Adjustments to curriculum for Australian school-aged students with disabilities:

What’s reasonable?

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Abstract

This study explored Australian discrimination cases involving students with disabilities to identify why adjustments to curriculum were a source of tension, and then further examine what were reasonable adjustments? Despite parents and educators citing tensions surrounding the provision of adjustments in discrimination claims, few studies have examined how commissioners and judges have determined the reasonableness of curriculum adjustments.

Using a qualitative line of inquiry, 134 Australian judicial decisions involving 84 students with disabilities were initially identified and examined using the explanation of reasonableness, outlined in section 3.4 of the Disability Standards for Education 2005 (DSE). Analysis of the 134 decisions revealed an upward trend in litigation, with claims mainly emerging in Government schools, particularly in New South Wales, Victoria, and Queensland. After eliminating cases where issues around curriculum were not discussed, 92 judicial decisions involving 54 Australian students with disabilities remained, and were the focus for detailed analysis.

The first sub-question explored what counted as a disability when determining adjustments to curriculum. Findings revealed tensions around the qualifications of practitioners diagnosing disabilities, and the validity of assessment measures used with some populations. Findings further revealed tensions relating to the record-keeping practices of both families and schools. Concerns were noted in relation to students who chose not to disclose their disability, students ineligible for additional resourcing, and students where the impact of the disability on learning fluctuated. A key implication from these findings was the need to address the discrepancy between the legislated definition of disability, and that used...
by schools to identify students eligible for additional resourcing to support their educational needs.

The second sub-question explored whose voice was heard when determining adjustments to curriculum. The findings showed it was reasonable that students with disabilities have a voice in decision-making whenever possible, although the voices of students with disabilities were rarely heard. Typically the student’s parent was consulted, with schools at times not acting on the desires of families, especially where the school determined it was not in the student’s best interest. Issues were noted in cases where parents self-represented during litigation. A key finding from this analysis identified the need to improve ways in which students, and their families, can meaningfully engage in educational decision-making.

The third sub-question explored whose interests were considered and how these were balanced when determining whether adjustments to curriculum were reasonable. Findings revealed limited attention in litigation on the benefits of providing adjustments, with families arguing some adjustments were in place for the benefit of the school, rather than the student. When balancing interests, behaviour that impacted on the learning of others or that posed a risk to health and safety of others received significant attention, as did hardships imposed by additional costs related to staffing, resources, administration, and modifications. A major finding showed further scrutiny is required in the way benefits are measured, and how economic rationalism can be balanced against theoretical and philosophical arguments for inclusion.

The final sub-question considered how academic integrity was maintained when providing curriculum adjustments. Findings revealed academic integrity received limited attention for school-aged students with disabilities. Recommendations were proposed for: (a)
families, (b) professional practice, (c) policy, and (d) future research based on the findings from this study.

As the first comprehensive Australian study that has extensively examined disability discrimination issues with a specific focus on adjustments to curriculum, this research has made an important contribution to the field by clarifying how schools and parents understood the concept of reasonableness, and how it was treated in judicial decision-making. This better understanding of the phrase reasonable adjustments, as relevant to curriculum, has served two purposes. First, it has added to the knowledge about one of the variables (curriculum) that contributes to tensions between parents and educational authorities in relation to disability discrimination. Second, it offers educators and parents a better understanding of how to negotiate curriculum adjustments to minimise the likelihood of future litigation.
Statement of Originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

____________________

Shiralee Poed

August, 2015
Statement of Appreciation

And the Oscar goes to ...

**Best Supervisor in a Leading Role**
**Professor Deb Keen**
Thank you Deb. You’ve been with me from the start, and completion of this work would simply not have happened without you.

**Best Supervisor in a Supporting Role**
**Dr Barbara Garrick**
You joined me on this journey right at the end, but it was your supportive comments and helpful advice that shaped this final version.

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- Dr Elizabeth Dickson

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For research training and ideas that have strengthened the design of my thesis, I offer my thanks.

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You are my sunshine.

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For family, friends, colleagues from Griffith University and the University of Melbourne, fellow HDR students, and ice skating coaches and team-mates, who encouraged, listened, supported, understood when I missed important events, and cared – thank you.

And to the Australian students, their families, and the educators and practitioners whose stories are captured within this thesis, I thank you.
Note on Citation Style

This thesis crossed the fields of both law and education. This posed an issue in relation to citations. I have adhered to using the American Psychological Association (APA) format, as required by the School of Education and Professional Studies at Griffith University. APA does not provide guidance on how to format Australian legislative materials, including legislation and case law. Alternatively, citation of Australian legal material is set out in the *Australian Guide to Legal Citation* (AGLC). The AGLC adopted the convention of footnoting, at odds with how to reference in APA.

To resolve this issue, I have chosen to follow the convention of attribution authorship of all legislation to the ComLaw website and, after first use, adopted a consistent abbreviation for the full name of each Act. To improve readability of the judicial decisions cited throughout, I have used the name of the complainant, year and page, paragraph or section information as the pinpoint reference, rather than the full APA ComLaw reference. A full list of cases and published judicial decisions is located in Appendix A.

The AGLC also stated abbreviations Australian judicial officers should have an abbreviation signalling their role after their name appears in citations. So, as an example, where a Federal Magistrate is cited in text, the initials FM appear after the officer’s name.
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<tbody>
<tr>
<td>ABA</td>
<td>Applied Behaviour Analysis</td>
</tr>
<tr>
<td>ACARA</td>
<td>Australian Curriculum, Assessment and Reporting Authority</td>
</tr>
<tr>
<td>ADD</td>
<td>Attention Deficit Disorder</td>
</tr>
<tr>
<td>ADHD</td>
<td>Attention Deficit and Hyperactivity Disorder</td>
</tr>
<tr>
<td>AHRC</td>
<td>Australian Human Rights Commission</td>
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<tr>
<td>ASD</td>
<td>Autism Spectrum Disorder</td>
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<tr>
<td>AustLII</td>
<td>Australasian Legal Information Institute</td>
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<tr>
<td>AVT</td>
<td>Advisory Visiting Teacher</td>
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<tr>
<td>CROC</td>
<td>Conventions on the Rights of the Child</td>
</tr>
<tr>
<td>DEECD</td>
<td>Department of Education and Early Childhood Development (Victoria)</td>
</tr>
<tr>
<td>DESU</td>
<td>Distance Education Support Unit</td>
</tr>
<tr>
<td>D-P</td>
<td>Deputy President</td>
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<tr>
<td>DDA</td>
<td>Disability Discrimination Act 1992</td>
</tr>
<tr>
<td>DSE</td>
<td>Disability Standards for Education 2005</td>
</tr>
<tr>
<td>FM</td>
<td>Federal Magistrate</td>
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<tr>
<td>HREOC</td>
<td>Human Rights and Equal Opportunity Commission</td>
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<tr>
<td>IBP</td>
<td>Individual Behaviour Plan</td>
</tr>
<tr>
<td>IEP</td>
<td>Individual Education Plan</td>
</tr>
<tr>
<td>J</td>
<td>Justice</td>
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<tr>
<td>JJ</td>
<td>Justices</td>
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<tr>
<td>NAPLAN</td>
<td>National Assessment Program of Literacy and Numeracy</td>
</tr>
<tr>
<td>NF</td>
<td>Neurofibromatosis</td>
</tr>
<tr>
<td>P</td>
<td>President</td>
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<tr>
<td>PECS</td>
<td>Picture Exchange Communication System</td>
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<tr>
<td>PSD</td>
<td>Program for Students with Disabilities</td>
</tr>
<tr>
<td>PSG</td>
<td>Program Support Group</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Name</td>
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<td>-----------------------------------------------</td>
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<tr>
<td>QADT</td>
<td>Queensland Anti-Discrimination Tribunal</td>
</tr>
<tr>
<td>QSA</td>
<td>Queensland Studies Authority</td>
</tr>
<tr>
<td>SEDC</td>
<td>Special Education Developmental Centre</td>
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<tr>
<td>SEU</td>
<td>Special Education Unit</td>
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<tr>
<td>SQ</td>
<td>Sub-Questions</td>
</tr>
<tr>
<td>VCAT</td>
<td>Victorian Civil and Administrative Tribunal</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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Chapter One – The Quest to Understand Reasonableness

The Disability Discrimination Act 1992 (Cth) (DDA) promotes positive discrimination or differential treatment for people with a disability. This is viewed as a critical step towards improved educational outcomes for this set of learners (Keeffe, 2004b). The DDA obligates educational providers to ensure both students with disabilities and their associates (e.g., parents, carers) are not discriminated against in the following areas:

- by refusing or failing to accept the person's application for admission as a student; or
- in the terms or conditions on which it is prepared to admit the person as a student; or
- by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or
- by expelling the student; or
- by subjecting the student to any other detriment. (ComLaw, 2015a, s. 22)

The DDA meets Australia’s obligations as a signatory of the Convention of the Rights of Persons with Disabilities (United Nations, 2006). The key objectives of the DDA are to:

(a) eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
   i. work, accommodation, education, access to premises, clubs and sport; and
   ii. the provision of goods, facilities, services and land; and
   iii. existing laws; and
   iv. the administration of Commonwealth laws and programs; and
(b) ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and

(c) promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community. (ComLaw, 2015a, s. 3, emphasis added)

The DDA offers no practical guidance on how the law should be implemented (Beecher, 2005), but section 31 contains a provision permitting the Attorney-General to formulate standards that further clarify obligations (2015a). Standards relating to education were developed in 2005 to provide guidance on the implementation of the DDA.

The Australian Disability Standards for Education 2005 (Cth) (DSE) outline how specific areas of education are to be made accessible for students with disabilities through the provision of reasonable adjustments. The DSE emphasises considering the needs of students with disabilities “on the same basis” as their peers, and obligates schools to provide the same opportunities and choices to students with a disability as those offered to their peers (ComLaw, 2015c, s. 2.2). Initially, the DDA only required schools to consider the needs of students with disabilities at the point of enrolment. The DSE extends this concept beyond enrolment to also include the ability to participate in educational programs as well as access to facilities and services “on the same basis” as their peers (s. 2.2(3)). The DSE also includes a positive obligation for schools to ensure a safe and supportive environment for students with disabilities, free from victimisation and harassment (s. 8.3).

Despite the enactment of the DSE, there have been disputes between schools and parents in relation to adjustments for students with disabilities (Australian Human Rights Commission, 2011). Consequently, this study aims to answer the question: In Australian discrimination cases involving students with disabilities, why are adjustments to curriculum a
source of tension, and then further explore what are reasonable adjustments? To date, few studies have examined the meaning ascribed to the term *reasonable adjustments* in relation to curriculum design, delivery and assessment. This study examines 134 Australian judicial decisions relating to 84 school-aged students to explore how judges or commissioners have interpreted the law and made findings of fact about the events involving these students.

This study adds to the knowledge about variables that contribute to disputes between parents and educational authorities in relation to curriculum decisions for students with disabilities. A hermeneutic inquiry, employing a forensic linguistic analysis of judicial decisions, identifies sources of tension between parents, educators and other experts in relation to adjustments to curriculum. Analysis of these tensions provides insights into how judges and commissioners have determined *reasonableness* in relation to curriculum adjustments. The findings also inform educators and parents on how they can better understand and negotiate curriculum adjustments that reduce potential future litigation.

As recommended by Bloomberg and Volpe (2008), this chapter commences with a contextualisation of this study leading to a problem statement. The chapter continues with details of the purpose for this research, along with the rationale and significance. The research questions are outlined and the approach used to explore this issue is also provided. A complete overview of the thesis is presented along with my background and professional experience as the researcher. This chapter then concludes with a list of definitions and key terms.

**Background and Context**

**Educational provisions for students with disabilities.** Education is a social institution that is a key to individual empowerment (Innocenti Research Centre [UNICEF], 2007). Education can not only build the capacity of marginalised individuals, but can
challenge and change societal attitudes that perpetuate marginalisation (UNESCO, 2005). While mandated schooling has existed in Australia for more than 200 years, enrolment of students with disabilities in specialist, followed by mainstream, educational institutions is more recent (Ramsay & Shorten, 1996). The presence of a disability was not viewed as a challenge to all school communities to adopt a more inclusive approach that truly embraced diversity. Rather, mirroring broader society, the diagnosis of a disability was often seen as “a ground for exclusion” that resulted initially in no educational provisions, and later in segregated education provisions (Quinn & Degener, 2002, p. 23).

Since its genesis, the education of students with disabilities in Australia has mainly focussed on individualised pathologies, where the type of service provision had direct correlation with the disability diagnosis given to the individual. Special schools were established, where the commonality for this group of learners was their disability diagnosis. These students rarely attended mainstream schools. Moreover, there was no expectation that these students would access the same curriculum as their peers or, conversely, that the curriculum taught to their peers in mainstream schools would be in any way adjusted and taught in special schools to students with disabilities.

Parents, who at the time were grateful for a segregated provision over the alternative full exclusion, soon came to demand more inclusive educational opportunities (Swan, 1996). Over the last one hundred years, there have been gradual changes in educational provisions for students with disabilities. First, there has been a decrease in the reliance on the medical profession when making educational decisions. Second, there has been a reduction in the number of segregated educational environments. Both of these changes have increased pressure on mainstream classroom teachers to provide more inclusive classrooms.
Inclusion is more than accessing mainstream learning environments; it is recognition by society that students with disabilities are entitled to the same educational opportunities as those given to their peers (Gillies, 2013). In recent years, the inclusion agenda has extended to include an emphasis on providing students with disabilities access to the curriculum “through rigorous, meaningful and dignified learning programs” (Australian Curriculum Assessment and Reporting Authority (ACARA), n.d.). The inclusion of students with disabilities in schools has not been a smooth journey. Tensions between parents and educators have arisen when it comes to service provision (Australian Human Rights Commission, 2011). Complex decisions about content, pedagogical approaches, assessment, and reporting continue to challenge the teaching profession in academic literature, in policy, and in practice (Aspland, Datta, & Talukdar, 2012; Griffin, van Garderen, & Ulrich, 2014). Many mainstream teachers do not feel adequately prepared to design a course of study that can meet the needs of all learners (Costello & Boyle, 2013; Florian, 2014). This may be because of the pressure on universities to provide an introductory course that balances the needs of any authority that audits pre-service training, the competing demands within the faculty and University, and contemporary research (Garrick, Winter, Sani, & Buxton, 2015). Training in special education tends to emphasise disability-specific content, rather than provide teachers with the content knowledge required to support the educational needs of students with disabilities across all education settings (Dempsey & Dally, 2014). In particular, some special education preparation programs inadequately prepare graduates with the curriculum knowledge necessary to teach in secondary classrooms (Kuehn, 2013).

Principals feel vulnerable in relation to their accountability for the quality of learning experiences for students with disabilities, and their capacity to provide quality learning programs to their peers in mainstream schools (Keeffe, 2004b; Williams, Pazey, Shelby, &
Yates, 2013). Principals also note concerns about accommodating students whose behaviour might impact on their learning and that of their peers (Wood, Evans, & Spandagou, 2014).

**Legislative provisions for students with disabilities.** In Australia, as in many other countries, legal disputes have arisen between parents of students with disabilities and educators. These disputes span an array of educational issues such as enrolment, access to services and facilities, provision of specialist support services, and access to excursions and extra-curricular activities. Prior to the introduction of anti-discrimination legislation, schools were under no obligation to provide students with disabilities the same educational opportunities as their peers. Consequently limited legal recourse was available for parents concerned about their child’s educational opportunities. From the 1970s, Federal and State levels anti-discrimination legislation was enacted to protect the rights of people with disabilities in accordance with Australia’s obligations as a signatory to a range of United Nations (UN) and international conventions. For the first time, this Australian legislation provided a voice to students with disabilities (although mostly represented by their parents/carers).

At the Federal level, section 22 of the DDA makes it unlawful for educational authorities to discriminate against a person on the grounds of their disability. Discrimination can be a conscious act, where a person with a disability is deliberately treated differently on the basis of their disability (Blumenfeld & Raymond, 2000), otherwise known in Australian legislation as *direct discrimination* (see for example ComLaw, Part 1, s 5). Discrimination can also be an unintentional act that still results in a discriminatory outcome, otherwise known in Australian legislation as *indirect discrimination* (DDA, Part 1, s 6). This thesis is concerned with discrimination in relation to the provision of reasonable adjustments for students in relation to their curriculum whether direct or indirect.
**Reasonable adjustments.** In education, an adjustment is defined as an action or a measure taken by a school that enables a student with a disability to participate in the same manner as their peers (Ashman, 2015). Introduced in 2005, the Australian *Disability Standards for Education* (Cth.) (DSE) outline how reasonable adjustments can make specific areas of education more accessible. Schools are obligated to provide adjustments in the areas of enrolment, curriculum development, accreditation and delivery, participation, student support services and the assessment and elimination of harassment and victimisation. Section 3.4 of the DSE describes what makes an adjustment reasonable:

1. For these Standards, an adjustment is *reasonable* in relation to a student with a disability if it balances the interests of all parties affected.

   *Note* Judgements about what is reasonable for a particular student, or a group of students, with a particular disability may change over time.

2. In assessing whether a particular adjustment for a student is reasonable, regard should be had to all the relevant circumstances and interests, including the following:

   a. the student’s disability;
   b. the views of the student or the student’s associate, given under section 3.5;
   c. the effect of the adjustment on the student, including the effect on the student’s:
      i. ability to achieve learning outcomes; and
      ii. ability to participate in courses or programs; and
      iii. independence;
   d. the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students;
(e) the costs and benefits of making the adjustment.

Note A detailed assessment, which might include an independent expert assessment, may be required in order to determine what adjustments are necessary for a student. The type and extent of the adjustments may vary depending on the individual requirements of the student and other relevant circumstances. Multiple adjustments may be required and may include multiple activities. Adjustments may not be required for a student with a disability in some circumstances. The Standards generally require providers to make reasonable adjustments where necessary. There is no requirement to make unreasonable adjustments. In addition, section 10.2 provides that it is not unlawful for an education provider to fail to comply with a requirement of these Standards if, and to the extent that, compliance would impose unjustifiable hardship on the provider. The concept of unreasonable adjustment is different to the concept of unjustifiable hardship on the provider. In determining whether an adjustment is reasonable the factors in subsection 3.4 (2) are considered, including any effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students, and the costs and benefits of making the adjustment. The specific concept of unjustifiable hardship is not considered. It is only when it has been determined that the adjustment is reasonable that it is necessary to go on and consider, if relevant, whether this would none-the-less impose the specific concept of unjustifiable hardship on the provider.
(3) In assessing whether an adjustment to the course or program in which the student is enrolled, or proposes to be enrolled, is reasonable, the provider is entitled to maintain the academic requirements of the course or program, and other requirements or components that are inherent in or essential to its nature.

*Note* In providing for students with disabilities, a provider may continue to ensure the integrity of its courses or programs and assessment requirements and processes, so that those on whom it confers an award can present themselves as having the appropriate knowledge, experience and expertise implicit in the holding of that particular award. (ComLaw, 2015c, s 3.4)

This section of the DSE is central to this research. Judicial interpretation is seen as a key litmus test of discrimination; if a judge finds that an adjustment is not reasonable, then there is no legal obligation upon schools to make the adjustment (Thornton, 2009). Since 2005, commissioners and judges have applied this information when determining the *reasonableness* of the actions or measures taken in disability discrimination complaints. This section of the DSE does not clearly define the word *reasonable*, and that this lack of specificity may contribute to tensions in determining the reasonableness of proposed adjustments (Dickson, 2006b).

**Problem Statement**

Internationally, since the enactment of anti-discrimination legislation, there have been a growing number of complaints made on the grounds of disability. In Australia, only around seven percent of discrimination cases relate to education (Australian Government Department of Education Employment and Workforce Relations (DEEWR), 2012), with most resolved
through conciliation (Australian Human Rights Commission, n.d.; Dickson, 2007; Hannon, 2000). Some of the cases not resolved at conciliation have generated much academic discussion and media attention, as summarised in Table 1:

**Table 1. Literature Review of Key Australian Discrimination Issues**

<table>
<thead>
<tr>
<th>Issue</th>
<th>References</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restricted attendance and/or inadequate supports due to resourcing constraints</td>
<td>(Barry, 2011; Ferrari, 2009)</td>
</tr>
<tr>
<td>School transport issues</td>
<td>(Jackson &amp; Varnham, 2007; Perkins, 2008)</td>
</tr>
<tr>
<td>The use of educational assistants (teacher aides)</td>
<td>(Gardiner, 2011; Griffin, 2011a, 2011b)</td>
</tr>
<tr>
<td>Educational negligence</td>
<td>(Dalby, 2013; Preiss, 2012)</td>
</tr>
<tr>
<td>Discrimination from a leadership or management perspective</td>
<td>(Keeffe-Martin &amp; Lindsay, 2002; Keeffe, 2003, 2004b, 2004c; Stewart, 1996, 1998, 2005)</td>
</tr>
</tbody>
</table>
Discrimination law as a vehicle for promoting human rights and inclusive practices  


Since many disputes between schools and parents are tensions over what constitutes a reasonable adjustment, commissioners (such as those from the Australian Human Rights Commission [AHRC] and the various State and Territory anti-discrimination commissions) or judges must interpret the law and make findings about events to determine whether schools have met their legislative requirements. Despite parents and educators citing curriculum concerns in discrimination claims, the problem is that few studies have examined the meaning commissioners/judges ascribe to the term reasonable adjustments in this context. This thesis examines these judicial decisions to identify contexts, commonalities and differences to better understand the tensions that surround the provision of adjustments to curriculum.

Statement of Purpose, Rationale and Significance

This thesis draws upon judicial interpretations of reasonable in relation to adjustments to curriculum for Australian school-aged students with a disability. It examines the published tribunal and court decisions from every Australian discrimination case involving a school-aged student with a disability. It identifies, where documented, the types of curriculum adjustments, and judicial interpretations of the reasonableness of these adjustments. While few Australian discrimination claims have focussed solely on curriculum for students with disabilities, an analysis of all published decisions from decided cases reveals the types of adjustments to curriculum being sought (or rejected) by parents and provided (or refused) by teachers.
The findings from this research are significant as they add to the knowledge about variables that may contribute to tensions between parents and schools. The findings also offer insights into how teachers and parents can negotiate adjustments that minimise the potential for future litigation. It is not a matter of teachers, principals or parents becoming lawyers. Rather, the findings can promote a clearer familiarity with the law to both ensure the law is upheld and to defend actions taken by the school (Devine, 2002, July). A comparative analysis of judicial decisions provides policy makers critical feedback that can enhance educational policy for students with disabilities (Helms, 2010).

**Research Questions**

The central phenomenon explored in this thesis is the intersection between Australian disability discrimination law and interpretations of the reasonableness of adjustments to curriculum for students with disabilities in Australian schools. Reasonableness, according to the DSE, is measured by considering

- the impact of the disability;
- whether the student or their associate were consulted during the decision-making process;
- the impact of the proposed adjustment on the student, his or her peers and teachers, and the costs versus benefits of providing the adjustment; and
- whether the proposed adjustment in any way diminishes the integrity of the outcome being taught.

To answer the central research question, ‘in Australian discrimination cases involving students with disabilities, why are adjustments to curriculum a source of tension, and what were reasonable adjustments’. The following Sub-Questions (SQ) guide the examination of each judicial decision:
SQ1  What counts as a disability when determining adjustments to curriculum? Chapter Five presents the results from this research relevant to this sub-question.

SQ2  Whose voice is heard when determining adjustments to curriculum? Chapter Six presents the results from this research relevant to this sub-question.

SQ3  Whose interests are considered and how are these balanced when determining whether adjustments to curriculum are reasonable? Chapter Seven presents the results from this research relevant to this sub-question.

SQ4  How is academic integrity maintained while ensuring reasonable adjustments to curriculum? Chapter Eight presents the results from this research relevant to this sub-question.

Research Approach

This is a qualitative thesis, following a constructivist epistemological stance. An epistemological stance requires a researcher to determine the relationship between themselves and what is known, challenging them to consider how they know what they know and, even more deeply, what is considered knowledge (Tuli, 2010). Constructivist researchers contend that knowledge and meaning can be generated from the interactions people have between their ideas and their experiences (Mutekwe, Nodofirepi, Maphosa, Wadesango, & Machingambi, 2013). This research explores the ideas represented in the anti-discrimination legislation, and how these interact with the experiences of students, parents, teachers and others whose stories are documented in the judicial decisions from disability discrimination cases.

Interpretivism is the theoretical perspective that informs this research. Interpretative research demands that the direct experiences of people are observed, with the researcher responsible for explaining these experiences “through the eyes of different participants” (Cohen, Manion, & Morrison, 2007, p. 19). This research seeks to understand how the term
reasonable adjustments is interpreted through the eyes of various stakeholders; students, their parents, teachers, and educational authorities. It further explores, when each of these perspectives are given, how judges/commissioners determine whether the adjustments sought, rejected, provided or refused are reasonable. It is at this point that it is possible to see how disputes can arise.

The term reasonable adjustments did not appear in Australian legislation until 2005. Prior to the DSE, judges/commissioners considered the concept of reasonableness when determining the occurrence of indirect discrimination. A discriminatory act must be unreasonable before it is unlawful. Similar considerations to those relevant to reasonableness were, and still are, taken into account when determining unjustifiable hardship. Educational authorities can claim the provision of an adjustment, whilst reasonable in some aspects, might impose financial hardship on the school, or be of limited benefit to the student, or pose a risk to the student, their peers, or staff (Poed, 2015). Decisions around indirect discrimination and unjustifiable hardship are found in earlier judicial decisions, making these cases also worthy of analysis.

The qualitative methodology chosen for this thesis is artefact analysis using hermeneutics (Swann & Pratt, 2003). Hermeneutics involves a detailed examination of texts, and the context in which they were generated, to derive a deeper understanding of an issue (Bloomberg & Volpe, 2008). The artefacts under analysis, judicial decisions from Australian educational cases, unpack the obligations expressed in anti-discrimination legislation (Walker & Daves, 2010). The published decisions outline the legal reasoning used by judges and commissioners when determining reasonableness in relation to curriculum adjustments for school-aged students with disabilities.
Reporting of judicial reasoning and decisions may be brought under the umbrella of forensic linguistics. Used since the 1980s, forensic linguistics describes the interaction between language and law (Johnson & Coulthard, 2010; Newman, 2011; Olsson, 2004; Shuy, 2001). Conducting a linguistic analysis of education judgements from discrimination cases sheds light on what is considered reasonable by courts and tribunals. It also reveals adjustments, perhaps highly valued by parents and/or teachers, which are not considered reasonable. This sort of analysis will then show why adjustments are a source of tension. The process used for this examination provides a template for future scholars to analyse judicial decisions about the reasonableness of adjustments to curriculum. This process is described in greater detail in Chapter Three.

**Structure of the Thesis**

**Table 2. Thesis Structure**

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Structure</th>
</tr>
</thead>
</table>
| Chapter One| ■ Background and context  
■ Problem statement  
■ Statement of purpose, rationale and significance  
■ Research questions  
■ Summary of research approach  
■ Researcher profile  
■ Key terms and definitions |
| Chapter Two| ■ Detailed review of the literature surrounding the requirement for reasonableness in education, specifically in relation to adjustments to curriculum  
■ Conceptual framework / lens through which the literature review was filtered |
<table>
<thead>
<tr>
<th>Chapter Number</th>
<th>Chapter Title</th>
<th>Structure</th>
</tr>
</thead>
</table>
| Three          | Study design – line of inquiry, epistemology, theoretical perspective, methodology, method | - Selection process used to identify discrimination cases  
- Explanation of ex post facto use of explanation of reasonable  
- Study delimitations  
- Ethical considerations  
- Framework for artefact analysis  
- Approach to coding data  
- Trustworthiness of the research – subjectivity and objectivity, limitations, dependability, transferability |
| Four           | Demographic information from the judicial decisions                           | - Sampling decisions                                                                                                                                                                                   |
| Five           | Analysis and findings in relation to student’s disability                    |                                                                                                                                                                                                       |
| Six            | Analysis and findings in relation to student and associate voice             |                                                                                                                                                                                                       |
| Seven          | Analysis and findings in relation to the effects of providing the adjustment to curriculum | - Analysis and findings in relation to costs versus benefits  
- Analysis and findings in relation to unjustifiable hardship                                                                                                                                               |
| Eight          | Analysis and findings in relation to academic integrity                      |                                                                                                                                                                                                       |
| Nine           | Conclusions                                                                  | - Limitations  
- Recommendations  
- Researcher reflections                                                                                                                                                                                    |

**The Researcher**

Since graduating as a teacher in 1989, I have worked in primary, secondary and special State, Catholic and Independent schools across two Australian States: Queensland and New South Wales. I have also worked as an education advisor to schools, providing assistance with the inclusion of diverse learners. In 2005, I commenced a role with a State educational authority as a policy advisor. My role was to assist with the drafting of legislation and to lead the development of policies in relation to students with diverse learning needs. At times I was also called on to provide internal advice on the practices used by schools in relation to allegations of discrimination.
This, and other roles, highlighted for me compliance issues in relation to
discrimination legislation. I mediated sessions between teachers and parents and saw first-
hand some of the tensions. I felt some principals and teachers had little understanding of their
legislative obligations in relation to curriculum adjustments. I read allegations of
discrimination written by families frustrated with the provisions offered to their child. I also
read responses written by schools addressing these allegations. I wondered how a court or
tribunal might conciliate these matters. I also wondered, if the complaints proceeded beyond
conciliation, how a court or tribunal might resolve these matters. Discussion of
reasonableness in academic literature was limited, particularly as it applied to curriculum
decisions for students with disabilities. These experiences drove and framed the conduct of
this research.

In 2007 I commenced a career as an academic, and have since lectured and published
in this field (Poed, 2015; Poed & Elkins, 2011; Poed & Keen, 2009, Sep.). Although I have
completed some undergraduate legal studies and audited some postgraduate courses, I do not
have a formal legal qualification. This, however, is not a legal dissertation. It is an
examination of legislation and judicial decisions to better understand the issue of reasonable
adjustments from the perspective of teachers, policy-makers and parents.

**Definitions and Key Terminology used in this Study**

This thesis adopts the use of *person-first language*. Person-first language insists the
use of *person with a disability over disabled person*. It argues the emphasis on person-first,
and disability second, an approach strongly recommended by peak Australian advocacy
agencies such as *People With Disability Australia* (2010-14) as well as the *Australian
Network on Disability* (*n.d.*). It is also important to acknowledge that for some people with
disabilities, person-first language is considered to be patronising (Young, 2010). Disability
oppression scholars also view the use of person-first language “as wrought with oppression, as it is still used to identify and label individuals based on differences” (McKinney & Lowenhaupt, 2013, p. 311).

Person-first language is also rejected by some groups of people with disabilities, especially the Deaf community. This community argue disability is an important aspect of their cultural identity (Johnson & McIntosh, 2009). For this reason, when referencing the Deaf community, person-first language will not be used. Throughout this thesis, the term deaf written with a lower case ‘d’ refers to young students who are hard of hearing, and who may or may not identify culturally as Deaf. Deaf written using a capital ‘D’ refers to adults who identify with Deaf culture or as part of the Deaf community (Victorian Department of Education and Early Childhood Development (Victorian DEECD), 2012).

When describing the disabilities of the students named in this thesis, the term used in their judicial decision is provided. Therefore, there are times where students who had an ASD may be described as having autism, Asperger’s syndrome, Rett’s syndrome or pervasive developmental disorder depending on their diagnosis. The same is true for students with mental health or medical conditions, learning disabilities, as well as physical or vision impairments. Where a genetic condition is provided that explains the student’s intellectual disability, that detail is also provided. In Australia, the term learning disabilities refers to difficulties students experience when learning that cannot be attributed to a cognitive, hearing or vision impairment.

The term equity is used throughout this thesis. The Oxford English Dictionary (2015) defines equity as that which is fair, impartial, and right. Equity in education is achieved when:
Educational outcomes are not the result of differences in wealth, income, power or possessions. Equity in this sense does not mean that all students are the same or will achieve the same outcomes. Rather, it means that all students must have access to an acceptable international standard of education, regardless of where they live or the school they attend. (Gonski, 2011, p. 105)

These two definitions have informed the meaning of equity as it applies in this thesis.

The word curriculum has many possible interpretations. It can encompass the:

- intended curriculum (what teachers planned to teach);
- enacted curriculum (what was taught, where it was taught, and the pedagogies used to teach it);
- experienced curriculum (the views of the student as articulated in cases by them or their associate); and
- assessed curriculum (how student learning was measured), and the achieved curriculum (how learning was reported). (Queensland Department of Education Training and the Arts, 2008, p. 1)

Curriculum extends to that which also occurs outside of the classroom (Stewart & Knott, 2002). School excursions, by example, provide real-world perspectives on what is taught as well as opportunities for making learning more interesting, relevant and meaningful. Finally, when defining curriculum, Kohlberg’s (1975) concept of “hidden curriculum” must also be considered; that is, “the moral atmosphere of the school” (p. 46) created by the informal social relations that exist within the school as well as its governance. Used within this thesis, the term curriculum extends to each of these concepts.
Conclusion

In summary, schools are obliged to provide reasonable adjustments to curriculum for students with disabilities. These adjustments enable the student to participate free from discrimination. Despite this mandated obligation, a small number of Australian families have sought legal recourse after failed conciliation attempts to resolve allegations of discrimination. Outlined in this chapter was the background, rationale and proposed method for an examination of these judicial decisions. Chapter Two provides further discussion of the requirement for reasonableness in the education of students with disabilities.
Chapter Two – The Requirement for Reasonableness

This thesis examines judicial decisions to reveal why there are tensions in relation to the provision of curriculum adjustments for Australian students with disabilities. Litigation typically occurs when there is a tension between the practices of the school and the desires of the student and their family. Specifically, the research seeks to identify the types of tensions around adjustments to curriculum being sought (or rejected) by families of students with disabilities versus the types of adjustments to curriculum provided (or refused) by schools. The requirement for schools to provide reasonable adjustments is enshrined in human rights conventions and in legislation. These laws are outlined in this chapter. The concept of reasonable adjustments, as outlined in the DSE (ComLaw, 2015c), is further examined, with supporting literature to explain the key considerations taken into account when determining reasonableness. To better understand the practices of schools, a review of various bodies of literature reveal curriculum and educational practices for Australian students with disabilities. This chapter concludes with an outline of the process used in Australia to make a discrimination complaint as well as the litigation course of action.

Australian Legislative Provisions for Students with Disabilities

Across Australia, there are 23 educational jurisdictions, each responsible for implementing both State and Federal legislation and policies. Historically, each original State or Territory Education Act promulgated free, compulsory and secular education systems. When these first Education Acts were passed, parents of children with disabilities were not obligated to ensure their child attended school (Jackson & Varnham, 2007; Sahlin, 2007a). Widely held theory at that time was that children with disabilities were “ineducable” and would not benefit from receiving an education (Boyle, Scriven, Durning, & Downes, 2011).
By the beginning of the 20th Century, legislation mandated that Australian children between the ages of 6 and 13 attend school. Yet, in each State and Territory, additional clauses and regulations continued to exempt children with disabilities from attending school (Swan, 1994). There are limited historical records of the formal educational provisions for Australian students with disabilities (Swan, 1988). Prior to the 1950s, some students attended residential institutions, mainly in Sydney and Melbourne. Some of these institutions employed teachers, although the educational content differed from that taught in schools (Ashman & Elkins, 2005). Other students lived in institutions where no formal educational provisions were available. In the absence of any other opportunity, and against medical advice, some families chose to home-school their children.

Throughout the 1980s and 90s, States and Territories across Australia passed or amended anti-discrimination legislation to offer general protection against acts of discrimination for those with a protected attribute. Certain attributes (such as gender, age, marital status, race, and disability) were identified within anti-discrimination legislation, making it illegal for a person to be treated unfairly on the basis of this attribute. At that time, Williams (1996) observed that there was variance in the wording and meanings of, and coverings provided by, the various State and Territory anti-discrimination statutes. This is still true today. Table 3 outlines the current State and Territory anti-discrimination and equal opportunity legislation:
Table 3. Current State and Territory Anti-Discrimination Legislation

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Most recent Act</th>
<th>Last amended</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australian Capital Territory</td>
<td>Discrimination Act 1991</td>
<td>24 February 2014</td>
</tr>
<tr>
<td>New South Wales</td>
<td>Anti-Discrimination Act 1977</td>
<td>8 January 2015</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Anti-Discrimination Act 1992</td>
<td>2 June 2014</td>
</tr>
<tr>
<td>Queensland</td>
<td>Anti-Discrimination Act 1991</td>
<td>1 July 2014</td>
</tr>
<tr>
<td>South Australia</td>
<td>Equal Opportunity Act 1984</td>
<td>3 October 2013</td>
</tr>
<tr>
<td>Victoria</td>
<td>Equal Opportunity Act 2010</td>
<td>2 September 2014</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Equal Opportunity Act 1984</td>
<td>18 December 2013</td>
</tr>
</tbody>
</table>

These Acts, refined over time, obligate educational authorities to offer protection against discrimination for those with disabilities. The protection afforded to those who have a protected attribute, differs across the country. This is one reason why Federal disability discrimination legislation was proposed.

The Disability Discrimination Act 1992 (Cth.) (The DDA). The drafting of Federal disability discrimination legislation was first proposed in 1990. The mandate was to review legal issues experienced by Australians with disabilities. The initial focus was to address discrimination in employment, seen by the then Minister for Health, Housing and Community Service, the Honourable Brian Howe, as an important step in meeting the country’s obligations under both the International Labour Organisation Convention as well as the International Covenant on Economic, Social and Cultural Rights (Commonwealth of Australia [House of Representatives], 1992).

In July 1991 consultation on the National Disability Discrimination Paper, written by the National Disability Discrimination Legislation Committee, commenced. During these public hearings, and in the written submissions, the issue of discrimination in education was continually mentioned (Shelley, 1991). Community consultation expanded the scope of the
legislation to include other areas in society where people with disabilities experienced discrimination, including education (Conley Tyler, 1993). During the second reading of the Bill in the House of Representatives, Mr Howe promoted a vision of a:

  fairer Australia where people with disabilities are regarded as equals, with the same rights as all other citizens, with recourse to systems that redress any infringements of their rights … where difference is accepted, and where public instrumentalities, communities and individuals act to ensure that society accommodates such difference. (Commonwealth of Australia [House of Representatives], 1992, p. 2755)

The following section provides an analysis of the objectives of the DDA, a discussion of the concepts of direct and indirect discrimination in schools, and a discussion of the term unjustifiable hardship. The discussion is important in establishing the foundation for understanding the legislative provisions for students with disabilities.

  **Objectives of the DDA.** Section 3 of the *Disability Discrimination Act 1992* (Cth) calls for the elimination of discrimination in education. The objectives make it unlawful for an educational authority to directly or indirectly treat a student with a disability less favourably than a student who does not have a disability (s3). It lists that the goal, “as far as practicable”, is for students with disabilities to have the same educational rights as their peers. The phrase “as far as practicable” signals that there are times where it may not be possible to avoid practices that are discriminatory and that there is legal recognition to the limits of what can or needs to be done. Academic integrity is an example of a legal limit. A teacher cannot compromise the integrity of a subject, allowing a student to pass, if they have not achieved the learning objectives. Whitburn (2014), however, is very critical of this phrase, arguing its use
is “abhorrent” (p. 9) as it allows schools to “opt out” of their obligation to include students with disabilities.

**Direct and indirect discrimination in schools.** Discrimination is defined as “any practice that makes distinctions between individuals and groups so as to advantage some and disadvantage others” (Waldeck & Guthrie, 2004, p. 7). There are two forms of discrimination. The first is direct discrimination, where a student is treated less favourably than their peers on the basis of their disability. An example of direct discrimination might be where a school refuses to enrol a student with a disability. The second type of discrimination is indirect discrimination. Indirect discrimination results when a requirement or rule is created for all students, but the application of that rule results in unfair treatment for students with a disability (Hamper, et al., 2010; Lindsay, 2004). In his speech on the DDA and its impact in the area of education, the then Australian Deputy Disability Discrimination Commissioner, Graeme Innes, provided the following indirect discrimination example:

A timetabling decision is made that all maths classes will occur in the upstairs part of a building, where there is no physical access. This would appear to be neutral treatment, but would have a disparate impact on students with a physical disability. If the downstairs classrooms were equally as adequate for maths classes it would not be reasonable in the circumstances. However if we were talking about science classes, and there were no science labs downstairs, then the reasonableness argument may not apply. (Innes, 2003)

Indirect discrimination may occur unintentionally. A rule or policy applied may unintentionally have a detrimental impact on a student with a disability. Neither motivation nor intention, however, is relevant; indirect discrimination is just as culpable as direct discrimination (Basser & Jones, 2002; Waldeck & Guthrie, 2004).
**Unjustifiable hardship.** Unjustifiable hardship is similar to the Canadian and American concepts of *undue hardship* or the European concept of *disproportionate burden* (Lewis, Suen, & Federing, 2010, Jun.). It places a limit on the burden a school might experience in relation to the education of a student with a disability. Prior to the review of the DDA that led to a change in this term (discussed below), unjustifiable hardship applied only to financial hardship at the point of enrolment. If a student with a disability required facilities or services that would impose a financial hardship, and this hardship was deemed to be unjustifiable, the school could refuse enrolment. Other examples of hardship will be discussed shortly.

**Review of the Disability Discrimination Act 1992 (Cth) (2004).** In 2003, in accordance with the Commonwealth Government’s Legislation Review Schedule, the DDA was referred to the Australian Productivity Commission to consider, among other things, the social impact of the legislation, including costs and benefits to the community as a whole and to people with a disability (Australian Government [Productivity Commission], 2004). By this time, successive Australian Governments were affected by the concepts of human capital, productivity and efficiency and neoliberal ideas of the individual (Harvey, 2005). Governments used these ideas to impose a business model overlay to all funded activity. The Productivity Commission’s inquiry found that the DDA had been relatively successful in reducing physical barriers to inclusion, particularly in relation to education. The Commission highlighted the additional work needed to address attitudinal barriers, especially where race, language, socioeconomic background and remoteness were additional variables. The Commission also found that there was an explicit requirement for reasonable adjustments to apply as a standalone duty in all areas of the DDA, subject to any unjustifiable hardship concern. The inquiry recommended:
improving the operation of the DDA, including the introduction of an explicit
duty to make reasonable adjustments. This goes to the heart of the DDA, and
would complement other features such as prohibitions on direct and indirect
discrimination. Such a duty would be consistent with the Australian
Government’s original intentions for the Act, and would promote awareness
among organisations and people with disabilities. Balanced by an (sic) clearer
and broader unjustifiable hardship defence, the duty would reassert the role of
the DDA as a vehicle for achieving real change for people with disabilities.
(Australian Government [Productivity Commission], 2004, p. XLVII)

The DSE were promulgated for the purpose of clarifying the obligations of education
providers and these standards are now discussed with particular reference to their
construction.

*Disability Standards for Education 2005 (Cth) (DSE).*

*Construction of the DSE.* Section 31 of the DDA provided power to the Federal
Education Minister to develop disability standards in all areas. Section 32 of the DDA also
made it unlawful for these standards, once enacted, to be violated. In 1995, a taskforce of
Commonwealth, State, and Territory representatives set about drafting disability standards for
education with the first draft tabled in 2002. The purpose of the DSE was to clarify the
obligations of educational authorities and providers (pre-school to post-compulsory; public,
private and not-for-profit institutions) in the provision of educational services to students with
a disability. Throughout the drafting, there was significant disagreement between
representatives of the taskforce (Beecher, 2005). The process stalled following disagreement
in relation to the potential costs associated with implementation. From a human capital theory
perspective, it is fundamental that Governments invest in all of their citizens so, in turn, they
can contribute to the economy through gainful employment (Liachowitz, 2011). Human rights issues in other areas of society had a history of being trumped by arguments of economic rationalism (Carpenter, 1993). In an attempt to address the costing concerns, the *Australian Education Systems Officials Committee* commissioned an independent cost-benefit analysis (Margarey, 2004). This analysis found that the potential benefits from the implementation of education standards outweighed the associated costs, particularly for those education authorities that were already compliant with the DDA (Allen Consulting Group, 2003). On this advice, the Government tabled the draft DSE for the consideration of State and Territory Education Ministers.

When the draft DSE were tabled, most State and Territory Ministers again voiced reservations, citing the financial implications for implementing these Standards in practice. Despite these strong concerns, the Honourable Brendan Nelson, who was at that time the *Commonwealth Minister for Education, Science and Training*, issued a press release indicating that the Commonwealth would proceed with the introduction of the Standards on a unilateral basis (Nelson, 2003). The Federal Government, at that time, held the view that the Standards would inform the general public of the types of educational barriers faced by students with disabilities (Waldeck & Guthrie, 2004). During the second reading of the *Disability Discrimination Amendment (Education Standards) Bill 2004*, the Honourable Michael Ferguson, Member for Bass, reasoned, “[T]he standards recognise that to overcome the disadvantage arising from their disability students with disabilities need to be treated differently to remove or reduce barriers to their participation in education” (Australian Human Rights Commission, 2015). Despite the controversy associated with the perceived costs for introducing the Standards, delivering justice through economic and cultural inclusion of people with disabilities outweighed other considerations in this debate (Dickson, 2012b).
The DSE. The DSE came into effect in August 2005, and outlined key obligations for providers in relation to particular aspects of education. Providers are required to take reasonable steps to ensure prospective applicants can seek to enrol in an education setting “on the same basis” as any other applicant (ComLaw, 2015c, Standard 4.2). Further, providers are required to ensure students with disabilities can participate in courses or programs, and have access to services, specialist supports, and facilities, on the same basis as their peers. This includes the provision of reasonable adjustments to enable participation (ComLaw, 2015c, Standard 5.1).

Where a disability inhibits participation, even with an adjustment, providers are also required to ensure a reasonable substitution of activities. The DSE requires providers to take reasonable steps when designing lessons, subjects, and courses so that students with disabilities can participate without discrimination (ComLaw, 2015c, Standard 6.2(1)). The DSE also notes that providers are not required to make unreasonable adjustments that undermine the academic integrity of the subject, course or program. Finally, providers are required to ensure their educational environment is free from victimisation and harassment for students with disabilities and their associates (ComLaw, 2015c, Standard 8.2).

Each section of the DSE provides a list of suggested measures an education provider should implement as evidence of compliance. In relation to participation, the following measures are suggested:

(a) the course or program activities are sufficiently flexible for the student to be able to participate in them; and

(b) course or program requirements are reviewed, in the light of information provided by the student, or an associate of the student, to include activities in which the student is able to participate; and
(c) appropriate programs necessary to enable participation by the student are negotiated, agreed and implemented; and

(d) additional support is provided to the student where necessary, to assist him or her to achieve intended learning outcomes; and

(e) where a course or program necessarily includes an activity in which the student cannot participate, the student is offered an activity that constitutes a reasonable substitute within the context of the overall aims of the course or program; and

(f) any activities that are not conducted in classrooms, and associated extra-curricular activities or activities that are part of the broader educational program, are designed to include the student. (ComLaw, 2015c, Standard 5.3)

In relation to curriculum development, accreditation and delivery, the following compliance measures are offered:

(a) the curriculum, teaching materials, and the assessment and certification requirements for the course or program are appropriate to the needs of the student and accessible to him or her; and

(b) the course or program delivery modes and learning activities take account of intended educational outcomes and the learning capacities and needs of the student; and

(c) the course or program study materials are made available in a format that is appropriate for the student and, where conversion of materials into alternative accessible formats is required, the student is not disadvantaged by the time taken for conversion; and
(d) the teaching and delivery strategies for the course or program are adjusted to meet the learning needs of the student and address any disadvantage in the student’s learning resulting from his or her disability, including through the provision of additional support, such as bridging or enabling courses, or the development of disability-specific skills; and

(e) any activities that are not conducted in a classroom, such as field trips, industry site visits and work placements, or activities that are part of the broader course or educational program of which the course or program is a part, are designed to include the student; and

(f) the assessment procedures and methodologies for the course or program are adapted to enable the student to demonstrate the knowledge, skills or competencies being assessed. (ComLaw, 2015c, Standard 6.3)

As stated earlier, the DDA does not define reasonableness. It qualifies the term only by stating it must not impose an unjustifiable hardship on the provider. The DDA does not define the types of adjustments considered reasonable nor the benefits they should provide (Walsh, 2012). This has been considered an oversight given both schools and students would need clarification in order to determine how reasonableness would be measured (Dickson, 2006b).

The DDA required schools to only consider adjustments at the point of a student’s enrolment. The focus was on equity of access, but not really on equity of participation. Through the introduction of the Disability Standards for Education 2005 (the DSE), the requirement for education authorities and schools to provide adjustments was extended beyond the point of enrolment. Educational authorities and schools were now specifically required to provide reasonable adjustments in the areas of curriculum development,
accreditation and delivery, student participation, student support services, and the assessment and elimination of harassment and victimisation. While the extension of the DSE to focus on participation was welcomed as a further step to improve inclusion of students with disabilities, there was also a level of uncertainty on the basis by which the actions of providers would be judged as reasonable (Buckingham & Graffam, 2006; Dickson, 2006b).

When the DSE were introduced, the following framework for assessing the reasonableness of proposed adjustments was included:

(1) For these Standards, an adjustment is **reasonable** in relation to a student with a disability if it balances the interests of all parties affected.

*Note* Judgements about what is reasonable for a particular student, or a group of students, with a particular disability may change over time.

(2) In assessing whether a particular adjustment for a student is reasonable, regard should be had to all the relevant circumstances and interests, including the following:

(a) the student’s disability;

(b) the views of the student or the student’s associate, given under section 3.5;

(c) the effect of the adjustment on the student, including the effect on the student’s:

   (i) ability to achieve learning outcomes; and

   (ii) ability to participate in courses or programs; and

   (iii) independence;

(d) the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students;
(e) the costs and benefits of making the adjustment.

(3) In assessing whether an adjustment to the course or program in which the student is enrolled, or proposes to be enrolled, is reasonable, the provider is entitled to maintain the academic requirements of the course or program, and other requirements or components that are inherent in or essential to its nature. (ComLaw, 2015c, s3.4)

On 10 February 2005, the Disability Discrimination Act 1992 (the DDA) was amended to extend the scope of the DDA in three areas (Robertson, 2005, Jul.). First, the concept of unjustifiable hardship was extended beyond the point of enrolment, allowing schools to claim hardship at any point during the student’s educational journey. This avoided the previous onus on schools to attempt to foresee the impact of the disability in the future. This was considered particularly relevant, as shown in the case of Finney, in P-12 schools, and where the nature of the disability was progressive (Australasian Legal Information Institute, 2015d). Now, at any point during enrolment, schools may be able to argue that the provision of adjustments to curriculum would impose unjustifiable hardship (costs in staffing, resources or modification to resources outweigh any benefit for the student). Second, amendments were added that compelled education providers to provide programs and strategies to prevent harassment and victimisation of students with disabilities and their associates. This obligation to provide an environment free from harassment or victimisation was exempt from any unjustifiable hardship claim. Third, the definition of an ‘education provider’ was extended to include preschools as well as bodies that develop and accredit curricula, course and training materials.

A set of Guidance Notes accompany the DSE. These aimed to assist the reader to understand the scope of the DSE. They offer practical examples of how educators can
comply. The Guidance Notes remind schools that the process for seeking adjustments must be made transparent and accessible. Grievance processes must also be documented for those seeking a review in relation to the preferred adjustments (Australian Government [Department of Education], 2013).

*Disability Discrimination and Other Human Rights Amendment Act 2009 (Cth).*
The above-named legislation was in force from 5 August 2009. The AHRC offered seminars across Australia to explain the amendments made to the *DDA* as a result of this Act (Fougere, 2009). Several changes that resulted from these seminars have relevance to this study. First, the original definition of disability in the *DDA* was amended to include anyone with a genetic predisposition to a disability as well as behaviour as a manifestation of a disability. Second, the burden of proof of ‘reasonableness’ shifted from the complainant to the alleged discriminator. Third, the requirement for reasonable adjustments was applied not only to direct, but also indirect discrimination (Dickson, 2011, Oct.; Laikind, 2009, Dec; Walsh, 2012). As previously noted, direct discrimination can occur where a school fails to provide a student with a disability a reasonable adjustment, and as a result the student is treated less favourably than their peers. Indirect discrimination can also occur where a school requires a student with a disability to comply with a policy or practice reasonable for all other students, without the support of an adjustment.

*Review of the Disability Standards for Education 2005 (2011).* In December 2010, the Federal Government released a discussion paper that, among other things, outlined Terms of Reference for a review of the DSE. The aim of the review was to:

- Review the clarity and specificity of the Standards;
- Determine whether the Standards had led to increased participation, and decreased discrimination, of people with disabilities;
- Record whether people with a disability felt better community recognition and acceptance; and
- Evaluate the compatibility of the Standards with the education system.

(Australian Government [Department of Education Employment and Workforce Relations], 2010)

The process for the review included both stakeholder consultation sessions and written submissions. A DSE review team was formed. Their role was to report findings from 150 stakeholders who attended forums, and over 200 written submissions (Australian Government [Department of Education Employment and Workforce Relations], 2012). Overall, the review concluded that there was a general lack of awareness of the DSE. A key concern was the difference in definition of disability used across education jurisdictions for funding purposes. The review also found that there was a lack of clarity in relation to the requirement for consultation, and the key concepts of unjustifiable hardship, on the same basis and reasonable adjustment. Issues noted included:

- who was entitled to an adjustment;
- the evidence required to prove the existence of a disability;
- the timeliness of adjustments;
- medical and specialist recommendations not being adopted by schools;
- balancing resourcing costs for providing adjustments against benefits derived; and
- the lack of consultation, both initial and ongoing, with parents, and with students.

During the 2011 review of the DSE, teachers expressed concerns regarding the concept of reasonable adjustments. Both users and providers of education suggested:
There is too much flexibility in interpretation and the Standards do not adequately explain what is deemed acceptable in terms of adjustments. There was broad agreement that there needs to be more information about what is considered ‘reasonable’ for adjustments and who decides whether or not the action taken is sufficient. (Australian Government [Department of Education Employment and Workforce Relations], 2012)

To address these concerns, there were 14 recommended actions. These included the development of “user-friendly, sector-specific guidance materials” containing best practice guidelines (Australian Government [Department of Education Employment and Workforce Relations], 2012, p. ix). This work is still in progress. The next section turns to a discussion of reasonable adjustments, the central tenet of this chapter.

**Reasonable Adjustments**

As defined in the first chapter, adjustments are actions or measures a school can take to ensure a student with a disability can participate in education in the same manner as their peers (Ashman, 2015). The provision of adjustments is a key requirement of the *United Nations Conventions on the Rights of Persons with Disabilities* (2006, Article 24c). This provision is defined as:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. (United Nations, 2006, Article 2)

Educators have an express duty to make reasonable adjustments to curriculum. When deciding on the appropriateness of an adjustment, educators may first consider whether there
is any other adjustment of a less disruptive nature that would offer the same benefit to the
student. They would then assess whether the adjustment may need to be changed over the
course of the student’s studies (ComLaw, 2015c, s 3.6 a-b). It is also mandated that
adjustments are provided in a timely manner (ComLaw, 2015c, s 3.7). To assist these
considerations, the school must consult with the student or their associate, and the student or
their associate must provide the school with any information that informs how the disability
might impact the student’s learning (ComLaw, 2015c, s 3.7).

In the original drafting of the DDA, the term reasonable adjustment did not appear
although positive discrimination through differential treatment was implied (Australian
Government [Productivity Commission], 2004; Keeffe, 2004b). The scope of what would be
considered reasonable, and the limit of what would be required in relation to adjustments, and
direction on how to take into account student voice (or that of their associate, usually a parent
or guardian) were all unclear (Cumming, Dickson, & Webster, 2013; Dickson, 2011, Oct.;
Gardiner, 2011). The requirement for reasonableness was first critiqued during the drafting of
the DDA. The Honourable Chris Miles, Liberal member for Braddon, argued:

not only do we have people assessing the almost unassessable things such as
feelings and humiliation, but the Bill also provides for things like reasonable
accommodation needs. Who determines what is reasonable? Is there a
community standard as to what reasonable accommodation is? Is reasonable
accommodation in northern Australia the same as in southern Australia? There
is a great diversity. If we are going to put into place legislation that addresses
these things, we will have to have a lot more clarity than is provided by
generalised terms such as ‘reasonable accommodation’. (Commonwealth of
Australia, 1992, Aug. 19)
The framework provided in the *DSE* for determining reasonableness has provided the conceptual basis for this study. The framework clarifies the aspects that must be considered by a judge or disability discrimination commissioner when determining whether an adjustment is reasonable. In considering claims of discrimination, judges and commissioners are required to determine whether there has been direct or indirect discrimination in the provision of reasonable adjustments. The four aspects that must be considered are (1) the nature of the disability; (2) the views of the student or their associate; (3) balancing interests by considering the effect of providing the adjustment and the costs versus benefits, including consideration of whether these pose an unjustifiable hardship; and (4) the impact of the adjustment on the academic integrity of the course. This section discusses these four aspects in greater detail.

**Nature of the disability.** Determining exact numbers of people with disabilities is a complex task, given the global differences in definitions. Approximately 10% of the world’s population have a disability, some of which is caused by preventable actions such as war, poverty and disease (Hodgson, 2013). In Australia the percentage of school-aged students with a disability is approximately 7% (Australian Bureau of Statistics, 2014) although this percentage varies between States and Territories given the differing criteria for determining disability (Tan, 2012). At the time of drafting of the Australian *Disability Discrimination Act 1992*, definitions of disability were shifting from those influenced by the medical and psychological professions to ones that argued disability as a social construction (Dempsey, 2003). Defining disability as a social construction derives from the literature that argues that, even though a person may have an impairment, a disability only exists where that impairment interacts negatively with other personal and environmental factors thus causing a limitation or restriction (Leonardi, Bickenbach, Ustun, Kostanjsek, & Chatterji, 2006). Davis (1999) illustrates that many people who meet medical definitions for deafness, for example, prefer to
view themselves as a linguistic minority within society. As a linguistic minority, many prefer the use of capital ‘D’ Deaf to signify their cultural identity (Eberle, Parks, Eberle, & Parks, 2012; Sparrow, 2005). For these reasons, the legal definition of disability, presented below, is critical as it can shape societal views and the treatment of those with a disability (Basser & Jones, 2002).

In Australia, to successfully argue a claim of discrimination, there is a legal requirement that a person has a disability as defined in the legislation (Cumming & Dickson, 2007). In its most recent amendments, the DDA broadened the definition of disability to include:

a) total or partial loss of the person's bodily or mental functions; or
b) total or partial loss of a part of the body; or
c) the presence in the body of organisms causing disease or illness; or
d) the presence in the body of organisms capable of causing disease or illness; or
e) the malfunction, malformation or disfigurement of a part of the person's body; or
f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour; and includes a disability that:
   i. presently exists; or
   ii. previously existed but no longer exists; or
iii. may exist in the future (including because of a genetic predisposition to that disability); or

iv. is imputed to a person.

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability. (ComLaw, 2015a)

The Federal definition is unconcerned with the type or degree of disability or its duration, acknowledging the needs of the person with a disability are likely to change over time (Sahlin, 2007b). Australian disability discrimination case law suggests that it would be difficult for a claim of discrimination to succeed where a disability was undisclosed, however there is no statutory protection to guarantee this. Disclosure is the process of informing the school of the nature of the student’s disability, and how it can be best accommodated in the classroom. This is especially important for those students whose disabilities are not immediately obvious and where teachers may not be aware of the disability (Matthews, 2009). Students, or their associates should be informed of the importance of disclosure in ensuring that appropriate adjustments can be privately tailored for the student (Squelch, 2010). School staff should also be trained in how they respond to disclosure to minimise negative consequences such as stigma, student anxiety and discomfort and to optimise positive outcomes including appropriate supports and accommodations (De Cesarei, 2014; Rocco, 2001, Jun.; Rowe, 2011).

The DDA definition of disability has impelled educational authorities and schools to ensure the educational needs of this cohort of learners are accommodated (Dempsey, 2007). Medical practitioners, while qualified to diagnose a disability and describe the condition medically, are unqualified to state the impact of the condition on a student’s learning or the types of adjustments that might alleviate the impact (Rowlett, 2011). The reverse of this is
also true; teachers are unqualified to diagnose disability. Schools must take into account the nature of the disability; that is, how a disability affects a student’s participation in their educational program (Disability Standards for Education 2005 Supporting Materials, 2005, section 4.2). To facilitate participation, educational authorities generally provide funding for some students with disabilities although the Federal definition of disability is far broader than definitions used by educational authorities to determine additional resourcing for students with disabilities (Tan, 2012). As a result, some students are entitled to reasonable adjustments under the Federal definition of disability, but are not entitled to additional resourcing at a State/Territory level. In addition, students are only entitled to additional funding while the disability is within the range defined for funding purposes. If the student’s disability falls outside of this range, typically additional funding would no longer be available.

How disability is defined can influence how students are perceived. This definition can have a profound impact on the education, and lives, of those with disabilities (Wendall, 1996). The World Health Organisation (2014) suggests disability is an umbrella term that includes not only the impairment related to the way the body functions or is structured, but also the limitations experienced as a result of social or environmental barriers or restrictions. Teachers make curricula decisions based on their understanding of the student’s disability. Katzman et al. (2005) found that teachers will attribute poor educational outcomes to a student’s disability rather than to social or environmental barriers. Consequently, expectations may be lowered and adjustments focused more on remediating the impact of the impairment rather than on adjustments of academic content (Rabinowitz, 2012). For students with challenging behaviour, Hehir (2007) found that educational programs frequently emphasised reducing behavioural outbursts, with limited focus on the educational supports needed to ensure academic success for these learners. An examination of judicial decisions in relation to the adjustments teachers make for students with disabilities may reveal whether
curriculum decisions made by teachers, or the types of adjustments sought by families, are shaped or limited by their understanding of the nature of a student’s disability. This understanding may illuminate the reasons why disputes escalate to court action.

**Student/associate voice.** When determining reasonableness, the DSE requires schools to consider the views of the student or their associates. Student voice rarely features in the history books of special education. Instead, there is a history as told by the parents, public servants, administrators and teachers who diligently worked to meet the educational needs of students identified as belonging to this group. Practices considered exemplary at the time may be discriminatory by today’s standards. Educational views have changed over time, in line with international understandings of the rights and abilities of persons with disabilities.

Today, student voice is an inherent human right. Under the *United Nations Convention on the Rights of the Child* (CROC) (2000, Article 37d), all children have a right to be heard in any legal proceedings that affect them; actions impacting on children must consider their best interests (Article 3); parents may provide direction on behalf of their child until the child is capable of forming their own views (Article 5); and once capable, a child is entitled to have their views considered (Article 12). In most cases, however, it is the child’s parent that brings forward an education complaint and the student, the recipient of the alleged discriminatory conduct, may not have the capacity or the opportunity to present their first-hand experiences (Lindsay, 1997).

In many legal proceedings, the voice of the child is not heard or is lost “in the bitterness of the dispute between parent and education authority” (Jackson & Varnham, 2007, p. 109). Under the *DDA*, schools must consult with a student and/or the student’s associate when determining adjustments. This provision extends to students providing information about how their disability impacts on their learning. This information enables schools to
select adjustments most suitable to reduce this impact. Where students are not able to provide this information, the school must consult an associate. This is most commonly the student’s parents or carers, but may include a relative, another person with whom the student resides, or another person who shares a genuine interest in the educational needs of the student. The final decision then rests with the school. Jackson and Varnham (2007) propose the obligation to consult with the student is diminished by the inclusion of an obligation to consult with an associate of the student.

Many complaints made by parents of children with disabilities allege a lack of meaningful participation (Porter, Georgeson, Daniels, Martin, & Feiler, 2013). Opportunity for meaningful participation is the first step towards developing positive home/school relationships (South Australia (Department of Education Training and Employment), 2000). Dickson (2011, Oct.) concludes that “there is an imperative for school staff and students and their families to keep in regular, respectful communication about the impact of the relevant disability and its management” (p. 4). Once a school has consulted the student, or their associate, about their needs, the next challenge is how to meet these needs (Gillies, 2013). There is an abundance of research that acknowledges the importance of home-school collaboration in education (Dettmer, 2012; Hedeen, Moses, Peter, & Center for Appropriate Dispute Resolution in Special, 2011; Latunde & Louque, 2012; Manor-Binyamini, 2014; Salazar, 2012; Simpson & Bakken, 2011). The examination of judicial decisions in this thesis may reveal whether student, or associate, voice has any weight in relation to curriculum decisions and the disputes before the courts that arise from them.

There has been no review of Australian legal cases to examine whether student voice has been considered. For the purposes of this study, student voice is defined as opportunities
for the students to articulate their views in relation to the optimal adjustments to meet their needs (Byrnes & Rickards, 2011).

**Balancing interests.** To meet the test of reasonableness, a teacher must balance the interests of that child against all others. To determine the needs of the student, teachers conduct both informal and formal assessments (Jarvis, 2013). If the expertise to determine these adjustments does not exist within the school system, there may be a cost to the school or to the education authority to hire an independent expert to conduct this assessment. From this detailed assessment, consideration must be given to the benefit of the adjustments to the child with the disability, but also the benefit to other students.

While there are many academic papers related to the efficacy of particular interventions for students with disabilities, there is limited discussion in the research literature of the benefits of adjusting standardised school-age curriculum for students with disabilities. Some noted benefits include increased student’s independence, enhanced self-esteem, and increased opportunities for social interaction and positive role models (Smith, 2012). Further, adjusting standardised curriculum may also provide an alternative way for the students to show their knowledge against a prescribed curriculum outcome (Thurlow, Liu, Ward, & Christensen, 2013).

The provision of an adjustment for a student with a disability may benefit other learners experiencing difficulty (Borges & César, n.d.; Cole, 2012; Hall, Strangman, & Meyer, 2011; Healey, Bradley, Fuller, & Hall, 2006; McGuire, 2011; Wans, 2009; Wareham, Clark, & Turner, 2006; Young & Kraglund-Gauthier, 2012, Jul.). Universal Design for Learning (Rose & Meyer, 2002) is a proactive approach to teaching and learning that sees activities and learning programs designed for maximum access. Embedding adjustments when units of work are first planned also helps teachers to ensure they can offer a
differentiated curriculum that accommodates a broader range of learners in subsequent years. This saves teachers from needing to constantly retrofit the curriculum to meet the needs of learners with disabilities (Stanford & Reeves, 2009).

An additional benefit is that schools receive extra resourcing by enrolling students with disabilities. This resourcing can be used to employ extra staff, reducing teacher-student ratios, or to employ specialist staff. Resourcing used to employ extra or specialist staff can benefit other students ineligible for additional funding who might need access to support (Burgstahler & Moore, 2009). Capital works resourcing enables building modifications, such as accessible parking, toilet facilities, and ramps. These accessibility features benefit not just the student, but are available when community members attend school performances, interviews, and functions (Steinfeld & Maisel, 2012; Zeff, 2007). Providing adjustments can also enhance community perceptions of the school being a compassionate learning community (Katz, 2012).

The DSE allow schools to balance the benefits of providing adjustments against the costs incurred. There are frequently resource costs associated with the provision of reasonable adjustments (Lodewijks, 2011). Financial costs are not the only consideration. An adjustment may have a detrimental impact on the independence and self-esteem of the student, feelings of stigmatisation, as well as their opportunity for social interaction (Webster & Blatchford, 2013). An adjustment may also cause a detriment to the student’s peers, with some teachers feeling they would be less available to support other learners in the class (Montgomery, 2013).

A further detriment is the deficit ideology embedded in the concept of a reasonable adjustment. The very concept of an adjustment implies teachers design lessons and assessment tasks based on the curriculum outcome before considering how students with
disabilities might participate in the task (Alchin, 2014). Retrofitting tasks to meet the needs of a diverse range of learners can exacerbate teacher stress levels (Ellis, 2013; Emery & Vandenberg, 2010). To remedy this, some teachers delegate the instruction of students with disabilities to teacher aides and then become less involved in teaching the student (Causton-Theoharis, 2009; Giangreco, Yuan, McKenzie, Cameron, & Fialka, 2005). This practice can compromise the quality of instruction for this set of learners (Hehir, 2002). Delegating teaching to aides has limited empirical support as to the impact on educational outcomes (Gardiner, 2011). As shown in Chapter one, there is limited analysis of judicial decisions in relation to the costs versus benefits debate when determining the reasonableness of adjustments to curriculum.

The DDA states that schools are not obligated to provide adjustments that would cause unjustifiable hardship. The original concept of unjustifiable hardship only applied at the point of enrolment. If a school determined a student with a disability required facilities or services that would impose a financial hardship, it was not unlawful for the school to refuse enrolment (Wilkinson, Macintosh, & Denniss, 2004). The DSE extended the provision of unjustifiable hardship (Fougere, 2009). Schools may be able to argue that the provision of adjustments to curriculum for a child with a disability would impose unjustifiable hardship. A judge or commissioner would consider the staffing, resourcing, administration, or modification costs and whether these outweigh any potential benefits for the student (Squelch, 2010).

Measuring hardship can be a point of discordance between parents and schools, and also complex for judges and commissioners. Schools need to experience the hardship associated with changing their curriculum, pedagogy and organisation if they are going to eliminate discrimination (Slee & Cook, 1999). When measuring hardship, judges and commissioners must listen to, and choose between, two interpretations of the same law.
In doing so, judges and commissioners are socially constructing the meaning of unjustifiable hardship through their interpretation (Parashar, 2010). An analysis of Australian judicial decisions in relation to unjustifiable hardship that may be imposed by making adjustments to curriculum would add to the literature, and is a focus for data analysis in this thesis.

**Academic integrity.** An adjustment cannot make up for knowledge, experience or expertise the student does not have (Dickson, 2011, Oct.). To complete a subject or course, students with disabilities must meet the same requirements as their peers. Schools are not required to provide adjustments that would diminish the academic requirements of subjects or courses of study (DSE, s3.4 (3)). Adjustments should only provide a level playing field, one in which students can demonstrate learning on the same basis as their peers, and enable teachers to discriminate student performance against academic standards (Gosden & Hampton, 2000; Steer, Gale, & Gentle, 2007). Adjustments should “minimise the impact of any test-taker attributes that are not relevant to the construct that is the primary focus of the assessment” (American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, 1999, p. 101). Here equity is defined by the access a student has to success rather than by access to the subject matter's target skills.

