

Issues in Australian Disability Discrimination Case Law and Strategic Approaches for the Lawful Management of Inclusion

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Abstract

This paper identifies issues from Australian case law that are associated with the management of the inclusion of students with disabilities in Australian schools. Examples from disability discrimination case law are analysed and discussed according to the contexts of the student and school situation and the requirements of the law. Strategic approaches for the lawful management of inclusion are then suggested so that schools and principals are able to proactively manage inclusion and reduce the incidence of unlawful disability discrimination in schools.

Introduction

The inclusion of students with disabilities in regular classroom settings has been increasing at a steady rate in the past two decades. Before this time a disability was regarded as a medical deficit and students with disabilities were either ignored and remained in home care or placed in separate medical institutions where the focus of support services was daily care through medication or therapy rather than education. Eventually, those students with disabilities who were able to access the regular school setting were quickly considered as ‘different’ and separate, special schools were developed to cater for their educational needs.

Integration trends for students with disabilities in the 1980’s showed little understanding or sensitivity to the unique needs of students with disabilities (Lipsky & Gartner, 1997; Parsons & Tait, 1994b). According to Banks and Kayess (1999) the behavioural, social and learning norms that were used to establish rules and expectations by schools had the effect of systematically excluding students with disabilities from access and participation in school activities and learning. Integration was, therefore, a form of assimilation that lacked the basic philosophical commitment to valuing all students and reducing the barriers to learning that students with disabilities experienced. Poorly planned and minimally resourced integration experiences also created pedagogical difficulties for school administrators and teachers who believed they were not qualified or experienced to modify school culture, practices, or curriculum to accommodate a broad range of student learning needs or maximize learning outcomes.

Today, students with disabilities are part of the diverse student population that is recognised by schools through the broad term inclusion. The paradigm of inclusion purports to address the inadequacies of previous integration policies and to develop a whole school approach to

inclusion including: school cultures that create a welcoming sense of belonging for all students; school policies that reduce barriers to learning, attendance and participation; and school practices that are based on respect for all individuals and an appreciation of diversity (Booth, Ainscow, Black-Hawkins, Vaughan, & Shaw, 2000). Inclusion is therefore, a complex process that involves all members of the school community and requires strategic planning, policy development, adequate resources, professional development and effective implementation. It is not surprising, therefore that school administrative systems in Australia are at various levels of competence and experience in the proactive management of inclusion, particularly those aspects of inclusion that have requirements established within the legislation.

The introduction of Anti-discrimination legislation in all Australian jurisdictions provided the opportunity to address the inequities experienced by students with disabilities in all aspects of education and to provide complaint-based remedies for unlawful discrimination on the ground of disability. The objectives of the legislation in particular provide motivation for schools to become aware of the way that stereotypical attitudes and beliefs can negatively influence decision making and to ensure that students with disabilities are able to join equally in belonging to a school culture, participating in all activities and sharing success and learning with friends and colleagues.

This paper addresses the relationship between the requirements of the disability discrimination legislation and the legal risk management of inclusion in Australian schools. Section one identifies discriminatory attitudes and behaviours as the most common recurring concern in disability discrimination cases particularly as they relate to enrolment, suspension or exclusion, and participation. Legislative requirements are analysed and reference is made to case law to illustrate current management practices. Strategic approaches to reduce the possibility of discrimination are also recommended for each of the above issues. In section two of the paper a model for the proactive legal risk management of inclusion is developed and explained. In this model, the prerequisites for the lawful management of inclusion are discussed before the processes that are involved in case management are identified and the final strategy of appropriate support is suggested.

Discriminatory Attitudes and Behaviours

Behaviour that amounts to unlawful discrimination often involves stereotyping and negative assumptions that are made without foundation in fact. Stereotypes provide individuals with a convenient and powerful cognitive framework that is congruent with their own expectations of society, people, groups and power. Information about different groups or individuals in society is selectively sorted according to predetermined stereotypes rather than rationalized according to evidence or data. This framework reinforces expectations to the extent that some people prejudge others to maintain the status quo of who belongs to the 'in group' and who should be relegated to the 'out group' in society. In the school context, therefore, decisions involving stereotypical assumptions about a student with a disability will have the consequences of simplifying the complexities of the disability through broad generalizations and also relegating the student to the 'out group' by minimizing their access to power, decision making, services and support. In *Finney v Hills Grammar School*, for example, decisions were based on broad generalizations about the condition called Spina Bifida and limited data was collected about the student's actual needs, the

nature of the disability and the impact on learning. Stereotypical assumptions about the disability and the student resulted in the school refusing the student's enrolment. The student did not belong to the 'in group' or dominant culture of able-bodied members of the school community.

As highlighted above, students with disabilities have always belonged to an 'out group' in schools and society. Their exclusion from regular school settings reinforced and compounded the stereotypical belief that many of these students were unable to learn. The medical model of disability provided the organizing factor for teachers and others to maintain an understanding that intellectual and physical disabilities were deficits and little could be done for students to assist their learning (Oliver, 1996). For many years this powerfully incorrect assumption entrenched the perception that students with disabilities should not attend regular schools and, consequently, a disproportionate number of students with disabilities were excluded from the regular school settings.

