Submission to the Department of Education and Training

Review of the Education and Training Reform Act Regulations

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Contact:
Julie Phillips
Disability Advocate
PO Box 412, Fairfield VIC 3078
Ph/Fax: 9481-0999
Email: email2jphillips@yahoo.com.au
Mobile: 0417 570 197
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Introduction

The writer is a Disability Advocate who has been working in the disability sector since 1990. Since 2000 the writer has been assisting people with disabilities through general advocacy, and by assisting them to make complaints of discrimination, supporting law firms who require specialised assistance to work effectively in this area.

Her history includes working for disability service providers at a grassroots and senior management level, and involvement on numerous Boards in the disability sector, current today. The majority of her work is voluntary.

A significant number of students being home-schooled are students with disabilities, and this submission is made in that context.

The majority of the writer’s work consists of complaints against the Department of Education and Training ("DET") due to high demand, many of which settle at the Federal Court of Australia.

Due to her work, the writer has a unique insight into the formal and genuine position and attitude of DET towards students with disabilities and their rights, assuming that documents prepared for the purpose of litigation are true and correct.

As has been set out in discrimination cases that DET has settled, students with disabilities have suffered the following due to their school experiences:

- self-harm
- psychological damage
- depression
- anxiety
- suicidal ideation
- trauma
- lack of education

In the above discrimination cases, the parents of those students have suffered:

- psychological damage
- depression
- anxiety
- suicidal ideation

The above reflects the critical nature of education for students with disabilities in Victoria.
A. RELEVANT BACKGROUND TO THE REVIEW OF THE EDUCATION AND TRAINING REFORM STANDARDS

1. Quality of Education for Students with Disabilities

1.1 Victorian Equal Opportunity and Human Rights Commission “Held Back” Report

1.1.1 In 2012, the Victorian Equal Opportunity and Human Rights Commission ("the Commission") released its report into the quality of education for students with disabilities in Victoria.¹

1.1.2 The Commission undertook its research project into this area in response to concerns expressed by parents, advocates and community members relating to inaccessible education for many students with disabilities in Victoria.

1.1.3 The Main Findings are numerous and can be found in the report but include:

1.1.3.1 discrimination still exists in Victorian schools;

1.1.3.2 one in four educators had witnessed discrimination;

1.1.3.3 significant barriers still exist for students with disabilities;

1.1.3.4 barriers include funding limitations, lack of specialist supports, inadequate knowledge and training in disability among teachers, lack of time for teachers to provide an individualised approach for students with disabilities, and discriminatory attitudes;

1.1.3.5 some educators care deeply about their students and are frustrated by resource and capacity constraints;

1.1.3.6 DET has developed many valuable programs, policies, guidance and curriculum supports – these have the capacity to make an enormous difference, however, these are applied inconsistently by schools and are not effectively monitored by the DET;

1.1.3.7 a decent education is “hit and miss”;
1.1.3.8 schools continue to refuse to enrol students with disabilities;
1.1.3.9 schools continue to refuse to allow students with disabilities to attend full time;
1.1.3.10 requested adjustments could be partially made or not at all;
1.1.3.11 there was a lack of teacher training and specialist supports;
1.1.3.12 students with disabilities were refused access to excursions, school camps and other extracurricular activities;
1.1.3.13 bullying is a significant widespread problem for students with disabilities requiring urgent attention;
1.1.3.14 inconsistent Student Support Groups, if any;
1.1.3.15 inconsistent Individual Learning Plans, if any;
1.1.3.16 suspension and expulsion due to disability;
1.1.3.17 restraint and seclusion was a significant problem and was often unrecorded;
1.1.3.18 students with disabilities were having their human rights breached;
1.1.3.19 students with disabilities often travelled for many hours on buses to get to specialist schools without food, water and toileting facilities, violating their rights;
1.1.3.20 parents feared repercussions if they complained to DET;
1.1.3.21 the Program for Students with Disabilities was an inadequate tool to address supports for students with disabilities;
1.1.3.22 there are no systems for routinely monitoring how students with disabilities are faring in school;
1.1.3.23 there are no key performance indicators for the Program for Students with Disabilities.
1.2 Victorian Auditor General’s Office “Programs for Students with Special Learning Needs” ²