Teachers should have a detailed understanding of the inherent requirements of what they are teaching and the construct validity of their assessment instruments. This helps ensure any adjustment made for a student with a disability does not diminish the educational outcome they are working to achieve or compromise the integrity of the task (Azzopardi, et al., 2014; Davies & Dempsey, 2011; Roberts, 2013; Steer & Gentle, 2007). This is of particular significance in studies that lead to certification, as students with disabilities need to
meet the same requirements as their peers in order to achieve the award. The increased national benchmarking of student achievement, however, ensures academic integrity is important in every year of schooling (Walsh, 2012). As an example, a maths teacher would need to consider whether using a calculator to solve a mathematical equation would compromise the skill under assessment, providing the student with an unfair academic advantage. If the target skill being assessed is mental or written computation, the use of a calculator would offer the student an advantage and would diminish the academic integrity of the target skill. If the target skill is to calculate the perimeter of rectangles, the calculator offers no advantage if the student is unaware of the formula for calculating perimeter. In this case, the use of a calculator would not diminish the academic integrity of the target skill, but would simply provide a student who may have difficulty with mental or written calculation to demonstrate their knowledge against the target skill. Understanding the inherent requirement of a course and/or making the adjustment available to all students negates concerns by some students that adjustments provided to their peers offer them an advantage (Carroll, 2012). In addition, linking the most appropriate adjustment to the barrier imposed by the disability is a skill in which teachers have great variance of ability (Byrnes, 2008).

Even when requested by students or their associates, or recommended in a specialist report, teachers are not required to make adjustments that are unreasonable (Heyward, 2011). The teacher’s role is to both consider requests for adjustments and ensure compliance with the academic integrity of the subject. The most common adjustments provided for students with disabilities are:

- one-on-one support from an assistant, or peer or small group instruction;
- access to specialist support services provided by therapists;
- increased support from the classroom teacher;
altered presentation of the lesson or materials (large print, Braille, signed interpretation, translation of directions into the student’s native language, or clarification or repetition of information);

- use of technology or specialised equipment (magnification, amplification, acoustic, computers, calculators, etc.);

- varied opportunities for the student to display their knowledge (use of scribes, computers, Braille, etc.)

- additional response times (including scheduled rest breaks, extended time to complete work, scheduling tasks over multiple sessions/days or at specific times);

- environmental adjustments (installation of ramps/railings, tactile aides, specialised lighting and acoustic requirements, locating students in particular rooms due to access requirements):

- administration of medication;

- assistance with toileting and other personal care support. (Dickson, 2007; Poed & Keen, 2009, Sep.; Porter, et al., 2013; Walsh, 2012; Wiliam, 2010)

Concerns about the academic integrity of adjustments have mainly surfaced in higher education (Byrd, 2010; Helms, 2010; Jackson, 2010; Riddell, Tinklin, & Wilson, 2005; Roberts, 2013; Rowlett, 2011). Cases including Bishop (Australasian Legal Information Institute, 2015a), Brackenreg (Australasian Legal Information Institute, 2015b), Chung (Australasian Legal Information Institute, 2015c), Reyes-Gonzales (Australasian Legal Information Institute, 2015e), and ‘W’ (Australasian Legal Information Institute, 2015f), have all provided interpretations of reasonableness of adjustments in relation to academic integrity. Kamvounias and Varnham (2006) found that judicial interpretation in higher education was typically sought in three areas of academic judgement: (1) the grade awarded for individual items of work, (2) whether a student should pass or fail a subject, and (3) whether a student
making unsatisfactory progress should discontinue in a degree. Helms (2010) investigated judicial decisions surrounding reasonable adjustments in the tertiary sector and concluded that findings are generally supportive of settings where sincere efforts have been made to provide reasonable adjustments that do not compromise the integrity of the course.

In the tertiary sector, some faculty have expressed negative attitudes towards the provision of adjustments and the potential that these adjustments compromise the academic integrity of courses (Byrd, 2010). In the school sector, apart from a few isolated discrimination cases, there is limited academic debate about judicial interpretation in the area of academic integrity.

**Reasonableness in Relation to Curriculum Adjustments**

Given Australia’s ratification of international conventions discussed earlier in this chapter, and legislative obligations to provide adjustments to education for students with disabilities, it is often teachers who are tasked with the responsibility of providing adjustments. Adjustments are considered in light of the curriculum being taught. Until recently, each State and Territory across Australia held responsibility for the development of curriculum for school-aged students. In the late 1980s, the Australian Government recommended the development of a National Curriculum. The *Hobart Declaration (Standing Council on School Education and Early Childhood, 2009)* laid the foundation for its development. State, Territory, and Commonwealth Ministers of Education supported the creation of an education system that held high expectations for all learners, with specific provisions made available to those with special learning needs. This declaration introduced the concept of *Key Learning Areas*, stating that all students should develop skills in literacy, numeracy, problem solving and analysis, technology, history and geography, languages other than English, environmental concerns and issues of citizenship. Many students with
disabilities did not study these Key Learning Areas; instead the curriculum at that time had a life skills focus, with literacy skills, when taught, addressing functional skills (e.g., counting money, telling time) (Falvey, 1989; Halpern, 1989).

The *Adelaide Declaration* was endorsed in 1999 (Standing Council on School Education and Early Childhood, 1999). This Declaration mandated a just education system, free from discrimination. The declaration also reinforced equal educational opportunities for students with disabilities. In 2008, almost 20 years since a National Curriculum was first proposed, State, Territory, and Commonwealth Governments signed the *Melbourne Declaration* (Ministerial Council on Education Employment Training and Youth Affairs, 2008), agreeing to work together to develop an *Australian Curriculum*. The newly developed *Australian Curriculum, Assessment and Reporting Authority* (ACARA) had oversight for the development of this curriculum. From 2008-2010, the content for Foundation¹ Year to Year 10 English, Mathematics, Science and History was developed. The Geography curriculum was endorsed in 2013. Embedded in all new curriculum were seven general capabilities expected of all learners: literacy and numeracy skills, competence in the use of information and communication technologies, creative and critical thinking, intercultural understandings, ethical behaviour, and personal and social competence (Australian Curriculum Assessment and Reporting Authority (ACARA), 2013).

ACARA (2013) stated that the new Australian Curriculum would form a continuum, specifying expectations for teachers on what needs to be taught in each year of schooling. For those students that learn at different rates to their peers, ACARA have stated that it is the responsibility of education authorities to develop policies on the adjustments teachers may provide, and then teachers have responsibility for ensuring these adjustments are given.

¹In the Australian Curriculum, Foundation (F) refers to the year before Year 1. Across Australia currently this year of schooling may be known as Kindergarten, Reception, the Preparatory Year, or Prep.
ACARA further argued that most students with special educational needs would be expected to reach the same educational standards each year as their peers, with teachers expected to adjust their pedagogy and provide assessment tasks that enable students to demonstrate what they have learnt. In the initial “Shape of the Australian Curriculum”, (Australian Curriculum Assessment and Reporting Authority (ACARA), 2009), no specific provisions were mentioned for students who, even with significant adjustments, would be unlikely to achieve the same educational standards as their peers. Then, after much public pressure, ACARA revised this position, stating a working party would be responsible for an alternative curriculum for this set of learners, mainly those with severe cognitive impairments (ACARA, 2010).

In January, 2014, the Federal Education Minister, the Honourable Christopher Pyne announced a review of the Australian Curriculum. Between 28 February and 14 March, 2014, members of the public were invited to share their views in relation to whether this new curriculum would deliver what “students need, parents expect and the nation requires in an increasingly competitive world” (Australian Government [Department of Education], 2014a). A total of 1531 submissions were received, with only eight from organisations concerned with the education of students with disabilities (Australian Government [Department of Education and Training], 2014b). The final report on this review was released in October 2014 (Australian Government [Department of Education], 2014b). The recommendations of the review included some restructuring of the curriculum to “reduce the prescriptive lockstep design and to cater in particular for student diversity including for those with disabilities” (Australian Government [Department of Education], 2014b, p. 207).

In addition to curriculum development, ACARA is also responsible for developing a national assessment program. The National Assessment Program – Literacy and Numeracy
(NAPLAN) is administered annually to all Australian students in Grades 3, 5, 7 and 9. Aligned to the *Australian Curriculum*, the assessment tools measure students’ progress in literacy (reading, writing, and language conventions), numeracy, scientific literacy, civics and citizenship, and information and communications technology literacy. Students with disabilities may access these testing procedures (with appropriate adjustments) or may be withdrawn with parent/carer permission. Australian data suggest approximately five percent of students with disabilities are withdrawn from the current NAPLAN (Davies, 2012; Elliott, Davies, & Kettler, 2012). In the 2011 report by *Queensland Parents of People with a Disability* (Mann, 2011), 14.3% of parents surveyed indicated that their child was not learning to read at school, 12.3% were not learning to write, and 7.7% were not learning numeracy. These figures suggest parent permission might not be the only reason a child would be withdrawn from literacy and numeracy testing procedures. The lack of literacy and numeracy education for such a large cohort of students may prompt some schools to encourage parents to withdraw their students, keep their student home on testing days, or suspend the student from school on testing days. There may also be a view that some students, particularly those with disabilities, are less likely to benefit from learning basis skills such as those assessed by NAPLAN (Lange & Meaney, 2011, Feb.).

To respond to these concerns, some educators have called for achievement results of students with disabilities enrolled in mainstream schools to be reported separately from the school’s overall performance. As reported in *The Age* newspaper (Milburn, 2011), McGaw argued that the test scores of students with special needs skew a school’s overall performance, disadvantaging schools that include students with disabilities in national reporting measures of skills such as literacy and numeracy. Rather than viewing the range of achievement scores as reflective of a community of diverse learners thereby providing the educational challenge of how to close the achievement gap, McGaw recommended the separate reporting of results.
for students with disabilities (Poed, 2011). All of this suggests that the requirement for reasonableness in relation to participation in assessment and reporting of results for students with disabilities requires closer examination. The discussion also highlights that the inclusion of students with disabilities in accountability measures is not compliant with the legislative requirement for reasonableness (Cumming & Dickson, 2013).

At present, curricula decisions for students with disabilities in Australian schools are often documented in some form of Individual Educational Plan (IEP). These plans are known by many different names across various education jurisdictions. In Queensland, the Queensland Curriculum and Assessment Authority (2015) still use the term IEP, although Education Queensland (2014) prefers Individual Curriculum Plans. New South Wales have adopted the term Personalised Learning and Support Plan (NSW Government Education and Communities, 2012). In the Northern Territory (Northern Territory Government (Department of Education and Training), 2012), the preferred term is an Education Adjustment Plan. Both Victoria and the Australian Capital Territory have chosen the term Individual Learning Plan (ACT Government (Education and Training), 2010; Victorian Department of Education and Early Childhood Development (Victorian DEECD), 2014). Western Australia, Tasmania and South Australia still use IEP (Government of South Australia (Department of Education and Child Development), 2014; Tasmanian Government (Department of Education), 2013; The Government of Western Australia (Department of Education), 2015). Given the wide range of names used for these documents, the term Individual Education Plan will be adopted throughout this thesis given IEPs are widely recognised internationally.

Across the nation, the quality of plans written for students with disabilities varies according to the educational jurisdiction and State or Territory where the student attends school (Dempsey, 2012). Unlike the United States, IEPs are not legally mandated in
Australia, but teachers in most jurisdictions use IEPs as a planning tool. They are also, in some jurisdictions, tied to resourcing requirements. An IEP usually documents a child’s entry skills, goals and short-term objectives, strategies for achieving these goals, including any adjustments, resources, supports, and strategies for determining whether the goal has been met (with embedded timeframes for achieving the goal) (Westling & Fox, 2009).

The process recommended by most Australian education sectors for the development of an IEP usually involves a team of people concerned with a child’s education. Likely members of the team should be the child (although this is rarely the case), the child’s advocate (usually a parent/carer), and the child’s teacher (Wilson, Poed, & Byrnes, 2015). In secondary schools, where a student encounters many teachers, frequently only the person appointed as the “special education” teacher attends the meeting. Other invitees might include allied professionals (e.g., therapists, nurses, guidance officers), and administrators (head of curriculum, deputy principal or principal). The product is a written document, capturing the nature of the discussion and the individual plan for the child for a period of time (generally six months). It is through the collaborative process of writing this plan that tensions between families and schools may surface, in relation to views of the child’s abilities, goals that are set, and adjustments that are recommended (Gershwin Mueller, 2014). The IEP is frequently the written evidence tabled in court cases to demonstrate schools have met their requirement for reasonableness. For Australian students, an IEP “is expected to serve educational, legal, planning, accountability and resource allocation purposes” (Shaddock, MacDonald, Hook, Giorcelli, & Arthur-Kelly, 2009, p. 69).

When developing an IEP, teachers require a detailed understanding of the nature of the student’s disability, and how it might impact on their learning. Sometimes, however, there is an over-emphasis in the IEP on content that relates to the teacher’s beliefs about the nature of
the disability diagnosis with a limited focus on teaching the student school curriculum (Mitchell, Morton, & Hornby, 2010). For example, IEPs for students with vision impairment may focus on Braille skills, orientation and mobility requirements, and assistive technology needs. For students with cognitive impairments, IEPs may focus on daily living skills such as personal hygiene, travel training and cooking, and less on accessing age-appropriate curriculum. Similarly, for students with challenging behaviour, plans may outline strategies to reduce the instance of outbursts, rather than explore the barriers or identify the supports needed to be academically successful (Hehir, 2007). Teaching time spent addressing impairment-specific needs reduces the available time to study other academic content (Hehir, 2007; Katzman et al., 2005). This places an added burden on the classroom teacher who is tasked with the responsibility of delivering an individualised curriculum in a mainstream classroom environment, posing a risk that this will be delivered by a teacher aide rather than a teacher (Shaddock, Giorcelli, & Smith, 2007). Certainly, some students require specific additional curriculum; the challenge is avoiding lowered expectations or curriculum choices based solely on a disability diagnosis.

Teachers now hold greater responsibility when considering the issue of access to the curriculum for students with disabilities. Planning the classroom environment, determining a student’s entry skills, setting goals, using an array of pedagogical techniques, knowing how to best use specialist staff, understanding how to design lessons to accommodate all learners, knowing the appropriate adjustments to use, and knowledge of research-validated curriculum practices are critical. Yet, there is some research that Australian teachers feel ill-prepared to teach to diversity (Australian Education Union, 2008; Conway, 2010; Forbes, 2007). This, coupled with anti-discrimination legislation, has potential to expose schools to a “fertile field” of litigation (Aitkenson, 2002, p. 33), and to contribute to tensions in relation to the provision of adjustments to curriculum.
Disability Discrimination and Educational Litigation in Australia

A person lodging a complaint of discrimination in Australia has a choice of jurisdictions. They can lodge their complaint at either the Federal or State level. Complaints are usually made by the individual concerned, or another person on their behalf if the person is unable to make the complaint themselves. Occasionally a group of people will bring forward a complaint. This is known as a “representative complaint”, “special complaint” or a “class action”.

There is a two-step process once a complaint is lodged. The first step requires parties to attempt to conciliate the complaint but, where unsuccessful, adjudication is required (Gaze & Hunter, 2010). Conciliated complaints are subject to confidentiality requirements and are typically unpublished, making analysis by external parties impossible (Ramsay & Shorten, 1996). Adjudicated complaints involve “a subtle comparison of what was expected and what actually happened. The discrepancy between the two is then judged by criteria derived from statute and precedent” (Bruner, 2008, p. 43). On appeal, a discrimination case may be heard through the High Court, although this rarely occurs. High Court decisions become important precedents not just for courts and tribunals below, but for the conciliation arena also, as the effect of decisions from the most authoritative level percolates down to the informal base of the dispute resolution hierarchy, beyond which few complaints proceed. (Thornton, 2009, p. 12)

Disability discrimination legislation provides the platform that allows all students to participate in education, especially those who have “sat at the margins—often unnamed in curriculum, policy, and practice” (Luke, Green, & Kelly, 2010, p. 34). Teachers should avoid viewing legislation as a list of ‘musts’ and ‘must nots’; and that this sort of compulsion can
lead to resentment rather than produce the goodwill and compassion it seeks to achieve (Walton, 2011). When litigation occurs, it provides schools with valuable feedback about the validity of their practices in light of the legislation. An analysis of case law related to disability discrimination in education, as undertaken in this thesis, provides educators with a more nuanced understanding about the scope and limits of reasonableness in relation to adjustments to curriculum, feedback for policy makers, and clearer guidance for students and families (Helms, 2010). Those involved in the design and provision of education should be challenged to “detect, understand and dismantle exclusion” (Slee, 2012, p. 11). This thesis seeks to identify concerns in the provision of curriculum adjustments for students with disabilities that have resulted in their inability to access and participate on the same basis as their peers.

Conclusion

In summary, the requirement for reasonableness in relation to adjustments for students with disabilities is enshrined in both human rights conventions and legislation. For this study, the definition of reasonable from the DSE provides the lens through which the literature has been reviewed. While first clarified in the DSE, the concept of reasonable adjustments evolved from the requirement that schools positively discriminate so that students with disabilities enjoy the same educational opportunities as their peers. Noted benefits for providing curriculum adjustments include increased independence, enhanced self-esteem and increased opportunities for social interaction. Adjustments were also shown to benefit peers, staff, and the school. Also discussed was the importance of maintaining the integrity of subjects and courses. This extends the notion that there is a limit to reasonableness. Schools are not required to provide unreasonable adjustments.
The review of literature suggests that there are some practical concerns in the application of the concept of reasonableness. The variances in definitions of disability across education jurisdictions, as well as an understanding of how the disability impacts learning, are both noted issues. The review of literature also found concerns surrounding perceptions of how a disability impacts, and in some cases may limit, curricula choices. Despite both human rights and legislative calls for student voice to be heard, the review of literature suggests students are rarely consulted. Their associates, typically their parents, also express concerns about opportunities for meaningful participation in educational decisions. The costs of providing adjustments extended beyond simple financial concerns. The detriment to the student, their peers, staff and the school were all noted concerns. Concerns were also noted about how a school would measure any hardship associated with providing an adjustment.

An overview of curriculum and educational practices in Australia offers some pointers into potential areas of litigation that include the quality of curriculum provision, the assessment practices, and the tools used to record adjustments (particularly IEPs). The chapter concludes with insights into the process for lodgement and determination of discrimination claims. The DSE definition of reasonable will now provide the lens through which judicial decisions will be examined in this thesis. Chapter Three provides an overview of the approach and methodology for this study, including discussion of how the judicial decisions were selected and analysed.
Chapter Three – A Method for Determining Reasonableness

The primary aim of this research was to determine why there are tensions in the provision of curriculum adjustments for Australian students with disabilities and then to determine what is reasonable. This chapter provides a detailed description of the method used in this study to address the following research sub-questions:

SQ1 What counts as a disability when determining adjustments to curriculum?

SQ2 Whose voice is heard when determining adjustments to curriculum?

SQ3 Whose interests are considered and how are these balanced when determining whether adjustments to curriculum are reasonable?

SQ4 How is academic integrity maintained while ensuring reasonable adjustments to curriculum?

In order to do this, the chapter provides an outline of the design of the study, detailed information on the selection of judicial decisions, the rationale for conducting this research as an ex post facto study, delimitations of the study, ethical considerations, the framework for artefact analysis, the techniques used to code data and leave an audit trail, the method for artefact analysis, and how trustworthiness was established.

Study Design

When conducting research, it is necessary to make explicit the nature of inquiry, epistemology, and the theoretical perspective taken; in turn, these inform choices of methodology and the specific research methods adopted (Gray, 2013). Figure 1 shows the research design and method adopted for this thesis. The rationale for the selected research design is detailed below:
Line of Inquiry

Qualitative research aims to capture and analyse individuals’ perspectives and experiences so as to gain a holistic understanding of a situation (Bell, 2010; Bloomberg & Volpe, 2008; Burns, 2000). Further, qualitative research is open-ended, inductive and understanding oriented (Blaikie, 2000; Creswell, 2005). Where little is already known about a problem, qualitative research relies on the organisation and analysis of data to find themes, patterns, categories and similarities (Cohen, et al., 2007). In the words of Bogdan and Biklen (2007, p. 6), qualitative researchers are “not putting together a puzzle, whose picture is already known. They are constructing a picture that takes shape as they collect and examine the parts”. The previous chapter both summarised what is already known on the central phenomenon and provided direction for data collection (Burns, 2000).

In this study, the data examined (i.e., transcripts of court and tribunal decisions) were text-based. A qualitative line of inquiry enabled deeper examination of these documents to gain a better understanding of the concept of reasonableness. Hatch (2002) proposed qualitative research emphasises particular characteristics including the prominence of participants’ perspectives or voices throughout the research as well as the detailed examination of artefacts related to the phenomena being investigated. As this research looks
for themes within the judicial decision in relation to perspectives of reasonableness, a qualitative line of inquiry was chosen as the most appropriate approach.

**Epistemology**

The epistemological stance chosen for this research is within a constructionist approach. Constructionism is an approach that enables learners (including researchers) to not only use personal experience to construct and reconstruct knowledge and their world, but to also explore how “knowledge is formed and transformed within specific contexts, shaped and expressed through different media, and processed in different people's minds” (Ackermann, 2001, p. 92). At the heart of a constructionist approach is the social interaction between human beings and their world, and the collective generation and transmission of this knowledge (Crotty, 1998). Qualitative researchers who adopt a constructionist epistemology equally position both scientific and non-scientific meanings, arguing these are “all constructions, and none is truly objective or generalisable” (Feast & Melles, 2010, Jun./Jul., p. 4). The issue of generalisability will be discussed in more detail in a later section of this chapter.

Constructionism, conceived by American mathematician and scientist Seymour Papert (1982), builds upon Piaget’s constructivist theory of learning and Vygotsky’s social constructivist theory. Dewey first promoted a constructivist notion of learning through doing (Bączkowska, 2010). Piaget’s constructivist theory (1952) maintained that children build knowledge from their interactions with their environment. Vygotsky’s social constructivist theory (1978) reasoned that knowledge is created initially in social contexts, and then students make meaning from this knowledge. This research explored how knowledge, in relation to the framework used to describe reasonableness in the DSE, was interpreted by those concerned with the education of students with disabilities.
Theoretical Perspective

The choice of theoretical perspective, or research paradigm, influences the interpretation of knowledge (Mackenzie & Knipe, 2006). One school of thought in qualitative research traditions is interpretivism (Ritchie, Lewis, Nicholls, & Ormston, 2013). Interpretivism is about interpreting and understanding an ever-changing world by studying a social phenomenon from within (Cohen & Manion, 1994; Crotty, 1998; Mertens, 2005; Swann & Pratt, 2003; Williamson, Schauder, Wright, & Stockfeld, 2002). This study both sought to explain the concept of reasonableness as it related to curriculum adjustments for students with disabilities, and to shed light on how various groups (i.e., educators, parents, students, expert witnesses, lawyers, judges and commissioners) interpreted reasonable. Given the centrality of individuals’ views in understanding the meaning of reasonableness, an interpretivist paradigm was the most appropriate choice (Creswell, 2003). Swann and Pratt (2003) found that interpretivism assisted in understanding and interpreting an issue within a specific context although Glesne (1999) elaborated it may not be possible to generalise or predict findings. This is particularly relevant when examining allegations of discrimination, as each case turns on its own facts. For this reason, it is not possible to broadly generalise a judge’s or commissioner’s decision.

Methodology

Methodology is the “collection of methods or rules by which a particular piece of research is undertaken” as well as the “principles, theories and values that underpin a particular approach to research” (Somekh & Lewin, 2005, p. 346). It is the:

- theory about the research methods that will be used. It’s theory which underpins the decisions made about the researcher’s range of choices of – for example – what to study; who to study; where to study; which research tradition to work with; what knowledges to draw upon; what to include and
exclude, foreground and background and the consequences of this decision;
what counts as data and why; relational and ethical concerns; and how to
represent the findings/how to write the research. (Thompson, 2013, para. 9)

The qualitative methodology chosen for this thesis was artefact analysis using hermeneutics (Swann & Pratt, 2003).

Examining artefacts, in this study judicial decisions from Australian discrimination cases involving school-aged students, provided a rich source of data to help understand a central research question (Given, 2008). The lens used to examine these artefacts was the explanation of reasonableness published in the DSE. These published decisions outlined the reasoning used by judges and commissioners to determine reasonableness in relation to curriculum adjustments. A legal artefact analysis in educational research is unusual, but researchers have studied other text-based materials such as student report cards, teachers’ lesson plans, school websites and newsletters (Hatch, 2002). Details on how these artefacts were analysed is provided later in this Chapter.

Artefact analysis sits within the broad approach known as Hermeneutics. Hermeneutics involves a detailed examination of texts, the context in which they were generated, and their intent, to derive a deeper understanding of an issue (Bloomberg & Volpe, 2008; Crotty, 1998). Emerging in the seventeenth century as an approach to the interpretation of scripture, hermeneutics has evolved as an interpretive methodology used by a broad range of scholars wanting to better understand how language, not only in written text, helped shape understanding, situations and practices (Crotty, 1998).

Method

Judicial decisions unpack the obligations expressed in legislation (Walker & Daves, 2010). Reporting of judicial reasoning and decisions falls under the umbrella of forensic
linguistics. This term has been used since the 1980s to describe the interaction between language and law (Johnson & Coulthard, 2010; Newman, 2011; Olsson, 2004; Shuy, 2001). Examples of ways in which Australian authors have used forensic linguistic methodology include articles on the analysis of police interview records (Eades, 2013; Nakane, 2011); the wording of police cautions (Gibbons); interview barriers and linguistic challenges for second language speakers (Eades, 2003, 2010; Fraser, 2009; Powell, 2000); and handwriting analysis (Varney, 1997).

The use of a forensic linguistic method by education researchers allows authors to analyse court transcripts to discuss education matters. Some education discrimination matters for students with particular disability attributes have been analysed using a forensic linguistic approach, as shown in Table 4:

**Table 4. Forensic Linguistic Analysis of Discrimination Matters**

<table>
<thead>
<tr>
<th>Attribute</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Physical impairments</td>
<td>(Moran, 2004; Rees, et al., 2008)</td>
</tr>
<tr>
<td>Hearing impairments</td>
<td>(Bastin, et al., 2008; Dickson, 2005, 2006a; Keeffe, 2004a; Komesaroff, 2004a, 2007; Rees, et al., 2008; Snoddon, 2009; Tucker, 1995)</td>
</tr>
</tbody>
</table>

In each of these articles, the authors have analysed specific statements made by claimants and defendants, expert witnesses, judges, or commissioners that were recorded in a judicial decision. Conducting a forensic linguistic analysis of judgments in education discrimination claims shed light on what adjustments judges and commissioners considered reasonable. The analysis also revealed the types of adjustments, perhaps highly valued by parents and/or
schools, not considered reasonable. The following section outlines the process used to select the judicial decisions for examination.

**Selection of Judicial Decisions**

As outlined in the previous section, judicial decisions were chosen to examine the concept of reasonableness in relation to adjustments to curriculum for students with disabilities. Since the introduction of anti-discrimination legislation in Australia, continued tensions exist between parents of school-aged children and education providers in relation to provisions for students with disabilities. While the majority of these allegations are settled via mediation, some cases progress to either an anti-discrimination Commission hearing or a court case (Allen, 2009). While the AHRC provides de-identified summaries of conciliated complaints, there is insufficient detailed publication of mediated cases so as to provide a more thorough understanding of the definition of reasonableness. Komesaroff (2004b) claimed the problem with cases settled out of court, or through mediation, is that they are often settled “without admission of liability, avoid legal precedent and impose a requirement of confidentiality” (p. 3). Since the introduction of Australian anti-discrimination legislation until September 2014, 84 students and/or their families have proceeded with claims of discrimination across a total of 134 hearings. A full list of the cases is provided in Appendix A.

Copies of 134 judicial decisions were retrieved from the online database published by the *Australasian Legal Information Institutes* (AustLII). The AustLII website, administered by the Faculties of Law from both the University of Technology Sydney and the University of New South Wales, is a free-access online resource providing access to a broad range of legal materials including legislation, treaties, court and tribunal decisions, royal commission and law reform reports, and law journals (Australasian Legal Information Institute, n.d.). To
locate any judicial decisions, on a monthly basis between February 2011 and September 2014, a search was conducted of the AustLII website using the terms “school or college or education” and “disability” and “discrimination”. The final search, conducted on 30 September 2014 revealed 1950 results. These results were then filtered to identify reported decisions from discrimination proceedings as opposed to the other legislative materials published on the AustLII site. In addition, these searches were cross-checked by reviewing all Australian Federal, State and Territory court and tribunal sites using the same search processes. Media reports were also searched. Media articles were received via email by means of a Google alert using the same search terms. This frequently provided early identification of cases under determination. A descriptive analysis of the characteristics of these cases is presented in Chapter Four.

**Ex Post Facto Application of the Definition of Reasonable**

The framework used to ensure the reasonableness of a proposed adjustment, as outlined in the DSE, was provided in the previous chapter (see p. 34). This framework came into effect with the passing of the DSE in 2005. In summary, to determine reasonableness, consideration must be given to student/associate voice, the nature of the student’s disability, the costs versus benefits of providing the adjustment, and the maintenance of academic integrity. Some of the judicial decisions selected for this research pre-date the DSE. It is important to note, however, those education authorities in earlier cases still had both an obligation to not discriminate against students with disabilities as well as to increase access to education. For this reason, an ex post facto (after the facts) examination is helpful for analysing data that were created in the past in order to understand and inform future practice (Cohen, et al., 2007). From an interpretivist paradigm, shining a light on all the discrimination decisions to-date, including those decided prior to the enactment of the DSE, provided a larger data set with which to speculate about the scope of reasonable adjustments
to curriculum and also to consider the impact of the DSE in clarifying policy implementation and judicial determination of a reasonable adjustment.

The next section details the delimitations chosen to further narrow the scope of this study.

**Study Delimitations**

To better understand what is considered a reasonable adjustment in relation to curriculum for Australian school-aged students, the following delimitations served as boundaries to narrow the scope of this study (Bloomberg & Volpe, 2008). First, while “reasonable adjustments” is a concept that has been tested in other fields such as employment, this thesis focused on its application in education. Second, the forensic linguistic analysis only covered cases that discussed adjustments to curriculum. As outlined in Chapter One, many of the decided cases argued other key concepts: e.g., enrolment, responses to complex behaviour, provision of support services, and access to services. These concepts, while important, did not address issues of curriculum that were the focus for this thesis. Curriculum was chosen as the focus area as research in relation to adjustments to curriculum is limited, and it was possible to make an original contribution to the field by analysing judicial decision-making in relation to curriculum. Chapter Four outlines those cases that were excluded because they contained no information relating to adjustments to curriculum. Third, this thesis focused on cases that involve school-aged students only and did not extend to children with disabilities in education services prior to school age, after school care, or to students in the higher education sector. Fourth, this research was not limited to any particular type of disability. If the student met the Federal definition of disability, as outlined in the legislation, and was eligible to bring forward a discrimination claim, then their case was considered for analysis. This meant analysed cases involved students with learning difficulties, health
conditions, and other disabilities generally not given additional funding by schools. Fifth, the research was limited to cases decided on or before 30 September, 2014. Published judicial decisions after this date, and subsequent appeals of decided cases, were not considered.

In the previous chapter, the concepts of direct and indirect discrimination were discussed. Waddington and Hendriks (2002) differentiated between reasonable adjustments versus direct and indirect discrimination. They claimed reasonable adjustments should be viewed as discrimination based on the assessment of an individual’s need, whereas both direct and indirect discrimination require a comparison between how others without a disability would have been treated in similar circumstances. For this reason, the focus of this thesis is on examining reasonable adjustments, and not specifically on direct or indirect discrimination or issues of an appropriate comparator, except where testimony formed part of a cost-benefit argument. In this way, data were reorganised to fill the following parameters for analysis. In summary, the key delimitations were education cases, decided on or before 30 September 2014, involving Australian school-aged students with disabilities where the provision of reasonable adjustments to curriculum was discussed during judicial reasoning.

**Ethical Considerations**

While this study follows a hermeneutic line of inquiry, ethical consideration also needed to be given to the identities of those named in the published judicial decisions. There is no doubt that the pursuit of a legal remedy to resolve a dispute is stressful on all parties involved, and sensitivity has been shown in the reporting of these published decisions so as to minimise any further distress for all concerned. In cases where, as part of the determination, specific details were to remain confidential, these details have not been disclosed in this study. The only information disclosed in relation to each published decision is that which can
be found publicly on the AustLII website, and any specific reference to a party involved in a court case has been cited appropriately.

**Framework for Artefact Analysis**

As mentioned previously, since the introduction of Australian anti-discrimination legislation until September 2014, 84 students and/or their families have proceeded with claims of discrimination across a total of 134 hearings. The judicial decisions from these 134 hearings were the artefacts used for analysis. Information sought related to the timespan of discrimination claims, the distribution of decisions across States and Territories, the education settings and sectors attended by the students who brought forward the claims, their level of schooling, and the nature of their disabilities. The findings in relation to demographic information from these judicial decisions are presented in Chapter Four.

The DSE (2005, section 3.4.2) outlined a list of considerations judges take into account when assessing whether an adjustment is reasonable, and this list provided the conceptual framework for this artefact analysis. The key statement from the DSE was that adjustments were considered reasonable if they balanced “the interests of all parties affected” (Section 3.4.1). To better understand the balance of interest statement, the remainder of the reasonableness framework guided this investigation. Section 3.4.2a of the DSE requires schools to consider the nature of the student’s disability when proposing an adjustment. This statement formed the basis for the first research sub-question: What counted as a disability when determining adjustments to curriculum? The judicial decisions were interrogated to determine how disability was defined. Each of the 134 cases was read, and any mention of disability was highlighted for more detailed analysis. The details of this analysis are presented in Chapter Five.
Section 3.4.2b also requires schools to consult with the student, or their associate, when adjustments are being considered. This statement formed the basis for the second research sub-question: Whose voice was heard when determining adjustments to curriculum? While the capacity of the individual student, or their advocate, may differ in their ability to have a voice (e.g., based on their cognition, language abilities, understanding of the education system, confidence), it was possible to examine judicial decisions to learn how student/associate voice was supported, and to identify issues of broader relevance. Highlighted in each of the 134 cases were any comments in relation to curriculum made by the student, or their associates (parents/carers), or expert witnesses (brought forward by the student or their parents/carers). Findings from this analysis are presented in Chapter Six.

Sections 3.4.2c-e of the DSE calls for consideration of the effect of providing the adjustment on the student and the broader community. Benefits were defined as the opportunities provided to the student to show they have met the learning outcome, the access provided to enable participation in the course or program, and the increased independence the student may gain. Also considered was the possible benefit of providing that adjustment for the other students in the class. The DSE made clear, however, that there is no expectation on schools to make unreasonable adjustments, and consideration must be given to the costs of the proposed adjustments, both financial and human. This included, but was not limited to, decreased independence for the student, inability to achieve the outcome despite the provision of the adjustment, impact on the learning of peers, and impact on staff. Also considered was the hardship experienced in the provision of the adjustment (on the student, their peers, the teacher, and the wider school community) and whether this hardship was justifiable, recognising the provision of an adjustment naturally comes at a cost, whether to person or financial. This formed the basis for the third research sub-question: Whose interests were considered and how were these balanced when determining whether adjustments to
curriculum are reasonable? Each of the 134 judicial decisions was interrogated to find reference to costs versus benefits argument, and this analysis is presented in Chapter Seven.

Finally, the definition of reasonable as outlined in Section 3.4.3 obligated education providers to ensure the academic requirements of a subject or course are not diminished through the provision of an adjustment. It further mandated that students may only be credentialed for completion of a course of study if they demonstrate the “appropriate knowledge, experience and expertise implicit in the holding of that particular award” (s 3.4.3). This formed the basis for the final research sub-question: How was academic integrity maintained while ensuring reasonable adjustments to curriculum? Cases were analysed and issues of academic integrity were highlighted. This analysis is presented in Chapter Eight.

Data Coding and Audit Trail

An objective of disability discrimination legislation is to eliminate discrimination. Thornton (2009) highlighted that it is judges and commissioners who take this abstract objective and meaningfully interpret it as they examine the set of facts in each case. The analysis used a deductive coding approach (Miles & Huberman, 1994a). This approach was adopted because the conceptual framework for this study was the DSE description of reasonableness, and a deductive coding approach enabled the findings to be classified against the aspects that must be considered in determining the reasonableness of adjustments. These aspects provided obvious themes to explore each judicial decision.

For this study, each of the 134 judicial decisions was printed and then manually coded using the framework outlined in the previous section. After extracting demographic information, the coding process involved two sweeps of each judicial decision. On the first sweep of each artefact, as recommended by Miles and Huberman (1994b), the coding commenced with a provisional start list of themes. This provisional list, found in Appendix
B, were disability, voice, benefits to effect of the adjustment, costs versus benefits, unjustifiable hardship, and academic integrity. The numerical code matched the chapter and section in this thesis where the results would be displayed. The numerical codes assisted in providing an audit trail, especially in sections of text where multiple codes were assigned to the same text (e.g., student voice as well as benefit to the student).

On the second sweep of each judicial decision, meaningful comments were then recorded in the margins of each case, leading to the development of sub-themes, presented in Table 5:

**Table 5. Themes and Sub-Themes for Coding**

<table>
<thead>
<tr>
<th>Sub-Question</th>
<th>Theme</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>SQ 1</td>
<td>Disability</td>
<td>5.1</td>
</tr>
<tr>
<td></td>
<td>Disability diagnosis</td>
<td>5.1.1</td>
</tr>
<tr>
<td></td>
<td>Adjustments to alleviate the impact of disability</td>
<td>5.1.2</td>
</tr>
<tr>
<td>SQ2</td>
<td>Voice</td>
<td>6.2</td>
</tr>
<tr>
<td></td>
<td>Student View</td>
<td>6.2.1</td>
</tr>
<tr>
<td></td>
<td>Complainants and respondents held differing views about the reasonableness of adjustments</td>
<td>6.2.2</td>
</tr>
<tr>
<td></td>
<td>Complainant representation</td>
<td>6.2.3</td>
</tr>
<tr>
<td>SQ3</td>
<td>Effect of the adjustment</td>
<td>7.1</td>
</tr>
<tr>
<td></td>
<td>Effect of the adjustment on the student</td>
<td>7.1.1</td>
</tr>
<tr>
<td></td>
<td>Effect of the adjustment on others</td>
<td>7.1.2</td>
</tr>
<tr>
<td></td>
<td>Impact of behaviour on learning</td>
<td>7.1.3</td>
</tr>
<tr>
<td></td>
<td>Costs versus benefits</td>
<td>7.2</td>
</tr>
<tr>
<td></td>
<td>Unjustifiable Hardship</td>
<td>7.3</td>
</tr>
<tr>
<td>SQ4</td>
<td>Academic integrity</td>
<td>8.1</td>
</tr>
</tbody>
</table>
Establishing Trustworthiness

The trustworthiness of a thesis starts with whether the author is qualified to add a unique contribution to the field, the subjectivity and objectivity in the design of the study, the limitations that have been identified and the process used to address these, the dependability of the research, and the extent to which the reader might transfer what has been learnt from this study to future work. An overview of my credentials was presented in Chapter One. This section outlines the efforts undertaken to ensure the trustworthiness of this research and to control any potential bias (Bloomberg & Volpe, 2008).

Subjectivity and objectivity. Wolcott (1994) emphasised the importance of subjectivity for qualitative researchers during description, analysis, and interpretation of findings. As an academic, and as a family member, I have a commitment towards the inclusion of people with disabilities, and believe disabling barriers in education threaten the capacity for full inclusion. It is difficult to read judicial decisions without becoming affected by some of the stories, but as a researcher using an hermeneutic line of inquiry, it is critical that my beliefs or emphases do not bias the shape of the study or the reporting of the data (Baszanger & Dodier, 2004). To address this limitation, the proposed research questions were scrutinised by my supervisory team. Second, no theoretical lens was used as a filter to examine the literature. Instead, this is an artefact analysis, using only the framework for determining reasonableness, as published in the DSE, to interrogate the artefacts. This approach was selected to ensure the findings would be untainted and unaffected, as much as possible, by my beliefs or choice of a theoretical lens (Gordon & Garcia, 2011; Minow, 1990). Silverman (2004) proposed that it is possible for researchers to skew their findings through the selection of texts. To understand the central phenomenon, the judicial decisions provide the broadest possible explanation of what is considered reasonable in relation to curriculum adjustments for Australian school-aged students.
Limitations of the study. There is a limitation in trying to seek guidance on the meaning of reasonableness by reviewing decided discrimination cases. Every decided claim turns on a unique set of facts that are individualised to that student and how their disability impacts on their learning (Dickson, 2012a). For this reason, decided cases usually do not offer precedents that guide future claims of discrimination.

Trustworthiness can be demonstrated by advancing limitations of the research; that is, by being upfront with potential problems or weaknesses of the study and advising how these were addressed (Creswell, 2005; Glesne, 1999). One research limitation of this study is the reliance on web-based materials to conduct this research. Over the course of writing this thesis, updates to materials have occurred. This research contains web material as published 30 September 2014. To ensure trustworthiness of the literature sourced, all legislation and judicial decisions were downloaded from a reputable site. Only the publicly available judicial decision for each case was examined; the limited funds made available to part-time postgraduate students precluded access to the full transcripts for each of the 134 hearings on financial grounds.

Dependability. Burns (2000) maintained dependability is a synonym for reliability that broadly means the capacity of a researcher to conduct the research tomorrow or next week or next year and still achieve the same findings. The judicial decisions were coded using the framework for determining reasonableness, as document in the DSE, informing the coding scheme outlined in Table 5 (see p. 75). This scheme was then used to interrogate the data, ensuring the same information would be found if the data were to be re-explored.

Transferability. Transferability referred not only to the ability to apply the findings from research to a wider population, but also to the capacity of future researchers to replicate the design of the study to future projects. A researcher wanting to replicate this research, or
explore the findings in greater detail, would be able to locate the judicial decisions used in this hermeneutic inquiry by following the details left in the “audit trail” in Table 5 (p. 75) (Rumrill Jr & Cook, 2001). The data were then coded using the DSE framework for determining reasonableness, a process that can easily be replicated if analysing future judicial decisions.

Conclusion

This chapter provided a summary of the constructionist epistemology and qualitative approach used to investigate the issue of reasonable adjustments to curriculum for Australian students with disabilities. Following an interpretive paradigm, a hermeneutic line of inquiry using artefact analysis guided this study. Also outlined was the method used in this study to select the judicial decisions (artefacts analysed in this study) from the AustLII website. The science of Forensic Linguistics, that is, the process for analysing the language of the law, was explained. In this case, forensic linguistics involved coding judicial decisions based on the framework for assessing reasonable adjustments, as outlined in Section 3.4.2 of the DSE. Delimitations were identified that assisted in narrowing the scope of the study, and ethical consideration given to those involved in litigation so as to prevent them from suffering further distress. Issues of trustworthiness, including limitations of the study, have been acknowledged and addressed. The remaining chapters document the findings from this investigation.
Chapter Four – Patterns in Litigation

From the introduction of Federal anti-discrimination legislation in 1992 until September 2014, there were 134 judicial findings from cases involving 84 Australian school-aged students with disabilities. This chapter explores patterns in the judicial findings from these 134 cases, especially in relation to the context in which each case occurred. It further explores whether adjustments to curriculum were a source of tension within the judicial findings from these cases, and what adjustments were considered reasonable. Having an understanding of the context in which each case occurred could reveal possible patterns in litigation. While each discrimination case turns on its own facts, research that reveals patterns in litigations has two benefits: first, it allows educators to improve practice for students with disabilities, and second, it can decrease the risk of future litigation (Leonard, 2007).

The analysis of these 134 judicial findings commences by noting the date each case was decided. Noting the date of each decision shows whether there has been an escalation in the number of education discrimination cases involving Australian school-aged students with disabilities. Increases in litigation could be a sign of student or parent dissatisfaction, a need for systemic changes that enable schools to better accommodate students with disabilities, as well as increased community knowledge and awareness about litigation as an option to resolve disputes (Zirkel, 2011).

Next, the analysis continues by revealing in which Australian State or Territory the student attended school. Judicial decisions are examined to determine the type of education setting involved (mainstream, special, etc.), the sector of schooling (State, Catholic, Independent), and the level of schooling (primary or secondary). Analysing this demographic information provided a better understanding of patterns showing where and when disputes occur. In addition, noting the student’s disability category helped to determine whether a
particular category might increase the risk of litigation or whether there is a correlation between the complexity of an individual’s needs and the tensions surrounding adjustments to curriculum.

The search technique, outlined in Chapter Three, identified 134 judicial decisions from discrimination matters involving 84 school-aged students with disabilities. Each judicial decision was then examined to determine whether adjustments to curriculum were discussed. Following this, cases where adjustments to curriculum were not discussed were eliminated from any further analysis.

This chapter concludes with a structure for presenting the analysis of artefacts, using the DSE as the conceptual framework, and the four research sub-questions as a guide.

**Timeline of Decisions**

In the course of reviewing the literature on education discrimination cases for this thesis, no publications were found that presented information on Australian litigation trends over time. It was, therefore, not possible to state whether parents were increasingly resorting to litigation to resolve disputes. Figure 2 shows the timeline of Australian reported judicial decisions with a trend line automatically generated from Microsoft Excel:
In relation to Figure 2 there appeared to be both an upward trend in litigation as well as a spike in 2005 and 2006. Australia has had only a small number of litigation cases, so any increase looks significant when graphed but is not necessarily statistically significant. In fact, removing the data from 1992 – 1994, it could be argued that Australian litigation trends have been reasonably stable over time. This spike in 2005-2006 could be related to the introduction of the DSE, the additional protection afforded by the DSE, and an increase in parents’ understanding of their child’s educational rights. If the introduction of the DSE was the reason for the spike, of interest is the decline in litigation in 2008 – 2010. It might also be true that the DSE had not been in place for long enough to flow through to litigation in 2005, so the reason for this spike remains unclear. The cases during that timeframe were distributed across Australia, across disability groups and, apart from the case of Hurst and Devlin, each involved a single complainant. Future research needs to monitor the number of cases over time to establish possible trends and factors that may influence the rate of litigation.
This upward trend must be treated cautiously as it may also be explained by the increased enrolments of students with disabilities in mainstream schools over this same timeframe. Many mainstream teachers do not feel adequately prepared to design a course of study that can meet the needs of students with disabilities (Costello & Boyle, 2013; Florian, 2014). As evidence of the trend towards inclusive education, in New South Wales, in 1997, approximately 5000 students with disabilities were educated in mainstream schools; by 2007, this had increased to 26,154 students, an increase of 523% (Australian Education Union, 2010). Discussion of enrolment patterns in mainstream versus special schools are presented later in this chapter.

Decisions by State/Territory

The second stage of reviewing the demographic data contained in each judicial decision was to note the State or Territory in which each student was enrolled. The purpose of this analysis was to note whether litigation was higher in any particular location across Australia. The distribution of judicial decisions across Australian States and Territories is shown in Figure 3:

![Figure 3. Distribution of Reported Decisions by State/Territory.](image-url)
The figure shows that the greatest number of discrimination decisions involves students educated in the States of Victoria, followed by New South Wales and then Queensland. As these three States are Australia’s most populous States, it is not surprising that they have the largest number of cases. Victoria’s figure is significantly higher for one key reason. In Victoria, there were two cases: *Bacon and Ors* and *Bolton*. *Bacon and Ors* was a special complaint involving eight students. The case of *Bolton* involved ten students. These two cases account for 18 of the 41 students in Victoria whose families have proceeded with litigation on an anti-discrimination matter. Both the cases of Bacon and Bolton involved the same school, and were heard around the same time on the same issue, with one heard in an antidiscrimination tribunal and the other a Supreme Court. If these 18 students, all seeking a judicial decision on the same matter, were counted as one litigation case, the number of litigation cases for the State of Victoria would be similar to those heard in New South Wales and Queensland.

**Decisions by Education Setting**

As stated earlier, the 134 decisions that have been made were in relation to claims brought forward by 84 Australian school-aged students with disabilities. Figure 4 shows the type of education setting in which these students were enrolled:
From the diagram it is clear that almost six in every ten decisions involved a student enrolled in a mainstream setting. For some of these students, this may mean they were educated in a classroom alongside their same aged peers, with or without additional resourcing and supports. For others, this may mean that they were educated in a special unit located in the grounds of a mainstream school, but taught alongside peers who also had disabilities, by a teacher who may have been a trained special educator. These variations reflect how differing Australian education jurisdictions define inclusive education (Forlin, Chambers, Loreman, Deppeler, & Sharma, 2013). As discussed in Chapter Two, mainstream teachers are frequently untrained in meeting the needs of students with disabilities. This may be a contributing factor to the amount of litigation involving these settings (Costello & Boyle, 2013; Florian, 2014).

Figure 5 shows the breakdown of decisions based on whether the student was enrolled in the Government (State) or non-Government (Catholic or Independent) sectors, noting 88% of all reported decisions involved a student enrolled in State schools:
As shown in Figure 6 however, the current proportion of students with disabilities enrolled in Government schools is 77 percent, compared to only 23 percent of non-Government school enrolments (Australian Government [Productivity Commission], 2014):

This leads to the question as to why there might be more cases in the Government sector relative to student enrolment. The Australian Education Union (2010), established to
represent the needs of those working in the Government sector, concluded that this is because the funding formula used to resource the non-Government sector, as well as other funding streams such as school fees paid by parents, resulted in non-Government schools having more funds to spend on the education of students with disabilities than are provided to their colleagues in the State sector. The Union further proposed the wider range of services available in the Government sector, including support classes or unit and specialist schools, meant that the Government sector typically enrolled students with more complex disabilities than those typically enrolled by Catholic or Independent schools. There is no evidence to suggest that the more complex a student’s needs, the greater the risk of litigation. This is worthy of additional monitoring because, if this is the case, it could be concluded that the Government school sector could be exposed to greater litigation risk given they accept students with more complex needs.

The next demographic information extracted from the 134 cases related to level of schooling at the time of the alleged discriminatory act. As indicated in Figure 7, 32% of complainants were of primary age, and 42% of secondary age. This difference is not particularly large especially when taken into account the cases of Bolton and Bacon mentioner previously. These two cases alone account for 18 of the 41 secondary students. The claims listed as primary/secondary (12%) represent those complainants whose claim spanned both their primary and secondary education.
Decisions by Disability Diagnosis

The reported decisions for each of the 84 students were further examined to determine the disability of the complainants. Figure 8 shows that the greatest proportion of complainants (54%) were those with intellectual and those with multiple disability diagnoses, each accounting for 27% of cases. Wen (2009) found that over half of all Australians who identify as having a disability actually have a combination of two or more disabilities, and that those with multiple disabilities frequently have higher support needs than those with single impairments. Wen also found that school age students who had multiple disabilities that included an intellectual impairment were more likely to either have restrictions placed on their education, or require a wider range of adjustments. The fact that students with intellectual and multiple disabilities account for the highest proportion of discrimination litigation is unsurprising given these cohorts of learners require the greatest breadth and depth of educational adjustments (Rosengard, Laing, Ridley, & Hunter, 2007).
Interestingly, while there were some decisions involving students with multiple impairments that included a vision impairment (mainly cortical vision impairment related to cerebral palsy), there were no judicial decisions involving students solely with vision impairments. It is unclear why there has been limited litigation in this area. Students with hearing impairment comprised 8% of judicial decisions. As both hearing and vision are sensory impairments, both requiring environmental adjustments, adjustments to the way content is presented and assessed, as well as access to specialised equipment and materials, the reasons why students with vision impairment are not represented within judicial decisions are worthy of further investigation.

Also of interest was the low percentage (2%) of decisions involving students with learning disabilities. Around 10-16% of Australian students have a learning disability (Learning Difficulties Australia, 2015), making this group of learners the largest cohort of learners.
students with disabilities in Australian schools. There may be a number of explanations for the low percentage of decided claims within this cohort of students. First, parents of children with learning disabilities may be unaware that the definition of disability in Australian anti-discrimination legislation extended to include their child and, therefore, they are not using litigation as a vehicle for ensuring their child’s needs are met. Second, claims of discrimination for this cohort of students may be more likely to be settled at mediation. To test this possible explanation, data held on the AHRC Conciliation Register, which published summaries of conciliated discrimination claims between 2009 and 2011 were examined. Of the 42 cases conciliated by the Commission, 9% were students who had a learning disability. Conciliated cases involving students with multiple disabilities represented 31% of all claims within this timeframe, and those involving students with ASD represented 29% of claims. It therefore seemed unlikely that the low rate of judicial decisions involving students with learning disabilities could be attributed to higher rates of conciliated outcomes. A third possible reason for the low representation of students with learning disabilities in litigation claims may be that schools are more adept at accommodating students with learning disabilities. Alternatively, it may be a combination of a number of these reasons, but this finding indicated that further research is needed to explain these results.

**Decisions Relating to Curriculum Matters**

Upon commencement of this research, a small number of the 84 individual claims had received national media attention (specifically the cases of Hurst-Devlin, Clarke, Finney, and Purvis) and a few other cases have been reported in academic journals. The specific nature of many of these complaints has not been broadly reported. The final stage in the demographic scan of each decision was to determine whether tensions relating to curriculum provision were discussed. After reading all 134 decisions involving 84 students with disabilities, some cases were excluded, as detailed in Appendix C. The excluded cases did not contain any judicial
reasoning in relation to adjustments to curriculum. These cases focused on harassment and victimisation, transportation concerns, physical access concerns, privacy and disclosure matters, after-school care, and enrolment concerns. Some of the decisions related to interlocutory (interim) hearings, where curriculum tensions were discussed, however no detail about these tensions were disclosed in the judicial decision. As a result, the remainder of this thesis will examine the 92 judicial decisions relating to 54 Australian school-aged students.

**Structure to Present the Artefact Analysis**

After identifying that the 92 cases relating to 54 Australian students contained discussion that related to adjustments to their curriculum, the next stage was to identify an appropriate structure to present the artefact analysis. As stated in Chapter Three, the analysis followed a deductive coding approach. After each artefact was read, provisional codes were manually assigned to each judicial decision. These codes are documented Appendix B. Then, on the second sweep of each decision, detailed comments were recorded in the margins of each case, leading to the development of sub-themes. These sub-themes allowed for the judicial decisions to be grouped so that cases that contained discussion of similar tensions could be compared.

Early in the writing process for this thesis, a decision was made to report the results of the analysis of the judicial decisions across four separate chapters, using the DSE description of reasonableness as the conceptual framework. Table 6 provides an overview of the focus for each chapter:
Table 6. Chapter Focus for Data Analysis

<table>
<thead>
<tr>
<th>Chapter</th>
<th>DSE quote as conceptual framework</th>
<th>Research sub-question</th>
</tr>
</thead>
<tbody>
<tr>
<td>Five</td>
<td>In assessing whether a particular adjustment for a student is reasonable, regard should be had to all the relevant circumstances and interests, including the following:</td>
<td>What counts as a disability when determining adjustments to curriculum?</td>
</tr>
<tr>
<td>Six</td>
<td>the student’s disability;</td>
<td>Whose voice is heard when determining adjustments to curriculum?</td>
</tr>
</tbody>
</table>
| Seven   | the effects of the adjustment on the student, including the effect of the student’s:  
- ability to achieve learning outcomes; and  
- ability to participate in courses or programs; and  
- independence;  
the effect of the proposed adjustment on anyone else affected, including the education provider, staff and other students;  
the costs and benefits of making the adjustment; | Whose interests are considered and how are these balanced when determining whether adjustments to curriculum are reasonable? |
| Eight   | In assessing whether an adjustment to the course or program in which the student is enrolled, or proposes to be enrolled, is reasonable, the provider is entitled to maintain the academic requirements of the course or program, and other requirements or components that are inherent in or essential to its nature. | How is academic integrity maintained while ensuring reasonable adjustments to curriculum? |

Chapter Five presents the results in relation to any discussion about the disability diagnosis. Chapter Six reports the results of any discussion in relation to student or associate voice and how these were treated in judicial decisions. Chapter Seven presents the results in relation to whose interests were considered during the hearing, and how these were balanced.
during the judicial determination. Finally, Chapter Eight reports the results from discussion related to concerns regarding academic integrity.

As a result of adopting this structure, judicial decisions may appear in multiple chapters. Appendix D provides a guide to each discrimination complaint and the chapters in which results from the analysis can be located. In each chapter, the results have been displayed using a consistent formatting approach, adapted from that used in the *International Journal of Law and Education*, a key Australian and New Zealand publication on education law matters. Each result commenced with a context in which the alleged discrimination occurred, a summary of the allegation of how the law was breached, discussion of that allegation in light of the key issue examined, the judicial decision, and implications for practice.

**Findings**

Findings from this analysis of demographic information highlight some notable patterns in disability litigation involving Australian students. First, while there is an upward trend in the number of discrimination claims being brought forward annually, this could reflect the increasing enrolments of students with disabilities in mainstream education settings, or increasing naming or diagnosis of students with disabilities. To make a more definitive claim, researchers require clearer data on the enrolment provisions for students with disabilities across Australia. Education jurisdictions could mirror data provided by the *New South Wales Department of Education and Communities* (2012). These data show historical trends in enrolments and funding, enrolment figures broken down by disability type as well as education settings. Until these data are published for other Australian education jurisdictions, no definitive reason can be provided for the upward trend in litigation.
Litigation has mostly occurred in the States of New South Wales, Victoria and Queensland possibly due to these being Australia’s three most populous States. Additional research could be conducted annually comparing litigation claims for each State/Territory as a percentage of enrolment figures for total students with disabilities. This would allow a more definitive claim as to whether there was an upward trend in litigation. It would also provide clearer information on whether any particular education jurisdiction has a higher litigation rate than their enrolment of students with disabilities when compared across the nation and would assist in identifying factors contributing to litigation. Where litigation is higher in one jurisdiction, it can be examined to tease out what it is about that jurisdiction that may lead to higher rates of litigation compared to others.

The disproportionate amount of litigation involving students educated in the Government sector is worthy of further investigation. At present there has been no research undertaken to substantiate the claims made by the Australian Education Union that the Government sector has less funding and accepts students with more complex needs and that this poses a risk for greater litigation. A further area warranting research is the low levels of litigation involving Australian students who have vision impairment as well as those with learning difficulties. These low levels of litigation may reflect that students with these disabilities are satisfied with the adjustments provided to them, research from which would benefit other sets of learners. Low litigation levels might also reflect level of student/parent awareness of the disability legislation and its application, particularly for those with learning disabilities.

As noted above, as a result of this inquiry into the demographic information contained in each case, 30 judicial decisions have now been excluded from this study as they do not discuss matters relating to curriculum. The following chapters will now report the analysis of
the 92 cases brought forward by 54 Australian students with disabilities in relation to the identified research sub-questions for this thesis.
Chapter Five – What Counts as a Disability

In this Chapter, findings from the 54 families who raised issues of curriculum adjustment and relevant to the complainants’ disability diagnoses are the focus, thereby leading to a consideration of what counts as a disability. Schools must also consult with the student, or their associate; consider the effect of providing the adjustment on the student, their peers and the broader school community; and maintain the academic integrity of the curriculum. Later chapters outline the results of the analysis in relation to these other circumstances and interests. As a result of this analytical approach, cases may appear in multiple chapters. Appendix D provides a guide to each discrimination complaint and the chapters in which the results from the analysis can be located.

Section 3.4 of the DSE stated that when “assessing whether a particular adjustment for a student is reasonable, regard should be had to all the relevant circumstances and interests”. One noted circumstance is the student’s disability. This chapter considers that circumstance by presenting the analysis of judicial decision related to the question, “What counts as a disability when determining adjustments to curriculum?” The DSE define disability in relation to a person as:

(a) total or partial loss of the person’s bodily or mental functions; or
(b) total or partial loss of a part of the body; or
(c) the presence in the body of organisms causing disease or illness; or
(d) the presence in the body of organisms capable of causing disease or illness; or
(e) the malfunction, malformation or disfigurement of a part of the person’s body; or
(f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or

(g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

i. presently exists; or

ii. previously existed but no longer exists; or

iii. may exist in the future; or

iv. is imputed to a person.

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability. (ComLaw, 2015a, s. 4)

Using a forensic linguistic analysis of the 92 cases involving 54 students, each judicial decision was manually coded using the approach outlined in Chapter Three. Eleven judicial decisions were identified that discussed the student’s disability (see Table 7). In eight cases, education authorities sought clarification as to whether the complainant met the definition of disability as outlined in the DSE. In five cases, the complainants felt entitled to specific funding, programs, supports or adjustments to alleviate the effect of their disability.
Table 7. Coding Sweep for Chapter Five (Disability)

<table>
<thead>
<tr>
<th>Coding Sweep</th>
<th>Code</th>
<th>Cases</th>
<th>No. of complainants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Disability</td>
<td>P Purvis I obo BI (Pagura-Inglis) YB Sievwright Sutherland Chinchin T Mrs J obo AJ (Cowell) Turner AB</td>
<td>11</td>
</tr>
<tr>
<td>2</td>
<td>Disability diagnosis</td>
<td>P Purvis I obo BI (Pagura-Inglis) YB Sievwright Sutherland Chinchin AB</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Provision of specific adjustments</td>
<td>YB Sutherland T Mr J obo AJ (Cowell) Turner</td>
<td>5</td>
</tr>
</tbody>
</table>

The remainder of this Chapter will explore the findings from these specific discrimination cases in relation to disability diagnosis and provision of specific adjustments.

**Judicial Decisions Relating to Disability Diagnosis**

The following seven cases discussed tensions between schools and parents in relation to whether the student had a disability under Federal or State legislative definitions of disability. The first three judicial decisions each explored behaviour as a manifestation of disability. The fourth case examined, in fine detail, whether certain learning disabilities met the federal legislated definition of a disability. The fifth case explored tensions for a student who met the legislated criteria for disability, but was ineligible for additional resourcing from their education sector. Case six highlighted the challenges in making a correct diagnosis of a
cognitive impairment in a student who was non-verbal. The final case examined the responsibility of schools in meeting the educational needs of a student whose disability, at that time, was not diagnosed.

**P v. Minister for Education.**

*Context.* In 1997, the case of *P v. Minister for Education* was decided in the *Queensland Anti-Discrimination Tribunal* (QADT). Born in 1986, P was diagnosed with Down syndrome three weeks after his birth. From the ages of three to five, he attended an SEU to receive early intervention in preparation for school. Towards the end of 1991, unhappy with P’s personal progress and educational development, his mother withdrew him from the SEU program and enrolled him in a mainstream pre-school for two mornings per week. The following year, his mother increased his enrolment at this pre-school to five mornings per week. In 1993, P enrolled at Rasmussen State School in Year 1 and remained enrolled at this school until the end of Term 1, 1995. After a period of home schooling, the Education Department recommended cancelation of P’s enrolment at Rasmussen Primary School and further recommended his enrolment at Aitkenvale Special School. The Department also reduced the level of funding to P.

*Allegation of how the law was breached.* P’s mother alleged that the Minister for Education had discriminated against her son on three counts, by:

- reducing the level of funding available to support his enrolment in a mainstream primary school,
- deciding to exclude him from his mainstream school, and
- recommending his enrolment at a special school.

*Evidence presented in relation to disability.* This case explored whether behaviour should be viewed as a manifestation of a student’s disability (in P’s case, Down syndrome).
Throughout the hearing, concerns were raised about the complainant’s behaviour, including his personal safety, and the possible risk to other students and staff. It was alleged that P would not follow instructions, ran out of the classroom and out of the school grounds, threw himself on or off items, cut his hair, and removed all his clothes to play in the mud after rain. There were concerns about behaviours that posed a risk to others. These included throwing of furniture and other items, spitting, hitting, pulling the hair of other students, bumping into others during physical activities, and cutting the hair of his teacher aide. Finally, there were concerns about behaviour that impacted on the learning of others (screaming, the need for constant re-direction reducing teacher time available to other students, time out needed for toileting assistance, and also times where there was no teacher in the room as they were searching for P after he had left the classroom or school grounds).

As a result of these behavioural concerns, the respondent countered no discrimination had occurred, as the complainant had been treated the same as his peers. They argued any student who exhibited similar behaviours to those of the complainant would have been subject to disciplinary action that may have included exclusion.

Decision. Member Keim cautioned that the background facts provided in relation to P’s behaviour painted a negative picture of P, concentrating mainly on the difficulties arising from his impairment. He further advised these should not be concluded as the complete picture of P, who throughout the case was also described as “a loving and a loveable human being” (1997, p. 3). He determined that the communication and behavioural concerns noted by P’s teachers were, “inherently part of his particular impairment, comprised by the particular genetic and medical irregularity experienced by him which comes under the broader rubric, Down syndrome” (1997, p. 48). He concluded that P had been “treated differently on the basis of his impairment to the manner in which another child without his impairment was
or would have been treated in similar circumstances” (1997, p. 49). He also stated that it was important to determine whether the differential treatment given to P was unreasonable given the costs versus benefits of educating P in a mainstream classroom. These matters, and the final decision from this case, will be discussed in more detail in Chapter Seven.

**Implications.** The current definition of disability, outlined in the introduction to this chapter, was last amended in August 2009 (ComLaw, 2015b). This definition now contains this key phrase, “[T]o avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability” (ComLaw, 2015a, s. 4). The judicial decision for P pre-dates this amendment. Even at that time however, education authorities had both an obligation to not discriminate against students with disabilities, as well as to increase access to education. In making his determination, Member Keim ruled the communication and behavioural concerns noted by the school were a manifestation of the diagnosis of Down syndrome. This determination differs from that made in the following case.

**Alex Purvis on behalf of Daniel Hoggan v. The State of New South Wales.**

**Context.** Daniel Hoggan was born in 1984. Daniel had both an intellectual and vision impairment caused by severe encephalopathy at six months of age. As a result of this illness, there was bilateral damage to the frontal lobes of Daniel’s brain and to his vision. He also developed epilepsy that was later controlled by medication.

Daniel received limited early childhood education. In 1990, he commenced his primary education in a school that had a Support Unit. Daniel’s education program was mostly provided in the unit. In 1993, his foster parents withdrew him from that school. It was not until November 1994 that Daniel commenced a one-hour per day placement at a local primary school. In 1995, Daniel continued at the new school on a part-time basis in a Year 5/6
composite class, moving to a full-time enrolment from Term 2. He completed his primary education at this school in 1996.

During the 1996 school year, his foster parents attempted to enrol him in the local state high school. An application for enrolment was completed and case meetings were held to discuss his needs. Following observation of Daniel in his primary school, a committee was formed to discuss the enrolment application, and this committee recommended that Daniel should not be permitted to enrol. Instead, it was recommended he enrol at another high school that had a support unit. Daniel’s foster parents argued that Daniel’s behaviour had regressed when he attended a school with a unit, and felt it was in Daniel’s best interests to enrol in a mainstream school. Despite his foster parents’ views, the school formally declined enrolment. Daniel’s foster parents appealed the decision to the District Superintendent, and lodged a complaint with the Human Rights and Equal Opportunity Commission (HREOC).

A new principal was appointed to South Grafton High School in December 1996. At this time, the district superintendent wrote to the complainant advising Daniel’s application for enrolment would be reviewed by the new principal. In January 1997, the HREOC also convened a conciliation conference. The school advised the Commission that the enrolment decision was under review, with a recommendation to be made by February. The complainants advised the Commission that they would await pressing for an interim decision pending the revised enrolment decision.

A new committee was formed in February 1997 to determine the level of resourcing and support required to support Daniel’s enrolment. At this time, staff members of the teachers’ union called for the committee to ensure strict observation of integration guidelines provided by the NSW Teachers Federation. The Committee invited Daniel to attend the school for one day so that they could best assess his needs in situ. The Committee also met
with staff from the primary school, who reinforced the need for a strong orientation program, as well as the development of a welfare plan addressing Daniel’s requirement for physical assistance when changing clothes for physical education lessons, especially if using female teacher aides.

Mr Purvis wrote to the principal expressing his concern to the school that the orientation program may result in the school rejecting Daniel’s enrolment, but was willing for Daniel to attend an orientation upon confirmation his enrolment was accepted. The principal replied that Mr Purvis should consider it more as a trial day, designed to assess the supports and resources needed, and Mr Purvis agreed to proceed. Following this day, a lengthy report was prepared by the Committee documenting “issues, background and plans for the support and resources sought” (1999, section 2.5.2). This report was presented by the principal to a meeting of members of the union, who passed a motion to “defer a decision on whether to ‘approve’ Daniel’s enrolment” (1999, section 2.5.2). At a further meeting six days later, a motion was carried to reject the enrolment. The principal wrote to the staff, asking union members to clarify whether the rejection was being made on industrial or educational grounds. The union members passed a further motion, criticising the Department for requiring staff and the principal to make a decision on enrolment without sufficient information, and for agreeing to provide additional support to enable the enrolment when an alternative enrolment placement was available at a local high school that had a support unit.

At the end of February 1997, the teachers were informed that the principal had accepted Daniel’s enrolment. Over the next few weeks, the school installed an accessible toilet/bathroom for Daniel, based on the advice given by the primary staff. The complainants argued this was an unnecessary expense, with Daniel only having used the accessible primary toilet/bathroom on one occasion.
Daniel commenced his enrolment at South Grafton High School on 8 April 1997. On five separate occasions throughout that year Daniel was suspended from school. On December 3, the principal advised the Department of Community Services, that, due to health and safety concerns, he had recommended Daniel be excluded, and enrolled at the neighbouring state high school in their Special Education Unit (SEU).

**Allegation of how the law was breached.** The complainant alleged Daniel’s treatment during his enrolment at South Grafton State High School, his suspensions and his exclusion, constituted less favourable treatment pursuant to sections 5 and 22 of the *Disability Discrimination Act 1992*. The complainant lodged the following allegations:

- The school had failed to train Daniel’s teachers to meet his individual needs; and
- The school failed to seek advice from specialist trained staff in drafting behaviour plans.

**Evidence presented in relation to disability.** Just like the case of P, this case also explored whether behaviour should be viewed as a manifestation of a student’s disability. In this case, the disability was an acquired brain injury that caused an intellectual impairment. It was alleged Daniel’s intellectual disability manifested in behaviours such as “rocking, humming, swearing, and at time aggressive behaviour such as hitting or kicking” (1999, section 5.1). His behaviour was described by his neurologist as resulting from his severe brain injury manifesting in behaviour that was “disinhibited and uninhibited” (1999, section 2.2). She further attributed some of his behaviour, such as hitting others, to his inability to communicate his needs. His intellectual impairment was also considered to affect his “thought processes, [and] perceptions of reality” (1999, section 5.2). The neurologist also noted that Daniel “acts without view of consequences or an intent of the behaviour” (1999, section 2.2).
When Daniel was ten years of age, a clinical psychologist found it was not possible to assess his cognitive functioning as he was “not capable of the sustained attention and response to directions ... necessary for the validity requirements” (1999, section 2.7.3). At thirteen, a Department of Community Services psychologist found Daniel’s intellectual functioning to be significantly below that of same-aged peers, with his receptive language abilities equivalent to those of a child aged under three. When Daniel was fifteen, a different clinical psychologist assessed his cognitive functioning at a four-year old age range. His foster mother suggested that there was greater “value in seeing Daniel as a brain damaged child rather than a severely intellectually handicapped one” (1999, section 2.7.3).

