child needs more support - schools are very reluctant to apply for that funding because as a principle they have competing priorities for funding and if their school is using a lot of their own discretionary funding to support children with disabilities that means that they cannot build extra playgrounds or improve the amenities. They are tossing up those decisions. From what I understand the process to apply for additional funding for a child for additional SSO hours and support is really prohibitive and takes a really long time. Teachers have said to me we probably won’t get it. To me that is a really big issue. I think principals and teachers should be encouraged to apply for that funding and not think it’s going to be an impediment to the school, which is how it seems to me. They are so reluctant. The parent will come to us and say I am being rung everyday to come and collect my child. I drop them off in the morning and then an hour later I am being called to come and get my child because they are being disruptive. So we organise to go and have a meeting with the teacher, or the principal. The first question is there’s obviously not adequate support - why don’t you fund it? The school will say that is too hard. They are really reluctant to do it.”

Due to a lack of funding or resourcing, a school will often reject a request from a family or student for the necessary support services they need, which can have negative impacts on their learning but also lead to classroom teachers having to fill in that role instead.

“A mother of an eight-year-old child with insulin-dependent diabetes was told that the school did not have enough funding for a SSO to support her daughter throughout the day. The child’s blood sugar levels can spike within ten minutes and she needs to be monitored throughout the day. Her mother has instead had to train her teacher for how to work the pump and check the blood sugar levels. The child herself has had to learn how to check her own levels as well just in case she does not have the support needed.”

The Australian Education Union has raised questions about the roles teachers should play, as well as the industrial issues these roles raise.

“It becomes an interesting question - is it the teacher’s role to teach, or is it the teacher’s role to teach and also be a social worker and also be responsible for medical issues? I think teachers are good at teaching. But increasingly given the complexity of students schools are going to need to become a place where there are a range of other services available on tap.”

There is overwhelming agreement that there needs to be additional funding and support services in the school sector. This includes additional funding for extra teaching staff, SSOs and professional medical staff either onsite or that are significantly easier to access. Concerns have been raised about the current staffing

formula under Tier 1 wherein the number of students determines the number of teachers allowed, which then determines the number of support staff allocated. Tier 2 funding is directed in response to individual needs.

“Part of what we and certainly part of what our ask is of government is to increase the level of support - increase the number of teachers, increase the number of SSOs, to take into account the increasing complexity that exists across the system. I think as a system there will need to be a GP, a nurse, psychologists. There will need to be that group of additional professionals that provide support to students available onsite. It is a big challenge and a big cost, but it actually makes a lot of sense and cuts down the waiting times. That would make a big difference.

“As a union we accept that students should have access to mainstream education. But along with that comes with the expectation that the resources are there to support that. At the moment at a school level there is a real shortage of professional support staff like education psychologists, speech pathologists, occupational therapists. The shortage of these professionals contributes to the delay and at the moment those services are delivered at a district level.”

“When you’re looking at invisible disabilities, neurological differences, people need support and capacity building to put adjustments in place. It is not sometimes as obvious as other types of disability. Training and building capacity for people across the board is lacking. It is not always a lack of awareness or desire, it is a lack of capacity”.

“It goes back to what kind of resourcing and capacity building teachers have, which is something that builds a great teacher, someone who is constantly reflecting on their practices, they are engaging in meaningful professional development, and building those relationships, there is a natural element to it, but it can be built over time with good training and reflective practices, resourcing over time as well, that does build capacity so they are able to support student’s needs. Differentiating in a classroom is hard but it is something that can be taught and taught so it is fluent. Applying adjustments can be challenging but again the more you do it the more fluent you are in it. It comes down to everyday practice which should be done at multiple levels in your everyday, you can differentiate your curriculum and your questioning. Making sure you are skilled and fluent, and you can develop those skills with the right resourcing and the right funding, the right headset and culture.”

“It’s about will. The principal will turn around and say we don’t have the budget for that. The Department needs to have a discretionary fund for special instances. The Minister for Education has a discretionary fund but schools don’t necessarily know the public service side of things and so they won’t go to head office and say this has come up, it’s pretty major.”

Smaller class sizes have also been raised as a fundamental solution to student and staff wellbeing.

“Class size has a formula attached to it in the way that classes are established. That formula was introduced in 1989 at a time when it was a one size fits all delivery from the teacher. In 2021 that approach is no longer valid or acceptable and an individualised approach according to an individualised learning plan is the way the system is moving. To have a class of 30 and the expectation that an individualised learning plan for each of those children means you cannot have 30 children in a class anymore. It’s a different set of demands, a different pedagogy, way of teaching. So there probably needs to be some extra funding to recognise that and reduce class size so the kids get a fairer opportunity of getting support. There is SSO support, that is one thing, SSOs may or may not have tertiary education. It is usually very dependent on the teacher to lead that pedagogical approach with that SSO.”

Support during transition stages is required for students with disabilities and needs to be improved according to parents and community organisations.

