Publishing Details

Produced by the Centre for Disability Research and Development
Faculty of Community Services, Education and Social Sciences
Edith Cowan University
Joondalup 6027
Western Australia
December 1998

About the Authors:

Dr Robert Jackson is currently Director of the Centre for Disability Research and Development at Edith Cowan University. He has been involved with people with a disability for over 25 years as a psychologist, manager, researcher and academic. Dr Jackson has been involved in discrimination education issues for most of his working life, initially advocating for access to any education for people with a disability and more recently in support of inclusive education. Dr Jackson has supported several families in discrimination issues and has appeared as an expert witness in discrimination cases in several States of Australia.

Associate Professor Jim McAfee is Associate Professor of Special Education at Pennsylvania State University. Dr McAfee has been involved with Special Education and disability issues for many years with a particular interest in the legal issues around people with an intellectual disability and the criminal justice system, and discrimination in education. He is a member of an independent panel in Pennsylvania that reviews disputed cases involving the education of children with a disability in that State. Dr McAfee is a regular visitor to Australia where he has been an adviser and supporter of parents trying to achieve an inclusive education for their children.

Judith Cockram is a Research Associate at the Centre for Disability research and Development. Judy has an extensive publication record in the area of people with an intellectual disability who come into contact with the law. She continues to support families she met through her research, many of whom were caught up in complex bureaucratic and legal mazes. Ms Cockram has been involved in the review of the Western Australian Authority for Intellectually Handicapped Persons Act and is currently completing her PhD in disability and the legal system.

FORTUNATELY, THIS WON'T HAPPEN

Recently I had a night-mare. I was in an alien society where children with red hair were considered to be different to all other children. Special Red-Head Schools had been set up so all these children could receive an appropriate education.

The children travelled miles each day to the few Red-Head Schools and only associated with other red-headed children. They did not have any non-redhead children as friends. At the special school for "Reds" (as they had become known) the children received a different curriculum as it was well known that these children could not cope with the normal classroom demands. All the teachers were considered expert in teaching the Reds and some had done advanced training in coping with red-headed children. This meant that others in the society were uncertain how to relate to Reds as it was generally believed that you had to have special skills.

As the Reds did not mix with other children, they did not know what was appropriate behaviour. They just copied other Reds. This meant their behaviour became very different to non-Red children and they couldn't mix easily in society although the teachers tried hard to teach them non- Red ways of behaving.

Over time it had been accepted that all Reds were not the same. Some had lighter shades of red hair and it was felt that they required a different form of education to the pure Red Schools. Special centres were set up in regular schools where these Light-Reds were sent and they received a different curriculum again. As they were grouped together in these Light-Red Centres other children learned to distinguish the subtle shades of redness. Even though they were in the midst of non-Red children, these Light-Reds still did not belong and the other children would not play with them. They were Reds, after all.

While the parents of the Reds and Light-Reds had been grateful for the special schools for many decades, some had begun to question this. They wanted their children to go to the regular school with some help to get established. The head of education would have no part of this and put every barrier in the way of Reds going to regular school. He said it was clear that these parents had been stirred up by radicals who wanted to overturn the system.

I woke up in a sweat with the vivid recall that in the dream the Minister had just said these children must go to the Red School as he knew what was best. Police were tearing the children from their mother's arms and forcing them onto the Red school bus.

I'm glad it was just a dream. It couldn't happen in reality.

Letter to the Editor, The Australian, 22nd May 1995, page 8.

1. Introduction

The current situation

Under the Disability Discrimination Act (DDA) 1992, it is an offence to discriminate against a person due to their disability (direct discrimination) or to require a person with a disability to meet conditions which while appropriate for people without a disability, are not possible to be reasonably met by a person due to their disability (indirect discrimination). It is also illegal to discriminate against the family or associates of a person with a disability on the grounds of the person's disability. In effect, it is a requirement of education systems to allow the access to all of the education requests of people with a disability, including providing the necessary supports and environmental adaptations necessary for the person to be able to access the education. The limitations to these broad requirements are covered under 'unjustifiable hardship' provisions which require a balancing of the likely benefit or detriment to the people concerned; consideration of the effect of the disability; the cost of meeting the requirements of the Act; and the requirements set out in Action Plans given to the HREOC.

There is little doubt that discrimination in education against people with a disability is a real problem. In Australia, the National Children's and Youth Law Centre published a report on disability discrimination in schools in 1997[i]. The research involved focus groups, telephone interviews and survey techniques with a total of 784 people including parents, carers, students and former students. A range of disability discrimination issues were uncovered in the areas of enrolment, post enrolment, meeting personal support needs, participation and belonging, discriminatory attitudes by staff, bullying, other parent attitudes, and insensitivity to disability specific issues. Of particular concern was the experience of making formal complaints under the Disability Discrimination Act (DDA). Complaints were found to be costly and time consuming

with long delays involved. For example one case involved 13 months of protracted negotiations with the education system only coming up with a workable proposal days before the scheduled hearing. Complaining direct to the school was negative for a large majority, with students discriminated against or forced to leave school as a result. Three parents were threatened with defamation action by schools.

In higher education, anecdotal accounts indicate that discrimination continues but few of these cases have reached the point of being determined by the Human Relations and Equal Opportunity Commission (HREOC) Tribunal. Discrimination issues in higher education have covered physical access; inadequate support such as interpreters for deaf people or provision of course notes; inadequate allowance for inability to complete tasks within the requisite time and setting up "special" graduation ceremonies for people with a disability. It appears that as higher education systems have to compete for students, they are relatively willing to come to conciliated agreements when challenged on discrimination issues. The potential public stigma of being found to have discriminated against students seems to be a powerful incentive to come to a conciliated agreement. In contrast, compulsory education in the school years means that there is not the same danger of losing students so school education systems remain the major area of resistance to compliance with the Disability Discrimination Act.

In the discrimination cases that have been taken against education departments, the majority have been settled out of court after protracted delays. There are reports of out of court monetary settlements being made by education departments but as these are always confidential it is not possible to verify this or to discover any actual settlement amounts. The delays can extend to several years between the time of the initial complaint and its resolution for school children and during this period the child's education is commonly disrupted if not stopped completely.

Families are of course put through enormous emotional and financial strain. It is not surprising that many families drop the complaint rather than put themselves and their family member through such an ordeal. It is extremely difficult to sustain a complaint of discrimination against a huge and powerful government department when critical years of a child's education are lost, perhaps never to be recovered.

Of the cases that have proceeded to a court judgement, (the 'L' and 'P' cases in Queensland), in both cases the education department and school were found to have discriminated against the child but the department was not held accountable under the 'undue hardship' provisions of the DDA. If a department with a budget of over a billion dollars can be allowed to claim it is too hard to include a child in a regular classroom, then it is clear that the DDA will have limited ability to enforce any substantive forms of adjustment required by a student on education departments. Other cases have gone to trial in other states, but were settled or dropped before judgement was handed down.

Overall, it is apparent that in most jurisdictions there is a trend by school education authorities to 'stonewall' discrimination complaints and draw them out as long as possible in the hope that the families will withdraw the complaint. With the exception of Queensland, other States appear to prefer to settle out of court rather than have any judgements made that might constitute precedents. In the case of Queensland, the education authorities have shown a willingness to spend hundreds of thousands of dollars on a QC and interstate expert witnesses to try to win a case, even though the sum expended would have covered several times over the support necessary for the child to attend the neighbourhood school. Dr Andrew Elek, an economist who has held senior economic positions with the Australian government and international agencies gave a detailed analysis of the costs of inclusive education to the tribunal in the 'P' case in

Queensland. Overall, he found the costs of inclusion to be cost neutral, which is consistent with detailed research on costing carried out in the United States.

The current DDA legislation, while helpful, has not ensured that discrimination in education does not occur with large or small systems, particularly in the area of inclusion of students with an intellectual disability. Indeed it seems that it is considered to be a failure by families trying to gain inclusive education for their son or daughter. Additional measures will be required and this discussion paper lists alternatives that are used around the world and comments on their likely effectiveness.