The respondent criticised the complainant’s position, suggesting this view would mean that it did not matter “what Daniel does or how he behaves within the school community, he is not obliged to be part of the standards and practices of the school because of his disability and hence he is, in effect, allowed free range. If he injures another student or a member of staff that, apparently is cause for a moment of passing regret but, because of his disability, the school can do nothing about the matter” (1999, section 4.2).

**Decision.** Commissioner Innes found the teachers at Daniel’s school had a poor understanding of Daniel’s disabilities, and their impact in an educational environment and noted “this lack of understanding is a fundamental issue in this case” (1999, section 5.6). While there was detailed information held on file about Daniel’s disabilities, the principal acknowledged that most teachers had not read this information. The Commissioner cautioned the use of the term “violence” as a descriptor for Daniel’s behaviour, suggesting it was “not appropriate to describe the behaviour of a child whose behaviour stems from an illness which had caused an injury to his brain” (1999, section 5.13). He further suggested, “a policy intended as a behaviour management strategy in the welfare sense became a vehicle for a
form of punishment. By inflexibly following a behaviour-consequence approach, rather than attempting to manage the behaviour, Daniel’s behaviour (which was a symptom of his disability) was being punished” (1999, section 5.13). The Commissioner determined that “Daniel’s behaviour occurs as a result of his disability” (1999, section 6.2) and Daniel’s complaints were upheld with damages awarded. Further details about the nature of specific complaints are outlined in Chapters Six and Seven.

**Appeal.** In 2001, the Department appealed the decision to the Federal Court of Australia citing errors in law in a number of matters. The first matter was the determination on the grounds of disability. At that time, the *Disability Discrimination Act 1992* required a distinction to be made between a disability, and behaviour that might manifest from a disability. At the time of this hearing, being treated less favourably on the basis of that behaviour did not necessarily constitute less favourable treatment on the basis of disability. In Daniel’s case, Justice Emmett found that Daniel’s behaviour was not a manifestation of his disability (that is, there were other students with the same types of disabilities who did not behave in the same way as Daniel). Emmett J concluded “the Commission, in effect, treated the behaviour of the complainant as necessarily being a manifestation of his disability. However, while in the case of the complainant, his behaviour was in fact the result of or caused by his disability, that behaviour is not necessarily caused by or the result of a disability such as the disability of the complainant” (2001, para. 45). Emmett J found Commissioner Innes had misconstrued the Act, and on this matter ordered the original decision be set aside.

In 2002 Mr Purvis appealed Emmett’s decision, and the case was heard before Justices Spender, Gyles and Conti in the Full Federal Court. Each of the judges agreed with the finding by Emmett J that Daniel’s behaviour was a “consequence of the disability, rather than any part of the disability” (2002, para. 28). They also concurred that Commissioner Innes had
failed in applying the comparator test correctly explaining “a true comparison is to ask what had happened (or would happen) to players with a similar record” (2000, para. 34). The appeal was subsequently dismissed.

In 2002, proceedings in relation to this matter commenced in the High Court. One of the matters appealed was whether behaviour manifesting from a disability could be defined as a disability. Two of the High Court judges, McHugh and Kirby JJ, agreed with the commissioner’s finding that Daniel’s behaviour, a manifestation of his disability, constituted a disability under the meaning of the Act.

A majority of the High Court found the actions of the principal came from a genuine desire to ensure the safety of the student, his peers and his staff. Callinan J found “disruption of a class, violence towards other students and teachers, and departures from standards which staff of a school seek to maintain clearly have a capacity to interfere with the provision of education by the State” (2003, para. 266). He found “the Act cannot be sensibly read, in my opinion, as extending to behaviour which constitutes criminal or quasi-criminal kind, including as it did, offensive language and assaults” (2003, para. 271). He continued, “otherwise, behaviour with a capacity to injure, indeed even kill someone, or to damage property (by, for example, burning a school down) could be excused, and the first respondent bound to tolerate it, or seek to abate it, no matter how difficult, disruptive, expensive, or ineffectual measure for abatement might be” (2003, para. 271). The complainant lost his appeal in a 5:2 decision.

**Implications.** Similar to the case of P, the initial case of Purvis, heard in the AHRC, concluded behaviour that results from a disability and leads to less favourable treatment of a student constitutes a disability. Unlike P, however, this decision was appealed by the respondent. In all subsequent appeals, the decision to view behaviour as a manifestation of a
disability was overturned. These rulings, at that time, placed a limit on definition of
disability, finding the disability definition at the time did not extend to symptoms of a
disability. As noted earlier, the judicial decisions in the case of Purvis pre-date the 2009
amendment to the legislated definition of disability that now notes behaviour can be seen as a
manifestation of a disability, and therefore constitutes a disability.

**I on behalf of BI v. State of Queensland (Pagura Inglis).**

**Context.** BI was diagnosed, aged 12, with severe conduct disorder and oppositional
defiant disorder, as well as showing early indicators for schizophrenia. He was later
diagnosed with an ASD. In December 2004, the complainant, *I*, on behalf of her son, sought
permission from the Anti-Discrimination Tribunal Queensland to have two separately
commenced proceedings jointly heard by the tribunal. Both complaints related to BI’s
exclusion from two different Queensland state high schools. One exclusion occurred in 1998,
and another in 2001. An additional exclusion from a primary school, while noted, was not
subject to the complaint.

In 1998, when suspected of stealing a teacher’s wallet, BI was expelled from
Rochedale State High School, and recommended “other programs, outside of mainstream
schooling would be more appropriate to his needs than any available in the State school
system” (2003, para. 5). The complainant felt this statement was “indicative of a conclusion
that Benjamin should be excluded from State schools, and indeed all State schools because of
a perceived need for special care and welfare” (2003, para. 6). After a period of time out of
school, in October 2000 the complainant met with the principal and school guidance officer of
BSHS (acronym used by the tribunal to protect the identity of the school), as well as District
Office personnel to discuss a return to the school. A decision was made for BI to attend
BSHS from the start of the 2001 school year. A further meeting was held in November 2000
where the school guidance officer, along with District Office personnel, ascertained BI’s educational needs at Level 6 (based on his ASD diagnosis) and prepared an IEP for him. The IEP proposed BI attend school from 13 November 2000 until 15 December 2000 twice per week, for one-hour social interaction sessions. These were seen as a critical starting point for re-engaging BI in schooling. At this meeting the complainant argued she advised the school that, due to the extent of BI’s mental health concerns, he might have periods of absenteeism, which at times may be lengthy. BI was well enough to attend eight of the ten planned sessions.

In 2001, a modified IEP was written, increasing his twice weekly sessions to two hours per session. From January until May 2001, BI only attended four sessions with the complainant arguing “BI was too ill, either with his schizophrenia or because of the side effects of Clozapine (which are considerable), to go to school except on these 4 days” (2005, p. 4, para 5). In May 2001, the principal of BSHS cancelled BI’s enrolment without warning. The decision to cancel BI’s enrolment from BSHS was overturned by the District Education Office, and a new placement at CRSHS was planned from the start of 2002.

**Allegation of how the law was breached.** Both complaints were centred on the same argument, “whether there has been some compensation allowed for in relation to [BI’s] treatment within the education system” (Pagura-Inglis v State of Queensland, 2004, p. 3, para 2). It was alleged the Education Department had failed to recognise BI’s disability, and had failed to provide him with educational assistance. The complainant argued that the cancelation of BI’s enrolment had caused emotional distress, which manifested in a fear that BI could not afford to miss a day at CRSHS, often attending school even when extremely

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2 Ascertainment was the former process used by Education Queensland to determine the required level of funding to support the education of a student with a disability. Students needed to have a diagnosed disability, and were then assigned to a scale of Level 1 – 6 with Level 6 representing the highest level of need. BI was “ascertained” as requiring Level 6 funding.
unwell. In addition, the complainant also sought remedy for the loss of educational opportunity as a result of the cancelled enrolment.

**Evidence presented in relation to disability.** This case explored mental health concerns, and whether adjustments should be made to accommodate behaviour arising from these diagnoses. When first diagnosed with mental health concerns, BI’s psychologist recognised the early symptoms of schizophrenia and, by the age of 16, BI was taking Clozapine, a powerful drug generally reserved for adult treatment. BI’s psychologist testified “BI was the only child in Queensland taking it” (2005, p. 3, para 1). In addition to his mental health diagnoses, BI was also diagnosed as having an ASD, with his level of need ascertained by the Education Department at Level 6. The diagnosis of an ASD was critical, without which BI would not have been eligible for ascertainment funding as mental health at that time, and still presently, was not included as a funded disability category in Queensland State schools. In accordance with Departmental policy, it was an individualised school decision as to whether BI could access support from the school’s special education team as he was not a “funded” student. Without disability funding, the school believed there was no obligation to provide an Individualised Education Plan for BI. The only service BI could access was that provided by guidance officers.

The principal of BSHS, upon cancelling BI’s enrolment based on his poor attendance record, stated:

I did not take his disability into account in any way in deciding to cancel his enrolment. I was not made aware that his disability had caused non-attendance. I considered the fact that he was not attending. (2005, p. 7, para 14)

The evidence showed that the principal made no enquiries into the cause of BI’s absence, and simply relied on advice given to him by the school guidance officer. It was the guidance
officer’s view that BI’s non-attendance was because the complainant did not wish to drive her son to school. The complainant was able to present evidence that she contacted the school on most occasions to inform them of BI’s illness and absenteeism. It was unclear as to why some of these messages were not relayed to the guidance officer, or to the personnel supporting BI’s IEP. It was also unclear, when the guidance officer did speak with the complainant, why he formed the opinion that the complainant was being untruthful about the reasons for BI’s absence when “there was no reason for such disbelief” (2005, p. 16, para 37).

The complainant further alleged “enrolments were conditional upon regular attendance” and “BI was not able to comply with that term because of his illness” (2005, p. 13, para 28). During the hearing, the principal advised that had he been informed of the reasons for BI’s absence, he would not have cancelled his enrolment, citing other cases of students absent due to illness and not having their enrolments cancelled.

**Decision.** President Dalton agreed that the attendance requirement imposed by BSHS did constitute an unreasonable term because it failed to consider the reasons for non-attendance. He found that this information was clearly provided on a regular basis by the complainant. He further concluded that the school did not take into account the nature of BI’s illness and the effects of the medication he was trialling (information about which was clearly provided by the complainant’s mother during the 2000 enrolment process). According to Dalton P, the view by the guidance officer that BI’s mother did not wish to transport her son to school was based on “intuition, rather than reason” (2005, p. 8, para 17).

Dalton P further concluded it was unreasonable for the principal to cancel BI’s enrolment without making further enquiries to BI’s mother. He stated “the fact that BI, who had such a limited range of expressed emotion, and such limited communication skills expressed such determination to attend CRSHS and expressed a fear that his enrolment there
would be cancelled at all, let alone as determinedly as he did for a period of two years, is in itself a sign that it was very significant to him” (2005, p. 20, para 45). Dalton P awarded BI $25,000 compensation, along with an additional $2000 interest. In concluding, Dalton P ordered:

the facts of this case be brought to the attention of relevant officers within Education Queensland with a recommendation that they be considered as supporting the view it would be appropriate to have a category or categories of disability ascertainment for children with mental illnesses. In this case, it was only because the complainant had been diagnosed with Autistic Spectrum Disorder, a relatively minor complaint compared to his schizophrenia, that he could be dealt with within the education system, and that seems inappropriate, particularly given the very good work and progress which was made at CRSHS in the complainant’s case. (2005, p. 22, para 53)

Chapter Seven presents additional information about the issue of costs versus benefits raised in this case.

**Implications.** The decision in this case has important implications for education systems and schools. It highlights that the definition of disability used within the legislation extends beyond that typically used by an education system for allocating resourcing. It serves as a reminder to schools that the needs of all students with disabilities, not just those for whom the school receives an additional resourcing allocation, must be taken into account when making decisions about their education. Despite the concluding remarks made by Dalton P, mental health is still not a funded disability category in Queensland.

Context. YB was a 17 year old student due to complete his secondary education at the end of 2010. The complainant’s mother first instituted proceedings in 2007 and many conciliation attempts failed to resolve the dispute. The impact of YB’s impairment was such that he required “additional teaching support, more time to complete tasks than is given to other students, and different writing and reading materials” (YB v State of Queensland, 2009, p. 3, para. 1). YB’s case was heard before Senior Member Endicott in the QATD in May and June of 2010.

Allegation of how the law was breached. YB alleged the respondent had imposed upon him a requirement to access his education program without the required support. He further alleged, due to YB’s impairment, he was unable to comply with this requirement. The first purpose of the hearing was to determine whether the complainant had an impairment within the meaning of the Queensland Antidiscrimination Act.

Evidence presented in relation to disability. In the original complaint, filed by YB’s mother on his behalf, it was alleged YB had:

- a phonological processing disorder, scotopic sensitivity or Irlen syndrome,
- dyslexia or comparable visual and auditory processing problems affecting the development of efficient literacy skills especially the visual perception and processing of texts and technical aspects of writing, mild dysgraphia or comparable visual-spatial and visual-motor problems affecting the efficient production of handwriting and executive dysfunction affecting the recalling, planning and organisation of complex tasks. (2010, p. 3, para. 9)

It was argued, that these difficulties caused the complainant to learn at a slower rate than his peers. A significant amount of expert and lay evidence was presented to the tribunal to
determine whether YB had an impairment within the meaning of the *Queensland Anti-Discrimination Act* (as was in effect at that time). Evidence from a paediatrician, a University Professor in neuropsychology and an educational consultant/psychologist were all accepted by the tribunal.

The respondent, the State of Queensland, argued appropriate adjustments had been made to accommodate the complainant’s learning needs. Details of these adjustments are presented later in this Chapter.

**Decision.** Based on expert testimony, it was agreed YB had “significant problems with phonological decoding that have resulted in difficulties with spelling ... an additional impact on YB’s reading speed and ... weakness in executive functioning manifested by concentration difficulties impacting on YB’s reading outcomes” (2010, p. 5, para. 25). The tribunal found that the complainant did have an impairment (a significant phonological disorder with difficulties in executive functioning) that impacted on his rate of learning and concluded this fell within the legislated meaning of impairment.

The diagnosis of scotopic sensitivity was rejected, as the practitioner who provided this diagnosis had no formal qualifications in psychology or medicine. Senior Member Endicott determined that the practitioner was unqualified to provide diagnoses on brain dysfunction. In making this decision, weight was also given to the expert opinion of the paediatrician who found the visual and auditory skills of the complainant had been within the normal range during testing and who further declared “the medical evidence about scotopic sensitivity was extremely limited and the existence of such a condition had not in his opinion been validated” (2010, p. 4, para. 18). A further diagnosis of dyslexia and mild dysgraphia was also rejected by the tribunal, who acknowledged the practitioner providing the diagnosis while an “experienced educator with qualifications in learning support and special education, ... had not
demonstrated expertise in diagnosing dyslexia” despite an online Certificate in Dyslexia from the “University of New York”\(^3\) (2010, p. 6, para. 30). Senior Member Endicott concluded that without published research in dyslexia printed in peer reviewed journals, it was not possible to accept the witness as an expert in dyslexia. The fact that earlier testing by the Professor in Neuropsychology had failed to diagnose dyslexia further supported this finding.

**Implications.** This case offered some important advice to schools and education systems. Students with learning disabilities that cause them to learn at a different rate to their peers were acknowledged as having a disability under the Federal definition. For many schools, given these students are not entitled to additional resourcing on the basis of their disability, this finding may come as a surprise. What was highlighted by this case was the weight given to the medical or therapeutic qualifications of those diagnosing learning disabilities. Teachers should be aware that the completion of online postgraduate studies may not provide the necessary qualifications to diagnose learning difficulties.

**Sievwright v. State of Victoria.**

**Context.** Jade Sievwright was a Victorian student with expressive and receptive language disorders, auditory processing difficulties and borderline mild intellectual impairment. She had attended Glen Katherine Primary School from January 2004 until April 2006, and thereafter had attended Briar Hill Primary School until early February 2010. Jade then relocated to Sydney to undertake an intensive 16-week language support program known as Lindamood-Bell. Developed in the late 1960s, the program is designed to improve the reading skills of students who have auditory processing difficulties by teaching them alternative strategies to perceive sounds. Upon completion of this course, Jade returned to

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\(^3\) There is no “University of New York”, and online searches failed to reveal the institution that provided this qualification.
Briar Hill Primary School to complete the remainder of her primary education before enrolling at Preston Girls’ Secondary College.

**Allegation of how the law was breached.** The complaint alleged that between January 2004 and April 6, 2009, the respondent’s failure to provide sufficient funding to employ a full-time integration aide throughout her primary education resulted in the complainant not being provided a quality education that enabled her to reach her potential. It further alleged both Briar Hill Primary School and Preston Girls’ Secondary College had failed to make reasonable adjustments for Jade. The reference to Preston Girls was an error, as Jade was not enrolled in this College during the period outlined in the Statement of Claim. In fact, Jade did not enrol at Preston until 2010 and did not attend the school until 2011.

**Evidence presented in relation to disability.** The key question raised in this case surrounds the legislative obligations of schools to make adjustments for students who meet the Federal or State legislated definition of disability, but where they are ineligible for additional resourcing to support their educational needs as their diagnosis falls outside the criteria applied for funding eligibility. A further key issue for determination was whether, over the entire period of claim (2004 – April 2009), the complainant was diagnosed with a disability, and whether the respondent was aware of this diagnosis. The complainant alleged she had a receptive and expressive language disorder, auditory processing difficulties and a mild intellectual disability although it was further alleged that by September 2010 (a point outside the timeframe) the Lindamood-Bell program had improved her cognition to the point where a diagnosis of a mild intellectual disability was no longer relevant. It was alleged that the combined effect of these difficulties, as well as the complex partial seizures also experienced by the complainant, resulted in her not being able to learn at the same rate as her peers; difficulty hearing, processing, comprehending and absorbing written and spoken
vocabulary; significant difficulties with sound discrimination and phonetic awareness; difficulty expressing ideas in meaningful, grammatically correct sentences; and difficulty with verbal communication, perceptual reasoning, working memory and processing speed.

On the evidence, the Court accepted that the respondent was aware in her first year of school that the complainant had a low average IQ of 80, a moderate receptive and expressive language disorder, and auditory processing weaknesses. It was further found that the respondent became aware of the epilepsy diagnosis when the complainant reached Year 3. Year 4 testing revealed an ongoing moderate language impairment as well as mild intellectual impairment (IQ68). Finally in Year 5, although this grade was outside the period of claim, an audiology assessment revealed an auditory processing weakness, a Year 6 IQ assessment of 72, and a Year 7 language assessment of ongoing language difficulties. There was some dispute by the respondent in relation to a diagnosis of a receptive language disability based on language scores within an IQ assessment.

**Decision.** On 21 February 2012, Marshall J handed down a decision in the matter of *Sievwright v State of Victoria* in the Federal Court of Australia. The Court found that while the overall IQ score was not at a level acceptable for receipt of educational funding for an intellectual disability in Victoria, the receptive language discrepancy was so significant as to meet the criteria for disability as defined in the *Disability Discrimination Act 1992* in that a student with that level of receptive language impairment was bound to “learn differently from a person without such receptive language limitations” (2012, p. 15, para. 77). Chapter Six provides further discussion in relation to Jade’s educational needs.

**Implications.** This decision has important implications for both education authorities and schools. To explain the requirements for eligibility for additional resourcing based on disability, each Australian State and Territory currently publish a clear set of guidelines with
criteria that set the benchmark for eligibility. In most States and Territories, to be eligible for additional resourcing based on cognitive function, students are required to achieve a score at least two standard deviations below the mean on standardised measures of intelligence. This definition of cognitive functioning is problematic particularly for students who have a significant discrepancy between their verbal and non-verbal performance scores, as in Jade’s case.

Across Australia, the greatest discrepancies in disability resourcing allocations are found in the criteria set for supporting students diagnosed with language impairments. Some Australian States and Territories provide no additional resourcing for students with language impairment; others set their criteria at two standard deviations below the mean on assessments of receptive and/or expressive language skills; others require three standard deviations below the mean (Tan, 2012). One category that receives no funding is those students who have significant discrepancies between their verbal and non-verbal performance IQ scores, but these students would benefit from additional resourcing under the category of “language disorder”.

In 2015, all Australian schools are required to participate in the first annual Nationally Consistent Collection of Data on School Students with Disability (Australian Government [Department of Education and Training], 2014a). While this collection will inform Government of the numbers of students with disabilities, their locations across Australia, and the provisions made for these students throughout their schooling, there is no obligation on education jurisdictions to use the criteria set by the Federal Government when allocating resourcing to schools. Without consistent eligibility criteria being applied across all Australian States and Territories, States that continue with restrictive resourcing eligibility are likely to see ongoing claims of discrimination from families whose children meet the criteria
for disability under Federal legislation, but are ineligible for additional resourcing to support their educational needs. The cost of providing the required adjustments for these students then falls on individual schools and classroom teachers.


Context. Lindsay Sutherland commenced her education at a primary school in Victoria in 2001. Lindsay had epilepsy (decreasing in severity due to being controlled by medication) as well as cerebral palsy. Her cerebral palsy resulted in limited mobility of her limbs, and the use of communication devices and a wheelchair. The impact of her disability in a school setting included the need for personal care assistance with gastro-intestinal feeding, mobility and toileting; assistance in determining and using an appropriate alternative communication system; as well as assistance to facilitate full inclusion in classroom activities. During her time at the school, there were ongoing tensions between Lindsay’s parents (particularly her mother) and the school, and Lindsay eventually left the school in late 2005.

Allegation of how the law was breached. Lindsay’s family alleged her school treated her less favourably than her peers. This less favourable treatment was alleged to have resulted in “diminished classroom participation, diminished access to the curriculum and impaired socialisation opportunities, such that she is not at the same level as her peers” (2007, p. 3, para. 7). Complaints of victimisation against Lindsay, and her next friend Jenny Harrison, were also alleged. Under Part 2, Division 4, Section 42 of the Disability Discrimination Act 1992, victimisation refers to an act that subjects, or threatens to subject, a person with a disability or their associate, to a detriment.

In October 2004, October 2005, and May 2006, Lindsay’s mother lodged complaints with the Victorian Equal Opportunity and Human Rights Commission, alleging victimisation,

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4 Known as a “next friend” or “litigation guardian”, this person is charged with the responsibility of accurately representing the minor or person with a disability (Cornell University Law School, n.d.).
as well as less favourable treatment. In addition to complaints related to the curriculum provided for Lindsay, other complaints of social isolation during lunchtime, morning tea and recess; lack of social activities; inadequate qualifications of staff members; inadequate specialist support from therapists; concerns relating to criminal history checks on staff; discussions regarding the appropriateness of a mainstream versus a special school enrolment; harassment; as well as concerns regarding supervision and transportation arrangements for school camps were all presented.

Evidence presented in relation to disability. Under dispute in the case was Lindsay’s cognitive functioning. Specifically in focus was whether severe intellectual disability could be diagnosed in a child who had no verbal and limited other forms of communication. Counsel for the complainant argued, “presumably on instruction” (2007, p. 9, para. 31), that Lindsay had no intellectual impairment, although in 2001 Lindsay’s treating neuropsychologist had prepared a report to assist with a family negligence claim in which she had stated Lindsay had severe developmental delay with “ongoing problems with development of physical and cognitive skills, which will limit her potential” (2007, p. 10, para. 33). On evidence, the neuropsychologist argued while it was “impossible to carry out the standard form of psychological assessment of cognitive function”, Lindsay did have, in her opinion, “a significant cognitive impairment” (2007, p. 10-11, para. 35).

An education and developmental psychologist representing the respondent agreed with the neuropsychologist’s views that cognitive assessment was impossible and, in her opinion, believed Lindsay to be “intellectually disabled, meaning she has a reduced cognitive capacity” (2007, p. 13, para. 47). These views on Lindsay’s cognitive capacity were disputed by Lindsay’s speech pathologist who, in 2001, argued Lindsay’s learning potential was excellent.
**Decision.** After a wealth of expert debate on this topic, Deputy President Ann Coghlan of the *Victorian Civil and Administrative Tribunal* (VCAT) was satisfied that Lindsay had a significant cognitive impairment (2007, p. 14, para. 50). The Commissioner paid particular attention to the views of the neuropsychologist and psychologist. She also questioned whether Lindsay’s mother was reliable “both as a litigant and a witness” given in the family court matters heard in the Supreme Court she was willing to claim that Lindsay had significant global developmental delays as well as intellectual dysfunction (2007, p. 14, para. 53). Further aspects of this case are presented later in this Chapter.

**Implications.** There is no argument among clinicians that students who are non-verbal can perform poorly on some standardised measures of intelligence, especially those measures that rely heavily on language comprehension of lengthy verbal directions or require verbal responses (Loftin, 2003). Yin Foo, Guppy, and Johnston (2013) published the world’s first systematic review of intelligence assessments for children with cerebral palsy. Their research found that there is a lack of sound psychometric assessments for students who have cerebral palsy, particularly those with communication, motor, and visual impairments. They further recommended more data are necessary to ensure standardised assessments of IQ are reliable as a measure of intelligence in children with cerebral palsy. While the judicial decision in the case of Sutherland predates this research, it highlights this complexity. Schools working with non-verbal students should be mindful of this case, and the more recent recommendations from this research. These include the adoption of “a multidisciplinary and multi-method approach to IQ assessment” that is “supplemented by information from parents and teachers, observations across environments, and informal assessment procedures” (Yin Foo, et al., 2013, pp. 7-8).
Chinchen v. New South Wales Department of Education and Training.

Context. From Kindergarten until the middle of Year 3, Rhys Chinchen, just like his two older siblings, attended Seaforth Public School in New South Wales. Then, for a period of 18 months, his family relocated to the United Kingdom. In 1999, on their return to Australia, his parents re-enrolled Rhys at Seaforth, and the school recommended Rhys be placed in an extension class, for students with superior academic ability. As Rhys was in the UK when the school administered the testing process for selecting students for the extension program, the recommendation for Rhys to enrol in this program was made at the discretion of the principal, who believed Rhys to be a “bright student who appeared to lack motivation” (2006, para 17). Both the school and Rhys’ parents were aware he was having difficulties with both his handwriting and task completion, but were unaware of the cause of these difficulties.

After nine months in the extension program, Rhys’ parents arranged for him to be assessed by a private psychologist. Rhys was diagnosed as both “a very gifted child with a specific learning disability in efficient processing skills” (2006, para. 8). His IQ was assessed at 138. This learning disability, known as motor dyspraxia, impacted on his fine motor skills. This caused him difficulty when attempting to complete work, especially handwritten tasks, under timed conditions. He had very poor handwriting and difficulty with organisation of both self and belongings. Despite being diagnosed as gifted, Rhys Chinchen failed to make academic progress during his primary education.

Allegation of how the law was breached. Between the years 1999 – 2000, while enrolled in Years 5 and 6, Rhys’ parents sought a public apology, destruction of all departmental files and school reports written by Rhys’ teacher, and compensation for the following allegations:
• Other than a home support plan to assist him to complete outstanding work, Rhys was denied access to any support for his disability;

• When his parents complained to the regional office that the school had removed Rhys from the extension program, the school ceased to provide a home support plan;

• The removal of the home support program limited Rhys’ access to the benefits of the extension class;

• For a sustained period of time, the school continued to threaten to withdraw Rhys from the extension program;

• Rhys’ teacher publicly harassed and humiliated Rhys on the grounds of his disability, and these actions were endorsed by school management;

• Rhys’ was further harassed by his teacher when his parents complained about this treatment;

• The principal refused to investigate any matters involving Rhys, therefore denying him the benefit of a safe education;

• The principal’s decision to refuse to investigate matters was retaliation for the parents’ complaints about Rhys’ teacher;

• Rhys was denied access to both the extension class as well as a gifted and talented program for a period of time throughout his enrolment;

• This denial was a consequence of his parents lodging a formal complaint to the regional office, and further resulted in his teacher’s refusal to teach Rhys;

• Senior management refused to investigate complaints of discrimination; and

• The school made false and defamatory accusations to senior management within the education department in order to damage the credibility of the complainant. The school also subjected both Rhys and his parents to various personal attacks.
Evidence presented in relation to disability. A key aspect within this case is whether a school can be held accountable for discrimination on the basis of disability if they are unaware of the disability. The respondent argued Rhys’ disability was not diagnosed until September 1999 and, therefore, the school had not discriminated against Rhys on the basis of disability as they were unaware he had a disability. It was the belief of Rhys’ classroom teacher that he was simply “lazy and unmotivated” (2005, para. 28). This opinion was formed as Rhys showed capability in some subjects and was also able to perform work at home at a higher standard than that which he could produce during class time.

Decision. Judicial Member Goode and Non-Judicial Members Nemeth de Bikal and Weule concluded the decision by Rhys’ teacher to label him as lazy and unmotivated “closed her mind to the possibility that Rhys’ apparent difficulty with completing tasks in class (other than maths) was attributable to some other cause” (2006, para. 29). They expanded by adding:

[it] is clear that teachers do not have the expertise and training to diagnose motor dyspraxia. Nonetheless, in accordance with the respondent’s policies, they have a responsibility to ensure that students are educated to their full potential and to be alert to any learning difficulties which might inhibit this ...

We are satisfied that in 1999 the characteristics of Rhys’s (sic) disability ... were evident to [the teaching staff]. The characteristic, difficulty completing tasks under a time constraint, is of particular significance. It was clear to the School that although Rhys was experiencing difficulty completing tasks in class, none of the strategies introduced by [his teacher] had proved effective. In these circumstances, the School had a responsibility to investigate the matter
further by seeking the intervention of a school counsellor. (2006, para. 193 - 194)

In their decision, the Panel found, “[W]e are of the view that a prima facie case of discrimination can still be made out provided the identified characteristic (for example, difficulty with the completion of tasks under a time constraint) was known to the school” (2006, para. 189).

The Panel were satisfied that these difficulties were known to the school, and that the school should have either sought advice from the school counsellor or sought appropriate external expert advice, as was suggested by Rhys’ parents. In making this determination, the Panel cited the findings from Sir Ronald Wilson P in the case of X v McHugh, Auditor-General for the State of Tasmania (1994) EOC 92-623:

The respondent may well feel aggrieved that there should be an attempt to hold him accountable for conduct which lacked deliberate intention on his part at the time. But that is not the test. Intention or motive is not required, as the High Court has said. The objective of the Act is to eliminate, as far as possible, discrimination against persons on the ground of disability in areas of public life; and therefore proscribes, not merely deliberate discrimination, but thoughtless discrimination as well. Employers are required to be vigilant in their regard for circumstances affecting the interests of their employees. I agree, at least in the circumstances of this case, with the interpretation of the Act advanced by Counsel for the respondent, namely, that s 5 is about objective discrimination. It is not necessary that an employer know the existence of the disability. It is enough if an employer is shown to have discriminated because of a manifestation of a disability. (2006, para. 196)
Further aspects of this case, in relation to the allegations noted above, are discussed in Chapter Seven.

**Implications.** This case offered important insights for schools working with students suspected of having a disability or difficulties that causes them to learn differently to their peers. The decision highlighted an obligation for schools to further investigate any concerns they have in relation to a student’s learning. Where a school provides evidence to suggest they were concerned the student was not learning at the same rate as his or her peers, this case suggested judicial decision-makers might expect those concerns to be appropriately investigated to determine whether there is an underlying disability at the heart of the issue.

**AB v. Ballarat Christian College.**

**Context.** AB lodged a claim on behalf of her son JQ who was a 12-year-old student enrolled in Year 6 at Ballarat Christian College. He had attended the school since Year 4. In 2012, the school made a decision that several Year 6 students would not be permitted to attend the interstate school camp as a result of concerns regarding their behaviour. In JQ’s case, the concerns related to “verbal bullying, teasing of other students in and out of class, and failing to comply with teachers’ directions” (2013, p. 2, para. 2).

**Allegation of how the law was breached.** It was alleged that JQ had both Asperger’s syndrome and a severe pragmatic language disorder and that, as a result of these disabilities and the behaviour that manifested as a result of these disabilities, the school had discriminated against him by not permitting him to attend the school excursion. The complainant further alleged that the school had required JQ to access his education without the benefit of a Program Support Group (PSG)\(^5\), an IEP or a positive behaviour plan.

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\(^5\) In Victoria, the Program Support Group is “a team of people that work collaboratively to develop, write, monitor and evaluate the individual learning plan” (Victorian Curriculum and Assessment Authority, 2009).
The school denied JQ had either disability and asked the court to draw an inference from the fact that the applicant had failed to call JQ’s health professionals to give evidence. The respondent also argued that they had made reasonable adjustments to accommodate JQ’s needs.

**Evidence in relation to disability.** The complainant presented two reports as evidence that JQ met the federal definition of disability. The first was from the psychologist who in 2010 diagnosed JQ with an IQ that “falls within the Autism Spectrum” (2013, p. 10, para. 84). This psychologist did not provide evidence during the hearing. Instead, two other expert witnesses criticised this report, stating an IQ assessment was not a reliable measure for diagnosing an ASD; rather, “the ‘gold standard’ test for autism is the ADOS test (Autism Diagnostic Observation Schedule)” (2013, p. 11, para. 94). The original psychologist’s report was also criticised as it failed to include an assessment of JQ’s adaptive behaviour skills. While the report stated that JQ fell within the autism spectrum, the report was further criticised by the expert witnesses for not specifically stating the degree of impairment.

The second report provided in evidence was from the speech pathologist who diagnosed JQ with a “severe pragmatic disorder” not a “severe pragmatic language disorder” as was alleged by JQ’s mother. Again, this practitioner was not called to give testimony. JQ’s language skills were assessed using the *Clinical Evaluation of Language Fundamentals (4th ed.)*, the assessment tool widely accepted as the appropriate tool for diagnosing language disorders. JQ’s scores on the Pragmatic Profile fell within the severe range, although no definition was given as to what this meant.

The respondent agreed JQ had been diagnosed with an ASD in 2010 and a severe pragmatic disorder is 2012, but argued that at the time of the proceedings and throughout his education at Ballarat Christian College neither disability had any impact on his social or
academic functioning. In addition, JQ’s disabilities did not meet the requirement for additional resourcing, and so any adjustments provided to JQ had a financial impact on the school.

At the point of JQ’s enrolment at the school, the special needs co-ordinator had accepted the psychologist’s report, and had provided JQ’s class teachers with strategies to accommodate his learning. The respondent argued that from 2010 until 2011, JQ was “well-behaved, well-liked, was a social leader, had good friends, and achieved reasonable academic results across the curriculum” (2013, p. 3, para. 11). His good behaviour returned in 2013, although a decline in academic results was attributed by the school to the fact that JQ was “being kept home one day a week” for reasons that weren’t outlined in the judicial decision (2013, p. 3, para. 11). The school argued that in 2012, largely as a result of being in a class of students that were “disruptive and challenging”, JQ’s behaviour deteriorated (2013, p. 4, para. 11).

**Decision.** Member Wentworth accepted the testimony of the expert witnesses that while each of the complainant’s diagnoses was unreliable, on the balance of probabilities, JQ probably had an ASD and some language difficulties. Both authors of the original reports were criticised for their ambiguity. The impact of JQ’s behaviour on learning is discussed in Chapter Seven.

**Implications.** The finding from this decision has implications for those practitioners who diagnose disabilities. First, an IQ assessment cannot diagnose an ASD. Second, when reporting a student has a disability with a particular range (in this case, severe), additional information should be given to explain the meaning of this range. Third, when giving a diagnosis, practitioners must use research-validated assessment instruments.
Summary of Findings from Judicial Decisions Relating to Disability Diagnosis

This section of analysis explored judicial decisions where disability diagnosis was a tension in the provision of adjustments to students with disabilities. A summary of these eight decisions is presented in Table 8:

Table 8. Judicial Decisions Relating to Disability Diagnosis

<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>P</td>
<td>Behaviour as a manifestation of the disability where mainstream school desired that the student enrol in a special school</td>
<td>Behaviour was considered a manifestation of his disability. Outcome: Pending (Chapter 7 presents further details)</td>
</tr>
<tr>
<td>Purvis</td>
<td>Behaviour as a manifestation of the disability</td>
<td>Behaviour was considered a manifestation of his disability, but later overturned on subsequent appeals. Outcome: Lost on appeal</td>
</tr>
<tr>
<td>(Pagura-Inglis)</td>
<td>Behaviour as a manifestation of the disability</td>
<td>Failure to attend school was seen as a manifestation of his disability. Outcome: Won</td>
</tr>
<tr>
<td>YB</td>
<td>Question as to whether certain learning disabilities were disabilities as defined in federal legislation.</td>
<td>Disabilities diagnosed by qualified practitioners accepted, but those diagnosed by unqualified practitioners rejected. Outcome: Pending (Outcome presented in the next section of this chapter)</td>
</tr>
<tr>
<td>Sievwright</td>
<td>Meeting legislative definition of a disability but ineligible for additional educational resourcing</td>
<td>Despite not meeting state eligibility requirements for funding, the disability met federal requirements as it caused the student to learn differently to her peers. Outcome: Pending (Chapter Six presents further details)</td>
</tr>
<tr>
<td>Sutherland</td>
<td>Diagnosing cognitive impairment in a student who was non-verbal</td>
<td>On expert advice, the court accepted the student most likely had a significant cognitive impairment that was not assessed due to her language difficulties. Outcome: Pending (Chapter 7 presents further details)</td>
</tr>
</tbody>
</table>
### Case
<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chinchen</td>
<td>Meeting the educational needs of an undiagnosed student who was gifted/learning disabled</td>
<td>School should have sought specialist assistance to provide advice on appropriate adjustments. Pending (Chapter 7 presents further details).</td>
</tr>
<tr>
<td>AB</td>
<td>Alleged that, as a result of the behaviour that manifested from his disabilities, the school had discriminated against him by not permitting him to attend the school excursion. The complainant further alleged that the school had required her son to access his education without the benefit of a PSG, an IEP or a positive behaviour plan.</td>
<td>Court accepted the student had the disabilities alleged, but criticised the ambiguity of the reports and the validity of the assessment tools used to diagnose the student.</td>
</tr>
</tbody>
</table>

### Judicial Decisions Relating to the Required Adjustments to Alleviate the Impact of the Disability

The previous section explored the tensions relating to the diagnosis of disability. The following five cases discuss tensions between schools and parents in relation to specific funding, programs, supports or adjustments complainants deemed necessary to alleviate the effect of their disability. These include the provision of full-time aides, additional funding, delivery of targeted curriculum such as social skills intervention, access to appropriate systems to support non-verbal communication, and supports for students whose disability results in lengthy periods of absenteeism and physical access requirements. A further issue explored is strategic litigation. Strategic litigation involves using litigation as well as other vehicles such as media to attempt to bring about social change, and to draw public attention to a concern (Barber, 2012).

**YB v. State of Queensland 2009.**

**Context.** As presented earlier in this chapter, YB was a 17 year old student who required “additional teaching support, more time to complete tasks than is given to other
students, and different writing and reading materials” as a result of a number of learning disabilities (2009, p. 3, para. 1).

**Allegation of how the law was breached.** YB alleged that the respondent had imposed upon him a requirement to access his educational program without the required support. He further alleged that, due to his impairment, he was unable to comply with this requirement.

**Evidence presented in relation to the required adjustments to alleviate the impact of this disability.** The complainant alleged that his difficulties impacted on his rate of reading and writing, his comprehension of written tasks and written work, spelling, ability to read small fonts, ability to complete class work and assessment tasks within recommended timeframes, ability to read material printed on white paper due to glare, organisational skills that impacted on work completion, and ability to remember deadlines for assessment tasks and appointments.

The complainant argued that these difficulties could only be alleviated through the provision of the following adjustments: one-on-one learning support to break tasks down and clarify expectations for tasks, full-time in class support from a teacher aide, materials such as handouts and workbooks/textbooks to be provided in large print and on coloured paper, additional time to complete in class tasks and assessments.

The respondent was able to provide testimony from staff involved in the complainant’s education showing that all of the above adjustments were provided (mostly within a timely manner). In addition further adjustments included the provision of a laptop to the complainant on which teachers uploaded course materials. It was also argued that the complainant frequently failed to attend additional learning support sessions made available to him, and that
he attended class and support sessions without the large print materials, his glasses, his diary or his laptop, making it difficult for him to learn.

**Decision.** Senior Member Endicott concluded she was:

left with the impression that YB’s evidence had been predicated by a desire to explain his disappointing academic achievements to perceived shortcomings in support from the school and not to a failure to make the best of the opportunities made available to him by the school. (2010, p. 13, para. 72)

It was therefore concluded that the requirement to access his education without the required adjustments had not been imposed on the complainant, and his complaint was dismissed. A further aspect of this case is discussed in Chapter Six.

**Implications.** Highlighted within this complaint was the importance of record-keeping. His learning support case manager was able to show evidence of informing YB’s class teachers of YB’s needs and how these could best be met. The school was able to provide clear evidence of a range of adjustments, as well as learning support, provided for YB over a sustained period of time. The importance of record keeping emerged as a theme throughout the analysis of judicial decisions, and this theme is discussed in more detail in the following decisions.

**Sutherland v. State of Victoria Department of Education and Training (2007).**

**Context.** As stated earlier in this Chapter, Lindsay Sutherland commenced her education at a primary school in Victoria in 2001. Lindsay had epilepsy and cerebral palsy, the features of which included limited mobility. To limit the impact of these disabilities, Lindsay used communication devices and a wheelchair. At school, she required personal care assistance, assistance in determining and using an appropriate alternative communication
system, as well as assistance to facilitate full inclusion in classroom activities. There were ongoing disputes between Lindsay’s parents (particularly her mother) and the school, and Lindsay eventually left the school in late 2005.

*Allegation of how the law was breached.* The complainant alleged “because the school used a less effective method of communication with Lindsay than it used for her classroom peers without the impairment” this resulted in Lindsay being treated less favourably (2007, p. 18, para. 66).

*Evidence presented in relation to the required adjustments to alleviate the impact of this disability.* Much debate centred on Lindsay’s method of communication. An extensive number of expressive communication systems had been trialled, many with limited success. Communication methods trialled included tracking vocalisations, tone, volume, gestures, and eye gaze. Also trialled were alternative communication devices such as a BIGmack™, Macaw™, Cheap Talk™, different switches and voice-activated devices, communication books, communication dictionaries, eye point grids, “yes/no” cards, Boardmaker™ symbols, as well as the Picture Exchange Communication System (PECS)™. The complainants alleged ongoing concerns regarding the appropriateness of some of the methods, as well as the quality of staff training provided to ensure the appropriate implementation of these methods.

Each of these methods played a critical role in Lindsay’s ability to access curriculum. Individual teachers gave evidence of utilising these methods and developing strategies to enable Lindsay to engage with the curriculum. Extensive evidence was presented showing that new communication methods were trialled each time a system failed, or when a new device became available, or when a change in therapist resulted in new ideas or new suggestions.
The complainant countered that, due to a lack of staff training, on many occasions the school failed to provide Lindsay with an appropriate communication system, failed to use the system correctly, or changed systems inappropriately on the whim of the class teacher or therapist. As a result of these decisions, Lindsay’s mother argued Lindsay’s educational opportunities were diminished.

As evidence of how these communication devices were applied, and how decisions about the appropriate choice of communication system were made, the school produced PSG meeting minutes, copies of home-school communication, and written and oral evidence from a large number of teachers, teacher aides and therapists. Also produced was information about the training received by various staff members in the use of different communication devices.

**Decision.** Coghlan DP was “not satisfied that lack of training was the reason for any claimed failure to apply an appropriate expressive communication for Lindsay, rather than any problems derived from Lindsay’s difficulties” and this allegation was dismissed (2007, p. 31, para. 127). Further aspects of this case will be discussed in Chapters Six and Seven.

**Implications.** Similar to the finding in the case of YB, the tribunal in this decision relied heavily on the detailed evidence provided by the school. Both cases demonstrate the persuasive value of written evidence in the judicial decision-making process. It reinforces for schools the importance of archiving possible documentary evidence of records such as IEP, records of phone conversations and meetings, curriculum plans, and student reports.

**T v. Department of Education.**

**Context.** In February 2001, the complainant lodged a complaint on behalf of her son against St Helen’ District High School. T had a diagnosis of Attention Deficit Disorder (ADD) for which he was medicated. The complaint relates to an event that, in one hour, saw
the complainant’s behaviour escalate to a point where he was verbally abusive and made physical threats against teachers and students. As a result of this event, T was suspended from school. Initially the Tasmanian *Anti-Discrimination Commissioner* dismissed the complaint as lacking in substance, but T applied to the *Anti-Discrimination Tribunal* for review of this decision.

*Allegation of how the law was breached.* The complaint alleged T’s school did not make reasonable adjustments to accommodate his ADD. It further alleged the decision to suspend him from school was discriminatory as his behaviour was a manifestation of his disability.

*Evidence presented in relation to the required adjustments to alleviate the impact of this disability.* In this case the complainant proposed that, had certain adjustments been provided by the school, these would have alleviated the impact of T’s disability and would have avoided an unnecessary suspension. The respondent claimed T’s behaviour posed a risk to the safety of both staff and students. They argued that, while they had been more lenient for T than they would students who did not have an ADD, it was necessary to suspend T. The respondent also denied any impropriety in their actions.

Two specific adjustments sought by the complainant were social skills training and an appropriate individualised behaviour plan. The complaint alleged the inclusion of social skills instruction in T’s educational program would have reduced the likelihood of the behavioural outburst. The school provided evidence that the complainant had been “receiving support since 1998 in the Special Needs area (spelling, maths, life skills)” (p. 6). The respondent could not present evidence of “what was covered by life skills support” (p. 10), but concluded it was likely that instruction would have included lessons in social skills. The respondent was also unable to recall “the number of hours each week that the child took part in the specialised
educational program” (p. 10) although did suggest the program would have been more successful had T attended school more frequently. The respondent was able to show, since 2000, a behaviour management plan had been in place for T.

**Decision.** Member Kohl accepted the school’s testimony that T had received “life skill support” for four years. The decision noted that, while the school could not produce evidence of the nature of the support provided, “the complainant did not at any time express a view that life skills were different to social skills. It was open to the Commissioner and the tribunal to conclude that life skills would include social skills” (2003, para. 41). In concluding that the life skills support provided to T most likely covered social skills, Member Kohl dismissed T’s complaint as lacking in substance.

**Implications.** Educators should perhaps be cautious in applying this decision more broadly. As demonstrated in the previous cases of both Sutherland and YB, courts and tribunals typically required stronger written evidence from schools detailing the nature of adjustments provided to assist in the judicial decision-making process. It was not clear on what grounds Member Kohl accepted the school’s argument that some of the life skills support provided to T included social skills instruction. While the complaint was dismissed as lacking in substance, had the parent kept records of the nature and amount of supports provided to T, their written documentary evidence (in the absence of any given by the school) might have swayed a different decision.

**Mrs J, on behalf of herself and AJ v. A School (Cowell).**

**Context.** In July 1993, after a disjointed primary school education during which AJ attended four separate primary schools, AJ’s parents commenced the enrolment process so that she could commence high school in the following year. On the application for enrolment, AJ’s parents informed the school AJ had Perthes’ disease, a physical disability affecting her
right hip joint. During the enrolment interview, her parents advised the school that no special consideration was required “save that in the case of physical education, she should not be pressed to undertake more activity than she herself wished” (1998a, section 2.2). Throughout her first year of high school, however, AJ began to experience difficulties with her hip resulting in considerable amount of pain and intermittent use of crutches, making it “often difficult, if not impossible, for her to negotiate the stairs” (1998a, section 2.2).

**Allegation of how the law was breached.** In August 1996, Mrs J lodged a discrimination complaint alleging the school had discriminated against her daughter. The complaint alleged that during AJ’s frequent absences from school, the school failed to provide adequate work and supervision. The complaint further alleged, on days when AJ was in pain due to her Perthes’ disease or when recovering from the effects of surgery, the school also failed to provide adequate work and supervision by requiring AJ to complete lessons in the ground floor library instead of negotiating stairs to get to her second floor classroom. The complainant also alleged AJ’s treatment was unfavourable as she was provided with neither appropriate supervision while in the library nor, on a couple of occasions, adequate work.

**Evidence presented in relation to the required adjustments to alleviate the impact of this disability.** Several key tensions were discussed within this decision. First, the case outlined the school’s obligations to AJ in light of her frequent absenteeism. Second, the issue of whether the provision of a reasonable adjustment may have alleviated the effects of AJ’s disability was addressed in this context. Finally, the case discussed whether the actions of the school amounted to less favourable treatment, and in particular, whether any less favourable treatment caused AJ’s lack of achievement and distress.

Detailed evidence was presented to show AJ had frequent absences during her time at high school. In 1994, AJ attended school for only 14 weeks of the year. In Terms 2 and 3 of
1995, with the school’s consent, AJ’s parents withdrew her from school, and she underwent major hip surgery in June 1995, after successive frustrating postponements. During her absence, the school made limited contact with AJ, pastoral or academic, on the belief that her learning was being supported through the distance education option *Open Access*. She returned to school for the final term of Year 9, but having missed so much schooling, her report describes her educational progress simply in general terms rather than against specific educational outcomes.

In 1996, AJ returned to school to commence Year 10 but, only a few days into the term, AJ attempted to climb the stairs two at a time and she injured her hip, resulting in another seventeen days’ absence. At this time, AJ’s father contacted the school and spoke with Mrs M, the house\(^6\) co-ordinator. In this conversation, Mrs M recorded Mr J having stated AJ would again require surgery; that she was “devastated and extremely depressed as well as in constant pain” (1998a, section 4.3). According to Mrs M’s notes, she contended Mr J had indicated he would give AJ one more opportunity to return to school post-surgery, but he would consider sending her to a state school as he had both financial worries as well as concerns about “his inability to keep AJ healthy” (1998a, section 4.3). He indicated AJ felt “inadequate and dumb” (1998a, section 4.3). He wanted the school to provide additional support, perhaps through the supply of some current or ex-Year 12 students to provide coaching for a few hours each week.

AJ’s frequent absenteeism was a source of frustration for her teachers, with Mrs M claiming “they never knew when she was going to come in to the school and the return of work was erratic” (1998a, section 4.3). After returning from a period of absenteeism, AJ often worked in the downstairs Library. The librarian felt AJ was “diligent and resourceful”

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\(^6\) House systems are commonly used in Australian (mainly private, secondary) schools to group students for the purposes of pastoral care lessons, sporting competitions, cross-age activities such as leadership and mentoring, under the guidance of a senior staff member appointed as a House Co-ordinator.
as she often rejected any offers of assistance, never sought assistance, and seemed self-sufficient, but AJ stated during her time in the library “she felt lonely and depressed, lacking any sense of achievement or of being worth anything” (1998a, section 4.3).

**Decision.** Commissioner Wilson stated AJ’s illness and pain were:

work the primary cause of the disastrous outcome of her time at the school. It accounted for her frequent absences from the school and from her friends; it accounts for the embarrassment of being different from other students, particularly when she was forced to rely on crutches; it accounts, at least in part, for the missed lessons and consequent lack of self-esteem and a sense of pride and achievement in her. (1998a, section 4.3)

To address this, Commissioner Wilson suggested, “it would have been easier for the school if both Mrs J and AJ had complained more” (1998a, section 4.3). The Commissioner was critical of some of the school’s actions. He felt that AJ’s frequent absenteeism and time spent in the library warranted the appointment of “one or two persons to be available to her as a personal priority. It could have been her tutor, or the school counsellor or the librarian or the task could have been shared between two of these people” (1998a, section 4.3). He felt greater pastoral interest needed to be taken by the school in AJ’s welfare. He found that, “the lack of ongoing pastoral care of this quality was not a major factor in its contribution to the breakdown of her psychological health following her leaving the school in 1996, but it was one factor” (1998a, section 4.3). Most criticism, however, was levelled at the school’s lack of response to Mr J’s cry for academic assistance for his daughter.

Commissioner Wilson found that “the complaint of less favourable treatment has been substantiated, notwithstanding the discrimination was of a relatively minor nature,
contributing to AJ’s subsequent distress and damage only in the proportion of 25%” (1998a, section 5).

Appeal. In November 1998, an appeal of the Commission’s decision, lodged under the Administrative Decisions (Judicial Review) Act 1977, was heard in the Federal Court of Australia. The school, as well as AJ and her family, each sought review of some of the Commission’s decisions. The school sought to have the Commission’s decision reversed, believing the Commission had:

errred in its approach to the complaint of direct discrimination under s5(1) of the DD Act by importing from s5(2) a positive obligation to treat a disabled person more favourably than a person without a disability, rather than by asking whether the person with a disability had been treated less favourably than a person without such a disability. (1998, p. 10)

The school claimed s5 of the Act contained no obligation for schools to have done more, so any failure to provide additional pastoral care to AJ did not constitute discriminatory conduct.

At that time, a determination of direct discrimination required a comparison to be made between the real treatment of the person with a disability in comparison to that which would have been given to someone without a disability in similar circumstances. The Commission identified that the critical question for this case was “whether the school was in some measure responsible for AJ’s personal distress and lack of achievement because it treated her less favourably than it treated the other students” (1998b, p. 14). The Commission noted:

It will be remembered that s5(2) of the Act ensures that it is not just a question of treating the person with a disability in the same way as other people are
treated; it is to be expected that the existence of the disability may require the person to be treated differently from the norm; in other words that some reasonable adjustment be made to accommodate the disability. (1998b, p. 14)

Judge Mansfield did not conclude that the Commission had misinterpreted the meaning of s5 of the DDA. Rather, Mansfield J concluded when providing an adjustment some positive action may need to be taken. In addressing the criticisms levelled at the school by the Commission, the Judge noted the Commission had failed to consider how “the school treated, or would have treated, a student without a disability in much the same circumstances” and ordered the decision and compensation be set aside and the case returned to the Commission for a comparative analysis (1998b, p. 17). In making a comparison, Mansfield J recommended that the Commission compare AJ’s treatment to that which the school might have provided to a student without a disability who was receiving long-term medical treatment, or who missed large amounts of their schooling due to travel, parental movement, personal interests or activities. That matter was remitted to the Commission, as follows.

In July and October of 1999, in the HREOC, an inquiry into the matter of direct discrimination and harassment was heard7. Lengthy testimony and written submissions on the matter were submitted by both the complainants and the respondent. To establish direct discrimination, the complainant needed to demonstrate she had been treated less favourably, on the basis of her disability, than a person without a disability, where the circumstances were the same or not materially different. To establish this, the complainant was required to provide an appropriate comparator. Mrs J called a student known as PX to serve as the comparator. The student, while in Year 9, had broken both legs and required plaster casts,

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7 Parts of an original suppression order relating to the names of the original complainants were lifted, and it was revealed that AJ was Fleur Cowell, and her mother was Mrs Cowell. The respondent’s identities, including the name of the school, teachers at the school, and the house in which Fleur was enrolled, remained suppressed. However, for continuity, the complainant will still be referred to as AJ and her mother as Mrs J.
missing two weeks of school. This occurred just prior to an exam block, so PX spent time at home revising materials previously suggested by teachers. During this two week absence, PX had no contact with his teachers. Upon PX’s return to school, he worked in the library without teacher direction when unable to access classes.

A second witness, Mr CY, a teacher at the school, was also called by Mrs J. This teacher attested that during his 20 years at the school when advised that a student would be absent, he would send home worksheets and materials if requested by the student or their family, but did not automatically do this otherwise. On the student’s return to school, he would invite the student to come and see him so that he could provide additional assistance. He indicated it was the usual practice of the school to assess the ability of students who had been absent for a considerable time to determine the most appropriate level of class for the student to enter on their return, but that it was not the role of the special education teachers to support these students as their delay in learning was caused solely by their absence from school and not their intellectual abilities.

The respondent submitted that AJ had been treated less favourably as a result of her own actions. The school offered to transfer AJ to a different house group, one whose classroom was located on a ground floor classroom, but it was AJ’s preference to remain in her house group with her friends. They argued had AJ agreed to change house groups, it would have been unnecessary for her to work in the library, which then caused her feelings of isolation and anxiety. The respondent also argued AJ had also refused to complete work set by her class teachers while she was absent. It was further argued that work had been sent home to AJ during her absence, but, as it was not returned, additional work was not sent as it was difficult for her teachers to determine the appropriate level at which to set work. They continued by suggesting that AJ, while aware of the school counsellor, had failed to seek
assistance. The respondent alleged Mrs J had failed to keep the school informed of when AJ would be absent or present at school, making it difficult for teachers to be organised. The respondent compared the communication between the school and AJ and her family during periods of absenteeism to that afforded to other students who were absent for considerable periods claiming there was no evidence to show that the school provided additional tuition to students without disabilities who were absent from school for considerable periods. The respondent also argued there was “no need for any affirmative action or positive action by the respondent, but rather that the respondent respond in a reasonably proportional way to AJ’s disability” (2000, s. 4.1.2). In summary of their proportional response, the respondent cited their attempts to have AJ change House, adjustments made to the school timetable and classroom layout, as well as changed arrangements for AJ to access the computer labs. Finally, the respondent argued that Mrs J had failed to provide a relevant comparator.

On the matter of direct discrimination, McEvoy J found “it was clear AJ was certainly disadvantaged most significantly as a result of her disability, and the disadvantages she faced included educational disadvantage” (2000, s 5.2). She also found “the school acted as it saw appropriate to assist her in relation to the disadvantages consequential on her disability which were relevant to her education” (2000, s 5.2). The critical question, as identified by Commissioner Wilson, was “whether the respondent school was responsible to some degree for AJ’s personal distress and lack of educational achievement because it treated her less favourably than it treated other students” (2000, s 5.2.1). She further concluded:

The respondent certainly could not necessarily treat [AJ] the same as another student without a disability who was away from school for a long period, as that comparator would never be sufficiently precise to take into account the consequence of [AJ]’s disability. [AJ]’s disability meant not only that she was
away from school for long periods and therefore fell behind in her school work, it also meant when she was at school she often worked downstairs, she lost touch with her peers and she, as well as having the other consequences of her illness and disability such as loss of energy and pain, had also lost confidence. (2000, s. 5.2.2)

McEvoy J agreed PX was not an appropriate comparator, and as the onus of proof rests with the complainant to establish an appropriate comparator, she found this proof had not been discharged. Further, she found the disadvantage experienced by AJ resulted from her disability and not the respondent’s treatment. She found there was no obligation on the respondent to move the entire House to a ground floor classroom, and that AJ’s rejection of the offer to change House led to many of her claims of direct discrimination, including her feelings of isolation and neglect. This decision necessitated the school’s alternative arrangements for AJ to work in the library, which was deemed a reasonably proportional response. As AJ failed to return work during periods of absenteeism, the school’s response to not send further work was deemed appropriate, as was the assessment of AJ’s needs on return to school that resulted in her changing levels for Maths. McEvoy J was also satisfied that special education services were not made available to AJ, but that counselling services were available. In relation to the matter of direct discrimination, McEvoy J dismissed the complaint. Further attempts to appeal this decision were dismissed.

**Implications.** This case contained important messages for staff in schools supporting students whose disabilities result in ongoing absenteeism. While the case was dismissed, the decision highlighted the importance of helping the student maintain a sense of connectedness, both academically and pastorally/socially, to school. It also demonstrated if a school offered adjustments to alleviate the impact of a student’s disability, and the student or their family
rejected these adjustments, this rejection would be considered in the judicial decision-making process.

**Anja Turner on behalf of Rebekah Turner v. State of Victoria – Department of Education and Training.**

**Context.** In 2004, Anja Turner on behalf of her daughter Rebekah (Becky) lodged a complaint with the Victorian Equal Opportunity and Human Rights Commission, formerly called the Equal Opportunity Commission of Victoria (the Commission). The complaint spanned Becky’s education at four Victorian Government schools: two primary schools, one P-12 and one secondary. The case involved a “long and tortuous” litigation process spanning seven hearings totalling 38 days spaced across six-years of Becky’s education (2008, p. 33, s. 147).

**Allegation of how the law was breached.** It was alleged that the respondent, between the years 1999 and 2005, had unreasonably imposed a requirement for Becky to access her educational program without appropriate assistance. Specifically, it was argued that the complainant required a full-time teacher aide in order to access her educational program. It was agreed by both parties that a condition had been imposed for Becky to access her education over an extended period of time without full-time access to a teacher aide. The complaint alleged Becky was not able to comply with this condition, and had therefore suffered a detriment. It was further alleged that this condition was unreasonable.

**Evidence presented in relation to the required adjustments to alleviate the impact of this disability.** Lengthy testimony and written evidence about the precise nature of the complainant’s disabilities were presented. It was alleged that the complainant had “ADHD, anxiety, depression, receptive language disorder, expressive language disorder and learning disability”, but the respondent rejected these diagnoses (2007, p. 12, s 53).
During the proceedings, the complainant applied for the Minister for Educational Services to be summoned. In summoning the Minister, the complainant argued that the Minister could provide evidence on the reasonableness of Becky accessing her education without funding that would provide additional support. The Minister had approved changes to the criteria for funding of severe learning disability under the *Learning Disorders Program* and had also changed the criteria for funding under the *Programs for Students with Disabilities* (PSD). These changes meant Becky was not eligible for individual funding. Counsel for the respondent argued that the Minister was not in a position where she could provide relevant evidence, and that the use of a summons to gain information about general Government policy was an improper purpose. It was also argued that, as Government was in session, a Minister could not be compelled to attend a tribunal.

**Decision.** From the extensive medical evidence presented, McKenzie DP made the following conclusions: during the period in which the discrimination was alleged to have occurred, the complainant did not have ADHD, nor an anxiety disorder (although she did at times exhibit signs of anxiety). The primary cause of her anxiety was noted to result from brain dysfunction; her learning difficulties, problems at home and low self-esteem. These were all seen as secondary contributing factors. She did, at times, have clinical depression although the lengths of the depressive episodes were unclear. From 1999, it was also found that her brain dysfunction caused difficulties with working memory and auditory processing; from 2000 it caused a severe learning disability and a severe receptive language disorder; from 2003 a moderate receptive language disorder that was considered severe from 2005; and from 2005 it resulted in a significant gap between verbal and performance intelligence, with verbal performance significantly lower. Becky therefore did have a disability that met the criteria set under the legislation, though at times she was not eligible for individual funding under State funding guidelines.
In relation to the request for the Minister to be summonsed, McKenzie DP agreed with the respondent, finding that “the case relates to the complainant, not to all students with disabilities or all students with learning disorders” (2006a, p. 4, s 14). She also found, “there is no suggestion that the Minister has personal and direct knowledge of the complainant’s circumstances” (2006a, p. 4, s 15). It was therefore found to be unnecessary to summons the Minister to give evidence and the application was dismissed. Further matters of discrimination in relation to this case are outlined in Chapter Six.

**Implications.** The decision in relation to this aspect of the case provided important information for families who attempt strategic litigation to bring about policy change. Becky’s family sought to have the criteria for funding for severe learning disorders reviewed. The complainant argued that it was unreasonable for her daughter to be required to access her education without the support of a full-time teacher aide. The respondent did not deny this requirement had been imposed, but argued it was a reasonable requirement. McKenzie DP determined this case was not the forum for reviewing Government decision-making.

Complainants bringing forward claims of discrimination need to focus on the facts as they pertain to the litigant, without attempting to use litigation to seek a review of government decision-making on behalf of groups of students.

**Summary of Findings from Judicial Decisions Relating to the Required Adjustments to Alleviate the Impact of a Disability**

This section of analysis explored judicial decisions where tensions arose from requests for specific adjustments, deemed necessary to alleviate the impact of a student’s disability. A summary of these five decisions is presented in Table 9:
### Table 9. Judicial Decisions Relating to Adjustments to Alleviate the Impact of Disabilities

<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>YB</td>
<td>The request for specific adjustments to alleviate the impact of his learning disabilities</td>
<td>School produced evidence that a broad range of adjustments were provided, and tribunal ruled parent complaint was to justify student’s disappointing results. Some criticisms of lack of record-keeping by family. Outcome: Lost</td>
</tr>
<tr>
<td>Sutherland</td>
<td>The unsuccessful trial of multiple communication methods for a student who was non-verbal resulted in less favourable treatment</td>
<td>Failure to find an appropriate communication system was attributed to student’s difficulties rather than any inappropriate actions by the school. Outcome: Lost</td>
</tr>
<tr>
<td>T</td>
<td>Complainant alleged a behavioural incident that led to a school suspension would have been prevented if the school had provided social skills instruction</td>
<td>Tribunal concluded life skills support provided to the student most likely included social skills instruction despite a lack of written evidence from the school. Outcome: Lost</td>
</tr>
<tr>
<td>J obo AJ (Cowell)</td>
<td>Provision of work to a student frequently absent from school, and appropriate supervision and support for the student returning to school after period of absenteeism. Further tensions in relation to humiliation felt by student from differential treatment given by school.</td>
<td>School criticised for lack of pastoral care and support, but student’s absenteeism viewed as major contributing factor to her difficulties. Outcome: Partial win awarded by tribunal overturned on all subsequent appeals.</td>
</tr>
<tr>
<td>Turner</td>
<td>Complainant desired a full-time teacher aide to alleviate the impact of language and learning disabilities and mental health/behavioural conditions, some of which did not meet eligibility criteria for additional educational resourcing or fell in and out of funding ranges over time. Complaint also used litigation strategically to attempt to change policy so that all students with disabilities that fluctuate resulting in falling in and out of funding ranges would continue to be eligible for additional resourcing</td>
<td>Student found not to have met disability definition throughout some period of the claim, and court cautioned that each case turns on its own facts related to the complainant, not all students with that particular disability. Outcome: Lost</td>
</tr>
</tbody>
</table>
Discussion of Implications

A number of key points emerged from the findings in this chapter in relation to answering the question of what counted as a disability when determining adjustments to curriculum (sub-question 1). It is the role of medical practitioners to offer a diagnosis and then the education provider, in consultation with the student or their associate, to determine the appropriate adjustment to alleviate the impact of the disability (Rowlett, 2011). The cases of YB, AB and Sutherland offered insights into issues related to the assessment and diagnosis of disability. The cases of YB and AB tested the limits of the definition of disability, by determining that disability diagnoses only counted when the diagnosis was given by a qualified professional using valid assessment instruments. Education practitioners need to be aware that the completion of online postgraduate studies may not provide the necessary qualifications to diagnose learning difficulties.

The case of Sutherland explored whether cognitive impairment could be reliably diagnosed in students who are non-verbal. A finding from this case, supporting the research of Loftin (2003) and Yin Foo, et al. (2013), was that it is challenging to measure intelligence in this set of learners. An implication for practitioners assessing students who are non-verbal is that they need to be familiar with the research in this area, and use only tools designed to measure intelligence in this population of learners.

The Federal definition of disability acknowledged that the needs of the person with a disability are likely to change over time (Sahlin, 2007b). In the case of Sutherland, the school kept strong documentary evidence showing how the student’s needs had been accommodated over time. An implication from this decision is that schools need to consider how they keep longitudinal documentation of adjustments made for students.
As noted in the literature review, Australian disability discrimination case law suggested that it would be difficult for a claim of discrimination to succeed where a disability was undisclosed. Disclosure was an issue in the cases of Chinchen and Turner. Disclosure is the process of informing the school of the nature of the student's disability, and how it can be best accommodated in the classroom. Disclosure is especially important for those students whose disabilities aren’t immediately obvious, and where teachers may not be aware of the disability (Matthews, 2009). In the case of Chinchen, the school attempted to unsuccessfully argue that the student’s learning disability was not formally diagnosed at the time of some of the alleged discrimination, so they were not obligated to provide adjustments. In the case of Turner, the parent alleged her daughter had a number of disabilities, some of which the school argued were undisclosed. An implication from these decisions is that, even without a formal diagnosis, schools are obligated to provide adjustments, and to seek further investigation from a qualified professional if they have a reasonable suspicion that a student has a disability.

Tensions surrounding the issue of resourcing were noted in the cases of I, Sievwright, and Turner. Education authorities generally provide funding for some students with disabilities although, as discussed in Chapter Two, the Federal definition of disability is far broader than definitions used by education authorities to determine additional resourcing for students with disabilities (Tan, 2012). In the case of I, while the school received no additional resourcing to accommodate the needs of the student, the case highlighted that schools are obligated to provide adjustments even when additional resourcing is not available. The case of Sievwright highlighted the implications for schools accommodating students whose eligibly for additional resourcing fluctuates over time. The challenge for schools is how to continue to offer the same level of support that the student received when they were eligible for additional resourcing. In the case of Turner, the judge criticised the parent for attempting to use litigation as a way of bringing about a policy change that would ensure additional
resourcing for learners with language disorders. Families who try to use litigation to bring about a change to government policy should be aware of the findings from this decision, and proceed with caution.

The literature review noted concerns teachers might have in educating students who have behavioural difficulties as a manifestation of their disability. Analysis revealed behaviour as a manifestation of disability was a tension in several cases. The cases of P and Phu found teachers were more focused on providing adjustments that alleviated the impact of the behaviour rather than educational progress. This supports the research of Hehir (2007), who found that educational programs frequently emphasised reducing behavioural outbursts, with limited focus on the educational supports needed to ensure academic success. In the case of T, the parent alleged that, had the school provided social skills instruction to her son, he most likely would not have been suspended from school for behaviours that manifested from his disability. The school countered that, despite the lack of documentary evidence, they had provided social skills instruction as part of a life skills program, a factor that swayed the tribunal to dismiss the case. There are programming implications for schools that can be drawn from these decisions. First, when developing IEPs for students who have behaviour as a manifestation of their disability, schools would be wise to pay attention to both the behaviour and academic needs of the student. Second, interventions that have a proactive approach to reducing the severity, frequency, or intensity of the behaviour manifestation may limit the student from being subjected to a more reactive disciplinary response, potentially reducing the future risk of litigation.

In the case of YB, record keeping was noted as a concern, with the complainant seen as an inaccurate historian of the supports received. This finding suggests that families who use litigation to seek a remedy on a discrimination matter need to ensure they have accurate
records of the alleged discrimination. The converse in this decision showed school that keep accurate records of the provisions made available to students are able to use this as evidence of the adjustments provided, limiting the potential for the claim of discrimination to be upheld.

The case of AJ (Cowell) challenged how schools provide supports to students where absenteeism impacts on their ability to gain benefits from the supports given. An implication from this decision is that schools must take additional responsibility to ensure students whose disability impacts on their attendance remain connected, socially and academically.

