Case Note

Students with Disabilities and Challenging Behaviours: Implications for Educators from *Hoggan v The State of New South Wales (Department Of Education)* (2000) Human Rights and Equal Opportunity Commission, 98/127, 13 November, Inquiry Commissioner Innes

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Introduction

The Human Rights and Equal Opportunity Commission has recently completed a hearing that involved a young, teenage boy called Daniel whose challenging behaviours were characteristic of the disabilities he sustained from a severe brain injury as a young child. Daniel's enrolment provided a significant challenge for the local high school where, according to the Commissioner's findings, plans and policies implemented to manage his behaviour quickly became 'ad hoc' and reactionary. Within the first year of his attendance at the school, Daniel was suspended five times and eventually excluded.

Commissioner Innes found that a causal nexus existed between Daniel's behaviour, his disability and the suspensions and exclusions. He found that the school had discriminated against Daniel unlawfully on the grounds of his disability and awarded $49,000.00 damages in compensation.

This was a complex and difficult case that involved three years of preliminary investigations and negotiations before the final Commission hearings in May, August, September and November 2000. Twelve volumes of exhibits were tendered and evidence was heard from eight complainant witnesses and nineteen witnesses from the respondents.

As he had in the *Finney v Hills Grammar School* (1999) case, Commissioner Innes provided a comprehensive and well-documented analysis of the way that unlawful discrimination on the grounds of disability occurred in education. He critically analysed attitudes, decisions, policies, processes and all aspects of the management of each of these cases to clearly identify occurrences of discrimination. Commissioner Innes also provided a detailed discussion of the legal principles involved in the area of disability discrimination to further explain why discrimination had occurred and what the education authorities or the school may have done to prevent or

eliminate that discrimination. Considered together, the reports of the findings in these most recent disability discrimination cases provide education authorities, principals and schools with a valuable and comprehensive interpretation of the *Disability Discrimination Act* 1992 (Cth).

This paper will discuss the implications of the findings made by Commissioner Innes in the *Hoggan v New South Wales (Department of Eduction)* 2000 case and consider the impact these findings may have on the management of the inclusion of students with disabilities and challenging behaviours in schools today.

Case History

Daniel Hoggan was born on 8 Dec. 1984. Due to his high support needs as a child, Daniel would spend one week with his natural parents and one week with his foster parents. Just before Daniel's fifth birthday, the family situation broke down and Daniel was made a Ward of the State. He was placed with the Purvis family on a long term basis and began school at the Support Unit at Grafton Primary School when he was six years old.

Daniel eventually attended a regular year 5/6 class for his final year of primary school. His foster parents wanted him to attend a regular school setting for high school. They rejected the possibility of a placement at a Support Unit at Grafton High School because they believed Daniel needed positive role models to learn appropriate behaviours and to experience friendships and belonging as a member of a regular school community.

Daniel's first application to enrol at South Grafton High School was rejected by the principal at the time. A complaint from the foster parents to the Human Rights and Equal Opportunity Commission resulted in a reconsideration of Daniel's application for enrolment. Consequently, an application by the school for substantial support from the education department was approved, discussions were held with Teachers' Federation representatives who had voted to 'reject' Daniel's application for enrolment and welfare and discipline policies specifically for Daniel were developed before his enrolment was eventually accepted. He started high school at South Grafton High School on 8 April 1997 with the support of full-time teacher aide hours.

Thirteen days later, Daniel was suspended for one day for hitting the teacher's aide. Positive comments from the communication book for the remainder of term two indicate that Daniel seemed to settle well into high school life. He attempted work prepared by the Distance Education Support Unit, joined in classroom activities and maintained social contact with his peers. On 7 May, Daniel was suspended again for two days for kicking another student and swearing at the teacher's aide.

During terms three and four the consequences of Daniel's behaviour, as they were specified in his behavioural management policy, resulted in more suspensions each for longer periods of time. A very brief summary of events indicate that Daniel was suspended on 30 July for 2 days, the 2 September for 13 days (reduced to 8) for kicking a fellow student and again on the 18 September (18 days suspension) for punching the teacher aide on the back.