Commonwealth and State Anti-Discrimination laws such as the *Anti-Discrimination Act, 1991 (Qld.)* and the *Disability Discrimination Act, 1992 (Cth.)* were introduced to address aspects of unlawful discrimination including negative stereotyping. Disability Discrimination laws aim:

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 Act, 1992. Section 3)

For example, in *Finney v Hills Grammar School* (1999), the Hearing Commissioner found that the school had discriminated against the complainant by refusing her enrolment. He found that stereotypical attitudes from the principal and the school had contributed to unlawful discrimination in that the principal of the school had relied upon negative stereotypes of the medical condition of spina bifida, rather than obtaining an independent professional assessment of the student's physical and educational needs. According to the Hearing Commissioner the principal then based his decision not to accept the student's enrolment on a 'worst case scenario', which included the construction of lifts, pathways, wide doorways and toilets. The Commissioner rejected the school's claim that the costs needed for reasonable accommodation would be in excess of one million dollars because this level of accommodation for the student was held to be unnecessary. This determination was subsequently upheld by the Federal Court.

In *Purvis*, the Hearing Commissioner found the principal responsible for not dispelling negative stereotypes held by the teachers. The teachers demonstrated a prejudicial bias against the student when decisions were made to reject the student's application for enrolment without informed advice about the student's learning and behavioural needs. In these circumstances there was evidence that ignorance and stereotyping had informed the decision-making process because an Individualized Behaviour Management Plan was developed for the student without access to information from experts in the fields of behaviour management or special education and the foster parents were not consulted about the conditions or consequences of the plan. The Hearing

Commissioner in *Purvis* claimed that these attitudes contributed to the failure of the inclusion experience for the student. He awarded damages for unlawful discrimination in favour of the complainant and recommended that the teachers undergo professional development to improve their understanding of the philosophies and practices of the inclusive curriculum. It is important to note, however, that the finding of unlawful discrimination by the Tribunal was subsequently overturned when the Commissioner's decision was appealed to the Federal Court.

In both cases, the purpose of an independent, professional assessment would have been to reduce the possibility that the school administration or teachers might make prejudicial decisions based on stereotypical assumptions. It seems likely that if schools are able to receive accurate and informed advice on the current nature of a student's disability and the educational needs of each student then stereotypical assumptions are less likely to impinge on decision-making. Slee (2001), on the other hand, warns that the language of experts in the special education field, is used to perpetuate myths about disability and that 'disabled people become clients, their behaviour proscribed and explained by officials' (p389). Official reports have the potential to focus on the differences created by the social expectations of the disability and to ignore the complex features of personality, interests, abilities and learning that the student with the disability shares with all other students.

Labelling or categorizing is another inevitable outcome of the process of accessing expertise for the purpose of providing information and advice about the implications a disability may have for a student, the teacher and the school. Minow (1990) raised a number of concerns about labelling humans or their behaviours when she suggested that labelling theories were based on deviance and that this stigmatised the person as someone who did not belong to the majority group in society. Labelling, like stereotyping, applies unclear definitions or criteria to show how an individual deviates from an unspecified norm in society. Artificial boundaries are created that entrench the negative social response to the student with the disability and reduce the potential to explore more positive relationships.

Minow (1990) also suggested that while labels and stereotypes appeared to reduce anxiety and restore order in circumstances that could be very complex and confusing they also had the effect of creating a false truth or legitimacy because of the broad generalisations they were based on. Flynn (1997) confirmed this finding when she reported a mixed response from parents about labelling but she also added that certain disability categories, and consequently, the students that were identified by them, received more negative responses from school administrators and teachers.

When my child was enrolled, he was labelled an ADD student, a troublemaker. I was then also labelled a bad parent. Further on into his schooling his behaviour was assessed by a therapist, who then labelled him as autistic. I was then labelled a remarkable parent for my parenting skills with my child and was given greater assistance for his needs.

Mother of nine year old boy with autism (p17).

Strategic Approaches for the Lawful Management of Inclusion:

- Promote inclusive school cultures in which difference is accepted as a reflection of the diversity of all humans and each student is welcomed as a unique member of the school community.
- Build confidence and skills in teachers and school administrators by providing professional development in the philosophies and processes of the inclusive curriculum.
- Develop and implement strategies to improve the articulation and understanding of parents' perspectives on education and which promote effective communication between all relevant groups.
- Provide professional development for teachers and school administrators to improve communications and relationships with parents/ caregivers and students.
- Acknowledge that litigation in courts and tribunals should be a last resort and that wherever possible primary dispute resolution should take place within the school community and by non-adversarial means.
- Establish processes that allow the voices of students with disabilities to be heard, acknowledged and affirmed as well as those of their parents/carers.

Enrolment Practices and Processes

Enrolment practices and processes have been identified in both the United Kingdom (Harris, 2000) and the United States (Osborne, 2000) as the most contentious areas of concern for the non-discriminatory education of students with disabilities. Although enrolment is also a significant source of contention in Australia, the situation for students with disabilities is a little different. Unlike the United Kingdom or the United States there is no legislative authority which mandates inclusive education in Australian schools and there are few formal policy statements declaring that all students with disabilities should be educated beside their non-disabled peers to the maximum extent possible (Ahern, 1997). Instead, the parents or caregivers of students with disabilities rely on the good will of the school or education authority and upon the deterrent effects of legal prohibitions on the ground of disability. (Keeffe-Martin, Lindsay, & Stewart, 2001). This creates an uneasy relationship, particularly when good will does not extend to the provision of inclusive education and disability discrimination legislation provides a means of redressing discriminatory policies and practices.