Conclusions from these findings, with recommendations for future actions, are presented in Chapter Nine. The next chapter explores tensions that arise in relation to whose voice is considered or consulted when curriculum adjustments are made.
Chapter Six – Whose Voice is Heard

This chapter presents the results of the analysis in relation to whose voice was taken into consideration during judicial decision-making involving the 54 students. The aim of this analysis was to answer research sub-question two: Whose voice is heard when determining adjustments to curriculum? The DSE (2005, section 3.4.2) states that education providers must consult students, or their associates, when determining adjustments. Section 1.4 of the DSE defines associate as a spouse, domestic partner, relative, carer, or business, sporting or recreational partner. For school-aged students, the associate is typically a parent or carer. Section 3.5 of the DSE outlines that these consultations should include:

- discussion about the reasonableness of the adjustment;
- whether the adjustment would achieve enrolment, participation in both courses, learning experiences and activities, use of facilities and access to services on the same basis as the student’s peers; and
- whether an alternative adjustment would achieve the same aims with less disruption or intrusiveness to others.

Judicial decisions were examined to determine whether students were consulted in relation to the adjustments to curriculum made on their behalf, how this consultation occurred, and whether students participated in the judicial process. Findings from this examination are documented in this chapter. In addition, the judicial decisions were further explored to learn whether the associates of the student with a disability had a voice in the educational process, and how courts determined reasonableness when the views of the associate differed from educators. Findings from this examination are also documented in this chapter.

Using a forensic linguistic analysis of the 92 cases involving 54 students, each judicial decision was manually coded using the approach outlined in Chapter Three. Sixteen
judicial decisions were identified where there were tensions in relation to whose voice was heard (see Table 10). In four of these cases, the judicial decisions included discussion related to student voice. In nine cases, the judicial decision-making contained specific statements in relation to how the judge/commissioner weighed the views of the parent or the child’s specialist against the views held by the teachers. The children featured in these cases, either due to the nature of their condition or their age, were mostly represented by legal counsel or a relative; four judicial decisions discussed the issue of complainant representation.

Table 10. Coding Sweep for Chapter Six (Voice)

<table>
<thead>
<tr>
<th>Coding Sweep</th>
<th>Code</th>
<th>Cases</th>
<th>No. of complainants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Voice</td>
<td>Purvis JC Beasley Finney Walker CAD P Abela Sievwright Turner Kiefel Phu Sutherland YB Prendergast Oakes</td>
<td>16</td>
</tr>
<tr>
<td>2</td>
<td>Student Voice</td>
<td>Purvis JC Beasley Finney</td>
<td>4</td>
</tr>
<tr>
<td>2 cont’d</td>
<td>Complainant and respondent with differing views</td>
<td>Walker CAD P Abela Sievwright Turner Kiefel Phu Sutherland</td>
<td>9</td>
</tr>
</tbody>
</table>
The remainder of this chapter will explore the findings from specific discrimination cases in relation to student voice, differing complainant and respondent views, and complainant representation.

**Judicial Decisions Relating to Student Voice**

Four cases discussed the issue of student voice. The first two judicial decisions explored the right of a student with a disability to not take part in a legal proceeding brought forward on their behalf. The remaining two decisions presented in this section analysed judicial decision-making when students were able to contribute evidence.

**Purvis v. State of New South Wales.**

*Context.* The full context for this case was provided in Chapter Five. In summary, Daniel Hoggan had an intellectual and vision impairment caused by severe encephalopathy at six months of age. He also developed epilepsy that was later controlled by medication. After a protracted battle between the school and Daniel’s foster carers regarding enrolment, Daniel commenced at South Grafton High School on 8 April 1997. On five separate occasions throughout that year Daniel was suspended from school. On December 3, the principal advised the Department of Community Services, that, due to health and safety concerns, he had recommended Daniel be excluded and enrolled at the neighbouring government school in their SEU.
Allegation of how the law was breached. The complainant alleged Daniel’s treatment during his enrolment at South Grafton State High School, his suspensions and his exclusion, constituted less favourable treatment pursuant to sections 5 and 22 of the Disability Discrimination Act 1992. The complainant lodged the following allegations:

- The school had failed to train Daniel’s teachers to meet his individual needs; and
- The school failed to seek advice from specialist trained staff in drafting behaviour plans.

Evidence presented in relation to student voice. During the hearing, Daniel did not give evidence. Commissioner Innes noted that, “this was not surprising given the nature of his disabilities” (2000, s. 1). Towards the end of the hearing however, Commissioner Innes requested a chance to informally meet Daniel, citing Article 12.1 of the CROC which states that, “[C]hildren be given appropriate involvement in decisions and actions affecting them” (2000, s. 1). The Commissioner explained meeting Daniel would allow him “to gain a better understanding of the person to whom the complaint relates” (2000, s. 1).

Decision. Daniel declined to meet the Commissioner, a decision Commissioner Innes noted as “unfortunate” (2000, s. 1). The Commissioner explained meeting Daniel would have “assisted me in the making of what has been a very difficult decision” (2000, s. 1). Chapter Seven includes additional discussion of this case in relation to curriculum adjustments to support behavioural needs.

Implications. In Australia, a Disability Commissioner is entitled, under various legislative provisions, to order a summons for a witness to appear. While the Convention in the Rights of the Child enshrines the right for children with disabilities to take part in decisions that relate to them, through Commissioner Innes’ decision, it is also clear that when
offered opportunities to be a part in legislative proceedings, the child is entitled to decline this opportunity.

**JC on behalf of BC v. State of Queensland.**

**Context.** In 2005, the complainant, JC, lodged a complaint against Pine Rivers State High School, Queensland, on behalf of her son, BC, who was diagnosed with both an ASD and ADD. The complaint centred on two specific tensions. First, the parent had been advised by the principal that BC needed to be psychologically assessed before he could return to school. Second, the school had failed to provide reasonable adjustments to accommodate BC’s disabilities, particularly in relation to his maths curriculum.

**Allegation of how the law was breached.** The complaint alleged the requirement for BC to undertake a psychological assessment in order to be permitted to return to school was discriminatory, as was the failure of the school to provide the necessary adjustments to accommodate his disability.

**Evidence presented in relation to student voice.** During the interim hearing, the complainant requested her son “take no part in the hearing of this case” citing it would “further damage a very vulnerable and sensitive individual” (2006, p. 4, para. 3).

**Decision.** Dalton P refused to make this order. She noted the complainant had, “the right but not an obligation to call her son as a witness” (2006, p. 4, para. 3). She advised the complainant that it was her role to prove the alleged discrimination to the Commission, using oral or written evidence. Noting BC had presented a written witness statement, Dalton P further cautioned, “unless he attends for cross-examination, it is most unlikely that I, or any other member hearing the case, will have regard to that witness statement” (2006, p. 5, para. 3).
There was no further published decision in relation to this case, so no comment can be made about the precise nature of the allegations in relation to an adjusted maths curriculum for this student.

**Implications.** This was the only Australian judicial decision where a complainant sought to prevent the alleged recipient of the discriminatory act from taking part in litigation. In the case of Purvis, it was the student who chose not to take part in proceedings. BC may also have advised his mother he did not wish to take part in proceedings, but there is no evidence of this in the artefact.

**Mrs Robyn Beasley (on behalf of Dylan Beasley) v. State of Victoria Department of Education & Training.**

**Context.** In October 2003, Mrs Robyn Beasley lodged a complaint of discrimination, on behalf of her son Dylan, with the VCAT. Dylan, who was deaf since birth, communicated using a sign language called Auslan⁸. Dylan’s parents were also deaf, so Auslan was the sole method of communication in the home. Between 1999 and 2003 while a student at Pearcedale Primary School, Dylan was taught by eight teachers and sign language interpreters, but claimed, as none could adequately communicate in Auslan, he was instead taught using a combination of spoken language, fingerspelling and Signed English.

**Allegation of how the law was breached.** The complaint alleged Dylan had been treated less favourably than his peers as the respondent had failed to use the best communication method, resulting in Dylan not being able to reach his educational potential.

**Evidence presented in relation to student voice.** Apart from issues of legal competence, it is unknown why, in some cases, students give evidence yet they do not in others. In this case Dylan did give evidence. He claimed that he was unable to understand

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⁸ Auslan, or **Australian Sign Language**, is the native language of the Australian Deaf community. Like any language, Auslan has its own syntax, grammar and structure.
the communication method used by the staff who worked with him. The respondent argued Dylan was able to understand a considerable amount of what was taught. They further stated that the lack of complaints made by Dylan or his parents supported this view.

**Decision.** McKenzie DP found that there was a discrepancy between Dylan’s evidence and that of his teachers as to “the extent to which he understood the method of instructional communication used to teach him” (2006, p. 5, para. 17). Despite this, McKenzie concluded “Dylan’s evidence cannot be ignored. He is in the best position to know whether the method of communication used for him was one that he could understand, and to be able to estimate his level of understanding” (2006, p. 5, para. 18). She concluded that it was likely Dylan understood more than he estimated, but not as much as believed by his teachers. Dylan’s complaint was partially upheld and compensation was awarded. Further aspects of this decision are discussed in Chapter Seven.

**Implications.** This finding provided further evidence that courts and tribunals consider the voice of the student as part of their decision-making.

**Finney v. Hills Grammar School.**

**Context.** Scarlett Finney was born in 1992 with spina bifida. This disability results from a malformation of the spine and the effects vary from person to person depending on the severity of the malformation and its location on the spine. Typically, those who have spina bifida generally have difficulties with mobility, bladder and bowel control as well as hydrocephalus which can lead to learning difficulties. In 1997, Scarlett’s parents lodged an application for enrolment at the Hills Grammar School. Located in New South Wales, Hills Grammar is an Independent, non-denominational, co-educational K-12 school. Encouraged by the natural bushland surrounds, the non-denominational approach (which would not

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9 Hydrocephalus is fluid on the brain which can cause brain swelling and is generally alleviated by the insert of a shunt to drain the fluid.
conflict with the family’s Jehovah’s Witness beliefs), and the school prospectus that indicated the school accepted students with disabilities, the Finney’s and Scarlett were excited about the potential of Hills Grammar to meet Scarlett’s needs.

On enrolment, Mrs Finney advised the school, “Scarlett has spina bifida and requires a school with certain specifications, for example, level walkways, grounds, preferably no steps into class rooms etc. wheelchair accessibility” (1999, p. 2). This comment triggered an extensive enrolment process, designed to determine the current and future extent of Scarlett’s needs and the financial implications of meeting these. Ultimately the school rejected Scarlett’s enrolment claiming:

An important factor in the consideration of each applicant is the ability of the school to meet the special needs of every child, given the level and nature of available resources. Following a thorough examination of Scarlett’s special needs and the school’s ability to meet them, we do not believe that we have adequate resources to look after her in the manner that she requires and in a way that is suitable for her. It is with great regret that we have reached this conclusion. (p. 3)

*Allegation of how the law was breached.* Scarlett’s parents alleged the school discriminated against their daughter by refusing to accept her enrolment. The respondent countered that to have done so would have caused the school unjustifiable hardship.

*Evidence presented in relation to student voice.* Despite only being aged six, Scarlett’s legal counsel made an application for Scarlett to give evidence. Her counsel hoped that Scarlett would be able to tell the Commissioner her feelings in relation to the school’s decision. The respondent challenged Scarlett’s competence to provide evidence.
**Decision.** The Commissioner ruled against the respondent, and quoted Scarlett as saying:

I felt a bit disappointed that I could not go to that school – I wanted to go to that school. They wrote in a book that they do take people with disabilities”.

She further said “it (the school) had lots of things that I’d like to go on. (1999, p. 4, s. 4.1.1)

In his findings on this matter, Commissioner Innes said:

The opinion of the person with the disability should not be accepted without question because this could place respondents in very invidious positions. But the person’s views should be given weight, alongside the views of experts in the field who have had a chance to assess the individual in question and form an opinion. The greatest barriers which people with disabilities face in our community are the negative assumptions made about them by other members of the community. (1999, p. 43, s. 6.14)

Chapter Seven further explores an aspect of unjustifiable hardship presented in this case.

**Implications.** Again, this judicial decision upheld the intent of the Disability Discrimination Act 1992 and the Conventions on the Rights of the Child balanced against consideration of the views of the school and experts in the field.

**Summary of Findings from Judicial Decisions Relating to Student Voice**

This section of analysis explored judicial decisions where tensions arose from requests for specific adjustments, deemed necessary to alleviate the impact of a student’s disability. A summary of these four decisions is presented in Table 11:
### Table 11. Judicial Decisions Relating to Student Voice

<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Student Voice</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purvis</td>
<td>School failed to train Daniel’s teachers, or seek expert advice, on how to meet his learning and behavioural needs.</td>
<td>No mention of Daniel’s level of involvement in decision making about adjustments at the school. Daniel did not give evidence during proceedings and declined an invitation to speak with the Commissioner at the end of the hearing.</td>
<td>Commissioner noted Daniel’s decision to not take part in proceedings was unfortunate. Outcome: Pending (Outcome presented in Chapter Seven).</td>
</tr>
<tr>
<td>JC</td>
<td>School required student to undergo psychological assessment before being permitted to return following a suspension, and did not provide adjustments to meet his needs.</td>
<td>No mention of JC’s level of involvement in decision making about adjustments at the school. Parent requested student take no part in proceedings.</td>
<td>Court permitted student to not be called as a witness, but ruled his written statement would be disregarded as he could not be cross-examined. Outcome: Legal proceedings did not continue.</td>
</tr>
<tr>
<td>Beasley</td>
<td>School failed to provide Auslan, limiting the complainant’s ability to reach his educational potential.</td>
<td>No mention of Beasley’s level of involvement in decision making about adjustments at the school. Student gave evidence during litigation. Claimed he was unable to understand the communication method used by staff that worked with him.</td>
<td>Court valued Beasley’s evidence, although felt he did understand more than he estimated, but less than the school believed. Outcome: Partially won claim with compensation awarded.</td>
</tr>
<tr>
<td>Finney</td>
<td>School refused to accept enrolment.</td>
<td>Student gave evidence during proceedings. She stated she was disappointed with the decision of the school to not permit her to enrol.</td>
<td>Commissioner upheld the right of persons with disabilities to have their voices heard, and for their views to be balanced against expert advice. Outcome: Pending (Outcome presented in Chapter Seven).</td>
</tr>
</tbody>
</table>
Judicial Decisions Relating to Tensions Around Adjustments

Education discrimination cases arise from unresolved tensions between the student and their school. Nine judicial decisions provided detailed documentation of specific tensions in relation to curriculum adjustments. When coding these artefacts, noted tensions included the parent desire for the student to receive additional resourcing, conduct a review meeting of the student’s progress, and have an IEP developed. Other tensions surfaced when it appeared that the school did not follow, or actively rejected, recommendations made by a private specialist engaged by the parent to work with their child. Some parents expressed concern regarding the school’s choice of interventions for their child. Others simply demanded the school consult with them before making adjustment decisions. The analysis of these decisions focuses on whose voice was taken into account in the judicial decision.


Context. Born in 1995, Alex Walker was 12 years of age when his parents lodged a complaint of discrimination and victimisation with the HREOC. Alex attended Branxholme Primary School, Victoria, and later Bainbridge College. He had learning disabilities, dyslexia, Attention Deficit and Hyperactivity Disorder (ADHD) and Asperger’s syndrome. At times, these diagnoses manifested in some complex behaviours that posed a safety risk for peers and staff.

Branxholme Primary School documented Alex’s behaviours during Years Four, Five and Six. During Year Four, Alex was taught in a composite class. The teacher grouped students into ability groups, with Alex taught in a small group of four students known as “the Treasures”. There was fluidity between groups based on subject area and content knowledge; however Alex remained in the Treasures group for most of the time. Four days each week a teacher aide was appointed to the class and regularly worked with the Treasures on work
assigned by the teacher. At times, the teacher aide worked one-on-one with Alex. This group were given tasks that were designed to challenge them, but were shorter than those completed by most other students.

Throughout that year, instances of misbehaviour by Alex included the use of inappropriate language, some inappropriate playground behaviour, making obscene comments and gestures, and inappropriate peer interactions. Despite his parents’ misgivings, the school recommended that to alleviate Alex’s stress during unstructured times, he should return home (only a few houses away) for recess and lunch. On days when this might not be possible, the school provided additional playground supervision.

In 2005, Alex continued with his same teacher in a composite class and was again taught predominantly in the Treasures group. There were three teacher aides employed to work with the class, two of whom worked mainly with Alex. Apart from the occasional inappropriate comment or refusal to follow a direction, Alex’s classroom behaviour was mostly appropriate. Playground misbehaviours included throwing away items belonging to other students, tripping younger students, throwing equipment and rocks at students (resulting in injuries), failing to follow directions, swearing at staff, making verbal and gestural threats to kill the principal, and physically attacking the principal. Consequences for misbehaviour included being sent home for the day, kept inside during recess and lunch, and suspension from school.

In 2006, Alex continued in a composite class with the same teacher, but while still being taught in ability groups, there was no Treasures group that year. Alex was suspended on several occasions for swearing or inappropriate comments in class. Other instances of anti-social behaviour included wrestling a younger male student to the ground and simulating a sex act, and making inappropriate and threatening comments to other students that further
escalated into the ongoing harassment and physical attack of a particular female student. Tensions also surfaced over school excursions. These are discussed in Chapter Seven.

In 2007, the complainant commenced his secondary education at a private school, but was asked to leave in June. The school stated that they could no longer cope with Alex’s disruptive behaviour, sexually explicit behaviours and innuendo, use of technology to access pornography, violence against other students, unwillingness to complete tasks, and inappropriate language. No complaint was brought against this school in this discrimination case. Alex enrolled in distance education for most of his subjects, and attended a vocational program designed for students aged 15-19 held at an Adult Education facility.

In July 2007 a meeting was held at Baimbridge College with a view to a part-time enrolment, subject to the appointment of a male mentor and funding support from the education department. Funding was approved in mid-October, and a mentor was appointed by mid-November. A plan was developed that included Alex’s attendance at Baimbridge two mornings per week, as well as the school funding his continued attendance at the Adult Education facility four days per week. The limited attendance arrangements were seen as a strategy for assisting Alex to cope with the stress of a secondary environment.

For the two sessions at Baimbridge, the plan was for the complainant to work on his distance education materials, as well as science, technology, computer, library and gym activities, with one-on-one support from his mentor. It was also decided he would receive recess breaks at a time separate to the rest of the students in the school. The plan was agreed to by Alex’s Mum who stated retrospectively she felt it had been successful. Alex worked well for the remainder of 2007, and it was agreed he would return in 2008 and recommence Year 7 in a class with other students.
At the start of the 2008 school year, Alex continued attending Baimbridge two mornings a week in class with the support of integration aides for the entire sessions, spent two and a half days at the Adult Education program, and continued his studies through distance education. By April, the following behaviours occurred: misbehaviour in and out of class, use of sexual language, discussion of pornography, conversations preoccupied with violence, and derogatory comments made to school visitors. The school enacted a revised recess routine that required Alex to remain in the classroom for the first fifteen minutes of each recess, with the option to remain in the classroom for the rest of the break (which he mostly elected to do).

In September 2008, Mrs Walker requested an increase in her son’s attendance at Baimbridge. At the time the request was rejected by the principal who felt Alex was not ready, and this would increase Alex’s stress. Two months later, the school agreed to increase Alex’s attendance to Tuesday mornings, a full day on Thursday (with the option to take lunch breaks in the library), and Friday mornings. Staff noted improvements in Alex’s behaviour and agreed, in 2009, he would attend three days per week with two days at the Adult Education program. In 2009 Alex’s behaviour deteriorated (one reason cited was fatigue). By May, Alex was kept apart from other students at recess and lunch.

Allegation of how the law was breached. The complainant alleged, between 2001 and 2009 that the Department had:

- failed to allow Alex to attend school during recess and lunch,
- refused his attendance on a school excursion,
- failed to allow him to attend school for the third term of 2007 and then refused to allow him to return on a full-time basis,
- prevented him from using the school bus in 2008,
imposed a requirement that Alex access his education without an appropriate IEP, and without a trained staff member responsible for implementing an IEP,

placed conditions on his enrolment, participation and attendance, and

victimised Alex by ejecting him from the school grounds out of school hours while watching an extra-curricular activity.

**Evidence presented in relation to the differing views on the reasonableness of adjustments.** Tendered into evidence were a series of IEPs, the first two dating back to when Alex was in Year Six. Documented in his primary school plans were details of the academic program followed by Alex, informal observations of his strengths and interests, adjustments to the routine, curriculum, pedagogy, and assessments, as well as explicit instructions for those working with Alex, including the use of direct language and clear instructions.

Baimbridge College also produced Alex’s 2008 and 2009 IEPs.

At times, these plans incorporated advice from external psychologists as well as an expert in autism; at other times they were developed by the school and then sent to the external experts for comment and review. There was evidence that the experts then either approved the plans, or the schools had willingly amended the plans based on specialist feedback. There was also evidence that these plans were then implemented. The respondent argued that there was no requirement for Alex to access his education without one-to-one assistance and from Year 4 onwards, at all times, he had the assistance of an aide.

**Decision.** By the conclusion of the case, it was apparent to Tracey J that the dispute centred on the differing views held by both parties on:

- the efficacy and effectiveness of teaching and socialising regimes which were put in place at Branxholme and Baimbridge in order to cater for Alex’s disabilities. Mr and Mrs Walker considered that, had different strategies and
additional resources been devoted to Alex’s education, he would, despite his disabilities, have been able to reach the same levels of literacy and numeracy as those achieved by his peer group. The Department’s contention was that this expectation was not realistic. It accepted that Alex was intelligent and was able (as he did) progressively to improve his literacy and numeracy. His disabilities, however, meant that his progress was slower than that of others in his academic year group who were not disabled. (2011, p. 14, ss. 57-58)

In this case, Alex was called as a witness and gave evidence. Tracey J found Alex to be “an intelligent, responsive, polite and articulate young man. He was an honest witness. He readily agreed, for example, that he had engaged in misconduct, from time to time, whilst at the two schools” (2011, p. 42, s. 253). He concluded that while Alex “did not receive the exclusive attention of a teacher or an aide at all times when he was at the school, I am not satisfied, on the evidence, that in all of the circumstances, it was necessary that he receive such a level of assistance, much less that it was unreasonable not to provide it” (2011, p. 42, s. 263).

**Appeal.** In a 2012 appeal of the case, Judges Gray, Flick and Reeves explained that the DSE:

require a school to consult a student or his or her parents about prescribed matters. They do not, however, require that such consultation take any particular form or occur at any particular time. Those involved may meet formally or informally. Discussion can be instigated by either the school or the parents. Consultations may occur in face-to-face meetings, in the course of telephone conversations or in exchanges of correspondence. Once consultation has occurred it is for the school to determine whether an adjustment is
necessary in order to ensure that the student is able, in a meaningful way, to participate in the programmes offered by the school. The school is not bound, in making these decisions, by the opinions or wishes of professional advisers or parents. The school is also required to determine whether any reasonable adjustment is possible in order to further the prescribed aims. There may, therefore, be cases in which an adjustment is necessary but no reasonable adjustment is able to be identified which will ensure that the objectives contained in the relevant Disability Standards are achieved. (p. 46, s. 145)

Further aspects of this case, in relation to the balancing of interests, are outlined in Chapter Seven.

**Implications.** In this instance, the voice of the school was paramount. This case offered some insights on the obligation for schools to consult with students or their associate in relation to curriculum adjustments. Both findings supported the range of consultative approaches typically used by schools, including phone conversations, written communication, and face-to-face meetings. Both decisions supported the notion that, after consulting, it is then the role of schools to determine the appropriate adjustments for the student, even where these adjustments might be viewed as being at odds with the desires of the student or their associates. The overarching goal of the adjustment, emphasised in both decisions, is that it met the prescribed aims of the disability legislation, that is, to eliminate discrimination by ensuring, as far as practicable, students with disabilities have the same rights as their peers (ComLaw, 2015c, s. 3).

**CAD on behalf of SMD v. JK and Scott.**

**Context.** SMD was a nine-year-old boy with Down syndrome. In 1992, while enrolled at his local Queensland primary school and accessing his education through their
SEU, tensions arose in relation to the arrangements made for SMD to travel to and from school. SMD lived 200 metres from the school, on the opposite side of the road. Outside the school was a crossing monitored by a supervisor, although for a brief period during this year, the crossing supervisor was also responsible for a second crossing. At the request of SMD’s parents, the school developed and implemented a travel training program. It was a program where the support for SMD to travel between home and school would eventually be faded, allowing him to travel independently, except for where he was required to cross the road which would remain supervised by the crossing supervisor.

Allegation of how the law was breached. The complainant alleged the school had discriminated against SMD by not allowing him to walk unaccompanied from the school gate to his home.

Evidence presented in relation to the differing views on the reasonableness of adjustments. Between May and July 1992, SMD had almost achieved the goal of walking independently home at the end of each school day. He was still supervised by the crossing supervisor as he crossed the road, and either a teacher or an education assistant walked behind him to ensure he waited for the supervisor to signal he could cross. In the event where he did not wait, SMD was restrained to prevent him from running on the road.

Following the July school holidays, and then a period of absence from school due to attending respite care, the school felt the program needed to be adapted. They requested for SMD’s mother to meet him on the other side of the crossing each afternoon to walk him home. They set this as a goal for the July to September IEP. SMD’s mother refused to meet him each day. Instead she requested for SMD to be allowed to walk unaccompanied. The respondents alleged SMD was no longer able to safely walk unaccompanied home from school and, in October, the principal ordered the travel training temporarily be curtailed citing
concerns for SMD’s safety. The principal advised SMD’s mother that many students walked to school with their parents, and her refusal to assist SMD’s training coupled with the inappropriate example she set when crossing the road had retarded SMD’s training. SMD’s mother withdrew her son from the school.

**Decision.** In October 1993, the parties reached a settlement. A travel program, written by an independent psychologist, had been designed for SMD. This program included multiple assessments of SMD’s ability to travel independently, and recommendations (with fixed timeframes) to support SMD to learn to travel independently. As part of the agreement, the Education Department had agreed to “inform school principals and other school staff of the broader implications of this complaint and the need to consider the rights of parents and students under the **Anti-Discrimination Act**” (1993, para 14). The Department agreed to pay $952.00 compensation to SMD for the anguish the school had caused.

**Implications.** In this instance, parent view was the major factor in the conciliated outcome. The principal failed to take into account the family’s view in making their decision to cease the training program, a decision that might have been viewed as a punitive response to the complainant’s refusal to assist with the program, rather than a genuine concern for SMD’s safety.

**P v. Minister for Education.**

**Context.** As described in Chapter Five, P was a Queensland student with Down syndrome. From 1993 until the end of Term 1 1995, P attended his local State school. A decision was made at both the school and the regional level to reduce P’s teacher aide support by 10.45 hours across the week.

**Allegation of how the law was breached.** P’s Mother alleged the Minister for Education had discriminated against P on three counts, by:
• reducing the level of funding available to support his enrolment in a mainstream primary school,
• deciding to exclude him, and
• recommending his enrolment at a special school.

Evidence presented in relation to the differing views on the reasonableness of adjustments. An initial planning meeting, involving the complainant, was held on 13 December 1994 to discuss strategies on how to cope with this reduced support, but no decisions were reached. The next day a letter was sent to the complainant, inviting her to a meeting on 16 December 2004, to discuss P’s enrolment.

The school tabled a number of enrolment possibilities, including that P move to a special school, or that he dually enrol at both a special school and another mainstream school. The meeting concluded with the complainant stating it was her preference for P to remain at his current school and that she would explore the possibility of parent volunteers who could provide classroom support in lieu of the decreased teacher aide hours, an idea she later wrote was “born out of desperation” (1997, p. 14).

In a letter to the principal dated 20 January 1995, the complainant indicated she would not accept the enrolment options, so a number of education experts were invited to the school to observe P and make further recommendations, a process the complainant criticised as “designed to fail” (1997, p. 15). The results of these observations, tabled at a placement meeting on 10 April 1995, affirmed the observations of P’s teachers. Throughout the day, in both the classroom and the playground, there were periods where P was on-task, but there were also significant periods of negative behaviour.

The complainant, and her support personnel who attended the placement meeting with her, left prior to the end of the meeting, clearly articulating that enrolment anywhere other
than the current local school was unacceptable. After their departure, the committee decided P’s educational needs would best be met at the recommended special school and a letter advising the complainant of this decision was dated 11 April 1995. From that date, until the date of the hearing, P did not attend school and no attempts were made to enrol him at the recommended special school.

**Decision.** Member Keim described the December meeting as “emotional and lengthy” (1997, p. 14). Member Keim found that the respondent’s proposed special school recommendation constituted less favourable treatment as it ignored the complainant’s desire for P to remain at his present school, and ignored the attachments and familiarity P had at his current school. Member Keim also contended, “whereas the other students without impairments were able to receive an education suitable to their needs at their local school and a local school of their choice, P was placed in a position where he could neither receive education adjudged suitable to him at a school which neither he nor his parent chose and which was not his local school” (1997, p. 51). While Member Keim found P was the subject of discrimination, the issue of exemptions required determination before this discrimination could be determined as unlawful. These matters are further discussed in Chapter Seven, as they relate to the costs versus benefits of a mainstream education.

**Implications.** This judicial decision highlighted the importance of taking into account the desires of students and their parents when making decisions that affect them. The school, aware of the parents’ wishes, proceeded with a course of action that failed to consider the desires of the family. The key implication for schools is to ensure the desires of parents are considered when making decisions that involve students with disabilities.

Context. Beau was born on 28 September 1993. He was diagnosed in 2001 with ADHD, in 2006 with a mild intellectual disability, and in 2007 with short-term auditory processing difficulties in relation to processing complex verbal information. His father disputed the diagnosis of ADHD stating, “I don’t believe children have ADHD. I don’t believe in it” (2013, para. 6). On this basis, at times he refused to administer prescribed medication despite the school’s evidence that when medicated Beau was “far more responsive in class and was not disruptive” (2013, para. 6). Beau’s educational history was as follows:

- Panton Hill Primary School (Jan 1995 – June 1996);
- Diamond Creek Primary School (July 1996 – December 1996);
- Panton Hill Primary School (1997 – 2005);
- Eltham High School (January 2006 – May 2008 excluding time spent at an intensive social skills program);
- St Helena Secondary College (July 2008 – December 2009);

Beau’s father indicated that the movement between secondary settings was due to bullying experienced by Beau. Mr Abela also expressed his dissatisfaction with the treatment Beau received from staff as well as his dissatisfaction with how the school responded to their complaints regarding Beau’s treatment. At the time of the 2011 interlocutory application, Beau was 18 years of age and had left school with “no intention of returning” (2011, para. 4).

Allegation of how the law was breached. Beau alleged in November 2010 that the Department had directly discriminated against him by refusing his enrolment at any Victorian Government school. He further alleged, on the basis of his disabilities, he was the subject of discrimination during both his primary and secondary education. This discrimination was as a
As a result of the schools’ failure to provide reasonable adjustments. Specifically, Beau claimed he was required to access his education without the assistance he required. He argued he needed “significant, if not full-time, one-to-one assistance in his academic subjects from a teacher or aide who [was] trained in the management of his disabilities; and modified curriculum; and an IEP developed in consultation with experts in [his] disabilities; and speech/language therapy” (2013, para 68). He further claimed the requirement to access his education without these supports was unreasonable given his disabilities.

Evidence presented in relation to the differing views on the reasonableness of adjustments. One point of tension in this case was the differing views held by the schools and Mr Abela about the role of parents in a child’s education. Mr Abela was of the view that “it was the school’s job to educate Beau and not his” (2013, para. 10). Consequently, Mr Abela refused to enforce homework programs arguing failure to complete homework had no bearing on Beau’s literacy and numeracy achievements as these were the responsibility of the teachers. He further refused to attend meetings or even answer calls from the schools in relation to Beau’s behaviour stating “it’s your problem” when challenged by staff and “I don’t have time for this” (2013, para. 11). He marked written communication from the schools “return to sender” (2013, para. 15). He did not attend PSG meetings to discuss Beau’s academic progress or educational goals.

During his primary education and his first three terms at Eltham High School, Beau alleged he had not been provided with funding to support his needs, no PSG meetings had occurred, no IEPs written, no speech language therapy provided, and that he had received little more than limited one-on-one assistance with minor modifications to his program that allowed him to complete easier or less work than his peers. He outlined that a small amount
of funding was secured for the remainder of his time at Eltham, and this was used to provide limited teacher aide support, but no educational adjustments were made to his program.

While enrolled at St Helena’s, Beau alleged no remedial tuition or speech assistance was given. While enrolled at Collingwood Alternative School, Mr Abela alleged the school had failed to keep Beau safe, citing three instances. On the first two occasions, while travelling to school, Mr Abela alleged Beau had been assaulted and later threatened. The third occasion was from an event where Mr Abela alleged students had thrown orange peel at Beau and then threatened him.

Beau called a number of education psychologists and speech pathologists, some of whom had never met him or worked with him or his schools, to provide expert evidence on how he should have been taught, and to outline the resources that would have made this provision possible. In particular, some of these experts argued Beau would have achieved better outcomes in literacy and numeracy had the school used direct instruction approaches. This view was then countered by other education experts who argued direct instruction had limited efficacy. Beau further argued he should have been provided a modified curriculum, documented in an annual IEP, implemented by a qualified special educator, designed to address his disabilities and enable him to catch up so that he could access the regular curriculum in the same way as his peers.

The respondent presented detailed information about the supports that had been made available to Beau throughout his education. Both an education psychologist and a speech pathologist first noted Beau’s educational needs arising from his disabilities in 2000. These specialists recommended “continued literacy support”, but did not consider one-on-one support necessary (2013, para 112). For the remainder of his primary education, Beau received intensive literacy instruction, first through a qualified and experienced Reading
Recovery teacher, and later from a classroom teacher as well as an integration aide. During Years 1 and 2, Beau was given priority placement in both literacy and numeracy support groups. In Year 2, he was also provided with an adjusted mathematics program in class. In Year 3, in class Beau received small group instruction for mathematics as well as remedial literacy support outside the classroom. In Year 4, both literacy and numeracy work was individualised for Beau, and he worked one-on-one with an integration aide. During Year 5, Beau was withdrawn from a number of subjects to receive intensive literacy support. He was also provided with an IEP that outlined modified homework activities designed to support his literacy and numeracy development. In Year 6, Beau was engaged in a language support program with a qualified teacher, and was given a parent helper to assist during other classes. His modified homework plan continued, and modifications were also made in a number of his subjects.

When at Eltham High School, the school formed a support group to help determine Beau’s educational needs. Mr Abela was a member of this support group. In early 2006, Beau was reassessed by the education psychologist who had previously assessed his cognitive functioning. She noted a severe decline and diagnosed Beau’s IQ within the mild intellectual impairment range. Her report documented a range of adjustments to accommodate Beau’s educational and behavioural needs, but did not specify that he required one-on-one assistance. Beau received counselling, monitoring by a medical professional, mentoring, travel assistance, and support in class by integration aides. Each of his subjects was modified, with Beau’s interests used as a way to engage him in learning. A laptop was purchased for Beau’s exclusive use, and he received twice weekly intensive numeracy lessons. He was also withdrawn from French, to receive additional literacy support. For one term of Year 7, it was recommended that Beau attend an intensive social skills program held offsite along with four to six other students. This decision was supported by Mr Abela, who later refused to transport
Beau to the program who argued that, if the school wanted him to attend, they needed to get him there. Not long after commencing in the program, Beau indicated he no longer wished to attend. His support group arranged that Beau would attend the intensive program for three days per week and, subject to good behaviour, would be allowed to attend Eltham for the remaining two days each week. Following this intensive program, Mr Abela raised the possibility of Beau attending a special school to develop the necessary skills to be successful post-school. A visit was arranged, but Beau reacted negatively to this possibility of attending and did not visit the school.

At the request of Mr Abela, Beau was enrolled to commence Year 8 at the special school but Beau refused to go, and Mr Abela refused to allow him to return to Eltham. This situation continued until March when Beau returned to Eltham High School. During Year 8, Beau was provided with an intensive literacy program designed by a speech pathologist. Mr Abela continued as a member of the support group and was aware of this program. Beau’s subjects continued to be modified, and he also attended twice weekly cooking classes as well as a program focused on building relationships and addressing behaviours of concern. When Beau moved to Year 9, the school, with Mr Abela’s permission, moved him into a special program, designed to allow students to complete Years 9 and 10 over three years rather than two. In May of that year, Beau left the school.

In July, 2008, Beau enrolled at St Helena Secondary College and, at his father’s request, joined Year 8. At the request of Mr Abela, Beau was given a graduated return to school which was supported by the school’s counsellor. Beau received support from an integration aide for 29 out of his 30 lessons each week and each subject was modified to support Beau’s needs. He was also provided with intensive support in literacy (based on recommendations from Beau’s speech pathologist), numeracy, and independent living skills.
One month post-enrolment, both Mr Abela and Beau expressed satisfaction with the program provided. Beau’s teachers each received information about Beau’s educational needs. Mr Abela was provided this information in order to offer feedback before it was distributed to staff, but declined to give any comments. Mr Abela also failed to attend any of the remaining support group meetings. Beau left St Helena in December 2009. When Beau left the school, a representative from the respondent spoke with Mr Abela and recommended at least six other schools where Beau could enrol.

Early in 2010, Mr Abela and a disability advocate met with regional representatives from the Education Department. They sought an educational placement for Beau that emphasised direct instruction for literacy and numeracy, a safe and accepting environment, increased supervision extending across all break times, and support by a male teacher aide. The region recommended a number of schools to Mr Abela, and following a visit to Collingwood Alternative School, Mr Abela arranged an enrolment interview which he attended with the disability advocate. After initially advising the school Beau would be home schooled, Mr Abela later met the school and agreed for his son to enrol despite the school outlining that this was conditional on Beau abiding by the school’s expectations for behaviour. Beau was provided with a full-time teacher aide, supervision during all breaks, travel training, an IEP, and one-to-one instruction by a trained teacher aide using direct instruction. During his two-month enrolment, the school documented many concerns regarding Beau’s behaviour from repeated threats to peers, inappropriate name-calling of staff, refusal to follow directions or complete work, and leaving the school grounds. Mr Abela refused to attend a meeting to discuss Beau’s progress, and then withdrew Beau from the school. The respondent showed that they had made several attempts to discuss other enrolment options with the family, but there had been limited contact from Mr Abela, only from the disability advocate.
**Decision.** Tracey J concluded:

Mr Abela was obviously dedicated to his son. He had brought him up as a sole parent and sought to do whatever he considered to be appropriate to assist his son. He was particularly concerned to ensure that his son received a better education than he had done. Mr Abela had his own problems with literacy and numeracy and was not able to assist Beau to the extent that he wished. His own disability meant that he had an imperfect understanding of some of the medical and educational reports which he received. He was not, however, lacking in intelligence. (2013, para. 25)

Tracey J also found Mr Abela was not a particularly good historian, with a number of pieces of evidence lacking in accuracy or specificity. Schools were able to produce written documentation of meetings and conversations that Mr Abela denied happened. In these cases, Tracey J acted on the contemporaneous evidence provided by the school, and rejected Mr Abela’s testimony.

Tracey J found “Beau’s pleaded case [was] fundamentally flawed for a number of reasons” (2013, para. 81). He argued that it was not the role of courts to determine whether the lack of a specific form of assistance provided by a school imposed an unreasonable term or condition on the enrolment of a student, especially where there was conflicting expert evidence on the merit of that type of assistance.

Tracey J also found there was no doubt teachers had been acutely aware of the impact of Beau’s disability on his capacity to learn and they had written both formal and informal IEPs. The judgement also noted Beau’s program was modified based on recommendations made by speech pathologists. The case was dismissed with costs.
**Implications.** Similar to the finding in the case of YB outlined in Chapter Five, written documentation and strong record keeping was critical to judicial decision-making. In making his finding, Tracey J accommodated Mr Abela’s literacy difficulties and made some allowances for these, but no concession was given with regard to the lack of record-keeping in relation to the discrimination allegations. In this case, parent voice was lost to the contemporaneous evidence of the school and begs the question as to how a parent with limited literacy skills themselves can provide evidence similar to that provided by highly literate educators.

**Sievwright v. State of Victoria.**

**Context.** As outlined in Chapter Five, Jade Sievwright was a Victorian student with a language disorder, auditory processing difficulties and borderline mild intellectual impairment. She attended two different Victorian primary schools before relocating to Sydney to undertake an intensive 16-week language support program known as *Lindamood-Bell*. Upon completion of this course, Jade returned to Victoria to finish her primary education and commence her secondary education.

**Allegation of how the law was breached.** An issue for determination in the case of *Sievwright v State of Victoria* related to the provision of specific educational adjustments, as recommended by various medical and allied health practitioners versus those endorsed by the school. The complainant argued the respondent imposed four conditions on Jade’s education. The first condition was that she accessed her education without a full-time teacher aide. This aspect is dealt with in Chapter Seven. The second condition was that Jade participated in the *SRA Spelling Mastery* and the *SRA Corrective Maths Program* according to the school’s guidelines (which did not align with the recommended guidelines of Jade’s psychologist) and
that she participated in the SRA *Corrective Reading Program*\(^{10}\) despite it being implemented by a staff member with no formal qualifications in language disorders or disabilities. Third, Jade was expected to access her education without an IEP. Fourth, Jade was to access her education without a school-based speech therapy program.

To remedy the effects of this discrimination, the complainant sought the following relief:

- A full-time aide for all academic subjects;
- Remedial direct instruction in literacy (spelling and reading) and mathematics by a qualified practitioner trained in using materials published by SRA;
- Formal documentation of an IEP incorporating the recommendations of a number of medical and allied health professionals, to be developed in consultation with the complainant’s mother;
- Engagement of a speech therapist to assess the complainant twice per term and then develop and implement a speech-therapy program, reviewed each term;
- Professional development for all staff in strategies for teaching the complainant;
- Financial compensation totalling almost $60,000 for allied health and educational expenses, including speech therapy, counselling, teaching equipment used for home schooling, and provision of the Lindamood-Bell Reading program; and

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\(^{10}\) *SRA’s Spelling Mastery, Corrective Maths* and *Corrective Reading* are all intensive intervention programs, taught directly to students who are performing below the expected grade-level. The programs each provide scripted, explicit instruction learning materials, along with student resources, which aim to close the achievement gap for struggling students (Marchand-Martella, Martella, & Przychodzin-Havis, 2005).
Financial compensation for loss and damages, as well as for legal costs.

(2012, s. 4)

Evidence presented in relation to the differing views on the reasonableness of adjustments. Jade’s academic difficulties were first noted in 2004 by her classroom teacher during her Preparatory Year at Glen Katherine Primary School, Victoria. Jade struggled to complete tasks in the same timeframe as her peers, lacked focus and attention, and showed difficulties with processing and literacy. Jade’s Year One teacher arranged psychological and speech assessments of Jade’s abilities. Jade received support through the Reading Recovery program, and adjustments to numeracy class and home work. Her end of Year report showed Jade had made limited progress. Jade was also assessed by a neurologist. The school told the neurologist that Jade experienced frustration arising from poor recall, word retrieval difficulties, mild speech error problems, and fatigue while reading.

Jade was placed on a wait list for Departmental-funded speech therapy, but her family also commenced private therapy. For an eight-week period, between 8.30 am and 12.30 pm, Jade undertook an intensive speech therapy program funded by her family. Her therapist recommended an audiology assessment. The audiologist suggested a wide range of environmental adjustments. Jade’s teacher noted that, while not all adjustments were documented in Jade’s education plan, she did make these adjustments during her lessons.

Throughout Year Two, Jade’s school secured three hours per week funding to employ a teacher aide to work with Jade during literacy and numeracy block. The teacher aide implemented a plan designed by the class teacher, based on recommendations from the specialists consulted the previous year. At the end of the first semester, the complainant enrolled Jade at Briar Hill Primary School, a smaller State school. The new school provided Jade with targeted small-group literacy intervention, focussed on phonics, reading high-
frequency words, and reading strategies. Jade also continued to attend the privately funded intensive speech therapy program for half days. The school offered Jade’s mother Departmental-funded speech therapy, but Jade’s mother declined the offer as she was concerned two different speech therapy programs would confuse Jade and potentially hinder her progress. Jade’s mother noted her daughter appeared to have “blank spells” and Jade’s doctor recommended a paediatric assessment. Jade was diagnosed and medicated for epilepsy.

Jade continued to receive the same support levels upon entering Year Three. Jade ceased taking her epilepsy medication in May, as her class teacher noted limited effect and her paediatrician felt Jade had outgrown the blank spells. In June, the school developed an IEP for Jade as assessments of reading and mid-year school reports still showed Jade was experiencing difficulty. In July, the school commenced a 30-minute, four-times per week small group program taught by a teacher using *SRA Corrective Reading*. The end-of-year report noted Jade was benefitting from the SRA program, but that she was still struggling when reading aloud in class, and was well below average across all areas.

When Jade entered Year Four, her mother wrote to the regional director asking for funding for one-on-one assistance, and for the school to pay for both an FM transmitter\(^\text{11}\) and speech therapy. The assistant regional director wrote to Jade’s mother, and recommended the school apply for funding under the *Program for Students with Disabilities* (PSD)\(^\text{12}\). Jade’s mother replied to the assistant regional director, indicating she had been told Jade’s combined disabilities did not meet eligibility requirements for PSD funding so applying would be

\(^{11}\) An FM transmitter, most commonly used in schools by children with hearing impairment, is a device that assists students who are distracted by background noise. The teacher wears a microphone, which allows their voice to be directly transmitted to a device worn by the student. This assists the student to better hear the teacher’s voice over any background noise.

\(^{12}\) Program for Students with Disabilities is the initiative of the Victorian DEECD that allocates additional resources to schools to support the educational needs of eligible children with disabilities.
“fruitless” (2012, p. 11, para. 44). The assistant regional director suggested that the school arrange a meeting to revise Jade’s needs and, if appropriate, to submit a funding application. The assistant regional director recommended the school loan an FM Transmitter to trial with Jade. An FM transmitter was trialled for a month, but found ineffective by both Jade and the teacher, and its use was abandoned in August.

The complainant took Jade to see a psychologist. The psychologist recommended that Jade would benefit from five 90-120 minute weekly sessions using the SRA Correcting Reading Program, the SRA Spelling Mastery Program and the SRA Corrective Maths Program. The psychologist also recommended that these programs were to be taught by a person formally qualified in their delivery, although no explanation was offered as to the nature of the required formal qualifications. The school continued to offer three 30-45 minute sessions per week in Corrective Reading with a teacher. The psychologist’s report offered recommendations for the class teacher on how to teach oral and written comprehension, following of instructions, and increased comprehension of vocabulary.

At the end of Year Four, the school recommended Jade move to a different class in Year Five, one that emphasised literacy and numeracy acquisition. Jade’s mother supported this change, as well as the proposal for a PSD funding application. Jade’s mother started the Corrective Reading program at home (three days per week maximum), after being trained in its implementation by the school’s psychologist. Again, the school offered speech therapy to Jade that was to be delivered by a final-year speech therapy student, but Jade’s mother rejected the offer again as she was concerned it would inhibit progress made during private speech sessions.

Jade commenced Year Five in the new class that had one full-time teacher, an additional teacher ten hours per week (the one who had been delivering the Corrective
Reading Program), and an aide funded to work with two boys. The aide indicated she worked with Jade intermittently on a one-on-one basis, with the teacher indicating individualised support was offered whenever possible, but also mindfully to avoid singling Jade out from her peers more than needed or setting low expectations for her. In July, the teacher working in the room for ten hours per week (the Corrective Reading teacher) was promoted to principal, and a new teacher was appointed. The school applied for PSD funding, and 12 hours per week of funding for a teacher aide were approved, to commence the following year. Jade’s psychologist recommended some of the funds should be allocated to SRA instruction, with the remaining funds to support employment of a teacher aide. A review by Jade’s audiologist again recommended the use of the FM transmitter. Jade was also assessed for admission into the Lindamood-Bell Institute to undertake an intensive reading program. Jade’s mother was concerned about what would happen to Jade’s funding if she were accepted into Lindamood-Bell but the principal reassured her, in writing, that the funding would still be available provided Jade remained enrolled at the school and was simply recorded as absent.

Jade attended school for the first two weeks of Year Six, before being accepted into the Lindamood-Bell program. She attended the 16-weeks of one-on-one intensive literary instruction, at a cost of $29,000. At the end of her enrolment, assessments showed Jade had made limited improvement. Prior to Jade’s return, the complainant wrote to the school outlining her preference for the PSD funding to be spent on a minimum of two hours in-class support and one hour individualised literacy and numeracy intervention each day. The school advised that the teacher aide was no longer available to work with Jade, but a temporary aide had been appointed with a new aide to be recruited for the second semester. Concerned about these arrangements, and the inexperience of the temporary aide, Jade’s mother decided to home-school her daughter for the remainder of her primary education.
The respondent produced evidence showing that they had consulted with Jade and her mother, modified Jade’s curriculum, and implemented recommendations from specialists. During the hearing, all teachers reported that Jade would have benefitted from the provision of a trained full-time teacher aide, and that additional resourcing would have alleviated some of the pressure of providing for Jade’s needs although there was no evidence to suggest that this would have resulted in improved literacy and numeracy outcomes or better overall results for Jade. Counsel for the complainant proposed that, despite the school’s actions, Jade’s potential had not been realised, and the education gap between Jade and her peers had been widened.

The respondent argued that the school used all of their intervention resources to implement the Corrective Reading program, and they had insufficient funds and no trained personnel to implement the Spelling Mastery or the Corrective Maths program. The teacher who implemented the Corrective Reading program advised that she had contacted the publisher and was told students would benefit from the program even if only implemented three times per week, and this matched her experience of using the program successfully at her prior school. The teacher argued that, had she been told progress would be limited unless implemented five times per week, she would have sourced an alternative reading program. The teacher also indicated she had reservations in implementing the Corrective Maths program as she had used this program at another school, but felt that the American content, especially in relation to money and measurement, caused difficulties for students. A number of teachers also expressed concern that extra withdrawal for individualised assistance would have caused Jade to feel disconnected from her peers, disrupted her learning, and affected her self-esteem.
A professor of psychology, called by the respondent as an expert witness, claimed one-to-one assistance would not improve Jade’s overall IQ which had been assessed at 72. She argued that there was a correlation between low IQ and low academic skills, stating that while education environment is important, in her view it was not possible for a child with low average IQ to move into the average range of abilities. The professor further argued that there was “no evidentiary basis that the remedial programs ... work with children with low IQs” (2012, p. 23, para. 107). She also noted “kids with an intellectual disability, who have to work harder in school, tire more quickly” (2012, p. 24, para. 109) and this matched the respondent’s evidence documenting Jade’s fatigue and poor concentration.

The psychologist representing the complainant disagreed with this finding. She argued that, when conducted 30 minutes per day five days per week, the SRA program was successful, and that poor results were often reflective of the program being implemented without fidelity. She agreed that students with cognitive difficulties were unlikely to make the same gains as their peers, and may require two to three times longer to achieve the same results, and only after a lot of repetition. Counsel for the complainant argued the adjustments provided for Jade, while well intentioned, were not beneficial.

The discrimination complaint alleged that an annual IEP should have been developed for Jade incorporating each of the specialist’s recommendations. The complainant tendered into evidence several departmental documents advising it was good practice to develop an IEP for students with disabilities as well as for those who had additional needs. During the period of claim, IEPs were not mandated by the Victorian DEECD. At no point during the period of claim did any of the specialists involved in Jade’s education recommend an IEP.

The complainant also alleged that Jade had been discriminated against through the school’s failure to provide a speech therapy program. The respondent had, on three
occasions, offered speech therapy to Jade. The complainant declined the first offer as she did not want her daughter to go on a wait list. Later offers were also denied due to the potential impact these offers may have had on the progress being made by Jade in her private speech therapy program.

**Decision.** Marshall J sought to establish the nature of the recommendations made by the various practitioners, the extent to which the respondent had implemented these recommendations, and “the evidence concerning whether the recommendations made in respect to Jade’s schooling constituted ‘special assistance’ which Jade required in order to access her education” (2012, p. 16, para. 80.6). Marshall J concluded that:

> The public school system is structured upon education in groups and in a classroom, rather than individually. Implementing the remedial program in the way suggested ... would mean that Jade was out of the classroom for an [sic] one and a half hours of a five and a half hour school day, every day. Mrs Hirth said that the idea of such extensive isolated intervention “takes my breath away”, and gave evidence that in her view such intervention was out of touch with the realities of the school environment ... Jade’s teachers, and Mrs Hirth in particular, gave evidence that removing Jade from class for 90 minutes per day would make it more difficult for her to engage with the curriculum, and may also damage her ability to connect with her peers. (p. 41, para. 211)

> On the evidence of the teachers and aides, and the evidence regarding Jade’s self-esteem and fatigue, Marshall J concluded that “the provision of remedial programs at a higher frequency and for longer sessions may not have been sustainable or beneficial for Jade” (p. 41, para. 212). On the matter of lack of formal training to implement the _Corrective Reading_ program, Marshall J found that the heavily scripted nature of the
SRA direct instruction programs allowed untrained people, like Jade’s mother, to quickly learn how to implement the program with no requirement for any formal qualification.

Marshall J noted three concerns with the alleged requirement that Jade access her education without an IEP. First, Jade’s needs changed over time, so it was inappropriate for an IEP developed when Jade was in Year 5 to incorporate specialist recommendations from when she was in Year 1. Second, some recommendations were trialled and discarded when found to be ineffective. The continued inclusion of these recommendations would have been inappropriate. Third, there were a total of 96 recommendations made in the various specialist reports with considerable overlap. Marshall J concluded that, at those points in time where no formal IEP was recorded, there was no evidence to suggest Jade had suffered a detriment.

Marshall J noted that Jade was assessed by two different speech pathologists during the period of claim, neither recommending a school-based speech pathology program. Marshall J concluded that, “it was not unreasonable for the State, with its finite resources, to maintain a waiting list for children to access speech therapy, where that list is prioritised according to children’s needs and the availability of speech therapists” (p. 41, para. 214). The choice for Jade’s mother to pursue private speech therapy was not considered an imposition of an unreasonable requirement. Marshall J found that there was “no evidence that the level of speech therapy offered by the Department was insufficient for Jade, nor any evidence as to what Jade’s academic attainment might have been had she received speech therapy in the terms submitted” (p. 28, para. 137). It was noted, however, that “Jade might have suffered serious disadvantage in her education in the absence of speech therapy had no offer of speech therapy been made by the Department” (p. 39, para. 199).

Marshall J concluded:
it cannot be said that Jade suffered a serious disadvantage or failed to access her education by reason of the imposition of the condition or requirement that she do without the special assistance. She was participating in the classroom, albeit in a modified way, and making modest improvements. (p. 42, para. 220)

Marshall J found no unlawful discrimination had occurred in this matter, and the complaint was dismissed with the applicant to pay the respondent’s costs. An attempted appeal of this decision was also unsuccessful.

**Implications.** In this case, there were clear ongoing tensions between Jade’s mother and the school in terms of the level of adjustments provided for Jade. These tensions raised an issue also noted in Chapter Five; that is, the entitlement to support, in this case IEPs and Student Support Group meeting, by students ineligible for additional resourcing. Despite Jade’s disabilities not meeting disability resourcing criteria, her mother expected the school to meet to discuss Jade’s educational program, and then document the required adjustments in an IEP. The respondent argued that there was no obligation to do this in the formal way desired by Jade’s mother. Instead, they argued it was appropriate for teachers to consult parents informally about curriculum adjustments. The school also rejected certain adjustment suggestions from specialists if trial showed they had limited impact for Jade. The judicial decision noted that Jade suffered no detriment from the school adopting this approach, thus inferring this approach was appropriate.

The second tension centred on the adequacy of the intensive intervention offered to Jade. The complainant’s views, particularly in relation to the delivery of the intensive instruction programs, appeared to be shaped by Jade’s psychologist. The school held a different view, concerned about the potential impact withdrawal instruction might have on Jade’s self-esteem, as well as the limited resourcing the school had to offer all of the
suggested interventions. Again, it can be inferred from the judicial decision that weight was

given to the school’s consideration of the effect of providing these adjustments on Jade’s self-
esteeem. The outcome, in this case, is that the voice of the educator rather than the associate

appears to have been given more weight.

Anja Turner on behalf of Rebekah Turner v. State of Victoria – Department of

Education and Training.

Context. As outlined in Chapter Five, Anja Turner on behalf of her daughter Rebekah

(Becky) lodged a complaint that spanned Becky’s education at four Victorian Government

schools: two primary schools, one P-12, and one secondary. The transcript of the case

provided a year-by-year account of the difficulties faced by Becky at school.

Allegation of how the law was breached. Both Becky and her mother argued that the

failure to provide adequate levels of educational assistance to accommodate Becky’s

disabilities resulted in her falling behind her peers, and that documentary evidence of school

reports containing positive statements about the complainant’s progress were considered “at

best incorrect and at worst misleading” (2007, p. 7, s. 25).

Evidence presented in relation to the differing views on the reasonableness of

adjustments. The Turner case presented lengthy testimony documenting the disparate views

held by teachers versus Becky’s family and medical practitioners in relation to her educational

abilities and the required adjustments to support her needs. While teachers had reported that

Becky was making progress at a rate that was satisfactory in comparison to her peers,
specialist reports by speech pathologists, psychologists and paediatricians all indicated

substantial delays in learning.

In 1999, during Year 2, Becky was taught by two teachers in a combined Year1/2

class with 27 students. The complainant met with the school on two occasions to discuss her
daughter’s progress. The first meeting, in February, was with the principal and with the
complainant’s psychologist. As a newly enrolled student at the school (having completed
Year 1 at a different school), Becky’s mother outlined her daughter’s educational needs. A
further meeting was held in June, this time with Becky’s two teachers also in attendance.
Concerns included incomplete homework and Becky’s anxiety. The complainant informed
the school that a significant amount of time was spent each evening assisting Becky with
homework, and a home-school communication book was trialled over a four month period to
document concerns. By the end of the year, according to her school reports, Becky
progressed in all curriculum areas, and for the most part was achieving at the appropriate
academic standard. There were, however, some strands within curriculum areas, where there
was a six-month delay.

In Year Two Becky received small group instruction, one-on-one assistance, as well as
clarification and reinforcement of instructions. Her teachers noted that Becky did require
more individual assistance than her same-aged peers, but in comparison to the other fifteen
children who were in the Year 2 cohort, five other children were performing at a lower level
than Becky (2007, p. 23).

In 2000, Becky commenced Year Three. Again, parent-teacher meetings were held
twice this year, in February and August. At the February meeting, Becky’s mother advised
the teacher that her daughter had ADHD and required additional assistance. In August,
Becky’s psychologist and speech pathologist also attended the meeting. Becky’s speech
report indicated a severe receptive language disorder. Throughout that year, the class teacher
provided no individual assistance to Becky. Becky indicated she was scared of the class
teacher, often crying at home, and she started to experience headaches and cramps. From
school reports, as well as standardised and statewide testing results, by the end of Year Three,
Becky had slipped further behind her peers. She was “two years behind in writing, one and a half years behind them in spelling, and six months behind them in mathematics” (2007, p. 31, s. 155).

Unhappy with her daughter’s progress, the complainant met with the principal of another primary school to discuss enrolment for Year 4. At this meeting, she highlighted her daughter’s educational needs and indicated that she was approximately one year delayed academically. The principal advised that the school was:

empathetic to children with learning needs and that they were often placed in a class in which a teacher’s aide was working, because that aide, along with assisting the children for whom the aide was funded, would also sometimes be able to assist others. (2007, p. 32, s. 162)

There was no teacher evidence given for this year of schooling, but Becky reported she received no additional assistance except that offered to other students generally. She had a good relationship with her teacher, and her mother reported this to be a positive school year. At the end of the Year, her overall assessment indicated Becky had made significant educational progress and, in most areas, was working at the same level as her peers.

In 2002, Becky entered Year 5 where she would then go on to have the same male teacher for Year 6. The class also had a teacher aide for both years. In 2002, the aide was funded to work with two students in the class for a total of almost 23 hours per week. Becky had significant difficulty with English, especially spelling, and also struggled with mathematics. Becky claimed the teacher gave directions too quickly using language she did not understand, yelled at her if she sought clarification, at times ignored her or told her he was busy and suggested she ask a peer, or gave her the answers without explaining the process. Becky also claimed that the teacher showed her work to other students as an example of what
not to do. She claimed that she was given a maximum of ten minutes per week assistance from the teacher aide, and that homework would take, on average, two hours per night. Throughout 2002 and 2003 Becky also commenced cooking classes with the teacher aide from which she said she gained “very little” (2007, p. 38, s 192).

The teacher aide who worked in this class recorded in a diary each occasion she worked with Becky. Across the course of the 2002 school year, 31 instances of support were noted. These included assistance with “finding resources for projects, help in spelling, maths and using the internet” (2007, p. 39, s 199). Becky, with her mother’s permission, also joined in on shopping excursions where ingredients for cooking lessons were purchased. She would then join these cooking classes. The teacher aide indicated that these lessons were to assist students to “locate supermarket items, basic food preparation and basic money-handling skills” (2007, p. 39, s 202).

Becky’s teacher agreed he occasionally told Becky to attempt work on her own to promote her confidence in her capacity to work independently. He also agreed that at times he recommended Becky seek assistance from a peer. He estimated ten minutes per hour of maths lessons and five minutes per hour of English classes were spent teaching Becky and a peer in a small group setting. It was found, on one occasion, that the teacher had read Becky’s work aloud to the class, complete with errors, and this had caused embarrassment. At a meeting in June 2002, the teacher acknowledged he had limited experience in teaching children with additional needs and felt uncertain about the strategies he could use. A meeting was held in August 2002, attended by Becky’s psychologist. Here Becky’s recent struggle with depression, anxiety, and learning difficulties were all discussed. Becky’s teacher agreed to tutor her in numeracy for 20 minutes per week after school. The after-school tutoring occurred between August and September and then it ceased. In addition, it was agreed the
teacher would arrange opportunities for Becky to work with younger children to build her self-confidence. This occurred on two occasions.

In 2003, Year 6, Becky again received assistance from the teacher aide on 14 documented occasions. A meeting was held at the start of the school year to again discuss Becky’s educational needs. Goals were set across each curriculum area. During the first term, Becky experienced hallucinations and, on several occasions, was aggressive at home. She was hospitalised on two occasions, and was diagnosed with a “variant of panic disorder” (2007, p. 43, s. 216). In May 2003, Becky’s neuropsychologist assessed her learning delays to be three years in English and even greater in mathematics. Another meeting was held in July 2003. Again, there was disagreement between Becky’s mother, her treating medical practitioners, and her teacher about her educational needs. They agreed that an IEP would be drafted by August 2 to then be discussed at a meeting scheduled for August 7. The IEP was not sent home until August 6, at which time the complainant cancelled the meeting.

In late August Becky attended an orientation program for another school. On her enrolment application, when asked whether the student had special needs, Becky’s mother wrote, “No, but is a visual learner!” (2007, p. 52, s. 260). On 1st September Becky returned home from school so distressed that her mother contacted the new school who agreed to fast-track her enrolment for Term 4, 2003. Her parents formally withdrew her from her school and she started at the new location in October 2003.

In 2004, Becky was in a composite class of 60 students from years 7, 8 and 9. She had two one-hour sessions per week of small-group withdrawal for comprehension, spelling and punctuation skills as well as small group maths lessons. Additional adjustments provided to support Becky’s learning included oral rather than written instructions, extra worksheets (sometimes in large format with additional white space for notes), scaffolded teaching,
repetition, dot point written summaries, prompts, one-on-one support, and reduced expectations in terms of workload. Becky frequently viewed this final adjustment as a reinforcement that her teachers simply did not have time to assist her, rather than seeing it as an adjustment designed to remove some of the pressure of having to complete work at the same pace as her peers.

Becky also attended a life skills shopping program, which was offered for a full-day every four to six weeks. During these sessions, she would go shopping with a small group of students with the reported aim of building self-confidence, money management, and practical skills in shopping.

The complainant reported during 2004 at least two hours each evening was spent assisting Becky with homework. In November 2004, Becky was diagnosed with “a double depressive disorder” (2007, p. 53, s 265) and, despite being ineligible for funding under the PSD, a meeting was held in December 2004. At this meeting it was agreed that the school would assess Becky’s literacy and numeracy skills at the commencement of the new school year and an IEP would be devised. This testing did not occur and goals for Becky were not set. This started a deterioration in parent-school relationship that spread across 2005.

During 2005, Becky did not attend the withdrawal literacy, maths or life skills program, but was included in the mainstream full-time. For maths, this meant Becky was working with peers who were working at a Year Seven/Eight level, despite Becky being assessed at working at mid-Year 6 level. Midway through 2005, the maths’ teachers swapped classes, with a Year Nine teacher assigned to Becky’s class. It was alleged that this teacher failed to provide adjusted work for Becky, and this caused some distress. Becky was transferred to a different class of students who were working at a Year Nine level, but Becky was given the “Maths Power” and “Maths Mates” programs to work through. Both programs
provided revision of basic maths skills. Becky alleged the work was too difficult, and she felt embarrassed to constantly interrupt the teacher to seek assistance. This differed from the teacher’s recollection who felt Becky made good progress, although she was still working at a level two years below her peers. The teacher acknowledged she did not constantly monitor Becky’s progress, but that Becky had access to both one-on-one teacher assistance as well as teacher aide assistance and additional time to complete work.

A number of adjustments were provided in literacy. A novel was read aloud in class, although Becky said she found this difficult to follow. Audio tapes of the novel were also ordered, although these did not arrive in time. Modified literacy tasks were provided as well as teacher aide assistance. An IEP was developed in August 2005, but the complainant criticised its layout and specificity. At this time, Becky had been diagnosed with “a severe expressive language disorder”, and with a significant discrepancy between verbal and performance IQ (2007, p. 53, s. 265). A regional office consultant in language difficulties met with the school in September and assisted them in IEP goal development, strategy and resource selection, and evaluation techniques. After this session, the school developed a revised IEP.

In 2006, the complainant commenced her education in Year 9 at a new school, the largest Government school in that region. Under the guidance of a trained special education teacher, the school implemented the following adjustments for the complainant: withdrawal from three history lessons per week for modified small-group history tuition; individualised homework/assessment assistance; assistance with reading, spelling and comprehension; ongoing and frequent liaison between the special education teacher and class teachers regarding Becky’s educational progress; withdrawal maths classes taught in a small-group environment by a qualified maths teacher using a modified maths curriculum; 30 minutes per
week literacy (reading and spelling) tuition and mentoring by a senior student under the supervision of the special education teacher and an experienced English teacher; and PSG Group meetings in February, April and June.

A significant tension, spanning the entire period of Becky’s case, was the issue of educational assistance and the provision of a full-time teacher’s aide. It was the opinion of Becky and her mother that the provision of a qualified full-time aide, supervised by a teacher, was essential. This view was supported by many medical experts who worked with Becky including her neuropsychologist, two psychologists, and her speech pathologist. While not specifically arguing for a teacher aide, Becky’s psychologist indicated that without specialised individualised instruction, the gap between the abilities of Becky and her peers would continue to widen (2007, p. 91, s 460). The respondent’s expert witnesses cautioned the risk of learned helplessness and dependency concerns associated with the provision of a full-time teacher aide. These conflicting views were shared by many of the teachers who had taught Becky.

**Decision.** Some aspects of the contemporaneous evidence provided by teachers were treated with caution. First, there was specific criticism of vague comments written by teachers, including that Becky “was progressing ‘reasonably’ well ... and ‘sometimes’ needed extra assistance” (2007, p. 10, s 36). Second, records of parent meetings and PSG meetings showed that teachers had agreed to adjust their teaching pedagogy, and this was taken as acknowledgement that teachers were aware their approaches weren’t working and they needed to try something different. It was also taken as evidence that teachers were aware of Becky’s difficulties and the need to provide adjustments. Third, some teachers testified that their findings of Becky’s abilities in the classroom differed to those presented in medical reports, and therefore they had rejected these reports. Medical experts, however, testified that
“some of the teachers were reluctant to accept their diagnoses” and this evidence was preferred by McKenzie DP and these three factors impacted on the weight given to the teachers’ evidence (2007, p. 10, s. 38). The complainant argued that the school painted an unrealistic, perhaps even misleading, picture of Becky’s abilities when it came to reporting. McKenzie DP preferred the teachers’ evidence, finding the positive comments were provided “out of a genuine desire to foster Becky’s confidence and self-esteem, but it has had the effect of masking the true extent of her difficulties and need for assistance” (2007, p. 8, s. 26). At times, McKenzie DP felt the school had exaggerated Becky’s progress.

McKenzie DP noted “the discrepancy may also be explained by the fact that Becky had to perform the standardised tests without additional assistance, while she received some educational assistance in the classroom” (2007, p. 8, s. 27). It was concluded that “Becky’s academic progress was better than the standardised tests predict, but worse than her teachers describe” (2007, p. 8, s. 28).

McKenzie DP found that, during some years, the assistance given was both reasonable and adequate, as was her participation in and access to curriculum. At other points in time, the educational assistance was viewed as inadequate, and the lack of adjustments provided to Becky had diminished her educational opportunities. The combined impact of Becky’s severe language disorder and lack of educational assistance were considered to contribute to her overall academic failure.

With reference to the 2004 life skills program, McKenzie DP noted that “although the program was well-intentioned, participation in it and the consequent withdrawal from mainstream classes for a day every four to six weeks did not benefit Becky” (ref). McKenzie DP noted that, despite their lack of training or knowledge of her needs, “the teachers increasingly looked for better ways of teaching Becky” (2007, p. 59, s 292). There was,
however, criticism of Becky’s 2004 and 2005 IEPs, and in particular her goals. In 2004, the maths goal was for Becky to finish her workbook, while in music it was for her to keep up with the class. The goals lacked any strategies and McKenzie DP noted they “simply place responsibility for compliance on Becky” (2007, p. 61, s 304). The plan did not document Becky’s present level of performance, nor did it contain strategies designed to progress this level. Vague strategies such as “material should be written on the blackboard” were also criticised (2007, p. 61, s 304). In 2005, McKenzie DP described the school’s approach as “ad hoc and unplanned, although well intentioned” (2007, p. 75, s 373).

Further criticisms by McKenzie DP of the adjustments provided included:

questions were not always answered, the assistance given to her was sometimes inappropriate to her needs, and she was not monitored sufficiently to determine when she did not understand that she was missing out on what was being taught or did not ask for assistance although she needed it. Her teachers placed on Becky an inappropriately heavy responsibility to determine for herself when she needed assistance, determine what kind of assistance she needed, and ask for it. 2007, pp. 77-75, s 371)

In 2006, despite the extensive adjustments, McKenzie DP was critical of some of the assistance provided to Becky. The literacy support program provided by a senior student was criticised for the minimal assistance it provided. Second, when in class, the onus of responsibility for seeking support continued to rest with Becky, and there were times where Becky needed assistance but did not ask for it. It was noted that:

there was still too much reliance on Becky’s capacity to identify herself all the occasions when she needed assistance, those part of the teaching or content she did not understand and, indeed, exactly what she did not understand. Given
Becky’s severe language disorder, her difficulties in understanding, and her occasional losses of concentration, this was an unreasonable expectation of her. (2007, p. 89, s 451)

The use of withdrawal maths and history lessons for assignment and homework support was also criticised from the perspective that, as her academic program increased in complexity, it was likely more time would need to be devoted to homework and assignment assistance, and less to instruction.