Safeguards

Conceptually, the discussion might be assisted by the consideration of the issue as a safeguarding[ii] problem. That is, the law is there but we need to build in procedures to ensure that the spirit and letter of the DDA is implemented by education systems. We might consider that three discrete types of safeguards are needed:

Preventative safeguards:

These are safeguards built in with the expectation that discriminatory practices will be implemented, often under the guise of being supportive procedures. For example, a Unit on the grounds of a regular school is one common method of continuing segregation practices while expousing inclusion. Similarly, requiring examinations as the key form of assessment in higher education under the guise of maintaining academic standards will produce great hardship for a student who is slow or has limited writing skills due to a disability. Preventative safeguards would be procedures designed to prevent such practices occurring, exposing them for what they are or at

least preventing them being imaged as non-discriminatory or even 'supportive' for people with a disability. Some examples of preventative safeguards that could be used would be allowing parents to choose the mode of education that they believe is in their child's best interests (segregated or inclusive); employing the principle of least restrictive alternative with the onus of proof on the education system; and requiring alternative forms of assessment for students so that the impact of the disability can be minimised. In all cases there would need to be 'riders' to allow for the unreasonable hardship provisions of the Act to apply but with the balance brought clearly in support of the person with a disability. At the moment, the onus of proof lies with the person with a disability and there is no penalty for time delays or legal processes used to exhaust financial or emotional resources of people with a disability or their supporters.

Corrective Safeguards.

If a discriminatory practice has appeared, a corrective safeguard would be a procedure to first of all discover such a practice and second, to stop it occurring. Hence procedures related to monitoring of systems, due process safeguards and similar approaches would fall under this heading. Currently there is effectively no powerful monitoring of compliance with the Act. While Action Plans are required to be lodged with the HREOC, these do not appear to be checked to see if they are true, likely to be effective or even if they are being implemented. The only other checks are individual complaints by students or families, but it takes a survey such as that referred to above to indicate the extent of problems. While records are kept by HREOC, these are a very gross indicator of the type and extent of discriminatory practices.

Examples of corrective safeguards would be published data on the number and extent of school inclusion; audits of DDA compliance by an outside body such as the auditor general; requirements for all educational bodies to publish details of all complaints of discrimination made against them so that the accuracy of individual complaints could be checked by the people who had made the complaints; and tying funding directly to performance under the Act.

Developmental Safeguards.

These would be practices built in that might have no immediate impact but safeguard non-discriminatory practices over the longer term. For example, staff education; family involvement in decision making; community participation in the promotion of anti-discriminatory practices; community education programs -- all might have minimal immediate impact but significant impact over the longer period. Some examples of attempts to develop such safeguards are the promotion of awards for positive examples of non-discrimination or inclusion; training associated with the design and implementation of action plans; highlighting examples of local and international positive approaches through the media and professional publications; specific training on the DDA and its requirements; and making support available for institutions wishing to improve their performance under the Act.

Apart from safeguards being considered in these three categories, safeguards will also need to be considered at multiple levels. That is, there will need to be consideration of safeguards at the level of legislation, policy, goals, institution processes, classroom processes, system renewal, staff training ... and so on. Hence we might consider a matrix with the three categories of safeguards being considered at the different organisational levels:

The advantage of using such a conceptualisation is that it clearly shows the need for multiple safeguards, at all levels of the system, and that these safeguards should be redundant where possible, be both internal and external, and range from informal to highly formal approaches. It also carries the implication that safeguards themselves are prone to deterioration, and hence they themselves need to be safeguarded.

Inclusion

In the report by the National Children's and Youth Law Centre on Disability Discrimination in Schools[iii] 63% of respondents reported experiencing discrimination (75% of the students) and the major types of discrimination that occurred were limited participation or inclusion (240 complaints), negative attitudes of staff (202); and lack of support (190). The next highest category, refusal of enrolment with 128 complaints was the first that might fall easily into an area that might be affected by policy or legislation. In education then, a major area of discrimination has been the failure of systems to include people with a disability in the educational mainstream with appropriate supports. One of the most common perversions in this area is to call segregatory practices inclusion. Segregation units on the grounds of the school are called inclusion, special classes are called inclusion, isolation at the back of a classroom is called inclusion -- and so on. Hence an essential first safeguard for inclusion is to define it.

To define inclusion however can be complex. Wills and Jackson[iv] set out eight aspects to inclusion, namely:

- physical presence in the normal school environments
- social inclusion with other children

- inclusion in the same curriculum material as other children in the class (albeit modified)
- positive image in the child's own eyes
- positive image in the eyes of others
- relevant skill development
- potent teaching
- positive expectations.

They argued that these are the defining characteristics of inclusion for all children, with or without a disability. Indeed it could be argued that these characteristics are relevant to education for all people at all ages.

While all of these characteristics are essential to inclusion, it could be argued that for broad surveys of inclusive practices they are probably too complex to operationalise on a national basis. However, the DDA focuses on the concept of "reasonableness" as in 'unreasonable hardship', and if inclusion is not clearly defined then 'reasonable' becomes a slippery concept. The spirit of the DDA is that access and opportunities available to the general population should not be denied to people because of a disability. If the definition by Wills and Jackson is what an average student would expect when involved with education then it provides a useful measure against which discriminatory practices can be measured. This is particularly the case with inclusion not being a well understood concept and commonly understood as physical presence. How as people at all levels of education understand, physical presence is just the first necessary condition and direct and indirect discriminatory practices can still flourish with a person physically present in an educational environment.

The definition of inclusion used by the Western Australian Department of Education is:

"In the WA context inclusion is the practice by which a child with a disability is enrolled full time in the regular classroom and accessing the regular curriculum (with or without modification)."[v]

For the purposes of this discussion paper it is recommended that this definition or a modified version be used when considering broad approaches to enforcing compliance with the DDA. For detailed research looking into the quality of inclusion, it is recommended that the definition used by Wills and Jackson be used.

(a) Current processes for compliance promotion in disability discrimination law

i. Policy and legislation

Within Australia, all schools systems appear to have accepted the idea of inclusion in principle and have policies allowing the inclusion of children with disabilities in regular schools. In some cases (such as the ACT), detailed regulations purporting to bring the school system into line with the DDA have been published. These policies appear to have had some impact on children with physical disabilities with greater physical access to school buildings and other physical accommodations. For children with an intellectual disability the policies tend to be focused on providing alternative education approaches such as fully segregated schools, segregated centres on the grounds of a regular school with a separate principal and staff, or segregation units on the grounds of a regular school but under the control of the regular school principal. Placement is strictly under the control of the education authorities in reality if not in policy terms. For example, in most States it is the parent's right to enrol the child at the local school, but if the child requires

support, then the school system determines the level of this support and how it is provided. In most cases the support is only effectively offered in a segregated unit or centre.

In Victoria, parents do have the right to choose inclusion, but a common complaint is that the level of support offered in the regular classroom is insufficient so that parents commonly choose a segregated option as greater support is available. In Western Australia, parents who wish to choose inclusion can apply to join a pilot program where appropriate support is made available. In a review of this program Chadbourne (1977)[vi] found that (p6):

- inclusion is manageable provided it is properly resourced
- without a teacher aide inclusion would not work properly
- most school community members do not wish to be party to a policy that excludes children with an intellectual disability form their local school
- there is no compelling reason to oppose inclusion provided it is properly resourced.

On the basis of these findings, the WA government moved to fund additional places in full inclusion, building to a total of 50 places per year. However it should be noted that the policy resulted from parental pressure for inclusion of their children rather than any attempt to comply with the DDA. Moreover, the policy shift is poorly advertised amongst schools and parents so that at least some principals appear to be unaware of its existence and advise parents accordingly, and many parents express surprise and disappointment when they learn that they are too late to apply for a position on the program.

In remote rural areas, inclusion also appears to be provided as a matter of course as no alternative is available. In particular, in rural WA and Queensland successful inclusion has been going on for many years and the WA education department has even made films on the program in conjunction with the Commonwealth Department of Education[vii]. The fact that successful inclusion occurs in rural areas but is denied to parents in city areas across Australia is a point of some mystery, particularly as the discrepancy has not been supported in cases before tribunals. It is most likely that the rationale had more to do with the economics of providing expensive segregated education in rural areas rather than any belief about the efficacy of alternative means of education.