“As soon as they are transitioning from the school system into the workforce that is a huge concern because they are not getting the transitional support out of the school system into meaningful workplaces. The most successful are structured work environments but that is not one size fits all.”

“You have preschool where there is free play. Then students go into more structured learning in primary school. Then they are going into high school where they’re going to different classes which are all over the place. I don’t think primary to high school is done well at all, spending the time and getting to know what that looks like. Then imagine going to high school and then university and you’ve got to get yourself to lectures and tutorials. It is hard enough for someone without any kind of condition. The support and scaffolding isn’t there. It is very superficial. The scaffolding is not intense enough.”

Discrimination at the admission stage of schooling has also been raised as a systemic issue by parents and community organisations.

“One student was not accepted into a public school because the Deputy Principal, Regional Manager and Specialist informed their parents that they were not welcome at the school. The parents were told that other parents who send their children to the particular school expect their children to become scientists and we do not think your child is going to be academically capable of achieving this.”

“We were told by the Department for Education that if we did a tour of the school, it would hinder our chances of getting our daughter into the school”

“Schools are not necessarily wanting kids that aren’t going to perform academically going through Year 11 and 12 because it will tarnish the school’s reputation, particularly in the independent school sector. The motivation in the schools to keep the students in the school system and support them to succeed to the best of their ability might not be the schools’ expectation. That’s when it comes to a business model, which is an underlying issue.”

Minimal training, professional development and support for staff

Teachers and support staff are not formally trained in the Standards. There is generally no induction training or ongoing professional development. Advocates and families are also concerned about the lack of training about disability itself and the diverse ways that different children can present. There is also a lack of available resources for staff who want to meet their obligations. There are e-learning resources, but this has been reported to not be very useful. Families, teachers and advocates have commented on the lack of training and professional development for staff.

“When a child comes to a school with an NDIS plan there should be no issue. But when it is to do with particularly autism behaviours or behavioural disabilities, like oppositional defiance disorder for example, kids are coming to school in particular with behaviour support plans or they are coming with evidence and not being supported”

“There was an issue once where my child hurt herself on the playground. Because she has global delay, she does not know how to process something like that, and she was quite upset about it. The teacher monitoring the playground told her to get over it. I later found out this was a relief teacher. But when I asked the principal about whether they train any of their staff there was no definitive answer”

“If I prepare and go into a meeting and cite the Disability Standards for Education a principal will look at me blankly.”

“Teaching staff should have the basic knowledge they need. Teachers need training in special needs and basic terminology. There is a push for kids to be placed in mainstream schools, where they are often lost in the pack and then labelled a problem child”

“There is a real lack of understanding. A lot of schools claim that their teachers are trained on disabilities in the mainstream. This may happen but I don't think it is strictly adhered to. There is a real lack of tolerance. There is a real lack of tolerance from other parents too because obviously they want the best for their child and if a child is continually distracting the class and requiring enormous amounts of attention that can be concerning for parents. Most parents of children with disability have a complete understanding of that which is why they ask for more SSO support, but that isn't always provided.”

“I am often told that my daughter doesn't look autistic – but what does autism look like? Autism presents differently in girls. Whereas boys and girls have the same diagnosis on the autism spectrum disorder, boys will yell a lot and be loud, which takes up a lot of the class time. However, girls don't always present this way and so their needs often don't get met as much. Girls will put on a mask where they are seemingly okay and the issues of what is upsetting them comes out later. I really want teachers to understand that one doesn't need more support than the other – we need to ensure girls and boys are supported equitably”

Community organisations and union representatives have said that often training and professional development provided is ad hoc, on a needs-basis, and often only in response to requests from parents. While there is some discussion of the *Equal Opportunities Act* and the *Disability Discrimination Act* at a management level, there appears to be little formal training provided to teaching staff working in classrooms. There is also a 'crunch point' between the interaction with the *DDA* and the *Work Health and Safety Act*.

"My last year in a school was 2018. I taught for 30 years. In the ten years I was at [a particular school] the number of ASD students went from two to six or seven in year 8 alone. We struggled as a system to deal with that. I think the training and professional development is pretty ad hoc, done on a needs basis (maybe) and while I'm embarrassed to say this often it is in response to a parent saying 'my child suffers from a particular syndrome or has a particular disability'. The parent thinks the teacher needs to understand more about that and then they organise for a specialist to come in and provide some training for the teachers of that particular child if not all the staff. My experience has been it's needs basis. I don't think I ever sat down to a professional development session where they said 'let's talk about ASD' or 'let's talk about management of students who are in wheelchairs' for example. At a system wide level - I couldn't say there is nothing, but I couldn't say I'm aware of anything systemic either."

