

Legislation, Case Law and Current Issues in Inclusion: An Analysis of Trends in the United States and Australia

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Introduction

Parent, civil rights, education and advocacy groups initiated a socio-political movement towards inclusive education in the 1960's by challenging education authorities to include students with disabilities in regular school settings. They argued from a 'rights-based platform that reflected the ideals of equity and social justice expressed in a number of international statements including, for example, the Universal Declaration of Human Rights (1948) and the United Nations Convention on the Rights of the Child (1972). It was not until legislative changes were made in the United States, however, that schools were required to educate students with disabilities alongside their non-disabled peers to the maximum extent possible. Since then, special education and the management of inclusion in schools have become public and accountable through the law and the pace of litigation over issues that relate to inclusion, student rights, disability and discrimination significantly increases each year (Osborne, 2000).

This article analyses and compares legislation and appeal processes that relate to disability discrimination and the management of inclusion in schools in common law countries including the United States and Australia. Specific laws and rights of appeal against administrative decisions and school actions that relate to inclusion are identified. Finally, the Australian disability discrimination legislation from both State and Commonwealth jurisdictions is described and analysed through the interpretation of case law. In particular the concepts of 'reasonable accommodation' and 'unjustifiable hardship' are discussed in relation to the way that principals manage inclusion in schools.

The description of the law and appeal processes used in the United States provide an international, contextual basis for the analysis of Australian legislation, particularly the *Disability Discrimination Act*, 1992 (Cth.). Australia's relatively low level of litigation in the area of special education belies the fact that the number of cases progressing to full court hearings is increasing and that the cases are becoming more complex (Walters, 1999).

Legislation

In the United States, Section 504 of *The Rehabilitation Act* (1973), *The Education Of All Handicapped Children Act* or EAHCA, PL 94-124 (1975) and the *Individuals with Disabilities Education Act* or IDEA (1990, 1991 & 1997) are the most important statutes that are used to challenge procedural issues or resolve claims of discrimination on the grounds of disability (Osborne, 1999). In this section, examples from case law are analysed to provide an historical

perspective of the way that the law has shaped educational decision-making towards full inclusion. Current, recurring legal issues identify specific areas of concern in the interpretation of the law. Consequently, the way the courts analyse and interpret these issues has an impact on the management of inclusion in schools. The emergent issue of the provision of medical services for students who are frail is used as an example of the complex progression of decisions from the courts to determine the level of responsibility of the regular school setting to enrol and provide educational services for students who are medically frail.

Parents have regularly used litigation to challenge and appeal decisions made about the provision of educational services for students with disabilities and as a consequence, the parameters of inclusive education are clarified, defined and redefined as a result of decisions reached in the courts. In this way, comprehensive case histories have developed to set precedents in many aspects of the management of educational services for students with disabilities.

Although the landmark decision of *Brown v Board of Education* (1954) did not relate to a case about disability it established the right to access regular schools rather than segregated settings for students from racial minority groups. Stewart, Russo & Osborn (in press) have identified this case as important in initiating the relationship between education and the law and it was in this case that Warren CJ gave judicial recognition to the importance of equal access to education for all students. He claimed: ‘in the field of public education, the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal’.

The right to access education in regular school settings was not generally extended to students with disabilities, however, until the parents of children with an intellectual impairment from Pennsylvania successfully contested a class action against the state education authority. Known as the *PARC*¹ case (*Pennsylvania Association for Retarded Children v. Pennsylvania, 1972*) the parents convinced the court that their children were being undereducated in segregated settings and that their opportunities to succeed in learning and in society were, consequently, significantly reduced.

Section 504 of the *Rehabilitation Act* of 1973 followed quickly after the findings from the *PARC* case. Under this statute, discrimination against a person with a disability is prohibited in any program or activity that receives Federal financial assistance (Section 104.1). The broad terms of the Act require education systems to protect and advocate for the needs of individuals with disabilities; to proactively manage programs and services by establishing a rationale and priorities for the provision of services; to establish grievance procedures; and to ensure that extra funds are available to promote discrimination free services.² Similar provisions were introduced into the private sector through the *Americans with Disabilities Act (A.D.A.)* in 1990.

Two years after the *Rehabilitation Act* (1973) was passed, more comprehensive legislation that specifically related to schools and inclusive education was introduced in *The Education For All Handicapped Children Act, (1975) or PL 94-124*. In this legislation two important principles were introduced that would have an impact on inclusive education throughout the world. The first principle of the least restrictive environment (LRE), states that students with disabilities should be educated beside their non-disabled peers to the maximum extent possible. The second principle insists that a free and appropriate education for all students (FAPE) should include special

education and related services and be provided at public expense to meet the same standards as the state education agency. These principles were comprehensively debated in numerous court cases in the United States in the 1970's and 1980's.³ Parents of students with disabilities and school or education authorities argued on the interpretations, expectations and legislative intentions of what constitutes the least restrictive environment and what may be regarded as free or appropriate education for each student.

Eventually, the inclusive principles of the LRE and the FAPE were clarified, developed, expanded and incorporated into the renamed *Individuals with Disabilities Education Act* (IDEA) of 1990. The PL94-142 and IDEA have been regularly reviewed by Congress (1978, 1986, 1990 and 1997) to reflect interpretations from the courts and the IDEA is now regarded as the most important statute that promotes inclusion and provides protection for students with disabilities in educational settings (Lipsky & Gartner, 1997; Osborne, 2000; Russo, 2001).