Daniel's foster parents believed that the suspensions had a detrimental effect on his behaviour and isolated him from his friends. The school, however, believed that Daniel was stressed and not coping with school life and this was why his behaviour deteriorated. The

Commission determined that these views in isolation were too simplistic accurately to reflect the complexity of Daniel's needs and that the school had become committed to strategies that were poorly informed and eventually exacerbated all attempts to manage Daniel's behaviour.

On 3 Dec. 1997, following advice from the education department's legal office, the principal sent a letter to the Department of Community Services informing them of Daniel's expulsion. Commissioner Innes suggested the foster parents should have also been immediately informed as a matter of courtesy. At this point in time, communications between the foster parents, the school, educational experts in the field and the education authority had deteriorated and the management of the case had apparently been taken over by the District Superintendent.

On 22 March 1998, Daniel's foster parent lodged another complaint with the Human Rights and Equal Opportunity Commission alleging that Daniel had suffered unlawful discrimination on the ground of his disability in the area of education.

Daniel's Disability

It was accepted by both parties in the case that Daniel was a person with a disability within the meaning of S 4 of the *Disability Discrimination Act* 1992 (Cth). Evidence from at least five expert witnesses, including doctors, psychologists and child neurologists, however, was not consistent and information about Daniel's functional abilities was not conclusive. Commissioner Innes requested a meeting with Daniel so that he could understand the young person who was central to the deliberations of the Commission and clarify some of the evidence that was presented about the impact of Daniel's disability. Daniel's legal representatives, however, rejected this offer, and Commissioner Innes then had the extra responsibility of interpreting a range of medical, psychological and anecdotal data.

In summary, the Commission accepted that Daniel had a moderate intellectual impairment that he sustained from a severe brain injury at seven months of age. This resulted in visual difficulties, epilepsy and difficult behaviours. Daniel, however, was not clinically blind. He had a processing disorder that impaired his ability to make sense of the information he received from his eyes. He did not require glasses, he was able to read large print and he could manoeuvre around obstacles in a playground. He did, however, have difficulty associating meaning with written words and interpreting what his eyes are seeing.

Clinical Psychologist, Mr. Alan Andreason claimed that Daniel was weak in sustaining attention, had a reduced sense of self and was unable to describe his own needs to others, however, he was relatively strong in vocabulary and some abstract concepts. This pattern of mixed abilities was consistent, he claimed, with brain injury rather than an intellectual impairment (p.32).

When at school, Daniel exhibited a range of complex and sometimes aggressive behaviours. Some of these included biting, kicking, scratching, punching, refusal to attend, swearing and running dangerously onto the road. Dr. Graham Wise, a child neurologist, explained how uninhibited behaviours were a result of frontal lobe damage and consequently a major part of Daniel's difficult behaviours. He claimed that Daniel would have difficulty 'smoothing out any emotional ups or downs', act without any view of consequence or intent, become frustrated and may either isolate himself or lash out aggressively (p.7).

As a result of the analysis of the medical evidence from the professional witnesses, the Inquiry Commissioner confirmed that a causal nexus existed between Daniel's behaviour, his disability and the subsequent suspensions and exclusion. He described Daniel's behaviour as the cause and the suspensions and exclusions as the effect of less favourable treatment.

The Law

The next task for the Commission was to establish whether Daniel had been treated less favourably because of his disability. It was further necessary to show that the school had made reasonable accommodation of Daniel's disabilities.

The main objectives of the *Disability Discrimination Act* 1992 (Cth) (DDA) are clearly stated in section three:

1. To eliminate discrimination as far as possible, against people with disabilities
2. To ensure, as far as practicable, that people with disabilities have the same rights to equality before the law as the rest of the community, and
3. To promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

Part of the legal discussions about the underlying objectives of the DDA focussed on the issue of the parent's right to choose the preferred educational setting for their child. Daniel's foster parents had already chosen an educational placement for him in a regular school setting. The school and educational authority, however, provided evidence that the Support Unit had qualified staff who were experienced in managing educational services for students with Daniel's level of educational need.

