

THE INCLUSION AND EXCLUSION OF STUDENTS WITH DISABILITY RELATED PROBLEM BEHAVIOUR: THE CONTRASTING APPROACHES OF AUSTRALIA AND THE UNITED STATES OF AMERICA

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This article examines the different approaches taken by Australia and the United States of America to the inclusion in mainstream schools of students with disability related problem behaviours. In Australia, students must use discrimination laws to protect a mainstream placement. In the USA, by contrast, there is a federally mandated right to a 'free and appropriate education' in the 'least restrictive environment'. Exclusion of students with disabilities in Australia is achieved through tedious but straightforward administrative action. In the US, 'stay put' provisions protect a student's mainstream placement until it is independently reviewed. It is concluded that the mandating of exclusion by Australian courts and tribunals has reduced the imperative for school administrators to take positive steps that may mitigate problem behaviour and facilitate the inclusion of students with disabilities in the mainstream environment.

I INTRODUCTION

Escalating rates of student misbehaviour and of related student exclusions have attracted recent media interest in Australia. End of school celebrations tainted by violence have resulted in the suspension or exclusion of students in both Sydney¹ and Melbourne² this year. Recent media reports in Queensland suggest that state has seen an alarming spike in exclusions and suspensions from State schools. One report claims that 'Brisbane and Sunshine Coast schools issued 31 per cent more suspensions and 11 per cent more expulsions in 2007-08 than in 2005-06. During the same period, suspensions rose 25 per cent at Gold Coast and Ipswich region schools, and 22 per cent in and around Townsville'.³ The escalating rates of suspensions and exclusions in Queensland have been attributed to a 'get tough' policy on school discipline which mandates compliance with school behaviour codes and focuses on controversial behaviour modification training.⁴ Commentators have sought also to blame student misbehaviour on everything from inadequate school funding,⁵ to poor parenting,⁶ to the intrinsic frailties of the younger generation.⁷ It is uncontroversial, however, that misbehaviour is often related to underlying disability, to behavioural disorders such as Attention Deficit Hyperactivity Disorder (ADHD), to brain disorders such as Aspergers Syndrome and even to brain damage. It is interesting to speculate, therefore, as to whether increased rates of suspension and exclusion are, at least in part, attributable to a perceived increased opportunity to exclude, lawfully, students with disability related problem behaviour from the mainstream school setting.

While education policy documents trumpet the idealistic policy of the 'inclusion' of students with disabilities at mainstream schools,⁸ actually effecting inclusion places individual

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school communities under sometimes enormous financial and social and educational pressures. The problems created by including a disruptive and uncooperative student with disability in a mainstream class room may be mitigated by proper resourcing in terms of staffing and expert support. Such accommodations are, however, expensive. A cheaper, quicker solution is to exclude the disruptive student from the mainstream school environment and to relocate him or her to a special facility designed to cater for ‘special needs’. Since the controversial decision of the High Court of Australia in *Purvis v State of New South Wales*⁹ it is undeniably easier for schools to exclude, lawfully, disruptive students where that disruption is a corollary of disability.

The problem posed by students who display disability related difficult behaviour is not exclusive to Australia. This article compares and contrasts the treatment of students with disability related behaviour problems with the treatment of similar students in an education system which takes a fundamentally different approach to the mainstream inclusion of students with disabilities in mainstream classes — the education system of the United States of America (US). The many differences between the Australian approach and the US approach all flow, perhaps, from one key underpinning difference. In the US, students with disability have a federally mandated ‘right’ to a ‘free and appropriate education’ in the ‘least restrictive environment’.¹⁰ That is, they have a prima facie right to inclusion in a mainstream classroom. In Australia, however, while there is an obligation to attend school during compulsory years of education, there is no legislated universal ‘right’ to education per se, let alone to education in a mainstream classroom.¹¹ Australian students with disability who are denied access to mainstream schooling must rely on the protection of discrimination legislation for a remedy. Only if their exclusion amounts to unlawful discrimination will they secure a mainstream place. The cases demonstrate that it is easier to prove unlawful discrimination where the disability is physical. It is almost impossible, however, where the disability involves disruptive behaviour. It will be seen that to remove a disruptive child from the US mainstream class room requires more than the relatively straightforward, if time-consuming, administrative action that is required to bring about an exclusion in Australia.

II THE AUSTRALIAN POSITION ON STUDENTS WITH DISABILITIES WHO ‘MISBEHAVE’

A *The Administration of Exclusion in Australia: Queensland Exemplar*

For the purpose of this discussion, the policies and processes in the State of Queensland will be analysed as an exemplar of the administrative action involved in a refusal to enrol or an exclusion of a student with behaviour problems. Queensland has recently updated its education legislation¹² and associated policies informed by that legislation.¹³ Queensland was also the first Australian State to entertain legislative challenges to its refusal to provide mainstream placements to students with disability related problem behaviour. The cases of *L v Minister for Education*,¹⁴ *K v N School*¹⁵ and *P v Director-General, Department of Education*¹⁶ informed the reasoning of courts and tribunals, and arguably, the policies and practices of education administrators in other Australian jurisdictions.¹⁷ As noted, above, Queensland has also experienced a recent ‘plague’ of suspensions and exclusions.¹⁸

1 *Independent Schools*

Although Queensland independent schools are regulated by legislation,¹⁹ it should be noted that they are not under any general obligation to accept enrolment from any individual student, subject to their decision not offending anti-discrimination legislation, and are not required to comply with the exclusion policies applicable to State government schools.²⁰ Their approaches

to refusal to enrol or exclusion may therefore be more generous, or, and this is perhaps more likely, less generous than the approach of State schools. Enrolment at an independent school may be subject to a contract which stipulates compliance with a behaviour code as a condition of enrolment. Schools, for example, may enforce a ‘zero tolerance’ policy towards some problem behaviours.²¹

2 *State Schools*

In conjunction with legislative and policy reform of the provision of state school education in Queensland, all Queensland state schools must now have a behaviour management plan in place. A copy of the plan must be provided to all applicants for enrolment.²² The plan is to be informed by an overarching code of school behaviour, generated by the Department of Education, Training and the Arts (Queensland) in order to ensure a ‘consistent standard of behaviour for all state school communities’.²³

The code is given teeth by a hierarchy of penalties for breaches ranging from detention to suspension to exclusion. A student may be denied enrolment at a particular school, or kind of school, or at all Queensland state schools. Thus a student’s options may be reduced to enrolment at an independent school, enrolment at a State special school with behaviour management support structures in place, or even to home schooling.