The most recent reauthorisation of the IDEA which occurred in 1997, promotes three major requirements that reflect the areas of recurring concern from cases in the field. These requirements include:

1. Strengthening parental participation in the educational process by protecting the rights of parents through the implementation of procedural due process hearings or mediation services in all states;
2. Increasing the accountability for students participation and success in the general education curriculum through the mastery of individualised education plan (IEP) goals/objectives and the inclusion of the general education teacher in the IEP team;
3. Implementing specific remediation and disciplinary procedures that protect the rights of students with disabilities who have behavioural difficulties and also maintains the safety and security of all students in schools.

Clearly, the United States Congress regards the current issues of increased parental participation in educational processes; greater educational accountability in educational outcomes; and behavioural management strategies for students with disabilities as priorities for the reduction of discrimination against students with disabilities in educational settings. The IDEA sets out comprehensive, procedural steps to achieve each of these outcomes and provides financial incentives as the motivation to comply. Unlike the *Rehabilitation Act (1973)* where funding is withdrawn if compliance is not achieved the IDEA ensures federal funding when the state can guarantee that all public schools comply with the procedures and requirements of the Act (McKinney & Mead, 1996).

To increase parental participation in the educational process, for example, the IDEA requires that either mediation services or independent Due Process Hearing Officers should be available in each state so that appeals against decisions made in the field of special education and inclusion may be negotiated through mediation or an independent appeals process rather than litigation. It is important to note that these measures were also introduced in an attempt to address educational issues promptly so that disruption to schooling for a student with a disability who is waiting for the outcome of a trial is minimised.

To promote the protection of students with disabilities who have challenging behaviours that are a manifestation of their disability (mentioned in point three above), the IDEA specifies a range of requirements that include an assessment of the student's needs, a contextual analysis of the student's behaviour from the I.E.P. team and the development of individualised behaviour management plans. Regulations for the suspension of a student are also clearly defined in what is now referred to as 'the ten day stay put rule'. This rule provides that a student may be suspended for up to ten days, an educational service must be provided for the student during the suspension and the student must be returned to the school of origin (Rutherford-Turnbull, Wilcox, Stowe, & Turnbull, 2001). Only in exceptional circumstances (usually involving drugs, guns and the safety of students and teachers) can the suspension be extended (to a maximum of 45 days) or the placement changed and this requires a court hearing.

In summary, the requirements of the IDEA in the United States are specific and have been changed and modified to become more responsive to student, parent and school needs in a climate of rapid social and educational change. The processes of these most recent changes are also a reflection of the history of court cases dealing with inclusion in the last two decades. A brief analysis of the progress of some of these cases provides an historical progression of the issues that have been resolved by parents and schools in the courts in the United States so that discrimination may be reduced and learning outcomes maximised for students with disabilities.

Case Law - A Short History of Inclusion

Four specific cases determined in courts in the United States are discussed in this section to show how the courts have progressively interpreted the legislation as new and different issues arise that relate to the inclusion of students with disabilities in regular school settings.

In the early part of the 1980's a number of court cases focussed on the inclusion of students with physical disabilities such as cerebral palsy and spina bifida. The courts debated whether the IDEA's principles of the least restrictive environment may actually be a segregated setting for some students whose attendance at a regular school would require significant physical accommodation. In *Roncker v. Walters*,⁴ the court clarified the concept of the least restrictive environment and stated:

Where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.⁵

By the end of the 1980's the focus for litigation had changed from the inclusion of students with physical disabilities to a discussion about the extent to which students with an intellectual impairment would benefit from an inclusive placement. In *Daniel R.R. v. State Board of Education*⁶ it was held that the language and role modelling from non-disabled peers made inclusion in a regular setting beneficial 'in and of itself ... even if the child cannot flourish academically'.⁷ However, two constraints were identified within this context: the teacher should

not have to spend all or most of his or her time with the student with the disability; and the curriculum should not have to be modified beyond recognition.

A two-part test was developed in *Daniel R.R.* to interpret the meaning of inclusion 'to the maximum extent possible'. The first part of the test involves proof from the education authority that supplementary aides and services have been provided for the student in the regular classroom. The second part of the test seeks to determine whether the student has been mainstreamed to the maximum extent possible. These criteria established the expectation that the student should be placed in the regular classroom with appropriate support before any consideration could be given to placement in a more segregated setting.

Although the level of attention that a student with a disability may require from the teacher and the management of the student's behaviour had been raised as issues during numerous court cases, no specific basis for determining the limitations of this attention were established until *Oberti v Board of Education*.⁸ In this case a young boy with Down syndrome had been refused entry into a regular classroom because he had experienced behavioural difficulties during kindergarten. The court found that appropriate behaviour management plans and supplementary aides and services would not preclude the student from the regular class setting. The court also introduced the concept that other students in the class would benefit from the inclusion of a student with a disability.

In *Sacramento City Unified School District v Rachel Holland*⁹ the court developed a framework for the possible analysis of the benefits and detriments of the inclusion of a student with disabilities into a regular classroom. In this case the court was asked to determine:

1. The educational or academic benefits for the child in the regular class as compared to the benefits of a special education classroom;
2. The non-academic benefits of integration with non-disabled children;
3. The effect of the presence of the handicapped child on the teacher and other children in the regular classroom; and
4. The costs of supplementary aids and services.

The *Holland* case provides lengthy discussions about the educational benefits of inclusion to the student. The court found that Rachel's Individualised Education Plan (I.E.P.) goals could be achieved within the regular school setting and that Rachel would gain significantly from having her peers as role models for language and social skills. It was the responsibility of the education authority to then prove that the more segregated setting would provide a greater benefit to Rachel in educational, academic and social terms.

