Playing by the Rules - Managing Student Disabilities and Avoiding Claims of Discrimination

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1 INTRODUCTION

Since the inclusion of students with disabilities in schools, educational authorities, principals and teachers understandably have struggled with the tension between the duty to provide equal opportunities for all and the duty to provide students and staff with a safe system of work and education.

Case Study

Consider this. A student of your school has suffered brain damage at an early age which has subsequently caused intellectual and visual disabilities and epilepsy. His disabilities are manifested in behaviour varying from rocking and humming to violent acts of kicking and punching other students and teachers.

Perhaps a detention or suspension is the appropriate action to take. But for how long will you continue to issue detentions and continue to suspend this student? However, if you exclude him from the school, there's a risk of receiving a complaint of discrimination on the basis of this student's disability. On the other hand, if you do not exclude him, there's a risk of receiving a complaint of a breaching your duties of care to other students and teachers. So what is the correct action to take? Does exclusion from school constitute unlawful discrimination against the student *because of* or *on the basis* of his disability?

See *Purvis v New South Wales (Department Of Education & Training*) (2003) 202 ALR 133.

The above case study is the exact situation the New South Wales Department of Education found themselves in 1997, with a student by the name of Daniel Hoggan. In that case, a complaint for discrimination on the basis of disability was made to the Human Rights and Equal Opportunity Commission (a Federal body) and the matter was ultimately decided by the High Court of Australia which found that there was no contravention of the *Disability Discrimination Act 1992* (Cth). The reasons will become apparent.

Therefore, **not all discrimination is unlawful.** And there *are* ways to manage the situation and avoid claims of unlawful discrimination being made against you.

This paper deals with what constitutes an unlawful act of discrimination on the basis of disability, in the area of education as set out in the *Anti-Discrimination Act 1991* (Qld) ("**ADA"**) and the *Disability Discrimination Act 1992* (Cth) (**"DDA"**).

2 UNLAWFUL DISCRIMINATION

2.1 General Prohibition

2.1.1 *Under the ADA*

Section 9 of the ADA provides that the Act prohibits direct and indirect discrimination.

2.1.2 *Under the DDA*

The DDA does not have an equivalent provision but the DDA contains provisions which prohibit discrimination in particular protected areas (including education). The effect is much the same because any event, the prohibition in section 9 of the ADA cannot be relied upon outside a protected area.

2.2 Protected Attribute

2.2.1 *Under the ADA*

Section 7 of the ADA lists all the "attributes" that a person may have which cannot be used to discriminate against a person:

> "The Act prohibits discrimination on the basis of the following attributes:
> (a) sex;
> (b) relationship status;
> (c) pregnancy;
> (d) parental status;
> (e) breastfeeding;
> (f) age;
> (g) race;
> **(h) impairment;**
> (i) religious belief or religious activity;
> (j) political belief or activity;
> (k) trade union activity;
> (l) lawful sexual activity;
> (m) gender identity;
> (n) sexuality;
> (o) family responsibilities;
> (p) association with, or relation to, a person identified on the basis of any of the above attributes."

You will note that the word "disability" is not actually used by the ADA, but rather discrimination occurs on the basis of someone's "impairment".

Note also that it is possible for a person to discriminate against another who does not *themselves* possess one of the attributes, but who is associated or related to a person with an attribute.[1] Therefore, it is possible for a complaint of discrimination to be made also by a parent of student with a disability, who experiences unfavorable treatment because their child has a disability.

[1] ADA, section 7(p).

a Imputed, Presumed or Past Attribute

The ADA extends liability even further pursuant to section 8 of the ADA. Not only can a person discriminate against a person who actually possesses the attribute, but discrimination can also occur on the basis of an *imputed or presumed* or a *past* attribute.

Section 8 in full provides that:

> "Discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of -
> (a) a characteristic that a person with any of the attributes generally has; or
> (b) a characteristic that is often imputed to a person with any of the attributes; or
> (c) an attribute that a person is presumed to have, or to have had at any time, by the person discriminating; or
> (d) an attribute that a person had, even if the person did not have it at the time of the discrimination."

For instance, a student is particularly hyper-active, is unable to concentrate for prolonged periods and acts impulsively. A person may impute to this kind of student or presume the impairment of Attention Deficit Disorder (or ADD) and discriminate against them on that basis, even if this student does not in fact have this "impairment." The word "characteristic" has been interpreted to mean a character that is distinctive or typical or is a distinguishing peculiarity or quality.[2]

The DDA does take into account imputed disabilities (see the definition of 'disability' below).

2.3 'Disability' Defined

2.3.1 *Under the ADA*

Under the ADA, "impairment" is defined in the Schedule as:

> ***impairment***, in relation to a person, means—
> (a) the total or partial loss of the person's bodily functions, including the loss of a part of the person's body; or
> (b) the malfunction, malformation or disfigurement of a part of the person's body; or
> (c) a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or
> (d) a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or
> (e) the presence in the body of organisms capable of causing illness or disease; or
> (f) reliance on a guide, hearing or assistance dog, wheelchair or other remedial device;
> whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that—
> (g) presently exists; or
> (h) previously existed but no longer exists.