1.2.1 In 2012 Victorian Auditor General’s Office released its report and found the following.

1.2.1.1 students with disabilities are receiving very different levels and types of supports across different schools;
1.2.1.2 schools required greater access to specialised support;
1.2.1.3 DET does not monitor the quality of Student Support Groups or Individual Learning Plans compromising the quality of support provided to students with disabilities;
1.2.1.4 students with disabilities were discouraged from enrolling in particular school;
1.2.1.5 despite the millions of dollars being spent on supports for students with disabilities, DET does not measure the effectiveness of that support;
1.2.1.6 policies and procedures are not being consistently implemented;
1.2.1.7 the DET complaints system is inadequate for the purpose of identifying areas of concern;
1.2.1.8 there was a lack of clarity around restraint and seclusion practices;
1.2.1.9 measurable performance indicators for the Program Students with Disabilities were needed.

1.3 Senate Community Affairs References Committee’s Inquiry Into Violence, Abuse and Neglect against People with Disabilities

1.3.1 This National report ³ dealt with restrictive practices in schools across Australia at 4.100-4.141.
1.3.2 The Committee’s views included:

1.3.2.1 the treatment of students with disabilities did not meet community expectations and standards;
1.3.2.2 there appeared to be systemic problems within the education system that led to many inappropriate practices;
1.3.2.3 parents were not able to refuse the use of “restrictive practices”, or be involved in the decision-making process;
1.3.2.4 proven positive behavioural management tools needed to take the place of restrictive practices;
1.3.2.5 the Committee was highly disturbed at the evidence around “restrictive practice”;
1.3.2.6 some of the practices constituted a national shame in the Committee’s view.

1.3.3 In terms of how the report related to the Victorian DET, the numerous Victorian examples of abuse were provided to DET Secretary Gill Callister for comment. Ms Callister replied with the assistance of the head of the DET Legal Division Kate Rattigan. Neither employee refuted one example of abuse, and instead personally attacked the writer by providing misleading information to the Committee. See Submission 131, DET Response to Submission, and Julie Phillips Response to DET.4

1.4 Review of Program for Students with Disabilities

1.4.1 This review completed by DET in 2015 included the following observations:

1.4.1.1 even students with low-level disabilities complete Year 12 at a rate that is 25% lower than their peers;
1.4.1.2 the design and operation of the Program for Students with Disabilities needs to be improved;
1.4.1.3 some schools are refusing to enrol students with a disability;
1.4.1.4 the lack of coherent and visible policy has meant that it has been difficult to develop a culture of inclusion;

4http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Submissions
1.4.1.5 additional training and specialist expertise needs to be provided to schools;
1.4.1.6 teachers’ scope to support students with disabilities needs to be improved;
1.4.1.7 schools do not understand how to maximise the use of integration aides;
1.4.1.8 professional development needs to be increased;
1.4.1.9 schools do not implement individual support planning consistently;
1.4.1.10 there are issues with teachers measuring the progress of individual students;
1.4.1.11 there is a lack of data on the outcomes for students with disabilities;
1.4.1.12 there is not adequate transparency and accountability;
1.4.1.13 there needed to be improved data collection, linkages and analysis to support enhanced planning, reporting and accountability;
1.4.1.14 the transition from Year 6-7 needed to be improved;
1.4.1.15 there needed to be a new funding model which involve comprehensive monitoring and tailoring of support to meet student needs;
1.4.1.16 the current Program for Students with Disabilities results in inequitable outcomes;
1.4.1.17 schools do not use evidence based interventions when supporting students with autism and dyslexia;

2 What Has Changed Since Reports/Inquiries?

2.1 Very little has changed since these reviews and inquiries, indicating that DET has little appetite to address the issues raised over the years. It is important to note that the reports set out above only cover the last five year period, not the reports noting similar failings that have been written prior to that period.

The DET response to the Review of the Program Students with Disabilities is typical of its response to all of the previous enquiries and reviews. In the main, recommendations that are “low hanging fruit” and which will not
substantially address the systemic and numerous problems for students with disabilities are the recommendations that DET is willing to put into place.

The recommendations from the above-mentioned Review that DET have accepted include the following:

- providing opportunities for further actions;
- providing guidance, policies and strategies - none that are mandatory;
- undertaking feasibility studies;
- considering issues and actions;
- developing options;
- trialling tools;
- making training “available” (rather than mandatory);
- having more investigations;
- raising awareness

The most significant recommendation which would have positively affected access to education for students with disabilities, which was reform of the entire Program for Students with Disabilities and its funding method, has not been accepted.