The school district's preference for a segregated setting relied heavily on Rachel's intellectual assessments that identified a 'moderate mental retardation'. The court rejected the claim that Rachel's education should focus on functional literacy and numeracy skills and described this approach as limiting. The claim that the skills and expertise of the special education staff in the segregated setting were superior was also questioned with the conclusion being made that the skills needed to teach Rachel involved effective teaching strategies that were regularly used in every educational setting.¹⁰

The court also identified a number of stereotypical assumptions made by the school district staff. These included broad generalisations from staff at the diagnostic centre who assumed that a student with Rachel's I.Q. could not be educated in the regular setting. Teachers who did not know Rachel assumed that she would be disruptive and not able to learn. This evidence was rejected when teachers who had direct experience in teaching Rachel claimed that she was not a disruptive influence in the class and was not a burden for the teacher.

Conflicting opinions from expert witnesses have become a consistent feature of similar court or tribunal hearings in both the United States and Australia. Experts provide evidence according to their own informed educational philosophies about inclusion or in some cases according to their own stereotypical attitudes, values and beliefs. Educational experts, for example, who had not met Rachel or who had not participated in the assessment of her individual educational needs, based their opinions on stereotypical assumptions rather than fact or evidence. Judge Levi clarified this issue when he stated: 'Finally, [to] the extent that the Holland witnesses have a preference for mainstreaming, it is a preference shared by Congress and embodied in the IDEA'.¹¹ and, consequently, he made his decisions according to the requirements of that law. Without empirical data that is directly relevant to the specific situation, expert witnesses for the school or education authority would find it difficult to develop a convincing case that a segregated setting may be more beneficial

In brief, this summary of case law shows the progression of inclusion in the United States as it is reflected through court hearings. Students with disabilities who were once excluded from all regular schools now have access to an education at the local school with their same age peers. The focus of more recent court cases has therefore changed from access issues to issues that relate to the management of inclusion or the provision of educational services for students with disabilities in the regular school setting.

The medical management of students who are physically frail and require medical support and supervision is a nascent area of concern for parents and schools. In the next section of this article, the legal argument that surrounds the increasing responsibility for school districts, schools and principals in particular to manage complex, expensive, and sometimes life threatening situations is identified.

A Current Issue – Medically Frail Students in Schools

The incidence of students attending regular school settings with serious medical needs, psychological illnesses or severe physical impairments, is increasing as the medical management of illness, disease and disability improves and young people with these conditions are able to experience an improved length and quality of life. For many, this means attending a regular school with their same age peers and medically managing the provision of health care services while the student is at school.

In the United States, cases concerning the provision of health care services for students with disabilities have stimulated extensive public debate (Bartlett, 2000; Katsiyannis & Yell, 2000; Lewis, 1999; Thomas & Hawke, 1999). Parents and school districts have used the IDEA legislation to argue the parameters of what constitutes the provision of special education and

related services so that a student may have access to a free and appropriate education. Related services are broadly defined in the IDEA as those ‘services that may be required to assist the child with a disability to benefit from special education’.¹²

The United States Supreme Court in *Irving Independent School District v Tatro*¹³ adopted the ‘bright-line’ test to more clearly define the school’s responsibilities in the provision of medical care. The bright-line test has been reapplied in numerous court cases since then because it simply and clearly specifies that the school is responsible for the provision of all medical services that do not have to be administered by a physician. In this case these services related to a process called Clean Intermittent Catheterisation (CIC) for a student with spina bifida.

In relation to the provision of medical services, Lear (1995) argued that the determination of who should provide the medical service, either a school employee or a physician, did not accurately reflect the various levels of responsibility left with schools. Some medical provisions require little or no training and may involve applying dressings or dispensing medications by the school’s administrative officer. Other medical processes such as catheterisation may involve medical procedures that are relatively simple if staff are trained in the process. However, more complex medical procedures may require professional nursing care and expertise and include oral suctioning, naso-gastric or gastrostomy tube feeding, clearing of a tracheostomy, ventilator dependence and also involve the management of life or death situations.

Eventually school districts made the courts aware of the complexity of the provision of health care services and the ‘Nature-of-Services’ test was developed. This is a very subjective test that involves consideration of the complexity, cost and burden of the provision of the medical service. The fact that each new case has to be taken on its own merits introduces an element of uncertainty in the way that schools interpret their level of responsibility. Bartlett (2000) has claimed that this level of subjectivity has resulted in mixed determinations from the courts and he has cited, albeit briefly, two cases that appeared similar in the level of support that was being requested and yet resulted in each receiving different judicial outcomes. It seems likely, however, that the detail required for a fair consideration of every individual case would raise very different contextual issues and different outcomes should not be unexpected.

School districts and parents of students with disabilities eventually became impatient with their reduced ability to consistently anticipate their rights or responsibilities under the related services component of the IDEA. Some cases used *Tatro*’s bright-line test and claimed schools should provide all services not required by a physician while others applied the Nature-of-Services test and subjectively analysed whether the services needed were an undue burden on the school. The outcome of *Cedar Rapids Community School District v Garret F.*¹⁴ and a subsequent appeal to the United States Supreme Court attempted to clarify the confusion that had been created.