2.3.2 *Under the DDA*

Under the DDA, "disability" is defined in section 4 as:

> ***"disability***, in relation to a person, means:
> (a) total or partial loss of the person's bodily or mental functions; or
> (b) total or partial loss of a part of the body; or
> (c) the presence in the body of organisms causing disease or illness; or
> (d) the presence in the body of organisms capable of causing disease or illness; or
> (e) the malfunction, malformation or disfigurement of a part of the person's body; or
> (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
> (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; and includes a disability that:
> (h) presently exists; or

[2] *Bear v Norwood Private Nursing Home* (1984) EOC 92 – 1019.

> (i) previously existed but no longer exists; or
> (j) may exist in the future (including because of a genetic predisposition to that disability); or
> (k) is imputed to a person.
>
> To avoid doubt, a ***disability*** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability."

Note that the definition under the DDA (section 4(k)) also takes into account the concept of an "imputed" disability (similar to that in section 8 of the ADA).

2.3.3 *General*

The definitions above are quite wide to ensure that all persons with disabilities are protected. The definitions include disabilities or impairments that:

- are physical;
- are intellectual;
- are psychiatric;
- are sensory;
- are neurological;
- affect learning;
- are physical disfigurements; and
- involve the presence of a disease-causing organism.

Note that the court has not accepted that obesity is a disability for the purposes of the Acts.[3] However, the Victorian Equal Opportunity Board is of the view that obesity will come within the definition if the obesity causes total or partial loss of a part of a body, malformation or disfigurement.[4]

Also note the slight difference in the definition of disability under the DDA in allowing for disabilities that may exist in the *future*, so that if the school were to learn that that a student's parent has developed a disease which is genetic, and discriminates against the student on the basis that the student may develop this disease in the future, this may constitute unlawful discrimination.

The ADA also includes "reliance on a guide, hearing or assistance dog, wheelchair or other remedial device" within the definition of "impairment" whereas the DDA does not. Section 54A of the DDA addresses the issue of a person using an "assistance animal" (not merely a dog) but does address the use of a wheelchair.

2.4 Direct Discrimination

2.4.1 *Under the ADA*

Section 10 provides:

> "(1) Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.
> (2) It is not necessary that the person who discriminates considers the treatment is less favourable.
> (3) The person's motive for discriminating is irrelevant.

[3] *Cox v The Public Transport Corporation* (1992) EOC 92-401.
[4] Amanda Nuttall, 'Reformulating the Categorical Approach to Discrimination Law' (2002), <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FBWU66%22>.

> (4) If there are 2 or more reasons why a person treats, or proposes to treat, another person with an attribute less favourably, the person treats the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment.
> (5) In determining whether a person treats, or proposes to treat a person with an impairment less favourably than another personis or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant."

Direct discrimination requires less favourable treatment. The person complaining of unlawful discrimination on the basis of impairment must show that he or she has received less favourable treatment, than another student, in circumstances that are the same.

2.4.2 *Under the DDA*

The definition of direct discrimination is essentially the same as that under the ADA. Section 5 provides that:

> "For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if, if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different."

2.4.3 *General*

a The real reason and where there is more than one reason

Note that the definition of direct discrimination under the ADA and the DDA differ slightly in that the unfavourable treatment under the DDA must be "because of" the disability, whereas the unfavourable treatment must be "on the basis of" the attribute under the ADA. It has been suggested that the meaning of these two terms differ, however, in all cases, there is still the need to determine the 'true basis' or 'real reason' for the conduct.[5]

Pursuant to section 10 of the DDA, if an act is done for two or more reasons, the complainant's disability need only be *one* of those reasons (whether or not it is the dominant or substantial reason for doing the act).

On the other hand, as stated above, under the ADA the attribute must be the *substantial* reason for the person taking a particular action (see section 10(4) ADA). Therefore, from an evidential perspective it would be much simpler to prove discrimination under the DDA for this reason.

Importantly, the school's motivation is not relevant (at least under the ADA). *"It is enough that the material difference in treatment is based on the status or private life of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator relating to either of those considerations."*[6]

[5] *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92 at [13], [14] per Gleeson CJ; *Forbes v Australian Federal Police (Cth)* [2004] FCAFC 95 at [65]-[67].
[6] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359, McHugh J agreeing, 382.

Case Study – The Real Reason for the Action

A student **("BI")** developed symptoms of schizophrenia. By the end of the year 2000, when BI was almost sixteen, he was taking the drug Clozapine for his schizophrenia (last line treatment for adults and BI was the only child in Queensland taking it). In addition, he had a diagnosis of Autistic Spectrum Disorder.