2.2 Similarly, in relation to the previous reports, research and reviews going back to 2015, few if any of the “big ticket” items have been addressed.

- **Individual Education Plans** continue to be produced in any format or not at all. There is no mandatory template. DET has made its formal position on Individual Education Plans very clear - it does not believe them to be a reasonable adjustment for students with disabilities. DET accepts and defends plans that are “unwritten”.

- **Student Support Groups** continue to occur in an ad hoc fashion or not at all. DET has made its formal position on Student Support Groups very clear - it does not believe them to be a reasonable adjustment for students with disabilities.

- **Behaviour Plans** continue to occur in an ad hoc fashion or not at all. There is no mandatory template. DET has made its formal position on Behaviour Plans very clear - it does not believe them to be a reasonable adjustment for
students with disabilities. DET accepts and defends plans that are “unwritten”.

- **Restrictive Practices/Assault and False Imprisonment**

As can be seen in Section C, DET propose to continue to rely upon what has been Regulation 15, and which is now proposed to be Regulation 25. This is despite widespread calls for it to be removed. Regulation 25 will continue to override any behaviour guidelines.

- **Measurable Outcomes**

Teachers continue not to understand what a measurable outcome is. A quote from Acting Principal Anna Rigoni in a letter dated 15 August 2016 which had the imprimatur of the Legal Division states: “It seems you are requesting goals with measurable outcomes developed in a style similar to those a clinician will provide, rather than an educator. Teachers work within an educational model not a clinical or therapeutic model. Teacher observations inform judgement about students’ current level of ability, their learning needs (goal setting) and their learning progress.”

Therefore despite criticisms beginning with the Victorian Auditor General’s Office in 2012 - continuing to 2015 in the Review of the Program for Students with Disabilities about a lack of measurable outcomes, it seems that DET have no intention of enforcing any requirement for measurable outcomes.

The lack of knowledge about the difference between “judgement” versus data, and what the word “measurable” means, is clearly insurmountable while the current DET leadership is in place.

- **School Buses**

Students with disabilities continue to travel for hours in school buses without any access to food, liquid or toileting facilities, in breach of their human rights, with the imprimatur of DET.
B. REGULATION 25 - ABUSE OF STUDENTS WITH DISABILITIES

Regulation 25 Restraint from danger

*A member of staff of a Government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour that is dangerous to the member of staff, the student, or any other person.*

Regulation 25 is unacceptable.

The interpretation of “*reasonable action*” is completely subjective. “*Behaviour that is dangerous*” is completely subjective. Regulation 25 allows, for example, for the physical restraint of a student if they are about to kick another student in the shins. It allows violence against a student by a school staff member if a student is predicted to, for example, throw a ruler at another student.

Regulation 25 (Regulation 15 in the current regulations) has been used by the Legal Division, and by DET Regional Offices, to excuse any type of assault or false imprisonment of students with disabilities to date. This is documented.

Behaviour policies and guidelines are irrelevant to DET when reports are made of assault and false imprisonment of students. While work is currently being carried out on new behaviour policies and guidelines, it is anticipated that once again they are to be only “guidelines” and will not be mandatory. Therefore, teachers can always be excused of violence against students with disabilities with behavioural problems, as Regulation 25, having the legal standing it does, will be seen as being superior to any “guidelines” for staff.

Recommendations by the Commission in relation to the *Education and Training Reform Act* in relation to restrictive practices have been ignored.

It could be seen to be that Regulation 25 does not comply with the rights of children under domestic and international human rights legislation, as it allows the abuse of students with disabilities in broad circumstances.

If Regulation 25 is retained, it is likely that the abuse of students with disabilities with behaviours of concern will continue in:

- the absence of mandatory procedures for staff;
- the continued use of behavioural “trainers” with martial arts backgrounds;
- the use and endorsement of “behaviour analysts” with no relevant qualifications to carry out behaviour analytical tasks;
- the recent push for teachers to carry out behaviour analytical tasks.
Case Study 1.
North-West Region have been promoting and engaging the services of Mr Dan Petro who refers to himself as a Behaviour Analyst. Despite his University confirming he does not have the qualifications to perform Functional Behaviour Assessments, and despite him undertaking such an assessment for a child that failed to result in an effective Behaviour Plan, with critical results for the child, North-West Region continue to engage and promote him. Mr Petro refused to respond to the writer when questioned.