It is hard to see how policy or legislation would impact on the more frequent but subtle areas of discrimination found in the study by the National Children's and Youth Law Centre on Disability Discrimination in Schools[viii]. Also this study found evidence of discrimination over a wide range of disabilities or impairments that did not seem to be readily acknowledged by all education systems. These included attention deficit disorders, autism and Asperger's syndrome, deafness, learning disabilities, chronic fatigue syndrome and mental illness.

Overall, it would seem that legislation and policy, while important means of setting out discrimination issues and suggesting responses, are not necessarily effective at countering it. Unless there are effective means to ensure that the legislation is followed and that policy is implemented and accountability is forced onto education systems, anti-discrimination in education will remain more an issue of impressive written statements than real action.

ii. Action Plans

Action plans are widely used across Australia as a means of gaining compliance with legislation. As part of the collection of data for this discussion paper, 170 education agencies were written to throughout Australia asking how they were implementing compliance with the DDA and asking for their suggestions for improving compliance with the DDA. Unfortunately there was a very limited time for response so the return rate was low (approximately 10%). In addition information was sought off the world wide web, through government departments and through libraries. In appendix 1 the results of these investigations are summarised. In summary, several agencies had little or no awareness of their obligations under the DDA, but the majority who responded were working on action plans or had action plans in place. In many cases these had been registered with the Human Relations and Equal Opportunity Commission (HEROC) but it seems that they are not vetted to see if they meet the requirements of the Act. In other cases the action plans were designed to meet the requirements of state disability discrimination legislation or disability services legislation, or a combination of several different legislative requirements.

As an example of the process of producing action plans, under the WA Disability Services Act (1993), each public authority must prepare and implement a Disability Service Plan to ensure that, in so far as its functions involve dealings with the general public, the performance of those functions furthers the principles of the Act. The plans outline the changes that will be made by public authorities to ensure that people with disabilities can access the services and facilities that are available to the broader community. Each public authority is required to have:

- developed a Disability Service Plan
- lodged the plan with the Disability Services Commission by 1 January 1996
- reported before 1 September each year on the implementation of the plan

Under the Act, the Disability Services Commission has responsibility for:

- advising public authorities in relation to the preparation of Disability Service Plans
- evaluating the effectiveness of such plans
- encouraging people who provide services to the general public to adapt those services to meet the needs of people with disabilities.

A total of 142 local governments and 107 State government departments or State Executive Service organisations were required to develop plans and submit them to the disability Services Commission by 1 January 1996. There was a 100% compliance with this legislative requirement with over 250 plans subsequently lodged with the Commission.

To support the implementation and review of plans the Commission has:

- conducted statewide training for public authorities, the non-government sector, consultants, architects and building surveyors on how to use the Access Resource Kit;
- jointly auspiced (with ACROD) the first national access conference *Creating Accessible Communities* providing a showcase of achievements in Western Australia;
- established a preferred list of disability access consultants to assist public authorities improve access to their buildings and facilities;
- produced technical advisory papers on key access issues.

Evaluation

Under the WA State Disability Services Act, the Commission has a responsibility to evaluate the effectiveness of Disability Service Plans. The implementation and impact of the plans will be progressively evaluated over the period 1997 to the year 2000. The main purposes of the evaluation will be to:

- provide information to help improve the effectiveness of Disability Service Plans within public authorities and across government
- assess the effect of the plans on access to services by people with disabilities.

The evaluation will include yearly reports on the implementation of the plans across all public authorities. A number of studies will be undertaken to provide a more comprehensive assessment of specific aspects of implementation:

- a study of how well public authorities are implementing their plans
- an examination of the relationship between the planning processes used by public authorities and the achievement of access outcomes
- an examination of the impact of plans on service accessibility.

While this work by the WA Disability Services Commission is impressive it is unlikely to have much impact on education, particularly at the school level. While the action plan by the WA Education Department has the failure to include children with a disability in regular schools as the first issue to be addressed, the action to be taken is to 'review policies in the area'. It is clear that action plans are not going to be the method to produce inclusion in WA schools unless there are additional measures to enforce compliance in action rather than words.

(b) Other mechanisms available for compliance promotion

I. Regulation.

Over the last two decades in particular there has been a large increase in legislation seeking to regulate various aspects of private and corporate activity. In human services we now have a large range of industrial, commercial, health and safety, rights and anti-discriminatory legislation operating. This legislation could be seen as part of a process of increasing regulation of activity, moving from self-regulation, through quasi regulation to full governmental regulation. Much of

the work on anti-discrimination legislation could be considered quasi regulation, as it is setting down standards and principles for organisations to follow, but not following up with the necessary level of compliance monitoring and accountability to ensure that the intent of the legislation is appropriately implemented.

ii. Standards

Standards have been widely used in industry for many decades so there is now a considerable data base to look at their effectiveness and intended and unintended outcomes. The organisation of Economic Cooperation and Development (OECD) has produced a preliminary report looking into some of these effects.[ix] Some key findings of this report were that command and control regulatory strategies are limited in that they can lead to over-regulation; produce wrong outcomes if regulations are too narrow or broad; encourage evasion or creative 'compliance'; and fail when strong monitoring and enforcement are lacking. As this experience is in areas with a long history with such regulation of standards, we should take great heed of these findings.

All of these characteristics appear to be present in the use of standards in disability (as in state and commonwealth disability service standards). Despite this bleak initial prognosis, there are some areas where the implementation of standards has been effective, and the OECD has investigated the characteristics that were related to the success of the standards in these areas. The key areas where standards have had some effect are occupational health and safety; environmental control and corporate compliance systems where corporations build in procedures to measure their own performance against government regulations. In building up an effective set of standards and compliance-friendly regulation, the following steps are recommended:

Steps for developing effective standards

1. *Problem identification and analysis*. The focus is on the problem rather than the rules. Patterns of non-compliance, problems encountered by organisations attempting compliance and hazards and risks are systematically analysed and documented. Then the policy makers look for an effective and efficient solution to the problem(s) identified. For example, with educational discrimination, specific problem areas would be identified, as has been done in this report and others referred to within it. It might be found that there is a considerable difference in the rate of compliance with the Act in different States or in different sectors of education. This information would then be used as the basis for developing specific strategies to overcome such problems.
2. *Harness capacity for securing compliance through voluntary approaches*. Partnerships between the regulating bodies and educational organisations will lead to sharing of information and creative solutions appropriate for individual systems or organisations. However it needs to be stressed that the experience in regulation is that this step by itself is insufficient to ensure compliance. Where there is an inherent benefit for the organisation, self regulation is more likely to be effective. For example, occupational health and safety procedures may lead to a reduction in worker's compensation claims with inherent advantages for the organisation. However, providing physical access to allow people in wheelchairs to attend a facility is more likely to result in increased costs than benefits so voluntary compliance is less likely to be effective.

To achieve a balance more in favour of voluntary compliance, it could be arranged such that:

- Systems or organisations that do voluntarily respond are less likely to get a severe performance audit, whereas systems slow to respond would be closely monitored and reported on. Similarly, good performance could lead to less stringent reporting and evaluation procedures in the future. For example performance on number of discrimination complaints, number of complaints conciliated, percentage of children fully included, satisfaction of students and families with the organisation and so on could be used to provide broad indications of the success of the voluntary compliance. If these measures were improving at an acceptable rate then full performance audits or more intrusive arrangements could be avoided.
- Market mechanisms are used. For example, budgetary allocations are dependent on levels of voluntary compliance. In the US funding is contingent on meeting the legal requirements of the legislation and processes to ensure this are set out below. Other alternatives could be direct financial reward for compliance, 'quality accreditation' which can be used for marketing purposes and awards for positive examples.
- Outcome-related goals could be set by the regulator with time limits and positive and negative contingencies dependent on performance. This implies some regulator or regulatory body as in the US, which would probably need some legislative backing unless it was funded from within the State or Commonwealth Departments of Education.
- Performance audit results are made public with appropriate commentary.
- Nurture compliance capacity by making available a range of support personnel to assist and encourage organisations and systems to achieve compliance with the Act. One strategy to maximise the effectiveness of this approach is the establishment of local committees to design and implement procedures. What has been found with

using support personnel is that it is most effective when those assisting mix both positive and negative information. That is, errors or failings are clearly spelled out as well as positive accomplishments. The information then is on how to rectify the areas of problem and meet set standards. Focusing on both the positive and negative has been found to be more effective that just focusing on one or the other.