3 *Queensland Suspension and Exclusion Policies and Procedures*²⁴

A school principal may suspend a student from a Queensland state school for up to 20 days for disobedience, misconduct or other conduct that is ‘prejudicial to the good order and management of the school’. A principal may recommend a student’s exclusion on the same grounds as those applicable to suspension, but where the student’s behaviour is ‘so serious that suspension of the student is inadequate to deal with the behaviour’. Exclusion may also be recommended where a student has contravened a behaviour improvement condition which requires a student to comply with a behaviour management plan designed to address ‘challenging behaviour’.²⁵ The decision to exclude is then made by the principal’s supervisor.

It may be inferred from the Education Queensland behaviour policies and procedures that the usual course of events is that a student is suspended for 1-5 days, then, if necessary for 6-20 days, and then, if necessary, excluded on the recommendation of the principal.²⁶ It is also possible, however, for the Director-General of Education, Training and the Arts to exclude a student without prior suspension. Such an exclusion is authorised where a:

- student's attendance at school or schools poses unacceptable risk to safety or wellbeing of other students or staff of school or schools
- student has persistently engaged in gross misbehaviour that adversely affects education of other students of school or schools.²⁷

The Director-General may exclude a student from ‘a State school, certain State schools or all State schools’. The Director-General may also refuse to enrol a student at a certain, or indeed, at any State school where ‘the student poses an unacceptable risk to the safety or wellbeing of members of the school community’.²⁸ It is interesting, at this point to note that Department policy expressly acknowledges that ‘[i]t is unlawful to refuse a student’s enrolment on the grounds that they have a disability’.²⁹ It will become clear later in this article, however, that this

acknowledgement is not necessarily a guarantee that a student with disability who misbehaves because of that disability will be enrolled at a mainstream school.

A student may appeal against a decision to suspend from 6-20 days, or to recommend exclusion, or to exclude and are advised of their right so to do. At first instance, appeals against suspensions and recommendations to exclude are made to a principal's supervisor. Appeals against decisions by a principal's supervisor are made to the Director-General. The decision of the Director-General is, apparently, final except that, in the case of a permanent exclusion, students may annually seek revocation of the exclusion order until they reach the age of 17. The application to revoke is submitted to and considered by the office which initially made the decision to exclude — the Director-General. In other words, as the maxim goes, 'an appeal is from Caesar to Caesar'.

In order to address concerns about 'due process' and 'natural justice', Department policies and procedures prescribe the appointment of case officers to liaise with and to advise the affected student and his or her family, the giving of notices explaining department proposals and decisions, and stipulate stringent notification and decision making periods. The final decision on all matters rests, however, with the Director-General. There is no opportunity for an independent and impartial review of a disciplinary decision by the Director-General unless a disaffected student takes the extraordinary step of seeking judicial review of the decision making under the *Judicial Review Act 1991*.³⁰

B Case Law Support for the Exclusion of Students with Disability Related Problem Behaviour

There are two varieties of discrimination recognised in Australian legislation: direct and indirect. The approach of the courts to each variety of discrimination suggests strong support for the policy and practice of excluding students who exhibit disability related problem behaviour from the mainstream school environment.

1 Direct Discrimination

Direct discrimination is the less favourable treatment of a person with a 'protected attribute' such as disability.³¹ To determine whether treatment is less favourable it is necessary to compare how the person with disability was treated with how a person without disability – a comparator – would be treated in 'circumstances that are the same or not materially different'.

To determine whether the refusal to enrol a student with disability related problem behaviour, therefore it would be necessary to determine whether a person without disability would also be refused enrolment in 'circumstances that were the same or not materially different'. Before the High Court case *Purvis*, the cases suggested that where problem behaviour was part of the disability it could not also be taken into account as part of the 'circumstances' informing the comparison.³² This is because the behaviour was regarded as inextricably bound up with the disability which caused it. The comparison, then, was between the treatment of a person with the disability and problem behaviour and a person without the disability and problem behaviour. As a person without disability or problem behaviour would almost invariably not be refused enrolment, the refusal to enrol the student with disability was prima facie discriminatory and unlawful. This comparison meant, of course, that it was very easy to prove discrimination for the person with disability. If such a person were entitled to enrol, however, there would still be the issue of their problem behaviour to be resolved. The 'unjustifiable hardship' exemption addressed

this issue and allowed prima facie discriminatory decisions to refuse enrolment or to exclude to be rendered lawful. The Queensland Anti-Discrimination Tribunal (QADT), for example, found that it would have caused the Queensland Education Department unjustifiable hardship to continue the placement in their mainstream classrooms of a girl with a developmental delay disorder who had toileting problems and a propensity to call out and to run away,³³ and of a boy with Downs Syndrome who was prone to pushing and shoving.³⁴ The relevant ‘hardship’ was located in the disruption to the learning environment and in the risk to the safety and well being of staff and other students. The unjustifiable hardship proved so strong a barrier to the enrolment of students with disability related problem behaviours that it appeared pointless to continue to assert any claim to a place in mainstream class rooms for such students. Queensland Advocacy Incorporated (QAI), which had funded L’s case before the QADT, concluded that, in inclusion cases, ‘litigation remains a last resort’ because of ‘the time and cost involved’.³⁵ In fact, after *L*, QAI made a policy decision ‘not to take on any further inclusion education legal matters in the near future’.³⁶ It was decided that there were ‘other areas where we should be directing our resources’.³⁷