Section 22 of the *DDA 1992 (Cth.)* provides that it is unlawful for an education authority to discriminate against a student with a disability by refusing or failing to accept the person's application for admission as a student or in the terms or conditions on which the education authority is prepared to admit the person as a student. Evidence compiled by Christine Flynn (1997) however, documents that Australian schools often use dissuasive enrolment strategies to avoid the enrolment of a student with a disability and these can range from blatant refusal to subtle discouragement. Flynn quoted a mother as saying:

I went to 15 schools before finding one that would take my child, and still then I was only offered partial enrolment. I could not be fussy as I had limited choices.
Mother of a six year old child with an intellectual disability (p.15)

Other conditional enrolment strategies identified in Flynn's (Flynn, 1997) study included: enrolling the student on a trial basis; asking the parent to be available to visit the school at recess or lunch or the student should go home during these times; that the student should only be allowed to attend for a limited number of hours or days per week; or that the parents should be available to provide toileting or feeding assistance through the day (p15).

It has already been identified that stereotypical attitudes and beliefs contributed to unlawful discrimination against a student with a disability in *Finney v Hills Grammar School* (1999). The school argued that the discrimination was not unlawful pleading the defence of unjustifiable hardship. In responding to the plea of unjustifiable hardship the Commissioner weighed up the costs and benefits to all parties involved. Section 11 of the *DDA* identifies some of the requirements to be considered by tribunals in determining unjustifiable hardship: These include:

- the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
- the effect of the disability on the person concerned; and
- the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.

In considering the complex matrix of factors that impinged on all individuals and groups to determine whether the student's enrolment would cause the school an unjustifiable hardship, the Hearing Commissioner's first priority was to identify and clarify the importance of the educational experience for the child and the inclusive experience for the other students at the school. The Hearing Commissioner accepted evidence that for religious, social and educational reasons the parents considered the school highly desirable for their child. Additional evidence concerning the student's current schooling indicated that she was not a disruption in class and her learning needs were not beyond the skills and abilities of the teachers in the school. The Tribunal accepted that the student's enrolment at the school and her inclusion in the school community would have a positive impact on the school environment for all students and teachers.

The financial circumstances of the school were analysed in conjunction with the quoted costs for the estimated modifications that the school had determined would be needed should the student's enrolment be accepted by Hills Grammar School. The Hearing Commissioner found that the costs of modification claimed by the school were exaggerated and in these circumstances the claim of unjustifiable hardship failed. This decision was also upheld on appeal.

In *Purvis v New South Wales* (2000) the staff at a high school in New South Wales made stereotypical assumptions when they voted to delay an enrolment application for a student with a brain injury and challenging behaviours. At the time of the vote, no formal assessment had been made of the student's educational needs and many of the staff had not yet met or taught the student concerned. At the Hearing, it was found that the teachers had been instrumental in the failure of the

inclusion experience for the student on the grounds that staff formed and maintained negative opinions about the student without any substantial data, valid evidence or reliable information and that the school did not provide this information to its staff.

Valid and reliable information is therefore essential in reducing the possibility that principals and teachers may be influenced by negative stereotypes, however, delaying enrolment decisions while the students' needs are being assessed creates a difficulty for both the student and the school. Unlike the United Kingdom and the United States that have legislated for the inclusion of the student in the nearest local school while educational assessments are completed, in Australian jurisdictions there is currently no legislative guidance about the timing of the assessment of the educational needs of the student or placement decisions during the assessment period. This can be illustrated by the *Purvis* case in which the student commenced school ten months after his application for enrolment was first submitted. The consequences of the delayed enrolment were compounded by the fact that no educational assessment of the student's needs had been completed at the time he commenced attendance at the school.

Comprehensive, accurate, informed educational assessments provide essential information for the school to identify and address the educational needs of each student. In this way the unique combination of learning, behavioural, health care and safety requirements for the student and the impact of the disability on their learning needs are recognised and more effectively addressed through a non-discriminatory management process.

Strategic Approaches for the Lawful Management of Inclusion - Enrolment:

- Develop formal enrolment processes and procedures in which collaborative negotiations are documented and reasonable timelines specified. Requirements for accurate and comprehensive educational assessments should be specified so that informed decisions may be made about the unique educational needs of each student.
- Establish a principle of cooperative sharing of information between parents, experts and teachers. In some circumstances, parents or students may choose to lawfully withhold information concerning a student's disability, however, the consequences of such action should be specified in the enrolment application documentation and other policies.
- Require all education authorities or schools to provide timely, professional educational assessments of students with disabilities and make a provision for payment of independent and expert assessments if this is required.
- Require as a matter of policy that independent assessments be completed within a specified period of time once an application for enrolment has been received.
- Require documents detailing the enrolment policy and processes be made publicly accessible and available to all parents/caregivers and the community as a matter of course.
- A committee of independent decision makers who are informed about the requirements of the law and enrolment policies should be convened to consider all appeals about decisions concerning enrolment. This approach is taken in the United Kingdom where the Special

Education Needs Tribunal is able to hear appeals in a timely, convenient and inexpensive process.

- All decisions concerning enrolment must involve discussions with parents/caregivers so that collaboration about enrolments and the provision of educational services may be open and transparent and reflect the processes identified in the enrolment policy outlined above.
- Formalize a mediation process so that communications between all parties is maintained and disruption to the student's school life is minimized.
- Establish a mediation service that consists of a panel drawn from representatives of educational and community groups who are informed about disability issues.
- Require each Education Authority to provide access to an independent mediation service that resolves difficulties within a specified time frame and that these decisions are given credibility within the State and Commonwealth formal appeal processes.

Suspension and Exclusion

The Commonwealth *Disability Discrimination Act* 1992 (Cth.), and analogous State and Territory statutes prohibit the suspension or exclusion of a student on the ground of a disability. For example, section 22(2) of the *DDA* provides that it is unlawful for an educational authority to discriminate against a student on the ground of the student's disability by suspending or expelling the student.