The expert witnesses were, again, not conclusive about their opinions about which setting may be significantly better for Daniel's educational needs. Some suggested that the segregated environment would be less stressful for Daniel because he would experience more rewarding learning experiences that directly related to his level of ability and because his environment would be more predictable than the regular high school setting. Others suggested that a supportive environment that appreciated and managed diversity in the school population would be more beneficial for Daniel.

Commissioner Innes referred to the PARC case or the *Pennsylvania Association of Retarded Citizens (PARC) v Pennsylvania* (1971) to illustrate the concept that segregated settings were discriminatory (p.74). The PARC case involved a class action taken by parents of students in segregated settings in Pennsylvania that established that these settings were under-educating their children through a weak and irrelevant curriculum that was not related to the curriculum in regular school settings. Educational outcomes for students attending segregated settings, at that time, were shown to be inferior and reduced the student's ability to function effectively in society.

The PARC case is regarded as the 'first generation' of the full inclusion court cases from the United States and it provided a significant motivation for the United States to address the issue of inclusive education through the law with particular rights specified for due process for parents

of students with disabilities (Lipton, 1994). *The Rehabilitation Act* (PL 93-112) that followed in 1973 is still used comprehensively today to define the expectations, parameters and interpretations of inclusive education through the courts.

The determination of Professor Alston in the *Dalla Costa v The ACT Department of Health* (1994) EOC 92-633, was also relied on to clarify the philosophy of 'mainstreaming'. Commissioner Innes acknowledged that the equalization of opportunity and the sharing of benefits from the local community were the cornerstone of the Federal disability discrimination legislation (p.74). He claimed that stereotypical attitudes towards disability resulted in exclusionary practices and that the attitudes and behaviours of some of the school staff amounted to stereotyping and were exclusionary. The issue of the court apportioning damages because of the failure of the school to address these attitudes and educate the teachers about disability issues will be discussed below.

Commissioner Innes, therefore, emphasised the legal preference for a regular school setting and claimed: '…that the provision of a segregated service – because of it being innately exclusionary – is discriminatory per se, and that even if inclusive education provides an inferior service, that service would have to be greatly inferior in order to counterbalance the loss by the person with the disability caused by the innate exclusion' (p57).

The preference for placement in a regular school setting was clarified in *Roncker v. Walters*, 700 F 2d 1058 (6th Circ. 1983) where the court stated:

> Where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. (700 F. 2d at 1063).

Although this case did not directly focus on the placement issue because Daniel was enrolled at the regular high school, Commissioner Innes referred to submissions made in a Canadian Supreme Court hearing in *Eaton v Brandt County Board of Education*, (1997) 1 SCR 241 at para 67-69 to provide background information to be able to accurately assess the relevance of Daniel's welfare and discipline policies and to understand the context of Daniel's expulsion from South Grafton High School (p75-76). In these submissions, stereotypical attitudes towards people with disabilities and the importance of the unique nature of reasonable accommodations were emphasised. The policies developed specifically for Daniel incorporated rigid responses that were consistent with the expectations of standards of behaviour for all students in the school. This resulted in a 'sink or swim' attitude towards Daniel's disability and his eventual exclusion from the school seemed inevitable.

Secondary to the legal preference of students attending regular school settings, Commissioner Innes emphasised the fact that the issue of parental choice was superior. He referred to the former Disability Commissioner, Elizabeth Hastings speech, 'The Right To Belong' (1997) where she claimed that: 'Some parents may choose to send their children to segregated settings, however, if they prefer to send their children to state, private, religious, community, experimental,

Steiner or home-based schools then all of these education service providers are now obliged to provide discrimination free education for children who have disabilities' (p.77).

An interesting feature of Commissioner Innes's considerations of some of the issues in this complex case included his reference to overseas court cases. The requirements of the law as it relates to the provision of educational services for students with disabilities in the United States, for example, are redefined and clarified each year through numerous court cases. Enrolment, placement, assessment of educational needs, curriculum, due process and behaviour management are recurring issues considered by the courts in the United States (Osborne, 1999). When Commissioner Innes discusses these cases, he is involving Australia more directly in the global trend towards inclusive education and the provision of discrimination free education services. He is also raising the expectation that Australian standards for discrimination free education services may be comparable to those of other countries such as Canada, The United States or the United Kingdom.