The decision of the High court of Australia in *Purvis*, however, has made it even easier to defeat claims of direct discrimination brought by ‘problem’ students. This is because the High Court have now authorised the separation of the behaviour caused by the disability from the disability itself. The behaviour is now relevant to the circumstances of the comparison made to determine whether there has been less favourable treatment. A school may now say that it is excluding a student because of their behaviour and not because of their disability even when the behaviour *is* or is *caused by* the disability. For this reason, as noted above, it should not provide any great comfort to students with disabilities that the Queensland policy documents acknowledge that failing to enrol someone because of disability is unlawful. According to the majority of the High Court in *Purvis*, the school that refuses to enrol or excludes a student with disability related behaviour problems will not be doing so because of their ‘disability’ but because of their ‘behaviour’. There will, as a result, be no actionable discrimination against that student. The High Court was forced to reach this decision, it can be argued, because a drafting error in the *Disability Discrimination Act 1992 (Cth) (DDA)* meant that there was no unjustifiable hardship exemption available to the respondent school in this case. The majority of the Court, however, was motivated to deliver an interpretation of the law which would allow a school to reconcile what Gleeson CJ described as a ‘conflict between its responsibilities towards a child who manifests disturbed behaviour and its responsibilities towards the other children who are in its care, and who may become victims of that behaviour’.³⁸

In *Purvis*, the student complainant, Daniel Hoggan, aged 12 at the relevant time, had been suspended several times before he was excluded on a count of violence against staff and the property of others. As the result of a brain infection in infancy Daniel had difficulty controlling his behavioural impulses. Daniel’s behaviour was sufficiently aggressive to cause alarm to school authorities and stress to Daniel’s teachers and aides:

Between 24 April 1997 and 18 September 1997 he was suspended five times. Each suspension was for an act of violence. The first suspension was recorded as being for “violence against staff”, the second for kicking a fellow student and swearing, the third for kicking his teacher’s aide, the fourth for kicking a fellow student, and the fifth for punching a teacher’s aide.³⁹

At first instance, the Human Rights and Equal Opportunity Commission (HREOC) held that Daniel’s behaviour was part of his disability and that excluding Daniel for his behaviour amounted to excluding Daniel for his disability. It was also of the view that more could have been done to

support Daniel's inclusion at the school in terms of expert support and training.⁴⁰ Ultimately, however, while 2 members of the High Court upheld the substance of the approach of HREOC,⁴¹ a majority rewrote the law relevant to the comparison to be made. A comparison between the treatment of Daniel and the treatment of a notional person without Daniel's disability, but with his behaviour, would permit 'due account to be taken of the first respondent's legal responsibilities towards the general body of pupils'.⁴²

The approach of the High Court is controversial in that it runs counter to dominant understandings of disability as including the functional limitations and behaviours which attach to it.⁴³ Moreover, while stripping the behaviour from the disability facilitated a solution to the problem faced by schools juggling their legislative responsibilities under anti-discrimination law and workplace Health and Safety laws, the High Court construction of the comparison has undoubtedly weakened the remedial effectiveness of the Act in unintended ways and in other contexts. It is clear that the exclusion of violent students is mandated by the *Purvis* decision, but it has also been relied on to authorise the suspension of a student merely *accused* of violence. In *Tyler v Kesser Torah College*,⁴⁴ the student complainant had been accused of throwing an object from a balcony, hitting a teacher. Driver FM found that a student without disability, similarly accused, would also have been suspended and that, as such, Tyler's suspension was not discriminatory. The complainant did not return to the school, and his case was that his suspension amounted to a constructive exclusion. The *Purvis* approach was also relied upon to authorise the relocation of a 'difficult' but not violent student from a mainstream to a 'special' class in response to the stress his behaviour caused to his teacher. The complainant in *Zygorodimos v State of Victoria, Department of Education and Training*⁴⁵ had, among other misdemeanours, thrown tantrums, been inattentive, put 'inappropriate objects' in his mouth, and run from the classroom. This case also demonstrates not only a willingness to apply the majority approach in a less 'dangerous' context than that postulated in *Purvis*, but also in the context of state legislation where the availability of other exemptions⁴⁶ would have already, perhaps, allowed an 'out' to a court keen to authorise the apparently 'less favourable' treatment of a 'problem' complainant. It is of further interest that the Court refused to consider evidence of other 'circumstances' asserted by the complainant to be relevant to his treatment. This evidence may have brought into issue the appropriateness of the school's response to the complainant's behaviour:

Before leaving this claim I should add that Mr Gray, counsel for Ben, relied on various matters which he said I should take into account to formulate the proper comparator. These included provisions concerning disciplinary policies of state schools in the Education Regulations 2000, the absence of a provision for the transfer of a child from one class to another in VCD's code of student conduct, and views expressed by some of the witnesses, such as the education expert Professor Branson, about when it would be appropriate to transfer a child for behavioural reasons from one class to another. While this evidence may be appropriate in general terms in dealing with the challenging behaviour of children, the only evidence which, in my view, is relevant to the proper comparator here, is how Dr Pearce would have treated a child other than Ben without epilepsy, but with similar behaviour.⁴⁷

2 Indirect Discrimination

Indirect discrimination provisions in anti-discrimination legislation address policies and practices which may be 'facially neutral' but they operate to exclude people with disabilities who cannot conform to them. Indirect discrimination arises if a term, condition or requirement is

imposed, with which a person with a protected attribute, such as impairment, does not or is not able to comply, but with which a higher proportion of people without the attribute comply or are able to comply. Thus, a comparison is built in to the determination of indirect discrimination, as well as of direct discrimination. Finally, the term imposed must be ‘not reasonable’.⁴⁸

Typically, discriminatory terms are not ‘written’ but inferred from the circumstances of the treatment of a complainant. It is not necessary that the person imposing the term is aware of the indirect discrimination.⁴⁹ This reflects the fact that discriminatory terms are frequently embedded in the culture of an institution rather than consciously constructed to discriminate. In respect of the case law concerning disruptive students with disabilities bringing claims of discriminatory exclusion, however, the term or condition imposed *is* made explicit — a student must comply with the school code of discipline. Such a term is ‘facially neutral’ in that all students are required to comply. The allegation of discrimination arises in that a student with a behavioural disability may not be able to comply with such a code.