3. *Monitoring and targeting for low compliance.*

- Tiering the contingencies dependent on the size of the organisation may lead to a greater overall level of compliance. That is, the means to force compliance for a State education system might be very different to the means to improve compliance for a single independent school or tertiary education facility. For a small educational organisation the means to promote compliance might be more educative and supportive, but for large organisations with the resources to organise and implement compliance mechanisms, failure to comply could be linked to more punitive and public exposure approaches.
- Restorative justice -- righting the wrongs. In environmental areas, a polluting company can be required to clean up the mess and pay compensation for the damage caused. In educational discrimination, a similar process could be implemented where compensation could be required for failing to implement the DDA. In consumer areas, the following processes are commonly gone through:
    - A commitment to cease the conduct.
    - Corrective action such as compensation.
    - A program to improve future compliance with the Act.
    - Publication of the infringement and remedial action.
    - Community service such as production of educational material and publications

A process similar to this would seem to be applicable to breeches of the DDA or any educational standards implemented.

- Back up of more severe methods if the more benign approaches to enforcing compliance fail. For example, there could be a graded response similar to that used in the commercial area such as:
  - Persuasion
  - Warning letter
  - Public reporting
  - Civil action
  - Criminal action

Overall it is clear from this analysis that there needs to be three clear aspects to the use of standards:

- Analysis of the problem
- Gathering voluntary or semi voluntary involvement.
- Monitoring compliance and targeting poor compliance.

In educational discrimination, there is ample evidence on the nature of the problem and some attempt to enlist voluntary or semi-voluntary compliance. There are very limited processes to monitor compliance or target poor compliance.

Problems with Standards

In addition, some other aspects of standards need to be considered.

- *Minimum Standards become the ideal.* By their very nature, standards are set at the minimum acceptable level of performance. If set at the ideal or 'industry best practice', many organisations will be unable to achieve the standards and so are less likely to comply.

However, once an organisation has achieved the standard, the pressure to improve is removed. This means that minimal standards either become the norm or standards have to be continually revised, with the inevitable criticism that the goal posts are being moved.

- *Standards depend on outcome measurement.* In order for them to be monitored, standards require clearly assessable criteria. Hence number of children in mainstream education, accessibility of buildings, supports available all are likely to be measured. However, it is much more difficult to set standards for teacher and school attitudes, staff harassment, bullying, limited participation, subtle stereotyping, poor expectations and other subtle aspects that are often more important descriptors of discrimination than the more objective measures. There is a danger that we will define discrimination by what we can easily measure but miss fundamental issues at the heart of rejection and abuse. An example from the use of standards in nursing homes illustrates some of these problems. One standard is that there must be a grievance procedure for resident complaints to be handled. However, despite the procedure being up on the wall of nursing homes and known to all residents they tend to be rarely used as residents are too scared of retribution if they complain. As parents report retribution from complaining about educational discrimination[x] , the parallels are obviously very real.
- *National standards may reduce positive moves on discrimination* . At the moment there is considerable differences between States in the implementation of the DDA and even within the one department in a State. Similarly, one TAFE can be implementing a fully inclusive program with in-mainstream supports where others can be replicating the segregation models of schools and calling it inclusion. While most tertiary institutions are coming to terms with the need to adapt assessment procedures to cater for people with disabilities, some institutions are holding separate graduation ceremonies for graduates with disabilities. While many tertiary institutions are coming to terms with people with physical or sensory disabilities attending, they are not yet considering the inclusion of students with an intellectual disability

as is occurring in other countries. By implementing blanket standards across all institutions across the country, the incentive for innovation, regional differences, model programs to emulate all are made less likely and the country can be reduced to a level of mediocrity approaching the lowest common denominator. Of course some might argue that this is the current state in Australia.

(c) Mechanisms available in other areas of law for compliance promotion

Auditor General

Possibly the most universally used method of forcing compliance promotion in other areas of legislation is the use of the Auditor General. All government departments have to have their accounts audited, not only in terms of their financial equitals, but increasingly, on their performance measures. These reports are presented in parliament and regularly reported in the press if problems are highlighted. Heads of government departments and Ministers of government seem to respond to these reports so they appear at least on the surface to be an effective method for forcing compliance with the relevant Acts. In addition, in an environment that is becoming defined in economic terms, an auditor has considerable legitimacy that other compliance bodies or mechanisms might not be able to match. As was shown in Victoria, attempts to curtail the powers of the auditor had major political costs whereas the silencing of other monitoring bodies or ignoring their reports might have less political and public impact.

Legislative reviews

A common practice in legislation since the 1980's in Australia has to have a sunset clause in legislation requiring that it be reviewed after a period such as five years. These reviews are normally done by external bodies with the review report going to the Minister. They may involve wide consultation with stakeholder groups and have mechanisms for public hearings and verbal or written submissions. It is common for such reviews to lead to major re-organisation of

government departments and even new legislation being written. However the actual outcome of such re-structurings appears to depend in large part on the ideological perspective driving the review process. Increasingly such reviews appear to be driven by economic or managerial agendas rather than concern for discrimination or the welfare of client populations. Similarly, public consultation can be real attempts to gain broad input or a means to control and manage dissent from the pre-set agenda.

2. Overseas compliance promotion through mandatory reporting of progress

(a) Legal cases in USA

The most commonly cited example of inclusion processes is in the USA. The first challenge to segregated education was in the famous case *Brown vs the Board of Education* where the concept of 'separate but equal' schools for black children was challenged. The US Supreme Court found that "segregated education is inherently unequal" and forced the racial integration of schools across the United States. Shortly after this time, the Pennsylvania Association of Retarded Citizens filed suit against the education system on the basis that decisions to segregate children with a disability were arbitrary. They provided examples of children in regular education who were performing at a lower level than others who had been forcibly segregated. This case (the PARC case) ran for several years on appeal but the finding that segregation was arbitrary forced a re-think at the Federal level. As a result, the Federal Government passed a law requiring the inclusion of all children in the neighbourhood school except where it could be clearly established that this was not possible. This law, PL 94-142, was passed in 1974. Since that time it has been amended and strengthened with bi-partisan support and is now known as the

Individuals with Disabilities Education Act (IDEA). In order to get Federal Government funding for education, school districts must demonstrate compliance with IDEA.

IDEA has been further clarified by several key court judgements.

- *Rowley vs Hendrick Hudson Central School District*: US Supreme Court

  Eight year old deaf child. Supreme Court found that the Act's (IDEA) requirement of a "free appropriate public education" is satisfied when the State provides personalised instruction with sufficient support services to permit the child to benefit educationally from that instruction ... If the child is being educated in a regular classroom, as here, the IEP (individualised educational plan) should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.
- *Holland vs Board of Education, Sacramento City Unified School District:* US District Court, E.D. California.

Moderately retarded 9 year old girl. Held that the appropriate placement under the IDEA was in a regular second grade classroom, with some supplemental services, as a full-time member of that class. The school district's option of half time in a regular class and half time in a segregated class was not acceptable.

- *Oberti vs Board of Education of the Borough of Clementon School District.*: US States Court of Appeals for the 3rd Circuit

8 year old boy with Down Syndrome who was removed from the regular classroom and placed in a segregated special education class. The court agreed with the district court's conclusion that the School District did not meet its burden of proving ....that Rafael could not be educated satisfactorily in a regular classroom with supplementary aids and services. Affirmed the district court's decision that the School District has violated the mainstreaming requirement of

IDEA. Moreover "we also hold that the school bears the burden of proving compliance with the mainstreaming requirements of IDEA regardless of which party (the child and parents or the school) brought the claim under IDEA before the court". (p3) Also sets out process for determining placement (section II)

- *Carter vs Florence County School District Four et al.* US Supreme Court

  Child classified as learning disabled. Parents were dissatisfied with the IEP drawn up by the school, who refused to modify it. Parents took the child to a private school and claimed the school fees from the school district. Court agreed with parents and required school district to pay for private school education.