Less Favourable Treatment and Reasonable Accommodation

The *Disability Discrimination Act* 1992 (Cth) defines direct discrimination in S5 as follows:

> 'A person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability if, because of the aggrieved person's disability, the discriminator **treats or proposes to treat the aggrieved person less favourably** than in circumstances that are the same or not **materially different**, the discriminator treats or would treat a person without the disability'

The respondents argued that they had treated Daniel more favourably than any other student in the school. They claimed that the funding for the full time teacher aide hours, the specific welfare and discipline plans, the curriculum from Distance Education Support Unit, the numerous meetings and the professional time and effort required to accommodate Daniel's needs were more than most other students received in the state. This fiscal interpretation of 'more favourable' or 'less favourable', however, was not accepted by the Commission.

Instead, Commissioner Innes emphasized the obligation of the educational authority to overcome the effects of the disability before a situation could be considered not 'materially different'. With the change in focus from the effort and expense involved in the strategies used to accommodate Daniel's needs to the overall influence these strategies had on reducing the impact of Daniel's disability, Commissioner Innes identified a number of issues that required further attention from the school if discrimination was to be reduced or eliminated.

Briefly, some of these included:

- The fact that Daniel's medical information was not shared comprehensively with all staff. Medical reports were available on the school file, however, teachers all described various interpretations of Daniel's disabilities and few had any understanding of the impact this would have on his learning. Consequently, the teachers' ability to include Daniel in

meaningful learning experiences or to understand and manage his challenging behaviours seemed questionable.

- The Support Teacher Learning Difficulties who was allocated relief time to assist Daniel and his teachers appeared to have spent little time with him and was unaware of the significance of his disabilities. Resources allocated to assist Daniel, in this situation, were not being used effectively.
- Communication difficulties between the parents and the school resulted in no formal assessment being made of Daniel's educational needs either before enrolment or during his placement at the high school. Commissioner Innes expressed regret that the teachers had not convinced the foster parents of the importance of such an assessment. He emphasised the value of sound educational decisions when he stated: 'In my view, both Daniel and the staff at SGSH would have benefited if a valid means of assessment had been found, as it would have provided a benchmark from which progress could have been gauged' (p.54 & p.59).
- The teachers were not informed about their responsibility to teach or assess Daniel. The Distance Education Support Unit provided curriculum materials and teachers were not given assistance in how to use these resources and the regular school curriculum to maximise Daniel's learning experiences. Various assessment strategies were being implemented and this resulted in inconsistent teaching practices and reporting. One respondent described the contribution from teachers: 'The actual amount of teaching, in the commonly understood usage of the word, undertaken by any of the individual teachers was non-existent' (p.55).

  Commissioner Innes interpreted this as an admission that Daniel was primarily being taught by the teachers' aides rather than the teachers thus providing clear grounds for proof of 'detriment in education' under the Act.
- Welfare and behaviour management policies were developed for Daniel before he attended the school. Behaviour management or special education experts were not consulted. Those most experienced in managing his behaviour and needs, his foster parents were also not consulted. These policies were then applied in a rigid and inflexible way and not renegotiated when the school became more informed and experienced with the management of Daniel's behaviour.
- The implementation of these policies and the daily management of Daniel's behaviour continued without access to special education or behaviour management experts in the field. Eventually, a report was requested that identified problems and suggested management strategies. The recommendations were ignored and the report was not discussed with the school, staff or foster parents. The principal also recommended strategies and only one was implemented.

The parameters of reasonable accommodation stretch from 'more than administrative convenience' to the boundaries of 'unjustifiable hardship'. Commissioner Innes extended the expectations of reasonable accommodation even further when he claimed that it would be difficult

for the multimillion dollar state education system to claim unjustifiable hardship (p.77). Professional advice, access to expertise in the field, flexible and planned management strategies and a positive attitude from the staff were identified by Commissioner Innes as significant starting points to provide a discrimination free education service for Daniel.