It appears that in many situations the complainant can choose to formulate his or her case as either one of direct or indirect discrimination.⁵⁰ In respect of claims brought under the *Disability Discrimination Act 1992* (Cth) (‘*DDA*’), there has, until recently, been an advantage in formulating claims in the student area as direct discrimination claims because the unjustifiable hardship exemption was not available to respondents once a student is enrolled.⁵¹ There was suggestion, for example, that the *Purvis* case could have been framed as an indirect discrimination case alleging that a discriminatory term had imposed that Daniel comply with the school’s code of conduct.⁵² Analysis of indirect discrimination cases brought by students with disability related disruptive behaviour indicates, however, that there is little doubt that, had the *Purvis* claim been so formulated, it would have stumbled upon proof that the term imposed was not reasonable.

The New South Wales Administrative Appeals Tribunal (NSWADT) case of *S on behalf of M & C v Director General, Department of Education & Training*⁵³ and the *DDA* case *Minns v State of New South Wales*⁵⁴ both involved allegations of indirect discrimination against students with ADHD: M of *M&C* and Ryan Minns. In *M&C* the following definition of ADHD was cited:

a mixed group of disruptive behaviours. These behaviours can have many causes and effects and their characteristics merge with normal behaviour. ADHD is a medically diagnostic label given when these behaviours cause difficulty with the child’s development; behaviour and performance; family relations and social interactions. Individuals with the disorder may be distractible, inattentive, impulsive and sometimes hyperactive.⁵⁵

The nature of the disability, ADHD, suggests, therefore, that it was not surprising that both M, of *M&C*, and Ryan Minns were frequently disciplined for breaches of the school rules at their mainstream schools.

In both *Minns* and *M&C* the term imposed was described as compliance with the conduct required by the school discipline policy.⁵⁶ Both the NSWADT and Raphael FM emphasised that it was ‘reasonable’ that schools generate and enforce codes of conduct. The NSWADT considered the point so ‘trite’ that it required ‘no further discussion’.⁵⁷ Raphael FM found that codes of conduct were necessary to enable ‘all students to benefit from the educational opportunities offered and the requirement to allow this to happen in a safe environment’.⁵⁸ The issue in both cases, however, was not the reasonableness of the *code*, per se, but the reasonableness of the required *compliance* with the code imposed on the complainants who alleged that their disability prevented such compliance. The evidence of M’s mother, in *M&C*, was that M ‘simply was not

capable of controlling her behaviour'.⁵⁹ Similarly, the complainant's case in *Minns* was that it was 'impossible for him to behave in a manner compliant with the discipline policy'.⁶⁰

The members of the NSWADT did not have to decide whether the requirement that M comply with the discipline code was reasonable, because they found that her case failed on another basis.⁶¹ It is interesting, however, that they nevertheless addressed the issue. They were, in fact, critical of the discipline policy at both schools which M attended and described the inflexible application of those policies as 'unreasonable'.⁶² Further, the Tribunal emphasised that it was not reasonable to expect a child with a disability such as M to comply with a standard discipline policy unless she had 'special support to enable ... her to do so'.⁶³ The Tribunal was satisfied that M did not have such support':

Not only was M an ADD sufferer, she was well behind her colleagues academically... In those circumstances, it was unreasonable to expect that she could significantly modify her behaviour as a result of being frequently disciplined in the absence of that attention, support and special care. It was in our view therefore unreasonable to punish her in the same fashion as any other member of the student body if she failed to comply with the requirements of the Code.⁶⁴

It must be remembered, however, that M's case failed. The Tribunal, therefore, could make these pointed criticisms of the respondent's treatment of M, secure in the knowledge that it would not have to take the controversial step of enforcing any improvement to the quality of that treatment.

The facts of the *Minns* case differed from the facts of *M&C* in that there was not the same evidence of lack of specialist support for Ryan. Moreover, Ryan's school had applied the discipline policy flexibly to take into account his impairment. Raphael FM balanced the benefit to Ryan in allowing him 'free rein'⁶⁵ in his behaviour against the potential detriment to others in the school community and found that the requirement that Ryan comply with the code of conduct was 'reasonable':

I am of the view that the requirement that was placed upon Ryan to comply with each of the school's disciplinary policies as modified was reasonable in all the circumstances. The classes in which Ryan was placed would be unable to function if he could not be removed for disruptive behaviour. The students could not achieve their potential if most of the teachers' time was taken up with handling Ryan. The playgrounds would not be safe if Ryan was allowed free rein for his aggressive actions. Therefore the claim for indirect discrimination must fail in the manner in which it is put.⁶⁶

The language of Raphael FM is clearly consistent with the language of Gleeson CJ⁶⁷ and Callinan J,⁶⁸ in the High Court in *Purvis*, who were both concerned to avoid the detriment to others in the South Grafton State High School community that may flow should Daniel Hoggan's enrolment be maintained. Indeed, Raphael FM explicitly drew attention to the factual similarities between the *Purvis* case and the *Minns* case and commenting that the consequence of Daniel Hoggan's disability was 'violent and anti-social behaviour very similar to that exhibited by Ryan Minns'.⁶⁹

It may be concluded, on the basis of the decisions in *M&C* and *Minns*, that while there is some clear case law support for the modification of school discipline codes to allow some flexibility in administering their application to students with disabilities, ultimately, under an indirect discrimination matrix, a student with disability whose non-compliant behaviour disrupts the school environment, may lawfully be excluded. As such, a complaint involving disability

related problem behaviour is likely to fail, regardless of whether it is run as a direct or indirect discrimination case.