- *Daniel RR vs State Board of Education et al. (El Paso Indep. School Dist)* US Court of Appeals, 5th Circuit. The Daniel RR test: Following the Rowley decision from the US Supreme Court, it was left to lower courts to determine the extent of support that is required of educational systems by law to provide for the education of the child with a disability in the regular classroom. The United States Court of Appeals (Fifth Circuit) did this in the case of Daniel RR and this has tended to be used as the guideline for the American Education System (Federal Reporter, Vol 874 F.2d 1989). The tests were (Point 14 of the report -- p1048 to 1050):

  - The Act does not require every conceivable supplementary aid or service to assist the child. For example, the education instructors do not have to devote all or most of their time to the handicapped child or modify the regular education program beyond recognition.
  - Determine whether the child will receive an educational benefit from regular education. The inquiry must focus on the child's ability to benefit from the educational lessons. "We reiterate however, that academic achievement is not the only purpose of mainstreaming. Integrating a handicapped child into a non-

handicapped environment may be beneficial in and of itself. Thus our inquiry must extend beyond the educational benefits the child may receive in regular education".

- "We must examine the child's overall experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child". "For example, a child may be able to absorb only a minimal amount of the regular education curriculum, but may benefit enormously from the language models that his non-handicapped peers provide for him. In such a case, the benefit that the child receives from mainstreaming may tip the balance in favour of mainstreaming, even if the child cannot flourish academically. Roncker, 700 F2.d at 1063." (However) ... mainstreaming a child who will suffer from the experience would violate the Act's mandate for a free appropriate public education".
- "Finally, we must ask what effect the handicapped child's presence has on the regular classroom environment, and thus, on the education that the other children are receiving." This may be due to two things: 1) the child's behaviour due to his disability is disrupting the education of the other children in the class to a *significant* (our emphasis) extent, or the child may require so much of the instructor's time (over and above the supplemental aids and services mandated under the Act) that the instructor will have to ignore the needs of other students in order to tend to the handicapped child.
- "If we determine that education in the regular classroom cannot be achieved satisfactorily, we next ask whether the child has been mainstreamed to the maximum extent appropriate. "... the school must take intermediate steps where appropriate, such as placing the child in some academic classes and in special education for others, mainstreaming the child with non-academic classes only, or providing interaction with non-handicapped children during lunch and recess. The appropriate

> mix will vary from child to child and it may be hoped, from school year to school year as the child develops."

Further cases are listed in the appendices. There are several key points that have been brought out in the law in the US which have central relevance to the Australian situation:

1. The basic placement is in the normal classroom, undergoing the normal curriculum, with the necessary supports in place. Any fall back from this position is the responsibility of the education system to justify, in court if necessary.
2. It is the responsibility of the education authorities to supply the necessary support to ensure that the child can progress educationally.
3. If less than full inclusion is required, any segregation must be temporary with the intention of returning the child to full inclusion. The child's individual education plan (IEP) would set out how this would be achieved.
4. If there is a dispute over placement between the parents and the education authorities, the child must stay in the current placement until the matter is resolved. This "stay put" provision puts pressure on the education system to resolve the matter expeditiously as in almost all cases the dispute is over the child remaining in a normal classroom.
5. Parents must be involved in all key decisions regarding the child's placement and educational program.
6. The school districts must provide dispute settling mechanisms so that it is not necessary for the parents to take legal action to resolve disputes. These mechanisms involve independent personnel so that the chance of a decision both being fair and seen to be so is more likely.

There are however some aspects of the American system that might require modification in the Australian situation. The system is totally structured around inclusion which means that parents who believe that segregated learning is in the best interests of their child can have inclusion forced against their will. This leads to disputation by families both for and against inclusion, whereas a situation based around the idea of parent choice might minimise such outcomes. Parents make decisions for their children on their sincerely held beliefs about their child's best interests, and they are the ones who carry the responsibility for the outcomes of such decisions through the child's life. Forced inclusion or segregation would seem to be counter productive as parents will gravitate over time to the option that appears to gain the best outcomes. As the evidence is so strongly in support of inclusive education, it could be expected that the demand for segregation would decrease over time. Even if it did not, it would remove the majority of the discrimination complaints around the issue of special or inclusive education.

Another aspect of the American system that could be problematic is the insistence on every child with a disability having an individualised education plan (IEP). While this might ensure that the child's educational development is not overlooked, it has the side effect of labelling the child as special and focuses considerable attention on the disability. If every child in the classroom had an IEP such a problem might be minimised, but if it is only the child with a disability then it can be a problem for inclusion. Rather than an IEP, an agreement that has to be negotiated and signed by the educator an parents might be an alternative, and any adjustments to the agreement similarly negotiated and signed. This would ensure parental involvement, a point still at issue in the US despite over 20 years of experience with IEPs and legal backing for parental involvement in their development.

b) Processes in the USA

Background

Inclusion of children with disabilities in the US is based upon four integrated and interdependent elements of educational and legal practice that are required under federal law (Individuals with Disabilities Education Act - Amendments of 1997):

(a) specific substantive principles,

(b) a cohesive set of procedures for implementation of the substantive principles,

(c) review by an independent agent when a dispute arises about adherence to the substantive principles for a specific child's program and/or placement (for compliance with the principles in arriving at a program and placement decision) and

(d) a compliance system for enforcing the actual program and placement.

Each of the 50 states and territories are required to develop and enforce regulations enacting the requirements of the federal law. Although the 50 states are bound by the federal law, there is considerable difference from state to state with regard to specific procedures. For example, Kansas has published all of its procedures in a six page document whereas Pennsylvania required a 76 page document. Differences reflect individual state law; the complexity of the educational system (e.g., Pennsylvania has 501 independent school districts, Hawaii has only one and Kansas has fewer than 50); the history of special education and services to children with disabilities in the state (California, New York and Pennsylvania experienced considerable public challenge to segregated and inferior systems of education for children with disabilities in the period 1970-1985); and the date the state entered the union (i.e. Pennsylvania as one of the original 13 colonies has a legal and political system that is a hybrid of English colonial law and the US constitution whereas Arizona (admitted in 1917) law and its political system closely parallel federal law and politics. Still all states are required to adhere to the substantive principles, to

develop a system for determining program and placement according to those substantive principles, to have an independent review procedure to ensure compliance with the principles and a compliance system to ensure that the programs and placements are actually implemented as agreed upon by the parents and the school district or as determined by the independent review. Following are descriptions of each of these elements as they have been implemented in Pennsylvania. A discussion of the procedural differences in two other states is presented after the Pennsylvania discussion.

Substantive Principles

The substantive principles that guide the educational placements and programs of children with disabilities are determined by federal law and not by state law although individual states may enact more stringent inclusive (but not exclusive) policies. The principles are:

1. Children with disabilities must be included in the general education classes, program and facilities to the maximum extent possible.

2. Schools must provide supplementary aids and services (e.g., teaching assistants, sign language interpreters, special transportation, therapy, revised curricula, positive behaviour management plans, etc.) to support children in general education settings.

3. Parents must be permitted to provide input into program and placement decisions.

4. Resources (supplementary aids and services) go with the child not the program.

5. Inclusion (and in rare appropriate cases) exclusion or segregation decisions are made on the basis of the individual child's needs and the existence of supplementary aids and services and not the child's category or level of disability.[1]

The questions that must be considered for inclusion/exclusion decisions are:

(a) can the child benefit academically from the general education setting with appropriate supplemental aids and services,

(b) can the child benefit socially from the general education setting with supplemental aids and services,

(c) will the child's presence be disruptive even with supplemental aids and services (including positive behaviour management plans),

(d) is the cost for inclusion excessive[2].

