



Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Systems and Individual Advocacy for vulnerable People with Disability

2020 Review of the Disability Standards for Education

**Submission by
Queensland Advocacy Incorporated**

**Department of Education, Skills and
Employment**

September 2020

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QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (**QAI**) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland. QAI's board is comprised of a majority of persons with disability, whose wisdom and lived experience of disability is our foundation and guide.

QAI has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for over a decade, highly in-demand individual advocacy through our individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program and, more recently, the National Disability Insurance Scheme Appeals Support Program, Decision Support Pilot Program, Disability Royal Commission Advocacy Program and Education Advocacy Service. Our individual advocacy experience informs our understanding, and prioritisation, of systemic advocacy issues.

In particular, our Education Advocacy Service provides information, advice and/or referral to parents on a range of issues for students with disabilities including enrolment, the use of restrictive practices, bullying and victimisation, lack of support within schools and for schools, segregation and rejection by schools and teachers including principals, physical abuse by teachers and or principals, accommodations and learning support, inclusive child care and kindergarten, bureaucratic buck-passing, and funding for local OSHC.

QAI's recommendations

QAI recommends:

1. The language in the Standards and Guidance Notes be amended to impose clearer legislative requirements on education providers to respond to requests for reasonable adjustments in a systematic and transparent manner, such as through the introduction of enforceable timeframes and legal requirement to provide written responses to requests for reasonable adjustments.
2. The implementation of Recommendation 2 from the 2015 review of the Standards requiring an accessible summary of rights, obligations and complaints processes be provided to all prospective students as part of enrolment processes, is published on every education provider's website and is prominently displayed in all education facilities.
3. The obligation on State and Territory government education departments to intervene when students with disability are denied access to an out of catchment education facility that would more appropriately meet their needs.

4. Greater accountability regarding the decision-making of education providers exercising unfettered discretion and a review of the current complaint mechanisms and practises which call into question issues of procedural fairness, take unreasonable lengths of time and often fail to resolve issues.
5. The implementation of Recommendation 10 from the 2015 review of the Standards recommending the exploration of a nationally consistent monitoring and accreditation model to strengthen proactive compliance with the Standards.
6. Implement measures to improve the culture of schools so that they are more inclusive, valuing and welcoming of students with disability. Include culture as a key performance measure for education and training providers.
7. Mandatory training for all education providers and educators regarding the Standards and practices conducive to inclusive education in the same way that mandatory training for child protection matters exists.
8. Align the Standards with the National Disability Strategy (theme 5) as a way of implementing Article 24 of the Convention on the Rights of Persons with Disability (requiring State Parties to ensure an inclusive education system at all levels).

Introduction

QAI is grateful for the opportunity to participate in the Australian Government's 2020 review of the *Disability Standards for Education 2005* (the Standards). QAI considers the Standards a valuable tool in ensuring students with disability are afforded access to education and training on the same basis as students without disability. The Standards provide a welcome addition to the legislative provisions of the *Disability Discrimination Act 1992* by providing clarity around the rights of people with disability accessing education and training as well as the legal obligations of education providers. The Standards also reflect Australia's ongoing obligation to implement the Convention on the Rights of Persons with Disabilities (CRPD) and the government's legal requirement to prohibit discrimination on the grounds of disability. It is noteworthy that the National Disability Strategy as Australia's mechanism for implementing the CRPD is currently being reviewed. The 2020 review of the Standards represents a timely opportunity to ensure consistency within the national policy agenda.

However, it is our experience that the implementation of the Standards remains grossly problematic and that students with disability continue to experience discrimination, neglect and ostracization in education and training settings. Through QAI's Education Advocacy Service, we are privy to examples of students with disability being denied their right to an inclusive education and bear witness to the suffering this causes students, their families and carers alike.

1 - Are the rights, obligations and measures of compliance set out in the Standards (and it's Guidance Notes) clear and appropriate?