Finally, the attitudes, motivations and actions of both the respondents and the complainant were analysed by the Commission. Communications between the school and the foster parents had eventually deteriorated to such an extent that no meaningful dialogue was taking place.

The foster parents claimed they were active and open to any involvement with the school if it resulted in an improved learning environment for Daniel. Communication difficulties were experienced from the beginning of the relationship, however, when the foster parents were not cooperative in allowing a comprehensive assessment of Daniel's educational needs before enrolment. At that stage, the foster parents were not convinced that the results would be used in Daniel's best interests. Further difficulties were experienced when Daniel was suspended. The foster parents claimed the suspensions gave Daniel the wrong messages and that other strategies had to be implemented. He was being rewarded for his misbehaviour because he was allowed to stay at home. Confidence in the way the school was managing Daniel's behaviour was undermined because consultation with them or the psychologists they had recommended had been minimal.

Commissioner Innes identified a degree of inflexibility in the foster parents' attitudes, however he claimed they were determined to achieve what they thought was the best for Daniel. He was critical of the education department's pressure on the foster parents to enrol Daniel at the Support Unit: 'Because they did not simply adopt the perceived 'accepted wisdom' in parts of the school community about where Daniel should go to school, they were perceived as different and difficult' (p.73).

The school, on the other hand, maintained that regular school settings had consistently failed Daniel because his intellectual impairment reduced his ability to join in curricular activities. School representatives claimed that the focus of the school on academic achievement rather than social skills made Daniel stressed and isolated. The Commissioner, however, accepted the broader definition of education set out in UNESCO's Salamanca Statement and Framework For Action On Special Needs Education, which viewed education as a comprehensive experience for young people, one that should incorporate all aspects of learning.

The school then claimed that Daniel had to be responsible for the consequences of his own behaviour and that his disability did 'not exclude him from the boundaries which existed for all students' (p.47). According to the school, Daniel did not want to be at the school and this resulted in school refusal and 'acting out'. The principal described his concern for the safety of staff and other students and explained that the suspensions were a direct result of the deterioration in Daniel's behaviour rather than the cause of his difficulties.

Commissioner Innes recognised that the principal and departmental representatives had shown a genuine concern that the placement had not been successful. The principal had spent an extraordinary amount of time and effort in managing curriculum, staff, industrial issues, safety, departmental and legal issues arising from the placement. The Commissioner accepted that the principal believed that he had been acting in Daniel's best interests at all times, however, he also

explained that an intention not to discriminate provided no defence against a complaint of discrimination.

Finally, Commissioner Innes recognised the inadequacies of the current complaint-based method of inquiry. The initial claim was lodged on 22 March 1998 and the date of the decision was over two and a half years later on 13 November 2000. The delay in time, failure to resolve the issues through negotiation and eventually the Commission processes proved very stressful for the foster parents and members of the school community. Daniel's school based education had terminated. His last day at school was 3 December 1998 just before his fourteenth birthday. With a view to rectifying these circumstances in the future, Commissioner Innes suggested that all education service providers were currently attempting to grapple with the interpretations of the *Disability Discrimination Act* 1992 (Cth) through consideration of the draft Disability Standards. He believed that policy and systemic changes would eventually reduce or eliminate discrimination in education on the grounds of disability and that this would possibly make lengthy, expensive and stressful Commission hearings unnecessary.

Remedies for Unlawful Discrimination

The Commissioner found that the educational authority had discriminated unlawfully against Daniel on the grounds of his disability. Daniel was no longer able to belong to the community of the local school or to experience the friendships of his peers. His potential for future employment had been reduced. Because of the length of time it had taken to resolve the situation, a return to the school where he should have completed his high school education was no longer possible. The Commissioner found that because discrimination had occurred the following damages were awarded as compensation.