In *Purvis* the difficulties attendant on the suspension and exclusion of a student with a brain injury are illustrated. The critical legal issue for the Human Rights and Equal Opportunity Commission in this case was the determination of a causal nexus between the disability and Student's challenging behaviours. A child neurologist was able to explain the implications of the student's brain injury:

The major part of his difficult behaviour would be disinhibited and uninhibited behaviour. That is, your frontal lobes are very important for you to smooth out emotional ups and downs, to cope with emotional crises in a relatively even way. So he would be likely to have a flare of temper which he wouldn't be able to control as well as a child of his age and with this degree of intellectual handicap who did not have those particular frontal lesions (p7).

Once the causal nexus had been established, the tribunal had to determine whether the school had treated the student less favourably by suspending and excluding him because of his disability. To do this, the tribunal scrutinized all aspects of the management of the student's learning and behaviour and identified a number of factors that contributed to less favourable treatment and eventual expulsion. For example, the student's Individualised Behaviour Management Plan was developed before he started at the school without access to informed or expert advice or consultation with his parents concerning the student's behaviour. Assumptions were made in the IBMP that resulted in strategies that did not constructively address his behavioural needs. The Commissioner identified a number of other concerns with the plan and suggested that the inflexible approach from the school also escalated the student's progress through

the suspensions to exclusion within a short period of time. The Commissioner also found that the plan was not reviewed after the student had attended the school initially, was not responsive to his positive behaviours or strengths and did not consider contextual issues that may have been avoided if the implications of the student's disability had been understood and his behaviour reliably documented. Clearly policy documents outlining priorities, processes, practices and review structures are needed for all schools that have students with disabilities who exhibit challenging behaviours so that the complex process of discrimination-free behaviour management may be managed effectively.

Eventually, the student's behaviour deteriorated and he was suspended five times in his first (and only) year of high school before being excluded from the school. Under the provision of the *Disability Discrimination Act 1992* the Human Rights and Equal Opportunity Commissioner found that Student's suspension and exclusion were unlawful.

Commissioner Innes summarized the impact of the exclusion:

Whatever the cause, the consequence for (the student have) been that he has not had the benefit of a secondary education with his peers and neighbours. In fact, as with many other people with disabilities before him, he has been excluded from that opportunity. This exclusion has been a great loss to Student, and will affect him for the rest of his life (p96).

Although no official data is available about the number of students with disabilities in Australian schools who have been suspended or excluded there is no reason to suggest that the pattern of disproportionate exclusions identified by Harris (Harris, 2001) in the United Kingdom may not be evident in Australia.

The findings of the Commissioner were ultimately overturned on appeal to the Federal Court. In a highly formalistic judgement that, in my opinion, failed to take sufficient account of the objectives of the disability discrimination statute and displayed a complete misunderstanding of the complex nature of the student's disabilities, Emmett J. overturned the Commissioner's decision. The Full Court of the Federal Court subsequently upheld this judgement. In both decisions, attention was given to the multi-faceted definition of disability in the *DDA*. The Court engaged in a narrow, arguably arid exercise in statutory construction that completely failed to account for the many and varied contextual factors that had been so pointedly highlighted in the determination of the Hearing Commissioner.

The decisions in the cases discussed here send confused and inaccurate messages about students with disabilities and how the policy and practice of inclusion should be managed.

Strategic Approaches for the Lawful Management of Inclusion – Behaviour Management

- Each education authority should develop behaviour management policies specifically for students with different disabilities to inform teachers and school administrators of the requirements of Disability Discrimination legislation.

- A process of behavioural assessment and a well-defined management program is required that specifies a range of personnel to be involved in the development of each Individualized Behaviour Management Plan. The content of the plan should include: learning and behavioural objectives; implementation; circumstances for review; issues that relate to safety and maximizing learning outcomes; authorizations required; suspension and exclusion procedures; reporting and appeal processes.
- Strategies, support and professional development are recommended for teachers experiencing difficulties managing students with challenging behaviours.
- A regular process to review current Individualized Behaviour Management Plans should be specified to assess the adequacy of the plans particularly when students experience difficulties.
- An independent panel of appeal experts should be consulted to review suspension/expulsion decisions made by schools or education authorities so that timely responses to complaints by parents/caregivers are provided and the principles of natural justice are implemented. Panel members should be informed about disability discrimination legislation, disability issues, policies and practices. Parents/caregivers should have the right to access the independent appeal body if they feel aggrieved by a decision. The panel will focus on the specific contexts of each situation and collaboratively negotiate options before making any recommendations. Recommendations from the panel that are implemented by the school or education authority may be viewed favourably by the Commission should the complaint progress to a formal hearing.
- Alternative educational provisions for students with disabilities who have been suspended should be provided.
- Documentation should be maintained by each school and education authority about the number of students with disabilities and challenging behaviours who are suspended or expelled. Strategies should be implemented to reduce the incidence of suspension or expulsion of students with disabilities.

Participation

Unlike the educational experiences broadly offered to most students to learn, enjoy, grow and achieve through educational experiences, participation for students with disabilities, it seems, is at the end of a long road of acculturation and identity building on behalf of the school. The social context of disability described in Booth et al. (2000) suggests that if the student with a disability is able to feel welcomed and valued as a member of the school community then it is more likely that participation in school activities will become meaningful, challenging and enjoyable. Flynn (1997) however, provides information that the reverse is also true and that discriminatory behaviours are powerful tools when used to isolate and exclude. She questions the social purpose of actions such as excluding students with disabilities from the school photos (p22) and claims that teasing, bullying and harassment are common features of school life for many students with disabilities.