QAI considers the Standards and Guidance Notes to be mostly clear and appropriate in their content. However, due to the inconsistent level of compliance among education providers, the language used needs to be more directive. For example, the Standards should set out enforceable time frames in which certain decisions should be made. QAI also notes the use of phrases such as 'it is good practice' in relation to suggested measures of compliance. QAI recommends the use of more explicit language that conveys specific legal requirements onto education providers, such as the requirement to provide a written response to a request for a reasonable adjustment.

2 - Do students, families and carers, educators, education providers and policy makers know about, understand, apply and comply with the rights, obligations and measures of compliance in the Standards?

Lack of awareness of the standards

Identified as a key issue in the 2010 and 2015 reviews, poor awareness of the Standards remains a key issue. In our experience the standards are rarely referred to in practice by education providers, either verbally or in writing, regarding decision-making that has occurred or by way of educating students with disability about their right to access education on the same basis as students without disability. Indeed, it appears that the Standards are only referred to when issues become inflamed to the point of escalated disputes. Students and their associates are often unaware of their right to be consulted in decision-making regarding requests for reasonable adjustments or are unaware of the considerations that a provider should make when assessing requests for support. This prevents the student from upholding their rights under the Standards and precludes the very outcome that the Standards are designed to achieve. A lack of knowledge regarding the decision-making considerations of education providers can also contribute towards misunderstandings and communication breakdowns and can damage relationships between students, their associates and the education provider.

QAI therefore recommends the implementation of Recommendation 2 from the 2015 review of the Standards, which QAI notes that the government agreed to in principle. The Recommendation is for the Australian government to work with State and Territory governments to ensure an accessible summary of rights, obligations and complaints processes is provided to *all* prospective students as part of enrolment processes, is published on every education provider's website and is prominently displayed in all education facilities.

Enrolment decisions

QAI is deeply concerned about the enrolment gatekeeping practices of education providers regarding students with disability. Parents have reported principals suggesting other schools because of an ill-conceived notion of a student's support needs based on the disability type. The suggested schools are often far from the student's home. On other occasions QAI has observed principals to rely upon often one-sided incident reports on a student's record from a previous school to inform their decision as to whether to enrol a student with a disability at their school. In these situations, principals often cite their 'out-of-catchment area' policy by way of justifying a decision to decline the enrolment of a student with a disability. These decisions are in direct contravention of Part 4 of the Standards which require education providers to take reasonable steps to ensure enrolment on the same basis as students without disability. Out of catchment area policies usually provide for exceptions, yet anecdotally we are aware that exceptions are rarely given to students with disability. The very students who are forced to apply to schools outside of their catchment area have typically endured negative, discriminatory and often mentally harmful experiences at education facilities within their own catchment school. To then be denied an opportunity to access an education at another facility at the unfettered discretion of a principal is to deny people with disability their human right to an education which is appropriate to their needs.

QAI is concerned that these practices not only breach the *Disability Discrimination Act 1992* but are reflective of a wider issue concerning the lack of accountability regarding decision-making of education providers. Efforts to seek a review of a principal's decision are extremely arduous and rarely successful. Our education systems must ensure students with disability are accepted and welcomed into their local schools. Where a student with a disability is forced to apply to a school outside of their catchment area due to the barriers faced in obtaining an inclusive education within their own catchment area, the relevant State and Territory government departments responsible for the provision of education must intervene to ensure that students with disability have access to an education facility that welcomes them and is appropriate to their needs. The alternative is to leave students trapped in education facilities which cause further harm or force students into Special Education, home-schooling or distance education, essentially reinforcing the segregated framework that years of policy reform has rightly sought to overcome.