"It depends on the sector but professional development budgets for teachers are drying up across the board, so their opportunity to engage in meaningful professional development to increase understanding is not there (and you need to understand disability before you can look at having any type of confidence in applying strategies and adjustments). It is not like there is a lack of opportunity for teachers to engage in meaningful professional development, it's funding and capacity as well. If you're talking about removing yourself from a classroom for a day and then having to cover costs when you're away for professional development that's an issue. There are some teachers and educators that have an amazing understanding and are confident when they are applying adjustments and supporting student's individual needs, working collaboratively with families, and using reflective practices. There's other teachers that need support but the motivation is there. Then there's others that don't necessarily have motivation or skills."

The workload for staff has also been raised as an issue.

"A member - teacher - feels like for example the student behaviour management policy isn't being implemented properly because of a decision made by a leader for example. Or they are receiving less support for managing a particular child whether that's in terms of learning or behaviour. They might come to us and say that this is unfair, the workload is huge and dealing with this particular child is really complex."

Fostering an inclusive culture in the school community was also raised.

“I would love to have as much information out there as possible. Everyone should understand it’s not the 1950s anymore and we don’t lock people up [for having disabilities], there is no reason to stare and point at a kid because they are wearing noise cancelling headphones because they can’t stand the surrounding sound”

“There needs to be more understanding. Some schools do it much better than others but it really comes down to the individuals and the people involved. You could have all the training and money in the world but if you don’t have the proper people who are really caring and are willing to put in, in relation to the children, put that additional effort that is required. It is such a big benefit for all children to have that experience of all abilities, it’s so enriching. Instead of rejecting it and getting kids picked up in a different way so that the child is seen as being different and a nuisance. Instead of embracing that culture of inclusion - that would be my big thing that that could be much more effective. Everyone in schools needs training in disabilities.”

While there seems to be some integration in newer teaching degrees around inclusive education, this does not seem to be borne out in practice so far. There is also a question about how practical these courses are. Furthermore, many teachers currently in the education sector did not have access to inclusive education courses when they obtained their degrees.²

“In terms of general education degrees, they do a unit on disability, and within that unit they are covering multiple disabilities. There are no substantial or specific courses. There is a lot of reliance on individualised professional development. The Department for Education has tried online modules which didn’t go down terribly well because they were not seen as appropriate for covering what a teacher needs.”

² UniSA – Inclusive Education: “To advance the development of inclusive professional approaches to meet the diverse range of learner needs and contexts from birth to adulthood.” <https://study.unisa.edu.au/courses/101830/2022>

Flinders – A typical first year may include: “an introduction to special and inclusive education, an appreciation of how to work effectively with students who have complex needs and learning difficulties” <https://www.flinders.edu.au/study/courses/bachelor-education-secondary>

UofA – Teaching the Diverse Classroom: “This course is concerned with the diverse educational needs of students in Australian schools. The course will examine how assumptions and biases, and the impact of diverse influences affect teaching. The needs of students from various backgrounds commonly encountered in mainstream classrooms such as Indigenous students, students from linguistically, culturally and religiously diverse backgrounds, and students with special learning needs will be clarified, and teaching resources and inclusive strategies will be evaluated and developed.” <https://www.adelaide.edu.au/course-outlines/109064/1/sem-2/>

NDIS and students

There are also issues with the way the National Disability Insurance Scheme (NDIS) is set up and how this interacts with students. In particular, the loss of early intervention funding after a child turns eight-years-old was raised as a significant concern.

“The NDIS early intervention for children after they turn eight-years-old is rubbish. As soon as the child turns eight, the NDIS drop you and there is minimal funding for therapies or supports. You are supported for the child’s early years and then there is no support, and information on your rights is completely dropped. I was getting \$30,000 a year for three to four therapists when my daughter was between the ages of four and seven. After she turned eight I got \$7,000. What is the difference between when your child is six and when your child is eight? There is no difference but the level of support disappears. Every year I have to convince the Government that my daughter still has autism. I know lots of parents that don’t get any funding at all.”

“There is early intervention - when a baby is born and they have a disability - they will be put on early intervention which goes up until they turn eight. Then they do a big review of everything and some children are deemed not to be eligible for any support. We support a lot of people to appeal those decisions. At eight they are still needing those interventions such as speech therapy and OT. So there are huge discrepancies in the amount of NDIS funding that people get. We are finding out that it is the wealthier people that are getting much more funding through NDIS so as always our really vulnerable children and families are slipping through the cracks of receiving the supports they need. In recent months NDIS are really cutting plans.”

“What we have found with students with disabilities is the real difficulties faced by parents receiving NDIS funding and the nexus between that support and school. There is a real clunky nature of support that goes to a student with a recognised disability and the inability of the school or preschool to provide a space for support for that particular child to operate. Some schools have real problems in letting that child be released from their class to access support. As a system it is clear that this aspect needs to be smoothed out and there needs to be some flexibility at a school level to allow these kids to get that support. Parents are saying kids are at school all day and so when are they accessing that support? Well it is when they come home. Parents have said that ‘my kids are exhausted after a long day at school’ so they are not in a good place to get the full benefit of that support.”