He had been out of school for some time prior to this, but his mother, Mrs I, was keen for him to have some kind of schooling and made arrangements for him to attend BSHS for some limited social interaction.

A new program was developed in 2001 for BI which involved him attending school twice a week, for two hours at each session. It was not controversial that BI's attendance during 2001 was poor. He attended only four times from 29 January 2001 until 18 May 2001 when his enrolment was cancelled. Mrs I said that BI was too ill, either with his schizophrenia, or because of the side effects of Clozapine (which are considerable), to go to school, except on these 4 days. This was not challenged by the School.

However, the court accepted that the reason for the cancellation of the student enrolment at a school was that the student was not attending class, not his impairment. Any student who fails to attend class would have had their enrollment cancelled, irrespective of any impairment.

I on behalf of BI v The State of Queensland [2005] QADT 37.

2.5 Indirect Discrimination

2.5.1 *Under the ADA*

Apart from direct forms of discrimination, a person can be found to have breached the ADA for indirectly discriminating against a student.

Section 11 relevantly provides as follows:

> "(1) Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term -
> (a) with which a person with an attribute does not or is not able to comply; and
> (b) with which a high proportion of people without the attribute comply or are able to comply; and
> (c) that is not reasonable.
> (2) Whether a term is reasonable depends on all the relevant circumstances of the case, including, for example-
> (a) the consequences of failure to comply with the term; and
> (b) the cost of alternative terms; and
> (c) the financial circumstances of the person who imposes, or proposes to impose, the term.
> (3) It is not necessary that the person imposing, or proposing to impose, the term is aware of the indirect discrimination.
> (4) In this section - 'term' includes condition, requirement or practice, whether or not written."

By way of example, say that a student seeks to apply to your school and is permanently required to use the aid of a wheelchair. Students go from class to class via stairs only, and there are no ramps within your school, or within a particular part of your school, making it difficult for this particular student to also go from class to class given the lack of facilities.

One could argue that this is a case of indirect discrimination – the school has imposed a term (albeit not in writing) that students must use the stairs to attend classes. This term clearly cannot be complied with by the student who utilizes a wheelchair and a high portion of students are able to comply, and the term is arguably not reasonable.

2.5.2 *Under the DDA*

Section 6 of the DDA provides that:

> (1) For the purposes of this Act, a person (the ***discriminator***) ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
>
> (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
>
> (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.

Note this is slightly different again from the ADA. Under the DDA for a person to have indirectly discriminated against another person, there is no need to demonstrate that a higher portion of people are able to comply with the requirement, but it must have the effect of disadvantaging persons with the disability, unless the requirement is reasonable having regard to the circumstances of the case (see s6(3)).

> (2) For the purposes of this Act, a person (the ***discriminator***) also ***discriminates*** against another person (the ***aggrieved person***) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
>
> (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
>
> (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.
>
> (3) Subsection (1) or (2) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.
>
> (4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

Section 6(2) of the DDA is considerably wider in scope, making it essentially a requirement for a person who imposes a term or requirement to make reasonable adjustments for the person with the disability, for example, by arranging for ramps to be installed within the school grounds, unless it is an unjustifiable hardship for the school to make these reasonable adjustments.[7] In deciding what are reasonable adjustments Schools should consult the Disability Standards for Education because a failure to comply with the standards can amount to a contravention of the DDA (discussed further below at 4.2).

The requirement of making a reasonable adjustment under the ADA is not expressed. However, note again, it is not a requirement to make this reasonable adjustment if the school can demonstrate that the term is reasonable having regard to the circumstances of the case. Under the ADA the listed relevant factors when considering reasonableness suggests the school needs to consider is whether there is an **"alternative term"** that can be imposed which the student who has an impairment is able to comply with and which is reasonable.

[7] see DDA, s 29A.

2.5.3 ***General***

a Reasonableness

Section 11(2) lists the factors that should be taken into account when deciding the reasonableness of term. However, the question of reasonableness requires much thought and advice. Note that, it is up to the school to prove that the term is reasonable. And the court in *JM v QFG and GK* [1998] QCA 228 stated that:

> "the test of reasonableness is an objective one, requiring the weighing of the nature and extent of the discriminatory effect, on the one hand against the reasons advanced in favour of the term on the other and all the circumstances, including those specified in section 11(2) must be taken into account."

Case Study – Reasonableness of a Term

Raphael FM considered a requirement or condition that students in a particular class utilise the toilet in another building, rather than a toilet outside the classroom.

This was a requirement with which the applicant, a student who had spina bifida that caused difficulties with bladder and bowel control, could not comply.

The school claimed that the toilet outside the classroom could not be used by the Applicant because it was kept locked and set aside for the use of one student who was required to catherterise himself. It was suggested that if the Applicant used the toilet then there would be a risk of infection to the other child and that he would suffer from not being able to use the toilet.