In this case the plaintiff student Garret F. was injured in a motorcycle accident when he was four years of age. This resulted in a serious spinal injury that left him paralysed and ventilator dependent. Garret was not able to breathe without the assistance of an electric ventilator and he also required tracheotomy supervision, suctioning, positioning, assistance with food and drink and constant observation to make sure that he was not experiencing any respiratory distress. Although these services did not require administration from a physician they were comprehensive, involved

monitoring life threatening situations and were expensive. Throughout his primary school years, Garret's parents had provided the services of the nurse in the school from the finances provided from the payout made in relation to the accident. That money had run out by the time Garret entered high school and, consequently, the school was asked to provide the medical services needed to support Garret in the educational setting.

The court administered the *Tatro* test and decided that, according to the law, the school was responsible for the employment of a full time nurse for the provision of the medical assistance required. The school then appealed but the decision from the trial was confirmed. The school then appealed to the Supreme Court where the decision was upheld on the grounds that the services were related services that Garret needed to attend school and a physician was not needed to administer the services.

Katsiyannis *et al.* (2000) and Thomas and Hawke, (1999) have described the Supreme Court decision as a blanket endorsement of the responsibility of schools to provide medical services for students with disabilities and they have suggested that the findings in *Cedar Rapids* will lead to demands from schools to review the requirements of the IDEA or to request more money from Congress to implement these increased responsibilities. Principals, teachers, parents, students and political representatives are now contesting social justice issues in the arena of the value of the educational dollar, educational priorities, the marketability of education and accountability (Barton & Slee, 1999; Pullin, 1999).

Legislation and Disability Discrimination Case Law in Australia

Legislation

Unlike the United States, Australia does not have a Bill of Rights to establish fundamental human rights expectations for all citizens and from which legislation such as the IDEA is drawn. Consequently, before anti-discrimination legislation was introduced into state, territory and federal jurisdictions, Australian education authorities did not have any immediate or binding obligation to inclusive education. Instead, Australia's commitment to inclusion, at least theoretically, was formalised when Australia became a signatory to international conventions and conferences¹⁵ that endorsed inclusive schooling for students with disabilities. Through these commitments the United Nations called on the international community to recognise the importance of providing education for all children within the regular education system and encouraged countries such as Australia to adopt the principles of inclusive education as a matter of law or policy.

Australia relies entirely on the anti-discrimination statutes to eliminate disability discrimination by educational authorities and inclusive education practices, though recommended, are left to the goodwill and expertise of the principal of the school or the teacher in the classroom. Innes (December, 2000b) has claimed that 'complaints based on general non-discrimination provisions alone would not be sufficient to achieve widespread elimination of disability discrimination' (p3), however, other attempts to clarify or administer the legislation more effectively such as Disability Standards, Public Inquiries or Exemption Powers have not been successful to date.

Parents of students with a disability in Australia, therefore, have to rely on the long, expensive, stressful and at times unsuccessful conciliation and personal complaint processes to redress a claim of discrimination (Flynn, 1997). Teachers, schools and education authorities, on the other hand, have to rely on interpretations made from case law to clarify the expectations of the anti-discrimination provisions. Case law is analysed in this paper to determine how discrimination may be reduced and inclusive practices promoted in schools. Finally, the benefits of a broad definition of disability are discussed as are the limitations that broad interpretations of the objectives of the anti-discrimination Acts have.

Disability Discrimination Legislation in Australia

The Commonwealth *Disability Discrimination Act* (DDA) of 1992 and the anti-discrimination legislation or equal opportunity legislation from each State and Territory are the specific pieces of legislation that impact most significantly on the provision of discrimination-free educational services for students with disabilities in Australian schools.

Lindsay in Ramsay and Shorten (1996) describe three main areas in which the legislation prohibits discrimination in education:

- Admission of a student may include the refusal to accept an enrolment or negotiating differential terms upon which an applicant may be admitted;
- Access to educational benefits may encompass such matters as subject offerings, attendance at school camps or excursions and course choices; and
- Expulsion or exclusion in which educational authorities are prohibited from expelling students on any of the grounds of a disability even though these decisions are likely to arise out of a complex factual matrix.

Even though there are minor differences between the State, Territory and Commonwealth legislation, this paper focuses on the Commonwealth *Disability Discrimination Act* or DDA (1992), however, reference is also made to the *Queensland Anti-Discrimination Act* or QADA (1991) in the analysis of the definition of disability as well as the discussion of case law.

A Broad Definition of Disability

For the purposes of the legislation, a person has a disability under Commonwealth law (DDA) if there is:

- total or partial loss of the person's bodily or mental functions; or
- total or partial loss of a part of the body; or
- the presence in the body of organisms causing disease or illness; or
- the presence in the body of organisms capable of causing disease or illness;
- the malfunction, malformation or disfigurement of a part of the person's body; or
- a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or

- a disorder, illness, or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour; and
- includes a disability that
- presently exists; or
- previously existed but no longer exists; or
- may exist in the future; or
- is imputed to a person.

In the above definition the Commonwealth legislation makes provision for those students in schools, for example, who may have HIV/AIDS, social and emotional difficulties, brain injury, medical conditions or psychiatric illness and also students who 'learn differently'. The *Queensland Anti-Discrimination Act (QADA)* that was introduced a year before the Commonwealth Act defines impairment, in part, as a disorder or malfunction that results in the person learning more slowly than a person without the disorder or malfunction. This gives legal representation to people who have an intellectual impairment but not, necessarily, to people who may be learning disabled. Williams (1996) has claimed that the lack of a functional, clinical or educational definition of learning disability further complicated the question of who may be considered to have a disability under the State legislation.