My child was made to stand out in the front of the class while the other class members said why they didn't want my child in their classroom. The teacher then suggested they vote on the matter and he was voted out.

He didn't want to go back to school after that and would often make himself sick so he wouldn't have to go

Mother of an eight year old boy with ADD (p25).

To reduce the possibility of discriminatory behaviour, schools are obliged to provide reasonable accommodation for students with disabilities so that they can participate equally in educational experiences. The case of *I v O'Rourke and Corinda State High School (2001)*, illustrates an effective framework for non-discriminatory decision making in a secondary school setting. Three complaints of discrimination were made that related to "T's" participation in the school ball, the school graduation dinner and an excursion to an island to study tourism during "T's" final year at school and two were found to be not unlawful.

In the event of the school ball the school was asked to justify the selection of a venue for the ball that was not wheelchair accessible. A panel of students, parents and teachers experienced in organizing the school ball was convened to find a venue that provided access for all students. The panel also identified other criteria that influenced the choice of venue and these included: the dance floor had to be able to accommodate over 300 people at once; expense was a factor as the students paid for the evening themselves; and venues that served alcohol had to be avoided. A number of venues were reviewed before the panel decided to return to the original decision to hold the school ball at the Greek Club. The school then began to identify the barriers to equal participation and reduce these so that all students could enjoy the educational experience of the ball.

The accommodation that the school implemented included: maintaining a constructive dialogue with the parents; inspecting alternative sites suggested by the parents, paying for a stair climber at the venue, providing direct supervision while the student was on the stair climber; reviewing the safety and operation of the stair climber with the occupational therapist; testing the stair climber; providing a teacher aide for assistance with toileting and eating and requesting the attendance of the Advisory Visiting teacher for the Physically Impaired as attendant for "T".

The Tribunal found that the school had minimized the barriers to participation to such an extent that the student was able to attend the ball and enjoy the occasion with her peers and consequently, neither direct nor indirect discrimination had occurred.

In relation to the school dinner, the school followed the same process of identifying barriers to participation and working towards reducing the impact of these barriers so that all students could enjoy and participate in the school dinner. In this situation, the school dinner was to be held on a barge in the Brisbane River. Barriers to participation included wheelchair access to the barge and toilet facilities. To reduce these barriers the school implemented a range of strategies that included: the industrial technology class constructed a portable toilet facility; screens were provided for discretion; the school paid for access ramps that were wide enough for the wheelchair and extra staff were hired by the venue managers to provide safe, responsive services if necessary. Again, a positive dialogue was maintained with the parents. For these reasons, the Tribunal found that "T" had not been discriminated against.

In the event of the excursion to Tangalooma Island, however, the Tribunal found that the school had directly discriminated against the student. The school considered a number of strategies to reduce the barriers that prevented access and participation in the island excursion. These included: the cost, convenience and safety issues of loading the student and wheelchair onto the boat with a fork lift; travelling overland by four wheel drive from another barge servicing the island; locating a suitable four wheel drive for loading and disembarking; and the cost, availability and safety issues related to hiring a helicopter. The school offered an alternative excursion to a local shopping centre for those students who were unable to attend the island excursion. The school decided that the transport, health and safety issues were significant and that the student's needs were unable to be accommodated. The school recommended that "T" attend the alternative excursion at the local shopping centre.

Again, the school had made extensive enquiries about possible accommodation for the student's disabilities and followed the same non-discriminatory processes in weighing the evidence of educational gain, safety, expense and dignity that they had applied in previous situations, except that they had not involved the parents in all of the direct deliberations and they had not gained professional advice about the health and safety issues that made the excursion prohibitive. The Tribunal held that the decision to exclude the student from the island excursion and offer a place at the shopping centre excursion amounted to direct discrimination because the barriers to participation were not reduced and the processes followed in making the decision were not discrimination free.

Strategic Approaches for the Lawful Management of Inclusion – Participation

- Education authorities should draft and implement inclusive education policies that are premised on the principles of inclusion and identify participation by all students as the goal. Schools should apply the principles within this policy to develop school policies that identify local community needs to maximize participation by all students within the school community.
- Education authorities should systemically and systematically review school activities and educational experiences to ensure that participation for all students is maximized.
- School committee structures should be informed of the requirements of the disability discrimination legislation and their interpretations to ensure that the processes for natural justice and collaboration with parents/caregivers are emphasized. Communication processes with parents/caregivers and students should be formalized in school policy documents.
- Schools should be informed of processes required to identify barriers to participation and strategies to reduce these barriers to maximize participation wherever possible and minimise discrimination.
- Education authorities should provide professional development for teachers and school administrators in the principles of participation and the critical role of parents/caregivers and students.

- Parent/caregiver liaison roles within schools should be emphasized to educate teachers and school administration about disability issues and to promote positive relationships between schools and parents/caregivers.

The first section of this paper has addressed the disability discrimination legislation and analyses some of the interpretations made from the legislation in recent case law. It is immediately apparent that the simple language used in the legislation does not reflect the complex process of decision-making required to provide discrimination-free educational services for students with disabilities. The range of strategies we have recommended to ensure equality of access and participation are further evidence that the lawful management of inclusion is complex and, as examples from case law show us, for some principals in schools this process is overwhelming. The next section of this paper draws together the common threads from disability discrimination legislation and case law interpretations to provide a framework for the legal risk management of inclusion. From this model, principals in schools will be more readily able to plan proactively for the management of inclusion to maximize access and participation for students with disabilities and reduce the potential for litigation.