However, the evidence did not support this argument because a small cupboard could be built to accommodate the catheterization equipment. Also this child had to live in the real world where a sterile environment could not be expected, and the use of the toilet by the Applicant would not put the child at risk of infection. The toilet was also clearly more suitable for the Applicant than any other toilet given its nearness, and the fact that it provided a private area for her to wash and change.

Raphael FM therefore found the requirement or condition to be unreasonable.

Travers v New South Wales (2001) 163 FLR 99.

b Able to Comply

Note also that in terms of whether a person is or is not able to comply with a term, the question is whether the person is able to comply reasonably, practically and with dignity. You must look beyond 'technical' compliance.[8]

Case Study – Complying with the Term

The court found that a school had discriminated against a student who was of Sihk ethnicity because it had refused him entry into the school as his turban prevented him from wearing the school hat.

Although the student could physically comply with the term by removing his turban, he could not be expected to do so.

Mandla v Dowell Lee [1982] UKHL 7.

[8] *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2004] FMCA 915 at [9].

2.6 In the area of education

2.6.1 *Under the ADA*

Discrimination must occur in a particular area prescribed by the ADA. Education is a recognized area, and there are two sub-areas in which discrimination may occur:

1. The prospective student area; and
2. The student area.

Section 38 provides that:

> "An educational authority must not discriminate –
> (a) In failing to accept a person's application for admission as a student; or
> (b) In the way in which a person's application is processed; or
> (c) In the arrangements made for, or in the criteria used in deciding who should be offered admission as a student; or
> (d) In the terms on which a person is admitted as a student."

Section 39 provides that:

> "An educational authority must not discriminated –
> (a) In any variation of the terms of a student's enrolment; or
> (b) By denying or limiting access to any benefit arising from the enrolment that is supplied by the authority; or
> (c) By excluding a student; or
> (d) By treating a student in any way in connection with the student's training or instruction."

2.6.2 *Under the DDA*

Section 22 of the DDA provides:

> (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's disability:
> (a) by refusing or failing to accept the person's application for admission as a student; or
> (b) in the terms or conditions on which it is prepared to admit the person as a student.
> (2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's disability:
> (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or
> (b) by expelling the student; or
> (c) by subjecting the student to any other detriment.
> (2A) It is unlawful for an education provider to discriminate against a person on the ground of the person's disability:
> (a) by developing curricula or training courses having a content that will either exclude the person from participation, or subject the person to any other detriment; or
> (b) by accrediting curricula or training courses having such a content.
> (3) This section does not render it unlawful to discriminate against a person on the ground of the person's disability in respect of admission to an educational institution established wholly or primarily for students who have a particular disability where the person does not have that particular disability.

Note that the DDA also extends anti-discrimination law to mean that education providers are also not permitted to discriminate against a person by developing or accrediting curricular or training courses that will exclude a person from participation or cause detriment to that person.

As sub-section (3) provides a school established wholly for students with a particular disability can discriminate against a person who does not have that particular disability.

2.6.3 *General*

An educational authority is defined under the Acts as generally meaning a body that administers a school,

college, university or other institution providing any form of training or instruction. Note that courts have interpreted this term broadly to include child care centres.[9]

Case Study – Prospective Student Area (Enrolment)

Ms Murphy sought to have her child admitted in a school, and the court found that the events which occurred throughout the admission process mean that the school had acted in a discriminatory manner.

The parents of the child had approached the school principal in March 1995 to enrol their child into the school. The decision to enrol the child was not advised until 1 week prior to the commencement of the 1996 school year. The principal had merely advised that the decision had been "delayed", when in actual fact several measures were being taken accommodate for the child, which the parents were not informed of. Whilst the school had not denied the application, the DDA prohibits a "failure to accept" an application also.

The court found that the principal failed to keep the parents informed from March 1995 to January 1996 as to the progress of the application, including what action had been taken and what was proposed and the Department's expectation that the school would be in a position to accept the child as a student at the commencement of the 1996 school year. This was described as an "unnecessary and an alienating experience". The parents were found to have suffered detriment in the form of stressful uncertainty and pervasive ignorance.

The child's mother was required to persist with enquiries to others (given that the school principal was not keeping her informed) in order ascertain whether her child would be able to attend the school.

Therefore, the school had treated the child and her parents less favourably than those able-bodied children and their parents who had applied to have their child admitted in 1996 in the same kindergarten class, and this occurred "because of" or as a consequence of the fact that the child had the disability.

From this, schools must understand that it is essential to ensure that parents who are seeking enrollment of their disable child are kept properly informed, and do not feel excluded throughout the process. It is important also not the unnecessarily delay the decision.

Murphy and Grahl on behalf of themselves and *Sian Grahl v The State of New South Wales (NSW Department of Education) and Houston* (2000) EOC 93-095.