If the answer to either of the first two questions is affirmative, the child must be included in the general education setting. Obviously, most children with disabilities can derive social benefit (e.g. appropriate modeling) from children in the general education setting. Thus, it is rare that these elements are used to deny inclusion. The third element (disruptiveness) involves a more complex debate. Disruptiveness is not mere inconvenience (such as a student slowed by a wheelchair), nor is it mere misbehaviour, especially when the misbehaviour has been untreated. The disruptiveness must be chronic and unresponsive to an array of interventions. Schools must demonstrate that they have implemented and evaluated interventions for the disruptions. Furthermore, if exclusion is permissible for disruption, it is only permissible from the specific environment in which the disruption occurs not from the entire general education program.

Determining Program and Placement

Program and placement decisions for children with disabilities are determined by multidisciplinary teams. The composition of the teams differs for each child dependent upon the child's needs. For example, a child with an intellectual and physical disability is likely to have a special education teacher, a general education teacher, a parent, a psychologist, an educational

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[1] Existence in this sentence means within the realm of possibility (i.e. does an appropriate supplementary aid or service exist) not does the school currently have such an aid or service.

[2] Excessive cost has not been a factor in decisions about inclusion although several school districts have attempted to use this issue. In Holland v. Sacramento the district attempted to exclude a student with an intellectual disability from a general education class and program claiming that the cost would be $100,000 US per year. The district calculated this cost based on $20,000 for the cost of a teaching assistant and $80,000 for the cost of training the general education teachers. The court ruled that the district's assertions were incorrect in that the student required the services of a teaching assistant whether she was in a general education setting or special education setting. Thus the $20,000 cost was not attributable to inclusion. Secondly, the $80,000 cost for training the general education teachers was disallowed because all teachers in California were expected to have training in disabilities as part of their certification and the State provided free training to any districts that requested it.

administrator and a physical therapist as his/her multidisciplinary team. The minimum team membership is one or both parents, a special education teacher, a general education teacher, a school psychologist and an education administrator with the authority to assign resources to meet the child's needs.

The first step in the process is the development of a comprehensive evaluation report (CER). The CER is a single document developed by the team from information provided by the team members and non-team sources (e.g., medical records, social services reports, court records, previous educational records). The CER contains (a) an identification of the child's disability, (b) evaluation of the child's present functioning in cognitive, sensorimotor, social-emotional, and academic realms (it may also include family history, medical history etc. if these are relevant), and (c) a statement of the child's educational needs in each of those realms. The multidisciplinary team then develops an individualised educational program (IEP) for the student. The IEP must contain (a) a statement of the student's current levels of educational performance **and how the child's disability affects participation in the general curriculum**, (b) a statement of annual goals and short-term objectives based upon the needs identified in the CER and **how these goals and objectives enhance the child's progress toward participation in the general education curriculum**, (c) a statement of the specific special education services and related services (supplemental aids and services) to be provided including assistive technology, vocational education, extended school year, adaptive physical education, behaviour management, and transition services, and **how these services enhance the child's ability to participate in the general curriculum and be educated with nondisabled students**, (d) dates for initiation and duration of services, (e) objective criteria for determining, on at least an annual basis whether the learning outcomes are being achieved, (f) **a description of the extent to which the student will participate in programs and activities with general education students and of the adaptations and supplementary aids and services that are necessary to**

ensure meaningful participation, (e) **an explanation (justification) of the extent to which the child will not participate with nondisabled children**, and (f) beginning at age 14, a statement of the needed transition services. (Emphasis added.)

The multidisciplinary team then determines an appropriate placement in the least restrictive environment. The team must first consider placement in the class in which the child would have been placed if he/she did not have a disability. If the team rejects this placement, it must state the reasons for doing so and then must consider part-time placement in that class and part-time placement in a special education class. At each step, as the placement under consideration gets farther from the class in which the child would have been placed if not for the disability, the team must consider whether supplemental aids and services would permit placement in the less restrictive placement (i.e. the placement that more closely approximates the general education placement).

Independent Review

When a dispute between a parent and the school arises about an educational program and placement, a review by an independent agent must be conducted. This is referred to as the due process system. In Pennsylvania, there are two levels of review. Other states have a single tier due process system.

The two levels are a review by a local hearing officer and subsequent appeal to an appellate panel. The local hearing officer is an individual who does not have a relationship (professional or financial) to the school. In Pennsylvania, hearing officers are educators from universities, lawyers and educators from other educational facilities not connected to the subject school. The hearing officer schedules a hearing with the two parties. Each is provided an opportunity to present evidence and testimony. The hearing officer may request additional evidence. The decision is binding on all parties. Following are the regulations regarding the conduct of such hearings.

(a) Parents may request an impartial due process hearing concerning the identification, evaluation or educational placement of, or the provision of a free appropriate public education to, a student who is exceptional or who is thought to be exceptional, if the parents disagree with the school district's identification, evaluation or placement of, or the provision of a free appropriate public education to, the student.

(b) A school district may request a hearing to proceed with an initial evaluation or an initial educational placement when the district has not been able to obtain consent from the parents.

(c) The hearing shall be conducted by and held in the local school district at a place reasonably convenient to the parents. At the request of the parents, the hearing may be held in the evening. These options shall be set forth in the form provided for requesting a hearing.

(d) The hearing shall be an oral, personal hearing and shall be open to the public unless the parents request a closed hearing. If the hearing is open, the decision issued in the case, and only the decision, shall be available to the public. If the hearing is closed, the decision shall be treated as a record of the student or young child and may not be available to the public.

(e) The decision of the hearing officer shall include findings of fact, a discussion and conclusions of law. Although technical rules of evidence will not be followed, the decision shall be based solely upon the substantial evidence presented at the hearing.

(f) The hearing officer shall have the authority to order that additional evidence be presented.

(g) A written transcript of the hearing shall, upon request, be made and provided to parents at no cost.

(h) Parents may be represented by any person, including legal counsel.

(i) A parent or a parent's representative shall be given access to educational records, including any tests or reports upon which the proposed action is based.

(j) A party may prohibit the introduction of evidence at the hearing that has not been disclosed to that party at least 5 days before the hearing.

(k) A party has the right to compel the attendance of and question witnesses who may have evidence upon which the proposed action might be based.

(l) A party has the right to present evidence and testimony, including expert medical, psychological or educational testimony.

(m) The decision of the impartial hearing officer may be appealed to a panel of three appellate hearing officers. The panel's decision may be appealed further to a court of competent jurisdiction. In notifying the parties of its decision, the panel shall indicate the courts to which an appeal may be taken.

(n) The following timeline applies to due process hearings:

(1) A hearing shall be held within 30 calendar days after a parent's or school district's initial request for a hearing.

(2) The hearing officer's decision shall be issued within 45 calendar days after the parent's or school district's request for a hearing.

(3) The appellate hearing panel shall render a decision within 30 calendar days after a request for review and shall provide the parties a written copy of the panel's decision.

(o) Each school district shall keep a list of the persons who serve as hearing officers. The list shall include the qualifications of each hearing officer. School districts shall provide parents with information as to the availability of the list and shall make copies of it available upon request.

In Pennsylvania, the due process system is managed by an agency called the Right to Education Office (REO). This agency functions under contract to the Department of Education but it is not part of the Department of Education. Thus, it retains some autonomy and independence. REO identifies potential hearing officers, trains the hearing officers, processes payment for services and manages a central data bank on hearings and decisions.

REO also provides administrative management for the appeals process. Both parents and school districts may appeal the decision of the hearing officer to an appellate panel. Until 1990, decisions of hearing officers were appealable to the Pennsylvania Secretary of Education. Because of allegations of bias and because the Secretary of Education was often unable to conclude an appellate review within a reasonable timeframe, the Department of Education chose to develop the current system of appeals. The description of the appellate system follows:

1. The decision of a hearing officer may be appealed to one of three appellate panels. The appeal must be filed within 15 days of the hearing officers decision.