- For the exclusion, and the consequential loss of opportunity and enjoyment of the school environment: $20,000.00.
- For the first two suspensions, which were short suspensions (one and two days): $2,000.00 each.
- For the next three suspensions, which were long suspensions (two to twelve days): $5,000.00 each.
- For the inflexibility regarding the amendment of Daniel's discipline and welfare policy: $2,000.00.
- For the diminished opportunity provided to Daniel by the respondent's failure to provide teachers with training or awareness programs: $4,000.00.
- For the diminished opportunity provided to Daniel by the respondent's failure to consult with experts in special education: $4,000.00
- The total damages awarded: $49,000.00

In his interpretation of the concept of 'reasonably proportionate' accommodation for Daniel's educational needs, Commissioner Innes specified three actions that, in his opinion, would have prevented any discrimination from occurring. These included:

1. Broad consultation in the development of the discipline and welfare policies. Input from the foster parents, specialists in behaviour management and special education was required.
2. Once the policy was in place, greater flexibility in its interpretation was required. Changes suggested should have been implemented based on the experience and considered opinion of all involved including experts in the field and the parents.
3. Advice from special education experts should have been taken and applied (p.85).

Students with Disabilities and Challenging Behaviours

Clearly, the most important message sent to schools and education authorities from this case is that suspensions and exclusions are not an acceptable management tool for students with disabilities and challenging behaviours. According to the findings of the Commission, any student with a disability who is suspended or expelled because of behavioural difficulties that are a manifestation of that disability will have been discriminated against unlawfully on the ground of the disability. Education authorities should analyse suspension and exclusion data to gauge the pervasiveness of this problem before developing and implementing awareness raising programmes.

A similar outcome in a court in the United States (*Honig v Doe*, 484 U.S. 305 [43 EDUC. L. REP. 857]. 1988) asserted that special education students could not be suspended for disciplinary reasons where their misconduct is a manifestation of the disability (Osborne Jnr, A.G. 1997). In 1997, however, amendments to the *Individuals With Disabilities Education Act* (IDEA) clarified this interpretation and now students may be temporarily suspended but the student must return to the same school. Educational services must also be continued for the student throughout the suspension. In a situation where it is too dangerous to keep a student in a particular placement the school may go to court for what is referred to as a *Honig* injunction before a change in placement may be considered. No such provision exists for Australian schools and the responsibility to manage the student's behaviour remains with the principal, teachers and available experts in the field.

Daniel's professional witnesses described the behavioural consequences of the chemical and emotional manifestations of his disability. According to the Commission, this would have been valuable information for Daniel's teachers to begin to develop an understanding of his behaviour and the way he learns. Teachers who are inexperienced in teaching students with disabilities may be overwhelmed by the disability itself and lose sight of the individual behind the disability. The reactive behaviour management plan based on 'actions-consequences-tolerance levels' reflected this approach.

It is not uncommon for students with disabilities to experience very high levels of frustration at times and to exhibit this through their behaviour. As children first, they experience the same need to belong, to be understood and to be loved as any other child. Similarly, the child with the disability also has to learn how to manage the negative feelings of anger, jealousy, and

frustration. Many circumstances increase frustration for students with disabilities. Some of these may include a reduced ability to communicate needs or to understand new or unfamiliar situations, increased pain, mobility difficulties, social and peer interactions and dependency issues. Teachers may not able to manage behaviours such as kicking, hitting, swearing or punching effectively if they do not have any understanding of the motivations for these behaviours. The interpretation of difficult behaviours is often complex and may require unique strategies for management. The recommendation by Commissioner Innes to refer to expert assistance to develop strategies to manage Daniels behaviour raises questions for education authorities about the availability of such expertise.

An Individualised Behavioural Management Plan should be a requirement for all students who have behavioural difficulties that are a significant part of the disability. As with the Individualised Education Plan the I.B.M.P. should be formalised, discussed with all staff, regularly renegotiated with parents and behavioural experts and authorised by parents, the school and medical practitioners where necessary.