Suspensions and expulsions can also be a difficult to manage. It may be possible to take this action, where it is necessary, where there is a legitimate reason for doing so (for example, the health and safety of other students and staff), and the school's policies and procedures have been adhered to in the same way it would be followed for a child not having a disability. The key is to ensure that the child with a disability is not treated any less favourably than another student in the same or not materially different circumstances.

[9] *Applicant N v Respondent C* [2006] FMCA 1936, [38]–[43].

Case Study – Student Area (Suspension & Expulsion)

A child who had Asperger's syndrome, ADHD and Conduct Disorder, and had been a student at two State Schools, claimed that he had been discriminated against on the basis of his disabilities by the school requiring that he attend part-time, suspending him a number of times and eventually expelling him.

The first occasion on which the student had been suspended involved the student (at [213]):

> *"Scraping a fellow student on the back with a protractor and disruptive behaviour in other classes – refusing to complete, ripping apart work sheets, defacing class work and hooking fish hooks into the clothes of other students."*

The court found that the school had not treated him less favourably than a student who behaved in the way that he had behaved, with his history, but who was not suffering from his disabilities (at [215]).

The court then explored the claim that the child had been discriminated against on the basis of his impairment by being expelled after one year and one term at the school. The school however, claimed that during this time his behaviour had been troubling and one teacher described him as the most difficult child the teacher had ever taught. The Principal claimed also that he had exhausted all possible alternatives to expulsion before he made this final decision, and that this was the only way to ensure the safety of staff and students. No other student had been expelled allegedly because no other student "was as consistently disruptive and badly behaved".

The court accepted this argument and found that there was no unfavourable treatment in the circumstances (at [222]).

Minns v State of New South Wales [2002] FMCA 60.

2.7 In the Area of Sporting Activities

Also of potential relevance is section 28 of the DDA which makes it unlawful to discriminate against a person from a sporting activity (including administrative or coaching activity), on the ground of their disability, unless:

- The person with the disability is not capable of performing what is reasonably required of them by the sporting activity; or
- Proper process has been followed in selecting a person on the basis of their skills and abilities; or
- The sporting activity is for persons with a particular disability and the person does not have this disability.

There is no equivalent provision under the ADA.

2.8 Exemptions

2.8.1 *Under the ADA*

a Religious, Single Sex or Particular Disability Schools

Section 41 of the ADA provides that having a school wholly for a particular sex, religion or for general or a specific impairment is not discrimination.

b Unjustifiable hardship

Using the example above where a student enrolled at a school requires the assistance of a wheelchair and cannot use stairs, it is not unlawful for an educational authority to discriminate against this student, if the requirement of special services or facilitates such as ramps, would impose an unjustifiable hardship on the educational authority.[10]

Section 5 of the ADA lists a number of factors that can be considered to determine whether implementing special services or facilities would impose an unjustifiable hardship, namely:

> "(a) the nature of the special services or facilities; and
> (b) the cost of supplying the special services or facilities and the number of people who would benefit or be disadvantaged; and
> (c) the financial circumstances of the person; and
> (d) the disruption that supplying the special services or facilities might cause; and
> (e) the nature of any benefit or detriment to all people concerned."

c Sport

It is possible for the school to restrict participation of a student in a competitive sporting activity (for example, extra-curricula netball or rugby) to people with a specific or general impairment.[11] A competitive sporting activity does not include coaching, umpiring, refereeing, administering a sporting activity.[12]

2.8.2 *Under the DDA*

a Unjustifiable hardship

Section 29A of the DDA provides an exemption which makes it not unlawful to discriminate against a person if avoiding discrimination would impose an unjustifiable hardship on the school. For example, where a school is required to install ramps or other facilities for a student requiring the assistance of a wheelchair and the school does not have the resources to arrange for this, the school may be able to establish unjustifiable hardship as a defence for its actions.

Section 11 of the DDA lists a number of relevant circumstances to assisting in determining whether an unjustifiable hardship would arise:

> "(a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
> (b) the effect of the disability of any person concerned;
> (c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;
> (d) the availability of financial and other assistance to the first person;
> (e) any relevant action plans given to the Commission under section 64.
> Example: One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community.
> (2) For the purposes of this Act, the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship."

b Special Measures

One might argue that implementing special measures and accommodating for a child with a disability by for example, providing a teacher's aid for the child, is discrimination also (albeit positive).

[10] ADA, section 44.
[11] ADA, section 111(1)(d).
[12] ADA, section 111(4).

However, section 45 provides that it is not unlawful to do an act that reasonably necessary and is intended to ensure that person with a disability have equal opportunities and afford persons with a disability opportunities to meet their special needs in relation to education.

2.9 Who can bring a claim

2.9.1 *Under the ADA*

Section 134(1) of the ADA provides that any of the following people may complaint to the commissioner about an alleged contravention of the Act:

> (a) a person who was subjected to the alleged contravention;
> (b) an agent of the person;
> (c) a person authorised in writing by the commissioner to act on behalf of a person who was subjected to the alleged contravention and who is unable to make or authorise a complaint.
> (2) Two or more people may make a complaint jointly.