2. Each panel is comprised of at least one educator with expertise in the education of children with disabilities, one attorney with expertise in education law and a third person who may be an attorney or an educator. Alternate appellate officer are available when a regular member is unable to fulfil the duties of the office.

3. No member of an appellate panel can have a professional or financial relationship with the school, child or parent that is the subject of the dispute.

4. Upon a written appeal to REO, the appellate panel members receive a transcript of the hearing conducted by the hearing officer including any documents or other exhibits. These transcripts are provided by REO.

5. The appellate panel has 30 days from the date the appeal was received by REO to review the decision of the hearing officer and issue a decision.

6. The appellate panel must (a) consider the complete transcript of the hearing and may request additional evidence or testimony, (b) ensure the hearing was conducted consistent with due process procedures, (c) give both parties opportunity for written argument, (d) make an independent decision, and (e) give the parties a written copy of the decision.

7. The appellate panel may conduct its deliberations via a meeting or via a telephone conference call. Most often, deliberations are conducted via a conference call after each member has had the opportunity to read the entire transcript.

8. One member of the appellate panel on a rotating basis writes the decision of the panel. A draft of the decision is circulated to the other two members for comment and editing prior to release of the decision to the parties and to REO.

9. Decisions of the appellate panel are further appealable to Pennsylvania courts or the federal court.

The hearing officers and the appellate panels are not responsible for ensuring that their decisions are carried out. They are responsible for determining the proper placement and program plan for a child in accordance with the substantive principles and the procedures for placement and program enumerated in the previous sections of this discussion. Ensuring compliance with the decision falls upon the final component of the system - the compliance monitoring system.

Compliance Monitoring

Compliance monitoring (i.e., ensuring that students with disabilities actually receive the services and placements identified in their Individual Education Programs-IEP) falls under the authority of the Division of Compliance, Bureau of Special Education, Pennsylvania Department of Education. The Division of Compliance responds to parental complaints that a service or placement has not been implemented. The Division will dispatch a compliance investigator who determines the validity of the complaint. The investigator writes a report with specific corrective

actions that must be taken by the school. If the school fails to take the corrective action, the Division can take action against the negligent school officials including removing them from office. Thus, if the child's IEP calls for placement in a general education second grade with a part-time teaching assistant to help the child access the general curriculum or to assist the child with movement from one class to another and the school does not place the child in the general education setting or provide the assistant, a complaint to the division will result in an order to place the child in the general education setting and provide the assistant. The order from the Division will provide a deadline for compliance and a potential consequence for noncompliance. The compliance officers do not reverse or modify the components of an IEP, or the orders of the hearing officer or appellate panel. They merely ensure that the school is properly implementing them.

The Division of Compliance also conducts random and systematic spot checks in schools. Compliance officers will enter schools, review educational records including IEPs and then follow the students whose IEPs they have reviewed to ensure that the program including the elements of inclusion enumerated in the IEP are being followed. If they are not, the officer will write a plan for corrective action which must be implemented within 30 days.

At this point an illustration of the process is appropriate. One school district in Pennsylvania has consistently failed to adhere to the principles of inclusion for students with intellectual disabilities claiming that its general education teachers were inadequately trained. Parents of several students requested hearings. In all cases, the hearing officer ruled that the district had failed to develop an IEP and placement for the children in the most inclusive appropriate setting and that the district had and continued to have access to free staff training in inclusive practices from the Department of Education. The hearing officer ordered (a) the inclusive placements were appropriate under the regulations and (b) the district to proceed with the placements in the inclusive classes and secure training for staff. The district appealed to the appellate panel which

upheld the hearing officer in all cases. The district continued to resist inclusion training and placements and the parents filed a complaint with the Division of Compliance. The Division ordered the district to schedule the training and proceed with the placements or the operation of the districts classes would be assumed by the Department of Education. The district complied and the staff in the district are currently receiving the training and the inclusionary placements have proceeded.

Summary of the US Monitoring and Compliance

- Some States have a standing compliance office from which a group of professionals go to specific school districts on a random and/or systematic basis. The standing group has the advantage of consistency and greater familiarity with the regulations but reduced independence due to the possibility of being politically pressured even though they are in theory independent.
- Other States have a compliance office that contracts professionals to carry out the monitoring to State guidelines. This model has greater independence and resistance to political pressure but possibly less efficiency in gathering information due to less experience than the alternative model.
- The compliance team visits sites, reviews records, checks IEPs, attends IEP meetings and may follow a student around for several days. The team then writes a report where deficiencies are specified and the school district has 30 days to prepare a response and plan for corrective action.
- If the district fails to comply with the team report recommendations then a range of sanctions are used:
    - Special conditions are imposed on the school district which have to be followed if funding is to be continued.
    - Delays in Federal/State funding.
    - Reduced funding.

•Total withholding of funding.

•Takeover of school management by the State, right down to day to day administration. This last option has been invoked in New Jersey and special conditions have just been imposed on the school district in Harrisburg Pennsylvania.

Compliance problems which may lead to such action are:

- Failure to submit an acceptable local plan.
- Failure to comply with an order by a hearing officer or court.
- Failure to implement corrective action required.
- Failure to submit required reports.

Evaluation of the Pennsylvania Model

The current model for promoting and monitoring inclusion in Pennsylvania went into effect in 1992. It was implemented simultaneous with another initiative that is known as Instructional Support. The Instructional Support system is a state funded program that provides instructional support teams to schools to provide teacher training, assistive technology and other resources to schools in order to develop pre-referral (i.e., before a child with a disability is referred for possible placement in special education) interventions. Instructional Support Teams and/or teachers work with regular classroom teachers who are experiencing difficulty in serving a child with a disability in the regular class and who because of this difficulty are considering referring the child for possible special education placement. The instructional support team conducts an assessment of the students' abilities and difficulties and the approaches that the teacher has used to teach the child and integrate him/her into the regular class. The team conducts an ecological analysis of the classroom situation and specifically identifies variables that work against maintenance of the child in the regular class. The team may choose to implement a number of practices to maintain the child in the regular class among which are:

1. teacher training in special techniques,
2. modification in classroom routines that are problematic for the child,
3. direct and systematic instruction for the child,
4. development and implementation of positive behavioural support systems,
5. application of assistive technologies,
6. temporary allocation of additional supports (e.g., teacher assistants, consulting teachers),
7. changes in teacher assignment, class location, etc,

During the first five years of the implementation of the Instructional Support, independent review and compliance monitoring system (1992-97), the number of new referrals for placement in special education declined by more than 40%. Costs associated with the system added approximately 15% additional to the special education budget during the first year. Costs declined every year after that as more and more teachers received training and training costs declined.

Michigan which initiated such a program almost 15 years ago determined that the initial cost increases (sometimes as high as 24%) gradually declined over a four to eight year period as the system was infused into undergraduate teacher preparation programs. Currently, Michigan (Michigan is working toward full inclusion) reports that its system for promoting inclusion including the independent review and compliance monitoring which are very similar to Pennsylvania's is no more costly than separate schooling.

In Pennsylvania, the number of children with disabilities who receive educational services in separate classes or schools has declined by more than 30% since 1992. This is attributable to the fact that the burden for defending separate placements falls on the school officials who must

demonstrate that regular class placement with supplemental aids and services is inappropriate. It is also attributable to the clearer standards that were implemented in 1992. Thus, hearing officers and appellate officers no longer have to rely on vague notions of least restrictive environment on which to make decisions about inclusive placements. Instead, they must simply determine whether the child can benefit, what services the child needs to benefit, and whether the child's inclusion is disruptive when the appropriate aids and services are provided.

Further evidence of the effectiveness of the system is provided by the nature of the cases brought in front of the hearing officers and the appellate panels. In 1990 (a year after the definitive inclusion litigation that established the principles described in the earlier section entitled "Substantive Principles"), Congress incorporated those principles into a federal statute (the Individuals With Disabilities Education Act of 1990). In the following year, Pennsylvania incorporated the principles into its special education regulations. From 1990- 93, approximately 50% of the cases brought for independent review in Pennsylvania were so called inclusion cases. In 1997-98, inclusion cases were less that 10% of the total. Inclusion cases are no longer occupying the time of the reviewing individuals nor are they occupying the time of school officials. In all but a few laggard districts, the issue is no longer whether a child will be included, but how the child will be included. Energies have been refocussed on implementation not politics.