The Legal Risk Management of Inclusion Model

The pivotal role of the principal in maximising the success of the inclusion experience for students with disabilities has been identified in the literature (Guzman, 1997; Thomas, S., & C., 1997). In particular, principals' attitudes and the level of knowledge of the law and the number of years of experience as a school administrator are critical if inclusion is to be successful and lawful (Stewart, 1996a). Walker and Walker (1997), however, place these essential criteria within a broader context of interrelated tensions that impinge on the way that principals manage inclusion. In particular, they identify four constraints that include: problem solving in schools is business driven and culturally bound; government policies demand accountability and a fiscal response; values and attitudes that shape our schools are entrenched in outdated thinking; and finally, that a conservative functionalist mentality pervades school cultures and reduces the potential for change. Irrespective of the extreme tension that exists in our schools between conformity and diversity, principals in Australian schools are provided with very little information or advice about how to manage inclusion in a successful and lawful manner. In this paper the Legal Risk Management of Inclusion Model (Keeffe-Martin, 2002) is proposed as a framework for the proactive, lawful management of inclusion.

Prerequisite phase

Three important prerequisites for the lawful risk management of inclusion have been identified through the analysis of case law and it is evident that a familiarity with relevant state and commonwealth legislation as an essential starting point. This needs to be followed by a working knowledge of the relationship between school and education authority policies as well as a comprehensive understanding of the principles of inclusion and how stereotypical attitudes and beliefs influence decision-making and school culture. Considered together the three prerequisites provide a sound platform for discrimination free decision-making and the preventive legal risk management of inclusion.

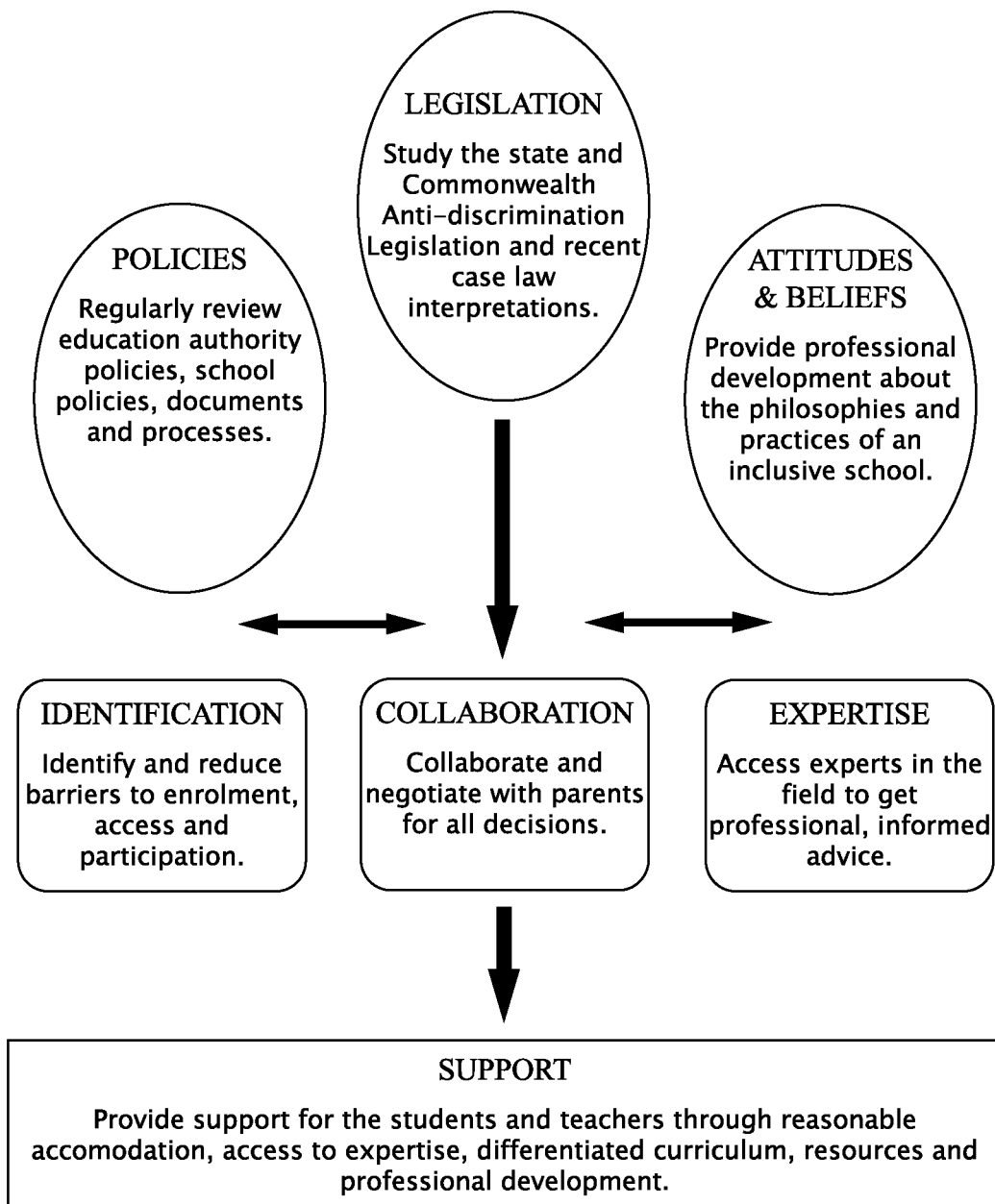


Figure 1: Legal Risk Management of Inclusion Model

Stewart (1996b) has indicated that principals in schools have a limited knowledge of the law and this, in turn, increases stress. This suggests that principals fear the legal consequences of making unlawful decisions but are not adequately informed about how to prevent this. Principals require more information about both state and commonwealth statutes that relate to disability discrimination. In Queensland, for example, principals in schools should be familiar with both the *Queensland Anti-Discrimination Act* (1991) and the *Disability Discrimination Act* 1992 (Cth). It has already been suggested in this paper that the broad objectives of the statutes, namely, to reduce discrimination on the grounds of disability in all educational experiences, mean that the language used in the statutes is deliberately vague and all-encompassing. This creates difficulties particularly in circumstances where the level of knowledge of legal concepts is generally limited. Legal terms such as less favourable treatment and circumstances that may be materially the same require explanation and interpretation for principals before they can be applied with confidence in school management situations.