McKenzie DP summarised three reasons why such divergent views were held in relation to full-time teacher aide provision. First, she noted that there is “no clear, universally or generally accepted answer” to the debate as to whether students with learning disabilities benefit from a full-time teacher aide (2007, p. 95, s 474). Second, the decision was typically influenced by the student’s needs, the adjustments provided, and their educational progress. Third, to know whether Becky would have benefitted from a full-time teacher aide required a level of speculation. McKenzie DP determined that it was not her job to answer this question. Instead, she was called to consider whether the respondent had discriminated against Becky by imposing a condition that diminished her educational opportunities and, as such, was unreasonable. She found:

Although in an ideal world, a full-time dedicated special education teacher might be a perfect solution to assist a child in Becky’s position, there is nothing to indicate that an aide, trained and supervised by a special education teacher or speech pathologist or both, would not be able to provide reasonable and adequate assistance for such a child. The bulk of the expert evidence is that Becky would have benefited more from her education if she had greater
one-on-one teacher aide assistance. I accept this evidence. (2007, p. 97, s 484-485)

In conclusion, McKenzie DP found:

that Becky had a severe learning disorder, an impairment within the meaning of that Act. I am satisfied that, at the times when I have earlier found that the educational assistance provided to Becky was not adequate or reasonable, each of the schools concerned knew about her severe language disorder. I find that class participation, access to the educational curriculum, and (generally) the opportunity to achieve educational potential, are benefits provided by the State. I speak of the opportunity to reach that potential, not the achievement of that potential. No education authority can guarantee a child will achieve his or her educational potential. I find that by imposing the requirement or condition which it did, the State indirectly discriminated against Becky (in the circumstances indicated in my findings) by limiting her access to these benefits. (2007, p. 116, s 586)

A directions hearing, to consider remedies and costs, was held in December 2007. A number of orders were made in relation to Becky completing her education. These included the development and implementation of an annual IEP, written under the guidance of a speech pathologist and a special education teacher; the provision of a full-time fully-qualified teacher’s aide for all classes, trained by the State and working under the supervision of a speech pathologist and special education teacher; and implementation of remedial reading, decoding, comprehension, spelling, and maths programs three hours each day, five days per week over eighteen month’s duration with annual reports of Becky’s progress on these
programs (and at other times by request) provided to the education expert who made this recommendation. In addition, the complainant received $82 000 compensation for loss, damage, and injury as a result of this discrimination.

In 2009, the State of Victoria appealed this remedy decision. Kyrou J found the tribunal had breached the rules of natural justice by making a finding that extended beyond the initial period of claim detailed in the complaint therefore incorrectly estimating the required compensation and incorrectly ordering the provision of a full-time teacher aide. The proceedings were adjourned, with parties to make revised submission on the basis of these new findings. The outcome of these revised submissions is unknown as there is no published decision.

**Implications.** This finding raised a number of important implications for educators and education authorities. With the case spanning such a lengthy timeframe, it is one of the first of its kind that appears to argue educational negligence. The finding relied on testimony from Becky and her family that the withdrawal program offered to her was inappropriate to her needs, and did not benefit her. The school was also criticised for expecting Becky to alert staff to her difficulties, noting the challenge this would place on students who have language difficulties. There are further implications in terms of how educators report the progress of students who are experiencing difficulties, with the school criticised for painting a positive, but misleading and exaggerated, picture of the student’s abilities.

Another key issue was that of resourcing. In evidence, many of the teachers who taught Becky indicated they had done what was possible within the existing resources and that, with additional support, they may have been able to provide more assistance. One strength demonstrated by the school, which could be adopted into professional practice more broadly, was their record-keeping of the programs and adjustments given to Becky.
James Kiefel (by his next friend Wendy Kiefel) v. State of Victoria (Department of Education and Early Childhood Development).

Context. James was born on 1 September 1999 and was 12 at the time his case was first heard. He was diagnosed with both an ASD as well as both expressive and receptive language disorders. The Victorian DEECD alleged that James had a mild intellectual disability, a claim supported by two psychologists but disputed by the complainant. The complainant argued any assessment of IQ was invalid as James was non-verbal and had severe autism. The manifestation of James’ disabilities included “difficulty in concentration and attention, anxiety, limited speech, avoidance of non-preferred tasks and bouts of aggression” (2013, para. 7) which included loud outbursts, biting, and hair pulling.

The case centred initially on an allegation that while James attended Bulleen Heights School, a specialist school in Victoria. The school had used time-out as a strategy to manage his behaviour without the informed written consent from James’ parents. Brought forward were affidavits from six other parents of children with ASD enrolled at Bulleen all citing similar concerns regarding the use of time-out and seclusion. In a 2011 interlocutory hearing, the complainant was advised she would not be able to rely on the six affidavits at trial.

In 2013, when the judicial decision was handed down by Tracey J in the Federal Court of Australia, the claim extended to allegations against several schools in which James was enrolled from the period 2005 to 2010. These include:

- Bulleen Heights School, where James attended in 2005;
- Wantirna Heights School, where James attended from 2006-2007; and

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13 An interlocutory application is an interim hearing, typically held before a final decision is handed down on a matter. The hearing is usually to seek interim relief, an immediate solution, or an injunction.
Essex Heights School, where James was enrolled from 2008 until June 2011 although, in 2010, James only attended for nine mornings throughout the first term and one day per week in Terms 3 and 4.

In July 2011, James relocated to the United States so that he could access an education program in a specialist school using *Applied Behaviour Analysis (ABA)*. It was the view of James’ parents that since enrolling in this setting, James’ language and behavioural skills had improved significantly.

**Allegation of how the law was breached.** James’ Statement of Claim documented a range of shortcomings with regard to his education, which he claimed had “prejudicially affected his education experience” (2013, para. 46). He argued that his education had been limited because the Department failed to provide him with the appropriate teaching, support, resources, and facilities to meet his needs. He also documented three pages of adjustments he argued each of the schools should have provided. The adjustments could be broadly summarised as appropriate IEPs, provision of both ABA and speech therapy, and access to toilets. In addition, there were allegations of injuries resulting from the use of physical restraint. The complainant argued that the failure to provide these adjustments accounted for James’ failure to make progress in his language and behaviour skills. Tracey J noted that there were problems with the pleadings in James’ case, complicated by a change to the amendments made to the *Disability Discrimination Act* in 2009. Allegations of victimisation were later withdrawn.

**Evidence presented in relation to the differing views on the reasonableness of adjustments.** The complainant made specific allegations against each school. Bulleen Heights School was alleged to have:

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14 *Applied Behaviour Analysis,* or ABA, is a behavioural intervention designed to be delivered intensively (15-20 hours per week) by a qualified ABA therapist (*Autism Behavioural Intervention Association*, 2013).
• failed to develop Individual Plans, and
• not provided therapy support to improve James’ communication skills.

The respondent was able to produce evidence of formal behaviour management as well as IEPs that were written for James while enrolled at Bulleen Heights. In relation to speech therapy, James’ received fortnightly speech therapy. The complaint also alleged Bulleen Heights excluded James prematurely from their inclusion program located at a local primary school, but this was not raised at trial.

In terms of curriculum, during James’ enrolment at Wantirna Heights School, it was alleged that the school:

• failed to develop Individual Plans,
• forced James’ to follow a toileting schedule that prevented him access at times to toilets, and
• failed to teach him literacy, numeracy or to follow an ABA, verbal behaviour or formal communication program or to provide speech therapy.

The respondent produced evidence of an informal plan that had been discussed at a staff meeting during 2006 as well as individual learning goals set for James at several support group meetings. In 2007, while no formal behaviour plan could be produced, James’ class teacher had consulted with a psychologist in relation to support strategies and had employed a range of these strategies in the classroom. In addition, a formal IEP was developed in 2007.

James’ parents alleged that the school forced James to follow a toileting schedule that included only allowing him to access the toilet while on the playground if he verbally communicated his needs. The school stated that James had experienced a number of toileting accidents, both during his time at Bulleen and when he commenced at Wantirna. The school
policy was that, when in the playground, no student was allowed to go to the toilet unless they had first asked a staff member who then ensured it was safe for the student to go. Requests could be made verbally or using a picture communication card, and students were never denied their request.

In relation to allegations about failure to provide ABA therapy, the respondent was able to produce an email from James’ parents in 2006 stating they wanted to move James from Bulleen Heights School to Wantirna Heights School “because the school did not offer ABA therapy” (2013, para 101). In relation to speech therapy, James’ received in class and withdrawal speech therapy at Wantirna Heights School, at times weekly.

During his time at Essex Heights School, in relation to curriculum, the complaint alleged that the school:

- failed to create and implement an Individual Behaviour Plan (IBP) or to arrange parent-teacher interviews,
- refused to fund a specialist to support James on an excursion,
- provided five different aides between 2008 and June 2009 and then discontinued aide support,
- failed to use materials provided by Mrs Kiefel as part of an ABA program,
- from March 2010, defaulted in the provision of adjustments, and
- in November 2010, ceased delivering an ABA program.

When James enrolled, Essex Height’s staff continued to implement the goals set in his IEP at Wantirna, revising these as each goal was met. The respondent was also able to produce evidence of behaviour management plans developed in 2008 during a student support group meeting, and multiple plans from 2009. At all relevant times while at Essex Heights, James had an IBP. Essex Heights also arranged for a functional behavioural assessment of
James’ behaviour and developed a range of strategies and behavioural techniques to support James.

Essex Heights School agreed that they had invited Mrs Kiefel to accompany James’ on a school excursion but countered James’ participation was not conditional on Mrs Kiefel accompanying James and, had she been unavailable, the school would have employed additional staffing. They also admitted seven teacher aides had worked with James during the period 2008-2009. The high turnover was attributed to three factors: natural attrition, complaints by Mrs Kiefel with regard to particular aides, and irregular attendance by James affecting the hours of casual staff. The school was able to show that, across James’ entire enrolment, multiple aides had worked with him, at times providing one-on-one support.

A key aspect of this case was in relation to the provision of ABA at Essex Heights Primary School. During 2009, Mrs Kiefel had expressed her desire for James to receive ABA. James’ teachers at Essex Heights were able to show that they had used some of the ABA materials provided by Mrs Kiefel, but occasionally, when materials weren’t used, it was because of a pedagogical choice, not a decision based on James’ disability. Whilst speech therapy services were available by parental request at Essex Heights, these had not been requested for James. James’ class teacher at Essex Heights felt his language needs were being met through the ABA program delivered to James by a qualified ABA therapist.

The school had approached the Department to seek expert advice, and a staff member had been recommended. This person was rejected by Mrs Kiefel. It took until March 2010 to source a qualified ABA therapist that Mrs Kiefel approved. In November 2010, the school advised Mrs Kiefel that they would no longer provide ABA or a verbal behaviour program for James. The school reasoned that they were not “set up to provide a full ABA therapy program for James. In particular the school was not able to provide a one-to-one program and
such a program could not be delivered in the type of mainstream classroom which James attended” (2013, para. 172).

Other allegations made against each school, unrelated to curriculum, were outside the scope of this analysis and not included for discussion.

**Decision.** Tracey J concluded that this “is yet another case in which well-meaning parents have been wrongly led to believe that redress is available under the DDA for what they perceived to be deficiencies in the manner in which educational services have been provided to their children by the State of Victoria” (2013, para 6). He concluded that James was not required to access his education without either an IBP or IEP. He concluded that speech therapy programs were available in each of the schools James attended and that he did not avail himself of this opportunity at Essex Heights. He found that there was no requirement for James to communicate verbally in order to access the toilet during breaks at Wantirna Heights School. He concluded that no contravention of the DSE had been made out and the application was dismissed with costs.

**Implications.** Like most parents of children with disabilities, James’ parents simply wanted the best for their son, and over time changed schools in the search for the best educational program. When they failed to find what they were seeking, they claimed each of the schools had discriminated against James by not providing what they saw as the gold standard education, specifically an ABA program. Similar to the finding in YB and Abela, this judicial decision highlighted the importance of record-keeping. Each of the schools had kept detailed records of the adjustments made for James. On the basis of this contemporaneous evidence, again the Court accepted this evidence over parent recollections.

Context. The complainant’s daughter, HP, was a 13-year-old girl with a diagnosis of autism, severe global developmental delay and neurofibromatosis (NF) Type 1. The most common complication for children with Type 1 is specific learning disability, including “difficulty with written work, poor organisational skills, impulsivity and a decreased ability to perceive social cues” (North, Joy, Yuille, Cocks, & Hutchins, 2008, p. 428). HP had no verbal form of communication and engaged in self-injurious behaviour, including hitting herself both in the face and head, as well as biting.

Part way through 2007, HP’s special school attempted to address her learning needs through the provision of an additional teacher aide in her classroom. This support was used to assist with feeding, prevention of injurious behaviour, data collection, and a program to encourage independence and develop communication skills. After approximately 12 months of this provision, the school informed the complainant that they wished to fade this level of support. On receipt of this advice from the school, the complainant applied to the Administrative Decisions Tribunal of New South Wales to prevent the school from reducing the level of support provided to his daughter.

Allegation of how the law was breached. The complainant alleged that HP was “denied access or had her access limited to benefits provided by the educational authority ... and/or that she had been subjected to a detriment” (2008, para. 3). In the initial complaint, it was alleged that the requirement for HP to access her education without one to one support amounted to discrimination by the respondent.

15 The Neurofibromatosis Association of Australia Inc (2007) define NF Type 1 as one of the most common genetic disorders, characterised by benign tumours that grow on the skin (cafe-au-lait spots) and on the nerve to the eye, which may cause blindness.
Evidence presented in relation to the differing views on the reasonableness of adjustments. The complainant’s view was that any reduction of support would result in an increase in injurious behaviour. This view was supported by expert testimony from medical practitioners who detailed the consequences of self-injurious behaviour, including possible retinal detachment (resulting in blindness) and brain injury. The complainant argued that the requirement that HP access her education without individualised support imposed a requirement or condition with which she could not comply.

The Department relied on testimony from an education expert in special education who had extensive experience and knowledge in special education. The witness argued it was not in the student’s best interests to maintain the level of support being provided by the school. She argued if HP “was engaged in purposeful and enjoyable activities she was less likely to exhibit self-stimulatory behaviour in the form of self-injurious behaviour” (2008, para. 25). It was argued that a reduction in support would allow the school personnel to “test the success of programs that had been implemented” (2008, para. 26).

Decision. In a preliminary finding, decided on 20 August 2008, the tribunal found that while there was a potentially serious risk of self-injury to HP, the advice of the respondent’s expert witness was accepted. The tribunal ordered school personnel to monitor the incidence of self-injury, feeding, and learning, and to reinstate support should there be any deterioration for HP.

Second legislative matter. In October 2008, a further preliminary legislative matter was heard. The complainant alleged that the school had ceased to provide full time one-to-one support for HP, were no longer collecting data on her self-injurious behaviour, and had reduced the support for feeding. The complainant argued that, as a result of these limitations,
there had been deterioration in HP’s learning and eating, and an increase in self-injurious behaviour.

In this interim order, the complainant also sought leave to arrange for an independent expert psychologist to assess HP. He argued that the expert education witness engaged by the respondent in the initial hearing was not independent of the respondent, and sought an order to employ a psychologist who specialised in children with autism. The complainant briefly mentioned that HP was learning how to use the PECS in the home environment and that the respondent had refused to use this system at school. This was an isolated statement in the findings with no redress by the respondent.

The respondent disputed these claims countering, at the request of the complainant, they had been providing daily data regarding food intake and incidences of self-injury. Tendered as evidence were behavioural data sheets, notes from the classroom teacher to home and measures to increase HP’s communication (although the judicial decision did not describe these measures). The respondent opposed the application for an external psychological assessment, arguing it posed an unnecessary delay required for both testing and then interpretation of the results.

It was undisputed that the school intended to fade the support being provided to HP although, at the commencement of this final hearing, no reduction had yet occurred. The complainant relied on testimony from HP’s paediatrician as well as support workers who provided respite and vacation care, and a DVD showing that full time one-on-one support was necessary to reduce the incidence of self-injury. Also presented was written documentation from HP’s paediatrician, general practitioner, and a psychologist. The complainant had sought the use of physical restraint to limit self-injury, but this was cautioned strongly by the expert witness as a strategy only to be employed as part of an overall plan.
The respondent countered with both classroom evidence detailing HP’s ability to understand prompts, follow simple directions, and communicate through gesture, all in the absence of a full-time teacher aide. The respondent also tendered extensive literature provided by their independent education expert citing that, while complete elimination of self-injury was rare, a functional understanding of behaviour combined with pharmacological and behavioural approaches were most effective. Of greatest concern was the risk of HP developing a dependence on the full-time aide unless this support was faded over time.

The tribunal found no increase in self-injurious behaviour and, while they accepted the complainant’s evidence that on one occasion HP had returned home hungry, they were not satisfied that the school had denied feeding support or that there had been an increase in self-injury. The tribunal dismissed the application, noting that “all parties were concerned about the safety and educational progress of [the student]” (2009, para. 105). The complainant was considered to be “a concerned parent” and the school staff “dedicated educational professionals” (2009, para. 106).

**Appeal.** In November 2010, the complainant appealed to the *New South Wales Administrative Decisions Tribunal* arguing the tribunal had made an error in their judgement in that competing considerations had not been weighed. It was argued:

The tribunal had failed to consider overtly whether the steps taken by the respondent were appropriate, whether they provided benefit to Helen, whether additional funding should have been sought earlier and the expert advice of Dr Mansour that one-on-one care was necessary to recognise behavioural patterns and help curtail the self-injurious behaviour. (2010, para. 14)
It was further argued that, “the tribunal made no assessment of whether the school’s contention that ‘overdependence’ was an appropriate basis for declining to provide one-on-one assistance” (2010, para. 15).

The Court of Appeals found:

What was required was an exercise in judgement as to what should in competing circumstances and within the bounds of reasonableness best be done in Helen’s interests bearing in mind that the decision maker, i.e. the school principal, had to make his or her decision over a relatively short period based upon the very same considerations which the tribunal took into account. None of these matters mentioned seems to be irrelevant nor does it appear to us that the tribunal failed to take into account a relevant matter ... It would be no light thing to categorise as unreasonable a decision taken by experienced teachers who were undoubtedly concerned for the welfare of Helen and were doing what they thought was best in her interests while justifiably also taking into account their other responsibilities. (2010, para. 16)

Aspects related to the costs versus benefit debate raised in this case are discussed in Chapter Seven.

**Implications.** This judicial decision outlined serious tensions between the views of the parent supported by HP’s medical practitioners versus those held by the teachers and experts in special education. HP’s self-injurious behaviour was of such significant concern that one more instance of self-injury would likely have cost HP her vision. Understandably, her parents and her medical practitioners held grave fears for her safety, with the complainant even willing for his daughter to be restrained to protect her from self-harm. The school,
supported by an expert in special education, viewed HP’s behaviour as stemming from her inability to communicate. The decision to introduce a communication system, and fade one-on-one support, was seen as the best educational intervention to support HP. These judicial decisions supported the school’s chosen course of action, with a caveat that the school needed to closely monitor and cease the intervention if it posed any risk to HP’s safety. From this decision, schools could feel justified in establishing interventions with data collection and monitoring protocols, provided these interventions were supported by research. What is interesting in this case is that the complainant called on expert evidence to support their case, but their evidence was insufficient judged against that of the teachers.

**Sutherland v. State of Victoria Department of Education and Training.**

**Context.** As discussed in Chapter Five, Lindsay Sutherland commenced her education at a primary school in Victoria in 2001. Lindsay had medically-controlled epilepsy and cerebral palsy. During her time at the school, there were ongoing tensions between Lindsay’s parents (particularly her mother) and the school, and Lindsay eventually left the school in late 2005.

**Allegation of how the law was breached.** The complainant argued that Lindsay was treated less favourably than her peers as she was not permitted to sit the 2004 state-wide compulsory assessment of literacy and numeracy, and this decision did not take into account associate view. As her associate, Lindsay’s mother desired that Lindsay take part in this assessment.

**Evidence presented in relation to the differing views on the reasonableness of adjustments.** The respondent agreed that Lindsay was not permitted to undertake the assessment. They argued it was “common practice among most schools that students in the PSD are not required to participate because of its unsuitability” (2007, p. 38-39, para. 180).
Expert advice argued that the level of adjustments required for Lindsay to sit the test would have meant the test was inappropriate.

**Decision.** The tribunal found that, “while it was regrettable that the question of Lindsay’s participation in the test was not discussed with Ms Harrison, I am not satisfied that the failure to have Lindsay participate in the test was less favourable treatment” and the complaint was dismissed (2007, p. 39, para. 184). Further aspects of this case will be discussed in Chapter Seven.

**Implications.** This decision appeared at odds with the other judicial determinations in this Chapter. The consistent message has been that children, and their parents, should be consulted in matters that affect them. It is clear from analysis of the other decisions that consultation does not necessarily lead to an entitlement of the student’s or parent’s desired adjustment but, in this determination, no consultation occurred. The judicial ruling only considered whether Lindsay might benefit from sitting the assessment, not her right (or that of her parents) to choose whether or not she took part.

**Summary of Findings from Judicial Decisions Relating to Tensions Around Adjustments**

This section of analysis explored judicial decisions related to tensions between parents and educators around the types of adjustments given to students. A summary of these nine decisions is presented in Table 12:
Table 12. Judicial Decisions Relating to Tensions around Adjustments

<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Walker</td>
<td>Parent sought a wide range of adjustments with school failed to make, and school placed conditions on student’s enrolment, participation and attendance.</td>
<td>Court agreed with school that Walker did not require the level of adjustments that he sought, but on appeal, noted the school does have an obligation to consult and that this consultation can take many different forms. Outcome: Pending (Chapter 7 presents further details).</td>
</tr>
<tr>
<td>CAD</td>
<td>As part of a travel training program parent wanted student to walk to school independently but school refused and ceased delivering the program.</td>
<td>Outcome: Settlement reached between both parties with an independent expert designing a travel program that met the needs of both parties. School paid complainant compensation.</td>
</tr>
<tr>
<td>P</td>
<td>Parent wanted student to remain enrolled in a mainstream school but school reduced level of funding support, excluded the student, and recommended he enrol at a special school.</td>
<td>Court noted school had not taken into account parent’s desires. Outcome: Pending (Chapter 7 presents further details).</td>
</tr>
<tr>
<td>Abela</td>
<td>Parent claimed a number of schools had failed to provide adjustments and support to accommodate his son’s needs. Student was then expelled, and parent claimed the Department had refused to enrol him in any school. Schools countered with extensive evidence of a wide range of adjustments.</td>
<td>Court noted Abela was a concerned parent, but not a good historian at record-keeping. Outcome: Lost, with costs awarded to the Department.</td>
</tr>
<tr>
<td>Sievwright</td>
<td>Parent, supported by various medical and allied health professionals, and school disagreed on the types of adjustments provided to the student.</td>
<td>Court found the adjustments made by the school were appropriate. The court also determined extra support as requested by the family would not have been beneficial to the student or sustainable for the school to deliver within their finite resources. Outcome: Lost, with costs awarded to the Department.</td>
</tr>
<tr>
<td>Case</td>
<td>Tension</td>
<td>Outcome</td>
</tr>
<tr>
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<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Turner</td>
<td>Parent alleged the failure of the school to provide adjustments caused her daughter to fall behind, and that school reporting of her daughter’s progress was incorrect and/or misleading. School produced evidence of extensive adjustments provided to the student.</td>
<td>Court criticised the school for some of its record keeping. Court felt at times the school had exaggerated the student’s progress in reports, but out of concern for the student’s self-esteem and confidence. Court found student was given adequate assistance during some years, but not during others. Goal setting in IEPs was the main criticism, with vague strategies and ad hoc unplanned approaches also criticised. Outcome: Won, with costs awarded to the family. Outcome of a subsequent appeal is unknown.</td>
</tr>
<tr>
<td>Kiefel</td>
<td>Parent claimed a number of schools had failed to provide adjustments, and as a result her son had failed to make progress. School produced evidence of adjustments made for Kiefel, many of which were made based on family advice or specialist recommendations.</td>
<td>Court again noted concerned parent who perhaps had been misled to believe that litigation would provide redress for perceived deficiencies in educational programs. Outcome: Lost, with costs awarded to the Department.</td>
</tr>
<tr>
<td>Phu</td>
<td>Parent dissatisfied that full-time one-on-one support not provided to daughter, with a focus on providing restraint to prevent self-injury. School argued one-on-one support would limit student’s independence and opportunity to practice communication. Parent lodged second matter to allow him to observe his daughter in the classroom so he could monitor her behaviour and school’s actions.</td>
<td>Voice of school heard, with respondent ordered to ensure student was monitored. Court agreed that parent presence in the classroom was not in student’s best interests. Outcome: Pending (Chapter 7 presents further details).</td>
</tr>
<tr>
<td>Sutherland</td>
<td>Parent complained school exempted her daughter from a state-wide literacy and numeracy assessment without consultation. School argued that even with adjustments the test wasn’t an appropriate measure for assessing the student’s skills, and exempted her from the test.</td>
<td>Court found the failure to consult was regrettable but the student was not treated less favourably. Outcome: Pending (Chapter 7 presents further details).</td>
</tr>
</tbody>
</table>

**Judicial Decisions Relating to Complainant Representation**

During legal proceedings that involve a minor or a person with a disability, usually a parent, carer, or relative of the person will appear on their behalf. In these cases, the parents
have an added responsibility as not only are they the voice of the student, but they are also legally representing the minor. The following analysis contained statements from four judicial decisions in which complainant representation was considered in relation to student or parent voice. Each of these cases highlighted one important implication: the challenge experienced by a person with a disability, and their next friend, when attempting to self-represent.

**YB v. State of Queensland.**

*Context.* As discussed in Chapter Five, YB was a 17 year old Queensland student due to complete his secondary education at the end of 2010. The complainant’s mother first instituted proceedings in 2007 and many conciliation attempts failed to resolve the dispute. The impact of YB’s impairment was such that he required “additional teaching support, more time to complete tasks than is given to other students, and different writing and reading materials” (YB v State of Queensland, 2009, p. 3, para. 1).

*Allegation of how the law was breached.* YB alleged the respondent had imposed upon him a requirement to access his educational program without the necessary educational support. He further alleged, due to his impairment, he was unable to comply with this requirement.

*Evidence presented in relation to complainant representation.* Two hearings were held into this matter. During the first, in 2009, YB was represented by his next friend, his mother JB. During the second hearing, held in 2010, both YB and JB took part in proceedings. For the first two days of the hearing into this matter, YB was represented by his next friend JB. On the second day of proceedings YB turned 18, so for the remaining four hearing dates, YB “took over the conduct of the complaint in the tribunal” (2010, para. 6). The deputy president of the tribunal had arranged for pro bono legal representation for YB.
but, when this legal counsel withdrew, YB had been unable to appoint another legal representative.

Decision. In the initial 2009 proceedings Savage P of the Anti-Discrimination Tribunal Queensland noted that “the complainant as represented by his mother faces difficulty of being represented by a person without legal skills” (pp. 3-4, para 5). Savage P concluded that, “it is not in the best interests of the complainant for him to continue to be represented by his mother as agent” and she would be “unable to adequately prepare or present evidence” due to “ongoing health problems that compound this difficulty” (p. 4, para. 6). He ordered:

The complainant’s agent should be in a position to satisfy the tribunal in accordance with the present Amended Practice Direction 9 that she or some other person can properly represent the complainant at a final hearing. (p. 5, para 8c)

Second, in the 2010 hearing, despite the above order, the complainant was represented by his mother until he turned 18, at which time he became the complainant. At this hearing, Douglas Savage P ordered YB to seek appropriate legal representation.

ACT Department of Education and Training v. Brian and Eugenia Prendergast.

Context. Simon Prendergast commenced Kindergarten in 1996 in the Australian Capital Territory. He was diagnosed at the end of that year with learning difficulties and, in 1997, with epilepsy. At times he also experienced abdominal pains of unknown origin. His general practitioner wrote to the school advising that Simon should be allowed to lie down when experiencing pain, but his teachers generally only allowed him to sit outside the room. His medical advice further recommended Simon eat a morning snack at 9.30, but he was not allowed to do this, despite another child with medical needs being permitted to eat in class.
Allegation of how the law was breached. In December 1997, Simon’s mother lodged a complaint of discrimination alleging that a number of actions by teachers in primary schools in Canberra had discriminated against Simon. She complained that, in spite of medical documentation, it was the opinion of Simon’s teachers that there were “no problems” at school (2000, p. 16). She argued this view stemmed from the position that Simon’s difficulties “were minor or non-existent and did not require accommodation” (2000, p. 3)

Evidence presented in relation to complainant representation. The ACT Department of Education and Training and the Children’s, Youth and Family Services Bureau made application to the Discrimination Tribunal to have the claim dismissed on the basis that it was lacking in substance. The respondent argued that the “complaints failed to substantiate a causal nexus between the actions of the staff of the school and an attribute of the complainant’s son” (2000, p. 5).

During the hearing, the complainant advised the complaint had been withdrawn.

Decision. Cahill P noted that “[A] review of the material supplied by the complainant to support their case shows that it suffers from a number of the pitfalls that commonly attend the efforts of self-represented litigants to present their case” (2000, p. 5). He found that, “despite the amount of material provided, important aspects of the complainant’s case do not appear, at first glance, to have been made out to a standard which would convince a tribunal of fact that they are meritorious” (2000, p. 7). Cahill P concluded by saying that unrepresented litigants caused courts a challenge as:

there can arise a tension between the need for the Court to assist an unrepresented litigant and the need to maintain its stance of neutrality. In dealing with that tension it must be remembered that the Court must not
assume the role of legal adviser to the unrepresented litigant, and is restricted to the determination of the proceedings before the Court. (2000, p. 6)

Further discussion of this case can be found in Chapter Seven.

**Oakes v. State of Victoria.**

**Context.** Heith Oakes was born on 11 November 2004. He was diagnosed with mild to moderate expressive language difficulties, fine motor difficulties and an ASD. There was also disagreement between Heith’s family and the schools as to whether Heith had ADHD. Heith attended Alfredton Primary School, Victoria from 2010 until November of 2011 and then Wendouree Primary School, Victoria, from December 2011 until 2012. At the commencement of 2013, Heith’s mother lodged a complaint with the VCAT alleging that the DEECD’s use of restraint had caused Heith to physically and psychologically deteriorate. It was alleged that Heith had become incontinent, had started to self-harm, was experiencing meltdowns following the use of restraint, and had become too scared to attend school. His absence from school was considered detrimental to his learning, and to the development of his social skills.

**Allegation of how the law was breached.** The complainant alleged that the Department failed to provide reasonable adjustments to accommodate Heith’s disabilities. Specifically, the complainant sought the development of an “Individual Education Plan/Positive Behaviour Plan” informed by a Functional Behaviour Assessment and overseen by a psychologist; minuted Student Support Group meetings to determine appropriate strategies using a student-centred planning process; clear, measurable goals and strategies with documented data collection, monitoring and evaluation procedures; and a safe and supportive school environment.
**Evidence presented in relation to complainant representation.** Counsel for the respondent submitted that the above-listed items were not “reasonable adjustments as contemplated under s 40 of the Act” (2013, p. 12, s. 20). Counsel elaborated:

Even if you assume that a positive behaviour plan is the reasonable adjustment, or the student support group is the reasonable adjustment, the applicant commits himself to showing that his disabilities would have been effectively addressed by a meeting or a document. Now there’s steps that must follow from that. There must be things that would have been implemented, or recommended, or changed or adjusted. What are they? Those things must have had an effect on Heith. How? In what way? None of this is spelled out and it needs to be, in order to engage with reasonable adjustments.

If we assume that for every student, a positive behaviour plan, no matter what its content, will always work to remedy behaviour (sic). If you approach it with that theory in mind, then this kind of claim can go forward. But that’s self-evidently wrong, but it’s even contrary to the applicant’s own evidence. The applicant leads evidence from a, I think it’s Associate Professor McVilly ... His evidence is 50-60 percent success rate with positive behaviour plan. So on their own evidence this kind of theoretical case can’t be made out. (2013, p. 14, s. 23)

**Decision.** Senior Member Megay of the tribunal found Heith’s Statement of Claim was “riddled with ambiguity” (2013, p. 5, s. 10). She also said the complainant had “failed to properly and adequately particularise the applicant’s case”, and that this had “occurred in the context of significant patience from both the Department and from the Court” (2013, p. 5, s. 10). The Department applied to have the complaint struck out. An advocate lodged a 45-
page statement on behalf of the complainant in response to the Department’s application. Senior Member Megay allowed the complainant another opportunity to re-submit their Statement of Claim. There were no further published judicial decisions in relation to this matter.

**JC on behalf of BC v. State of Queensland.**

**Context.** As outlined earlier in this chapter, in 2005 the complainant lodged a complaint against Pine Rivers State High School, Queensland, on behalf of her son who was diagnosed with both an ASD and ADD. The complaint centred on two specific tensions. First, the parent, JC, had been advised her son, BC, needed to be psychologically assessed before he could return to school. Second, the school had failed to provide reasonable adjustments to accommodate BC’s disabilities, particularly in relation to his maths curriculum.

**Allegation of how the law was breached.** The complainant alleged that the requirement for BC to undertake a psychological assessment in order to be permitted to return to school was discriminatory, as was the failure of the school to provide the necessary adjustments to accommodate his disability.

**Evidence presented in relation to complainant representation.** JC lodged this complaint on behalf of her son. She also disclosed to the tribunal that she experienced severe panic attacks that she found distressing and humiliating. JC had no legal representative.

**Decision.** Dalton P explained that “an unrepresented litigant is at a disadvantage in conducting proceedings” (2006, p. 3, s. 3). She concluded “from the number of applications made by Mrs JC and their substance, together with the material she has provided to me in support of them, that she is having great difficulty managing this matter on behalf of her son.”
(2006, p. 6). Dalton P directed the registrar of the tribunal to contact the *Bar Association of Queensland* to seek pro bono legal support for the complainant.

**Summary of Findings from Judicial Decisions Relating to Complainant Representation**

This section of analysis explored judicial decisions where tensions arose between parents and educators around the types of adjustments given to students. A summary of these nine decisions is presented in Table 13:

**Table 13. Judicial Decisions Relating to Complainant Representation**

<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Complainant representation</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>YB</td>
<td>The request for specific adjustments to alleviate the impact of his learning disabilities.</td>
<td>During the first hearing, the student was represented by his mother. During the second hearing, the student took over proceedings on the second day as he had turned 18.</td>
<td>Court noted it was not in his best interests for the student to be represented by his mother (due to ongoing health problems), and ordered that he seek legal representation. Outcome: Lost</td>
</tr>
<tr>
<td>Prendergast</td>
<td>Parent alleged school ignored medical advice and failed to provide adjustments needed by her son to accommodate his medical needs. School argued the written complaint had failed to draw a causal nexus between the actions of the school and the student’s medical needs.</td>
<td>Father represented complainant during litigation.</td>
<td>Court found the written complaint was poorly constructed. Outcome: Pending (Chapter 7 presents further details).</td>
</tr>
<tr>
<td>Oakes</td>
<td>Parent alleged school had failed to provide a range of adjustments needed by her son.</td>
<td>Mother lodged written complaint, as did a disability advocate on the family’s behalf.</td>
<td>Court found for the respondent, stating the complaint was ill-conceived. Outcome: Lost, but family given opportunity to re-submit complaint following legal advice. No further published decisions available.</td>
</tr>
<tr>
<td>Case</td>
<td>Tension</td>
<td>Complainant representation</td>
<td>Outcome</td>
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<tr>
<td>------</td>
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</tr>
<tr>
<td>JC</td>
<td>School required student to undergo psychological assessment before being permitted to return following a suspension, and did not provide adjustments to meet his needs.</td>
<td>Parent lodged complaint on behalf of son. Parent had mental health condition, and no legal representation.</td>
<td>Court recommended family seek legal representation. Outcome: Legal proceedings did not continue.</td>
</tr>
</tbody>
</table>

### Discussion of Implications

A number of key points emerged from the findings in this chapter in relation to answering the question of whose voice was heard when determining adjustments to curriculum (sub-question 2). The CROC (2000, Article 37d), stated all children have a right to be heard in any legal proceedings that affect them. A key finding was that when students had the opportunity to participate, it appeared to have a significant influence on the decision, particularly in the cases of Beasley and Finney. This has a stakeholder implication; families of students with disabilities pursuing litigation would be wise to consider allowing the child to have a voice within the proceeding. It should be noted, however, that providing a written statement was considered insufficient (see case of JC) as it did not allow the respondent to cross-examine claims made by the student. The case of Purvis showed that children with a disability also had the right to decline the opportunity to take part in proceedings.

As Lindsay (1997) revealed, in most cases it is the child’s parent that brings forward an education complaint and that the student, the recipient of the alleged discriminatory conduct, may not have the capacity or the opportunity to present their first-hand experiences (Lindsay, 1997). The analysis of these judicial decisions revealed that very few students took part in their hearings. This may reinforce the position of Jackson and Varnham (2007) that the obligation to consult with the student was diminished by the inclusion of an obligation to consult with an associate of the student. Alternatively, parents may have simply acted on
their child’s behalf given their age and perhaps the impact of their disability, as recommended in Article 5 of the Convention. The cases of YB, Prendergast, Oakes, and JC all highlighted the danger of untrained litigants acting in legal proceedings. Jackson and Varnham (2007) proposed that the student’s voice in litigation would be lost “in the bitterness of the dispute between parent and education authority” (Jackson & Varnham, 2007, p. 109). None of the judicial decisions appeared to be consistent with this position.

Under the DDA, schools must consult with a student and/or their associate when determining adjustments. As documented in Chapter Two, there is an abundance of research that acknowledges the importance of home-school collaboration in education (Dettmer, 2012; Hedeen, et al., 2011; Latunde & Louque, 2012; Manor-Binyamini, 2014; Salazar, 2012; Simpson & Bakken, 2011). The obligation to consult extended to students providing information about how their disability impacts on their learning. This information enables schools to select adjustments most suitable to reduce this impact. Where students are not able to provide this information, the school must consult an associate. This is most commonly the student’s parents or carers, but may include a relative, another person with whom the student resides, or another person who shares a genuine interest in the educational needs of the student. The final decision then rests with the school. This was reinforced in the cases of CAD and P, where the schools consulted, but then ignored the parents’ desires. In each of these cases, the judicial decision ruled that the actions of the school were not in the best interest of the student. In the cases of Walker and Phu, the judicial decisions reinforced a message that has important implications; schools can make a decision that differs from that desired by the family or other specialists, as long as it is seen to be in the best interest of the student.

Porter, et al. (2013) proposed that many complaints made by parents of children with disabilities alleged a lack of meaningful participation by the child, as well as a lack of
opportunities for parents to participate in decision-making. Dickson (2011, Oct.) reinforced that “there is an imperative for school staff and students and their families to keep in regular, respectful communication about the impact of the relevant disability and its management” (p. 4). In the cases of Abela and Kiefel, schools carefully documented their engagement with families, and their contemporaneous notes made a significant difference in the judicial decision-making process. Parallels with the YB case, shown in Chapter Five, are clear.

The one judicial decision that did not align with the literature on student voice was that of Sutherland. In this decision, the school made an educational decision for the student to be exempted from testing without consulting the parent. The comments made in this judicial decision noted the decision to not consult was regrettable but as the student had not suffered a detriment by missing out on the testing, the school had not treated the student less favourably. This particular decision has important implications for legislators. While the obligation to consult is enshrined in disability legislation, it appeared there are no consequences for education authorities that fail to meet this obligation if they can argue their failure to consult had no adverse impact on the student. The cases of Turner and Sievwright also considered the limits of what a school was required to do to accommodate a learner with disabilities. In each of these cases, the judicial decision factored in whether the student suffered any educational detriment from not being provided with the level of support desired by the family.

Conclusions from these findings, with recommendations for future actions, are presented in Chapter Nine. The next chapter explores tensions that arise when schools try to balance the interests of various stakeholders while providing adjustments to meet the needs of learners with disabilities. Considered are tensions relating to the costs versus the benefits of adjustments, as well as arguments of hardship experienced by schools in the provision of adjustments.
Chapter Seven – Balancing Whose Interests

In this chapter, findings are presented in relation to the effect of the adjustment on the student, his or her peers and teacher, and the education provider, thereby leading to an examination of whose interests were considered and how these were balanced when determining whether adjustments to curriculum are reasonable. Analysis considered the ability of the student and the student’s peers to achieve the learning outcomes, participate in the course or program, and the impact on the student’s independence. It also considered the costs and benefits of making adjustments. There is no obligation under the DSE for providers to make adjustments that are unreasonable or that would impose an unjustifiable hardship on them, so analysis included discussion in relation to unjustifiable hardship concerns.

Using a forensic linguistic analysis of the 54 relevant judicial decisions, each judicial decision was manually coded using the approach outlined in Chapter Three. 43 judicial decisions contained discussion of either the effect of the adjustment, costs versus benefits, or unjustifiable hardship (see Table 14). Two complainants discussed the effect of the adjustment on the student. In two cases, respondents discussed the effect on others. Eight cases considered the effect of behaviour on learning. Costs versus benefits were considered in relation to 32 complainants. Some of these cases specifically looked at the costs versus the benefits of providing educational programs to students with disabilities once they reached the age of school leaving. Others specifically discussed the costs versus the benefits of instructing students in Auslan. Five cases focussed on the issue of unjustifiable hardship.
Table 14. Coding Sweep for Chapter Seven (Balancing Interests)

<table>
<thead>
<tr>
<th>Coding Sweep</th>
<th>Code</th>
<th>Cases</th>
<th>No. of complainants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Effect</td>
<td>Prendergast</td>
<td>42</td>
</tr>
<tr>
<td></td>
<td>Costs versus benefits</td>
<td>Sutherland</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Unjustifiable hardship</td>
<td>Phu</td>
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<td>Zygorodimos</td>
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<td>Minns</td>
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<td>Purvis</td>
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<td>Walker</td>
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<td>I obo BI (Pagura-Inglis)</td>
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<td>Demmery</td>
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<td>Finn</td>
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<td></td>
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<td>Ross &amp; Semple (2)</td>
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<td>Hashish</td>
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<td>Bacon and Ors (8)</td>
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<td>Bolton (10)</td>
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<td>Sievwright</td>
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<td>Clarke</td>
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<td>Hurst and Devlin (2)</td>
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<td>K</td>
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<td>Finney</td>
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<td>2</td>
<td>Effect on the student</td>
<td>Prendergast</td>
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<td>Sutherland</td>
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<td>Effect on others</td>
<td>Prendergast</td>
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<td>Phu</td>
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<td></td>
<td>Impact of behaviour on learning</td>
<td>Zygorodimos</td>
<td>7</td>
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<td>Walker</td>
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The remainder of this Chapter will explore the findings from specific discrimination cases in relation to effect on the student, effect on others, impact of behaviour on learning, costs versus benefits, and unjustifiable hardship.

**Judicial Decisions Relating to the Effect of the Adjustment on the Student**

The following two judicial decisions contained specific references to the effect of providing an adjustment on the student at the centre of the alleged discrimination.

**ACT Department of Education and Training v. Prendergast.**

*Context.* As outlined in Chapter Six, Simon was diagnosed with learning difficulties and epilepsy. In December 1997, the complainants alleged that a number of actions by teachers in primary schools in Canberra had discriminated against their son, Simon.

*Allegation of how the law was breached.* Mrs Prendergast alleged that she was sternly rebuked by a teacher for tying Simon’s shoelaces, later elaborating that the teacher had
stated that Simon needed to tie his own laces. Mrs Prendergast alleged that this incident caused Simon to have heightened anxiety about attending school on days where gross motor activities were conducted as he was not able to tie his own laces, and resulted in Mrs Prendergast purchasing shoes without laces for her son. Simon’s exact age at the date of this specific allegation is not noted in the judicial decision. The case spanned his Kindergarten to Year Four education.

**Evidence presented in relation to the effect of the adjustment on the student.** The respondent, the ACT Department of Education and Training, did not produce any evidence to indicate tying his shoelaces was an educational goal for Simon. The respondent instead made an application to have the complaint struck out on the basis that it was “frivolous, vexatious, misconceived, lacking in substance, and not made in good faith” (2000, p. 4).

**Decision.** Cahill P of the ACT Discrimination Tribunal found that the intent of the teacher’s comment was to encourage Simon to be independent in tying his laces. The Commissioner found that there was “no evidence to support the view that the encouragement of independence in children in relation to their clothing constitutes unfavourable treatment” (2000, p. 15). The complaint was dismissed. Further details of this case are discussed in the next section.

**Implications.** In education, unfavourable treatment arises when a teacher treats a student differently because of their disability. Had Simon’s teacher always tied his shoelaces for him on the false belief that his learning disability meant he was incapable of learning how to tie his laces, there may have been grounds for unfavourable treatment. The DSE does not obligate schools to provide unreasonable adjustments. In this case, Simon’s teachers felt that tying his shoelaces for him was unreasonable as it limited his opportunity to learn a skill that would allow him to be independent. The judicial ruling supported the school’s position, and
shows that it is reasonable for teachers to not provide an adjustment if the goal for the student is to encourage independence.

**Sutherland v. State of Victoria Department of Education and Training.**

*Context.* As discussed in Chapters Five and Six, Lindsay Sutherland commenced her education in 2001. She had cerebral palsy and medically-controlled epilepsy. During her time at the school, there were ongoing tensions between Lindsay’s parents (particularly her mother Ms Harrison) and her Victorian primary school, and Lindsay eventually left the school in late 2005.

**Allegation of how the law was breached.** The complainant alleged that the school had “failed, with minor exceptions, to develop and advance the educational goals and curriculum content for Lindsay” (2007, p. 34). They further alleged that this failure had resulted in a diminished educational outcome for their daughter. It was alleged that Lindsay’s withdrawal from class as well as exposure to a curriculum that was at a significantly lower academic level to that of her peers had resulted in Lindsay having a significant academic delay (particularly in the area of reading).

**Evidence presented in relation to the effect of the adjustment on the student.** The complainant alleged that for one-third of each day Lindsay was taught by the classroom teacher, for another third she worked in the mainstream class being taught by the teacher aide, and for the final third she was withdrawn from the mainstream class and taught by a teacher aide. She argued that the impact of being taught by unqualified staff resulted “in a lower standard of teaching” (2007, p. 32, para. 130). The respondent countered that all content had been planned by Lindsay’s teacher and was implemented one-on-one by the teacher aide under the supervision of the classroom teacher. Each of the aides who provided evidence reinforced that their roles were to work under direction of the classroom teacher.
The complainant also expressed dissatisfaction that Lindsay was, at times, withdrawn from class. The respondent countered that Lindsay was only removed from the class either to work with therapists or if she was disturbing the learning of others. This was a last resort, with the teacher utilising a “time out corner” and other measures prior to withdrawal (2007, p. 32, para. 131). During Prep and Year 1, Lindsay was only ever withdrawn from the class to work with therapists (2007, p. 33, para. 137). It was only from Grade 2 that Lindsay started to become disruptive and time out strategies started to be implemented (2007, p. 33, para. 138).

Detailed allegations were made about the educational program provided to Lindsay for each year she was enrolled at the school. The respondent produced all of the IEPs developed by Lindsay’s classroom teachers with the assistance of a visiting teacher. The plans for 2001 and 2002 contained similar educational goals and content to that of her peers, although some aspects were at the lower end of development. By the end of 2003, Lindsay had more individualised goals, especially in the area of communication, and these goals were based on therapist’s recommendations (2007, p. 35, para. 148). The visiting teacher had also developed an assessment tool identifying the skills Lindsay needed to learn, and there was evidence that teachers had used this tool to assist with curriculum design and planning.

In early 2004, the complainant arranged for her daughter’s treating neuropsychologist to visit the school as she felt the goals set by the school were not reasonable and the school lacked the ability to set goals and plan learning activities. No further information was provided about the ways in which the goals weren’t reasonable from the parent’s perspective. A lecturer from the Centre for Developmental Health at Monash University also facilitated a staff training session on developing clearly defined, prioritised goals.

In 2005, the complainant argued Lindsay did not have an IEP or an adequate educational plan, a complaint denied by the respondent. Her classroom teacher argued the
specialist plan devised for Lindsay each term took hours to prepare, detailing goals across a number of key learning areas, and that it was discussed in detail on a number of occasions with the specialist visiting teacher service.

**Decision.** Coghlan DP was “not impressed by Ms Harrison as a witness” arguing she “failed to answer questions in a straightforward manner”, “held fixed views”, and “had unreasonable expectations of the school” (2007, p. 8, para. 26). She commended the staff stating that they were “all persuasive as to their concerns for Lindsay and their efforts to ensure she was treated appropriately and had access to all possible educational and social opportunities” (2007, p. 8, para. 27). Coghlan DP accepted the evidence that Lindsay was at all times taught by classroom teachers with the assistance of aides (2007, p. 33, para. 140). While some goals were at a developmental level much lower than would have been expected of her peers, the tribunal accepted that it would have been unrealistic to have academic goals set at the same level as her peers. All complaints were found to be not proven, and the case was dismissed.

**Implications.** As with other cases documented in Chapter Six, this case again highlighted the importance of evidence. The tribunal’s decision was heavily influenced by the written educational plans produced by the respondent. A message here is that it would be inappropriate for schools to present as evidence IEPs that contained the same goals year in year out. Where students do not achieve a goal, a re-work of the goal with different strategies would be appropriate.

A further implication from this case is the importance of language. It is important for teacher aides to not make statements to parents that could imply that they have responsibility for the design of the program and the teaching of the student. When talking with parents, statements such as “I taught x how to ... today” should be avoided. This can lead to the impression that the aide is responsible for the design of the program and the teaching of the
student. This decision reinforced the message that anyone employed in a support role is, at all times, working at the direction of the classroom teacher as they hold full accountability for the student’s program.

**Summary of Findings from Judicial Decisions Relating to the Effect of the Adjustment on the Student**

This section of analysis explored judicial decisions where parents and educators disagreed about what effect the provision of an adjustment would have on a student. A summary of these two decisions is presented in Table 15:

**Table 15. Judicial Decisions Relating to Effect of the Adjustment on the Student**

<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prendergast</td>
<td>Parent alleged that she was rebuked by the school for tying her son’s shoelaces. School alleged they were attempting to teach the student to be independent.</td>
<td>Court supported the school’s actions finding the school was attempting to increase the student’s independence. Outcome: Pending (Outcome presented in the next section of this Chapter)</td>
</tr>
<tr>
<td>Sutherland</td>
<td>Parent alleged the school failed to advance the goals set for her daughter, and this diminished her educational outcomes. Parent further claimed the modified curriculum, taught, at times, in a withdrawal space by a teacher aide, had further attributed to her daughter’s academic delays. School argued the adjustments provided were tailored to the student’s ability to allow her to be successful in her learning.</td>
<td>Court accepted the school’s evidence that it would have been unrealistic for the student to be taught using the same goals as set for her peers. Outcome: Lost.</td>
</tr>
</tbody>
</table>

**Judicial Decisions Relating to the Effect of the Adjustment on Others**

In the previous section, judicial determinations included discussion of the impact of an adjustment on the student at the centre of the allegation. The following two determinations considered the impact of an adjustment on others, such as peers and staff.
ACT Department of Education and Training v. Prendergast.

Context. In addition to his learning disabilities and epilepsy, the student, Simon Prendergast (discussed previously), suffered ongoing abdominal pains that, at the time of the discrimination claim, were under investigation from a specialist (later diagnosed as ketosis)\(^{16}\). As part of the management plan recommended by his medical specialist, it was advised that Simon needed to eat a snack each morning at 9.30.

Allegation of how the law was breached. The complaint alleged that Simon was not permitted to have his snack in the classroom at 9.30 each morning, despite another child being permitted to do so.

Evidence presented in relation to the effect of the adjustment on others. Mrs Prendergast wanted Simon to remain in the classroom during this time, so that there was continuity in his learning. His teacher removed Simon from the class for two reasons. First, Simon’s eating distracted other students, which had an impact on their learning and second, by having his snack near the Headmaster’s office Simon could be monitored to ensure he finished his snack within a reasonable time. The judicial decision notes that the respondent provided evidence of the disruption to the concentration of others caused by Simon’s eating (although no detail was provided of the nature of this evidence).

Decision. The complaint was dismissed by Commissioner Cahill, citing that there was no unfavourable treatment and that the continuity of Simon’s learning while eating a snack would be compromised even if he were to remain in the classroom. One further aspect of this case is discussed later in this chapter.

\(^{16}\) Ketosis, commonly used to manage seizures in children with epilepsy, is a metabolic state induced by a diet that includes high fat, low carbohydrates and moderate levels of protein (Freeman & Kossoff, 2010).
**Implications.** This judicial determination weighed the benefit of Simon remaining in the classroom against the impact that this might have on his peers. Simon’s teacher documented the benefit versus the impact of providing this particular adjustment, and the judicial ruling supported the teacher’s decision to avoid providing an adjustment where the impact on peers outweighs the benefits.

**Phu v. State of NSW (Department of Education and Training).**

**Context.** As outlined in Chapter Six, HP was a 13-year-old girl with a diagnosis of autism, severe global developmental delay and NF Type 1. Her NF manifested in specific learning disabilities, she had no verbal form of communication, and she engaged in self-injurious behaviour.

**Allegation of how the law was breached.** The complainant alleged that his request to attend the school so he could personally monitor his daughter’s learning, feeding and self-injury had been denied by the school.

**Evidence presented in relation to the effect of the adjustment on others.** The complainant alleged that the reason the school denied his request was to prevent him from “revealing the true story of some bad things, which could happen at school” (2008, para. 10). The respondent argued that the presence of parents in the classroom caused distress to students and disruption to the classroom routine. The respondent also cited examples of other opportunities available to families to attend the school, including end of year productions and science days.

**Decision.** On these matters the tribunal found that the complainant’s daughter was “in the same position as the other students in the school in respect to having parents observe their learning and feeding at school” (2008, para. 23). One final aspect of this case is presented later in this chapter.
Implications. Again, this judicial determination considered the impact of a parent’s presence in a classroom on both the student and her peers. It reinforced the previous implication, that is, when making decisions about adjustments, teachers should consider the impact on peers versus the benefits of providing an adjustment, and avoid adjustments that might cause distress to peers or disrupt learning.

Summary of Findings from Judicial Decisions Relating to the Effect of the Adjustment on Others

This section of analysis explored judicial decisions where parents and educators disagreed about what effect the provision of an adjustment would have on others including peers and staff. A summary of these two decisions is presented in Table 16:

Table 16. Judicial Decisions Relating to Effect of the Adjustment on Others

<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prendergast</td>
<td>Parent alleged school ignored medical advice and failed to provide adjustments needed by her son to accommodate his medical needs.</td>
<td>Court found that the school had not treated the student less favourably.</td>
</tr>
<tr>
<td>Phu</td>
<td>Parent dissatisfied that full-time one-on-one support not provided to daughter, with a focus on providing restraint to prevent self-injury. School argued one-on-one support would limit student’s independence and opportunity to practice communication. Parent lodged second matter to allow him to observe his daughter in the classroom so he could monitor her behaviour and school’s actions.</td>
<td>Court found the student was not treated less favourably.</td>
</tr>
</tbody>
</table>

Judicial Decisions Relating to the Impact of Behaviour on Learning

The eight cases discussed in this section also explore impact on the individual at the centre of the alleged discrimination, as well as the impact of peers and others. They each contain a common theme: the specific impact of behaviour on classroom learning and whether an adjustment would alleviate that impact.

**Context.** As stated previously, Ben Zygorodimos was a nine-year-old boy who attended the Victorian College for the Deaf. Along with being deaf, Ben had epilepsy manifesting in absence seizures, a benign brain tumour, an anxiety disorder, oppositional defiant disorder, as well as an attachment disorder. One aspect of the case related to how the school managed several behavioural incidents in which Ben was involved. Documented in the case was a long list of behavioural concerns, including disruptive classroom behaviours, damage to school/student property, failure to follow directions, and behaviours that posed a risk to personal safety.

**Allegation of how the law was breached.** The complainant proposed that the failure of the College to provide Ben with full-time instruction in spoken English, as this was his best means of communication as dictated by his impairment, was less favourable treatment. The complainant also alleged that the requirement for Ben to access his education through Auslan was not something with which he could comply. The complainant was also aggrieved by a decision of the deputy principal of the College to move Ben to another class.

**Evidence presented in relation to impact of behaviour on learning.** Many possible causes for Ben’s behaviours were speculated, including possible side effects from Ben’s epilepsy medication, sleep deprivation, as well as simply being a part of Ben’s diagnosed mental health conditions. It was the complainant’s view that some of the behaviour demonstrated by Ben was a response to his frustration at not being able to access the curriculum through the spoken word, as well as from a failure by the school to make reasonable adjustments for Ben’s other disabilities. Another suggested reason for Ben’s behaviour was that Ben had a muscle weakness that impacted on his writing ability. There was an escalation in misbehaviour when Ben’s teachers expected him to write.
Ben’s behaviours were regularly documented in a home-school communication book (and on occasion photographed and videoed) over a three-year time span and were frequently the subject of PSG meetings, and resulted in the trial of both positive and negative behaviour consequences. To encourage positive behaviour, Ben’s teachers used praise, rewards, as well as one-to-one attention, and also created a special book in which positive behaviours were recorded. Aversive approaches included tactical ignoring of negative behaviour, withdrawal of privileges and rewards, being sent to the office, given detention, having his mother called, being sent home from school, and one alleged instance of physical restraint. Evidence presented showed that while strategies worked some of the time, there was little overall change in what was described as “naughtiness – deliberate and controllable misbehaviour” (2004, p. 12). Counsel for the complainant alleged that the aversive approaches used by Ben’s teachers were inappropriately punitive.

**Decision.** McKenzie DP noted it was impossible “on the evidence, to make findings about which of these possible causes actually led to which particular behaviours” (p. 14). There was conflicting evidence on the matter of physical restraint and McKenzie DP concluded that the incident did not occur. McKenzie DP concluded that:

- The use of a home-school communication book was aimed at finding “a way in which Ben would be able to focus more on learning” (2004, p. 14);
- The taking of photos and videos were for the purpose of showing Ben’s parents what had occurred, and the use of video ceased after Ben’s parents complained about its use;
- Withdrawal from class and school was only ever to “diffuse a difficult situation, (rather) than to punish Ben” (2004, p. 14);
The transfer of Ben to another class was to alleviate the significant stress experienced by Ben’s teachers (supported by documentation from a psychologist) and to allow Ben to work in a class where there was greater capacity for being taught in spoken English while still receiving one-to-one support (including support with his writing). It was further concluded “the transfer was the last option tried by the [College] after numerous strategies had been tried with limited, or little success” (2004, p. 23) and that the transfer did not compromise Ben’s education.

All claims of discrimination in relation to the above matters were dismissed. At the conclusion of the hearing, Ben remained a student at College. McKenzie DP concluded with the following statement:

[The College] should, in my view, consider carefully what is the best way in which to discuss and communicate to parents decisions which it intends to make which will have important consequences for a child, such as the transfer of a child from one class to another, for behavioural reasons. (2004, p. 24)

**Implications.** There is no doubt from the evidence provided in this case that Ben’s behaviour had an impact on both his learning and that of his peers. This behaviour, while not a manifestation of his hearing impairment, could well have been linked to his anxiety or oppositional defiant disorder, or to the struggles he experienced by receiving his education in Auslan, in which he was not fluent. The school provided a wide range of adjustments to support Ben’s learning, and trialled numerous home-school communication approaches to share information about Ben’s behaviour. Yet the judicial finding encouraged the school to further consider how to communicate important decisions to families of children who have behaviours of concern. This finding has important implications for all schools that are
making decisions about strategies and behavioural support approaches implemented with students whose behaviour impacts on the learning of others.

Minns v. State of NSW.

Context. Ryan Minns commenced Year 7 at Taree High School, New South Wales, in February 1999. He had been diagnosed with above average intelligence, mild Asperger’s syndrome, conduct disorder and ADHD. Within a month of his enrolment, various staff members noted and made comment to the deputy principal that Ryan was more focussed at the start of the school day, but was having significant behavioural challenges in the later part of the day. A telephone conversation between the deputy principal and Ryan’s mother ensued, with the agreed outcome that the complainant would attend school each day only until 11.30 am.

In the letter from the school detailing this arrangement, it stated that if Ryan “met the conditions, which were to sit in the same position for all classes, to attempt his school work and not interfere with other students or their possessions, then a more lengthy period of attendance would be considered” (2002, p. 4, s. 9). Following a period of suspensions as well as continued part-time attendance, Ryan was expelled from Taree High School in April 2000.

In May 2000, he enrolled at Chatham High School but after two suspensions, a short-term suspension in June and a long-term suspension in July, Ryan chose to not return, instead submitting an enrolment request to complete his education via distance learning. Ryan received his first set of learning materials from distance education in late October 2000.

Allegation of how the law was breached. The complainant alleged that the two schools, administered by the respondent, had discriminated against Ryan by placing him on a part-time enrolment; denying him access to educational opportunities by suspending him and, in one case, expelling him; treating him less favourably than others would have been in
similar circumstances; and requiring him to comply with school discipline policies without taking into account the effect of his disabilities.

Ms Sawyer, Ryan’s mother, further alleged an additional enrolment condition was that Ryan continued to take his dexamphetamine, which was prescribed to assist in the management of his ADHD, and a supply of medication was given to the school so that the principal or deputy could provide it to Ryan on days he arrived at school un-medicated.

*Evidence presented in relation to impact of behaviour on learning.* Due to the nature of Ryan’s disabilities, the respondent outlined a number of activities that were put in place by Taree High School to facilitate Ryan’s transition from primary school. These included a visit by the deputy principal and the school counsellor to Ryan’s primary school to gather more information about his needs; a professional development session, delivered by the school counsellor, to inform Ryan’s teachers about the nature of his disabilities and strategies to support his inclusion; and the provision of two time-out locations that could be used by Ryan if he needed to withdraw from class. Pre-testing of Ryan’s academic ability revealed he was ranked “32 out of 188” students, and he was enrolled in the top stream of classes as the school felt “it would be of assistance for him to be in a class of motivated students” (2002, p. 29, s. 92). The school claimed they had previously used a part-time attendance strategy with other students with success, and the goal was to ease Ryan’s anxiety during his transition to high school, and to encourage him to manage his behaviour.

Ms Sawyer argued she had been given no choice regarding the part-time attendance strategy, or any other alternatives. She alleged that the school used partial enrolment as a form of punishment. The respondent countered that the reason Ms Sawyer later viewed the part-time enrolment situation negatively was because of the effect it had on her work situation. On many occasions, Ms Sawyer was telephoned by the school and requested to
collect her son, and during periods of suspension, she would either need to take time off work or leave her son unattended at home.

The complainant argued that the part-time attendance strategy had a further impact on Ryan’s learning. There were three subjects Ryan quite enjoyed and in which he experienced success. These were mathematics, physical education, and computing studies. Leaving school each day at 11.30 meant on some days he missed these lessons, and this, along with the periods of suspension, meant he fell behind in his learning.

Ryan’s psychologist argued more should have been done to facilitate his transition, including the development of a behaviour management plan that was informed by information gathered during the transition process. The psychologist stated that this plan should have included information from his medical professionals, a functional behavioural assessment so that there was better understanding of why Ryan might behave in particular ways, and the development of an incident response plan. The psychologist also recommended that Ryan required a one-on-one education program either full-time or for a minimum of 20 hours per week. The respondent countered no student in New South Wales received such a program, which was costed at approximately $27,000 per annum to offer.

Following his expulsion from the first high school, Ryan then enrolled at the only other local high school. Prior to the pre-enrolment meeting, the principal reviewed Ryan’s file and selected teachers who were “experienced and caring and tolerant” (2002, p. 39, p. 127). He then met with Ryan and his mother and made it very clear that the school would offer him a fresh start, but that inappropriate behaviour, like that demonstrated in his previous high school, would not be tolerated.

Lengthy evidence was presented by many of the teachers from both schools who worked with Ryan. Documented in detail were the types of complex behaviours experienced
in each of their classes. These included interrupting the learning of others, interrupting the teaching process, refusal to follow directions, destruction of work, rudeness to staff, failure to complete class work and homework, refusal to attend class, aggressiveness towards other students, physical violence towards other students, climbing on the roof of buildings, as well as kicking and punching doors and walls in close proximity to teachers. Many teachers claimed to have spent an inordinate amount of time supporting Ryan, to the detriment of time made available to other students. Of note was the time spent with Ryan trying to “catch up” at the start of each lesson due to either his part-time attendance or periods of suspension. It was also noted that many staff modified the tasks given to Ryan or did not expect him to complete the same assessment tasks as his peers, even though cognitively he was considered to be capable of working at the same level as his peers.

Ryan’s mother agreed, although Ryan did not, that both schools had provided many educational adjustments. The documented adjustments included assistance provided by teacher aides and support teachers, providing choice in the activities to be completed during the lesson, sitting Ryan near the door so that he could quietly exit if he needed time-out, support from both school-based and itinerant behaviour experts, as well as the delivery of an anger management program by a school counsellor. Ryan’s mother further agreed that her son needed to hold some accountability for his learning.

Many of the teachers noted they did not provide Ryan with work to do for lessons missed due to partial enrolment. The reason given for this was that Ryan repeatedly failed to complete homework so setting tasks to complete during periods of partial enrolment was viewed as futile. Work was set by some teachers to be completed by Ryan when he was on suspension. At times, Ryan’s mother failed to collect this work from the school and, on all other occasions, Ryan refused to complete these tasks.
As an alternative to suspension, Chatham High School trialled in school lunch-time detention, but Ryan refused to attend. In-school suspensions, where the student remained at school, but did not attend class and rather worked independently on material set by teachers, were also viewed as an unsuitable alternative to home suspension, as students needed to be motivated and able to work without supervision.

Following Ryan’s long-term suspension in July 2000, and given there were no other local high schools within reasonable proximity, the regional department explored the possibility of Ryan’s enrolment in distance education. The respondent claimed that there was concern about Ryan’s capacity to work on a prescribed program of study at home without supervision, so a number of alternatives were explored but were generally not successful.

**Decision.** Federal Magistrate Raphael found that Ryan’s “treatment was given to him because of his disability”, but was “not prepared to say that the treatment was less favourable”. Raphael FM noted that “faced with the choice between a disciplinary measure and a non-disciplinary measure the school chose a non-disciplinary measure” (2002, p. 63, s. 203). Raphael FM found while Ryan’s mother did not refuse the implementation of part-time attendance, it was likely that “she allowed it to occur as the preferable alternative to other actions such as lengthy suspensions or even expulsion” (2002, p. 50, s. 165). Raphael FM stated this did not constitute less favourable treatment.

In response to the discrimination allegation that both schools failed to provide Ryan with school-work during his period of partial enrolment, and during suspensions, Raphael FM concluded there was insufficient evidence presented by Ryan to meet the burden of proof. Also considered was Ryan’s comment that, even if work had been provided, he would not have completed it. Raphael FM concluded “I cannot see any evidence at all that would link the failure to provide school-work during his suspensions to any alleged disability howsoever
defined” (2002, p. 70, s. 229). In relation to his long-term suspension from the second high school, Raphael FM found:

As the evidence indicates that Mrs Sawyer did not attempt to collect any work then the failure (if such be the case) to provide it can hardly be less favourable treatment. If that is an incorrect statement of the law then one would be hard put to find how such treatment (if all other requirements for discriminatory conduct are established) and taking into account Ryan’s history of not doing work set for him would redound in damages or engender any other form of relief.

(2002, p. 72, s. 232)

The application was dismissed with costs later awarded to the respondent.

Implications. There are important implications that might be drawn from this judicial decision in relation to the part-time attendance of students with disabilities that manifest in behaviours of concern. With the cautionary reminder that each discrimination claim does turn on its own facts, and that each high school in this case was able to provide evidence of an array of adjustments to support Ryan’s enrolment, this judicial decision acknowledged part-time attendance as a non-disciplinary strategy rather than punitive strategy that did not constitute unfavourable treatment.

USL obo her son v. Ballarat Christian College.

Context. In 2012, the unnamed subject of this case was a Year 6 student at Ballarat Christian College, Victoria. The student was medicated to alleviate the effects of ADHD, first diagnosed in 2006 although there was limited evidence of any clinicians treating the student. His mother, identified only by the initials USL, lodged a discrimination claim on his behalf.

Allegation of how the law was breached. USL claimed that the school failed to take adequate steps to address her son’s disability, and this failure impacted on both his learning and wellbeing. She further alleged that, on the basis of his disability, her son was not allowed to attend an interstate school excursion as well as a school open day.
A further allegation made by USL was that the school had failed to provide her son with either a PSG or an IBP.

**Evidence presented in relation to impact of behaviour on learning.** The complainant alleged she was able to accommodate for her son’s disability and his, at times, difficult behaviour in the home environment through a highly structured routine. She further alleged that, while Ballarat Christian College had in place a number of adjustments, these were designed to support groups of students with behavioural concerns but not targeted to the specific needs of her son. She conceded that, until 2012, the school had managed her son’s disability, but his academic progress particularly in maths and spelling deteriorated in 2012. She further conceded that the number of complaints she received from the school in relation to her son’s behaviour had escalated in 2012 and that the efforts made by the school that year had limited effect. Had she known that the school could seek support from an outside expert, USL stated that she would have encouraged the school to take such action.

All teachers who had taught the student in 2012 provided evidence, except the head of middle school who had since died. Cross-examination of each of these teachers by the complainant’s legal representative focussed on three aspects. First, that the strategies used to manage the student were well-meaning but misguided; second, that the teachers believed the student to be bad rather than viewing his behaviour as a manifestation of his disability; and third, that the “class in which the boy was placed was out of control” (2013, p. 3, para. 17).

The respondent maintained that the student’s behaviour was not a manifestation of his disability. They listed his behaviour to include:

- Inappropriate language, teasing students, mocking language, answering back, impulsivity, calling out, talking back, being unable to discern minor issues
from major issues, argumentativeness, being disruptive, being easily distracted, and talking too much or being too chatty. (2013, p. 9, para. 63)

A consultant paediatrician acknowledged that some of the student’s behaviours were indeed a manifestation of his ADHD, but others, such as racist and sexist language, teasing and answering back were likely to be “volitional behaviours – which he defined as being behaviours over which the child had some control” (2013, p. 9, para. 65).