The fact that the definition of 'disability' is rarely contested in the tribunal hearings is a sign that the broad scope of those who may be protected by the law is effective. Innes (December, 2000b) compares this success with the contention surrounding interpretations from the *Rehabilitation Act (1973)* in the United States in which the definition of a handicapped person includes any person who 'has a physical or mental impairment which substantially limits one or more major life activities'.¹⁶ Major life activities are regarded as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Clearly, the more effectively a person is able to accommodate or compensate for a disability, the less protection will be granted by the law.

This subjective interpretation of disability in the *Rehabilitation Act (1973)* does not extend to the IDEA legislation. In the IDEA there are now thirteen categories of disability that rely on a diagnosis from a medical practitioner. The categories of disability include autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, learning disability, mental retardation, multiple disabilities, orthopaedic impairment, other health impairment, speech or language impairment, traumatic brain injury and visual impairment. Unlike the rarely contested Australian Commonwealth definition of disability, Osborne (1999) has claimed that questions regularly emerge in the courts regarding the definition and subsequent eligibility for a student to receive special education services.

In Australia, the right to disclose or not to disclose if or when a student has a disability has featured in more tribunal hearings than any discussion from the definition of disability. Parents who choose not to disclose may be fearful of the possibilities that the student is rejected at enrolment or that disclosure may result in prejudice from the school through stereotypical behaviours or attitudes (Flynn, 1997). There are currently no legal obligations for parents or

students to disclose a disability, however, the Human Rights and Equal Opportunity Commission has identified the importance that disclosure has for the identification of educational needs, the planning of appropriate programs and the provision of appropriate support services. Commissioner Innes, for example, has claimed that this was a shared responsibility and schools had an obligation to collaborate with parents, medical, therapeutic, educational and behaviour experts for each student to get the information needed to develop sound educational programs.¹⁷ The process of identifying, assessing and addressing the educational needs of students with disabilities in schools has not been developed or formalised to the same extent as the IDEA in the United States and this continues to remain a contentious area of concern for parents, students, education authorities, principals, guidance officers and teachers in Australian schools.

The Objectives of the DDA (*Cth.*) 1992

The objectives of the *DDA* are clearly defined:

1. To eliminate discrimination as far as possible, against people with disabilities;
2. To ensure, as far as practicable, that people with disabilities have the same rights to equality before the law as the rest of the community; and
3. To promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

Disability discrimination statutes state that it is unlawful to treat someone with a disability less favourably than a person without the disability would be treated in circumstances that are materially the same. In *Finney*,¹⁸ for example, a school treated a young girl with spina bifida less favourably when they rejected her application for enrolment. The school admitted that they had discriminated against the student because of her disability and they appealed to the Human Rights and Equal Opportunity Commission to make the discrimination lawful on the grounds of unjustifiable hardship. In another case,¹⁹ a young boy was treated less favourably when he was suspended five times before being excluded from a school. The tribunal hearing found that a causal nexus existed between the student's disability and his behaviour and that he was, consequently, discriminated against because of his disability. Legislation also prohibits indirect discrimination on the ground of disability.²⁰

In some circumstances, positive discrimination may be needed for people with a disability to experience substantive equality or equality of opportunity. In schools for example, the provision of medical, therapeutic or technological support services and teacher aide assistance may be required before a student with a disability is able to participate equally in an educational program. These services are provided to minimise barriers to learning and to focus on student independence, learning and the achievement of educational goals. An example of ensuring that a student with a disability has equal access to educational experiences may include changing room allocations to ground level rooms for a student with a hip complaint who experiences difficulty when climbing stairs.²¹

The third objective identifies the important educational role that schools have not only for student learning and educational outcomes but also as role models in the community for discrimination free behaviours and attitudes. Consequently, the Human Rights and Equal Opportunity Commission has a high regard for school compliance with the objectives of the *DDA* (1992) and this important community leadership role is considered when determining consequences for non-compliance. In *Finney*, for example, the hearing Commissioner found that the level of hardship that the school was expected to undergo by enrolling a child with a disability did not warrant a claim of unjustifiable hardship. In weighing up the benefit and detriment for all concerned in the case, the Commissioner found that the school personnel had based their decisions on flawed assumptions about the student's disability and the modifications she required. Moreover, he argued that the student and the entire school community would benefit significantly from her attendance at the school. It was held that, Scarlett Finney and her parents were entitled to relief in the form of compensation for the discrimination that had been experienced. This decision was upheld on appeal to the Federal Court.

Teachers are also inextricably linked to the role model responsibilities of schools and stereotypical attitudes or behaviours identified in discrimination cases are not tolerated. In *Hoggan v The State of New South Wales* for example, it was held that the education authority be fined \$40,000 for the suspension and exclusion of a student with a disability. An important component of the decision in this case was that the principal and/or the education authority had failed to provide teachers with professional development or disability discrimination awareness programs to reduce stereotypical assumptions made about the student.

Direct Discrimination in Australian Schools

Direct discrimination has already been defined in this paper and examples briefly discussed. To prove a case of discrimination the legal requirements involve ground causation and damage. In the case of direct disability discrimination in schools, the person with the disability must be 'aggrieved' about being treated less favourably because of their disability.

In '*P*',²² for example, a student with Down syndrome was not accepted for enrolment at the primary school after he had attended the pre-school at the same setting. The education authority recommended that the student be placed in the special school because that setting would be able to respond more effectively to realise his educational goals. The tribunal Commissioner found that direct discrimination had occurred because the student would not have to attend the special school if he did not have the disability. Enrolment at the special school was considered in terms of reduced choice and educational opportunity and it was the responsibility of the complainant (the parent) to provide evidence that the student had been aggrieved because they were treated less favourably.