2.9.2 *Under the DDA*

The DDA does not have a similar provision to section 134 of the ADA above, however, the same would apply.

In the case of students being discriminated against, as the law does not given them legal capacity until they reach the age of 18 and therefore, the child's legal guardian usually brings the claim on the child's behalf.

a Associates

Pursuant to section 7 of the DDA, a person who has an associate with a disability can also be subject to discrimination in the same way as a person with a disability can be.[13]

An associate includes a spouse, another person who is living with the person on a genuine domestic basis, a relative, carer, another person who is in a business, sporting or recreational relationship with the person.[14]

Note that section 7(p) of the ADA makes association with a person that has an impairment a protected attributed in itself. So an associate also has a right under the ADA to bring an discrimination complaint.

[13] Note that section 7 does not apply in relation to section 54A(2) or (3) regarding assistance animals.
[14] *DDA,* s 4 (Interpretation).

Case Study – Associates of a Child with a Disability

The parents of a child with Spinal Muscular Atrophy made a complaint to the Australian Human Rights Commission. They argued that they were discriminated against because they were 'associates' of a child who had a disability. The parents (Ms Murphy and Mr Grahl) alleged that they were treated less favourably than parents of children without a disability, because they were seen as "trouble makers" or "problem people" whenever they tried to ensure that the needs of their child were properly met.

For example, the school principal had deliberately decided of his own accord, without consultation with Ms Murphy to padlock the only gate that Ms Murphy regularly used for the purpose of entering the school with her child. The reason for closing the gate was found to be for the purpose of denying Sian and her mother the opportunity to enter the school premises by what was for them the most convenient and therefore their habitual mode of entry. The Principal also failed to address the issue when confronted by Ms Murphy.

There were several other instances of discrimination against the parents on the basis of their child's disability, including:

- unreasonably delaying enrollment;
- moving a large industrial bin from its usual position to the disabled car parking bay which was used by Ms Murphy because the school was supposedly accommodating the school dental van; and
- contacting police to have them remove Ms Murphy from the premises when she tried to address a concern with the school principal.

It was found that the parents had been discriminated against on the ground of being associates of a person with a disability. The school was ordered to apologise and publish its apology in the Bellingen Public School newsletter, and compensation was awarded to the parents of the child in the sum of $25,000.00.

2.10 Harassment in Education

Apart from direct and indirect discrimination, under the DDA it is unlawful for a staff member to harass a student at the educational institution who has a disability or person with a disability who is seeking to be admitted in that educational institution, in relation to that disability.[15]

Harassment includes any action taken in relation to the person's disability that is reasonably likely, in all the circumstances, to humiliate, offend, intimidate or distress the person. Harassment can also occur in relation to a student who has an associate with a disability.

This can occur if for example, a teacher repeatedly belittles and criticizes a student for their performance, something which is caused by the student's disability.

It is essential to recognize this kind of behavior as soon as possible and seek to promptly and effectively deal with the issue, by way of counseling both parties and monitoring future behavior.

2.11 Victimisation

2.11.1 *Under the ADA*

It is an offence under the ADA to victimize a person and to do so may attract a penalty for a corporation of 170 penalty units which is $18,700.00 and for an individual 45 penalty units or $4,950.00.[16]

[15] DDA, s37.

[16] ADA, s129.

Victimisation occurs if the school were to do an act or threaten to do an act, to the detriment of the complainant, because the complainant (or a person associated with or related to the complainant):

a. refuses to do something that would contravene the Act or in good faith;
b. alleges or intends to allege that the school has committed a contravention of the Act;
c. intends to bring a claim under the Act, appear as a witness or supply information or produce documents in a proceeding under the Act; or
d. intends to become involved in a prosecution for an offence under the Act,

or because that person believes that the complaint (or person associated with the complainant) is doing or intends to do one of these things mentioned above.

So for instance, if it comes to the schools attention that a parent of a student with a disability intends to bring a claim under the Act for discrimination, the school must not do anything or threaten to do anything to the detriment of the complainant, for example, threaten to suspend or expel the child.

2.11.2 *Under the DDA*

Section 42 of the DDA similarly makes it an offence to commit victimisation of a person. The maximum penalty is 6 months imprisonment.

3 EXPLORING LEGAL RISKS AND RESPONSIBILITIES REGARDING STUDENTS WITH A DISABILITY

There is no doubt that at times, the practical compliance with the Acts places considerable pressure on schools and individual teachers and allowing students with disabilities to attend your school is not without its legal risks.

There are numerous risks but below are some of the more common ones.

3.1 Legal Risk 1: Refusing to make reasonable adjustments or implement special measures

Sometimes refusing admission of a child with a disability seems like the most attractive and simplest course of action to take. But is a school obliged to accept a child and at least attempt to implement special measures?