It is usually the responsibility of the education authority to interpret the requirements of the statutes in policy documents. Like the vague language of the statutes, however, the language in policies reflects the tensions between legislative requirements, future educational directions for schools and society, fiscal restraints, conservative management practices and maintenance of the status quo of the dominant culture. Again the principals' management strategies are caught between the contestations of comfort and familiarity with change and diversity. Lindsay (1997) claims that the language of policy documents that relate to inclusion and the disability discrimination statutes is deliberately aspirational and vague. The policies affirm the principals' philosophical and educational beliefs that all students have a right to equal access to education (Bailey & DuPlessis, 1997) but they also allow the potential for doubt and conditional access. For example, a special education policy that gives every child the opportunity to attend the regular neighbourhood school "where it is possible, practicable and in the best interests of the child" (cited in Lindsay, 1997) is not providing an informed direction that complies with the requirements of the legislation. Instead, it creates a comprehensive, subjective, frustrating and sometimes, contentious decision making process for the principal.

To reduce the level of ambiguity and maximize the potential for inclusion experiences to succeed some schools have chosen proactively to develop their own inclusion policies and statements. Booth et al. (2000) believe that a cultural change in school climate is possible when a whole school approach to inclusion is implemented. In a similar way, schools are able to submit action plans with the Human Rights and Equal Opportunity Commission. These plans are designed by each school to provide the Commission with timelines and budget allocations to comply with the requirements of the DDA. Should a complaint of discrimination be made against the school, the Hearing Commissioner would consider the progress of the plan in the determination of the case. However, to date, only one school in Australia has submitted an action plan, whereas ten schools in Queensland alone have developed their own school inclusion policies and implemented comprehensive whole school approaches to inclusive education.

A significant feature of whole school approaches to inclusion involves comprehensive discussions about values and beliefs (Booth *et al.*, 2000). Professional development for teachers, principals and school administrators in the philosophical principles of inclusion also provides all

school personnel with an insight into the objectives of the disability discrimination legislation. An education program that highlights the influence of stereotypical attitudes and beliefs on teaching, curriculum and management in schools is identified here, as an essential prerequisite to the lawful risk management of inclusion.

Interaction Phase

Introducing the three prerequisites identified above to establish the groundwork for a school climate that is responsive to inclusive policies and practices reduces the potential for principals and school staff to become reactionary and resort to ad hoc strategies when complex situations arise in their schools. The case law analysed in section one of this paper provides examples of ill-informed management practices that create rather than resolve problems. This section of the legal risk management model identifies three consistent features from case law that are grounded in the prerequisites identified above while at the same time encourage principals to remain responsive to the unique needs of each individual case.

Central to the uniqueness of each case is the relationship between the school and the parents/caregivers. Keffe-Martin (1993) showed that parents of children who have Down syndrome felt misunderstood and undervalued when interacting with professionals such as teachers and doctors. Teachers, on the other hand, felt that they were either professionally inadequate or positively motivated by their interactions with parents. In a study of 73 special education teachers in a Brisbane education district, Keffe-Martin (2002) also found that teachers were polarized in their perceptions about their interactions with parents. Approximately 52% identified their interactions with parents as a most rewarding aspect of their jobs while the remainder identified the complexity of issues, a lack of training in counselling skills and insufficient time to provide adequate support, resulted in stressful interactions with parents. Clearly, as far as teachers are concerned, the principal's role involves providing professional development to upgrade skills and formal recognition of the time required to provide quality collaboration with parents.

It is extremely unfortunate that, apart from the complex negotiations between parents/caregivers and schools, the complaints based, legal appeal process in disability discrimination cases is so stressful and protracted that relationships are challenged and often become irreconcilable (Innes, 2000). Essentially, effective communications with parents/caregivers, alone, can reduce the potential for complaint and litigation and should be identified as a priority for principals. In this model, communication skills of effective listening, empathy, collaboration and negotiation are enhanced through knowledge of the principles of natural justice. According to Parsons and Tait (1994a) the rules of natural justice include:

A person has the right to be heard if a decision is to be made which affects the person's interests; and – a decision maker must be disinterested or unbiased in the matter to be decided.

Acting against Disability Discrimination, p181.

In the risk management of inclusion model, collaboration with parents/caregivers is central to both the identification of barriers to enrolment, access and participation and also to accessing to experts in the field. Considered altogether, the three components of the interaction phase of the

model function to provide informed advice to principals so that accurate and relevant educational decisions may be made and the risk of stereotypical assumptions is reduced. Experts in the field such as guidance officers, psychologists, advisory teachers and behaviour management specialists provide information about the barriers to learning and participation for each student and make recommendations about strategies to reduce these barriers.