USL gave evidence that the head of middle school had approached her the afternoon prior to open day advising her son should be kept a home to “prevent any potential issues” (2013, p. 12, para. 90). USL then contacted the principal, and claimed that she was told the decision to keep him home was “in the best interest of the school” and that he was “the worst behaved child in the entire middle school” (2013, p. 12, para. 90). The principal agreed that USL was asked to keep her son home on open day because of his bad language, racist remarks, and poor behaviour, and that these actions were “consistent with the College’s discipline policy and procedures” (2013, p. 13, para. 100).

USL also gave evidence that, after hearing from her son that he was not permitted to go on school camp, she contacted the head of the junior school who confirmed this advice. After an email complaint to the principal, USL received an email stating unless students who had behavioural concerns improved their behaviour, they would not be permitted to attend camp. USL offered to attend the camp, the principal rejected this offer. After additional warnings about his behaviour, USL received a letter advising her son was not permitted to attend the camp as the school were concerned about “the boy’s safety on camp and the well-being and the safety and wellbeing (sic) of others” (2013, p. 14, para. 108).

Under cross-examination, the teacher who made the decision to exclude the student from the camp, along with two other students, advised that, “students going on the camp
needed to be able to cope with the demands of the camp and need to be attentive and ready to follow instructions” (2013, p. 15, para. 110). He expressed concern about the impact each of these three students might have on the camp, and the difficulty it would cause if these students were sent home early due to their behaviour. He argued that, “the presence of a parent would have the potential for setting up a conflict of authority which would diminish the authority of teachers” (2013, pp. 15-16, para. 115).

In relation to the allegation on a failure to provide specific measures, such as a PSG and IEP, the complainant relied on the expert testimony of a behaviour analyst and a paediatrician. The analyst, having viewed the behaviour plans written by the school for the student, found that they were too vague, laden with emotive terms, focused on punitive responses, were open to varying interpretation, and were not able to be measured. The analyst had not met nor spoken with any of the school staff. The paediatrician, upon hearing the teachers’ testimony stated, under cross-examination, that he did not have concerns with the measures put in place by the school.

The respondent also called an expert witness to provide testimony on the school’s approach used to manage the student’s behaviour. This expert witness agreed that the content of the behaviour plans was appropriate and timely, but there appeared to be some communication difficulties between home and school. USL agreed she had attended meetings, but was unaware these were called PSG meetings and acknowledged she could not recall the detail of these meetings. The school provided copies of minutes from some PSG meetings as well as the student’s IEPs. His IEPs documented a wider range of adjustments to accommodate his disability, including “provision of a computer, frequent short breaks, a particular approach taken to the giving of homework, and the involvement of all of his teachers in specific learning strategies” (2013, p. 25, para. 188).
**Decision.** Harbison VP concluded that “the boy displayed behaviours at school in that year which went well beyond any diagnosed symptoms or manifestations of ADHD” (2013, p. 11, para. 79). She excluded the teasing of other students, using racially offensive statements, and inappropriate language as manifestations of ADHD. She found that the decision to exclude the student from both the open day and the school camp was on the basis of obnoxious and volitional behaviour rather than any manifestations of his ADHD. She concluded that, “there is no doubt in my mind that the boy’s disability and the symptoms of his disability played no part at all in the school’s decision to exclude him from the open day and the camp” (2013, p. 17, para. 123). The complaint was dismissed.

Her Honour also concluded that, in relation to the PSG meetings, USL seemed “keen in her evidence to downplay the frequency of those meetings” and “not willing to accept that she had participated in discussions about strategies to be undertaken” (2013, p. 24, para. 180). She found, however, that some of the “school record-keeping processes were not perfect” even, at times, “inadequate” (2013, p. 28, para. 211). She further found that “the decisions of the teachers appear not to have been well communicated to the mother” (2013, p. 28, para. 212) in part because of time constraints or the mother’s hostility towards staff. She reasoned however that Ballarat Christian College was “a small school, not a large institution” and that there was “a difference between making reasonable adjustments and documenting those reasonable adjustments” (2013, p. 28, para. 214). She found that it was unlikely USL was aware of all the attempts made by the school to accommodate her son and found, on evidence, that the school had taken reasonable steps to ensure his participation and dismissed the complaint.

**Implications.** Two important implications were drawn from this judicial determination. First, not all behavioural concerns can be attributed to manifestations of a
disability. Schools, with the assistance of experts, need to distinguish between general behaviours of concern and those that specifically arise from the disability diagnosis. Reasonable adjustments are then only necessary for those behaviours that are a manifestation of the diagnosed disability. Second, home-school communication is critical if families are to understand the adjustments provided by a school. In this case, the school took reasonable steps to ensure the student’s participation, but ineffectual communication between home and school in terms of both quality and quantity meant that the complainant was unaware of the frequency or intensity of those efforts.

**AB v. Ballarat Christian College.**

*Context.* As presented in Chapter Five, JQ was a 12-year-old student enrolled in Year 6 at Ballarat Christian College. JQ was not permitted to attend his Year 6 interstate school camp as a result of concerns regarding their behaviour. JQ attended the same school and was in the same grade as USL in the preceding case.

*Allegation of how the law was breached.* The complainant alleged that the school had required JQ to access his education without the benefit of a PSG, an IEP or a positive behaviour plan. The complainant described these measures as “reasonable adjustments” and argued that the school’s failure to provide these measures had disadvantaged JQ. They further alleged that banning JQ from the school camp was a misconceived discipline strategy that had caused him distress and humiliation. The school argued that they had made reasonable adjustments to accommodate JQ’s needs.

*Evidence in relation to impact of behaviour on learning.* The respondent described JQ’s behaviour in 2012 to include being insolent and argumentative with staff; failing to follow directions; calling out and disrupting others in class; teasing, taunting and bullying peers; and being uncooperative and noisy. This behaviour commenced in 2012, and the
school outlined a number of reasons why this behaviour may have surfaced at that time, including that some of JQ’s friends had left the school, he was a year older and the work was getting more difficult, his mother and step-father had separated, and he was not attending school one day per week. As a result of these behaviours, the school did not permit JQ to attend an interstate school camp.

JQ’s disabilities did not meet the level required to be eligible for additional resourcing. As a result, there was also no policy obligation on the school to schedule a PSG, or develop an IEP or behaviour plan. The school outlined a range of strategies that had been used to support JQ’s education including advice given by the special needs teacher to classroom teachers on appropriate educational strategies as well as additional professional development for staff, removal at the parent’s request from studying a foreign language so that time could be dedicated to aided homework completion, invitations to JQ’s family to discuss his educational program (the complainant did not respond to the written request), environmental classroom adjustments, social skills support, and behaviour management support.

**Decision.** Member Wentworth stated that, “in this case, the issue of reasonableness – the balancing of the relevant factors – was critical” (2013, p. 18, para. 174). She concluded that there is no requirement for schools “to create a perfect environment for every student with a disability regardless of the nature and extend of the disability, and regardless of the funding or teacher time required” (2013, p. 18, para. 170). She extended this thought by adding, “a school is not required to use all available funds and all available teacher time in order to make adjustments for one student. Nor is it required to do so to the detriment of the needs of other students, and the ability of the teachers to use their time, expertise and energy towards the education of all the students in their class” (2013, p. 18, para. 172).
Member Wentworth concluded that the school had excluded JQ from the camp “not ‘because of’ any disability but because of genuine and reasonable concerns” (2013, p. 22, para. 212). These concerns included failure to follow directions and bullying other students, behaviours unrelated to his disabilities. The claim was dismissed.

**Implications.** Similar to the finding in the case of USL, JQ’s behaviours, especially bullying other students, were not seen as manifestations of a disability, but perhaps as stemming from other events occurring in his life. The finding also acknowledged that there is a limit to reasonableness, and schools are not expected to provide adjustments where doing so would be detrimental to the needs of other students.

**Purvis v. State of New South Wales.**

**Context.** Aspects of this case, and subsequent appeals, were presented in Chapters Five and Six. In summary, Daniel Hoggan had an intellectual and vision impairment as well as epilepsy. On five separate occasions throughout 1997 Daniel was suspended from South Grafton High School. On December 3, the principal recommended Daniel be excluded and enrolled at the neighbouring Government school in their SEU.

**Allegation of how the law was breached.** The complainant alleged that the teachers at South Grafton High School had:

- no clear understanding as to whether they were to modify the existing program, administer work provided by the [Distance Education Support Unit] or undertake some other methods for teaching Daniel. Some teachers assessed him on the same work and in the same way as other students. Some teachers modified their programs and others did nothing different. (2000, s. 4.1)
The complainant was particularly critical of the school for not accessing experts to assist in developing an education program for Daniel.

Evidence presented in relation to impact of behaviour on learning. Even prior to Daniel’s enrolment at South Grafton, documented evidence of teacher meetings showed that some of his potential teachers felt that “Daniel’s presence in the class would affect the learning of other students” and that they were concerned about potential complaints from parents of other students in his class (2000, s. 2.5.3). Given the gap in abilities between Daniel and his peers, the school proposed that teachers would not be able to sufficiently adjust the materials taught in class and instead the Distance Education Support Unit (DESU) should provide modifications needed for Daniel’s educational program. Daniel’s enrolment was finally accepted on this basis.

His Department of Community Services case-worker countered that Daniel’s needs would be best met in a school that had an SEU, where he could work in smaller classes with staff trained in special education techniques, and on a program that had more of a “functional” emphasis (2000, s. 2.5.7). This case-worker also recommended that Daniel required functional communication training to address his anxiety and concentration. She also suggested that Daniel’s high school would need to provide an enlarged timetable, additional time to transition between classes, an acknowledgement system where Daniel would receive stickers for appropriate behaviour.

Daniel’s class teachers gave evidence of the impact of Daniel’s enrolment on their workloads. Some teachers claimed they spent on average 45 minutes per week preparing work specifically for Daniel. Others stated that they no longer completed oral activities in the classroom, but rather expected students to work in silence, “because of the noise that Daniel and his aide would make” (2000, s. 2.8.3). Many, but not all, of his teachers agreed that
Daniel had “made little, if any educational progress”, “minimal participation in class”, and “achieved no or minimal benefit from his participation in educational terms” (2000, s. 4.2).

The respondent’s written submission stated, in relation to the materials provided by the DESU, that “it was the teacher’s aide who had the principal responsibility for working through the material. The amount of teaching, in the commonly understood usage of the word, undertaken by any of the individual teachers was non-existent” (2000, s. 5.7). The year level co-ordinator alleged the co-ordination of Daniel’s materials from the distance education support unit, the organisation of staffing, and the management of Daniel had all added significantly to her workload.

**Decision.** Commissioner Innes agreed with the complainant that the school had failed to seek advice from experts in the development of Daniel’s program. He stated that this was a misguided decision that resulted in the school being unaware of “the benefits that could have been gained through more positive and informed strategies” (2000, s. 7.4). On this matter, Daniel was awarded damages.

The Commissioner also accepted the respondent’s written submission that Daniel was mostly taught by his teacher aide using materials provided by the DESU. He found that it was clear that the curriculum taught to students in Year 7 was not appropriate for Daniel, although Daniel did follow the same class timetable as his peers, and participated in some classes. Commissioner Innes concluded:

I am not persuaded that Daniel did not benefit educationally. I am also not persuaded that he did not participate in any curriculum activities. I am satisfied that he learned, and that the activities he carried out (although at a very different level) were following the same thrust of the curriculum. (2000, s. 5.8)
Aspects of curriculum adjustments required to support Daniel’s learning were not subject to judicial decision making in either of the appeals of Commissioner Innes’ decision but the complainant lost all subsequent appeals.

Implications. Two key implications were drawn from this aspect of the Purvis case. First, where schools lack expertise in knowing how to appropriately provide an educational program for a student with a disability, this case showed there is an expectation for them to consult. Second, had Daniel’s education program been solely taught by a teacher aide, with no staff input, this may have been viewed as detrimental. The input of teachers to attempt to align the distance education materials to the topics covered in class, and then Daniel’s inclusion in some activities, were seen as reasonable adjustments to accommodate the impact of Daniel’s disabilities on his learning.

P v. Minister for Education.

Context. As detailed in Chapters Five and Six, P was a nine-year-old boy with Down syndrome. From 1993 until the end of Term 1, 1995, P attended his local State school. Concerns were raised in Year 1 about P’s behaviour, including his personal safety, and the safety of other students and staff. Behavioural concerns included behaviours that posed a risk to others (such as throwing of furniture and other items, spitting, hitting and pulling the hair of other students, bumping into other students during physical activities, cutting the hair of his teacher aide), behaviours that posed a risk to P (not following instructions, running out of the classroom and out of the school grounds, throwing himself onto items or jumping off them, cutting his hair, removing all his clothes to play in any mud after rain), as well as behaviour that impacted on the learning of others (screaming, lost support for other students while staff left the room to assist P with toileting, constant re-direction reducing teacher time available to other students, times where there was no teacher in the room as they had to find P).
**Allegation of how the law was breached.** The complainant alleged that Rasmussen Primary School had discriminated against P by recommending his enrolment in a mainstream primary school be cancelled in preference for his enrolment at Aitkenvale Special School. An interim order sought for the respondent to accept an enrolment application either back at his school, or another local mainstream school, until the discrimination complaint had been resolved. The applicant’s counsel argued that refusal of P’s enrolment in a mainstream school may prejudice the discrimination matter. The respondent sought an exemption stating P’s continued enrolment at the mainstream school posed a risk to public health.

**Evidence presented in relation to the impact of behaviour on learning.** Evidence from the deputy principal showed that, throughout his pre-school enrolment, P had followed the same educational program as his peers. This declined when P was in Year 1, with increased time spent withdrawn from the room working on one-to-one activities, such as speech and language activities. Throughout Year 1, P received a range of supports. These included one-to-one assistance from a general teacher aide during lessons, lunch and play times, as well as support from an integration aide from the onsite SEU for one hour each day. Different attempts to fade teacher aide support throughout the year were unsuccessful. When P progressed to Year 2, the school increased support so that P received:

6 hours and 10 minutes a week of support from a teacher attached to the special education unit; 11 hours and 15 minutes per week of a disability teacher aide time, and an allocation of some 13 hours and 45 minutes of general school teacher aide time. This amounts to in excess of 30 hours of one-to-one support. (1997, p. 11)

The school argued that during preferred activities (such as looking at books, writing on the board, using play dough), P was able to remain on-task for up to 20 minutes at a time,
but during non-preferred activities (such as writing on paper, drawing and tracing) activities needed to be changed every four minutes. Physical activities, especially those involving other children, posed a high risk. P’s teacher aide was injured on a number of occasions, which resulted in time off work. P’s mother was opposed to any intervention provided outside the mainstream classroom, but the school countered the provision of such intervention was not “developmentally appropriate for the classroom” (1997, p. 5).

Some of P’s behaviours were attributed as attempts to communicate with others, and P’s teacher aide undertook training in Makaton (now known as Key Word Sign), a program where children are taught gestures or hand signs to support communication (Scope Victoria, n.d.). There were times during P’s enrolment where his teachers sought additional advice on how to manage P’s behaviour. The respondent argued the school managed P to the best of their ability, but the refusal by P’s mother to allow the school to engage outside experts for advice limited their ability to offer a broader range of supports.

During the hearing, four expert witnesses provided advice. All of the expert witnesses were in agreement that the current educational provisions were no longer tenable for P, his teachers, or his peers. One witness felt P’s needs could be met in a mainstream classroom provided expert specialist support was offered to his teachers. Three of the witnesses felt a special school enrolment was the better, but not ideal, location for P to attend school. There was also consensus that intensive instruction, particularly in the areas of communication and behaviour, was essential, and that this would be best provided through small group instruction. Again, there was also consensus that opportunities to practice these skills with mainstream peers were an essential part of P’s future educational plan.

The respondent argued that, under section 12 of the *Education (General Provisions) Act 1995*, the complainant had not been treated less favourably, but simply, taking into
account his aptitude and development, a better educational option had been recommended that was more beneficial to his needs. The respondent also argued that the complainant’s enrolment at a special school was not permanent, and further opportunities to study in a regular school may be possible.

**Decision.** Based on the evidence given by teachers, Member Keim found that “they appeared to have quite well thought out strategies for dealing with the educational difficulties involved in educating P” (1997, p. 6). It was also stated that the complainant’s reticence to allow outside experts to undertake formal educational assessments and provide expert advice prevented teachers from having a broader repertoire of strategies on which to draw.

It was noted that a combination of segregated and withdrawal services at the mainstream school may have met P’s educational needs, but the necessary co-operation between the complainant and the school was not present for this option to be successful and, “the education that P requires cannot be created by the provisions of statutes, but by the close co-operation of education authorities acting conscientiously with P’s mother and other relatives and friends acting lovingly but unselfishly” (1997, p. 61).

A final claim of workplace health and safety exemption was also dismissed. The transfer of a student with complex behaviour from one educational institution to another does not mitigate any public health concerns. Member Keim noted that while a smaller teacher/student ratio might have allowed better opportunities to address these concerns, the risks still existed.

Member Keim summarised, that action of the respondent to recommend enrolment of P at a special school was discrimination on the grounds of impairment, but the issue of unjustifiable hardship needed to be considered. This argument is presented later in this chapter. This discrimination was not considered unlawful as continuation of the current
educational arrangements would constitute unjustifiable hardship, and the complaint was dismissed.

**Implications.** The implication from the Workplace Health and Safety exemption will be discussed following the next case, as the same argument was presented. Other implications in relation to unjustifiable hardship are presented later in this Chapter.

**L v. Minister for Education.**

**Context.** In August 1995, an interim order was sought in the Anti-discrimination Tribunal Queensland for a seven-year-old student known as L. L’s mother explained that her daughter had been diagnosed with global developmental delay that had impacted on her intellectual development, communication skills, gross motor abilities and independence especially related to hygiene and eating.

On 12 July 1995, L was suspended from Beta State School\(^{17}\) for a period of 5 days for “behaviours prejudicial to the good order and discipline of the school; and heightened health and hygiene risks to other students” (1996, para. 13). The school also made a recommendation to the regional office for L to be excluded, but the Executive Director decided, in line with Departmental practice, to extend the suspension pending a review by the Department of Education.

**Allegation of how the law was breached.** L’s legal counsel argued that her suspension and the school’s proposal to exclude were discriminatory as she had been treated less favourably than a student without a disability.

**Evidence presented in relation to impact of behaviour on learning.** L commenced Year 1 at “Beta State School” in 1994, attending three days per week while also attending an

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\(^{17}\) Pseudonym given by the Anti-Discrimination Tribunal Queensland.
early intervention program at “Alpha Special Education Development Unit”\(^{18}\) the remaining two days per week. In her first year, L’s curriculum followed an IEP that had been written by staff from the early intervention program, and was facilitated by a teacher aide who had been employed using ascertainment funding\(^{19}\). The principal provided an affidavit that documented ongoing concerns raised by L’s teachers throughout her Year 1 education particularly in relation to managing her behaviour and the impact of this on L’s classmates.

In 1995, L progressed to Year 2 full-time where she remained until her suspension in mid-1995. Her two teachers held no formal qualifications or former experience in working with children whose needs were as complex as those of L. Both teachers alleged that the problems cited by Year 1 teachers worsened in Year 2 due, according to one of her teachers, to the increased developmental difference between L and her peers. The majority of time L spent in the classroom was in a withdrawal space working with a teacher aide. From this withdrawal space, the teachers argued that L disturbed other students through loud vocalisations and off-task behaviour. Also of concern was L’s “propensity to disappear from the classroom” (1996, para. 7). Her main teacher alleged that the disproportionate amount of time required by L to complete simple tasks and the constant demand for one-to-one supervision had a detrimental impact on his ability to teach her peers. This stress was further exacerbated by concerns regarding her self-help skills, specifically frequent toileting accidents and problems with vomiting.

The only support available to the classroom teachers was advice from an Advisory Visiting Teacher (AVT) who visited the school for approximately 90 minutes each fortnight. The role of the AVT was mainly to assist in the formulation of the IEP. L’s education was

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\(^{18}\) Pseudonym given by the Anti-Discrimination Tribunal Queensland.

\(^{19}\) Ascertainment was the former process used by Education Queensland to determine the required level of funding to support the education of a student with a disability. Students needed to have a diagnosed disability, and were then assigned to a scale of Level 1 – 6 with Level 6 representing the highest level of need. L was “ascertained” as requiring Level 6 funding.
supported by a teacher aide in a mainstream primary class, but the teacher aide was going to be on leave for five weeks. The principal arranged for an assessment of L’s educational needs. The assessment recommended L would require long-term educational support that would be best met as a first option in a local special school or secondly in the nearby “Gamma State School”\textsuperscript{20} that had an SEU. These options were offered to L’s mother in June 1995, but she rejected both stating an inclusive education would be in L’s best interests.

The respondent argued that L’s suspension was precisely the same as that which would be given to other students without impairment, but also displaying disruptive behaviours. The respondent claimed that L’s behaviour posed a risk to public health. Both the respondent and the complainant presented affidavits from expert witness detailing the risk of infection to other children posed by L’s regurgitation, saliva and nasal discharge, and toileting accidents. At that time, Queensland’s Antidiscrimination Act (1991, s. 107) mandated, “[A] person may do an act that is reasonably necessary to protect public health”.

\textit{Decision}. Member Holmes found that the initial decision to suspend L from Beta State School was appropriate under the \textit{Education (General Provisions) Act 1989} (section 24[2]) for “disobedience, misconduct and other conduct prejudicial to the good order and discipline of Beta State School” (1996, p. 20). Atkinson P ordered for L’s suspension to remain in effect, but prevented the school or region from making a decision regarding L’s exclusion. In Atkinson P’s determination, she found:

\begin{quote}
It would be possible to put another teacher’s aide in, but I am of the view that that would provide difficulties for the child in getting used to the new teacher’s aide and that the current hostile environment at the school, unless modified,
\end{quote}

\textsuperscript{20} Pseudonym given by the Anti-Discrimination Tribunal Queensland.
would not be a good environment to put her back into pending the
determination of this matter. (1995, para. 7)

Member Holmes expressed particular concern regarding the impact of L’s enrolment on her
classroom teachers. Member Holmes felt that the AVT visits offered limited practical
assistance and simply constituted another imposition on L’s teachers’ time. Member Holmes
also noted that “the effect of the (stressful) experience on [L’s main teacher] was manifest
when he gave his evidence” (1996, para. 8).

Member Holmes dismissed the respondent’s public health argument, citing “the very
fact that the respondent advocates a placement of L in an alternative educational institution
suggests it does not itself consider that L’s removal from contact with other students
necessary to protect public health” (1996, p. 9). The aspect of hardship is discussed later in
this chapter.

**Implications.** This judicial decision, along with the workplace health and safety
exemption sought in the case of P, highlighted some important messages about the framing of
a legal argument around the impact of an adjustment on others. While Member Holmes
certainly took into account the impact L’s enrolment had on the classroom teachers, he
dismissed the respondent’s attempt to argue L’s enrolment posed a risk to public health. This
mirrored the finding from P. In educational practice, schools and systems will make
recommendations that children with disabilities that manifest in behaviours of concern who
are enrolled in mainstream schools may receive a better quality of education in a specialist
setting. As part of the decision-making, it is not unusual for mainstream principals to argue
the behaviour of these students poses a risk to the safety of peers and staff, and that the
student would benefit from a smaller environment where teachers are more qualified to meet
their educational needs. There is rarely consideration for the risk to safety these students
might cause in a special school environment that typically enrols the system’s most vulnerable students.

Also excluded from the decision-making is the benefit derived by a student who has behaviours of concern from being in a setting where they have positive peer modelling. This was a key point made by two of the expert witnesses in the case of P. While not all students who attend specialist settings have behaviours of concern, there are a higher proportion of students in mainstream schools who can serve as positive peer role models.

Given L’s diagnosis of a global developmental delay, and that her behaviour was described as vocalisations and off-task behaviour that stemmed from the gap between her developmental level and the level of work she was expected to complete, the judicial decision made no reference to the importance of providing adjustments to her program that minimised the impact of her disability.

**Walker v. State of Victoria.**

*Context.* The case of Walker was presented in Chapter Six. Alex, born in 1995, attended Branxholme Primary School and Baimbridge College. He was diagnosed with learning disabilities, dyslexia, ADHD and Asperger’s syndrome. At times, these diagnoses manifested in behaviours that posed a risk to the safety of his peers and staff.

*Allegation.* A complaint was made in relation to a statement that was recorded in Alex’s behaviour management plan in July 2006:

Alex will not attend any school excursions or camps or participate in any after school activities; if Alex cannot be adequately supervised at school because of these activities he is to remain at home; Alex may continue to prepare for
Music Night at the end of term 3 but his participation is subject to his continued good behaviour. (2011, p. 44, s. 132)

The statement was amended in August to read:

Alex’s participation in any school excursions or camps or after school activities is to be negotiated with the principal; if Alex cannot be adequately supervised at school because of these activities he is to remain at home; Alex may continue to prepare for Music Night at the end of term 3 but his participation is subject to his continued good behaviour. (2011, p. 25, s. 132)

The complainant alleged that the inclusion of the original and the amended statements in Alex’s plan was discriminatory.

**Evidence presented in relation to impact of behaviour on learning.** The respondent countered that the principal’s decision to include this statement in Alex’s behaviour plan was due to concerns for Alex’s safety in an unstructured environment, particularly around water; the possibility of Alex running away; and concerns for the safety of Alex’s peers. Despite the presence of the statement, Alex still participated in all excursions and extra-curricular activities. He was not, however, permitted to attend a school camp due to concerns for his safety, and the risk his attendance posed on other students.

**Decision.** Tracey J found that the school were “mindful of their duty of care to other students” and the strategies were in place to “assist Alex and protect other students” (2011, p. 23, ss. 120-122). In relation to the school camp, Tracey J found that the school’s concern for the safety of the complainant and his peers was the reason for this statement, and was not satisfied this constituted discrimination.
**Implications.** For students with complex behaviours, this case highlighted duty of care to staff and peers is one “cost” that is taken into account during judicial decision-making. The principal’s evidence was not challenged, and the ruling found that the duty of care to staff and peers, as well as to Alex, was paramount. There was no discussion of the benefits Alex would experience by attending the camp, nor any discussion of additional resourcing that may have supported his attendance and reduced any potential risk. In a case that contained lengthy testimony and documentation of how the judicial decision was made, this aspect of the case seems to be given limited attention.

**Summary of Findings from Judicial Decisions Relating to the Impact of Behaviour on Learning**

This section of analysis explored judicial decisions where parents and educators disagreed about the specific impact of behaviour on learning, and whether an adjustment would alleviate that impact. A summary of these seven decisions is presented in Table 17:

**Table 17. Judicial Decisions Relating to the Impact of Behaviour on Learning**

<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Zygorodimos</td>
<td>Parents of a student who attended a school for Deaf students felt that instruction in spoken English, rather than Auslan, would have alleviated the impact of his behaviour.</td>
<td>Court found it impossible to determine which causes contributed to the complainant’s behaviours. School encouraged to find the best way to communicate their practices with families.</td>
</tr>
<tr>
<td>Minns</td>
<td>Parent felt school’s use of part-time attendance as well as detentions and suspensions to manage behaviour of student were inappropriate adjustments, and that these limited his learning. Also argued the requirement for him to be medicated to attend school was inappropriate. School countered part-time attendance was an appropriate adjustment to aid student’s anxiety.</td>
<td>Court found part-time attendance was not used as a disciplinary measure, but was an alternative to other punitive responses.</td>
</tr>
<tr>
<td>Case</td>
<td>Tension</td>
<td>Outcome</td>
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<tr>
<td>------</td>
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<tr>
<td>USL</td>
<td>Parent alleged school didn’t allow her son to attend a camp and excursion due to concerns regarding his behaviour. She further suggested other adjustments such as a behaviour plan and PSG meeting would have alleviated the impact of his behaviour.</td>
<td>Court found behaviours exhibited by the student went beyond those considered manifestations of his disability. Found it was these inappropriate behaviours that caused the school to not allow him to attend the camp and excursion. Found school provided adjustments, but parent may not have been aware of the provision of these. Outcome: Lost.</td>
</tr>
<tr>
<td>AB</td>
<td>Alleged that, as a result of the behaviour that manifested from his disabilities, the school had discriminated against him by not permitting him to attend the school excursion. The complainant further alleged that the school had required her son to access his education without the benefit of a PSG, an IEP or a positive behaviour plan.</td>
<td>Court found that the school had excluded the student from the camp because of genuine concerns that included failure to follow directions and bullying other students. Outcome: Lost.</td>
</tr>
<tr>
<td>Purvis</td>
<td>Parent claimed the school had no understanding of how the student’s behaviour impacted on his learning, failed to provide appropriate curriculum modifications, and assessed his learning in the same way as that of his peers. Parent alleged school should have sought expert advice when developing the student’s program.</td>
<td>Commissioner found the program taught was inappropriate and expert advice was warranted. Outcome: Won, with damages awarded, but overturned on all subsequent appeals.</td>
</tr>
<tr>
<td>P</td>
<td>Parent alleged the schools refusal to allow her son to return from suspension from his mainstream school, with the education system instead recommending his enrolment in a special school, was inappropriate. Parent sought provision of additional support so that he could return to mainstream.</td>
<td>Court found the mainstream teachers had used a range of strategies to alleviate the impact of the student’s behaviour. Court criticised the parent for failing to allow outside expertise to guide the school’s practice. Outcome: (Outcome presented later in this Chapter).</td>
</tr>
<tr>
<td>L</td>
<td>Parent alleged the schools refusal to allow her daughter to return from suspension from her mainstream school, with the education system instead recommending her enrolment in a special school, was inappropriate. Parent sought provision of additional support so that she could return to mainstream.</td>
<td>Court found the use of suspension was appropriate given the education department’s policy. Court found returning to the mainstream school would be inappropriate, given staffing changes that had occurred as well as the hostility at that environment and the impact L’s behaviour had on the stress levels of staff.</td>
</tr>
</tbody>
</table>
Walker

Parent alleged the school’s requirement for good behaviour as a condition for attendance on excursions, special events and camps was discriminatory.

Court found requirements were imposed due to health and safety concerns.

Outcome: Lost.

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### Judicial Decisions Relating to the Costs Versus the Benefits

Fourteen judicial determinations, as shown below, have included costs versus benefits arguments. Within these judicial decisions, two specific tensions emerged. As noted in the introduction to this chapter, one relates to the costs versus benefits of providing an educational placement for students who had attained a school-leaving age. This emerged in five of the judicial decisions examined. The other related to costs versus the benefits of instruction in Auslan. This also emerged in five judicial decisions.

**I on behalf of BI v. State of Queensland.**

**Context.** As discussed in Chapter Five, BI was diagnosed, aged 12, with severe conduct disorder and oppositional defiant disorder, as well as showing early indicators for schizophrenia. He was later diagnosed with an ASD. In 1998, BI was excluded from a Queensland State high school. In October 2000 the complainant met with school and district personnel to discuss enrolment at BSHS. To facilitate his return to school in 2001, the school proposed that BI attend school from 13 November 2000 until 15 December 2000 twice-weekly, for one-hour social interaction sessions. At this meeting the complainant alleged that she advised the school that, due to the extent of BI’s mental health concerns, he may have periods of absenteeism, which at times may be lengthy. BI was well enough to attend eight of the ten planned sessions.
In 2001, the school increased BI’s twice-weekly sessions to two hours per session. From January until May 2001, BI only attended four sessions due to ill health. In May 2001, the principal of BSHS cancelled BI’s enrolment as a result of BI’s limited attendance.

**Allegation of how the law was breached.** The complainant alleged that the Education Department had failed to recognise BI’s disability, and that the cancelation of his enrolment had caused BI emotional distress.

**Evidence presented in relation to costs versus benefits.** The respondent countered that their actions were reasonable, as the poor attendance by BI meant that he was getting limited educational benefit from the planned social skill instruction. They reasoned that, had his enrolment continued, BI’s illness was such during the second half of 2001 that “he probably would not have attended BSHS much” and “therefore his loss was not so great” (2005, p. 19, para 45). The respondent also alleged that the four hours set aside per week by the school’s only special education teacher was a waste of a resource that could be better targeted to another student.

**Decision.** Dalton P did not accept the respondent’s arguments, instead finding that the sessions required no preparation, and that the teacher herself indicated when BI failed to attend she would move on to work with other students. Dalton P further concluded that it was unreasonable for the principal to cancel BI’s enrolment, and BI was awarded compensation.

**Implications.** This case highlighted some of the practical difficulties associated with arguing the costs versus benefits of a reasonable adjustment. From the school’s perspective, the resourcing cost of staffing a program which may not run each week was seen to outweigh the potential benefit the student might receive if he did attend. The judicial determination took into account the benefit to the student in attending, and negated the costs finding that the school could redeploy the resource.
Demmery v. NSW Department of School Education.

Context. At the time of this case, Luke Demmery was a 10 year old profoundly Deaf student. The key matters for determination were related to Luke’s experiences while enrolled at Kendall Central School in remote NSW. Throughout his enrolment, Luke received a combination of support from an experienced Itinerant Support Teacher (Hearing), and a teacher aide. In 1995, Luke was placed in a composite Year 2/3 class, but the class teacher retired in January leaving the school to employ a casual teacher on contract until a permanent appointment was made in March. Between 28 March and 25 May (the final day Luke was enrolled at Kendall Central School), the new teacher was absent for 19 of the 36 school days. This absence was due to severe illness associated with the teacher’s pregnancy, of which she was unaware when she accepted her appointment. In the space of these 36 school days, Luke was taught by six different teachers. The tensions in this case centre on the costs of providing adjustments for a student in a remote location.

Allegation of how the law was breached. The complainants alleged that the school made inadequate use of the additional supports provided to Luke and, as a result, Luke’s benefit in receiving this support was diminished. Specifically, the delay in appointing a permanent teacher, followed by the series of casual teachers who provided relief when the new permanent teacher was unavailable; the appointment of an inexperienced teacher aide; and the assigning of the writing of Luke’s IEP to the itinerant teacher were all cited as examples of how the school had further discriminated against Luke.

Evidence presented in relation to costs versus benefits. There were three separate occasions from which tensions surfaced. First, on 19 May 1995, that Luke was omitted from a class performance on assembly. His parents, having attended the assembly, found Luke visibly distressed. Luke alleged that he was left out because he was deaf. The casual teacher
who took the class on the day of the assembly recalled that Luke had declined the opportunity to take part in the assembly. The teacher noted that during the performance Luke’s mother had retrieved Luke from where he was sitting with the other children who did not perform, and moved him to sit with her. The teacher recalled that Luke had shown no signs of distress either during the performance or on his return to class after assembly.

Second, on the same date, Luke was distressed by being excluded from a game of volleyball. His father alleged that, due to the earlier incident on assembly, he had arrived early that afternoon to check on Luke’s progress. He stated that he found Luke standing to the side of the volleyball court, visibly distressed at being excluded from the game. He alleged that he told the relief teacher he would be taking Luke home as he was clearly distressed and that the teacher advised Luke had been behaving in that manner quite frequently. The casual teacher Mr Demmery claimed to have spoken to stated, at the time of the incident, she was in the classroom teaching the Year 2 students. She recalled Mr Demmery coming to the room to collect Luke to leave early, and advised that he was out playing sport with a casual relief teacher supervising the students. She further recalled that Mr Demmery left to find the volleyball game and later returned to the classroom with Luke to collect his bag. Mr Demmery stated to her that he would be taking Luke home as he was not involved in the game.

Third, on four occasions throughout April and May, it was alleged that the class teacher positioned herself directly in front of Luke so that her face was close to his and yelled at him, causing distress. Most of the evidence was hearsay or lacking in specificity. One incident was alleged to have occurred when the teacher became frustrated that Luke had failed to complete a task. Another teacher witnessed Luke’s distress later in the day, and when this teacher questioned Luke as to why he was upset he said it was because of his teacher. One of
Luke’s peers elaborated that Luke had been in trouble for not completing his work. The teacher debriefed with Luke’s teacher who indicated that Luke had not commenced a writing task after 10-15 minutes. She explained that she had moved Luke to a desk closer to her so that she could monitor his progress and, when she encouraged him to have a go, he started to cry. She indicated that she gave him a tissue but, as it was the end of the day, he had left the room distressed.

The two teachers brainstormed a number of possible solutions, including discussing the concerns with Mrs Demmery and setting up a buddy system for Luke to support his learning. At the end of the school day, the class teacher waited for Mrs Demmery to come to her room, but she did not arrive so she was not able to advise Mrs Demmery of the incident. She did, however, later discuss the incident with the itinerant teacher who advised her that Luke sometimes would cry to avoid completing written work.

That afternoon at home, Luke re-enacted his version of the events to his mother, modelling his teacher yelling at him with their noses almost touching. Mr Demmery called the school to complain, and also raised an earlier incident that had been relayed to him by another parent. The school advised they would investigate the incident, and several days later wrote to the complainants documenting the teacher’s account as described above.

The respondent tendered evidence of contemporaneous notes provided by the school that showed a long history of grievances between Luke’s parents and various teachers, and the overall dissatisfaction that the complainants had with the school.

The complainants alleged a number of requirements or conditions imposed on Luke, but one key allegation became the focus for evidence: the requirement that Luke should have been able to cope with changes in routine. Two expert witnesses were called to provide evidence, one by the complainants and the other by the respondent. The complainant’s expert
witness found “the level of support provided by the school to Luke was adequate” (1997, para. 46), but considered the “two months of disruption as regrettable and less than ideal for all children and critically negative for Luke” (1997, para. 48). Both expert witnesses provided testimony that, for inclusion to be successful especially for children with hearing loss, schools need to minimise disruption to students’ routines. Given the remote location of the school, the respondent argued the school had no other choice but to appoint a temporary staff member while awaiting a permanent appointment.

As noted above in the allegation, Luke’s parents were also dissatisfied that Luke’s classroom teacher had not written his IEP goals and that these were developed by the visiting teacher. While the Department’s Integration Policy did state that the responsibility of determining the IEP was that of the classroom teacher, the respondent challenged that Luke would have suffered no detrimental impact by the itinerant teacher taking responsibility for the IEP’s development.

Decision. In the decision regarding the incident on assembly, the Tribunal found that there was insufficient evidence to support the allegation that Luke had been discriminated against. It accepted the testimony of the teacher that Luke had chosen to not participate in the presentation. The tribunal also determined that there was no evidence to support that discrimination had occurred in relation to the volleyball allegation, as Mr Demmery could not correctly identify the teacher he spoke to on that day. The tribunal further concluded that, in relation to the allegations of a teacher yelling at Luke, there was insufficient evidence to suggest that the attempts by the teacher to have Luke complete the written task were related to the fact that Luke was Deaf, so did not amount to disability discrimination.

The tribunal found that the school did impose a requirement on Luke’s enrolment that he should have been able to cope with unexpected changes in routine. They also determined
that this requirement was reasonable, and accordingly dismissed allegations of Luke being
discriminated against because of this requirement. In making this determination, the tribunal stated:

the circumstances that faced the management of the school in January 1995 is
(sic) not extraordinary. Schools must be expected to have to make last minute
arrangements to meet sudden and unexpected loss of teaching personnel, a
disabled child, such as Luke, as part of the normalisation process of
integration, may reasonably have to expect to be in a situation where a
temporary teacher has to take over his class pending the appointment of a
permanent teacher. (1997, para. 27)

**Implications.** While perhaps not stated explicitly, there are some costs versus
benefits implications that were implied from this judicial determination. In relation to
Luke’s non-involvement in both the class performance on assembly and the volleyball
game, there is no discussion within the judicial decision as to the benefit Luke might
have gained had he been involved in these two events. It was simply accepted that
because Luke did not appear distressed, and that he had chosen to not take part, no
detriment had occurred.

A second implication that was implied in this decision was that the enrolment of
students with a disability in regional or remote Australian locations comes with some
additional costs. In this determination, Luke was the one expected to be able to cope with the
teaching arrangements, rather than the school having a responsibility to ensure his needs
arising from his disabilities were being met. In her analysis of this case, Dickson (2006b, p.
34) labelled the tribunal’s position as “conservative” and “antithetical to any notion of a duty
of reasonable adjustment” (Dickson, 2006b, p. 34). She extended, the adjustments were
expected to be made by Luke rather than by his school and that by enrolling in a remote location, families “could expect only what was reasonable and appropriate having regard to that location” (Dickson, 2006b, p. 35).

**Finn v. Minister for Education.**

**Context.** In 1995, Vanessa Finn was an 18 year old with a severe intellectual disability, cerebral palsy and profound deafness. Having attained the age of 18, Vanessa’s enrolment was ceased by Education Queensland, despite written advice from the school’s principal that she would benefit from further school education. Vanessa’s father sought an interim order to allow his daughter to return to school to continue her schooling pending the outcome of a discrimination complaint.

**Allegation of how the law was breached.** Under section 12(1)(a) of the Queensland Education General Provisions Act 1989 the Minister was obligated to consider the age, ability, aptitude and development of students when determining the provision of educational programs in state schools. The case argued the Education Department had simply taken the student’s age, and the cost to the Department, into account, without regard for the student’s aptitude or benefits to the student.

**Evidence presented in relation to costs versus benefits.** Vanessa’s father argued that, despite his daughter’s age, she had made progress in her learning and there was a lack of post-school opportunities available. He claimed that there would be a detrimental impact on his daughter should she be unable to return to continue her education. Vanessa’s parents submitted a facsimile written by the principal of her school, stating:

> The last two years have seen her begin to blossom. She is extremely interested in her learning environment and very keen to explore. ... There are currently no post-school options for [the complainant] who lives in a Government
institution, but as she is at an important learning stage more input at school level would be valuable. (1995, p. 4)

The respondent argued that Vanessa’s residential institution had developed and were implementing a transition plan for her. The respondent felt that if Vanessa were to return to school it would inhibit the positive relationship she had with her residential program manager. The principal also argued that returning to school would be an unnecessary transition for Vanessa, and that it would have an impact on the remaining school community. On her exit from the school, services and resources had been redistributed to other areas of the school, including a newly enrolled student and an increase in students attending for respite. The principal claimed:

To further extend a placement for Vanessa would stretch the existing resources and require another rearrangement within the school. This may disadvantage younger students in the school program and those joining the program. This would mean the reassignment of teacher aide hours as well as the time of occupational therapists, the physio-therapist, the speech language pathologist, the nursing sister, the education program officer, from other groups of students who are receiving the benefit of that time. (1995, p. 6)

Decision. Atkinson P found in Vanessa’s favour ordering that she return to school pending the outcome of her discrimination claim.

Implications. It is difficult to draw implications from an interim decision, especially given the final outcome from the discrimination claim is not publicly available. Had Atkinson P not allowed Vanessa to return to school to continue her schooling, this may have been viewed as prejudicial to the pending case outcome. It appears the tribunal considered the
benefits Vanessa would derive from continued enrolment, and this factor influenced the interim outcome.

**Ross v. Minister for Education & Semple v. Minister for Education.**

*Context.* Two similar cases were brought before the *Anti-Discrimination Tribunal Queensland* in February 1996. Atkinson P ordered the cases of Ross and Semple to be heard as a joint application. Both students were excluded from the school they attended in 1995, having attained the age of 18. In both cases, it was alleged by the families that there were no post-school options available to the students.

*Allegation of how the law was breached.* Again, both complaints sought an interim order against the Queensland Minister for Education to enable students who had attained the age of 18 to remain enrolled in a special education program administered by the respondent. Both complaints alleged that the decision by the respondent to exclude these students was discriminatory on the basis of both age and impairment.

*Decision.* Atkinson P, having heard the case of Finn, granted the interim order and prohibited the respondent from denying a program of instruction to the two students at their previous schools, on the grounds that counsel lodge a complaint with both the Minister for Education and the Minister for Family Services within fourteen days, seeking resolution of the discrimination matter. Again, the conciliated outcome of this joint application is unpublished.

*Implications.* The findings from this interim hearing again reinforced that the tribunal considered the aptitude of the student and the benefit they derived from their educational placement rather than simply the student’s age.
Hashish v. Minister for Education of Queensland.

**Context.** A similar case of age and impairment discrimination was heard in the Queensland Anti-Discrimination Tribunal in 1996. Dean Hashish commenced at a special school in 1983 and, despite attaining the age of 18 on March 5, 1995, the principal allowed Dean to remain at the school until the end of 1995. During his time at the school Dean, who was both blind and deaf, had made considerable progress in communication and living skills.

**Allegation of how the law was breached.** In January 1996, Dean lodged a discrimination claim with the QADT, seeking to continue his education at the school citing the decision to terminate his enrolment was discriminatory on both age and impairment.

**Evidence presented in relation to costs versus benefits.** The respondent argued that Dean’s continued enrolment would effect the availability of resources to other students in the school. The respondent further argued that there were other post-school options available to Dean.

**Decision.** Member Holmes accepted Dean’s argument that the termination of his enrolment and lack of access to appropriate educational support services constituted discrimination and ordered for his return to school pending further resolution of the matter.

**Appeal.** In March 1996, Education Queensland appealed the tribunal’s decision. They argued that, in accordance with the definition of “disabled person” within the Education (General Provisions) Act 1989 (section 3.3), the Minister was not obligated to provide a special education program to students once they reached 18 years of age. Ambrose J quashed the tribunal’s interim order for the applicant to return to his special school, but concluded that “there may well be a need for the provision of programs of instruction for persons with the infirmities and developmental problems of the applicant beyond the age of 18 years” (1996, p. 7).
Further appeal. In February 1997, Dean Hashish appealed, but lost in a 2:1 decision. The hearing was before Fitzgerald, McPherson and Thomas JJ. Fitzgerald J determined the original tribunal’s order should be restored, finding that “the respondent’s contention that the appellant cannot lawfully attend a special school because he has attained the age of 18 years is incorrect” (1997, p. 11). McPherson J disagreed, and found that the appeal should be dismissed. McPherson found that, as Dean had attained the age of 18, he was no longer eligible for special education, and was therefore no longer entitled to attend a special school (1997, p. 19). This decision was supported by Thomas J who also dismissed the appeal.

High Court appeal. A final hearing on this matter was before the High Court of Australia in December 1997. By this time, Dean was no longer attending school, but brought forward the complaint “as a matter of principle” (1997, p. 6). During the hearing it was revealed that the Queensland Parliament had passed new legislation stating that children were entitled to 24 semesters of schooling (12 years) with discretion for students to apply for a further 6 semesters (3 years) of provision, thus removing “the problem from age 18 to perhaps age 21” (1997, p. 6). Also, the revised definitions of “disability” and “special education” within the legislation no longer contained any reference to age. Given these legislative developments, the High Court determined it was unnecessary to continue with the complaint.

Implications. The cases of Finn, Ross, Semple, then Hashish highlighted the possible role litigation played in enacting legislative and policy change. It is a possibility that, following the interim hearings, the cases of Finn, Ross and Semple were settled out of court, with the complainants permitted to continue their education. This would explain why there were no further published decisions. During the course of litigation by Hashish, the legislation governing education in Queensland was amended so that no further litigation was brought forward on this issue. With four cases brought forward in the space of six months,
the Education Department may have calculated the costs versus benefits of providing additional years of schooling to students with disabilities, and realised the benefits for the students outweighed possible future litigation costs.

**Bacon and Ors v. State of Victoria.**

*Context.* Eight Victorian students, aged between 14 and 20, lodged a special complaint with the Victorian *Supreme Court.* All were enrolled at Berendale Special School, a metropolitan special school. In 1992, the school introduced an *18+ Transition Program,* targeted at preparing students for transition to the workforce and into the community through travel training, life skills, social skills, communication skills, and vocational preparation. In November 1996, the respondent made a decision that students aged 18 or over would only be allowed to enrol in Victorian State schools if they were completing the *Victorian Certificate of Education* (VCE). As a result, the principal advised the parents of students enrolled at Berendale that the transition program would be discontinued.

**Allegation of how the law was breached.** The complaint alleged the discontinuation of this program resulted in students with intellectual disabilities being “denied the benefit of education and training in a Government school system beyond the age of 18” (1997, p. 3, s. 11-13).

**Evidence in relation to costs versus benefits.** Many parents gave evidence that the reason for sending their child to Berendale was the existence of this program. The respondent conceded the complainants’ intellectual impairments prohibited their ability to complete the VCE. The respondent also argued that, once a student attained the age of 18, it was the policy of the Department that they could only remain enrolled if they were completing their VCE.

**Decision.** Beach J found that the respondent had imposed a requirement or condition with which students with intellectual disabilities could not comply, namely to receive an
education beyond the age of 18 years a student needed to be enrolled in the VCE. Beach J concluded this requirement was not reasonable and that the new policy had been introduced in an “abrupt and unsympathetic manner” (1997, p. 15, s. 21-22). Beach J found:

> Where you have an established institution providing unrestricted programs for students who have a particular impairment you cannot at a later point in time introduce a new criteria which has the effect of excluding certain students from the institution not on the ground that they do not suffer the same impairment as those students attending Berendale but on the ground of a new criteria, in this instance their age. (1997, p. 12, s. 15-22)

Beach J ordered students who had left Berendale at the end of 1996 be permitted to return; that the 18+ Transition Program continue, with enrolled students funded under the Schools Global Funding policy; that the respondent pay the complainants’ costs; and that the complainants were eligible to apply for compensation for the anxiety caused by the new policy.

**Implications.** Due to similarities, the implications of this decision will be discussed following the next case.

**Bolton v. State of Victoria.**

**Context.** Around the same time of the Bacon and Ors v. State of Victoria case, Lisa Bolton made an application for interim orders to the Victorian Anti-Discrimination Tribunal in 1997 on behalf of herself and nine of her unnamed classmates, all of whom had mild intellectual impairments. All were enrolled at Berendale Special School, and all would

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21 As stated in Chapter Three, it is difficult to know the exact number of families who have proceeded with claims of discrimination because of the cases of Bacon and Ors and Bolton. Bacon and Ors was a special complaint involving eight families. The case of Bolton involved ten families. Both cases, heard around the same time, include families of students who attended Berendale Special School in Victoria.
reach the age of 18 by the end of the school year. As outlined in the previous case, the respondent’s policy position around age and education meant that the complainants would not be able to attend the Berendale program in the following school year.

**Allegation of how the law was breached.** The applicants sought an interim order from the tribunal to prevent the Education Department from excluding them from the 18+ Transition Program at Berendale Special School. They argued that the respondent’s decision to deny their children access to a benefit provided by the Department was detrimental and discriminatory on both age and impairment.

**Evidence presented in relation to costs versus benefits.** On behalf of the other families, Lisa’s parents argued that there was no other suitable program available to which their daughter could transition, and that her education would be jeopardised if she were forced to leave Berendale, causing “significant stress and psychological disadvantage” (1997, para 20). Lisa’s parents had reviewed other post-school training programs and had determined that these were unstructured, too short in length, and lacked appropriate peer support. They further claimed that their daughter did not have the requisite travel skills to access these programs.

The respondent presented a recently enacted Act and accompanying Regulations that had come into force after the complaint was lodged. This new legislation stated a principal was permitted to refuse to enrol or allow a student to participate in an educational program or course of study if the student was deemed over the age specified in the regulations. The regulations then specified that students over the age of 18 as at the first of January were not permitted to enrol in, or attend, a course of study offered by Victorian metropolitan state special schools. The respondent argued that these legislative amendments prohibited the
tribunal from making an order to permit the students to return to Berendale or participate in the Transition program.

**Decision.** McKenzie P determined that the position of Ms Bolton and her peers was similar to that of *Bacon and Ors*. She found that forcing Ms Bolton and her peers to leave the program would cause “harm and inconvenience” (1997, para 40).

McKenzie P also commented on the new legislative changes presented by the respondent. She noted that, during the second-reading speech of the *Education State Schools Bill*, specific reference was made to the Berendale 18+ Transition Program. It was quoted that the legislative amendments were “to prevent similar court decisions”, a direct reference to the *Bacon and Ors* decision (1997, para. 57). McKenzie P determined “all that these regulations do is take away what might otherwise have been an entitlement or right to attend school and participate in a program at any age. they (sic) do not actually prohibit participation or prohibit attendance” (1997, para 74). She clarified this further stating that principals had clear discretion to permit students over the age requirements to continue in the program. On the basis of this discretionary power, and given the urgency in making a decision prior to the start of the new school year, McKenzie P ordered the tribunal to hear the complaint within 30 days. There is no report of this complaint being heard, so the likely outcome was that the case was settled.

**Implications.** Similar to the Queensland cases, the judicial decisions of *Bacon & Ors* and *Bolton & Ors* highlight the possible collective power of consolidated complaints. In this case specifically, Berendale was referenced in parliament which supported the claim that these cases influenced a legislative change. It is also possible that this change may have occurred simply as a result of the changed political context occurring under the Victorian Kennett Government. Without complete confidence, it might be possible to say an
implication is that, where educational decisions impact negatively on groups of students with disabilities, multiple applications can apply pressure that may lead to policy change or, at the least, to a conciliated outcome that satisfies both parties. In each of the interim decisions, the benefits the students derived from remaining enrolled in their educational programs were a key aspect of the judicial decisions.

**ACT Department of Education and Training v. Brian and Eugenia Prendergast.**

*Context.* The Prendergast case was outlined both in Chapter Six and earlier in this chapter. In this case, it was also alleged that in February 1996, concerned about her son’s frequent absenteeism and lack of educational progress, Mrs Prendergast had suggested the possibility to the school principal that her son repeat Kindergarten.

*Allegation of how the law was breached.* The complaint implied, but did not specifically state, that Simon’s disabilities had affected his academic performance and that, by promoting him to Year One rather than allowing him to repeat Kindergarten, Simon was being treated less favourably as he did not have the capacity to perform at the required academic level.

*Evidence presented in relation to costs versus benefits.* It was the complainant’s view that moving to Year One would come at a significant cost to Simon. In a phone call to Simon’s teacher, Mrs Prendergast stated that if Simon:

> was promoted to the next grade when he had not gained sufficient experience to operate at the level required of that grade, his capacity to achieve a normal education may be diminished because he does not have the ability to perform at the required academic level. (2000, p. 11)
When Mrs Prendergast discussed this with both Simon’s teacher and the school principal, they tried to reassure her that Simon would benefit from going to Year One, and that he would be able to perform at the next level. The respondent argued that Simon’s retention in Kindergarten was not warranted.

Decision. The complaint was dismissed, with Commissioner Cahill concluding that there was nothing within the treatment of Simon that could be considered discriminatory or less favourable. The Commissioner found that the school staff had attempted to reassure Mrs Prendergast that the recommendation for Simon to move to Year One was not binding but Mrs Prendergast felt that the school had not made it clear that there was an option for Simon to repeat.

Implications. This case highlighted an ineffectual communication between the school and the parent. A concerned parent outlined her reservations about her child being progressed to the next year level. A teacher, in an attempt to reassure the parent, appeared from the parent’s perspective to have dismissed their concerns. From the school’s perspective, they felt that they had simply given more weight to their assessment of the student’s ability to manage Year 1. Such important education matters are better subject to meetings where both parties have an opportunity to present their case, and where options can be explored in detail, and decisions documented.


Context. As outlined in Chapters Five and Six, Jade Sievwright was a Victorian student with a language disorder, auditory processing difficulties and borderline mild intellectual impairment. She attended two different Victorian primary schools before relocating to Sydney to undertake an intensive 16-week language support program known as
Upon completion of this course, Jade returned to Victoria to finish her primary education and commence her secondary education.

**Allegation of how the law was breached.** The complaint alleged that the respondent had imposed a condition on Jade that she accessed her education without a full-time aide.

**Evidence presented in relation to costs versus benefits.** The respondent agreed that they had imposed a condition that Jade access her education without a full-time aide. They argued the provision of a full-time aide needed to be weighed against the costs this would have to Jade’s independence and self-esteem. An additional cost to be considered, argued the respondent, was financial. At that time, the Victorian Education Department did not provide additional resourcing for students with an IQ over 70. It presented evidence to suggest that, were it to fund students whose IQ was within the 71-75 range (estimated to be almost 14,000 students across the State), the financial burden would double the current PSD total budget, requiring an increase of $975 million (2012, p.20, para. 93) and require an additional 20,000 staff (2012, p. 40, para. 209).

**Decision.** Marshall J reviewed whether Jade was able to comply with this condition noting that, apart from one report in 2005, there was limited support from Jade’s specialists for the provision of a full-time aide. Also noted was the lack of evidence showing the disadvantage suffered by Jade through the imposition of this condition. Applying the test of reasonableness, Marshall J found that, prior to 2008, Jade did not meet criteria for funding under the PSD and the provision of a full-time aide would have been “beyond the financial capability of her school” (p. 40, para. 208). Marshall J concluded it was not unreasonable that Jade was not provided with a full-time aide.

**Implications.** The argument presented by the respondent in this decision was in terms of financial cost to an education system to provide additional resourcing to support a set of
students who legitimately have a disability as defined in the Federal legislative definition. As shown in other case implications throughout this thesis, there are groups of students across Australia for whom schools receive no additional resourcing, but are expected to provide adjustments to meet the educational needs arising from their disabilities. There was no discussion in this case of the benefits, short or long-term, that would be gained from the system investing additional resourcing to support the education of students with disabilities who had an IQ above 70 and therefore fell outside of the system’s resourcing criteria. There was also the issue again of a lack of documentation on behalf of the complainants.

**Chinchen v. NSW Department of Education and Training.**

**Context.** As outlined in Chapter Five, Rhys Chinchen was a gifted student with a specific learning disability. He attended Seaforth Public School in New South Wales. Despite being diagnosed as gifted, Rhys failed to make academic progress during his primary education.

**Allegation of how the law was breached.** In 2006, Rhys’ parents sued the New South Wales Department of Education and Training for unlawful discrimination, claiming that their son was denied access to support for his disability. The allegations included the principal’s threat to withdraw Rhys, and then his subsequent removal without parental consent, from an extension class designed to academically challenge gifted students. The parents further alleged that complaints they made to the school resulted in victimisation of both them and their son, including the withdrawal of a home program designed to assist Rhys with his learning difficulties.

**Evidence presented in relation to costs versus benefits.** At the start of Grade 5, despite the school acknowledging Rhys had difficulties with handwriting and completing tasks, his primary school recommended his placement in their Year 5/6 extension class.
Students selected for this class usually would remain in the class for the final two years of their primary education. The class, taught by a teacher untrained in gifted education but acknowledged by all parties as a “highly skilled, dedicated and enthusiastic teacher” (2005, para 55), ran on the “multiple intelligences model advocated by Howard Gardner” (2005, para 66).

Throughout the entire school year, there were ongoing concerns by the teacher about the limited amount of school work completed by Rhys. The complainants alleged that, on a number of occasions, Rhys’ teacher humiliated and victimised him in relation to this lack of work. Numerous meetings between Rhys’ parents, the class teacher, and the principal, and the trial of various strategies to increase Rhys’ work outputs, had not resolved these concerns. The parents had also lodged complaints with the Education Department, and mediation of these matters was unsuccessful.

At the Administrative Decisions Tribunal hearing, the respondent stated that throughout Year 5 Rhys completed oral work at a high standard, maintained a high standard in maths, submitted work completed at home on a computer that was of a high standard, mostly behaved well during class and, at times, contributed to class discussions. Achievement in written work and group tasks “did not match his ability” (2005, para 26), and he was distracted during lessons. His teacher concluded the reason for this discrepancy was because Rhys was “lazy and unmotivated” (2005, para 28). The respondent alleged that, throughout Year 5 Rhys had exclusive use of a laptop in class, and was allowed to finish incomplete tasks at home. His teacher indicated that she frequently provided opportunities for Rhys to demonstrate his knowledge in oral rather than written format. She stated that she would also sit with Rhys when tasks were given, and talk through his ideas before allowing
him to draft work on a computer. The complainants argued that the use of these adjustments was overstated, with Rhys not provided this level of support.

The summary of parent/school discussions regarding Rhys’ educational program, and the question of his ongoing placement in the extension program, resulted in differing recollections of events. His parents felt that Rhys would benefit from continuing in the program, with home support for completing tasks, as he could “mix with like-minded children” (2005, para 23). The school argued that Rhys should complete activities from the extension program in “a mainstream class which moved at a slower pace and provided a more structured environment” (2005, para 23).

At the start of 2000, a senior school psychologist had been appointed by the district office to make recommendations regarding Rhys’ placement and educational program. Their report endorsed the school’s position, that the extension program was too complex and that Rhys’ needs could be better met in a mainstream classroom with an individualised program. Rhys was moved into a mainstream class, and his new teacher briefed on both sets of learning needs (gifted and learning disabled). A feedback system was put in place to advise the family of any outstanding work. Additionally, Rhys was given access to a gifted and talented program offered at the local high school and, while the class teacher refused to mark any work provided by this program, he did agree to extend Rhys in other ways.

In August 2000, the complainants wrote to the Minister for Education concerned that their son was not being challenged in his mainstream program. They also expressed their dissatisfaction with the decision for Rhys to be withdrawn from the extension program. The school met with the family in September and proposed Rhys return to the extension program for the final term, as the 1999 teacher would not be taking the class. Rhys returned to the
extension class in October, with an agreement that the weekly feedback on incomplete work would continue.

**Decision.** The tribunal made the following finding:

In circumstances where the support provided in the classroom had proved ineffective, where the school had agreed to the home support plan but had failed to implement it, and where Rhys had not been referred to the school counsellor (for the purpose of obtaining expert assistance and/or to ascertain the cause of the problem), we find that the school did not provide adequate support for Rhys’ learning difficulty. We find that as a consequence, the respondent limited Rhys’ access to the benefits of the extension class. We find this also constitutes a detriment. (2006, para. 312)

The Panel found that the three unlawful discriminatory actions by the school in 1999 were substantiated, as well as one act of victimisation, and compensation was awarded. It was substantiated that Rhys was treated less favourably and denied access to support for his disability, as the school would most likely have sought the assistance of the school counsellor for a student without a disability experiencing the same difficulties in learning. The ongoing threat, throughout 1999, that Rhys would be removed from the extension class, and his eventual removal, was also upheld as discriminatory. Finally, the school’s withdrawal of the home support program as a result of the complainants’ lodging a complaint with District Office was substantiated as an act of victimisation.

In December 2006, the *Administrative Decisions Tribunal Appeal Panel* was due to hear an appeal of this case. The morning of the hearing however, the Panel was advised the parties had reached an agreed settlement, the specific details of which are unpublished. In
agreeing to the settlement, both parties acknowledged that the tribunal had erred in the finding of less favourable treatment, as they had not taken into account how a student without Rhys’ difficulties might have been treated in similar circumstances.

**Implications.** The school imposed on Rhys an expectation that a condition of his acceptance in the gifted program was his ability to complete all work. Work not completed in class could be completed at home, but no other adjustments were made available to alleviate the impact of his learning disability. In the original judicial determination, there was a heavy emphasis on the benefits Rhys would have been afforded if he were given access to the specialist gifted program and appropriate adjustments to support his learning disability.

**Mrs Robyn Beasley (on behalf of Dylan Beasley) v. State of Victoria Department of Education & Training.**

**Context.** As outlined in Chapter Six, Dylan Beasley was a profoundly deaf student who communicated using Auslan. Between 1999 and 2003, while a student at Pearcedale Primary School, Dylan was taught by eight teachers and sign language interpreters, but claimed that, as none could adequately communicate in Auslan, he was instead taught using a combination of spoken language, fingerspelling and Signed English.

Pearcedale Primary School had a deaf facility, defined as “a facility or area set aside at a school for hearing impaired students. The area normally includes a teaching space and specialised equipment. The teaching staff at each deaf facility comprise teachers of the deaf” (2006, p. 7, s. 25). Pearcedale had 39 students with hearing impairment, and each student used different methods of communication, including oral communication, lip reading, Sign Supported English, and Auslan only. The school employed ten postgraduate-qualified teachers in the role of Teachers of the Deaf, however not all of these were trained in Auslan.
From 2000, the school trialled a new teaching model. Under this model, deaf children were taught in mainstream classrooms alongside their same-aged hearing peers, with both a mainstream classroom teacher and a Teacher of the Deaf co-teaching the class. The mainstream class teacher was responsible for general instruction, with the Teacher of the Deaf available to provide additional reinforcement of work and adjustments where necessary. Students with hearing impairment were also withdrawn from class for additional English literacy, language, numeracy and general support. An Auslan assistant was also employed to work for forty-five minutes per week in a withdrawal mode with children who used Auslan as their first language. Some in-class assistance was also provided by this aide.

**Allegation of how the law was breached.** It was alleged that Dylan was treated less favourably than his peers as he was expected to access instruction using a method of communication that he could not understand, that is through Sign Supported English, fingerspelling and lip reading of oral language. It was further alleged that the respondent’s failure to teach Dylan using Auslan prohibited Dylan from reaching his educational potential.

**Evidence presented in relation to costs versus benefits.** The case centred on whether one form of communication was more effective than another in terms of assisting children who were deaf or hard of hearing to make educational progress. A breakdown of the communication methods used each year was provided, with evidence that Sign Supported English was the main form of sign language used, with finger spelling used to supplement words where no sign existed. Dylan argued that there were times where the Sign Supported English version of what was taught would take significantly longer than the spoken word, meaning his peers had either additional time to clarify questions, or a longer period of time to complete tasks.
The complainant argued that Dylan’s educational progress should have been measured by either comparing his actual educational outcome to his potential or by comparing his progress to that of his classmates who did not have a hearing impairment. The respondent considered this approach problematic. Dylan was considered to have intelligence in the high average range; however his literacy levels were behind those of his peers. Dylan also had a large number of absences over the four years in question, which impacted on his academic progress. Reports during this time span also indicated some concerns about homework completion, organisational skills and time management strategies.

**Decision.** McKenzie D-P advised that:

[T]he determination of reasonableness involves a balancing of the effects of the requirement or condition on the complainant and the reasons advanced in favour of the requirement or condition by the respondent; and in particular the aim of the requirement or condition and whether the requirement or condition was a rational or logical way of achieving the particular aim and was adapted to achieve that aim. (2006, p. 5, para. 15)

McKenzie D-P found that “the comparative slowness of the communication method used for Dylan compared with the method used for the hearing children, that is English by spoken word, had the result of limiting his class participation and limiting his opportunities for class participation” (2006, p. 17, s. 85). In relation to access to curriculum, however McKenzie D-P found that the use of written and visual means such as posters, diagrams, and whiteboards, as well as his access to specialist support through the deaf facility, meant that Dylan’s access to curriculum was not limited.

McKenzie D-P preferred to measure Dylan’s educational progress against the Victorian curriculum levels assigned for a child of his age. Evidence by way of school
reports and teachers’ records were presented to show Dylan’s educational progress made each year. In 2000 and 2001, Dylan made good progress across all subjects, including English, with McKenzie D-P noting that the lack of “Auslan does not seem to have affected his progress” (2006, p. 23, s. 124). From 2002 until 2005, however, Dylan’s progress varied depending on the subject studied. While improvements were noted in Art, Physical Education and Integrated Studies, there was no improvement in Maths, and the only strand of English in which he improved was Reading. McKenzie D-P ruled that the reason for the lack of educational progress was most likely to be from absenteeism rather than from the mode of communication used to teach Dylan.

In making a determination of whether the State directly discriminated against Dylan, McKenzie D-P offered this observation:

I do not accept that Auslan is a part or characteristic of his impairment. The evidence is that Auslan is the language of his deaf parents and was the language of his home. This in my view does not make it a part or characteristic of his impairment. (2006, p. 27, s. 143)

The discrimination question to be answered was whether the State, by expecting Dylan to be taught without a full-time Auslan interpreter, had imposed a requirement or condition that was unreasonable. There was one requirement for Dylan’s hearing peers (that they be educated in spoken English) and another for the non-hearing peers (that they be educated using a combination of Sign Supported English and finger spelling). No single requirement existed for all students in relation to verbal instruction. McKenzie D-P decided that Dylan could not comply with the requirement to access verbal instruction in this manner, and this seriously “deprived the opportunity for immediate discussion or question-and-answer with the teacher or between the teacher and the peers in the class” (2006, p. 31, s. 161). Even taking into...
account the additional support available through the deaf facility, McKenzie D-P ruled this requirement to be unreasonable as this support was not seen as a substitute for the benefits gained from classroom participation. The complaint was proved in part, with Dylan awarded both compensation and costs.

**Implications.** This judicial determination, and the award of compensation, appeared to focus on the benefits instruction in Auslan would have afforded Dylan. These included the possibility that Dylan would have been better able to access instruction, and participate in class discussion, at the same rate as his peers. This may have allowed Dylan to make better educational progress against the curriculum.

**Clarke v. Catholic Education Office & Anor.**

**Context.** In November 2000 a complaint of unlawful discrimination was lodged with the HREOC by Jacob Clarke, a young Deaf student. Having attended a primary school operated by the Catholic Education Office, Diocese of Canberra and Goulburn, Jacob’s parents attempted to enrol him in the local Catholic high school which was a “feeder” school. During his time at the primary school, Jacob received assistance from a teacher aide as well as a range of volunteers (including his parents) who were fluent in Auslan (his first language), signed English, finger spelling, use of gestures, and note-taking assistance. His parents, devout Catholics, pursued enrolment at the secondary school for religious reasons, but also because many of Jacob’s peers planned to attend the same school and some of these were able to communicate with him in Auslan and were able to assist him in class.

To facilitate his transition, the principal of the high school arranged a meeting to discuss Jacob’s needs. After the first meeting, a summary of the discussion was circulated to those in attendance, and this included the following points:

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22 When large numbers of students from a primary school, for example, then enrol at the same high school, that primary school might be referred to as a “feeder school” as they “feed” enrolments to the local high school.
3.4 There are provisions for support for Special Needs students at Mackillop – that is Special Needs Resource teachers, teacher assistants, a Learning Support Centre, IEPs, CEO support and provision of Professional Development courses relevant to the needs of Special Needs students. Also, specific courses have been undertaken by staff that would help Jacob such as the Note Taker’s Course for teacher assistants.

3.5 It was indicated at school/system level, there was no philosophical opposition to the undertakings regarding the varying range of supports that could be made available on behalf of Hearing Impaired students.

3.6 The school/system will not be providing signing interpreter services on behalf of hearing impaired students as the primary mode of support.

4.2 [The Clarkes] understand that [the College] would make provision for Jacob in the context of all students and their needs, encouraging students to move towards being independent learners. Specific support would be offered as outlined in 3.4 and 3.6. (2003, p. 5, s. 14)

Jacob’s parents objected to the above summary citing that it was an inaccurate transcript of the discussion. First, in relation to paragraph 3.5, Mr Clarke enquired as to “whether the respondents had any philosophical opposition to sign language support in the classroom” and was advised that they did not (2003, p. 5, s. 14). Second, he argued that statement 3.6 was not discussed during the meeting, but later added by a Senior Officer from the Catholic Education Office who had not been present. Finally, he claimed paragraph 4.2 had not been discussed and should be deleted from the record.
A further meeting was held, and the minutes of that meeting detailed an amended version of the support to be made available to Jacob. This included:

2.3 Teacher assistants trained in **notetaking** for students who will assist the student in the classroom to access the class information where possible.