Denial of reasonable adjustments

QAI has witnessed a disconcerting pattern of behaviour among education providers in relation to their legal obligation to provide reasonable adjustments. Reasonable adjustments are essential to ensuring students with disability can access education on the same basis as students without disability. Through our Education Advocacy Service, QAI has witnessed education providers to:

- Simply ignore requests for reasonable adjustments

- Pay 'lip-service' to reasonable adjustments recommended by specialists without taking any steps to ensure their implementation
- Refuse requests for reasonable adjustments without following the required consultation process and without ensuring the process for seeking an adjustment is 'accessible and transparent' as per section 4.2 of the Guidance Notes
- Refute the recommendations of specialist reports which have been obtained for the sole purpose of explaining the need for a reasonable adjustment and which provide the evidence and clinical guidelines for their implementation
- Fail to provide adjustments within a reasonable time frame as per section 3.7 of the Standards
- Fail to provide 'review mechanisms...to deal with any grievances arising from differences in the student's preferred reasonable adjustment and the adjustment recommended by professional' as per section 4.2 of the Guidance Notes
- Fail to provide 'a notice stating the decision and the reasons for the decision' when a provider relies upon unjustifiable hardship in relation to a request for a reasonable adjustment, as per section 4.4 of the Guidance Notes
- Exercise unfettered discretion to decline the involvement of support persons such as Guidance Officers, Inclusion Coaches and other education support staff when recommended by the relevant Regional Office.

These arbitrary decisions cause profound levels of emotional anguish for families already grappling with the day-to-day functional impacts of the student's disability. Confusion and frustration at a provider's lack of adherence to the Standards compounds the distress felt by families who are typically attending multiple healthcare appointments, obtaining and coordinating in-home supports, seeking access to funding through notoriously bureaucratic organisations, juggling employment obligations with family responsibilities and coping with the usual stressors of everyday life. Just as serious is the impact on a student's learning and the denial of their right to receive an education that values and encourages their participation. The lifelong consequences of exclusion in the education setting are reverberated in the experiences of people with disability who report feeling ill-equipped for adult life.

Inconsistency in decision-making and ad-hoc compliance with the Standards represents a violation of the *Disability Discrimination Act 1992*. The failure of education providers to determine what is a reasonable adjustment by regarding the interests of the student as a '*very significant*' consideration as per section 4.2 of the Guidance Notes is further evident in the use of restrictive practices on students with disability, many of whom are very young children. QAI takes the position that the use of such practices is cruel, inhuman and degrading and violates the human rights of the student. Decision-making in situations where a student's behaviour is viewed as 'challenging' typically ignores the stressors impacting the student and is explained as 'balancing the interests of all parties'. However, there is no 'balance' and decisions generally fall on the side of the education provider. The consequences for the student can be devastating. The

absence of reasonable adjustments in these situations impacts severely on students with disability who report feeling humiliated, highly anxious and distressed. This meets the very definition of 'harassment' provided in the Standards which is explicitly outlawed and for which the Standards stipulate there is no legal justification on the grounds of unjustifiable hardship.

The absence of reasonable adjustments for students with disabilities such as Autism and/or ADHD can lead to frequent suspensions due to escalations in behaviour that could have otherwise been avoided had reasonable adjustments that appropriately met the needs of the student been in place. The failure to implement appropriate supports that are designed to mitigate the likelihood of escalations means that students with disability are essentially set up to fail and experience significant periods of lost education as a result of frequent recourse to suspensions. Some of our clients who already experience significant vulnerabilities have been suspended more than 8 times in a year for up to 10 days per suspension. QAI is deeply concerned that such practices are a mechanism for providers to abdicate their responsibilities to educate students with disability and to deter families from maintaining their child's enrolment at the school. Some of our clients have had expulsions overturned on appeal, however these processes can take several months, during which time the student is not attending school or is receiving little to no education of value. Upon their eventual return to school, they experience isolation from their peers. The financial impact of repeated and prolonged suspensions for parents is equally destructive, with significant risk to the sustainability of employment due to parents being forced to expend all their leave and attempt to work from home whilst tending to their children. This risk is especially felt by low-income or single-parent families with limited supports.