The range of strategies that may be necessary to maximize access and participation are referred to in the legislation as a reasonable accommodation. Reasonable accommodation may be minor and relate to a change of classroom to a lower level to facilitate access for a student with Perthes, for example. Or they may require more complex accommodation and relate to a number of possible strategies including: changes to pathways and buildings to make them more accessible; changes to timetables or routines; modifications to curriculum; or purchasing equipment or technology to improve communication or learning. Again, informed advice from specialists in the field and quality negotiations with parents/caregivers mean that reasonable accommodation is an informed and impartial educational process of identifying and reducing the barriers to learning for students with disabilities.

Support and Review

The support and review phase of the model ensures that the strategies for reasonable accommodation are sustainable and relevant. Criteria for assessment must include an evaluation of the extent to which the accommodation has reduced barriers to access and participation and possible options to improve the process further. If it can be shown that the student has been able to access the educational experience in the same way as their peers then the accommodation may have been successful. An assessment of how the accommodation may have improved the quality of the educational experience for all students in the school or class may also be helpful. For example, the provision of professional development for teachers to learn sign language may also benefit other language and literacy programs in the school. Strategies to support the relationship with parents/caregivers should also be regarded as ongoing or long term so that parents/caregivers can approach the principal with confidence in the future that their concerns will be listened to and addressed seriously.

In summary, the legal risk management of inclusion model aims to provide a framework for principals to proactively manage inclusion. Through this model principals are able to anticipate issues before they arise as problems and establish inclusive processes and practices that are lawful and effective. The model identifies the common elements required for all principals as prerequisites. This phase of the model aims to provide a responsive foundation for future decisions about inclusion. The second phase recognises the unique quality of inclusive decisions and suggests that the relationship with parents/caregivers is critical to the success of identifying and reducing barriers to learning and participation. The third phase views reasonable accommodation and the relationships established in the long term. Strategies and resources are required for the ongoing benefits for all students, teachers and members of the school community.

References

- Ahern, M. (1997). *Special Education and Human Rights Law*. Paper presented at the Legal and Administrative Management Systems.
- Bailey, J., & DuPlessis, D. (1997). Understanding principals' attitudes towards inclusive schooling. *Journal of educational administration*, 35(5), 428-438.
- Banks, R., & Kayess, R. (1999). *The Disability Discrimination Act: Working towards compliance*. Unpublished manuscript.
- Booth, T., Ainscow, M., Black-Hawkins, K., Vaughan, M., & Shaw, L. (2000). *Index for Inclusion: Developing learning and participation in schools*. Bristol, United Kingdom: Centre for Studies on Inclusive Education.
- Flynn, C. (1997). *Disability discrimination in schools*. Australia: National Children's and Youth Law Centre.
- Guzman, N. (1997). Leadership for successfully inclusive schools. *Journal of Educational Administration*, 35.
- Harris, N. (2000). Great Britain K-12. In C. Russo (Ed.), *The Yearbook of Education Law 2000*. Ohio: Education Law Association.
- Harris, W. (2001). *Claims of discrimination in a school environment: Student rights and school board responsibilities*. Paper presented at the CAPSLE, Vancouver.
- Innes, G. (2000, 6 Dec.). *The Disability Discrimination Act seven years on: Have we had the good years or are they still to come?* Paper presented at the Pathways Conference, Canberra.
- Keeffe-Martin, M. (1993). *Parental Perceptions of Coping when a child has Down syndrome*. Unpublished Master of Education (Special Education), James Cook University, Townsville.
- Keeffe-Martin, M. (2002). *Principals' Perspectives of the Management of Inclusion and the Law*. Unpublished Doctor of Education (work in progress), Queensland University of Technology, Brisbane.
- Keeffe-Martin, M., Lindsay, K., & Stewart, D. J. (2001). Australia. In C. J. Russo (Ed.), *The Yearbook of Education Law 2001* (pp. 346-363). Dayton, Ohio: Education Law Association.
- Lindsay, K. (1997). *Discrimination law and special education*. Paper presented at the Legal and Accounting Management Seminar in School Law, Sydney, Australia.
- Lipsky, D. K., & Gartner, A. (1997). *Inclusion and School Reform: Transforming America's Classrooms*. Maryland: Brookes.
- Minow, M. (1990). *Making all the Difference*. New York: Cornell University.
- Oliver, M. (1996). *Understanding Disability: From theory to practice*. London: Macmillan Press Ltd.
- Osborne, J. A. G. (2000). Students with Disabilities. In C. J. Russo (Ed.), *The Yearbook of Education Law* (pp. 167-195). Dayton, Ohio: Education Law Association.

- Parsons, I., & Tait, S. (1994a). *Acting against disability discrimination*. Unpublished manuscript, Canberra.
- Parsons, I., & Tait, S. (1994b). *Acting Against Disability Discrimination: A practical manual for using the Disability Discrimination Act*. Canberra: Villamanta Publishing Service, Geelong.
- Slee, R. (2001). Driven to the Margins: Disabled Students, Inclusive Schooling and the Politics of Possibility. *Cambridge Journal of Education*, 31(3), 385-397.
- Stewart, D. J. (1996a). Principals knowledge of the law affecting schools. *Australia and New Zealand Journal of Law Education*, 1(1), 111-129.
- Stewart, D. J. (1996b). *The Principalship: A study of the impact of aspects of law on the administration and management of government schools in Queensland*. Queensland University of Technology, Brisbane.
- Thomas, R. A., S., M., & C., M. (1997). Inclusion and School Leadership - Editorial. *Journal of Educational Administration*, 35.
- Walker, A., & Walker, J. (1997). Challenging the boundaries of sameness: leadership through valuing difference. *Journal of Educational Administration*, 35.