2.12 Use of signing support – **if a staff member** (teacher/other support staff) were to have these skills and be in a position to input the learning support program (emphasis added).  (2003, p. 6, s. 15)

Jacob’s parents indicated it was their view that notetaking was inadequate as the primary aid for their son, that Auslan support was essential, and that they would be willing to provide an additional $15,000 to employ a teacher aide. In addition, they offered to:

- assist the school to gain any necessary Government grants or funding;
- arrange voluntary Auslan support (including any training for teachers); and
- attend all camps and excursions to assist with interpreting.

In a final meeting with the Clarkes, the principal indicated “signing support would be a threat to the support model offered and would tend to undermine it” (2003, p. 6, s. 18). An offer of enrolment was made to the family, which contained the following clause:

A positive and clear decision has been made by you to accept and support the model of Learning Support offered by our College as discussed and outlined in our earlier meetings (see attachment).  (2003, p. 7, s. 19)

The attachment detailed the provision of notetaking assistance, with the use of signing support only available if a skilled staff member was available. The letter of offer was accepted by Jacob’s parents, although in their response their acceptance was subject to a review of support provisions at the end of the first term with evidence that there was no detriment to their son’s
learning. The school countered that the acceptance of the placement meant the family supported the model proposed by the school, and it would only be subject to review along the normal review process. The family later withdrew their acceptance of the enrolment place and instead enrolled Jacob at a State high school that had Auslan interpreters on staff.

**Allegation of how the law was breached.** The complainant alleged that the respondent’s offer of enrolment was discriminatory as it was conditional upon a model of support that failed to provide Auslan assistance. It proposed that this would result in Jacob not being able to fully participate in lessons.

**Evidence presented in relation to costs versus benefits.** The complainants argued that Jacob “could participate and receive classroom instruction provided by the respondents only if he was prepared to ‘endure’ such instruction without the assistance of the interpreter” (2003, p. 13, s. 42). The respondent countered Jacob had been offered a classroom education (the service provided by the school) and to participate in this classroom education the school had positively discriminated against him by offering a proposed model of educational support not offered to any other student. They further argued that the proposed model of support was made available as the family had indicated their desire for Jacob to be successful in a hearing world, and that his dependence on an Auslan interpreter would inhibit this.

**Decision.** Madgwick J found:

to require such a person to receive education without the aid of an interpreter, while it may or may not be reasonable in the circumstances, is to place a requirement or condition upon that person’s receipt of education or educational services that is not necessarily inherent in classroom instruction. (2003, p. 14, s. 45)
Madgwick J expressed the following view:

In my opinion, it is not realistic to say that Jacob could have complied with the model. In purportedly doing so, he would have faced serious disadvantages that his hearing classmates would not. These include: contemporaneous incomprehension of the teacher’s words, substantially impaired ability to grasp the context of, or to appreciate the ambience within which, the teacher’s remarks are made; learning in a written language without the additional richness which, for hearers, spoken or ‘body’ language provides and which, for the deaf, Auslan (and for all I know, other sign languages) can provide, and the likely frustration of knowing, from his past experiences in primary school, that there is a better and easier way of understanding the lesson, which is not being used. In substance, Jacob could not meaningfully ‘participate’ in classroom instruction without Auslan interpreting support. He would have “received” confusion and frustration along with some handwritten notes. That is not meaningfully to receive classroom education. (2003, p. 14-15, s. 49)

Madgwick J concluded that, had the complainants enrolled Jacob in a school offering an educational program that at best included the possibility of Auslan support only if trained Auslan interpreters were available, this would have significantly limited his ability to participate in class, and would most certainly have had a detrimental impact on his progress. The view that Jacob should be weaned from his dependency on interpreting was seen as unreasonable, with the conclusion that this view would be distressing, harmful, frightening and confusing for Jacob. Jacob was awarded costs as well as damages, calculated by estimating the distress of separating him from his peers, the impact of transition from the
family’s preferred choice of a religious setting to a state high school, and the harmful impact the rejection might have caused on Jacob’s self-esteem.

The decision was upheld on appeal. During this appeal, Madgwick J offered a clear statement of the test of reasonableness:

The Court must weigh all relevant factors. While these may differ according to the circumstances of each case, they will usually include the reasons advanced in favour of the requirement or condition, the nature and effect of the requirement or condition, the financial burden on the alleged discriminator of accommodating the needs of the aggrieved person and the availability of alternative methods of achieving the alleged discriminator’s objectives without recourse to the requirement condition. (2004, 138 FCR 121 [115])

**Implications.** In the previous case of Beasley McKenzie D-P stated that the use of written and visual means as well as his access to specialist support meant that Dylan’s access to curriculum was not limited. In contrast, in this determination, Madgwick J found that the lack of Auslan provision would have limited Jacob’s education. Both Jacob’s and Dylan’s schools proposed a range of adjustments that ultimately were determined to not be a reasonable substitute to the benefits the students would have been able to access had their education been provided with Auslan support.

**Benjamin Zygorodimos v. State of Victoria – Department of Education and Training (Victorian College for the Deaf).**

**Context.** In 2003, Denise Zygorodimos, the mother of nine-year old Ben, lodged a discrimination claim against the College. At the time of the hearing, Ben was still enrolled at the College in his third year of schooling there. In addition to being profoundly deaf (although bilateral hearing aids enabled him to “hear” the spoken word), Ben also had
epilepsy manifesting in absence seizures\(^{23}\) as well as a benign brain tumour. Ben was also diagnosed as having a primary anxiety disorder, and a secondary oppositional defiant disorder, as well as an attachment disorder.

The aim of the College was to “develop in its students effective communication skills, so that they can take their place in the hearing and deaf communities” through “a bilingual approach using Auslan as a visual language, and English as the language of writing and speaking” (2004, p. 6). Ben’s preferred mode of instruction was through spoken word. He was not proficient in Auslan, although he was capable of both signing and understanding sign. Prior to attending the College, Ben had been taught Signed English, although his parents had commenced home tutoring in Auslan the year prior to Ben starting at the College. Over the three years, Ben’s teachers had used a combination of spoken word and Auslan for classroom instruction.

**Allegation of how the law was breached.** The complainant proposed that the failure of the College to provide Ben with full-time instruction in spoken English was less favourable treatment, as this was his best means of communication as dictated by his impairment. The complainant also alleged that the requirement for Ben to access his education through Auslan was not something with which he could comply.

**Evidence presented in relation to costs versus benefits.** Counsel for the complainant argued that only 15 percent of Ben’s instruction was in spoken English, the rest being in Auslan. As in most classrooms, there were also times when instruction was only through the written word, with teachers writing on the board for students to copy, or when students were copying from texts. The respondent showed that, at times, two staff members had tried to provide instruction in both English and Auslan simultaneously, but this had confused students.

\(^{23}\) Absence seizures are typically defined as “loss of awareness for a brief period. The person stares vacantly; the eyes may drift upwards and flicker. It may be mistaken for daydreaming” (Epilepsy Australia, n.d.).
as to where to look. They also produced evidence that showed teachers had taught Ben individually in English after instructions were given in Auslan.

**Decision.** McKenzie D-P noted that, at enrolment, Ben’s parents were aware that “Auslan constituted a significant method of communication” at the College (2004, p. 10). She found insufficient evidence to support Ben’s claims, instead proposing that there were times when Auslan was used to instruct the class (typically because this was the preferred mode of communication for all of the other students), but teachers or teacher aides would invariably provide Ben with one-to-one instruction either before or after this instruction had occurred. McKenzie D-P was not satisfied this treatment was less favourable, finding that “there were times when the rest of Ben’s class were not taught in Auslan or that Ben was not taught in speech. Ben and the rest of his class were taught as favourably or as unfavourably as each other” (2004, p. 20). The tribunal ruled that there was no requirement for Ben to access his full-time education in Auslan; that he was treated differently to his peers through the provision of one-to-one instruction, and the complaint was dismissed.

**Appeal.** In May 2004 the complainant sought leave to appeal the tribunal’s decision in the Supreme Court of Victoria. It was argued the key finding, “that there was no detriment to his education in the period February 2001 to December 2003 arising from the prevailing language of instruction”, was not supported by evidence and was, therefore, an error of law (2004, p. 10, ss. 9-10). It was further submitted that “there need only be a denial of benefit in the provision of education for a breach of the provisions of the *Equal Opportunity Act* to occur” (2004, p. 3, s. 11). Warren CJ found the tribunal had extensive evidence to support their decision and was not satisfied that the complainant’s appeal identified a question of law that would be successful on appeal. The application for leave to appeal was refused.
Implications. When compared to the cases of Clarke and Beasley, the Zygorodimos decision is interesting. In Clarke and Beasley, Jacob and Dylan attempted to enrol in, or attended, a school where spoken English was the main language of instruction, and where they, as part of a minority group of students within the school, required instruction in Auslan. In the case of Zygorodimos, Auslan was the language of instruction in the school, and Ben, despite also being deaf, preferred instruction through spoken language. In the same manner as that offered to Jacob and Dylan, Ben’s teachers would often teach the whole class in Auslan first, and then provide individualised instruction for Ben. This practice, deemed insufficient in the cases of Clarke and Beasley, conversely was not viewed as detrimental for Ben.

Hurst and Devlin v. State of Queensland.

Context. This case was brought forward by the parents of two primary-aged, profoundly deaf Queensland students. The first complainant, Gail Smith, brought forward a complaint on behalf of her daughter, Tiahna Hurst. At the time of the complaint Tiahna was seven years of age. The second complainant, Kim Devlin, brought forward her claim on behalf of her son, Benjamin (Ben). At the time of the complaint, Ben was 12 years of age.

Allegation of how the law was breached. The complaints, lodged by Tiahna’s and Ben’s mothers, alleged that “the respondent’s failure to provide teachers fluent in Auslan had retarded their education and will retard it in the future” (2005, para. 21). The complaint alleged that throughout Tiahna’s and Ben’s schooling they were taught by teachers who had variable ability in their fluency and quality of Signed English. Both complainants alleged Auslan to be the only appropriate method of instruction, and the use of any other method should be viewed as discriminatory. They further alleged the use of Signed English and spoken English for instruction was of such a poor standard that the result was both students
had suffered discrimination. This alleged poor standard of teaching was said to have resulted in “humiliation, anxiety, stress, social dislocation, educational disadvantage, cognitive delay, permanent cognitive damage and future economic loss” (2005, para. 170).

**Evidence presented in relation to costs versus benefits.** Tiahna was diagnosed as profoundly deaf prior to three months of age although, during testimony, Ms Smith amended her claim to state Tiahna was severely to profoundly deaf. Despite not being deaf herself, Ms Smith’s first language was Auslan as her parents were deaf. Auslan was also Tiahna’s first language, although she also used spoken language that was able to be understood clearly by those who knew her.

Tiahna received early intervention initially from an AVT, then from attending a Special Education Developmental Centre (SEDC). This early intervention program was in Signed English, but Ms Smith stated in her affidavit that, knowing this, she still felt it was the best program for her daughter. When Tiahna turned three, to continue accessing the early intervention program, her family would need to commute from the Sunshine Coast to Brisbane (approximately one hour) three times per week. Not able to afford this, her family decided to resume access to the AVT scheme, something they viewed as “a significant backwards step for Tiahna” (2005, para. 369).

From July until November 2001, on approximately 10 occasions, Tiahna attended a SEDC in a Queensland State school. At that time, the teacher assessed Tiahna as having age appropriate communication skills, with strong skills in signed communication, as well as clear speech skills. Her mother argued, however, that as no staff at the SEDC were able to communicate in Auslan, Tiahna became bored and frustrated, and her parents made the decision to remove her from the program.
In 2002, Tiahna enrolled in private school for pre-school, but no details about this arrangement were made available in the proceedings. The complainants argued, however, during this year they paid for additional therapy for Tiahna, a cost they felt should be borne by the respondents. In 2003, Tiahna returned to the Queensland State system and repeated her pre-school year. She then changed state schools in 2004 and commenced Year 1.

All educational evidence presented showed Tiahna had made good progress at school, that she spoke well, was able to communicate effectively with teachers and peers, and “cope in a regular classroom environment” (2005, para. 396). Tiahna was considered highly competent in both Auslan and Signed English.

Ben too was born profoundly deaf but was not diagnosed until 16 months. He was the first person in his family to be diagnosed with a hearing impairment. Initially his family believed Ben would be able to hear with the assistance of hearing aids, and they sought intervention to help him learn to speak. It was not until later that the family discovered Ben could not hear, even with his aids, and they started signing. At that time of the proceedings, Ben’s speech was not able to be understood by others, including his family members.

Ben received AVT support from soon after he was diagnosed. His childcare and kindergarten years were spent in settings not administered by the respondent. He commenced at a state SEDC just prior to turning four years of age. He then moved to pre-school at a State school and continued his enrolment at that school. His intelligence was tested at the age of five, and was found to be in the average to above average range.

Ben’s mother was the only family member who could communicate with Ben using signing. Signing was not introduced to Ben until he was four years old, which meant he had “no language development when he commenced school” (2005, para. 183). Ben’s mother commenced Signed English classes in 1998, and Auslan classes in 2002. Initially, at the
request of his mother, the school attempted to teach Ben in an oral format, using his residual hearing. When this proved unsuccessful, his Advisory Teacher recommended the introduction of Signed English.

Between pre-school and Year 3, Ben was on a shared enrolment between the SEDC and mainstream classes. During this time, some staff members who worked with Ben were untrained in Signed English, others had basic skills, some had skills “commensurate to Ben’s level of communication” (2005, para. 200), and some were proficient in Auslan. The shared enrolment arrangements typically meant that Ben remained in the SEDC each morning for literacy and numeracy instruction, and then he would return to his mainstream class each afternoon for “art and craft, music, health and physical education, studies of society, science and technology, including computer skills” (2005, para. 259). During these sessions, a teacher aide from the SEDC would attend the mainstream classes with Ben.

Ben’s mother’s concerns commenced when she observed him during a music class in Year 1 and “noticed he was sitting by himself doing nothing and looking bored” (2005, para. 218). She met with the deputy principal and teacher from the SEDC to discuss her observations and to request to attend other classes, particularly so she could assist Ben with his homework. It was her impression that she wasn’t welcome to observe classes, citing a conversation with the deputy principal in October 1999 alleging that he told her “she was not welcome inside the classroom during the day without first making arrangements or an appointment to be present” (2005, para. 220). Ben’s mother also met with the principal twice when Ben was in Year 2 to discuss her concerns about Ben’s educational progress, although the principal had no recollection of these meetings.

By Year Three, it was the observation of Ben’s teachers and teacher aides that he was good at lip reading and communicating through mime and gesture, but was having difficulty
with spelling, memorising words, sentence structure, reading, and responding to questions. It was also noted, despite educational assessments showing Ben to be of average to above average intelligence, he had fallen behind in his literacy and numeracy skills when compared to his same-aged peers. To assist, the school had placed Ben in the same class as a peer who was competent in Signed English, and this student was used to help Ben, particularly when instructions were given.

In May 2003, Ben was first introduced to Auslan. Around this time, his parents also accessed private language and auditory training therapy for Ben. Ben also had access to an Auslan interpreter, and received training in Auslan each week. Throughout 2002 and 2003, Ben’s attendance at school was erratic.

The respondent outlined their policy on communication methods used with students with hearing impairment. This policy recognised Auslan as one method of communication, but also included “Signed English (signing), finger spelling, lip reading, speech and the use of residual hearing” (2005, para. 115). The policy further noted that “Auslan does not have a written form and any student who uses Auslan, to the exclusion of all other methods of teaching, cannot acquire literacy in English” (2005, para. 116). The respondent argued that the sole use of Auslan would be detrimental for the student when interacting with peers and his teacher.

Separate reasons were cited by the respondent for the complainants’ educational results. In the case of Tiahna, the respondent alleged that irregular attendance at AVT sessions, limited attendance at the SEDC program, and poor school attendance, along with distractibility during sessions, limited parental involvement in planning meetings, uncooperative behaviour by Ms Smith, and interruptions to Tiahna’s schooling mode and place all contributed to Tiahna not meeting her potential.
In the case of Ben, the respondent argued that the late diagnosis of his hearing impairment, the delay in learning sign language, his poor behaviour, incomplete homework, irregular attendance, refusal to use an amplification system to augment his hearing, and the inability of his family to sign all contributed to his diminished educational outcomes.

The respondent was also critical of Ms Smith using the media to push an agenda for instruction in Auslan in the lead-up to the Federal Court hearing. It was noted that a charity by the name of Deaf Children Australia and others had “used these proceedings for the purpose of attempting to compel educators to introduce Auslan as a first language in the education of profoundly deaf children” (2005, para. 421).

A great deal of expert testimony was presented, arguing the merits of instruction in Auslan versus the use of a total communication approach that includes Signed English, lip reading, speech, and finger spelling.

**Decision.** Lander J concluded:

The Court is not an expert on education and, more particularly, on the education of profoundly deaf children. Decisions as to the appropriate method of the education of profoundly deaf children should be made by those qualified to make them, namely, educators, after a consideration of all of the evidence and all of the views whether favourable or unfavourable. The decisions should be made by the educators in the best interests of the children to whom the services are offered. Those decisions should be made after careful inquiry, proper research and calm reflection. (2005, para. 428–429)

In addition, Lander J found:
Each child with a hearing impairment should be individually assessed as to the best method of educating that child. In some cases, it will be in that child’s interests, where the hearing impairment is less, to educate that child orally. As the degree of deafness increases, the likelihood of the use of Auslan as a preferred method of communication also increases. When a child is profoundly deaf, ordinarily, subject to the parents’ wishes, he/she should be educated in Auslan. The views of the parents must be respected. (2005, para. 767-770)

Neither Tiahna nor Ben gave evidence, with Lander J noting “having regard to their age, nor would I have expected them to do so” (2005, para. 142). Lander J found Tianha’s mother to be a person with strong criticisms of the Education Department. He felt that her allegations were exaggerated and found her to be “an unsatisfactory witness” and was not “prepared to act on her evidence unless it was uncontroversial or corroborated by an independent source” (2005, para. 146). By contrast, Mrs Devlin, Ben’s mother, was noted as nervous and defensive, but willing to assist.

Lander J found that “the overwhelming evidence is that Ben’s education has suffered” and that he was not working at the same level as his hearing peers. As a result, he found that Ben had made a case showing he was not able to comply with the condition that he access his education in English without the assistance of an Auslan interpreter or teacher. Ben was awarded general damages for “hurt, embarrassment and social dislocation” (2005, para. 846) as well as compensation for future economic loss.

As Tiahna had maintained learning at the same rate as her peers, and was coping in the mainstream environment with Auslan, Lander J was not prepared to accept she could not comply with the requirement to access her education without the assistance of an Auslan
interpreter. He dismissed Tiahna’s case and, in June, ordered her family to pay the respondent’s costs.

On the matter of media involvement, Lander J found that “it would have been better if a lot of things had not been done and had not been said by Ms Smith” (2005, para. 391), but concluded her actions had no bearing on his findings. Lander J was also critical of some of the expert witnesses who gave testimony in the case, labelling them “crusaders” for a particular approach with limited objectivity (2005, para. 727).

**Tiahna’s appeal.** In July 2006, Tiahna’s mother won a case to have the decision by Justice Lander set aside. Judges Ryan, Finn and Weinberg concluded that Lander J had “allowed himself to be distracted by the somewhat unsatisfactory manner in which Tiahna’s case was presented” and that this had “led him to focus on the wrong issues” (2006, para. 106). Lander J found that the respondent had discriminated against Tiahna in not providing full-time instruction in Auslan, but concluded this had not caused any educational disadvantages, and so her case was dismissed. While Lander J had focused on the evidence that Tiahna had coped in her mainstream classroom, it was their opinion that Lander J had “failed to address the real issue … whether, by reason of the requirement or condition that she be taught in English without Auslan assistance, she suffered serious disadvantage” (2006, para. 106). It was further argued, on the expert testimony provided that, if Tiahna were to continue to be taught in English without the benefit of Auslan translation, she would not reach her educational potential. Tiahna’s mother sought general damages for discrimination. She further sought an injunction restraining the respondent from denying Tiahna access to an Auslan interpreter, should she return to the Queensland education system. Ryan, Finn and Weinberg JJ concluded:
A hearing impaired child may well be able to keep up with the rest of the class, or “cope” without Auslan. However, that child may still be seriously disadvantaged if deprived of the opportunity to reach his or her full potential and, perhaps, to excel. (2006, para. 125)

They further concluded that a decision on this matter should not be viewed as a precedent for all children who are deaf to be educated in Auslan, and that Tiahna’s case was “highly fact specific” (2006, para. 132). They noted the case had “engendered a great deal of passion” (2006, para. 133).

Tiahna’s application for general damages and injunctive relief was decided in the Federal Court of Australia in October 2006. On the matter of general damages, Ryan, Finn and Weinberg JJ found the appellant was not able to provide evidence that her daughter had suffered any loss or damage, and dismissed her appeal for compensation by way of damages. As Tiahna was no longer enrolled in the Queensland education system, the appeal also sought an injunction against a possible future act of discrimination, that Tiahna might return to Queensland and not have access to a full-time interpreter. Tiahna had moved to Western Australia to access instruction in Auslan, but wanted to resume her education in Queensland with the provision of a qualified full-time interpreter. It was noted four years had passed since the alleged acts of discrimination had occurred, and the circumstances had changed considerably; that Tiahna was older, her possible educational needs had changed, and the services she might now require would differ to those needed previously. The Judges also noted that, “the fact that there is no breach presently occurring may make it more difficult, as a matter of evidence, to establish that there is sufficient risk of a future injury to justify the immediate grant of an injunction” (2006, para. 22). On evidence, the appellant was found to
have not provided evidence to support her application for an injunction and dismissed the case.

**Implications.** Three important implications were drawn from this judicial determination. First, courts will not enter into debates about which educational approach might be best for particular learners. The judicial decision reinforced the message that educational decisions should be customised taking into account an individual student’s needs, and the desires of their parents.

A second implication from this case relates to whether a student can be seen as suffering an educational detriment if they have done well at school. In this judicial decision, as Ben Devlin was performing at a level lower than that expected of his peers, he was seen to have suffered a detriment. Tiahna Hurst, who was performing well at school, was, on appeal, seen to have been disadvantaged, not suffered any loss or damage. This raises a question as to whether the benchmark for detriment is simply not achieving a satisfactory grade, an issue similar to that raised in the case of Beasley. It also raises questions about how to measure a student’s capacity to achieve above the required grade level rather than simply measuring achievement against the standards set for the grade level.

A final implication from this case related to the use of litigation to seek policy change. As also shown in the case of Turner, discussed in Chapter Five, and again reinforced in this case, complainants bringing forward claims of discrimination need to focus on the facts as they pertain to the litigant, without attempting to use litigation to seek a review of Government decision-making as it applies to groups of students.
Summary of Findings from Judicial Decisions Relating to the Costs Versus the Benefits

This section of analysis explored judicial decisions where tensions surrounded the costs versus the benefits of providing adjustments. A summary of these fourteen decisions is presented in Table 18:

Table 18. Judicial Decisions Relating to Effect of the Costs Versus the Benefits

<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>The costs of providing additional support to a student whose mental health needs limited his ability to attend school to receive the benefits of those supports.</td>
<td>Court found school had over-stated the costs of providing the program. Outcome: Won, with compensation awarded.</td>
</tr>
<tr>
<td>Demmery</td>
<td>The costs of providing adjustments to a student in a remote location, including the requirement that students need to cope when there are delays in appointing staff with disability expertise.</td>
<td>Court determined it was reasonable for students in remote locations to expect a delay in service provision, specifically in the appointment of new staff. Outcome: Lost.</td>
</tr>
<tr>
<td>Finn</td>
<td>Costs versus benefits of providing ongoing education to a student who had reached the school-leaving age. Parent sought interim return to school while awaiting trial outcome.</td>
<td>Agreed the student would benefit in the interim from ongoing education. Recommended continued enrolment while awaiting trial outcome. Outcome: Won interim hearing; no published decision from final hearing.</td>
</tr>
<tr>
<td>Ross &amp; Semple</td>
<td>Costs versus benefits of providing ongoing education to students who have reached the school-leaving age. Parents sought interim return to school while awaiting trial outcome.</td>
<td>Agreed the students would benefit in the interim from ongoing education. Recommended continued enrolment while awaiting trial outcome. Outcome: Won interim hearing; no published decision from final hearing.</td>
</tr>
<tr>
<td>Hashish</td>
<td>Costs versus benefits of providing ongoing education to a student who has reached the school-leaving age. Parent sought interim return to school while awaiting trial outcome.</td>
<td>Agreed the student would benefit in the interim from ongoing education. Recommended continued enrolment while awaiting trial outcome. Outcome: Won interim hearing. Respondents won on appeal. Complainant appealed to the High Court. Matter was discontinued as legislative/policy change allowed student to continue his education.</td>
</tr>
<tr>
<td>Case</td>
<td>Tension</td>
<td>Outcome</td>
</tr>
<tr>
<td>------------</td>
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<tr>
<td>Bacon &amp; Ors</td>
<td>Costs versus benefits of providing a transition program to students who have reached the school-leaving age.</td>
<td>Judge agreed that a new policy requiring students to leave school upon attaining the age of 18, unless enrolled in the VCE, was discriminatory. Outcome: Won, costs awarded.</td>
</tr>
<tr>
<td>Bolton</td>
<td>Costs versus benefits of providing a transition program to students who have reached the school-leaving age.</td>
<td>Referencing the decision of Bacon &amp; Ors, judge found a new legislative changed was designed to prevent another successful outcome. Judge ordered case to be heard in 30 days. Outcome: No published record from final case.</td>
</tr>
<tr>
<td>Prendergast</td>
<td>Parent alleged student should benefit from being retained in Kindergarten rather than being promoted to Year 1.</td>
<td>Court found the decision to promote the student to year one was not discriminatory. Outcome: Lost.</td>
</tr>
<tr>
<td>Sievwright</td>
<td>Costs versus benefits of providing a full-time teacher aide to a student with learning and language difficulties.</td>
<td>Court found it was beyond the financial capacity of the school. Outcome: Lost.</td>
</tr>
<tr>
<td>Chinchen</td>
<td>Costs versus benefits of providing adjustments to a gifted student with learning disabilities enrolled in a program for gifted learners. School, against parents’ wishes, withdrew the student from the program citing the costs of providing the adjustments (on student self-esteem and teacher workload and stress levels) were too great.</td>
<td>Decision by school to withdraw student from program was seen as discriminatory as it denied him the benefit of a program to accommodate his giftedness. Outcome: Won, respondent appealed decision but settlement reached on day appeal was to commence.</td>
</tr>
<tr>
<td>Beasley</td>
<td>Costs versus benefits of instruction in Auslan, rather than other communication approaches.</td>
<td>Court found the slowness of the other communication approaches limited the student’s participation in class but did not limit his access to curriculum. Measured against age-based curriculum standards, student was found to have made good progress in most subjects, and any lack of progress attributed to absenteeism. Outcome: Won in part, with compensation awarded.</td>
</tr>
<tr>
<td>Case</td>
<td>Tension</td>
<td>Outcome</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>Clarke</td>
<td>Costs versus benefits of instruction in Auslan, rather than other communication approaches.</td>
<td>Court found school had placed a condition on his enrolment that he access education without an interpreter, and that this condition was unreasonable, significantly limited his ability to participate, and caused distress. Outcome: Won, with compensation awarded. Also upheld on appeal.</td>
</tr>
<tr>
<td>Zygorodimos</td>
<td>Costs versus benefits of instruction in Signed and spoken English, rather than in Auslan.</td>
<td>Court found family chose to enrol their child in a school knowing the language of instruction was Auslan. Outcome: Lost.</td>
</tr>
<tr>
<td>Hurst &amp; Devlin</td>
<td>Costs versus benefits of instruction in Auslan, rather than other communication approaches.</td>
<td>Hurst: Court found student had made progress in her learning at the same rate as her peers, so there was no education disadvantage. Outcome: Lost, and costs were awarded to the Department. Decision upheld on subsequent appeals. Devlin: Court found student had suffered as a result of not being provided instruction in Auslan, as his grades were below those of his peers. Outcome: Won, with costs awarded.</td>
</tr>
</tbody>
</table>

**Judicial Decisions Relating to Unjustifiable Hardship**

The judicial decisions explored so far examined whose interests were considered and how these were balanced when determining the reasonableness of adjustments. Section 11 of the *Disability Discrimination Act 1992* allows for respondents to enter an argument that states, even in circumstances where a court might deem an adjustment beneficial to a student, to provide such an adjustment would cause a school a hardship. To determine whether this hardship is unjustifiable, section 11 requires the court to consider:

(a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
(b) the effect of the disability of any person concerned;

(c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;

(d) the availability of financial and other assistance to the first person;

(e) any relevant action plans given to the Commission under section 64.

Example: One of the circumstances covered by paragraph (1)(a) is the nature of the benefit or detriment likely to accrue to, or to be suffered by, the community. (DDA, s. 11)

In the following five judicial decisions, the respondents argued that the cost of an adjustment would impose an unjustifiable hardship.

**L v. Minister for Education.**

*Context.* As presented earlier in this chapter, L was a Queensland student diagnosed with global developmental delay that had impacted her intellectual development, communication skills, gross motor abilities and independence especially related to hygiene and eating. On 12 July 1995, L was suspended from her Government primary school on the basis of behaviour that posed a risk to the safety of others. The school then made a recommendation to the regional office for L to be excluded, but the executive director decided to extend the suspension pending a review by the Department of Education.

*Allegation of how the law was breached.* L’s legal counsel argued that her suspension and the school’s proposal to exclude was discriminatory as she had been treated less favourably than a student without a disability. The respondent sought an exemption stating L’s enrolment caused the school unjustifiable hardship.
Evidence presented in relation to hardship. The complainant provided two expert witnesses. The first argued that the education of children with cognitive impairment was best provided in a mainstream classroom and that, with appropriate observation, data collection and trialling of different strategies, behaviours such as those exhibited by L could be addressed by her classroom teacher (given the appropriate training). The second expert witness presented research supporting the inclusion of children with cognitive impairments in mainstream settings, especially in relation to language and social skill development. He argued that, despite any formal training in special needs education, mainstream teachers, with the assistance of a teacher aide and AVT support, could be reasonably expected to teach students such as L. The complainant’s expert witnesses also presented arguments for the long-term benefits of inclusion, such as increased post-school workforce productivity, decreased post-school reliance on social services, and the creation of a more tolerant community.

The respondent claimed that, prior to her suspension, L was in receipt of twenty hours of teacher aide time, occasional assistance from an AVT, and time devoted each day by per class teachers to work with L on a one-to-one basis. The respondent’s expert witness agreed for the most part with the complainant’s expert witnesses. She argued that, where an attempted inclusion of a child had been unsuccessful, the mainstream placement of a child might not be possible. She argued that more was required to support the education of a child such as L than simply AVT support for the classroom teacher, citing a preferred co-teaching model where a special education teacher and regular teacher work together in a regular classroom to support the student. She also argued that, for a child to gain the benefits of language acquisition and social inclusion, specialist teaching was necessary. She proposed L attend a school with an SEU for a period of one to eighteen months to develop the required self-care skills and appropriate behaviours. She also concluded that, with ongoing liaison
between L’s State school and the special education unit, it would be possible to facilitate L’s return to her mainstream primary school. Her second proposal was for L to remain at her current primary school, but for a full-time special education teacher to be employed in place of the part-time Advisory service.

The respondent presented the economic costs of creating an SEU at L’s primary school; one that accommodated 6-8 students with a full-time teacher and teacher aide. The respondent further presented capital and recurrent costs of educating L in the mainstream. These capital costs were for the creation of an accessible shower/toilet, and the recurrent costs included two days per week of AVT time, a full-time teacher aide, staff professional development costs, and minor costs such as carpet cleaning.

**Decision.** Member Holmes considered the testimony of the complainant’s experts and concluded that it ignored, “the issue of the time which may be involved and the stresses which may be imposed by the attempt to overcome such difficulties in a regular classroom setting” (1996, p. 10). Member Holmes also found much of the evidence presented by these witnesses to be speculative, instead preferring the evidence given by the respondent’s expert witness stating it was more practical and less theoretical.

The respondent’s proposed costs were dismissed by Member Holmes, citing “[T]hat exercise seems to me rather to miss the point that what L’s parents are seeking is her inclusion in a regular classroom setting, not the introduction of a de facto special education unit” (1996, p. 13).

In determining the issue of unjustifiable hardship, Member Holmes considered the issue not only of economic impact, but also the costs and benefits to all concerned. From L’s perspective, and that of her parents, education in a mainstream classroom, close to home, and the same school as her sibling, was considered to provide the most benefit to L. In terms of
financial costs, Member Holmes found the arrangements supporting L’s inclusion to be lacking. Member Holmes concluded that, were the current arrangements to continue and her primary school to be compelled to continue L’s enrolment, the burden on L’s classroom teacher, and the disruption experienced by L’s peers, would constitute unjustifiable hardship and this would “outweigh the benefits to L” (1996, p. 18).

**Implications.** Discrimination on the basis of disability is not unlawful if the proposed adjustments would cause unjustifiable hardship. In this case, any benefits to the complainant and her family were outweighed by the costs this would pose on her peers and staff. The case highlighted some practical difficulties that arise when attempting to frame an argument around unjustifiable hardship, particularly when trying to calculate the financial impact of an adjustment. Interestingly the judge raised the issue of practicality versus theory, and placed more weight on practical considerations.

**P v. Minister for Education.**

**Context.** As presented earlier in this Chapter, P was a nine-year-old boy with Down syndrome with significant behaviour concerns, including concerns for his personal safety, and the safety of other students and staff.

**Allegation of how the law was breached.** The complainant alleged that Rasmussen Primary School had discriminated against P by recommending his enrolment in a mainstream primary school be cancelled in preference for his enrolment at Aitkenvale Special School. The complainant sought an interim order for the respondent to accept an enrolment application either back at Rasmussen Primary School, or another local mainstream school, until the discrimination complaint had been resolved. The applicant’s counsel argued that refusal of P’s enrolment in a mainstream school may prejudice the discrimination matter. The
respondent sought an exemption stating P’s continued enrolment at the mainstream school would pose an unjustifiable hardship on the school.

**Evidence presented in relation to hardship.** The respondent argued that P had made good progress at Rasmussen State School, but at a considerable cost to the other students and staff. They also argued that since P’s enrolment there had been some changes to staffing and that the level of resourcing provided to the school had been decreased. It was the belief of the respondent that the proposed new special school would cater better for P’s educational needs and that over time a return to mainstream classrooms could be facilitated.

**Decision.** Member Keim found that P had been the subject of discrimination as well as less favourable treatment, but the issue of unjustifiable hardship was considered. Here, the impact of P’s impairment and specific behavioural and communicative difficulties were considered. Second, the limited progress made in addressing these difficulties was noted. Third, the insistence of P’s mother that his educational needs be addressed in the classroom without the need for specialist withdrawal was also equally noted.

The crucial question of whether it would pose unjustifiable hardship to the respondent to provide the necessary support services was considered, as was the cost to peers and the school community in general in “tolerating” P’s disruptive behaviours. The finding was that, “[W]hen one includes these contributions by the employees of the respondent and P’s fellow students as part of the supply of special services or facilities, one can see that the intolerable situation faced by members of each of those two groups of people constituted unjustifiable hardship” (1997, p. 56).

Member Keim refused the application for an interim order, citing the pressure on the school community to re-instate the required supports, and the cost to other students and staff, outweighed the possible benefits that would be gained by P. Member Keim summarised, that
action of the respondent to recommend enrolment of P at a special school was discrimination on the grounds of impairment, but found that this discrimination was not considered unlawful as continuation of the current educational arrangements would constitute unjustifiable hardship, and the complaint was dismissed.

**Implications.** As in the case of L, in this case, any benefits to the complainant were outweighed by the costs P’s enrolment would impose on his peers and staff at his school. The judicial decision showed that not all discriminatory acts are illegal. While this school treated P less favourably, this discrimination was not unlawful because of the impact of P’s enrolment on the mainstream school community. The judge also determined that P was not benefitting from the education being provided to him.

**Phu v. State of NSW (Department of Education and Training).**

**Context.** As outlined earlier in this chapter, HP was a 13 year old girl with a diagnosis of autism, severe global developmental delay and NF Type 1. Her NF manifested in specific learning disabilities. She had no verbal form of communication, and she engaged in self-injurious behaviour.

**Allegation of how the law was breached.** The complainant alleged that the requirement for HP to access her education without one-to-one support amounted to discrimination by the respondent. The respondent countered that to provide HP with one-to-one support would constitute unjustifiable hardship.

**Evidence presented in relation to hardship.** The respondent raised the issue of finite resources and argued that the precedent of providing full-time one-to-one support for a student would impose unjustifiable hardship on the Department. The respondent stated that this hardship would extend to “the resources and demands associated with the need to obtain and place appropriately qualified and trained teacher aides” (2009, para. 102).
respondent also proposed that an increase in spending in this area would result in a decrease in spending on other programs funded by the Department. The Department argued 3,900 students with disabilities were enrolled in NSW special schools, representing almost 12% of the total population of students with disabilities in their state Government schools. It was alleged that “if the Department was required to provide Ms Phu with a full-time one-on-one teacher’s aide special similar demands would be made by other students with confirmed disabilities” (2009, para. 105). The respondent also argued that it would be difficult to determine, from these 3,900 students, who would benefit from a full-time aide and who would not.

**Decision.** The tribunal found that it was reasonable to expect HP to access her education without full-time one-to-one support from a teacher aide, and the complaint was dismissed. Based on this determination, the judicial decision made no further reference to the unjustifiable hardship evidence.

**Implications.** The respondent put forward a strong argument about the unjustifiable hardship that would be caused if systems were to provide full-time one-on-one assistance to students with disabilities. In the end, this judicial decision found HP would not have benefitted from this level of support. Taking into account the position put forward by the respondent, it is clear that there would be a significant cost to an Education Department if they were ordered to provide one-on-one assistance to students with significant disabilities.

**K v. N School.**

**Context.** In August 1995 the complainant, K, and four other families, was advised that the respondent, N School, was no longer able to accept the enrolment of children with special needs due to hardship arising from their enrolments. K was an eleven-year-old girl with an undiagnosed impairment, suspected as Rett’s syndrome, that impacted on her rate of
learning. The school was chosen by her family for its small enrolments and Christian environment. The only other local alternative was a very large state school. This led to a complaint being lodged with the QADT.

**Allegation of how the law was breached.** The complainant alleged the respondent, N School, had discriminated against K, in their educational segregation of her, and in the future plan by N School to cease her enrolment. The discrimination complaint sought both an end to the alleged discrimination, as well as an order for N School to develop a strategy, supported by the necessary funding, to ensure the educational needs of all enrolled students with disabilities, including those of K, would be met by the school.

The complaint also sought two immediate interim orders. First, that the respondent continued to accept K’s enrolment; and second, that the respondent be ordered to provide K with an educational program in her normal classroom, not in a withdrawal program as was the current case. The respondent also sought an interim order; that a psychologist, an educational expert, and a paediatric neurologist all be given permission to assess the needs of K, although the complainant argued the application to conduct these assessments should be rejected as they would provide information not available at the time of the alleged discrimination.

**Evidence presented in relation to hardship.** The issue discussed was the balance of convenience. In the interim hearing, the complaint alleged that K’s enrolment at another school while awaiting a decision on this matter would be disruptive and detrimental to her learning. K’s mother also argued that the current program provided by the respondent, which included a withdrawal program each morning, upset her daughter.

The school argued that the enrolment of K and other children with special needs resulted in a significant drain on the school’s resources, and that her enrolment at a state school would give her access to greater resources.
Interim Decision. Member Holmes reasoned that, “the balance of convenience favours the child being able to return to the school ... to remove her from the school would prejudice her complaint most seriously” (1995, p. 3). On the matter of K’s educational program being provided in the normal classroom, Member Holmes was not prepared to make such an order. Instead it was decided no clear detriment could be determined as “the existing state of affairs, in fact of most of this year has been that the child remains out of the classroom for a substantial part of each day” (1995, p. 4).

Additional interim hearing. In August 1996, a further interim decision was made with regards to this case. In this matter, the respondent sought access for K to be assessed by a neurologist, psychologist and educationalist, as well as access to records of any previous testing of K, and an authority to contact any neurologists or paediatricians previously consulted. The respondent argued this information was necessary to identify the precise nature of the support needed by K, the amount of resources required to meet her support needs, and the availability of resources.

Member Holmes ordered for K to be examined by the requested specialists, and for the respondent to have access to these three reports as well as any historical assessments that had been conducted.

Final decision. The matter was heard over eight days in October and November 1996. Assessments conducted by psychologists from the Queensland Spastic Welfare League, now known as the Cerebral Palsy League, revealed K functioned at a cognitive level much lower than her peers. K also had poorly developed motor skills despite extensive therapy, and a documented history by educational experts as having complex behavioural concerns, including prolonged periods of screaming and incidents of hyperventilation. It was alleged K’s disability may (or may not) arise from Rett’s syndrome.
Details of K’s educational history were provided. She commenced at N School in Year 1 in 1993. Each year N School received a small amount of Commonwealth Government funding to support her educational needs. Funding was also received for other children with disabilities, but collectively these funds were supplemented by the school to pay the salary of a special needs teacher. At the hearing, the school’s former principal advised in 1995 the shortfall from Commonwealth funding was double that which it had been in 1994.

K’s Year 3 teacher testified in 1995 she had struggled to meet the educational needs of K and one of her peers who also had special needs. As a result, a program was devised for the two students to be withdrawn during language and maths classes, and taught either by the special needs teacher or supervised by parent volunteers. Concerned about the use of parent volunteers for supervision, the former principal referred the matter to the school’s Board of Directors who made a recommendation that the four children enrolled at the school who had special needs should not be re-enrolled in 1996. The families of three of these students decided to leave at the end of the 1995 school year, but the complainant’s parents challenged the decision and returned their daughter to the school in 1996 to commence Year 4.

Each term K’s teacher, a new graduate, prepared an IEP for her, and either provided this to, or discussed this with, the two parent aides (themselves parents of children with special needs) who assisted on different days. The teacher stated that she found K’s complex behaviours very stressful, and by August of that year the teacher was diagnosed by her medical practitioner as experiencing anxiety. The school relocated the class to a room closer to the principal’s office so that the teacher could call on assistance as required. A decision was also made to place K’s desk outside of the classroom, where she could still see inside the room, but she was physically separated from her peers.
Several experts provided evidence with regards to the best educational program for K. One expert argued that, with a trained teacher, and an experienced teacher aide for 16-20 hours per week, as well as, if available, monthly advisory consultation from a Government state-wide service, K would benefit from a continued mainstream education. This expert also offered to assist the school by monthly attendance at meetings. The second expert also supported a continued mainstream education, although she noted the respondent’s “lack of expertise in the special needs area and lack of access to professional assistance made it ill-equipped to cater for the small number of children with high special needs” (1997, p. 6). This expert proposed the following support: an educational expert employed for four to five days at the start of each school year, followed by monthly consultations; a special education teacher responsible for developing an IEP as well as ongoing consultation for several hours per week with the classroom teacher; and continued use of volunteer aides. It was estimated an ongoing $9,000 per annum would be required to fund this model.

This figure contrasted sharply with the amount and model proposed by the respondent who calculated specialist advice for five three-hour sessions at the start of the year, as well as on-call visiting support would cost over $3,000 per annum alone. In addition, the cost of a specialist to devise an IEP and then provide remedial support was factored at almost $6,700. In addition, the employment of a full-time teacher aide was costed at almost $14,000 per annum.

The school Chairman of the Board of Directors testified that in 1996 the school had received $1,400 in Commonwealth funding for K, $1,900 in general grants and $1,200 in school fees. He also testified that over the past three years the school had alternated between a surplus and a deficit, achieving a total surplus of $1,100 in 1996. In addition, three affidavits from parents indicating they would remove their children from the school should K
be permitted to continue at the school were also offered into evidence, with the Chairman expressing fears that others may withdraw their children which would further impact on the school’s available funds.

**Decision.** Member Holmes accepted that, if K continued at the school, the respondent would bear an ongoing educational cost of between $9,000 and $10,000 p.a. She extended by adding, “[T]here is a further question as to whether that hardship is unjustifiable” given the large number of local settings that had special educational facilities (1997, p. 9). Member Holmes also noted that, “on the other side of the balance sheet, the disruption to K (and probably her sister also) of having to change schools and the preference of her parents for their child’s education in a Christian school must be taken into account” (1997, p. 10).

The decision acknowledged the impact of moving K from a familiar environment and the loss her parents would feel in being forced into a form of education they did not want for their child, but on balance of convenience found that the existence of other local specialist services and the hardship on the school outweighed these factors. Taking everything into account, Member Holmes found the balance in the school’s favour. Member Holmes concluded, “K was the subject of discrimination” but “N School has succeeded in discharging the onus on it of showing that K would require special services or facilities, the provision of which would impose unjustifiable hardship on it” (2007, p. 11). The application was dismissed, but a later attempt by the respondent to recover legal costs was unsuccessful.

**Implications.** Mirroring the decisions in the cases of L and P, in this case, any benefits to the complainant were outweighed by the costs K’s enrolment would pose on her school. The family were also tied to the economic balance sheet of the school.
Scott and Bernadette Finney on behalf of Scarlett Finney v. The Hills Grammar School.

**Context.** As discussed in Chapter Six, the complainant’s lodged an application for Scarlett’s enrolment at the Hills Grammar School, a New South Wales independent, non-denominational, co-educational K-12 school. Scarlett’s parents noted on the enrolment application form that their daughter had spina bifida and would require specific adjustments. This comment triggered an extensive enrolment process, designed to determine the current and future extent of Scarlett’s needs and the financial implications of meeting these. Ultimately the school rejected Scarlett’s enrolment claiming they did not have the required resources to meet Scarlett’s needs.

**Allegation of how the law was breached.** Scarlett’s parents alleged that the school discriminated against their daughter by refusing to accept her enrolment. The respondent countered that to do so would have caused the school unjustifiable hardship.

**Evidence presented in relation to hardship.** The respondent argued that there were two specific types of adjustments that would impose a hardship on the school. First, Scarlett’s need for a toileting program and, second, the ongoing adjustments to curriculum Scarlett would require across the lifespan of the enrolment period. At the time of enrolment application, Scarlett was both bladder and bowel incontinent. Mrs Finney advised the school that she catheterised Scarlett each morning and evening, and that a nurse would be available to attend the school once per day to catheterise Scarlett. Mrs Finney provided the school with the name of a nurse who, upon contact from the school, advised that she did not know the Finney family or Scarlett. The confusion was later resolved, with the nurse advising she would be available each day to catheterise Scarlett and the school could reasonably expect by the age of eight to ten years that Scarlett would be able to self-catheterise. In terms of managing Scarlett’s bladder incontinence, the only ongoing requirement would be for a sterile
accessible toilet with storage facilities for catheterisation equipment. After initial confusion around the availability of a nurse Mrs Finney forwarded a letter from Community Health, with a cover letter where she stated:

Enclosed is a letter of confirmation from the Community Health Service that they will visit Scarlett once a day. This should be sufficient for Scarlett, of course if there are circumstances where Scarlett would need further attention then I would make myself available. We have been trying Scarlett on a course of medication to assist her bowel emptying once a day properly in the mornings; having promising results with fewer accidents during the day.

(1999, p. 8)

In terms of Scarlett’s bowel incontinence, Mrs Finney advised Scarlett was undergoing a bowel management program which included, “a bowel wash approximately twice a week together with medication and a high fibre diet” (1999, p. 5). It was planned that Scarlett would wear pull-up disposable pants to school, and Mrs Finney reported that there were no concerns from Scarlett’s early intervention providers regarding “unforeseen accidents or embarrassment to Scarlett in regards to her incontinence” (2000, p. 5). Mrs Finney also advised that, in the unlikely event of an accident, either she or family friends who lived locally were prepared to come to the school to assist.

At the time of the hearing, Scarlett was enrolled at Jasper Road Public School. The principal of the school testified that Scarlett had required catheterisation twice per day at school. The setting had successfully applied for additional Government funding and had employed a teacher aide for five and a half hours per week. The teacher aide assisted Scarlett to catheterise by ensuring that all the necessary equipment was prepared, and the principal advised that the toileting and catheterisation program meant there were minimal disruptions to
class activities. The clinical nurse consultant who implemented Scarlett’s incontinence plans supported this testimony.

The respondents argued that consideration of Scarlett’s incontinence was one of their greatest concerns (1999, p. 7). They argued that they had received conflicting advice from Scarlett’s Long Day Pre-school operator where Scarlett had attended for three months before going to Kindergarten. It was claimed that the operator advised the school “Scarlett wore heavily padded incontinence pads, did not have bowel control, soiled herself in the classroom a couple of times a week, was too heavy to lift onto a table when she had to be changed and had to be changed on the floor” (1999, p. 22). The operator also testified that, “Scarlett had no bladder or bowel control and was not aware of when she had wet or soiled herself” (1999, p. 25). It was the view of the operator that Scarlett’s mobility and continence needs required the support of a full-time aide, leading the school to believe the complainants had understated their daughter’s needs.

This belief was further reinforced for the respondent when they contacted a special needs teacher at a local school in an attempt to learn more about the needs of children with spina bifida. This teacher advised the school that bowel incontinence would require a teacher aide, and the risk of injury from lifting Scarlett could lead to legal action and the need for the school to take out additional insurance. The respondent argued this teacher had urged them to consider the issue of strained peer relations from enrolment of an incontinent student and time detracted from the learning of peers while teachers had to attend to Scarlett’s needs. Finally, the special needs teacher also advised the respondent that most children with spina bifida required twice daily catheterisation.

The respondent also submitted that, in determining hardship at the point of enrolment, it was necessary for the school to consider the effect of the disability and potential hardship
across thirteen years of schooling, not just the immediate hardship that might be experienced during Scarlett’s Kindergarten year. In relation to adjustments to curriculum, it was not possible for the respondent to identify what curriculum adjustments would be required by Scarlett, nor the additional training required by Scarlett’s teachers in curriculum provision, as no formal assessment of Scarlett’s academic potential had been administered. The only advice the school had received was from Scarlett’s current Kindergarten teacher who advised that adjustments to physical education activities were currently required. The respondent argued that the school would experience hardship from Scarlett’s enrolment by having to provide additional supports in the areas of mobility (provision of ramps), toileting (the capital work costs associated with creating an accessible bathroom), teacher aide assistance with toileting and mobility, assistance on excursions, and alterations to timetabling to account for Scarlett’s movement between classes. The respondent alleged that parents would need to pay higher school fees to cover the cost of capital works required by Scarlett, and that staff would need to work longer hours to accommodate Scarlett’s educational needs.

**Decision.** Commissioner Innes concluded that a combined effort between the parents and the school would have been the best way for the school to determine Scarlett’s needs, including a formal assessment of Scarlett’s needs. He stated that, “[T]he greatest barriers which people with a disability face in our community are the negative assumptions made about them by other members of the community” (1999, pp. 43-44). On the matter of toileting, Commission Innes ruled that:

>[T]he investigation by the school as to the services and facilities that would be required by Scarlett was inadequate. This reflects an attitude of the school not to seriously consider her application for enrolment. The school formed an unnecessarily negative view of Scarlett’s ability to access its services and
facilities, based upon stereotypes and prejudices formed as a result of information obtained from sources which were primarily inexpert in spina bifida and in some cases wholly unaware of Scarlett’s individual circumstances. (1999, p. 33)

In relation to the long-term adjustments the respondent proposed Scarlett would need over her 13 years at Hills Grammar, Commissioner Innes found that:

[E]vidence from the school that it operates on a college format, and that enrolment is for the thirteen years of school ... However, there is a natural pause in schooling at the end of Year 6 because of the structure of the state school system. I cannot see a persuasive reason for treating private colleges differently in this regard. Further, no-one is able to predict what the economic situation of the Finney’s or the school may be in seven years’ time. Other factors, such as teachers, student’s health, or relocation can all play a role. There must be some reassessments each year, albeit minor, as to whether a student will continue at a school. I am not prepared to regard the enrolment as binding the parties further than the end of Year 6, and in my view there could be exceptions making the period even shorter in certain cases. (1999, p. 42)

In deciding this case, Commissioner Innes found that the school’s decision to reject Scarlett’s enrolment was “genuine but misguided ... based on general and often flawed assumptions” (p. 48). Commissioner Innes found Hills Grammar had discriminated against Scarlett, and awarded damages.

**Appeal.** Hills Grammar sought a judicial review of aspects of Commissioner Innes’ decision. They argued that there was no evidence that the period of enrolment would be anything less than thirteen years, and that the assumption of a “natural pause” between the
end of year six (primary education) and start of year seven (secondary education) in the State schooling system was not relevant in a private college that operated from Kindergarten to Year 12. On this matter, Tamberlin J of the Federal Court of Australia found that there was, “no statutory requirement in the legislation that the longest period of foreseeable enrolment or a worst case scenario must be selected and hardship weighed against it” (2000, p. 14). It was noted that the school’s prospectus made reference to a junior, middle and senior school and it was reasonable to consider these as natural points of transition. Also noted was the school’s letter of rejection, which indicated that Scarlett’s application for entry into Kindergarten had been unsuccessful. On these bases, Tamberlin J concluded “no reviewable error of law or principle was shown” (2000, p. 14).

**Implications.** The Finney case is a landmark case as it was the first ruling by the HREOC against a private school for discrimination under Federal disability discrimination legislation, and resulted in significant media attention. The case was described as one that “put all schools on notice about their obligations towards students with disability” (Public Interest Advocacy Centre, 2013). It clarified the obligation of education providers to accept the enrolment of students with disabilities even when these enrolments might cause the school some hardship. It also highlighted for schools the importance of making adjustment decisions based on factual information rather than hearsay or assumptions.

**Summary of Findings from Judicial Decisions Relating to Unjustifiable Hardship**

This section of analysis explored judicial decisions where tensions surrounded the hardship schools experience when they provide adjustments, and whether these hardships are considered unjustifiable. A summary of these five decisions is presented in Table 19:
### Table 19. Judicial Decisions Relating to Unjustifiable Hardship

<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>L</td>
<td>Hardship imposed by providing adjustments in a mainstream school to a student with behavioural concerns.</td>
<td>Court considered not just economic impact, but also costs and benefits to all concerned. Found the arrangements in place by the school to be lacking, but that the benefits of continued enrolment were outweighed by the costs to her teacher and disruption to the learning of her peers. Outcome: Lost.</td>
</tr>
<tr>
<td>P</td>
<td>Hardship imposed by providing adjustments in a mainstream school to a student with behavioural concerns.</td>
<td>Court found the impact of P’s behaviour on the learning of peers was an unjustifiable hardship that outweighed any benefits he gained in a mainstream environment. Outcome: Lost.</td>
</tr>
<tr>
<td>Phu</td>
<td>Hardship on an education authority to provide full-time one-on-one assistance for a student with significant disabilities.</td>
<td>Court found it was reasonable for the student to access her education without full-time individualised support, so unjustifiable hardship arguments did not need to be considered. Outcome: Lost.</td>
</tr>
<tr>
<td>K</td>
<td>Financial and other costs of providing adjustments to a student in a small, Independent school.</td>
<td>Court acknowledged that changing to a larger school with better resources would come at some costs to the family, but found that for her to remain at her current enrolment would pose the school an unjustifiable hardship. Outcome: Lost.</td>
</tr>
<tr>
<td>Finney</td>
<td>Benefits of enrolling a student in an Independent K-12 setting, when factored against the costs of providing adjustments across 13 years of schooling.</td>
<td>School was found to have over-estimated the costs of the adjustments, based on incorrect assumptions about the current, ongoing and future needs of the student. Outcome: Won, with decision upheld on appeal.</td>
</tr>
</tbody>
</table>

### Discussion of Implications

A number of key points emerged from the findings in this chapter in relation to answering the question of whose interests were considered and how were these balanced when determining adjustments to curriculum (sub-question 3). The review of research in this...
field presented in Chapter Two drew attention to some noted benefits of providing adjustments for students with disabilities including increased student independence, enhanced self-esteem, and increased opportunities for social interaction and positive role models (Smith, 2012). These benefits formed part of the judicial determination in the decisions of Prendergast and Sutherland. An implication for families using litigation to resolve discrimination matters is that they should emphasise the benefits their child gained from adjustments made, or present benefits that would be likely had the adjustment been given.

When discussing issues of inclusion in mainstream schools, most experts who gave testimony focussed only on the benefit to the child with a disability. While many authors have discussed how peers benefit from curriculum adjustments made for students with disabilities (e.g., Borges & César, n.d.; Cole, 2012; Hall, et al., 2011; Healey, et al., 2006; McGuire, 2011; Wans, 2009; Wareham, et al., 2006; Young & Kraglund-Gauthier, 2012, Jul.), very few expert witnesses made these claims.

The review of research also acknowledged the additional benefit schools received from the resourcing attracted by enrolling students with disabilities. The literature review noted resourcing assisted with the employment of extra teachers or teacher aides, or reduced teacher-student ratios, and that this benefitted other students ineligible for funding who need access to support (Burgstahler & Moore, 2009). Capital works resourcing, enabling building modifications, were noted as beneficial to not just the student, but other community members (Steinfeld & Maisel, 2012; Zeff, 2007). The literature further noted that providing adjustments enhanced community perceptions of schools being compassionate learning communities (Katz, 2012). None of these arguments were presented in any of the judicial determinations examined. Rather, the only discussion of resourcing, as shown in Finney, Sievwright, Phu
and K, related to financial hardship experienced by schools that enrolled students with disabilities.

Two additional benefits emerged in judicial determinations that weren’t examined within the literature. The first related to the benefit of students with disabilities attending school part-time as a management strategy for anxiety, as noted in the case of Minns. A national survey conducted by the peak advocacy association Children with Disability Australia (2015) revealed that approximately 17% of the 1025 respondents revealed their child had been offered part-time school enrolment, with inadequate levels of support most commonly cited as the reason. Yet, a literature search using the search terms “part-time school attendance” or “part-time enrolment” and “students with disabilities” revealed no refereed publications on the topic. This appears to be an area of research worthy of further attention.

The second area that emerged in relation to discussion of benefits was in relation to the ongoing enrolment of students with disabilities who had attained the school leaving age in their State. The five cases where this issue had emerged, namely Finn, Ross & Semple, Hashish, Bacon & Ors, and Bolton, were located in either Queensland or Victoria, with litigation a strategic action taken by parents in response to a legislative amendment or policy change that affected the ongoing education of their child. Most of the decisions were from interim hearings, where families sought immediate relief for their child to continue at school until the matter was investigated more thoroughly. The outcomes of the final hearing for the cases of Finn, Ross & Semple, and Bolton were unknown, but there was a later legislative or policy change that allowed for the continued education of these students, so it appears these were cases of successful strategic litigation. This contradicts the finding in the case of Turner.
(presented in Chapter Five) that cautioned families from using litigation for strategic purposes.

In judicial decision-making, the issue of detriment also requires attention. Montgomery (2013) noted that adjustments may cause a detriment to the student’s peers, and this argument was clearly presented in the cases of Prendergast, Phu, P, L, Minns, USL, AB, and Purvis. This argument was most strongly advanced in cases where behaviour interrupted the learning, or compromised the safety, of others. The literature review posited another potential detriment would arise where teachers delegate the instruction of students with disabilities to teacher aides, therefore compromising the quality of instruction for this set of learners (Causton-Theoharis, 2009; Gardiner, 2011; Giangreco, et al., 2005; Hehir, 2002). This was certainly a key issue that emerged in the case of Purvis. An extension of this detriment argument related also to the impact of workload on staff, as presented in the cases of P, L, Purvis, USL, and AB. Finally, in relation to staff detriment, the issue of duty of care for staff safety was presented in Walker. An implication from each of these findings is that schools should document any concerns they have in relation to the detriment that might arise from providing adjustments for students with disabilities. An interesting observation in the way some of these cases were argued was that the behaviour of these students was considered detrimental to peers in a mainstream setting, and that their needs would be better met in a specialist setting. However, there was limited discussion of the detriment this may cause to students enrolled in these settings, a point made by Dickson (2004).

Another detriment that emerged within the judicial determinations, but not within the literature review, included the cost to a school when they prepare materials for a student or hire a staff member to provide for their needs and the student then fails to attend, as outlined in the case of I on behalf of BI. The finding showed schools would struggle to use this as a
defence against discrimination, especially when other students could benefit from the adjustments.

A further issue was the refusal by some families to allow their child’s educational needs to be assessed, concerned that the assessment results might give the school leverage to terminate their child’s enrolment or to recommend their enrolment in a specialist environment. The cases of P and Purvis provided two examples of this discussion. Jarvis (2013) determined that schools needed assessments so that they could identify the appropriate levels of adjustments required for students. The implication for families is that schools are in the best position to provide adjustments when they have the most complete picture of how the disability impacts on learning and, where information disclosed is used to refuse or terminate enrolment, this opens the door for a different discrimination claim.

A detriment worth noting was the distinction drawn between behaviour that manifests from a disability versus behaviour that is simply inappropriate but cannot be attributed to disability. This was particularly relevant in the case of USL where the judicial determination noted reasonable adjustments were only necessary for behaviour that manifested from a diagnosed disability, and that under discrimination law schools were not obligated to provide accommodations for students with disabilities where behaviour manifested because of family circumstances, developmental stages, peer pressure or other reasons. Assessing whether behaviour is a manifestation of a specific diagnosis is difficult, and could be a ‘grey’ area and a possible source of ongoing tensions.

Squelch (2010) noted that, in determining hardship, judges or commissioners considered the staffing, resourcing, administration or modification costs, and whether these outweighed any potential benefits for the student. When it came to offering grounds to be exempt from acts of discrimination, as noted by Dickson (2004), hardship was the most
common argument put forward by schools. This was a core focus in the determinations for L, P, Phu, K, and Finney. Only the decision of Finney actually agreed with Slee and Cook’s (1999) recommendation that schools needed to experience the hardship associated with changing their curriculum, pedagogy and organisation if they were going to eliminate discrimination.

Conclusions from these findings, with recommendations for future actions, are presented in Chapter Nine. The next chapter explores tensions that arise when schools try to balance maintaining the academic integrity of what is being taught when providing curriculum adjustments to eliminate barriers that inhibit a student demonstrating their learning against the prescribed course outcomes.
Chapter Eight – Acting with Integrity

This chapter presents the results of the analysis of these artefacts in relation to how judges and commissioners treated the issue of academic integrity during judicial decision-making. The aim of this analysis was to answer research sub-question four: How is academic integrity maintained while ensuring reasonable adjustments to curriculum? Section 3.4(3) of the DSE specifies:

In assessing whether an adjustment to the course or program in which the student is enrolled, or proposes to be enrolled, is reasonable, the provider is entitled to maintain the academic requirements of the course or program, and other requirements or components that are inherent in or essential to its nature.

Note In providing for students with disabilities, a provider may continue to ensure the integrity of its courses or programs and assessment requirements and processes, so that those on whom it confers an award can present themselves as having the appropriate knowledge, experience and expertise implicit in the holding of that particular award.

In this chapter, judicial decisions were examined to consider aspects of academic integrity.

Using a forensic linguistic analysis of the 92 cases involving 54 students, each judicial decision was manually coded using the approach outlined in Chapter Three. Two judicial decisions included discussion relating to the academic integrity of adjustments (see Table 20). In one case, the judicial decision included discussion related to maintaining the academic integrity of subjects where the results contribute to a student’s tertiary entrance score. In another case, the issue of academic integrity was considered in relation to a student being
offered a substitute learning experience in place of an excursion. Given the small number of cases in relation to this topic, a second coding sweep did not produce any sub-themes.

Table 20. Coding Sweep for Chapter Eight (Academic Integrity)

<table>
<thead>
<tr>
<th>Coding Sweep</th>
<th>Code</th>
<th>Cases</th>
<th>No. of complainants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Academic integrity</td>
<td>Beanland I</td>
<td>2</td>
</tr>
</tbody>
</table>

The remainder of this chapter will explore the findings from these two discrimination cases in relation to academic integrity.

**Judicial Decisions Relating to Academic Integrity**

**Beanland v. the State of Queensland and the Queensland Studies Authority.**

**Context.** William Beanland had successfully completed grades 8-10 at Corinda State High School, Queensland, despite the educational impact of his cerebral palsy\(^{24}\) and cortical vision impairment\(^{25}\). The combined academic impact of these two impairments was that William experienced severe difficulties in the areas of reading and writing. In planning his subjects for grades 11 and 12, it was William’s intent to study both English and German. On the basis of his disabilities, William wanted to be exempted from the reading and writing components of these subjects.

**Allegation of how the law was breached.** William alleged that the State of Queensland (through the Department of Education, Training and the Arts) and the Queensland Studies Authority (QSA) (the respondents) had discriminated against him on the ground of impairment. The first respondent, the State of Queensland, was responsible for the operation

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\(^{24}\) Cerebral palsy is the most common physical disability affecting 1 in 500 Australian babies (Cerebral Palsy Alliance, 2015).

\(^{25}\) Cortical Vision Impairment is a brain-based difficulty in which the brain cannot interpret and process what has been seen. There is a high comorbidity of Cortical Vision Impairment with Cerebral Palsy (Swift, Davidson & Weems, 2008).
of State schools in Queensland, as well as the actions of those employed in those settings. The second respondent, the QSA, had legislative authority for the development and accreditation of syllabuses in Queensland.

William argued the actions of the QSA and staff from the school were discriminatory as they refused to amend the syllabuses for Senior English and German to allow him to have modified forms of assessment that removed the requirements of both reading and writing. William alleged that, while planning a pathway for his curriculum in the Senior Years (Years 11 and 12), false representations were made by the school, and that prior to each assessment task the requirement that he apply to the QSA for special consideration to alleviate these literacy difficulties constituted discrimination. William’s mother alleged that William was treated “less favourably than other persons without his medical condition were or would have been treated in materially similar circumstances” (2008, pp. 26-27, para. 69).

Evidence presented in relation to academic integrity. Following an interim hearing where some aspects of the complainant’s allegation were struck out, a final hearing was held in March 2008 before Member Boddice SC, and a decision was delivered in April 2008. Counsel for the first respondent alleged that in May 2005, staff from Corinda State High School met with William and his mother to discuss his IEP. During this meeting, the head of the English department provided an excerpt from the Senior English syllabus documenting the requirement for students to read independently and submit work in their own writing. In particular, counsel alleged that the school explained to William that students were required to “show that they can understand written and visual text” (2007, p. 12, para. 33). The school personnel at the meeting stated that they had expressed concern about William’s ability to “meet the requirements for demonstrating knowledge and control of textual features as outlined in the English syllabus” (2007, p. 9, para. 27). These were explained as “criteria
relating to spelling, punctuation, and grammar” and “the ability to produce work independently” (2007, p. 9, para. 27). The staff reinforced that they had said it was not necessary for students to physically be able to write, but that they needed to “demonstrate the composing process” to show they can “make the decisions writers have to make” (2007, p. 12, para. 33). The meeting concluded with the school personnel agreeing to liaise further with the QSA regarding appropriate, permissible adjustments.

A second meeting was held in August 2005. Two outcomes from that meeting included an agreement for William to spread the senior phase of learning over three years, instead of the usual two, allowing a reduced subject load each semester, and agreement that William would study Ancient History rather than Senior German. In November, a phone conversation with the acting head of special education, it was noted that William’s mother had wanted this second decision reversed so that once again William could study Senior German. Concerned with this choice, the head of special education contacted the QSA and was advised by the Senior Education Officer (German), that “while a scribe might be used, the student must compose language – e.g., verb endings and spelling – compose the ideas and correct the work” (2007, p. 10, para. 29). The Senior Education Officer had also advised that “the student must be able to read text. It was not a listening test” (2007, p. 10, para. 29). During the phone conversation, the head of special education outlined the special provisions that were currently being made for William, which included “enlarging text, using coloured paper, and using screen magnification on the computer” all of which the officer had advised were within the school’s right to make (2007, p. 10, para. 29). The officer had also suggested reasonable adjustments to the conditions of the test including the provision of additional time, allowing responses to be given orally, and the use of scribes (although the student would still be required to produce the words and the spelling).
A further meeting was held at the school in December 2005 where the head of special education highlighted the complexities for William in studying Senior German, noting both the mandatory requirements of the course, and the anticipated adjustments that William would require. William’s mother argued that the school guidance officer had stated, “given the way the syllabus is set up I don’t think William will be successful in English and German. There are limits on what a scribe can do. In an exam, the scribe can only do what William tells the scribe to do” (2007, p. 13, para. 35). During this meeting, the head of special education had discussed adjustments that could be provided, including the use of the software programs Zoomtext or Jaws for reading, Co-Writer for writing, and Dragon Naturally Speaking for dictation, the provision of a laptop, a dictaphone, and a scribe. A particular point of contention during this meeting was how William would meet the spelling requirement.

Also raised at this meeting were the concerns about Senior English. The school personnel at this meeting maintained that they had recommended, as William was doing senior over three years, that he delay commencing English and German formally until the second year, thereby allowing more time for the school to determine the provision of adjustments, but that he attend the English classes in his first year without completing any assessment. The school claimed that William’s mother was satisfied with this outcome and, when advised, the Head of English agreed that this was a wise decision.

Several days later, William’s mother made an appointment with the QSA to request that the Senior German and English syllabuses be changed, and for the reading and writing requirements to be removed. The QSA personnel stated that at this meeting they had argued that there were “mandatory aspects of the syllabuses that required students to display reading, writing and speaking skills” and that it was their right to maintain the academic rigour of these programs (2007, p. 17, para. 46). QSA staff stated that it was the responsibility of the
school to provide reasonable adjustments, where appropriate, to accommodate students’ needs. At the meeting, William’s mother was given a copy of the QSA’s Policy Statement on Special Consideration\textsuperscript{26}. It was argued by all three QSA personnel present at the meeting that William’s mother was not interested in special consideration, rather in getting the mandatory requirements of the syllabuses removed.

During the first semester of 2006, the school started to trial some of the proposed adjustments in William’s other subjects, utilising the software packages Zoomtext and Dragon Naturally Speaking as well as a digital voice recorder. Details of other support provided by teachers and teacher aides in Legal Studies, Health Education, and Modern History were submitted. Around the start of that year, the principal of the school stated that she had become aware that “the school might become involved in a discrimination complaint” but, upon raising this with William’s family, she stated that she was assured by William’s parents that the nature of the complaint was the QSA’s unwillingness to amend the syllabuses (2007, p. 16, para. 44). An IEP meeting was scheduled at the end of March but was cancelled by William’s father who telephoned the school to advise that “they had been told not to attend as they cannot talk about the discrimination case” (2007, p. 16, para. 43).