The President of the Anti-Discrimination Tribunal of Queensland found that direct discrimination had occurred in one instance in the case of '*I v. O'Rourke and Corinda State High School*'²³ and had not occurred in two other complaints made by the same student. '*I*' is diagnosed with spastic quadriplegia and severe intellectual impairment and at the time of the alleged discrimination she was in her last year of schooling. Complaints were made about three separate

incidents: the school formal or ball; a tourism excursion to Tangalooma Island and the Year 12 school dinner. The President found that discrimination had not occurred in the event of the school formal or the school dinner. In each situation the school was able to provide comprehensive details about the processes, priorities and considerations used to make decisions and these were found to be non-discriminatory. 'I' was prevented from attending the tourism excursion to Tangalooma, however, because of health and safety concerns that the school had about transportation on the ferry to the island. Although the school had considered various options to transport 'I' to the island, these were not discussed with the parents. At the last minute, it was recommended that 'I' attend an alternative excursion to the local shopping centre with other students who were also unable to attend the island excursion. The President found that the school had not based their considerations of health or safety on any professional advice or information and, consequently, they had discriminated against 'I' and treated her less favourably because of her disability.

In a comprehensive Australian study of 784 people and 30 key organisations, Flynn (1997) identified a complex and pervasive culture of direct disability discrimination in Australian schools. As a qualitative study, Flynn's research reveals a vivid portrayal of the manipulation involved in discrimination by schools, the frustration that parents and carers experience and the ostracising impact that discrimination has on the student with the disability. A report from the Disability Standards Task Force from the Department of Education, Training and Youth Affairs (2000) used discrimination reports, case law and conciliated settlements to identify enrolment, participation, curriculum development, student support services and harassment as major areas of consideration for the development of standards in education to reduce discrimination.

Indirect Discrimination from Unfair Rules and Expectations

Indirect discrimination arises when rules, expectations, traditions, policies, admission criteria, practices or requirements are applied to everyone but they have a disproportionate impact on a person with a disability and they are not reasonable in the circumstances. Indirect discrimination is defined in the Act²⁴ as a requirement or condition:

- (a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and
- (b) which is not reasonable having regard to the circumstances of the case; and
- (c) with which the aggrieved person does not or is not able to comply.

In *Grahl*,²⁵ Commissioner Carter identified circumstances that resulted in indirect discrimination. Sian was born on 10 March 1991. She has a severe disabling physical condition known as Spinal Muscular Atrophy that is a degenerative, neuro-muscular, genetic disorder. Sian experienced a rapid deterioration in her condition after she enrolled at the local primary school in February 1996. By the beginning of the next year she could only sit for a maximum of 30 minutes in an upright position before requiring assistance, she was easily fatigued and had difficulty holding a pen or pencil. She does not have an intellectual disability. Eventually Sian needed a wheelchair and her mother would walk with her to school every day and access the school via a convenient side entrance. After storm damage to the access the principal of the school decided to

lock the gate to the side entrance. As a consequence Sian and her mother had to travel a longer distance to the front of the school to gain access. Commissioner Carter stated:

I am satisfied that the gate closure and the denial of access was treatment of Sian which was less favourable than the treatment afforded able bodied children who had a variety of alternatives provided for them so that they could access the school.

In this situation the school was not able to provide the evidence that the requirement or expectation that Sian and her mother should use the front gate of the school was not discriminatory because:

- A substantially higher proportion of the students without the disability were able to comply with the access requirements of going through the front gate;
- It was not reasonable to require the extended journey when minor repairs to the driveway would have allowed continued access and for many reasons including safety, comfort and convenience Sian and her mother habitually used this entrance;
- The decision to close the gate was taken on account of Sian's disability.

The Parameters of Reasonable Accommodation - Unjustifiable Hardship

A reasonable accommodation may include any appropriate action or decision that considers all the relevant factors of the situation. Some factors that have been recommended for consideration in the Disability Standards for Education draft document (p3) include:

- The effect of student' disabilities on their education or training;
- The effectiveness of the actions or adjustments in achieving substantive equality for students with disabilities; and
- The impact of the appropriate actions or adjustments on other students and staff.

Before an accommodation may be determined a comprehensive analysis of the situation is necessary. This may involve obtaining information from those who are informed about the needs of the student including parents, carers and classroom teachers or from experts in the field such as doctors, specialists, psychologists, education advisors and special education or behaviour management specialists. This is usually a collaborative process in which the parents and/or the student and the school identify barriers to learning and the least intrusive accommodations that minimise these barriers are recommended.

A number of tribunal hearings relate to the different interpretations of what parents, schools and education authorities believe may or may not be a reasonable accommodation. In *Finney*, for example, the hearing Commissioner admitted that the borders between a reasonable accommodation and an unjustifiable hardship were not clear and required a comprehensive process of weighing 'indeterminate and largely imponderable factors and making value judgments ... which requires a balancing exercise between the benefits and detriment to all parties'. He

continued to clarify the difference when he explained that the contextual analysis of the entire case was important rather than specific issues or discrepancies from different points of view.

In *Hoggan*, Commissioner Innes applied a test of reasonableness that was referred to in *Secretary Department of Foreign Affairs and Trade v Styles* (1989). The test defined reasonableness as:

... less demanding than one of necessity, but more demanding than one of convenience ... The criterion is an objective one which requires the court to weigh the nature and extent of the discriminatory effect on the one hand against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.