It is important to note that Minister James Merlino did not make any censure of Bendigo Special Developmental School when an investigation at the end of 2015 confirmed reports of internal cages in classrooms.

This is the environment that applies to students with disabilities under the current Minister.

C. PROPOSED HOMESCHOOLING REGULATIONS


Given that set out in Section A, the current environment for students with disabilities in Victoria can be described as follows.

1.1 DET are spending millions of dollars defending and settling complaints by students with disabilities of discrimination against it, without addressing the systemic issues that are causing such discrimination.

1.2 Students with disabilities do not have the same access to education as students without.

1.3 Students with disabilities with behaviours of concern are at significant risk of physical violence in the form of restraint from DET staff if Regulation 25 remains.

1.4 Students with disabilities with behaviours of concern are likely not to have their behaviours mitigated until DET makes responses to behaviours of concern mandatory, adopts mandatory evidence based approaches and makes a decision to engage qualified practitioners. There is no indication from DET that this will occur.

1.5 The basic supports for students with disabilities such as Student Support Groups and Individual Education Plans continue to be
inconsistent and ad hoc. There is no indication from DET that this will change.

1.6 There are no measurable outcomes for students with disabilities, either from an individual perspective or program perspective. There is no indication from DET that this will change.

1.7 Bullying of students with disabilities is a significant and widespread problem.

1.8 Students with disabilities travelling on buses to special schools are at risk of dehydration and humiliation through no access to toileting facilities.

Due to the above, a reasonable person can conclude that the Victorian school system presents an educational, physical and psychological risk to students with disabilities.

2. Regulations

2.1 Regulation 72 (3) (c)

This regulation requires, amongst other things, that learning plans must accompany applications for home schooling.

Given that schools do not need to produce learning plans, it is a mystery as to why parents should be required to.

It is fact that many Victorian schools have often not been able to produce:

- evidence of any learning
- any minutes of meetings to plan the education of a child
- individual education plans
- behaviour plans
- data on learning or behaviours
- evidence as to how assessments of educational attainment have been arrived at
- modified curriculum

Given the above and that set out in Section 1, it seems that home educators are being held to a far greater standard than Victorian public schools. Parents of students with disabilities who are forced into educating their students at home, and those that choose such an education without such pressure, deserve an explanation as to why they are being held to such a high standard.
Any delay approving the plan may engage human rights legislation due to a delay in withdrawing the child in hostile circumstances.

2.2 Regulation 74

Given that set out in Section C (1), it is inappropriate that students with disabilities are expected to wait 28 days in a setting which may be physically and/or psychologically harmful to them while bureaucrats make a decision on home education.

Home education is often due directly to the inability of DET to meet the educational and safety needs of students with disabilities, and often not a decision that parents take voluntarily or lightly.

Forcing a student with a disability to continue in an environment which is causing them harm could expose those that make the decision to prolong such an experience to further legal action.

Deliberately exposing a child to physical or psychological harm may be seen to engage domestic and international human rights legislation.

Case Study 2.
A primary school age girl with Autism Spectrum Disorder was routinely subjected to restraint and seclusion over a period of several years, until her psychologist recommended that she be home-schooled and not attend any school due to trauma. Her mother had no intentions of home-schooling but was forced into the decision due to the treatment of her daughter by school staff.

The proposed regulations seem to infer that parents are making considered decisions about home-schooling due to a simple preference for such, when for many parents of students with disabilities, it is a decision forced upon them by DET in order that they protect their children.

Decisions to home school are often made after protracted and unsuccessful negotiations with individual schools and regional offices to provide reasonable adjustments or protection for children with a disability.

To make withdrawal of these children difficult is reckless and does not take into consideration all the circumstances in Section 1.
2.3 Regulation 76

The need for permission to exempt a student from key learning areas is something which is again, not required or expected of Victorian schools.

Students with disabilities are often prevented from accessing particular subjects in the school situation.

Case Study 3.
A recent school report for a secondary student for 2016 did not include English or Maths subjects. The student had been deemed “not academic” by teaching staff because he had an intellectual disability.

Indeed, students who are denied full-time attendance due to their disability are by virtue of this, denied access to numerous subjects. DET does not need to give parents an explanation, or ask for their permission to exclude them from segments of their education - they simply do it, whether with the agreement of the parent or not.