III THE US POSITION ON STUDENTS WITH DISABILITIES WHO ‘MISBEHAVE’

In the United States, the issue of students with disability induced problem behaviour is addressed in the context of the *Individuals with Disabilities Education Act (IDEA)* which creates a positive right to inclusion for students with disabilities in ‘the least restrictive environment’.⁷⁰ *IDEA* is federal legislation and, as such mandates a standard regime for addressing the inclusion of students with disabilities across the US. The ‘normal’ disciplinary procedures available in respect of ‘normal’ students are not considered appropriate for *IDEA* protected students. Unlike Australian anti-discrimination legislation, *IDEA* does not require a comparison to be made between how a student with disability who misbehaves is treated and how a student without disability who misbehaves would be treated. The general rule is that a student with a disability can be suspended for a maximum of 10 days for discipline code violations.⁷¹ While a school can seek, via court intervention, to have a student’s placement changed where there is a risk of injury to self or others, a change in placement can only be authorised after an exhaustive process of notices and independent ‘due process’ hearings.⁷² ‘Stay put’ provisions allow many children with disabilities threatened with a change of placement to stay in their current placement until review procedures available under the legislation are exhausted.⁷³ A ‘manifestation determination’ hearing, conducted by the school authority, the student’s parent and members of the Individualised Education Plan [IEP] team for the student,⁷⁴ must be scheduled within 10 days of any decision to seek to change the placement of a child because of a discipline code violation.⁷⁵ The hearing will determine whether the behaviour was ‘caused by, or had a direct and substantial relationship to the child’s disability’ or if the conduct was a ‘direct result of the local educational agency’s failure to implement the [child’s] IEP’.⁷⁶ If the behaviour is determined to be a result of either it will be held to be a manifestation of the child’s disability.⁷⁷ The legislative presumption appears to be that behavioural manifestations of disability evidence a deficiency of the student’s placement in not addressing the behaviour, as where the behaviour is determined to be a ‘manifestation’ the general rule is that the student must be allowed to return to school and the onus is on the school to adjust the student’s individual education program to address what can be done to mitigate the causes and effects of the behaviour.⁷⁸ Only if the hearing determines that the behaviour is not a manifestation of the student’s disability will regular disciplinary procedures be applicable.⁷⁹ A right is retained by the student, however, to ‘receive educational services...so as to enable the child to continue to participate in the general educational curriculum’,⁸⁰ albeit in a different, and, perhaps, ‘more restrictive’ environment. Moreover, and again reflecting an emphasis on institutional accommodation of problem behaviour, *IDEA* mandates an institutional response which may ultimately resolve behaviour problems by providing that students who are removed from their current placement ‘shall...receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur’.⁸¹

*Honig v Doe and Smith*⁸² is the only US Supreme Court case directly on point. The case demonstrates an insistence on both due process and parental involvement in the treatment of students with disabilities which is not standard in the Australian context. In *Honig* it was held that the indefinite suspension of two teenaged students whose violence was a manifestation of their impairments, pending the outcome of exclusion proceedings, offended the stay put provisions contained in *IDEA*. Doe was a ‘socially and physically awkward 17 year old who experienced

considerable difficulty controlling his impulses and anger'.⁸³ He was suspended after he had 'choked [a] student with sufficient force to leave abrasions on the child's neck, and kicked out a window while being escorted to the principal's office afterwards'.⁸⁴ Smith was suspended after a pattern of inappropriate behaviour including 'stealing, extorting money from fellow students, and making sexual comments to female class mates'.⁸⁵ The Court refused to entertain a defence argument that it should recognise a 'dangerousness' exception to the stay-put rule and found that Congress had deliberately removed from schools the opportunity to make unilateral decisions to exclude students with disabilities.⁸⁶ The Court explained that Congress had enacted the *Education of the Handicapped Act (EHA)* (now known as *IDEA*) in order to correct a culture of excluding students with disabilities on account of 'behavioural problems':

... Congress passed the EHA after finding that school systems across the country had excluded one out of every eight disabled children from classes. In drafting the law, Congress was largely guided by the recent decisions in *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (1972), and *PARC*, 343 F. Supp. 279 (1972), both of which involved the exclusion of hard-to-handle disabled students. *Mills* in particular demonstrated the extent to which schools used disciplinary measures to bar children from the classroom. There, school officials had labelled four of the seven minor plaintiffs "behavioural problems", and had excluded them from classes without providing any alternative education to them or any notice to their parents. 348 F. Supp., at 869-870. After finding that this practice was not limited to the named plaintiffs but affected in one way or another an estimated class of 12,000 to 18,000 disabled students, *id.*, at 868-869, 875, the District Court enjoined future exclusions, suspensions, or expulsions "on grounds of discipline". *Id.*, at 880.⁸⁷

The majority judgment,⁸⁸ delivered by Brennan J, emphasised that 'the Act [*EHA*] establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate'.⁸⁹ The majority held, further, that schools are not without remedy in the case of 'violent' students in that they can utilise disciplinary proceedings mandated by the legislation, including suspension for up to 10 days.⁹⁰ It stressed, however, that in the case of 'a truly dangerous child'⁹¹ if parents refuse to agree to an alternative placement judicial relief may be sought in the form of an injunction ordering the relocation of the child.⁹²

The case of *Consolidated School District No 93 v John F*⁹³ is a 'garden variety' example of many more recent cases which illustrate the US position.⁹⁴ John, a student with Attention Deficit Hyperactivity Disorder (ADHD), was suspended for the last 22 days of the 1992 school year for threatening another student through references to the Columbine School massacre that had occurred three days earlier. The Illinois District Court found that John's suspension was in violation of *IDEA*, the school having failed to follow the procedural safeguards mandated by that legislation. Holderman J found that the school was in breach of the legislation in that it 'did not modify [John's] IEP, discuss ways to address his behavioural problems, or consider ways in which in-school devices and services could address his behaviour problems'.⁹⁵ John was awarded \$US22,300 damages in respect of his unlawful suspension.