The importance that Commissioner Innes placed on assessing the participants' attitudes and understanding motivations for their behaviours should not be underestimated. He immediately related the attitude of some teachers to the discriminatory behaviours they exhibited and critised the school for not providing educational programmes to facilitate a change in their discriminatory attitudes and behaviours. Comprehensive education programmes to raise the level of awareness of disability discrimination should now become an integral part of any induction programme for a school for beginning and experienced teachers. Pre-service teachers should become informed of the impact of discriminatory attitudes as a part of their university studies and all principals should study foundational, education law subjects to develop the skills necessary to interpret case law and understand the implications this may have for the lawful management of inclusion.

Learning Disabilities

According to the definition of disability in S 4 of the *Disability Discrimination Act* 1992 (Cth), a person may be disabled if they have a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction. This definition is designed to be inclusive of all students with learning disabilities or learning difficulties. Again, students with learning difficulties who have a mixed pattern of abilities, similar to Daniel's, may experience extremely high levels of frustration and possibly limited success in school activities.

Including students with learning difficulties or mental health problems with students with disabilities who have recently been suspended or excluded may provide insightful data for consideration before future behaviour management policies, staffing of behavioural management specialists and processes for schools are implemented. Add to these statistics those students who have been suspended or excluded who have a disability that presently exists, previously existed but no longer exists, may exist in the future or is imputed to a person and the future possibility of suspending or excluding any student from an Australian school may be significantly reduced.

Managing Special Education

A significant problem with the interpretation of the *Disability Discrimination Act* 1992 (Cth) for schools is the considerable gulf that exists between what may be considered a reasonable accommodation and the defence of 'unjustifiable hardship'. In the *Hoggan* case, the school argued that they had made accommodations that, in their opinion, were more than reasonable. The Commission, however, found that these accommodations were ineffectual. Determinations made by the Commission suggested that good management practices were essential if discriminatory behaviour was to be reduced or eliminated.

Daniel's case was very complex but it was by no means exceptional. The experiences of South Grafton High School are not isolated or unique. Many schools today make every attempt to provide quality, educational experiences for students with disabilities who have challenging behaviours. Few schools, however, have a documented and comprehensive philosophy and management plan for special education, or education programmes about disability discrimination for new and experienced staff.

An inclusive, operational framework is required from which positive, solution focussed decisions may be made. The framework would include a vision of special education for the school, goals, aims, objectives, budgets and management plans. Issues such as discriminatory attitudes held by staff would be addressed from within this inclusive, operational framework. Expectations of the attitudes and, consequently, the behaviours of all members of the school community would become explicit and accountable. Roles such as the Support teacher learning difficulties, Guidance officer or Behaviour management teacher would be clarified. Processes for enrolment, placement, educational assessment, ascertainment, behaviour management, Individualised Education Plans and reporting would be planned and reviewed to ensure discrimination is reduced.

Principals and Legal Knowledge

It may be assumed in the *Hoggan* case that the Principal was not informed comprehensively about the consequences of suspending or expelling a student like Daniel. The discriminatory behaviour was repeated several times with five suspensions and one expulsion recorded. The fact that the principal's departmental and legal advisors did not warn him about the consequences of this action may be an indication that educational authorities may also be unclear about the implications of Section 22 of the Act which state clearly that it is unlawful to expel a student or subject them to any detriment (suspension) on the ground of their disability. Instead, without substantial medical evidence or even well documented educational assessments, they chose to argue that the expulsion was not on the ground of disability.

The situation was compounded at South Grafton High School when other legislative requirements such as the duty of care to other students and staff, Occupational Health and Safety requirements, industrial agreements with the Teachers' Federation, Special Education policies from the education department and perhaps others had to be considered. In the *Hoggan* case, the principal required accurate and informed advice about his obligations on a number of legal issues so that management and decision-making in this and similar situations may be lawful.

An immediate and significant implication from this case for education authorities is to recognise the fact that the level of knowledge that principals have of the law is minimal and that beginning principals are particularly vulnerable (Stewart, 1998). Principals are not able to adequately manage the complexities of special education or inclusion issues if they are not informed of the basic, underlying intentions and requirements of the *Disability Discrimination Act* 1992 (Cth). Case law such as this and the possibility that Disability Standards may be introduced for education services may motivate education authorities to provide the professional experiences necessary for principals to make lawful decisions and provide education services that are discrimination free.

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