Case Study – Reasonable Adjustments

A parent approached the school seeking to have their child admitted. This child had profound hearing loss and required the assistance of a teacher's aide who is fluent in Australian Sign Language (better known as Auslan). An application for an appropriate government grant was necessary, volunteers had to be found who could provide part-time Auslan signing support for the child, these volunteers had to be available to attend excursions and camps as the child's interpreter, and Auslan learning classes for teachers had to be arranged for on a voluntary basis.

When is it acceptable to take the risk and refuse to make these adjustments and when should you attempt to make these adjustments?

The court concluded that:

- the school had unreasonably imposed a term which provided that in order for the child to be offered a position in the school the child had to accept the existing Learning Support model as it was, that is, without Auslan support services being available;
- this term could not be complied with by the child given that he was in need of Auslan assistance;
- whereas a higher proportion of children seeking enrollment were able to comply with this term;
- the term was unreasonable having regard to the fact that the child was Auslan dependent and would not have received effective education without it, there was a reasonable alternative available because it was possible to find an appropriate Auslan interpreter, financial considerations were not a major concern.

Catholic Education Office v Clarke [2004] FCAFC 197.

Firstly, it is essential to note, that neither under the ADA nor under the DDA is there an express obligation imposed on a school to make reasonable adjustments for the child. However note, that the defences available to schools which argue that it would be an unjustifiable hardship on the school to accept the student,[17] would suggest that the school should have at least attempted to accommodate for him or her.

Further, whilst the Acts do not expressly oblige schools to do so, schools may need to in order to avoid discriminatory conduct.[18] For instance:

1. a failure to reasonably accommodate may go to proving less favourable treatment in a case of direct discrimination, if for example, the school has accommodated for another student in the past; or

2. where a school has imposed an unreasonable condition on a student and fails to accommodate for this student, this may be considered indirect discrimination.[19]

So even if there is no express provision to reasonably accommodate, it is advisable that a school at least (properly) explore its options in implementing an adjustment for the child.

[17] Section 21B DDA and section 44 ADA.
[18] per McHugh and Kirby J in *Purvis*.
[19] See *Catholic Education Office v Clarke* [2004] FCAFC 197 and *Daghlian v Australian Postal Corporation* [2003] FCA 759. Note also section 6(2) of the DDA requires that it be proved that the aggrieved person would be able to comply with the term only if the discriminator were to make reasonable adjustments for the aggrieved person, but the discriminator does not do so or doesn't propose to do so.

3.2 Legal Risk 2: Health and Safety & Duty of Care

Depending on the kind of disability a student may have, sometimes this student's disability may pose a risk to the health and safety of staff and other students. Consider for example, the case mentioned above, which involved a student with a disability that sometimes manifested in violent behavior, which gives rise to a legal battle.

There are two main duties of care owed by schools:

1. The duty of care, as employers, owed to employees to ensure a safe system of work;[20] and
2. The duty of care owed to students children to take reasonable care for the safety of the students including to avoid harm being suffered.[21]

However, competing with these duties is the law prohibiting unlawful discrimination against students on the basis of their disability.

So when is it excusable to discriminate against a person with a disability for fear of breaching the duties owed to students and staff? This is a complex question requiring a thorough analysis of the specific situation.

It is important to note that the health and safety of staff and students cannot be used as an excuse in every situation. To demonstrate that there was no discrimination *on the basis of the impairment*, the health and safety concerns (and not the disability) would have to be the substantial reason for taking the particular action.[22]

Note that this argument is more difficult to establish under the DDA, because even if health and safety was a substantial reason for acting in a discriminatory manner, the disability need only be *one* of the reasons. However, it is quite possible to establish that the health and safety concern was the only reason and the disability had no part in the decision made. For example, in the *Purvis* case where the student's disability was manifested in violent behavior, the court accepted that he would have been expelled regardless of his disability because any student who is violent towards another would have been treated in this manner.

Also drawing from other non-discrimination case law the court would probably have to be satisfied that there was a **genuine and/or reasonable** belief that there was a risk to the health and safety[23] of staff and students.

If there is a genuine and/or reasonable belief and acting in this discriminatory manner is *reasonably necessary* to protect the health and safety of staff members, then section 108 of the ADA may be relied upon as an excuse or an exemption to the discriminatory behavior. Note that this exemption extends only so far as it relates to *occupational* health and safety.
Similarly, section 47 of the DDA provides that it does not render unlawful anything that is done by a person in direct compliance with a prescribed law which would include the *Work Health and Safety Act 2011* (Qld) for example.

[20] See section 19 of the *Work Health and Safety Act 2011* (Qld).
[21] See for example, the High Court Case of *Geyer v Downs* [1977] HCA 64 where the court held that: "children stand in need of care and supervisions and this their parents cannot effectively provide when children are attending school…those then in charge of them, their teachers…must provide it" and *Richards v State of Victoria* (1969) VR 136 per Chief Justice Winneke.
[22] See section 10 (4) of the ADA.
[23] *Darvell v Australian Postal Corporation* [2010] FWAFB 4082 at [15].