A suite of amendments to *IDEA* in 2004, in force from July 2005, however, has diminished procedural safeguards for students who display problem behaviour as a result of disability, suggesting, perhaps, that problem behaviour is an ongoing challenge for school systems around the world. A particularly sharp erosion of rights has arisen from the fact that the circumstances in which a child can be removed from school, pending the implementation of *IDEA* hearing procedures, have been enlarged. Before 2004, *IDEA* had expressly authorised schools unilaterally

to remove children to an interim alternative educational setting for up to 45 days for drug and weapon offences, even when the offence was caused by the student's disability. This was the only circumstance when behaviour caused by disability could result in removal from school without a hearing. Now schools may unilaterally remove children in the additional circumstance that they have 'inflicted serious bodily injury', and for a longer period of 45 *school*, rather than *calendar*, days.⁹⁶ Further, when the matter does go to hearing, the hearing officer is no longer required to consider whether the school made a reasonable effort to minimise the risk of harm through the use, for example, of supplementary aids and services.

IV CONCLUSION: THE US POSITION COMPARED WITH THE AUSTRALIAN POSITION

It is tempting to compare the *IDEA* focus on the school's responsibility to accommodate, adjust to and mitigate the student's problem behaviour with the minority approach taken by McHugh and Kirby JJ, in *Purvis*, to the events culminating in Daniel Hoggan's expulsion. As noted earlier,⁹⁷ McHugh and Kirby JJ were of the opinion that more could have been done to accommodate Daniel and that 'if that accommodation had been made, it is likely that the educational authority would not have denied the benefits to Mr Hoggan or subjected him to the detriments that it did because it is likely that he would have behaved'.⁹⁸

The primary focus of the majority in *Purvis*, however, a focus which has reverberated through lower courts and tribunals around Australia, and which is reflected also in the approach taken in indirect discrimination cases, is not, perhaps, on students with disability and what can be done to ease their inclusion into a mainstream setting but on the others in that mainstream environment — on their safety, stress levels and learning amenity. These are, of course, legitimate concerns, but the decision in *Purvis* has made it so easy to exclude disruptive students that there must be a strong impetus to avoid taking expensive and demanding steps to achieve an inclusive mainstream environment.

The exasperation of Callinan J in *Purvis* when he spells out the 'very great investment of time, resources, energy, expertise, money and compassion' in Daniel⁹⁹ unfortunately implies an institutional impatience with and intolerance of the very real costs of inclusion. This kind of impatience and intolerance, exacerbated, perhaps, by governmental reluctance to fund the resources required to effect inclusion, may well be a hidden cause of spiralling suspension and exclusion rates that have attracted attention in Queensland, and around Australia.

The US position remains in stark contrast to the Australian. The 2004 amendments to *IDEA* undoubtedly bring the US position closer to the Australian position by allowing a wider scope for schools to remove students from their preferred school and by diluting the expectation that schools will proactively reduce the potential for student violence by reacting to and accommodating the disability causes of that violence. Despite the amendments, however, the emphasis on behavioural modification interventions, the opportunity for co-operative decision making between parents and school,¹⁰⁰ and the scope for independent and expedited enquiry into threatened sanctions of students with disabilities, aligned with the presumption that an accommodating mainstream placement is the norm, mean greater protection for 'problem' students exists in the United States.

Keywords: student; disability; behaviour; inclusion; comparative.

ENDNOTES

1. Lauren Williams, 'Students Banned After Muck-Up', *The Daily Telegraph* (Sydney) 26 September 2008, 3.
2. Anthony Dowsley and Karen Collier, 'Xavier Scandal Besets College', *The Herald-Sun* (Melbourne) 22 October 2008, 1.
3. James O'Loan, 'School Suspensions Skyrocket in Queensland', *The Courier Mail* (Brisbane) 27 October 2008, 1.
4. James O'Loan, 'Plague of Student Suspensions Hit Queensland Schools', *The Courier Mail* (Brisbane) 1 October, 2008 < <http://www.news.com.au/couriermail/story/0,23739,24426037-952,00.html>> at 20 October 2008 (citing Queensland Education Minister, Rod Welford).
5. James O'Loan, '22 Students a Day Suspended from Brisbane School', *The Courier Mail* (Brisbane) 22 October 2008 < <http://www.news.com.au/couriermail/story/0,,24531012-3102,00.html>> at 26 October 2008 (citing the Queensland Teachers' Union).
6. Ibid.
7. 'Under the Muck-Up Flows a Murkier Undercurrent', *The Age* (Melbourne) 25 October 2008, 8.
8. See Senate Employment, Workplace Relations and Education Committee, Parliament of Australia, *Education of students with disabilities* (2002) ('*Senate Report*'). The *Senate Report* concluded that 'inclusive practices' have become the 'prevailing orthodoxy' in Australian education policy in regard to the education of students with disabilities: 29, [3.1].
9. *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92 ('*Purvis*').
10. *Individuals with Disabilities Education Act* 20 USC § 1412(a)(5)(A) ('*IDEA*').
11. Except, perhaps, in Victoria. See *Education Training and Reform Act 2006* (Vic) s 1.2.2(2)(c) which provides as follows: 'every student has the right to attend a designated neighbourhood Government school with the exception of selective Government schools that are determined by the Minister'. The extent and effect of this section have not, to date, been tested in the courts.
12. *Education (General Provisions) Act 2006* (Qld).
13. Department of Education, Training and the Arts (Queensland), 'SMS-PR-021: Safe, Supportive and Disciplined School Environment' *Education Policies and Procedures Register* <<http://education.qld.gov.au/strategic/eppr/students/smspr021>> at 28 October 2009.
14. *L v Minister for Education for the State of Queensland (No. 2)* [1995] 1 QADR 207.
15. *K v N School (No 3)* [1996] 1 QADR 620.
16. *P v Director-General, Department of Education* [1995] 1 QADR 755.
17. For a related argument see M Jones and LA Basser Marks, 'The Limitations on the Use of Law to Promote Rights: An Assessment of the Disability Discrimination Act 1992 (Cth)', in Marge Hauritz, Charles Sampford and Sophie Blencowe (eds), *Justice for People with Disabilities* (1998) 60, 78.
18. James O'Loan, 'Plague of Student Suspensions Hit Queensland Schools' *The Courier Mail* (Brisbane) 1 October 2008 <<http://www.news.com.au/couriermail/story/0,23739,24426037-952,00.html>> at 20 October 2008 (citing Queensland Education Minister, Rod Welford).
19. *Education (Accreditation of Non-State Schools) Act 2001* (Qld).
20. The provisions in the *Education (General Provisions) Act 2006* relevant to exclusion apply only to State education institutions: See Chapter 8 of the Act.
21. Whilst it is not a Queensland school, consider the recent controversy over the suspension of several final year students from Newington College in Sydney after breaches of an announced 'zero tolerance' approach to 'inappropriate' behaviour on 'muck up day'. See Steve Gee, 'Mad Over Newington College Muck Up Day', *The Daily Telegraph* (Sydney) 27 September 2008 < <http://www.news.com.au/dailytelegraph/story/0,22049,24408606-5006009,00.html>> at 30 October 2008.
22. See *Education (General Provisions) Act 2006* (Qld) s 282.
23. See Department of Education, Training and the Arts (Queensland), *The Code of School Behaviour* (2006) <<http://education.qld.gov.au/publication/production/reports/pdfs/code-school-behaviour-a4.pdf>> at 28 October 2008.