Children with disabilities in foster care

Children with disabilities who are in foster care are particularly at risk when it comes to having their rights protected. This is because of the complex interaction between the Department for Child Protection who has guardianship over the child, a child's biological parents, the NDIS and service providers, a child's education provider and the rights of foster carer parents to advocate on behalf of the child in their care. While the Department for Child Protection have guardianship over a child they are responsible for directly dealing with the NDIS. However, it is often the foster parents who have the in-depth knowledge for what the child in their care needs. Advocates argue that – particularly for children in long-term foster placements – foster parents should have more say and involvement in the care provided to their foster child.

“A few issues around foster children and who have disability and the different stakeholders in all of that - child protection will be the guardian in many cases, then there's the foster parents who are the hands-on carers of the children, and the school will relate more to child protection and often the parents feel pushed aside in terms of the planning around what is happening with the child. We have had a few situations where the schools will only talk to child protection because Child Protection is the guardian and all the permissions come from Child Protection. I think there is a bit of disconnect there, that is probably an area that needs a bit of attention in terms of maybe Child Protection relinquishing some of that responsibility to the foster parents. They are entrusting the child to the parents care 24/7 – the foster parents are the ones taking them to school, to appointments - but they are still giving permission for the child to go on a camp, it just seems like that is a real disconnect. The parent might not agree (with the decision) and why should Child Protection who are one step removed be the ones that the schools engage with? Usually it is in cases where clearly the relationship between the parents and the schools isn't great. The parents may be anxious about the way the child is being educated and then the school defers to Child Protection. That is an issue.”

“The children who are at the centre of all of this have such complicated lives outside of just going to school every day. The school should be the rock, so that when all those other things that are really difficult in the child's life, the school should provide the support and cater to their needs so that is a real haven for them and a place where they can learn”.

Restrictive and harmful practices

According to the International Journal of Inclusive Education, academic research into developmental psychology and behavioural management measures has shown that an overwhelming focus on a 'manage-and-discipline' model in schools is having detrimental impacts on students, particularly for students with autism spectrum disorder and intellectual disabilities.³ This has played out in South Australian schools through the use of restrictive and harmful practices such as suspension, exclusion, expulsion, segregation or isolation and the use of restraints.

Suspension, exclusion or expulsion

Suspension, expulsion and exclusion practices have increased in use and are disproportionately used on more marginalised students including students with a disability.⁴ According to the Centre for Inclusive Education the use of suspensions, exclusions and expulsions are a punitive approach with calls for change:

These practices are punitive and have attracted increasing criticism from researchers and policymakers in recent years, with recommendations to instead implement forms of intervention that involve restorative justice practices or positive behavioural intervention and supports. This shift has occurred against the backdrop of criticisms that minority groups are disproportionately affected by their use (Curran, 2018), and that they contribute to achievement gaps, segregation, early school leaving, and involvement with the justice system (Raffaele Mendez, 2003).⁵

As of 2019 students with disabilities were 5.4 times more likely to be sent home from school, 2.6 times more likely to be suspended, and 4.9 times more likely to receive an exclusion than students without disability.⁶ The following graph demonstrates that students with disabilities received disciplinary action at alarming rates, accounting for 69.3% of 'take-homes', 56.6% of suspensions, and 67.4% of exclusions across 2019.⁷

³ Armstrong, David 2018, 'Addressing the wicked problem of behaviour in schools', *International Journal of Inclusive Education*, vol. 22, no. 9, pp. 997–1013.

⁴ Graham et al, The Centre for Inclusive Education, QUT, 2020, *Inquiry into Suspension, Exclusion and Expulsion Processes in South Australian Government Schools: Final Report*, accessed: <https://www.education.sa.gov.au/sites/default/files/report-of-an-independent-inquiry-into-suspensions-exclusions-and-expulsions-in-south-australian-government-schools.pdf> p 22

⁵ Ibid p 39

⁶ Ibid p 300-301

⁷ Ibid

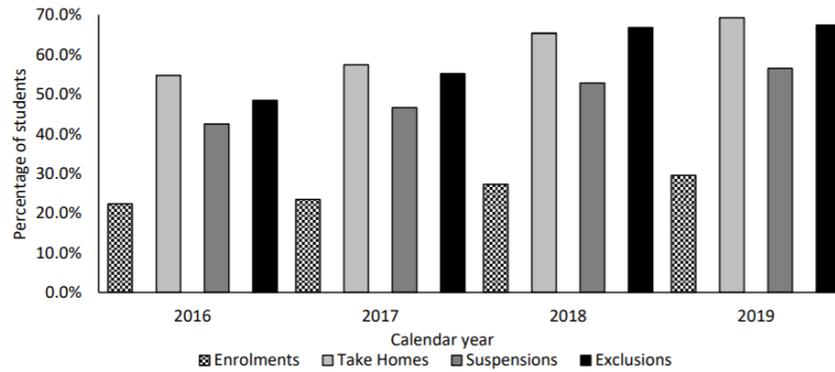


Figure 8.9. Percentage of school students (R-12) with a disability (NCCD) as represented in total enrolments compared to take homes, suspensions and exclusions, 2016-2019. Source: SA Department for Education data collections, unpublished, September 2020.