In this case the nature of the discriminatory effect of excluding the student from the educational experience of attending school was more significant than the reasons given for requiring the student to comply with the expectations outlined in behaviour management plans. The extent of the discriminatory effect was also a significant consideration because the student was unable to return to the school and had effectively been denied his secondary years of schooling.

Currently, the unjustifiable hardship clause in the Australian Commonwealth legislation (DDA) only applies to enrolment. Section 22 (4) provides:

This section does not render it unlawful to refuse or fail to accept a person's application for admission as a student at an educational institution where the person it admits as a student by the educational authority, would require services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational authority.

This means that the unjustifiable hardship, exemption clause cannot be applied if there is a significant deterioration in the student's condition or if a student becomes disabled after the enrolment had been accepted. In *Finney*, the school claimed that they would have to accommodate Scarlett's needs for the full thirteen years of her possible attendance at the school and that this would include extensive renovations to the school buildings and pathways. In summary, the school estimated that renovations to the school would exceed one million dollars; that the school fees would have to be increased for all students; that Scarlett required support for catheterisation that was currently unavailable at the school; that the curriculum would have to be changed; that alternative schools could accommodate her needs and that her attendance at the school was not in her best interests. The Hearing Commissioner then considered the evidence provided by medical specialists who suggested that Scarlett's support needs were minimal. After an inspection of the school the Commissioner found an unused toilet that would be suitable for Scarlett's requirements for catheterisation. In this case, a comprehensive amount of data was collected and analysed according to section 11 of the DDA that states that all relevant circumstances of the particular case are to be taken into account including:

- (a) The nature of the benefit or detriment likely to accrue or be suffered by any persons concerned;
- (b) The effect of the disability on a person concerned;

- (c) The financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
- (d) In the case of the provision of services, or the making available of facilities – an action plan given to the Commission under section 64.

Commissioner Innes found that the estimations made by the school were fundamentally flawed because no professional or educational assessment had been carried out to specifically identify Scarlett's needs. He found that Scarlett, her parents, the teachers, other students and community in general would benefit from the inclusion of a student with spina bifida in the regular school. He analysed the debt and the economic structures of the school in conjunction with the proposed estimate for the cost of the renovations and found that the school had grossly exaggerated Scarlett's needs and that the school could afford the minimal changes required for the more realistic time estimation of six years. The application for exemption on the grounds of unjustifiable hardship was, consequently, rejected by the Human Rights and Equal Opportunity Commission and again on appeal by the Federal Court of Australia.

There are currently no clear guidelines that will ensure a baseline of consistency for parental expectations or for schools to feel confident about decisions they make about accommodation that may or may not be reasonable. The process of negotiating accommodation may also be emotive, contentious and complex. At the very least, this will require a high level of communication skills from the principal, a comprehensive understanding of the principles of due process and a framework for decision making that reflects the objectives of the legislation.²⁶ Unlike the government and education authorities from the United States which have legislated for due process and mediation there are currently no similar services, procedures or policies in Australian schools that ensure natural justice principles are followed and positive and productive communications are maintained.

In a report from the disability sector's response to the draft Disability Discrimination Standards for Education, the unjustifiable hardship clause is identified as a 'core tool of discrimination' (p5). The Queensland submission from Parents of People with a Disability also claims that the clause legitimises discrimination. Their argument is that the claimant may be successful and prove a case where discrimination has occurred only to find that an appeal on the grounds of unjustifiable hardship may determine that the discriminatory practice is lawful.

In *Hoggan*, Commissioner Innes clarified the parameters of the unjustifiable hardship clause further when he suggested that it would be difficult for an education authority with a multi-million dollar budget to justify an exemption on the basis of unjustifiable hardship (p77). In all cases,²⁷ the educational experience for the student with a disability is highly valued and is the most important consideration in determining whether the costs of any accommodation is reasonable or whether it may cause unjustifiable hardship.

Litigation Trends and the Management of Inclusion in Australia

At this point in time, Australia has not experienced the same 'flood' of special education, litigation that is prominent in the United States. A complex complaint based, appeal process, unwanted

expense and publicity, the exemption clause of 'unjustifiable hardship' and the increased level of stress associated with lengthy court cases (Flynn, 1997) are some of the factors that make Australia's historical trend of reduced litigation in special education unique amongst other common law countries.

Anti-Discrimination Commissions in each state and territory and the Human Rights and Equal Opportunity Commission at the Commonwealth level all rely on the personal complaints method. A conciliation process is required by the legislation to be initiated after a student or a parent who feels that they have been discriminated against makes a formal complaint. The Commission is then obliged to collect a significant bulk of data so that interpretations may be lawful, decisive and fair. Consequently, it is not uncommon to have a time delay of eighteen months to two years before a hearing may be determined. This causes extreme stress for both the parents and the school representatives and disruptions in communications are not uncommon (Flynn, 1997).

In an attempt to address the inadequacies of the complaint-based system used in Australia, Innes (December, 2000a) has suggested that consideration must be given to faster resolutions if the objects of the *Disability Discrimination Act* are to be achieved. He raises the possibility of 'regulatory relief' in which the educational authority may be granted a specific amount of time to systematically address the issue of discrimination raised by a complaint. The education authority would remain accountable to the Human Rights and Equal Opportunity Commission while due processes may be formalised or educational programmes implemented that effectively reduce discrimination in schools.