24. The analysis in this section, except where indicated, is based on the Education Queensland policy document *SMS-PR-021: Safe, Supportive and Disciplined School Environment* <<http://education.qld.gov.au/strategic/eppr/students/smspr021/>> at 24 October 2008.
25. Education Queensland, *Guidelines – Behaviour Improvement Condition* <<http://education.qld.gov.au/strategic/eppr/students/smspr021/behaviourimprovecondguidelines.doc>> at 28 October 2008.
26. See Appendix A: *Education Queensland, Principal’s Action Flow Chart – Suspension, Recommendation for Exclusion, Cancellation of Enrolment* <<http://education.qld.gov.au/strategic/eppr/students/smspr021/flowchart.doc>> at 30 October 2008.
27. Education Queensland, *SMS-PR-021: Safe, Supportive and Disciplined School Environment* <<http://education.qld.gov.au/strategic/eppr/students/smspr021/>> at 24 October 2008.
28. See Education Queensland, *SCM-PR-020: Refusal to Enrol: Risk to Safety or Wellbeing* <<http://education.qld.gov.au/strategic/eppr/schools/scmpr020/>> at 30 October 2008.
29. *Ibid.*
30. There does not appear to be any reported or unreported Queensland case involving judicial review of a decision to suspend or exclude. The closest case is, perhaps, *R v NG* [2006] QCA 218 where the question on appeal was whether a student excluded from school in response to a sexual assault on another student could avoid a criminal prosecution in respect of the same incident on the basis that it would entail double punishment for the same offence. The Queensland Court of Appeal concluded, interestingly enough, that the purpose of exclusion was not ‘punishment’ but a regulatory act relevant to the ‘maintenance of good government’ in the school. See, particularly, [36] per de Jersey CJ; [72]-[73] per Keane JA; [78]-[80] per Mackenzie J.
31. See, for example, *Disability Discrimination Act 1992* (Cth) s 5; *Anti-Discrimination Act 1991* (Qld) s 10(1).
32. See *IW v City of Perth* (1996) 191 CLR 1, 67; *X v McHugh* (1994) 56 IR 248; *L v Minister for Education for the State of Queensland (No. 2)* [1995] 1 QADR 207, 210 (‘L’); *P v Director-General, Department of Education* [1995] 1 QADR 755, 779 (‘P’).
33. *L v Minister for Education for the State of Queensland (No. 2)* [1995] 1 QADR 207.
34. *P v Director-General, Department of Education* [1995] 1 QADR 755
35. Queensland Advocacy Incorporated, *Newsletter*, March, 1996.
36. Queensland Advocacy incorporated, *Annual Report 1995-1996*.
37. *Ibid.*
38. *Purvis* (2003) 217 CLR 92, 101 [12].
39. *Purvis* (2003) 217 CLR 92, 148 [183] (Gummow, Hayne and Heydon JJ).
40. *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC ¶ 93-117, 75172-5 [6.4].
41. *Purvis* (2003) 217 CLR 92, 144 [169].
42. *Purvis* (2003) 217 CLR 92, 101 [12] (Gleeson CJ).
43. See Mike Oliver and Colin Barnes, *Disabled People and Social Policy: From Exclusion to Inclusion* (1998) 13 ff. Oliver and Barnes provide a thorough summary of the meanings attributed to the terms impairment and disability by a variety of institutions including the UN and various organisations ‘controlled and run by disabled people’.
44. *Tyler v Kesser Torah College* [2006] FMCA 1 (Unreported, Driver FM, 20 January 2006).
45. *Zygorodimos v State of Victoria, Department of Education and Training* [2004] VCAT 128 (Unreported, McKenzie DP, 3 February 2004) [98]-[100] (‘Zygorodimos’).
46. See *Equal Opportunity Act 1995* (Vic) s 39. See Part V, Chapter 6: Exemptions.
47. *Zygorodimos* [2004] VCAT 128 (Unreported, McKenzie DP, 3 February 2004) [100].
48. See, for example, *Anti-Discrimination Act 1991* (Qld) (‘QADA’) ss 9(b) and 11, *Disability Discrimination Act 1991* (Cth) (‘DDA’) s 6.
49. See, for example, *QADA* s 11(3).
50. See, for example, *Minns v State of New South Wales* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) (‘Minns’) [245].