There is also academic and anecdotal evidence to suggest that children on the autism spectrum are suspended or excluded at a disproportionate rate.⁸ Oftentimes suspensions, exclusions or expulsions occur due to a lack of understanding about the connection between a student’s disability and their behaviour at school. These practices also occur when NDIS plans are not followed or reasonable adjustments are not implemented adequately.

“A male student convinced a girl in a younger grade, who has autism and intellectual disabilities, that if she wanted to have friends who were boys at school then she needed to do sexually inappropriate things at school. On his advice she made sexually inappropriate suggestions to a group of boys. The male who had advised her and made lude sexual comments to her on this occasion was not disciplined. The girl was excluded from school.”

“One school consistently either sent a girl home from school or isolated her at school because she had sensory issues with her school uniform. The student’s family requested that their daughter be able to wear a different fabric in the same style and the same colour, however the school principal rejected this request. This was despite evidence of the reasonable adjustments that the student needed being included in her NDIS plan. So what I’d really like the message to get out there to schools is that if a kid comes with an NDIS plan that provides evidence of what reasonable adjustments need to be made they must follow it. That is a welfare issue for the child. I really want them to understand the difference between equality and equity because schools don’t get that and the uniform issue was a perfect example.”

“A child with autism - who has left the education system now - wrecked 40K worth of equipment and got expelled. The issue is that he should have had proper support not to do that. The school should not have let it get to a crisis stage. They should have identified this earlier.”

⁸ Louise Davies, *Submission into Select Committee on Disability and Access to Education*, 2015,

“One boy with autism was suspended after misunderstanding a direction from a teacher. In a science classroom the boy was carrying a tray with science equipment on it and the teacher said ‘chuck them over there in that cupboard’. The boy took the teacher’s instructions literally and threw the tray towards the cupboard. The boy was then suspended for this. He could not understand why due to his disability.”

“A child in a regional area who was diagnosed with ASD, intellectual disability (high functioning) and incontinence had a behavioural management plan where school staff were supposed to regularly remind him to go to the toilet. The child was often not reminded and this would lead to him soiling himself at school. The school often called his parents (who were working) to come pick him up rather than offering him support at school. On one occasion the student had defecated himself and he was left in the public office reception for two hours without assistance. The child was humiliated sitting by himself in the office despite the school having showers and changing rooms. The school said the child was an WHS risk and they could not assist him. The parents had to remove the child from the school due to this incident.”

“One student was expelled from a Department of Education site. His mother asked to see the policy that allowed the site to do so and they could not produce it. The Centre was sending the student home because he has allergies and would sneeze. The Centre labelled the student a ‘covid risk’ and would constantly send him home. The mother was not finding out that her son was being sent home because she was at work and the Centre was not informing her. The student was falling behind in his work and was unable to catch up due to being sent home. The Centre expelled the student and this was the first time his mother had found out that he had been getting sent home from school and falling behind in his work. She wanted to organise extra supports for him but it was too late. There was no apparent policy framework allowing the expulsion to occur.”

A common theme is that expulsion or suspension does not have the outcome schools are seeking for students with disabilities, particularly for students on the spectrum. However, it is important to note that schools need the skillset, resourcing and capacity-building to have a supportive environment for students.

“We always question expulsion or suspension – what is that actually meant to achieve? The student is not at home reflecting on why they are there. The common thing is they think – thank god, it made whatever was going on that I couldn’t hold together in that environment stop. Then the school will have them back and wonder, have you learnt not to do the behaviour anymore? The student can’t control that environment, it is the school creating that environment, whether it is too noisy, too distracting, whatever it is, and that goes to the heart of it. I think because the schools don’t have all the skillsets, don’t have the resourcing and the capacity, it becomes circular. Some schools think what is the best way to make the student’s behaviour stop, let’s isolate the student as that seems to help, use some kind of restraint, suddenly lock doors, which is just not how it should be.”

“Our school has horrible policies as far as disciplinary measures go. A little boy who was throwing chairs was suspended. Giving a kid a couple of days at home won’t

help him if he can't hear what's going on in the classroom when he's there. Instead of helping the student their attitude is just 'getting rid of the problem'. If a child is six years old and having a hard day at school because something has gone wrong, being suspended in Grade 1 won't help him because he'll never know what he did wrong."