The broadly inclusive statements included in the Education Acts in each state proactively promote the principles of inclusive education but they do not translate easily into lawful and effective school management practices. Lindsay (1997) has claimed that there is a discrepancy between the inclusive ideals stated in the legislation and the level of commitment required for the lawful management of inclusion. This discrepancy creates a tension for principals who then have to rely heavily on good management practices rather than policy documents to prevent litigation. A limited knowledge of the law (Stewart & McCann, 1999), inexperience as a principal (Stewart, 1998), challenges from changing educational priorities such as educational accountability and competition for the educational dollar (Barton & Slee, 1999; Parrish, 2001; Pullin, 1999) discriminatory attitudes and undervalued relationships with parents (Flynn, 1997) are all management factors that contribute to discriminatory practices and behaviours in schools and, consequently, litigation.

There is a growing body of evidence to suggest, however, that the Australian trend of minimal litigation is changing. Parents, students, teachers, political and advocacy groups have raised the awareness of discriminatory practices in schools, workplaces and the community. In the 1999-2000 Annual Report for the Human Rights and Equal Opportunity Commission there were fifty-one (51) complaints made about discrimination in education. The 2000 Annual Report of the Queensland Anti-Discrimination Commission confirmed an escalation in litigation and added that the disability discrimination cases in education were also becoming increasingly unique and complex and that there was an increasing incidence of cases proceeding to full court hearings.

Clearly, the need for principals to provide discrimination-free educational services and to manage inclusion effectively is becoming increasingly important.

In summary, this article has identified the fact that different legislation in the United States and Australia has not changed the nature of the issues that each of these countries has to manage to provide safe, effective educational services for students with disabilities. Aspects of the IDEA have been analysed and although the expectations for the management of inclusion in schools is much clearer in this legislation, it does not result in a reduction of the number of court hearings and there is no empirical evidence to suggest that discrimination is reduced. Issues of recurring concern for parents and schools in both Australia and the United States have changed in focus from access and enrolment to more complex management issues that relate to the provision of quality educational experiences, medical services, behaviour management, suspension and exclusion. The increasing autonomy of schools through school based management and the increasing complexity of the management of inclusion raise the level of urgency that issues associated with the provision of educational services for students with disabilities deserves careful and considered legal and educational attention from all principals and school administrators.

Keywords

Inclusion; disability discrimination in education; human rights of children.

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Endnotes

1. *The Pennsylvania Association for Retarded Children v. The Commonwealth of Pennsylvania* 334 F.Supp.1257 (U.S. District Court, E.D. Pennsylvania 1972)
2. Rehabilitation Act, 1973 # 794d (f).
3. For example: *Mills v. D.C. Board of Education* 384 F. Supp. 866 (District Court of Colombia 1972) and *Honig, California Superintendent of Public Instruction v. Doe* 484 U.S. 305, 108 S.Ct.592, 98 L. Ed. 2d 686 (1988)
4. *Roncker v. Walters*, 700 F2d 1058 (Sixth Circuit. 1983)
5. *ibid* at 1063
6. *Daniel R.R. v. State Board of Education* 874 F.2d 1036 (Fifth Circuit 1989)
7. *ibid* at 1049
8. *Oberti v. Board of Education* 995 F.2d 1204 (3d Circuit 1993).
9. *Sacramento City Unified School District v Rachel Holland* 14 F. 3d 1398 (Ninth Circuit. 1994)
10. *ibid* at 880
11. *ibid* at 881
12. IDEA, 20 U.S.C. 140 1 (a) (17).
13. *Irving Independent School District v Tatro* 468 U.S. 883 (1984)
14. *Cedar Rapids Community School District v. Garret F.*, Supreme Court of the United States, (1999).
15. See for example: The Universal Declaration of Human Rights, 1948; The United Nations Declaration on the Rights of Mentally Retarded Persons, 1972; The United Nations Convention of the Rights of the Child, 1989; The World Conference on Education for All, 1990; The United Nations Standard Rules for the Equalisation of Opportunities for Persons with Disabilities, 1993; and The Salamanca Statement, 1994.
16. Section 504, *Rehabilitation Act* 1973. Subpart A. Reg. Sec.104.3 (j).
17. See: *Alex Purvis on behalf of Daniel Hoggan v. The State of New South Wales (Department of Education)* 2000 [HREOC]
18. *Finney v. The Hills Grammar School* [1999] HREOC (20 July 1999)
19. See: *Alex Purvis on behalf of Daniel Hoggan v. The State of New South Wales (Department of Education)* 2000 [HREOC]
20. See S6 DDA 1992 (Cth)
21. See: *Mrs J, on behalf of herself and AJ v. a School* [1998] HREOC (23 March 1998).
22. *'P' v. The Director-General, Department of Education.* [1997] Queensland Anti-Discrimination Tribunal (13 March 1997)
23. *'I' v. O'Rourke and Corinda State High School and Minister for Education Queensland* [2001] QADT (31 January 2001)
24. Section 6, DDA, 1992.
25. *Marita Murphy and Burkhard Grahl on behalf of themselves and Sian Grahl v. The State of New South Wales (NSW Department of Education) and Wayne Houston* [2000] HREOC (27 March 2000)
26. *'I' v. O'Rourke and Corinda State High School and Minister for Education for Queensland* (2000) provides a good example of the complexity of this process.

27. See for example: *Finney v. The Hills Grammar School* [1999] HREOC (20 July 1999) and '*P*' v. *The Director-General, Department of Education*. [1997] Queensland Anti-Discrimination Tribunal (13 March 1997).