51. After the decision of the High Court in *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92 ('*Purvis*') the DDA was amended to make the exemption available after enrolment. See *Disability Discrimination Amendment (Education Standards) Act 2005* s 3 and DDA s 22(4).
52. See, for example, Transcript of Proceedings, *Alexander Purvis on behalf of Daniel Hoggan v State of New South Wales (Department of Education and Training) and Another* (High Court of Australia, Gleeson CJ, 11 November 2003) [3]; *New South Wales (Department of Education) v Human Rights and Equal Opportunity Commission* (2001) 186 ALR 69, 78 [40].
53. *S on behalf of M & C v Director General, Department of Education & Training* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) ('*M&C*').
54. *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002).
55. *M&C* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) [20].
56. See *M&C* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) [117] and *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [247].
57. *M&C* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) [123]. *M&C* is a case brought under the *Anti-Discrimination Act 1977* (NSW) (*NSWADA*).
58. *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [247].
59. *M&C* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) [117].
60. *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [250].
61. M's case of indirect discrimination failed because she failed to adduce evidence, which would have allowed the Tribunal to 'define and quantify the status group with which M can be said to belong' and which would have enabled it 'to estimate the degree of compliance with the code practices by members of that group': *M&C* [2001] NSWADT 43 (Unreported, Judicial Member Britton, Members McDonald and Mooney, 21 March 2001) [128]. This was a somewhat controversial purported application of the High Court's approach to the compliance issue in *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165.
62. *Ibid* [131].
63. *Ibid* [131].
64. *Ibid* [133].
65. *Ibid*.
66. *Ibid* [263].
67. *Purvis* (2003) 217 CLR 92, 101-3 [11]-[14].
68. *Ibid* [266].
69. *Minns* [2002] FMCA 60 (Unreported, Raphael FM, 28 June 2002) [191].
70. *Individuals with Disabilities Education Act* 20 USC § 1412(a)(5)(A) ('*IDEA*'). Federal financial assistance is available to the states if they comply with *IDEA*. It was held by the US Supreme Court that a court called on to assess compliance with the Act must ask two questions: first, whether the state has complied with the procedures set forth in the Act; secondly, whether the individualised education plan (IEP) implemented through the Act's procedures is reasonably calculated to allow the child to receive educational benefits: *Board of Education v Rowley*, 458 US 176, 206-7 (1982). *IDEA* states a preference for mainstreaming 'special needs' students whenever possible: *IDEA* § 1412(5)(A).
71. *IDEA* § 1415(k)(1)(B).
72. *IDEA* § 1415(i).
73. *IDEA* § 1415(j).
74. *IDEA* § 1415(k)(1)(E).
75. *IDEA* § 1415(k)(E).
76. *IDEA* § 1415(k)(1)(E).
77. *IDEA* § 1415(k)(1)(F).

78. *IDEA* § 1415(k)(1)(F).
79. *IDEA* § 1415(k)(1)(C).
80. *IDEA* § 1415(k)(1)(D)(i).
81. *IDEA* § 1415(k)(1)(D)(ii).
82. *Honig v Doe and Smith* 484 US 305 (1988).
83. *Ibid* 312.
84. *Ibid* 313.
85. *Ibid* 315.
86. *Ibid* 323.
87. *Ibid* 324.
88. The minority dissent delivered by Scalia J, with whom O'Connor J agreed, did not address the substantive issues of the case but would have dismissed it on the basis that, as the plaintiffs were no longer in school, they were no longer entitled to relief.
89. *Ibid* 311-12.
90. *Ibid* 326.
91. *Ibid*.
92. *Ibid* 328.
93. *Community Consolidated School District No 9 v John F*, 33 IDELR ¶ 40 (ND Ill 2000). *IDEA* has been the subject of extensive litigation and has given rise to its own series of case reports: *Individuals with Disabilities Education Law Report* (IDELR).
94. See also, for example, *Colvin v Lowndes County, Mississippi School District*, 114 F Supp 2d 504 (ND Miss, 1999); *JC v Regional School District No 10*, 115 F Supp 2d 297 (D Conn, 2000); *Farrin v Maine School Administrative District No 59*, 165 F Supp 2d 37 (D Me, 2001).
95. *Community Consolidated School District No 9 v John F*, 33 IDELR ¶ 40 (ND Ill 2000) 12.
96. *IDEA* § 1415 (k)(1)(G). Note, however, that during these periods of suspension, and after a change of placement, *IDEA* requires that the affected student continue to 'receive educational services...so as to enable the child to continue to participate in the general educational curriculum'.
97. See above n 40.
98. *Purvis* (2003) 217 CLR 92, 136 [136].
99. *Ibid* 164 [239].
100. See, for example, the manifestation hearing process outlined above. It should also be noted that his or her parents are automatic members of each student's IEP team [20 USCA § 1414 (d)(1)(B)]. In a recent decision (14 November 2005) of the US Supreme Court, 'the co-operative process it establishes between parents and schools' was described as the 'core' of *IDEA*: *Schaffer v Weast*, 546 US 49 (2005). There is concern, however, that this decision will reduce the remedial effectiveness of *IDEA*. *IDEA* is silent on the point of who bears the burden of proof in due process hearings where the appropriateness of the terms of the IEP of a student with a disability is challenged [see 1415 (f)]. In *Schaffer* it was held by a majority of the US Supreme Court that the burden lies on the party making the challenge – that is, invariably, the student with disability.