3.3 Legal Risk 3: Vicarious Liability

Schools should note that whilst technically, the discriminatory action may come from one particular teacher the school could be "vicariously liable" for the actions of that teacher.

Vicarious liability is a well-established principle developed by judges and has in fact been mirrored in the ADA. Section 133(1) of the ADA provides that if any of a person's workers or agents contravenes the Act in the course of work or while acting as agent, both the person and the worker or agent, as the case may be, are jointly and severally civilly liable for the contravention, and a proceeding under the Act may be taken against either or both. A similar concept is articulated in section 123(2) of the DDA.

At least from a remedial perspective, employers are usually sued because seeking compensation from a school can prove to be more fruitful than seeking compensation from an individual teacher. But also from a legal perspective, liability is imposed on one person for the wrongful act of another, on the basis of the legal relationship between them. An employer is responsible for an employee's actions because the employee is usually acting within the school's authority and therefore an employer is presumed to have authorised the employee's behavior (even where the behavior is negative because arguably it was for the "benefit" of the school).

It would of course, be unfair to impose liability on a school in all circumstances. To establish vicarious liability, it must be shown that the person who acted in a discriminatory manner:

1. Was an employee of the school;
2. Was acting in the course of employment, within the scope of his or her authority and performing the employment duties.

It is also a defence against a claim of vicarious liability, if the school can establish that the respondent took steps to prevent the worker or agent from contravening the Act.

This is why it is essential for schools to ensure that their staff are aware of their legal obligations regarding discrimination, by conducting educational sessions and seminars for example.

4 HOW TO AVOID CLAIMS OF DISCRIMINATION – RISK MINIMISATION

4.1 General Risk Management

Risk management does not only require us to deal with a situation when it arises, but requires preventative and proactive action.

Schools should hold seminars for staff, educate them further on discriminatory practices. Schools should also perhaps consider undertaking an audit, ensuring that you have appropriate systems including policies and procedures in place to measure compliance with anti-discrimination laws.

For example, a compliance checklist may assist the school staff to better understand their obligations and recognise risks. Ensure that an appropriate complaints handling system is in place to provide an early warning system of possible breaches of standards and legal obligations.

Seeking appropriate advice regarding your existing policies and procedures may be worth while.

4.2 Disability Standards

Section 31 of the DDA provides that Minister with a power to set disability standards.

Having these standards put in place acts as a double-edged sword – if followed, the Part of the DDA relating to discriminatory acts is not applicable and school will not therefore have acted unlawfully (see section 34), but by the same token, it is unlawful to contravene any of those standards (see section 32).

See **Appendix A** to this paper for a copy of the current Disability Standards for Education.

The Disability Standard re-iterates the rights of students with disabilities and the responsibilities of the school in the enrolment, participation, accreditation and delivery of curricula, support services, harassment and victimization of students.

If there is one piece of advice that can be given to schools, it would be that schools must become familiar with the anti-discriminations laws including Disability Standards and take reasonable steps to ensure all students can access the same or comparable opportunities and choices, as those students without a disability. This may mean that 'reasonable adjustments' must be implemented, because note that "[e]ducation providers have a positive obligation to make changes to reasonably accommodate the needs of a student with a disability" *(Australian Government: Attorney General's Department).*

An adjustment includes:

- A measure or action that has the effect of assisting a student with a disability to apply for admission or enrolment, to participate in a course or program, to use facilities and services, on the same basis as another student without a disability; and
- Facilitating for support services to be accessed by students with a disability.
- The adjustments will be reasonable if they balance the interests of all parties affected.

Determining what reasonable adjustments are necessary requires a consideration of a number of matters including, the:

- the student's disability;
- effect of the student's disability on the ability to access the same or comparable opportunities;
- views and opinions of the student and their parents or carers ("associates");
- effect and benefits of the adjustment on the student;
- effect and benefits of the adjustment on the school (including its staff and other students); and
- cost (both financially and practically) of making such adjustments.

It's essential to appropriately collaborate with the subject student and their associates at least, and it would be advisable to consult with staff, and experts to form an effective and lawful individual plan.

5 NEED ASSISTANCE?

Our **experienced Discrimination Lawyers** regularly act in discrimination matters, including acting for schools and employers who are the subject of discrimination complaints made by students and employees and we offer our legal services Australia wide (not just in Brisbane).

We know discrimination matters require a careful, holistic and sensitive approach and this is the exact approach we take to ensure that you achieve the best outcome possible. We will always act in your best interests and not only care about the results but we care about you throughout the entire process. We make sure you understand the risks involved and your chances of success and we will be there for you.

If you require any assistance in relation to discrimination matters or in relation to any of our other areas of specialty please do not hesitate to contact us on (07) 3252 0011.