Segregation, isolation or use of restraints

According to a JFA Purple Orange survey from 2017, the use of restraint, or 'the practice of keeping someone under control', was being used significantly. According to the results 30.61% of parents and supporters responded that their child had experienced restraint at school, while 18.75% of current or former students indicated they experienced restraint at school.⁹

"At a junior primary school a new principal decided to remove the bigger sensory room space for children (formerly called the rainbow room). This new 'sensory room' is a small supply cupboard painted all black and colloquially called the Harry Potter cupboard by students and families because it is used as a disciplinary measure. One child with ASD and global delay was having a difficult morning and her mother dropped her off at school. Twenty minutes after the mother arrived home a friend rang her from the school letting her know that her daughter had been locked in the cupboard and she was inside screaming, crying and banging on the door wanting to be let out while a staff member was holding the door closed forcing the child to remain in the cupboard. Her mother had to return to the school to confront the staff and tell them to not lock her child in a dark cupboard. The school have not repeated this incident since but the mother is unsure if they would do it again and was not told whose direction it was to lock her child in a dark supply cupboard."

"At one school a teacher used a restraint chair on a child with autism to 'calm them down'. The teacher was fired and the school apologised. It was a small community and the family were concerned about the negative impacts of taking any further action against the school."

"A child with a family from a refugee background had limited verbal communication skills. He was supported by SSOs in a mainstream school. While he was eligible for placement in a special school, he and his family were told there was no place available in a special school. However, he was told by his mainstream school that he was not allowed to sit in the classroom because a parent had complained about his behaviour. The child was instead set up on a desk in the corridor segregated from other students. The school justified this action by arguing he was a 'potential danger' to other students. There was evidence that the child would get frustrated and try to attract the attention of a student he might like. However, he was supposed to be provided with one-on-one SSO support who should have been watching for trigger points and any escalation behaviours that may become dangerous. There was no attempt to incorporate the student in the general student body despite him being

⁹ *Report of the Select Committee on Access to the South Australian Education System for Students with a Disability, 2017, Parliament of South Australia p 92*

refused access to a special school. After his last year of primary school he, eventually, through some advocacy, was able to get into a special school.

Advocates and community organisations have argued that the use of harmful and restrictive practices could be avoided if schools took a more proactive approach through early intervention and support strategies *before* a situation with a student gets to a crisis point.

“Some schools provide safe spaces or rooms where children can go if they are feeling overwhelmed in class. Some schools have implemented a card or ticket system where a child with a disability can flag on the downlow to their teacher that they are feeling overwhelmed and are then able to take some time out or go to an area where they feel safe for a little while. Simple things like this can really improve the experience of children in school and lead to retention and a better learning experience for everyone”

“What the school sees as important is not meaningful to the student and the parents. For instance, yes if they are late, it is important to let someone know to make sure the student is not missing. But then to focus about improving late slips isn't helpful. Because from a parent's perspective will say – well that extra 15 minutes to regulate set them up for success for the day. So one of the big things for improvements, is the focus of the school might be on things that actually unravels the success of the rest of the day. But it's a compliance measure from a school about getting a student's late slips down. Does anyone care when they are 21, how many late slips you got if the rest of the day meant you were successful and you were learning? No one cares if they go out to lunch 15 minutes later than anyone else. If that's what they needed to do, let them do it. The system is wired in that what is meaningful or important for a school is not meaningful or important to get the right outcome which will take the pressure off. The school will say, your child wouldn't be getting the suspensions if they were on time. But a school is trying to make them fit into a system. Where should we put our efforts to get the right outcome for the student?”

“It comes back to behaviour – something looks like it shouldn't be hard to do so you should just do it. So they are told off for wrong behaviour. But when the bell goes off at school and everyone is rushing to get to their locker the neurodiverse kid, for example, has to stand outside, wait for the rush to go past, then go to their locker. That one little event can unravel their entire day. But if it was okay that they get to the locker after the bell has rung, life would look completely different.”

“We were excited when the NDIS Quality and Safeguards Rules and Regulations came out but we were disappointed when they did not apply to the educational sector. Something we are aware of is that what NDIS would deem as prohibited practices under safeguarding and restrictive practices rules and regulations, that are being used in educational settings. We think the focus should be on trying to develop proactive strategies, understanding positive behaviour supports, understanding connection, working on a strength-based model, trying to support educators to increase capacity to better support and apply practices. We'd like to see more movement in that area and the NDIS Quality and Safeguards around regulated restrictive practices expand across all sectors.”

Home-schooling

Another issue is that families will often be forced to remove their children from schools where schools are not accommodating their children. However, this will often lead to the use of home-schooling for children, which subsequently can impact on a child's development and mental health. Parents will often need to take time off from work for caring responsibilities meaning they are losing access to financial support as well. The National Disability Insurance Agency does not allow the use of NDIS funding to cover the cost of caring responsibilities.