The system in Pennsylvania suffers from some distinct difficulties. First, litigiousness is common. Parents and school districts are not reluctant to invoke the independent review. This is probably more a reflection of the history of special education in Pennsylvania than it is of the system that is in place. Other states that use a similar system have not encountered the same litigiousness. For example, McAfee (1998) conducted a study of the frequency and scope of due

process hearings. Illinois which has a system of review and compliance that is virtually identical to Pennsylvania and which also has a population similar in size and composition had only three due process hearings in the same time that Pennsylvania had 70. Similar results were encountered in Ohio, Texas, Wisconsin, Michigan and other populated states.

The second problematic element of the system in Pennsylvania is the bureaucracy required to run the independent review system. As stated earlier, the system is managed by the Right to Education Office. REO employs only 3 people who are responsible for scheduling hearings, copying transcripts, assigning hearing officers and appellate panels, and maintaining records. In addition, there are 29 hearing officers who are contracted on a per case basis and nine appellate officers similarly contracted. The bureaucracy must be interpreted in light of the population of Pennsylvania which is approximately 12 million.

Practices in Other States

Because all states are required to follow the federal guidelines, that is they must have an independent review (due process) procedure and a compliance procedure, the variability among states is not great. Therefore, rather than describe the systems in other states in detail, in this section I will describe some of the unique aspects.

1. About half of the states have an independent review of only a single tier. Thus, a hearing officer considers the positions of both parties and issues a decision. That decision is appealable to either state or federal court. An analysis of costs, length of time to a final decision etc. revealed that the two tier system is actually less expensive in the long run because fewer decisions are appealed to court. This reflects the nature of the second level of review. In the second level, the panels are usually comprised of both educators and attorneys. Thus the decision of the panels is more likely to reflect a broader and deeper understanding of the law and the

possibilities for inclusion. Fewer second tier reviews are overturned in court than first tier reviews.

2. Many states (e.g., California and New Jersey) have mandatory mediation before an actual hearing. A mediation officer is an individual who attempts to help the parties resolve the dispute. Unlike a review officer, the mediation officer presents alternatives to the parties, attempts to prevent matters from becoming more adversarial and promotes compromise. The research on mediation is quite mixed. In New Jersey, for example, mediation did not reduce the number of cases that ultimately made their way to independent review. States with mediation report no decreases in the number of cases that eventually go on to due process.

3. One state, Colorado uses a unique mediation/advocacy system where the school district selects an individual from among a preapproved group of advocates. The individual, after fact finding, produces a cost-benefit analysis including the cost of services for the child and the projected costs of continuing dispute (including time away from primary responsibilities for the school personnel who must attend due process hearings). The advocate makes a recommendation to school personnel who may adopt the recommendations or proceed to due process. The largest district in Colorado (Denver City Schools) reports that all of their disputes for the past 20 years have been settled through this unique mediation system without invoking due process procedures.

4. In 1979, Georgia issued regulations that required local districts to provide education services to all students with disabilities in their neighbourhood schools unless (1) the child presented a clear and present danger to himself or others, or (2) the child's medical condition precluded attendance at his/her neighbourhood school, or (3) the child required such specialised services (e.g. a deaf-blind child) that could not be provided in the neighbourhood school without prohibitive cost. Compliance panels comprised of three individuals from the Georgia Department of Education routinely monitor the placements of all children with disabilities and pay particular

attention to placements outside of the neighbourhood school. Districts may be directed to revise placements and services.

Broader Discrimination Issues in the USA

The Individuals With Disabilities Education Act (IDEA) covers effectively all types of discrimination in education - not just school inclusion. Thus physical access, appropriate supports, freedom from harassment or poor treatment would all be covered under this legislation. Running concurrent with IDEA is the Americans with Disabilities Act (ADA) which has many similarities to the Australian DDA, except that it is both broader in coverage and more detailed in its requirements. Most important however, compliance is both monitored and enforced. All public buildings have to be not only accessible but accessible in the same manner as for other people. Having a ramp going to a rear entrance is not acceptable if most people use the front entrance. A picture theatre that parks people in wheelchairs in front of the first row of seats would be in trouble. A full range of seating choices must be made available to patrons with a disability. All forms of transport must be accessible. Lifts must have both sound and touch indicators of the floor level.

When the ADA was implemented, organisations were given specific timelines to come into accord with the Act. "Undue hardship provisions" are in the Act but they are treated with high expectations on business and government. A restaurant saying that it could not afford to provide access to the building or toilets would be unlikely to be believed. The larger the organisation, the higher the expectations, so government and big business would find using the hardship provisions effectively impossible.

For monitoring, building plans have to meet the ADA and won't be approved unless they do. Action plans to meet the requirements over the first five years of the Act were monitored and

action taken against failure to comply. In addition, individuals with a disability regularly take legal action against businesses or organisations that they believe are engaging in discriminatory action. The result is that in most parts of the USA, people with a disability are highly visible and present. You can go out with a person with a physical or sensory disability with an expectation that the appropriate accessibility, supports and welcome will be available wherever you go. Given the similarity between the objectives of the ADA and Australia's DDA -- but the massive differences in the scale of implementation -- it is hard to come to any other conclusion than the differences are due to the lack of monitoring and enforcement of compliance in Australia. If people don't want to do something for ideological, financial or other reason, they often won't if no one is checking, even if the law says so.

c) Practices in other Countries

The situation in Canada is highly variable. Canada has a non-discrimination law similar to the law in Australia. However the implementation of the inclusion response to that law has been left almost entirely to local districts with little guidance from the states or the federal government. Thus, in British Columbia where inclusion advocates are very strong, inclusion approaches a full inclusion model. Initial costs for promoting and implementing inclusion were between 25 and 47 % higher for the first five years. After that, with inclusion as the model, costs fell to the levels before inclusion was implemented. They have remained at that level. Disputes about inclusion practices are rare because inclusion has been incorporated as a part of school culture. All teachers have been trained in inclusionary practices and view inclusion as part of the job of both regular and special education teachers working as teams. Rare disputes are dealt with informally, but no legal protection prevents a change in politics from overriding the inclusion movement.

In Ontario, inclusion is more sporadic. Disputes are fought in public forums (newspapers) but parents have little power to demand inclusive practices. Thus, decisions fall entirely on the building principal who may or may not support inclusive practices.

The policies and procedures of other countries are set out below. As can be seen from the tables, the approach is primarily one of writing inclusion and non-discrimination into policy but relying on goodwill rather than compliance mechanisms or even due process appeal to ensure that it happens. In some countries such as Italy where there is strong support for inclusion in particular at a governmental and senior bureaucratic level, widespread inclusion is reported. In other countries (such as Australia and the UK) where this same level of support is not present, it is clear that enforcement of compliance is necessary. Even in those countries where things are positive, a change of government or other personnel could see gains lost as the position is poorly safeguarded.

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[i] Flynn, Christine. April 1977. Disability discrimination in schools. National Children's and Youth Law Centre. Sydney

[ii] The discussion on safeguarding is based on material presented in public workshops by Michael Kendrick, one of the foremost thinkers in this area.

[iii] National Children's and Youth Law Centre, ibid.

[iviv] Wills, D., and Jackson, R. (1996) Inclusion: Much more than being there. Interaction,

[v] Holmes 1996. WA Education Department memorandum.

[vi] Chadbourne, R. 1997. Including children with intellectual disabilities in regular schools: A review of the Western Australian Project. Report commissioned by the Education Department of Western Australia and the Disability Services Commission. Faculty of Education, Edith Cowan University, Perth.

[vii] Integration: The how. WA Department of Education.

[viii] National Children's and Youth Law Centre, ibid.

[ix] OECD Public Management Service. September 1998. Preliminary report on the state of regulatory compliance. Ref: PUMA/REG(98)13.

[x] National Children's and Youth Law Centre, ibid.