Yet parents of disabilities who home school are again expected to meet a higher standard than DET. Parents deserve an explanation as to why.

3. SUMMARY

The Regulatory Impact Statement at page 7, first paragraph, states that “Parents have the right to choose an appropriate education for their child.” They do not. They do not have the right to:

- have an Individual Education Plan in place for their child which they endorse;
- have a Behaviour Plan in place for their child which they endorse;
- decide whether their child should repeat a year due to academic or social lag;
- have Student Support Groups that meet DET guidelines;
- have reasonable adjustments put in place for their children;
- be involved in the selection of integration aides that will be working with their child;
- prohibit the physical restraint of their child;
- a functional communication method for their child;
- academic teaching.

Given the lack of those rights, the option of home-schooling is vital, and needs to be made as simple as possible.
On page 7, DET states “The Department considers the current regulatory approach for home schooling to be unable to adequately assure quality in the instruction or educational progress of home-schooled children.”

The question has to be asked as to why home schoolers should be required to assure quality in instruction when all reports and reviews conclude that DET do not.

If there is any misconception about the adequacy of the qualification of teachers in Victoria/Australia, one only needs to refer to the many reports about their general lack of ability - such reports being numerous over the last decade. To quote the most recent reports\(^5\), which are not new, teachers themselves are experiencing difficulty with basic literacy and numeracy.

DET states that home-school parents do not “have to demonstrate any specific understanding of instructional practices that will meet their child’s needs” as if this is a problem. Neither do DET teachers. It is put as a problem that home schoolers do not have to provide any detail about how they will “address key learning areas”. Neither do DET teachers, as Individual Education Plans, can be in teachers’ heads according to sworn evidence and submissions given by DET to the Federal Court.

DET are concerned about children receiving “low quality learning experiences due to poor teaching and will instructional practices within a school, or may suffer poor health or well-being outcomes due to their learning environments.”

Numerous state and federal inquiries and reports indicate that students with disabilities already are receiving those experiences in Victorian government schools.

More disturbingly, the evidence is that despite receiving this information repeatedly over decades, DET have no intentions of rectifying the situation. This begs the question overall as to why home schoolers should be held to standards that DET are not.

The argument for NOT making regulations tighter for home schoolers is not simply a “they don’t so why should we” argument. It is much deeper and more disturbing than that.

When there is a perfectly good alternative to home-schooling for students with disabilities which is clearly superior to that of home-schooling, then it may be appropriate for authorities to press for details as to how a home schooling option will achieve the same standard which could be achieved at a local government school.

However the evidence is that for many students with disabilities, the local government school, and in particular special schools with their lack of belief in capacity, is not only not superior, but grossly inferior to home-schooling and sometimes dangerous to health and safety. For some students whose school experience is fraught with violence from school staff, even without academic teaching, home-school offers at the very least, safety.

In these situations, keeping a child at home just in order to protect them from harm is not only a sensible choice but a loving parent’s obligation and responsibility.

Lastly, the claim by DET that “The proposed regulations provide for the care, safety and wellbeing of students in government schools, particularly relating to student behaviour and responses to dangerous behaviour” is so blatantly false it cannot stand.

Regulation 25 permits “any” reasonable action (undefined) against students, and has been used repeatedly to defend assault and false imprisonment. As is consistent with DET’s refusal to approach the education of students, and particularly behaviours of concern, with any evidence-based approaches, the frequent use of restrictive practices according to the research, causes trauma - not only for the children, but for the adults using it. It does not affect behaviours of concern in any positive way and can worsen them.

The Regulatory Impact Statement contains a plethora of motherhood statements that indicate DET has genuine concerns about the education of students. These concerns are not reflected in any of the reports and enquiries into the treatment of students with disabilities by DET. It is not reflected in their responses to such reports and enquiries. It is certainly not reflected in the manner in which they approach litigation, which is hostile. Therefore the Regulatory Impact Statement is disingenuous and cannot be taken to be a serious document which supports the proposed Regulations.

4. RECOMMENDATIONS.

Recommendation 1.

That Regulation 25 be omitted from the new Regulations entirely and those that subject students with disabilities to physical violence are governed by the same criminal laws as the rest of the community.

Recommendation 2.

That until there is evidence that DET can provide a superior and safe alternative to educating students with disabilities than parents, or simply a safe environment, that authorities actively support home-schooling rather than put in place some of the new restrictions and limitations mentioned in this submission.