“A significant issue that has become apparent in the last couple of years is the number of predominantly single mothers with later teenaged children who are about to complete their secondary schooling who have lost all faith in the education system and are either educating them at home where they are incredibly isolated or they are attempting to educate them from home with a lot of resistance from the Education (Department) from a good place - the Education Department is trying to retain the children at school but the mothers in this case have built up such a resistance because of their experiences and because they don't feel like they have been heard or listened to that it's become a real fear that something bad will happen to their child if they let them go to school so they feel as though they are protecting their child. The real danger is that then the child drops out of the system, isn't engaged with ongoing activity, work activity, or other programs. These parents have lost all confidence in the system. The focus should be around increasing the support around the child and the parents to enable them to remain engaged.”

“When you look at the home-schooling rates for parents with a child on the Autism spectrum, for example, there is a huge prevalence. This comes from a systematic error where schools are forced into complex funding models, not able to get support, and therefore saying 'we can't support your child here'. Then the pressure comes from suspension and exclusion, forcing parents to home-school kids. The data is not with the school then, it doesn't tarnish their reputation. These are huge systemic issues that are happening. Home-schooling shouldn't have to be an option. Every parent should be able to enrol their child in a school and know that their supports will be prominent. It is a huge issue where schools are not able to support a student's needs and then they ultimately give up in some situations and force parents to home-school.”

Minimal accountability under the complaints-based mechanism

“The issue is that the Education Standards are legislated and [education providers] must comply – but that is only enforced if someone complains. There is a special educator allocated to every school but in the end they cannot force anyone to do anything and that is a systemic error.”

While individual rights are mandated under the *DDA* and the Standards, in order to get Education Providers to follow them the onus is on students and families to make a complaint. Rather than a compliance-based system being in place, there is nothing overarching which forces organisations to comply. The concept for the Standards, according to the Explanatory Memorandum and Second Reading Speeches of the *DDA*, was that organisations should proactively establish good practices rather than waiting for individuals to complain. However, as discussed in detail, this has not been the case.

“A lot of parents are not sure where they can find what they’re entitled to. The processes that different sectors and schools have in place adds to the confusion. Parents are not sure of the complaints system, the planning system, and there is mixed messaging within all of the sectors. Different sectors and different schools within sectors do things in different ways, particularly around things like One Plan and individual planning. This leads to a lot of frustration from parents, who fundamentally understand the key message from the Standards, but lack understanding of particular school processes and particularly how to challenge them through making complaints. Parents say they have been worn down to that point of compliance. It’s hard to explain the experience because it could be a different experience in the same school, it depends one year to next the teacher you get.”

“One thing I do say publicly is that people in the education department know they are not compliant with the Education Standards and they just keep going risking that parents won’t complain. It’s a calculated risk because they see that to fully comply would be too expensive. But honestly, they are completely liable if someone comes along with evidence of their disability and how to make the reasonable adjustments to meet those disabilities then they must comply. The education standards are legislated. Unfortunately, the disability legalisation in this country is complaints based. There is no compliance requirement until someone complains. In a sense compliance is an act of goodwill.”

“From a systemic point of view, it is interesting that if there is a complaint through the Department for Education it is circular and it ends up coming back to themselves to solve their own complaints. It goes through a Suspension and Expulsion Panel, You can raise if the process was followed in terms of procedural fairness but not whether there was natural justice or if rights have been infringed. People don’t feel they get a lot of rights of justice or being heard. Where is the independence? If someone has got something to raise about a school where is the independence when it comes back to the same people answering their own questions. When you are looking for systemic change there needs to be some level of independent oversight.”

Case law

Furthermore, case law has significantly undermined the operation of the *DDA*. Under *Purvis v NSW (Department of Education and Training)* [2003] HCA 62 the High Court significantly narrowed the application of direct discrimination which has had consequences for the ability to argue a claim of disability discrimination. This is because the Court held that determining the appropriate comparator in a direct discrimination case should be someone who displays the same kinds of behaviour as a person with a disability but for a different reason. This undermines s 5(1) of the *DDA* in all cases, but is particularly relevant for cases of discrimination in educational settings.

In *Purvis* the Court considered whether a young boy called Daniel Hogan – with brain damage causing epilepsy, intellectual disability, difficulty in controlling behaviour and a tendency to violent outbursts – who was expelled as a result of his behaviour had been discriminated against. The Court held that when determining whether someone has been directly discriminated against due to disability, the Court should compare their circumstance to someone who behaved in a similar way as the student with disability, but who did not have a disability and behaved this way for a different reason. The Court argued that because any other student who behaved as Daniel did would have been expelled and therefore it was **not** discrimination on the basis of disability to expel Daniel or students like him.

Another case that has undermined the operation of the *DDA* is *Sklavos v Australasian College of Dermatologists* (2017) 347 ALR 78. Academics have argued that *Sklavos* has watered down the obligation to make reasonable adjustments under the prohibition of indirect disability discrimination. The case has huge ramifications for reasonable adjustments under the *DDA*. In this case the Federal Court held that Dr Sklavos had not been discriminated against after he requested that – as a student with a recognised disability in which he suffered a phobia provoked by sitting exams – he be provided with an alternative assessment or be admitted by the College of Dermatologists.