Reform must urgently address poor compliance with the Standards and the subsequent discriminatory decision-making that continues to plague the educational experiences of students with disability. Greater consistency, transparency and accountability is desperately needed. Decision-making in relation to requests for reasonable adjustments must not fall solely in the hands of principals but should be the outcome of a consultation process that meaningfully involves all stakeholders, including the Regional Office. In addition to the introduction of more directive language in the Standards that confer legally enforceable requirements onto providers, QAI recommends the implementation of Recommendation 10 from the 2015 review which proposes the exploration of a nationally consistent monitoring and accreditation model to strengthen proactive compliance with the Standards.

Ineffective complaint process

The difficulties described above are intensified by the inadequate complaint mechanisms currently in place. For students with a disability in Queensland who are dissatisfied with the actions of their education provider, complaints can be made to their Regional Office. Unfortunately, complaints are usually met with lengthy delays (during which time students may not be attending school) and a reluctance to engage directly with students and their associates to resolve the matter. Exacerbating all of this, families can be exposed to questionable practices that see the Regional Office re-refer the complaint to the same Regional Office personnel who

made the original decision. Such practices raise alarm regarding due process and the impartiality of decision-making within education departments. It brings into question procedural fairness which must remain at the very core of all decision-making in government departments. Cumbersome complaints processes at the State and Territory level mean that people with disability can only access administrative justice through adversarial pathways at Human Rights Commissions. The damaging impact of litigation on relationships between students, their associates and education providers cannot be overstated. Having access to a functional, effective and independent complaint process at the State and Territory level is essential to the timely resolution of disputes as well as the maintenance of relationships which are vital for a student's ongoing access to an inclusive education.

Culture of the education facility

One of the consequences of having Standards rarely referred to in practice is the lack of dialogue in relation to rights, obligations and equitable decision making. In education facilities where individuals in positions of leadership do not have the requisite understanding of disability or value the essence of inclusive education, the experiences of students with disability can be markedly different to those attending facilities where the provider displays a welcoming and supportive attitude to all students regardless of their disability status. The attitudes and behaviour of the principal and others in positions of leadership create a micro-climate and filter down to the teaching strategies of the educators and therefore the experience of the student, whose access to reasonable adjustments becomes dependent upon the values of the individuals at the school as opposed to clinical guidelines regarding best practice. This then effects the behaviour of the student and the reasonable adjustments therefore required to support their education. Similarly dependent upon the approach taken by the principal is the experience of parents who seek to advocate on behalf of their child. In facilities where the micro-climate is unwelcoming towards students with disability, parents are viewed as difficult and unreasonable and are treated as pariahs in the school community. The resultant power imbalance translates into an experience of isolation that perpetuates the systemic structures which keep us from achieving a fully inclusive society. The culture of the school must therefore form part of a provider's performance measures and must become the focus of concerted intervention.

3 - In the 15 years since the Standards were developed, have the Standards contributed towards students with disability being able to access education and training opportunities on the same basis as students without disabilities?

There is no doubt that there are education providers who routinely comply with the Standards and show commitment to ensuring people with disability access education and training on the same basis as students without disability. The Standards can be a helpful tool in guiding stakeholders in their rights and obligations under the *Disability Discrimination Act 1992* and have

been a useful resource during discrimination litigation over the last 15 years. However, without greater awareness of the Standards and without effective compliance mechanisms, the Standards become a tokenistic policy measure that superficially satisfy Australia's obligations under the CRPD rather than the government's substantive responsibility to ensure equitable access to education and training for people with disability. The five-yearly review process is an important opportunity to consider whether changes are needed, however the lack of implementation of many of the recommendations from the 2010 and 2015 reviews suggests that this process too is at risk of becoming as perfunctory as the Standards themselves.

Conclusion

QAI thanks the Department of Education, Skills and Employment for the opportunity to contribute to this review. We are happy to provide further information or clarification of any of the matters raised in this submission upon request.