In this case the Full Court of the Federal Court rejected his claim because they argued that whether someone has been a victim of indirect disability discrimination requires a causal connection between the conduct and the disability under s 5(2) of the *DDA*. In practice this means that the disability itself must be the prominent reason for failing to provide reasonable adjustments. Proving a failure to provide a reasonable adjustment based on the requirement that the disability must be the reason means that you must prove you are denied a reasonable adjustment because the education provider (for example) does not like your disability or they have some kind of malice or prejudice against that disability. Furthermore, the Court held that by reason of s 6(3) of the *DDA*, the obligation under s 6(2) does not apply where the

requirement or condition itself required by an organisation is 'reasonable'. This is a high threshold to meet because a claimant must prove that (a) it is reasonable to require an organisation to provide the adjustment itself and (b) that the requirement the organisation is asking for is *not* reasonable. For example, if the requirement that all students should attend their class in a particular building is perceived as reasonable, a claimant will not be able to prove a claim under reasonable adjustments because reasonableness is a defence. These two thresholds together create an incredibly high benchmark for claimants to seek to make a successful claim under reasonable adjustments in the *DDA* and arguably undermine its objectives.

While *Sklavos* was a Federal Court case there has so far been no High Court challenge to this case. Liam Elphick from the University of Western Australia has queried whether *Sklavos* has led to the 'death of reasonable adjustments' and has recommended that parliament should amend the *DDA* to replace ss 5(2) and 6(2) with **one provision** to govern reasonable adjustments. For example, s 7A as a stand-alone provision to govern reasonable adjustments which would mean claimants would not have to prove causation between conduct and disability (as they currently do under s 5) and remove the reasonableness issues under s 6 by allowing claimants to argue instead that it is only the adjustments that need to be reasonable.

Federal reviews of the Disability Standards for Education

In both the 2015 and 2020 review of the Standards, audit reviews were recommended but this has not been done so far.

"[An audit review] was also recommended the previous time the Standards were reviewed. I have been banging my head against a brick wall for this since 2008. The Standards were barely understood when I started on this. You gain some level of traction and then the Education Department backs away."

"What we have to do is encourage people to make those complaints. The other issue I talk about is it is very slow and eventually very expensive to complain to the Human Rights Commission. The EO Commission in SA is a much better bet. Somebody will look at the complaint within few days of it being lodged and will ask to meet with the person that the complaint is about. It's all free. They may decide that they won't pursue it. But if they judge there is a case of discrimination there they will."

Recommendations

1. School leadership, staff and the greater school community should proactively foster an inclusive environment for all students that enriches the educational experience.
2. Schools to mandate induction training and ongoing professional development for school leadership and staff to include what the Standards are, the rights and obligations for schools, students and families, and general disability awareness and sensitivity training. The South Australian Minister for Education should advocate to the Australian Government to ensure that explicit references to the Standards are included in teaching degrees, including provision of reasonable adjustments.
3. The South Australian Department for Education to implement the *2020 Disability Standards for Education* review recommendations by working with the Australian Government and other States and Territory governments to develop information products for students, families and schools on their rights and obligations under the Standards.
4. The South Australian Minister for Education to implement the *2020 Disability Standards for Education* review recommendations pertaining to conducting an audit review of South Australian schools.
5. The South Australian government to increase funding for discretionary grants that schools can access to apply for funding for students with disabilities to fund reasonable adjustments and accessible facilities.
6. The South Australian government to assist schools in enabling them to hire increased numbers of student support officers and teachers.
7. The South Australian government to assist schools in establishing expanded onsite support for students including but not limited to social workers, psychologists, general practitioners, culturally appropriate supports for Aboriginal and Torres Strait Islander students, and 'safe spaces'.
8. The South Australian Minister for Education to advocate to the Federal Government to amend the *Disability Discrimination Act 1992* and its subordinate legislation the Standards to clarify and include:
 - a. Accountability and compliance standards that schools must meet – rather than the current complaint-based mechanisms that rely on schools and families making individual complaints to enforce their rights.
 - b. Requirements for education providers to provide training and professional development to their staff on the *DDA* and the Standards
 - c. Stand-alone provisions on reasonable adjustments.
 - d. Appropriate comparator pools for direct and indirect discrimination.

- e. Mandated transition planning within school year levels and in the transition from school to higher education.
 - f. Defining what a 'restrictive practice' or 'prohibited practice' is in line with the UNCRPD, outlining what it includes, and specifically prohibiting its use on children under section 22 of the Act. This includes practices that are prohibited for use on children under the CROC such as use of restraints, isolation or segregation, and exclusion. At current these practices are not explicitly referred to under the Act and would likely only fall under s 22(1)(c) 'other detriment'.
9. Expand the NDIS Safeguard Standards to education or develop an equivalent.

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