At the end of May, William’s father spoke with the principal regarding the provision of financial support from a family friend that could assist the school in the employment of a teacher aide and, after consideration, the family were advised to donate the money to the school so that an aide could be employed. The school provided costings to William’s mother early June and discussions were held about a suitable person for employment. Following an IEP meeting in June 2006, William’s parents removed their son from the school and enrolled him, with the financial assistance of a benefactor, at a private school.

\textsuperscript{26} At that time, the QSA Policy Statement on Special Consideration outlined the permissible adjustments to assessment conditions that could be provided to students studying senior subjects.
**Decision.** Member Boddice SC found that William was required to:

comply with the requirements of the Senior English and Senior German syllabuses which were no different to the requirements of any other student,

and that this requirement was subject to the complainant being afforded special consideration so that his ability to meet these requirements could be assessed properly and fairly. (2008, pp. 26-27, para. 69)

As the school provided, and continued to investigate the provision of, reasonable adjustments, Boddice SC was not satisfied that William was treated less favourably. Boddice SC cautioned that it was:

fundamentally important both respondents’ representatives [were] fully aware of the precise measures to be undertaken by way of special consideration to assist those students with impairments to satisfy the requirements of the syllabus for each subject. No student should be left to commence senior studies without knowing precisely what special considerations will be afforded to the student in respect of the subjects chosen by that student, whatever year that subject may be undertaken by the student. (2008, pp. 28, para. 72)

The complaint was dismissed with Boddice SC concluding that:

Whilst discrimination can arise from an act which treats as equals those who are different ... the affording of special consideration to allow the complainant the ability to meet these requirements [for Senior English and German] meant he was not being treated equally, in recognition of the fact that his impairments meant he could not fairly be treated as others without his medical conditions would be treated in materially similar circumstances. (2008, p. 27, para. 69)
**Implications.** A finding from this case showed that for students to pass Senior English and German there was an inherent requirement that they must be able to write and read in both languages. What was proposed was that students who study a subject that has a set syllabus are required to meet the mandated requirements of that syllabus with the provision of reasonable adjustments. Since this case, the mandated reading requirement in the Queensland German syllabus changed to have a stronger focus on comprehension of written text. Dickson (2012a) proposed that this change meant that the skill of decoding was no longer an essential requirement; rather, that text might be read aloud to a student to show whether they can comprehend written text. It may be possible here that this change was a direct result of this decision, in which case, this could be considered a strategic litigation action. A further but critical implication for educators that was highlighted in this judicial decision is the importance of pre-determining special considerations (adjustments) prior to the student commencing a course of study.

**I v. Bernadette O’Rourke and Corinda State High School and the Minister for Education of Queensland.**

**Context.** ‘I’ had multiple disabilities including cerebral palsy and a severe intellectual disability. She used a motorised wheelchair for mobility. The complaint covered three matters: I’s attendance at her Year 12 school formal/ball, her attendance at the Year 12 graduation dinner, and her attendance on a school excursion. As the first two matters only covered tension arising from access needs, and not adjustments to curriculum, they were excluded from analysis. The third aspect of this judicial decision discussed issues of academic integrity. Specifically, due to access requirements, the student was unable to attend a school excursion that was considered an integral aspect of a course of study. This judicial decision considered the appropriateness of an alternative excursion provided to the student as a substitute activity.
During her final year at Corinda State High School, Queensland, I completed a subject called Tourism Studies. The syllabus for this non-OP course included a full-day excursion to Tangalooma Resort, located on an island off the coast of Brisbane, accessible by ferry (the Tangalooma Flyer). In previous years, a forklift was used to transfer students in wheelchairs on and off the ferry (with no record of any mishaps). Early 1997, I’s parents signed the excursion permission form and enquired, to no response, about the wheelchair access arrangements. Then, in October of that year, three days prior to the school excursion, the school’s special education teacher, having at an earlier date reassured the parents arrangements would be made for I to attend, informed I’s parents that their daughter would not be able to attend the excursion. I’s parents contacted the principal who they alleged advised them that the decision to not permit I to attend the excursion was due to occupational health and safety concerns related to her safe handling on and off the ferry. Instead, the school offered I, and two peers who did not have disabilities, an alternative tourism excursion one afternoon to a travel agent at a local shopping centre while her peers attended the full-day excursion to Tangalooma.

**Allegation of how the law was breached.** In July 1998, the complainant lodged claims of discrimination in relation to her attendance of her school formal/ball, her graduation dinner, as well as attendance on a school excursion, the subject for discussion in this chapter. Council for the complainant argued that I’s:

- exclusion from the excursion to Tangalooma because of her impairments
- constituted direct discrimination on the ground of impairment in that without that impairment she would have attended the excursion. She was therefore

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27 In Queensland, Year 12 students can either study courses that contribute to an Overall Position (OP) score, that ranks students for University entrance, or non-OP courses, for those not planning on University entry, but rather leading to employment, apprenticeships or certificate courses offered at institutions of Technical and Further Education.
treated less favourably than another person without her attribute ... she was
treated differently from students in other years in respect of the Tangalooma
Flyer because the school learnt of the fact that the hoist used by the Flyer
might be unlawful. (2001, pp. 30-31)

The respondent sought an occupational health and safety exemption on this matter,
arguing access on and off the ferry posed a risk to I’s safety, a risk of which they were
unaware in previous years.

_Evidence presented in relation to academic integrity_. I’s mother presented as
evidence an article from the 1997 school magazine where a student had stated that the
Tangalooma excursion was a highlight of the Tourism Studies course where “a day away
from school at Tangalooma was the ultimate reward” (2001, p. 59).

The school presented evidence that they had explored whether arrangements could be
made for I to safely access the ferry. The principal stated that:

> because of the concerns raised by Mr and Mrs W (I’s parents) about access
issues at the Year 12 ball and dinner, she asked [an experienced teacher in
charge of the special education unit at the school] to investigate whether [I]
could safely access the Tangalooma Flyer (ferry). (2001, p. 8)

The ferry company advised the teacher that they would again use a forklift to load and unload
any student using a wheelchair, but would take no responsibility in the event of a mishap.
The school then investigated alternative transport arrangements; some were dismissed, as they
would require I to travel for a longer period of time, thus missing part of the excursion; the
principal dismissed others because they were more expensive. No consultation with I’s
family occurred during this period of investigation. The school concluded the risk of taking I was too great, and instead arranged the alternative afternoon excursion for I and two peers.

During the hearing, in addition to evidence from the special education teacher, the Head of the Department of Effective Learning and Teaching at Corinda State High testified that I’s non-attendance at the Tangalooma excursion in no way “disadvantaged her in regard to the learning outcomes of the Tourism Studies course” (2001, p. 28) as the subject did not count towards tertiary entry. This was endorsed by the Tourism Studies teacher who further argued that “from a learning perspective the trip to (the shopping centre) was just as advantageous as the trip to Tangalooma Island” (2001, p. 28) as the purpose of the excursion was simply to explore careers in tourism and, by visiting a local travel agent, I had not been subject to diminished educational outcomes.

**Decision.** In January 2001 Copelin P, found the respondent to have discriminated against I in relation to a school excursion as part of her Tourism studies. Copelin P concluded that there was insufficient evidence that I’s health and safety would have been compromised, especially given that “there was no evidence that any person had ever been injured in similar circumstances. On the contrary the evidence was that disabled students (sic) had been taken on this excursion successfully in previous years” (2001, pp. 49-50). She expanded by adding that:

- no expert advice was obtained to ascertain if the complainant could have safely accessed the vessel, and no discussions were had with her parents to ascertain whether they agreed to the access proposed or to see if an alternative means of transport, or an alternative venue could have been found. (2001, p. 52)

Copelin P concluded that I had suffered no educational disadvantage by not attending the Tangalooma excursion, but that she “did sustain a loss of enjoyment of that particular
school excursion with her peers because of unlawful discrimination” (2001, p. 59) from missing “an event which cannot be recaptured” (2001, p. 60) and awarded general damages of $3000.

**Implications.** A measure of compliance, noted in the DSE, states that activities conducted outside the classroom, such as school excursions, should be designed to include all students. The DSE further elaborates that a reasonable substitute can be offered to students where reasonable adjustments would be insufficient to allow them to participate.

Tourism Studies is a credentialed course offered by schools, with students able to receive recognition of this learning towards a certificate or diploma course offered at a College of Technical and Further Education. In this school, the full-day excursion to Tangalooma to learn more about occupation roles within the tourism industry was considered a core activity, documented in the syllabus for the course. This judicial decision found that a half-day excursion to a local travel agent was considered a reasonable substitute experience. Further implications from this judicial decision include the importance of seeking expert advice when making adjustments as well as the obligation to consult with families about proposed adjustments, matters that have been noted in earlier case implications.

The compensation awarded to the student was simply from the loss of enjoyment she would have experienced had she participated in the planned excursion with all of her peers. As this judicial decision was heard before the introduction of the DSE it is possible that, were it argued today, the complainant may have emphasised in greater detail the academic integrity of the substitute activity and whether it offered the appropriate knowledge, experience and expertise that students would have gained from the Tangalooma experience.
Summary of Findings from Judicial Decisions Relating to Academic Integrity

This section of analysis explored judicial decisions where schools argued academic integrity of what was taught would have been diminished had the adjustments sought by the family been provided to the student. A summary of these two decisions is presented in Table 21:

Table 21. Judicial Decisions Relating to Academic Integrity

<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beanland</td>
<td>Parent alleged the school refused to exempt her son from aspects of the course of study that he could not achieve as a result of his disability. School argued they could provide reasonable adjustments, but that to be credentialed as having completed the specific subjects, they needed to maintain the academic integrity of the course.</td>
<td>Court found that it was reasonable for the school to expect the student to undertake all aspects of the course of study, and to provide adjustments to alleviate any barriers. Outcome: Lost.</td>
</tr>
<tr>
<td>I</td>
<td>Parent alleged that a substitute excursion provided to her daughter was inappropriate, and that the school should have explored a wider range of options to eliminate the access requirements that prevented her daughter from attending the excursion undertaken by most of her peers. The school sought a health and safety exemption, arguing I’s attendance on the excursion posed health and safety risks.</td>
<td>Court concluded there was insufficient evidence of any health and safety risks, that the school had failed to seek expert advice, or consult with the parent, and had failed to investigate all possible alternatives. While the alternative excursion offered to the student was viewed by the court as a reasonable substitute, the court found the student sustained a loss of enjoyment from the substitute. Outcome: Won, with damages awarded to the complainant.</td>
</tr>
</tbody>
</table>

Discussion of Implications

A number of key points emerged from the findings in this chapter in relation to answering the question of how academic integrity was maintained while ensuring reasonable adjustments to curriculum (sub-question 4). It was unclear why academic integrity has had limited attention in litigation. A possible reason may be that the DSE contain a specific reference to the integrity of courses from which an award is conferred. In Australian school
education, awards are only conferred in the final year of schooling, so potential litigants concerned about diminished integrity of adjustments provided to younger students may not feel they can successfully defend a claim of academic integrity. Another possible explanation is that schools are doing an outstanding job in ensuring the adjustments provided to students with disabilities do not diminish the academic integrity of the course being studied. There is no research, however, from which conclusive statements can be made about the limited litigation in this area.

As noted in the literature review of this thesis, concerns about the academic integrity of adjustments have mainly surfaced in higher education (Byrd, 2010; Helms, 2010; Jackson, 2010; Riddell, et al., 2005; Roberts, 2013; Rowlett, 2011). Kamvounias and Varnham (2006) found that judicial decision-making in higher education claims was typically sought in three areas: the grade awarded for individual items of work, whether a student should pass or fail a subject, and whether a student making unsatisfactory progress should discontinue in a degree. Helms (2010) investigated judicial decisions surrounding reasonable adjustments in the tertiary sector and concluded that findings were generally supportive of settings where sincere efforts had been made to provide reasonable adjustments that did not compromise the integrity of the course.

As noted in Chapter Two, school-aged students with disabilities must also meet the same requirements as their peers to be credentialed for the completion of a course of study. Adjustments should level the playing field so that students can demonstrate their learning on the same basis as their peers, and enable teachers to discriminate student performance against academic standards (Gosden & Hampton, 2000; Steer, et al., 2007). In the case of Beanland, the removal of the requirement to read and write in Senior English and German was viewed as offering the student an advantage over his peers and, at that time, the QSA’s preference was
for the student to be given special consideration rather than exemption. As noted in Chapter Two, the American Educational Research Association, et al. (1999) stated that assessment tasks should “minimise the impact of any test-taker attributes that are not relevant to the construct that is the primary focus of the assessment” (p. 101). It appears that, since the Beanland case, the QSA may have shifted slightly from assessing reading as a decoding task to one that “involves comprehending meaning”, at least in Senior German (Queensland Studies Authority, 2008, p. 8).

The Beanland case offered some further answers to the question explored in this chapter. What could be inferred from Beanland is that a written syllabus sets the standard for accreditation of learning, and students are expected to achieve what was written in that syllabus to have their learning credentialed. However, this is at odds with the finding in the case of I. The syllabus in that case expected students to attend a full-day excursion, yet the judicial decision determined a half-day substitute activity, on the testimony of the class teacher and head of department, was a reasonable adjustment. The case of I pre-dated the introduction of the DSE. It would be interesting to see how the introduction of the DSE, with their emphasis on academic integrity, might have affected that decision.

It is perhaps too early in Australia’s litigation history to know the exact answer to the question of reasonableness balanced against academic integrity. As noted in Chapter Two, as the Australian Curriculum has mandated national standards for every year of schooling, there is a possibility that this may be an increasing area of litigation as families may argue that the prescribed outcomes students are expected to achieve at each level of schooling form the credential for that course.
The final chapter of this thesis will draw together some conclusions from the data analysis presented in Chapters Four through Eight, and present recommendations for future research.
**Chapter Nine – Regulating Reasonableness**

The purpose of this study was to determine why there are tensions in the provision of adjustments to curriculum for Australian students with disabilities and then to determine what is reasonable. The study both sought to explain the concept of reasonableness as it related to curriculum adjustments, and to shed light on how various groups (i.e., educators, parents, students, expert witnesses, lawyers, judges and commissioners) interpreted reasonable.

Attempts to analyse the language used in court and tribunal decisions, and to translate this material into language that educators and parents can understand, is a difficult process. Each discrimination claim brings us closer to understanding what constitutes reasonableness. The findings from this analysis present a clearer interpretation of the phrase ‘reasonable adjustments’ as it applies to curriculum. These findings provide educators and parents with a more nuanced understanding about the scope and limits of reasonableness. This chapter summarises the key findings and draws conclusions in relation to the research question and sub-questions. Recommendations to inform professional practice, policy, and future research follow. Some researcher reflections are also offered.

**Summary of Findings and Conclusions**

A complete summary of the 134 judicial decisions analysed in this study is located in Appendix E. The discussion that follows draws together the findings presented in Chapters Four to Eight to consider the overarching research question for this thesis: In Australian discrimination cases involving students with disabilities, why were adjustments to curriculum a source of tension, and then what was considered reasonable?

Chapter Four explored findings from the demographic information, and noted some patterns in Australian disability litigation. Twenty percent of the discrimination cases
examined in this study discussed tensions arising in relation to the student’s disability.

Findings from the analysis showed:

- There was an upward trend in litigation;
- Litigation mainly occurred in New South Wales, Victoria and Queensland;
- There was a disproportionate amount of litigation involving students in Government schools; and
- There was limited litigation involving students with learning disabilities or vision impairments.

These findings offered new knowledge into an area where there has been limited research, that is, the examination of patterns in Australian disability discrimination litigation. This contribution is important as the approach used to examine the cases provides a template through which future litigation can be examined. This, in turn, will allow for more definitive answers in relation to patterns such as whether there is an upward trend in litigation, whether this impacts any particular jurisdiction or setting, or set of learners with disabilities.

Chapter Five sought to answer the first research sub-question: What counted as a disability when determining adjustments to curriculum? Findings from the analysis concluded:

- There was a limit to the definition of disability, as diagnoses should be given by qualified medical practitioners using validated diagnostic methods;
- As suggested in previous research, the diagnosis of cognitive impairment in students who are non-verbal was problematic;
- Strong documented evidence of adjustments provided to students, how these are determined as well as how these alleviate the impact of disability, and why these might have been amended over time, assisted courts in understanding the
adjustments given. In addition, both parents and educators benefitted from good record-keeping practices;

- While schools were not obligated to provide adjustments to students who had not disclosed their disability, where a school suspected the student’s educational needs were attributable to a disability, adjustments should have been made;
- The broadness of the Federal definition of disability, especially when compared to guidelines used by systems of eligibility for additional resourcing, caused issues for students who sat on the cusp of funding cut-offs, for those whose needs fluctuated, those who were frequently absent from school, those with behaviours of concern, and for those ineligible for resourcing despite having a disability; and
- That using litigation to attempt to change policies in relation to funding was inappropriate, as each discrimination claim turned on its own facts, and should not be used as a strategic attempt to amend policy.

The major finding in relation to what counts as a disability was the discrepancy between the Federal definition of disability, and that used by educational jurisdictions to determine who is entitled to additional resourcing, special consideration during assessments, and supports such as IEP meetings and written plans. This discrepancy appeared to contribute to the tensions around the provision of curriculum adjustments. Introduced in 2015, the *Nationally Consistent Collection of Data on School Students with Disability* (Commonwealth of Australia [Australian Government Department of Education and Training], 2014) proposed a new way forward for schools to make professional judgements regarding the adjustments required by students with disabilities. Where students meet the definition of disability under the DDA, and there is a functional impact on the student’s learning, there is a requirement for schools to provide evidence of the curriculum adjustments made for that student. These adjustments range from support given as part of a differentiated teaching program through to
extensive adjustments that include individualised instruction within the classroom or in a highly specialised program or setting. In the next section recommendations are offered on how this new approach might successfully be adopted to limit some of the above-noted tensions.

Chapter Six sought to answer the second research sub-question: Whose voice was heard when determining adjustments to curriculum? Thirty percent of the discrimination cases examined mentioned tensions in relation to student or associate voice. Findings from the analysis illustrated:

- While there was an obligation to consult students, and their associates, in relation to their adjustments, students were rarely consulted. Further, when authorities failed to consult the student or their associate, and there was no adverse impact on the student, there appeared to be limited consequences;

- While the CROC (2000, Article 37d) encouraged the voice of those with disabilities to be heard during legal proceedings, the analysis of judicial decision showed that only Finney, Beasley, YB and Walker took part in proceedings, with Purvis offered the opportunity which he declined;

- Litigants who self-represented struggled to write a Statement of Claim that clearly set out their concerns, and were oft advised to discontinue proceedings and seek legal representation; and

- While schools were obliged to consult, they were not expected to act on that consultation where they could demonstrate that it was in the best interest of the student to act in a different manner.

A major finding in relation to whose voice was heard was to determine how best to support students with disabilities to have a voice during matters about them at school in
determining appropriate adjustments. In addition, for the voice of their parents as advocates to be better heard, more support was needed by families to make a meaningful contribution to the educational plans for their child. With such a strong emphasis in the literature on the importance of home-school communication (Dettmer, 2012; Hedeen, et al., 2011; Latunde & Louque, 2012; Manor-Binyamini, 2014; Salazar, 2012; Simpson & Bakken, 2011) and opportunities for meaningful participation of families in decision-making (Porter, et al., 2013), more needs to occur to ensure this research filters to practitioners.

There were also major findings in relation to student voice in the litigation process, with analysis showing students are rarely consulted during litigation. Analysis further revealed there were issues for those parents who, for financial or other reasons, needed to self-represent during litigation, with poor record-keeping, lack of meaningful participation in their child’s education, and unfamiliarity with the legal system all impacting on parents’ abilities to represent their child. In some cases, families clearly articulated their desires for their child’s education, but these were ignored by the school. This finding suggests that the government could give greater consideration to the consequences for those who, during a determination of reasonableness, are shown to have not considered student or associate voice.

Chapter Seven sought to answer the third research sub-question: Whose interests were considered and how were these balanced when determining whether adjustments to curriculum were reasonable? Eighty percent of the discrimination cases discussed issues of costs versus benefits, balancing interests or unjustifiable hardship. Findings from the analysis illustrated:

- Limited attention was given to the benefits students with disabilities experienced from the adjustments that were made for them. Further, while research expounded the benefits of adjustments on other students, these benefits were
rarely highlighted in litigation proceedings and, on the rare occasions when noted by expert witnesses, were often viewed by courts as theoretical or philosophical rather than practical;

- The issue of part-time attendance of students with disabilities was viewed by the court as a strategy that benefitted students as it alleviated the impact of anxiety, but findings from research of families of students with disabilities often viewed part-time attendance as a punitive approach used by schools to limit any burden on the school (Children with Disability Australia, 2015);

- The courts also considered the costs experienced by schools that made adjustments for students who then failed to attend school;

- When large numbers of families collectively used litigation to seek a policy or legislative change, it appeared these were more successful than when an individual parent attempted to use strategic litigation to change policy;

- Behaviour that impacted negatively on the learning of peers, or on staff stress levels, or on budgets of schools, or posed risk to health and safety, all appeared to be viewed as unjustifiable hardships that schools were not expect to accommodate. In addition, adjustments were only required for behaviour that was a manifestation of a disability. Schools were not obligated to provide adjustments to students where behaviour could be attributed to other factors such as family circumstances, peer pressure, or developmental stages; and

- Unjustifiable hardship determinations were made where the costs for staffing, resourcing, administration, modifications or the impact on staff and/or peers outweighed any benefits for the student.

The major conclusion in relation to whose interests were considered and how these were balanced suggests there needs to be further scrutiny in the way in which benefits are
measured. Evidence presented in the decisions clearly argued impact on the student, peers, and teachers, as well as financial costs. Despite an abundance of research, arguments about the benefits of providing adjustments were not clearly articulated in the judicial decisions, and were a key point of tension. This opens up a new research opportunity; one that explores how economic rationalism can be balanced against theoretical and philosophical arguments about the benefits of adjustments for students with disabilities, for their peers, and for the broader school community.

Chapter Eight sought to answer the fourth research sub-question: how was academic integrity maintained while ensuring reasonable adjustments to curriculum? Only 4% of the cases mentioned tensions in this area. Findings from the analysis illustrated:

- The issue of academic integrity, a core feature of higher education litigation, received limited attention in school discrimination cases. The likely reason for this was the confusion as to what constituted a credential, as academic integrity can only be used as an argument if the adjustment diminishes the integrity of a credential;
- With only one judicial decision to guide the implications, the written syllabus, or prescribed outcomes appeared to set the standard for accreditation of learning, signalling future attempts to use litigation to try to have the syllabus requirements amended may be thwart; and
- With only one judicial decision on the matter, it remains unclear how the reasonableness of substitute activity offered to a student unable to access the planned learning activity would be determined in future decisions.

That so few cases dealt with academic integrity raises the question of why this is the situation. One possible reason is there is already such a heavy emphasis on this in schools.
that it is not a source of tension. Another is that the nexus between academic integrity and what is meant by a credential needs further clarification. Some recommendations in relation to this are offered in the next section.

McLachlin (2007, p. 327) concluded that “the most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve”. In reviewing the outcome of the litigation proceedings examined in this thesis, there is a final observation that could be made. Of the 54 families whose discrimination cases were examined in this study, 20 (37%) were successful. On the surface, it may appear that, for these families, justice was served. However, justice could be better served by legislation, particularly Standards, that:

- mandated, and upheld, the right to meaningful participation for students with disabilities, and their families;
- enabled reasonableness to be interpreted consistently; and
- offered families a clearer, simplified dispute resolution process.

**Limitations**

As noted in Chapter Three, there were some limitations in the design of this research. This research only analysed judicial decisions published on the AustLII website on or before 30 September 2014. Only the publicly available judicial decision for each case was examined. The limited funds made available to part-time postgraduate students precluded access to the full transcripts for each of the 134 hearings. More recent decisions provide an opportunity for researchers to continue to investigate issues raised in this thesis. The research explored the issue of reasonableness in relation to adjustments to curriculum and therefore excluded other types of adjustments that allow for enrolment, access or participation.

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28 These figures are based on the final outcome after any appeals process.
As stated numerous times throughout this thesis, there is a limitation in trying to seek guidance on the meaning of reasonableness by reviewing decided discrimination cases. Every decided claim turns on a unique set of facts that are individualised to that student and how their disability impacts on their learning (Dickson, 2012a). For this reason, decided cases usually do not offer precedents that guide future claims of discrimination. By using the explanation of reasonable outlined in the DSE as the conceptual framework, and approaching this study using a forensic linguistic methodology, this thesis offers a letter of the law analysis of reasonableness. Each sub-question explored one aspect of the DSE’s explanation of reasonableness, with deductive codes used to identify statements within the judicial decisions that related to that aspect. This methodological design was adopted to increase the reliability and trustworthiness of the results, but limited the opportunity to focus on other possible tangential topics such as the quality of legal advocacy provided, especially to parents.

**Recommendations**

From these conclusions and noted limitations, the following recommendations are proposed for: (a) families, (b) professional practice, (c) policy, and (d) future research.

**Guidelines for families.**

A number of judicial decisions noted challenges families face with both self-representation during litigation as well as record-keeping and producing acceptable evidence for litigation purposes. Additionally, tensions were noted in relation to the meaningful participation of parents in their child’s educational program, and issues around home-school communication. Families would benefit from practical advice that would strengthen their engagement with schools as well as their approach to record-keeping at, and from, the point when parents, children and staff realise that a child has a functional impairment that impacts on their learning. Finally, tensions were noted in relation to the child’s diagnosis of a
disability and its functional limitations. Families would benefit from clearer information about the appropriate choice of professionals in terms of diagnosis.

**Guidelines for professional practice.**

Komesaroff (2004b) suggested one of the merits of litigation is that it might be the only way to convince educational authorities of the need for change. It is clear from the analysis that some of the schools subject to discrimination claims had good professional practice. Knowledge of their actions can provide confidence to other schools to know their actions are defensible. Teachers should justifiably feel supported that when they make decisions based on research, data, and feedback, the courts will be supportive of these decisions, even when there is competing advice from parents and medical practitioners. Analysis of the actions of other schools benefits teachers as it offers insights into how teachers can improve their professional practice and minimise the potential for future litigation. The findings from this research suggest the following guidelines for professional practice:

- Adjustments to curriculum should be provided for any student that meets the Federal definition of disability, not simply those that are eligible for additional resourcing under State or Territory guidelines.
- Teachers should keep detailed records of the curriculum adjustments they make, and decisions about adjustments should not be delegated to teacher aides.
- Rather than punitive behavioural responses, teachers should consider how to teach appropriate replacement behaviours including functionally equivalent communication and social skills.
Teachers should maintain data to show the effectiveness of their intervention choices and keep detailed documentation of the reasons why any changes to a child’s program, supports, or communication approach are made.

Longitudinal data of students’ educational programs should be kept annually, and shared each year with the next teacher so that the learning of students can be tracked.

Schools should review their home-school communication practices, opportunities for students and parent voice in decision-making, and consistency of communication approaches across grade levels.

**Changes to policy.**

The previous recommendations related to change to professional practice. Any uncertainty experienced by principals and teachers in the interpretation and applicability of policy can constitute a legal risk. None of the claims analysed for this research had suggested principals or teachers had acted outside of the policy set by their education authority. It may be possible that claims of that nature might be conciliated without an admission of liability, although it is difficult to find evidence to support this assumption given conciliated outcomes are typically confidential in nature.

Helms (2010) proposed that a comparative analysis of judicial decisions would enhance educational policy for students with disabilities, and this analysis certainly highlighted a number of areas where policy could be strengthened. Educational authorities would benefit from considering the following recommended changes to policies that govern the provision of adjustments to students with disabilities:

- All students with a disability are entitled to have a voice in the adjustments to their educational program. This voice is often only heard during meetings where an
Individual Education Plan is developed. Most State and Territory educational policies only require IEP meetings for students who meet the criteria for additional resourcing. This means, in many states, teachers and principals may be unaware that students who have learning disabilities, mild communication impairments, mental health conditions, foetal alcohol spectrum disorder, or other types of disabilities that do not meet additional resourcing criteria, need to be given an opportunity to have a voice in any proposed curriculum adjustments.

- Introduced in 2015, the *Nationally Consistent Collection of Data on School Students with Disability* (Commonwealth of Australia [Australian Government Department of Education and Training], 2014) proposed a new way forward for schools to make professional judgements regarding the adjustments required by students with disabilities. Where students meet the definition of disability under the DDA, and there is a functional impact on the student’s learning, there is a requirement for schools to provide evidence of the curriculum adjustments made for that student. These adjustments range from support given as part of a differentiated teaching program through to extensive adjustments that include individualised instruction within the classroom or in a highly specialised program or setting. It is recommended that the policies of each Australian educational authority adopt this approach of determining and then recording adjustments and that students, and their advocates, are central in decision-making. Additional resourcing should then be allocated on the basis of the adjustments necessary to eliminate barriers to education, rather than on medical definitions or categories of disability.
Areas for future research.

As noted in Chapter Three, a number of delimitations served as boundaries to narrow the scope of this study. Throughout this thesis, four areas in need of future research were identified. These included:

- Tensions related to part-time enrolment or attendance by students with disabilities;
- A more detailed examination of the low rates of litigation involving students with vision impairments or those with learning disabilities;
- Annual research comparing litigation claims heard in each State or Territory expressed as a percentage of the total students with disabilities enrolment figures (made easier with the 2015 introduction of a nationally consistent data collection approach). This would show whether there is an upward trend in litigation and whether any particular educational jurisdiction has a greater share of litigation; and
- An exploration into the issue of maintaining the academic integrity of the outcome being taught and how it is balanced against the adjustments provided for students at each stage of schooling.

Reflecting on the findings and conclusions from this research, the following list outlines worthwhile areas where the scope of this research could be extended:

- Student, or associate, voice is a cornerstone of the DSE, yet it appears students rarely have an opportunity to contribute to decisions regarding adjustment to curriculum.
- For a more detailed understanding of stakeholder perspectives, there may be merit in accessing the full transcript for the cases analysed during this research rather
than only the judicial decision. The judicial decision offered a summary of the evidence offered throughout the hearing, whereas the full transcript would offer a verbatim account of the hearing.

- The scope of this research was limited to judicial decisions published before September 2014. The adopted methodological approach provides a template for scholars to examine current or future litigation claims.

- The scope of this research was further limited to explore the issue of discrimination for school-aged students with disabilities. There is future scope to apply the same methodology to examine adjustments provided to students with disabilities in higher education.

- This research was also limited to explore discrimination in the provision of adjustments to curriculum for Australian students with disabilities. An area for future research could include an examination of how these data compare internationally to discrimination case law.

- There appears to be an emerging issue of educational negligence in relation to families citing dissatisfaction with what their student has learnt at school. Internationally there have been claims of educational negligence ruled by courts, and an examination of those cases would offer valuable insights for Australian educational authorities that could reduce litigation risk in this area.

- An extension of this research includes the development of an adjustment framework that guides the practice of classroom teachers. Similar to an occupation health and safety hierarchy of hazard control, adjustments could be
ordered from a least to most ranking, with exemption from a curriculum activity the final stage\textsuperscript{29}.

\textbf{Researcher Reflections}

As outlined in Chapter One, my professional background has afforded me opportunities to mediate sessions between teachers and parents and see first-hand some of the tensions relating to curriculum adjustments. At times, I felt that some principals and teachers had little understanding of their legislative obligations in relation to curriculum adjustments. I had read allegations of discrimination written by families frustrated with the provisions offered to their child. I had also read responses, written by schools, addressing these allegations. Martin Luther King Jr. is famously quoted as saying:

\begin{quote}
Now the other myth that gets around is the idea that legislation cannot really solve the problem and that it has no great role to play in this period of social change because you’ve got to change the heart and you can’t change the heart through legislation. You can’t legislate morals. The job must be done through education and religion. Well, there’s half-truth involved here. Certainly, if the problem is to be solved then in the final sense, hearts must be changed. Religion and education must play a great role in changing the heart. But we must go on to say that while it may be true that morality cannot be legislated, behaviour can be regulated. It may be true that the law cannot change the heart but it can restrain the heartless. (Taylor, 2008)
\end{quote}

As I entered this study, I wondered if the DDA and the accompanying DSE had brought about social change. I also wondered about the effectiveness of this legislative framework for

\textsuperscript{29} Scoping of this research has commenced, with the work being co-authored with colleagues at the University of Melbourne Graduate School of Education.
regulating behaviour, and in particularly regulating reasonableness as it relates to curriculum adjustments for students with disabilities.

The findings from this research have challenged some of my previously held assumptions. I finish this journey believing that the complaint process is very difficult for parents. At the Federal level, I think more could be done to help teachers, and families, better understand the concept of reasonableness, and there needs to be better jurisdictional guidance on the obligation to consult.

Final note

As the first Australian study that has extensively examined disability discrimination issues with a specific focus on adjustments to curriculum, this research makes an important contribution to the field by clarifying how the concept of reasonableness is understood by schools and parents, and how it is treated in judicial decision-making. The use of the DSE explanation of reasonableness as a conceptual framework allows for a letter of the law examination to occur so that the results are trustworthy, reliable and replicable.

When it comes to adjustments to curriculum, what is reasonable is that students with disability have a voice in decision-making whenever possible, and that their associate is consulted where a student is unable to make a contribution. What is also reasonable is that all students who have a disability under the Federal definition are entitled to receive adjustments, not just those for whom additional resourcing is provided, or those for whom special examination provisions apply. Further, it is reasonable that the interests of all those affected during the adjustment process are considered, but greater attention needs to be given to the benefits of providing adjustments. Finally, it is reasonable for schools to maintain the academic integrity of what is taught at every stage of schooling.
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## Appendix A: Complete List of Complaints

<table>
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<tr>
<th>Complainant</th>
<th>Names of cases</th>
<th>Educational Jurisdiction</th>
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<tbody>
<tr>
<td>1. A</td>
<td>A by his next friend B v C (FCA, 14 November 2011)</td>
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<tr>
<td>3. AB</td>
<td>AB v Ballarat Christian College (VCAT, 21 October 2013)</td>
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<td>4. Abela</td>
<td>Abela v State of Victoria, DEECD (FCA, 14 November 2011)</td>
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<td>5. ALI obo</td>
<td>ALI on behalf of ALT and ALK v NSW Department of Education and Communities (NSW ADT, 28 August 2012)</td>
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<tr>
<td>6. ALT</td>
<td></td>
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<tr>
<td>7. ALK</td>
<td></td>
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</tr>
<tr>
<td>8. Bacon</td>
<td>Bacon &amp; Ors v. State of Victoria (Victorian Supreme Court, 7 November 1997)</td>
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<tr>
<td>14. Beasley</td>
<td>Beasley v Department of Education &amp; Training (VCAT, 12 October 2006)</td>
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<tr>
<td>16. Beanland</td>
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<tr>
<td>17. Beasley</td>
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30 This was a special complaint brought forward by 8 complainants, all students at the same school.
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<tr>
<th>Complainant</th>
<th>Names of cases</th>
<th>Educational Jurisdiction</th>
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<tbody>
<tr>
<td>Bolton 31</td>
<td>Bolton v State of Victoria (VADT, 31 December 1997)</td>
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<tr>
<td>27.</td>
<td>Bolton v State of Victoria (VADT, 31 December 1997)</td>
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<tr>
<td>29. CAD</td>
<td>CAD on behalf of SMD v JK and Scott (QADT, 11 November 1993)</td>
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<td>31. Clarke</td>
<td>Clarke v Catholic Education Office &amp; Anor (FCA, 8 October 2003)</td>
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<td></td>
<td>Catholic Education Office v Clarke (FCAFC, 6 August 2004)</td>
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<td>32. J obo AJ/</td>
<td>Mrs J, on behalf of herself &amp; AJ v A School (HREOC, 23 March 1998)</td>
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<td>Cowell</td>
<td>A School v Human Rights &amp; Equal Opportunity Commission (FCA, 7 April 1998)</td>
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<td>A School v Human Rights &amp; Equal Opportunity Commission &amp; Anor (FCA, 11 November 1998)</td>
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<td>Cowell v A School (HREOC, 14 November 2000)</td>
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<td>Pembroke School Incorporate v Human Rights &amp; Equal Opportunity Commission (FCA, 19 August, 2002)</td>
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<td>33. Damiano</td>
<td>Damiano &amp; Anor v Wilkinson &amp; Anor (FMCA, 26 November 2004)</td>
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<td>34. Demmery</td>
<td>Demmery v NSW Department of School Education (NSWEOT, 26 November 1997)</td>
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<tr>
<td>35. Denton</td>
<td>Denton v State of Victoria (FCA, 2 August 2011)</td>
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<td>36. Finn</td>
<td>Finn v Minister for Education (ADTQ, 19 July 1995)</td>
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<td>Finney v the Hills Grammar School (HREOCA, 13 June 2000)</td>
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<tr>
<td>38. Gregor, A</td>
<td>Gregor v Department of Education (VADT, 19 June 1997)</td>
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<td>40. Hashish</td>
<td>Hashish v Minister for Education (ADTQ, 9 January 1996)</td>
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<td>Hashish v Minister for Education of Queensland (QSC, 20 March 1996)</td>
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<td>Hashish v the Minister for Education of Queensland (QSC, 25 February 1997)</td>
<td>Queensland</td>
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<td>Hashish v the Minister for Education of Queensland (HCA, 5 December 1997)</td>
<td>Queensland</td>
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31 This was a special complaint brought forward by 10 complainants, all students at the same school as that named in the case of *Bacon & Ors.*
<table>
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<th>Complainant</th>
<th>Names of cases</th>
<th>Educational Jurisdiction</th>
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<tr>
<td>41. Hurst</td>
<td>Hurst &amp; Devlin v Queensland (FCA, 31 March 2004)</td>
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<td>&amp; Devlin</td>
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<td>42.</td>
<td>Hurst &amp; Devlin v Education Queensland (FCA, 15 April 2005)</td>
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<td>Hurst &amp; Devlin v Education Queensland (No 2) (FCA, 16 June 2005)</td>
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<td>Hurst v State of Queensland (FCAFC, 28 July 2006)</td>
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<td>Hurst v State of Queensland (FCAFC, 27 October 2006)</td>
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<td>43.</td>
<td>I v O'Rourke and Corinda State High School and Minister for Education of Queensland (ADTQ, 31 January 2001)</td>
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<td>I v O'Rourke and Corinda State High School and Minister for Education of Queensland (ADTQ, 30 April 2001)</td>
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<td>44.</td>
<td>JC v State of Queensland (ADTQ, 3 February 2005)</td>
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<td>JC on behalf of BC v State of Queensland (ADTQ, 11 July 2006)</td>
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<td>45. K</td>
<td>K v N School (ADTQ, 1 December 1995)</td>
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<td>K v N School (ADTQ, 23 August 1996)</td>
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<td>K v N School (ADTQ, 7 January 1997)</td>
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<td>K v N School (ADTQ, 5 August 1997)</td>
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<td>46.</td>
<td>Kiefel v State of Victoria (FCA, 27 September 2011)</td>
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<td>Kiefel v State of Victoria (FCA, 13 June 2012)</td>
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<td>Krenske-Carter v Minister for Education (EOTWA, 11 November 2002)</td>
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<td>48. L</td>
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<td>L v Minister for Education (ADTQ, 18 January 1996)</td>
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<td>Leonard v Department of Education (VADT, 29 January 1998)</td>
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<td>50.</td>
<td>Loch v Director General, Department of Education and Training (NSWADT, 3 December 2007)</td>
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<td>51.</td>
<td>Mason &amp; Anor v Methodist Ladies College (FMCA, 17 June 2009)</td>
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<td>Minns v State of New South Wales (FMCA, 2 September 2002)</td>
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<td>53.</td>
<td>Modra v State of Victoria (FCA, 19 March 2012)</td>
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<td>Modra v State of Victoria (FCA, 11 October 2013)</td>
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<td>54.</td>
<td>Moore v State of New South Wales (FCA, 9 May 2014)</td>
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<td>55.</td>
<td>MT v Director General, NSW Department of Education and Training (NSW ADT, 3 September 2004)</td>
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<td>Director General, Department of Education and Training v MT (GD) (NSWADTAP, 22 December 2005)</td>
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<td>Director General, Department of Education and Training v MT (GD) (NSWADTAP, 23 December 2005)</td>
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<td>Director General, Department of Education and Training v MT (NSWCA, 29 September 2006)</td>
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<td>Director General, Department of Education and Training v MT (No 2) (NSWCA, 21 November 2006)</td>
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<td>Complainant</td>
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<td>56. Murphy, D</td>
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<td>57. Murphy, M</td>
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N v State of Queensland (ADTQ, 3 February 2005)  
N v State of Queensland (Costs) (ADTQ, 24 October 2005)  
N v State of Queensland & Anor (QSC, 3 April 2006)  
N v State of Queensland (ADTQ, 30 March 2007)  
N v State of Queensland (QSC, 25 May 2007) | Queensland |
| 59. Oakes | Oakes v State of Victoria (Department of Education) (VCAT, 2 October 2013) | Victoria |
| 60. P | P v Minister for Education (ADTQ, 23 January 1996)  
P v Director-General, Department of Education (ADTQ, 13 March 1997) | Queensland |
| 61. Pagura-Inglis | Pagura-Inglis v The Minister for Education (ADTQ, 23 October 2003)  
Pagura-Inglis v State of Queensland (ADTQ, 7 December 2004)  
I on behalf of BI v State of Queensland (ADTQ, 14 December 2005)  
I on behalf of BI v State of Queensland (ADTQ, 11 May 2006) | Queensland |
CP obo HP v NSW Department of Education & Training (NSWADT, 16 October 2008)  
Phu v State of NSW (Department of Education & Training) (NSWADT, 12 November 2009)  
Phu v NSW Department of Education & Training (NSWADT, 25 November 2010)  
Phu v NSW Department of Education & Training (NSWCA, 9 May 2011) | New South Wales |
| 63. Prendergast | ACT Department of Education and Training v Brian and Eugenia Prendergast (ACT DT, 29 December 2000) | Australian Capital Territory |
| 64. Price | Price v DET (NSW) (FMCA, 28 July 2008) | New South Wales |
| 65. Purvis | Purvis v State of NSW (HREOC, 3 August 1999)  
New South Wales (Dept. of Education) v Human Rights & Equal Opportunity Commission (FCA, 29 August 2001)  
Purvis v State of NSW (Department of Education) (HREOC, 13 November 2000)  
Purvis v State of NSW (Department of Education) (FCAFC, 24 April 2002)  
Purvis v State of NSW (Department of Education & Training) (HCA, 5 November 2002)  
Purvis v State of NSW (Department of Education & Training) (HCA, 29 April 2003)  
Purvis v State of NSW (Department of Education & Training) (HCA, 30 April 2003)  
Purvis v State of NSW (Department of Education & Training) (HCA, 11 November 2003) | New South Wales |
<p>| 66. Rocca | Rocca v St Columba’s College Ltd and Rogers (VCAT, 26 June 2003) | Victoria |
| 68. Semple | S v Director General, Department of Education (NSWADT, 21 March 2011) | New South Wales |
| 69. S, M | S v Director General, Department of Education (NSWADT, 21 March 2011) | New South Wales |
| 70. S, C | | New South Wales |</p>
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<td>71. Sievwright</td>
<td>Sievwright v State of Victoria (FCA, 21 February 2012)</td>
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<td>Sievwright v State of Victoria (FCA, 24 September 2013)</td>
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<td>Sievwright v State of Victoria (FCA, 8 November 2013)</td>
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<td>72. Stephens-Sidebottom</td>
<td>Stephens-Sidebottom v State of Victoria DEECD (FCA, 8 August 2011)</td>
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<td>73. Sutherland</td>
<td>Sutherland v State of Victoria – Department of Education &amp; Training (VCAT, 19 January 2007)</td>
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<td>74. T</td>
<td>T v Department of Education (TADT, 11 July 2003)</td>
<td>Tasmania</td>
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<td>75. Tate</td>
<td>Tate v The Department of Education and Early Childhood Development (VCAT, 6 June 2012)</td>
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<td>76. Travers</td>
<td>Travers v New South Wales (FCA, 3 November 2000)</td>
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<td>Travers v State of New South Wales (FMCA, 21 March 2001)</td>
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<td>77. Turner</td>
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<td>Turner v Department of Education &amp; Training (VCAT, 25 August 2006)</td>
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<td>Turner v State of Victoria (VCAT, 7 February 2008)</td>
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<td>State of Victoria v Turner (VSC, 4 March 2009)</td>
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<td>78. USL</td>
<td>USL v Ballarat Christian College (VCAT, 2 June 2014)</td>
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<td>79. Wade</td>
<td>Wade v State of Victoria (FCA, 19 April 2012)</td>
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<td>Wade v State of Victoria (FCA, 3 October 2012)</td>
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<td>80. Walker</td>
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<td>Walker v State of Victoria (FCAFC, 22 March 2012)</td>
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<td>81. Winn</td>
<td>Winn Julene v State of Victoria &amp; Ors (VCAT, 2 August 1998)</td>
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<td>Winn v State of Victoria (Department of Education) (VCAT, 20 May 1999)</td>
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<td>82. Woodward</td>
<td>Woodward v State of Victoria (FCA, 1 October 2009)</td>
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<td>83. YB</td>
<td>YB v State of Queensland (QADT, 10 November 2009)</td>
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<td>YB v State of Queensland (QCAT, 16 August 2010)</td>
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<td>84. Zygorodimos</td>
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# Appendix B: Provisional Themes for Coding

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<td>Disability</td>
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<td>SQ 2</td>
<td>Voice</td>
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<td>SQ 3</td>
<td>Effect of the Adjustment</td>
<td>7.1</td>
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<td>Costs versus benefits</td>
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<td>Unjustifiable hardship</td>
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<td>SQ 4</td>
<td>Academic integrity</td>
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# Appendix C: Excluded Judicial Decisions

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<tr>
<th>No.</th>
<th>Name of case</th>
<th>Reason for exclusion</th>
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<tbody>
<tr>
<td>1.</td>
<td>A by his next friend B v C</td>
<td>Request by a journalist to view a Statement of Claim involving a school-aged student with a disability. No information in relation to the specifics of the claim, or whether it was a curriculum matter, were provided.</td>
</tr>
<tr>
<td>2.</td>
<td>A obo B v State of NSW Department of Education and Training</td>
<td>The proceedings related to an application for approval of settlement in a discrimination case involving an 11 year old Aboriginal minor with significant intellectual impairment and post-traumatic stress disorder arising from witnessing and experiencing domestic and personal violence. B also exhibited serious behaviours of concern. B’s mother alleged that the school had failed to take reasonable steps to enable B’s participation in courses and programs, and that they had failed to make reasonable adjustments to accommodate B’s educational needs. B’s school countered that they had provided educational services to the best of their ability given the serious nature of B’s unco-operative, inappropriate, sexualised and violent behaviour, offensive language, and harassment and assaults of both students and staff. Following mediation, and with no admission of liability, a confidential settlement was reached. No further information about the nature of the adjustments sought was provided in the decision.</td>
</tr>
<tr>
<td>3. &amp; 4.</td>
<td>ALI obo ALT and ALK v NSW Department of Education and Communities</td>
<td>The case, which was dismissed, related to an allegation of bullying.</td>
</tr>
<tr>
<td>5.</td>
<td>Bannister v State of Victoria</td>
<td>At the time of the findings, Daniel was a 16 year old with an autism spectrum condition, ADHD, ODD, severe pragmatic language disorder, as well as difficulties with memory, processing, sensory and motor skills. The allegation, spanning nine years of schooling, contended that a failure to provide adequate levels of assistance resulted in Daniel having limited access to curriculum and reduced participation, including attendance at camp. It was further alleged that his expulsion and delayed full-time re-enrolment in a school was discriminatory. The respondent provided details of the educational adjustments provided, funding provisions and specialist staffing supports. They also countered that Daniel’s part-time enrolment was part of a plan agreed to by his mother. The findings outline the terms of a confidential settlement reached, without admissions of liability. No further details were provided.</td>
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<tr>
<td>No.</td>
<td>Name of case</td>
<td>Reason for exclusion</td>
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<tr>
<td>6.</td>
<td>Bowyer v NSW Department of Education and Training</td>
<td>In October 2007 Bowyer and Pullen (the complainants) lodged a complaint on behalf of their son who had cerebral palsy. A further complaint was lodged in April 2008. The matters were referred to the tribunal in 2009. At the first case conference on this matter, it was advised that Ms Pullen, the child’s mother, had recently passed away from complications arising from her diagnosis of multiple sclerosis. Amended submissions were filed in September 2009 but the respondent objected to the inclusion of allegations that they had discriminated against Ms Pullen and argued this complaint did not form part of the original complaint and should therefore be excluded. In 2010 Member Grotte found that this allegation did form a new complaint and that the passing of Ms Pullen created prejudice to the respondent’s ability in defending the allegations. The application to amend the complaint was dismissed. A case conference was scheduled for August 2010. No further information about this case was available.</td>
</tr>
<tr>
<td>7.</td>
<td>Damiano &amp; Anor v Wilkinson &amp; Anor</td>
<td>An undisclosed complaint was made by Ms Damiano to the Human Rights &amp; Equal Opportunity Commission and dismissed. The complainant took their concerns to the media, to which the respondent, the principal of the school, made a response. A telephone conversation between both parties ensued, and the complainant lodged a further complaint of harassment to the Federal Magistrates Court, which was found to be unsubstantiated. No curriculum issues were raised in the victimisation case.</td>
</tr>
<tr>
<td>8.</td>
<td>Jason Denton (by his next friend, Lyn Boyd) v State of Victoria (Department of Education)</td>
<td>The decision related to a settlement in relation to discrimination in the provision of education services. The complaint was filed in 2009, but terminated by the AHRC later that year on the grounds that there was no reasonable prospect of conciliation. Following lengthy delays in proceedings, the case was settled in 2011. No details about the nature of the complaint were available.</td>
</tr>
<tr>
<td>9.</td>
<td>John Gregor &amp; Robyn Gregor v State of Victoria (Department of Education)</td>
<td>Case related to the provision of transportation to and from school for two siblings.</td>
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<td>10.</td>
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<td>12.</td>
<td>Charles (Jock) Leonard v Department of Education</td>
<td>Case related to a student with a temporary knee problem being prohibited from enrolling in a high school where achievement in sport was part of the selection process. Adjustments to curriculum were not discussed.</td>
</tr>
<tr>
<td>No.</td>
<td>Name of case</td>
<td>Reason for exclusion</td>
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<td>13.</td>
<td>Loch v Director General, Department of Education and Training</td>
<td>In 2007, the complainant sought permission from the <em>Administrative Decisions Tribunal of New South Wales</em> for her complaint, which was declined by the <em>NSW Anti-Discrimination Board</em>, to proceed. The complaint was on behalf of her nine year old son with Asperger’s syndrome. After he stopped attending school, it was alleged the Regional Education Director had refused to re-enrol him stating the relationship between the mother and the school was “poisoned”. An alternative school enrolment was rejected. No details of the circumstances leading to this situation were discussed. The leave was refused.</td>
</tr>
<tr>
<td>14.</td>
<td>Mason &amp; Anor v Methodist Ladies College</td>
<td>The decision was in relation to the transfer of proceedings from the <em>Federal Magistrates Court</em> to the <em>Federal Court</em>. No other details in relation to the <em>Statement of Claim</em> or to adjustments to curriculum were provided.</td>
</tr>
<tr>
<td>15.</td>
<td>Luke Modra (by his next friend, Ellen Modra) v State of Victoria (DEECD and Department of Human Services)</td>
<td>At the time of the initial complaint, Luke was a 21 year old man with profound autism, intellectual impairment and epilepsy. The complaint alleged discrimination in both the provision of education and residential services. The education complaint related to the use of restraint and failure to provide educational services. The complaint was terminated as there was no reasonable prospect of conciliation. Justice Gray of the <em>Federal Court of Australia</em> warned the legal practitioner that an inadequate statement of claim had been filed, and advised that he engage senior counsel with anti-discrimination litigation experience. Failure to do so would be met with costs being awarded against him. The first decision, published in 2012, was in relation to costs being ordered against the legal practitioner. A second decision, published in 2013, related to a settlement in relation to these actions. Further details in relation to the nature of the complaint were not available.</td>
</tr>
<tr>
<td>16.</td>
<td>Moore v State of New South Wales</td>
<td>Decision documented the approval of a settlement in relation to a student’s attendance, participation, and then exclusion from an after-school care program.</td>
</tr>
<tr>
<td>17.</td>
<td>MT v Director General, NSW Department of Education &amp; Training</td>
<td>Decisions documented a breach in privacy allegation. A teacher at a school, who also was the coach of a local soccer team, accessed the school file of a student who was also a member of his soccer team, and made a decision to not allow that student to play in a grand final on the basis of the disclosed sensitive medical information that had only been provided by the parents to the school, but not to the soccer club.</td>
</tr>
<tr>
<td>18.</td>
<td>Debbie Murphy v State of New South Wales</td>
<td>The inquiry was discontinued on the death of the complainant at the request of the complainant’s legal representative and her son.</td>
</tr>
<tr>
<td>19.</td>
<td>Marita Murphy and Burkhard Grahl on behalf of themselves and Sian Grahl v The State of New South Wales (NSW Department of Education) and Wayne Houston</td>
<td>Case relates to a hostile educational environment, resulting from delayed enrolment acceptance, failure to provide appropriate furniture, concerns with case management and integration funding meetings, victimisation, access needs related to parking and padlocking of gates, appointment of inexperienced teacher aides, and manual handling concerns. While some of the alleged hostility related to IEP meetings, adjustments to curriculum were not discussed.</td>
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<tr>
<td>No.</td>
<td>Name of case</td>
<td>Reason for exclusion</td>
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<tr>
<td>20</td>
<td>N on behalf of N v State of Queensland (acting through the Department of Education and the Arts)</td>
<td>Complaint alleged student with a speech-language impairment, ADHD, social and cognitive deficits and general learning disabilities had been bullied at a Queensland state college, and that the department had failed to respond to the bullying. Adjustments to curriculum were not discussed in this case, or in any of the subsequent appeals.</td>
</tr>
<tr>
<td>21</td>
<td>Price v DET (NSW)</td>
<td>In 2008, Price brought a claim of discrimination against the New South Wales Department of Education claiming their decision to remove him from the Distance Education Support Unit and proposing that he be home-schooled was discriminatory. It was also alleged the applicant was not provided the necessary resources to support his study, and that some modules of work were not adjusted to meet his needs. The decision focussed on how the grounds were pleaded in the application. Cameron FM found the application had no reasonable prospects of success and dismissed the case.</td>
</tr>
<tr>
<td>22</td>
<td>Carina Rocca and Paquale Rocca v St Columba’s College Ltd and Julie Ryan</td>
<td>Non-admission of a student with a disability into a private secondary school on the basis of religious beliefs.</td>
</tr>
<tr>
<td>23</td>
<td>S on behalf of M &amp; C v. Director General, Department of Education and Training</td>
<td>This judicial decision relates to a complaint made by a mother on behalf of her two daughters and against two different schools. The complaints in relation to C all centre on allegations of victimisation, harassment and bullying. The complaints in relation to M all refer to punitive disciplinary actions arising from a number of behavioural incidents and the application of the school’s discipline code.</td>
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<tr>
<td>25</td>
<td>Stephens-Sidebottom v State of Victoria (DEECD)</td>
<td>Hearing in relation to a settlement of a mediated claim that related to discrimination on the basis of race and disability by peers. No matters of curriculum raised in the judicial decision.</td>
</tr>
<tr>
<td>26</td>
<td>Adam Tate obo Jackie Shan Tate v the DEECD</td>
<td>The case, which was dismissed, related to an application for a student to be relocated to a classroom further away from a road as traffic fumes exacerbated her asthma.</td>
</tr>
<tr>
<td>27</td>
<td>Travers v New South Wales</td>
<td>Case by complainant with Spina Bifida sought access to an accessible toilet within close proximity of her classroom.</td>
</tr>
<tr>
<td>28</td>
<td>Christos Wade (by his next friend, Lamprini Wade) v State of Victoria</td>
<td>The first judicial decision in relation to this matter, dated 19 April 2012, was an interlocutory applicant by the respondent to have various paragraphs struck out from the complainant’s statement of claim. The statement was considered to be long, complex and ambiguous. The second decision, dated 3 October 2012, related to a settlement in relation to the matter. While there was mention that the claim related to the failure of schools to provide adjustments as well as victimisation, no details of the nature of these allegations was provided.</td>
</tr>
<tr>
<td>29</td>
<td>Winn v State of Victoria (Department of Education)</td>
<td>A complaint was unsuccessful in conciliation with the Commission and the complainant had 60 days to refer the matter to the tribunal. It was not referred within this timeframe so the complaint was dismissed by the Commission. The complainant applied to have an amended complaint heard but this was refused.</td>
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<td>No.</td>
<td>Name of case</td>
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<td>30.</td>
<td>Woodward v State of Victoria</td>
<td>The decision reported a settlement in relation to two matters. Details of the allegations were not provided.</td>
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Appendix D: Chapter Location by Complainant

<table>
<thead>
<tr>
<th>Complainants</th>
<th>Chapter(s)</th>
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<tbody>
<tr>
<td>AB</td>
<td>5, 7</td>
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<tr>
<td>Abela</td>
<td>6</td>
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<tr>
<td>Bacon</td>
<td>7</td>
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<tr>
<td>Beanland</td>
<td>8</td>
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<tr>
<td>Beasley</td>
<td>6, 7</td>
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<tr>
<td>Bolton</td>
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<tr>
<td>CAD</td>
<td>6</td>
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<tr>
<td>Chinchen</td>
<td>5, 7</td>
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<tr>
<td>Clarke</td>
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<td>J obo AJ (Cowell)</td>
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<tr>
<td>Demmery</td>
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<tr>
<td>Finn</td>
<td>7</td>
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<tr>
<td>Finney</td>
<td>6, 7</td>
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<tr>
<td>Hashish</td>
<td>7</td>
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<tr>
<td>Hurst &amp; Devlin</td>
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<td>I</td>
<td>8</td>
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<td>JC</td>
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<td>K</td>
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<td>Kiefel</td>
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<td>L</td>
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<td>Minns</td>
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<td>Oakes</td>
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<td>P</td>
<td>5, 6, 7</td>
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<tr>
<td>I obo BI (Pagura- Inglis)</td>
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<td>Phu</td>
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<td>Prendergast</td>
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<td>Purvis</td>
<td>5, 6, 7</td>
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<td>Ross</td>
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<td>Semple</td>
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<td>Sievwright</td>
<td>5, 6, 7</td>
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<td>Sutherland</td>
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<td>T</td>
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<tr>
<td>Turner</td>
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<td>USL</td>
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<td>Walker</td>
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<td>YB</td>
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<td>Zygorodimos</td>
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Note: As stated previously, the cases of Bacon and Bolton were special complaints involving 8 and 10 students respectively.
## Appendix E: Summary of Judicial Decisions

<table>
<thead>
<tr>
<th>Case</th>
<th>Tension</th>
<th>Student Voice</th>
<th>Complainant Representation</th>
<th>Outcome</th>
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</thead>
<tbody>
<tr>
<td>AB</td>
<td>Alleged that, as a result of the behaviour that manifested from his disabilities, the school had discriminated against him by not permitting him to attend the school excursion. The complainant further alleged that the school had required her son to access his education without the benefit of a PSG group, an IEP or a positive behaviour plan.</td>
<td></td>
<td>Court accepted the student had the disabilities alleged, but criticised the ambiguity of the reports and the validity of the assessment tools used to diagnose the student. Court found that the school had excluded the student from the camp because of genuine concerns that included failure to follow directions and bullying other students.</td>
<td>Outcome: Lost.</td>
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<tr>
<td>Abela</td>
<td>Parent claimed a number of schools had failed to provide adjustments and support to accommodate his son’s needs. Student was then expelled, and parent claimed the Department had refused to enrol him in any school. Schools countered with extensive evidence of a wide range of adjustments.</td>
<td></td>
<td>Court noted Abela was a concerned parent, but not a good historian at record-keeping.</td>
<td>Outcome: Lost, with costs awarded to the Department.</td>
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<td>Case</td>
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<td>Student Voice</td>
<td>Complainant Representation</td>
<td>Outcome</td>
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<tr>
<td>Bacon &amp; Ors</td>
<td>Costs versus benefits of providing a transition program to students who have reached the school-leaving age.</td>
<td>Judge agreed that a new policy requiring students to leave school upon attaining the age of 18, unless enrolled in the VCE, was discriminatory.</td>
<td></td>
<td>Won, costs awarded.</td>
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<tr>
<td>Beanland</td>
<td>Parent alleged the school refused to exempt her son from aspects of the course of study that he could not achieve as a result of his disability. School argued they could provide reasonable adjustments, but that to be credentialed as having completed the specific subjects, they needed to maintain the academic integrity of the course.</td>
<td>Court found that it was reasonable for the school to expect the student to undertake all aspects of the course of study, and to provide adjustments to alleviate any barriers.</td>
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<td>Lost.</td>
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<td>Case</td>
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<td>Student Voice</td>
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<tr>
<td>Beasley</td>
<td>School failed to provide Auslan, limiting the complainant’s ability to reach his educational potential. Costs versus benefits of instruction in Auslan, rather than other communication approaches.</td>
<td>No mention of Beasley’s level of involvement in decision making about adjustments at the school. Student gave evidence during litigation. Claimed he was unable to understand the communication method used by staff that worked with him.</td>
<td>Court valued Beasley’s evidence, although felt he did understand more than he estimated, but less than the school believed. Court found the slowness of the other communication approaches limited his participation in class but did not limit his access to curriculum. Measured against age-based curriculum standards, student was found to have made good progress in most subjects, and any lack of progress attributed to absenteeism. Outcome: Won in part, with compensation awarded.</td>
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<tr>
<td>Bolton</td>
<td>Costs versus benefits of providing a transition program to students who have reached the school-leaving age.</td>
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<td>Referencing the decision of Bacon &amp; Ors, judge found a new legislative change was designed to prevent another successful outcome. Judge ordered case to be heard in 30 days. Outcome: No published record from final case.</td>
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<tr>
<td>CAD</td>
<td>As part of a travel training program parent wanted student to walk to school independently but school refused and ceased delivering the program.</td>
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<td>Outcome: Settlement reached between both parties with an independent expert designing a travel program that met the needs of both parties. School paid complainant compensation.</td>
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<td>Case</td>
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<td>Complainant Representation</td>
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<tr>
<td>Chinchen</td>
<td>Meeting the educational needs of an undiagnosed student who was gifted/learning disabled. Costs versus benefits of providing adjustments to a gifted student with learning disabilities enrolled in a program for gifted learners. School, against parents’ wishes, withdrew the student from the program citing the costs of providing the adjustments (on student self-esteem and teacher workload and stress levels) were too great.</td>
<td>School should have sought specialist assistance to provide advice on appropriate adjustments. Decision by school to withdraw student from program was seen as discriminatory as it denied him the benefit of a program to accommodate his giftedness. Outcome: Won, respondent appealed decision but settlement reached on day appeal was to commence.</td>
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<td>Clarke</td>
<td>Costs versus benefits of instruction in Auslan, rather than other communication approaches.</td>
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<td>Court found school had placed a condition on his enrolment that he access education without an interpreter, and that this condition was unreasonable, significantly limited his ability to participate, and caused distress. Outcome: Won, with compensation awarded. Also upheld on appeal.</td>
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<td>Case</td>
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<td>Student Voice</td>
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<tr>
<td>J (obo) AJ Cowell</td>
<td>Provision of work to a student frequently absent from school, and appropriate supervision and support for the student returning to school after period of absenteeism. Further tensions in relation to humiliation felt by student from differential treatment given by school.</td>
<td>School criticised for lack of pastoral care and support, but student’s absenteeism viewed as major contributing factor to her difficulties.</td>
<td>Outcome: Partial win awarded by tribunal overturned on all subsequent appeals.</td>
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<tr>
<td>Demmery</td>
<td>The costs of providing adjustments to a student in a remote location, including the requirement that students need to cope when there are delays in appointing staff with disability expertise.</td>
<td>Court determined it was reasonable for students in remote locations to expect a delay in service provision, specifically in the appointment of new staff.</td>
<td>Outcome: Lost.</td>
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<tr>
<td>Finn</td>
<td>Costs versus benefits of providing ongoing education to a student who had reached the school-leaving age. Parent sought interim return to school while awaiting trial outcome.</td>
<td>Agreed the student would benefit in the interim from ongoing education. Recommended continued enrolment while awaiting trial outcome.</td>
<td>Outcome: Won interim hearing; no published decision from final hearing.</td>
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<td>Case</td>
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<td>Finney</td>
<td>School refused to accept enrolment. Benefits of enrolling a student in an Independent K-12 setting, when factored against the costs of providing adjustments across 13 years of schooling.</td>
<td>Student gave evidence during proceedings. She stated she was disappointed with the decision of the school to not permit her to enrol.</td>
<td>Commissioner upheld the right of persons with disabilities to have their voices heard, and for their views to be balanced against expert advice. School was found to have over-estimated the costs of the adjustments, based on incorrect assumptions about the current, ongoing and future needs of the student. Outcome: Won, with decision upheld on appeal.</td>
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<tr>
<td>Hashish</td>
<td>Costs versus benefits of providing ongoing education to a student who has reached the school-leaving age. Parent sought interim return to school while awaiting trial outcome.</td>
<td>Agreed the student would benefit in the interim from ongoing education. Recommended continued enrolment while awaiting trial outcome. Outcome: Won interim hearing. Respondents won on appeal. Complainant appealed to the High Court. Matter was discontinued as legislative/policy change allowed student to continue his education.</td>
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<tr>
<td>Hurst &amp; Devlin</td>
<td>Costs versus benefits of instruction in Auslan, rather than other communication approaches.</td>
<td>Hurst: Court found student had made progress in her learning at the same rate as her peers, so there was no education disadvantage. Outcome: Lost, and costs were awarded to the Department. Decision upheld on subsequent appeals.</td>
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<td>Devlin: Court found student had suffered as a result of not being provided instruction in Auslan, as his grades were below those of his peers. Outcome: Won, with costs awarded.</td>
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<tr>
<td>I</td>
<td>Parent alleged that a substitute excursion provided to her daughter was inappropriate, and that the school should have explored a wider range of options to eliminate the access issues that prevent her daughter from attending the excursion undertaken by most of her peers. The school sought a health and safety exemption, arguing I’s attendance on the excursion posed health and safety risks.</td>
<td>Court concluded there was insufficient evidence of any health and safety risks, that the school had failed to seek expert advice, or consult with the parent, and had failed to investigate all possible alternatives. While the alternative excursion offered to the student was viewed by the court as a reasonable substitute, the court found the student sustained a loss of enjoyment from the substitute. Outcome: Won, with damages awarded to the complainant.</td>
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<td>Case</td>
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<td>Student Voice</td>
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<tr>
<td>JC obo BC</td>
<td>School required student to undergo psychological assessment before being permitted to return following a suspension, and did not provide adjustments to meet his needs.</td>
<td>No mention of JC’s level of involvement in decision making about adjustments at the school. Parent requested student take no part in proceedings.</td>
<td>Parent lodged complaint on behalf of son. Parent had mental health condition, and no legal representation.</td>
<td>Court permitted student to not be called as a witness, but ruled his written statement would be disregarded as he could not be cross-examined. Court recommended family seek legal representation. Outcome: Legal proceedings did not continue.</td>
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<tr>
<td>K</td>
<td>Financial and other costs of providing adjustments to a student in a small, Independent school.</td>
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<tr>
<td>Kiefel</td>
<td>Parent claimed a number of schools had failed to provide adjustments, and as a result her son had failed to make progress. School produced evidence of adjustments made for Kiefel, many of which were made based on family advice or specialist recommendations.</td>
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<td>Court again noted concerned parent who perhaps had been misled to believe that litigation would provide redress for perceived deficiencies in educational programs. Outcome: Lost, with costs awarded to the Department.</td>
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<td>Case</td>
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<td>L</td>
<td>Parent alleged the school’s refusal to allow her daughter to return from suspension from his mainstream school, with the education system instead recommending her enrolment in a special school, was inappropriate. Parent sought provision of additional support so that she could return to mainstream. Hardship imposed by providing adjustments in a mainstream school to a student with behavioural concerns.</td>
<td>Court found the use of suspension was appropriate given the education department’s policy. Court found returning to the mainstream school would be inappropriate, given staffing changes that had occurred as well as the hostility at that environment and the impact L’s behaviour had on the stress levels of staff. Court considered not just economic impact, but also costs and benefits to all concerned. Found the arrangements in place by the school to be lacking, but that the benefits of continued enrolment were outweighed by the costs to her teacher and disruption to the learning of her peers.</td>
<td>Outcome: Lost.</td>
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<tr>
<td>Minns</td>
<td>Parent felt school’s use of part-time attendance as well as detentions and suspensions to manage behaviour of student were inappropriate adjustments, and that these limited his learning. Also argued the requirement for him to be medicated to attend school was inappropriate. School countered part-time attendance was an appropriate adjustment to aid student’s anxiety.</td>
<td>Court found part-time attendance was not used as a disciplinary measure, but was an alternative to other punitive responses.</td>
<td>Outcome: Lost, with costs awarded to the respondent.</td>
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<td>Oakes</td>
<td>Parent alleged school had failed to provide a range of adjustments needed by her son.</td>
<td>Mother lodged written complaint, as did a disability advocate on the family’s behalf.</td>
<td>Court found for the respondent, stating the complaint was ill-conceived. Outcome: Lost, but family given opportunity to re-submit complaint following legal advice. No further published decisions available.</td>
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<td>Case</td>
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<td>P</td>
<td>Behaviour as a manifestation of the disability where mainstream school desired that the student enrol in a special school.</td>
<td>Parent wanted for student to remain enrolled in a mainstream school but school reduced level of funding support, excluded the student, and recommended he enrol at a special school. Parent alleged the schools refusal to allow her son to return from suspension from his mainstream school, with the education system instead recommending his enrolment in a special school, was inappropriate. Parent sought provision of additional support so that he could return to mainstream. Hardship imposed by providing adjustments in a mainstream school to a student with behavioural concerns.</td>
<td>Court noted school had not taken into account parent’s desires. Court found the mainstream teachers had used a range of strategies to alleviate the impact of the student’s behaviour. Court criticised the parent for failing to allow outside expertise to guide the school’s practice. Court found the impact of P’s behaviour on the learning of peers was an unjustifiable hardship that outweighed any benefits he gained in a mainstream environment.</td>
<td>Behaviour was considered a manifestation of his disability. Court found the mainstream teachers had used a range of strategies to alleviate the impact of the student’s behaviour. Court criticised the parent for failing to allow outside expertise to guide the school’s practice. Court found the impact of P’s behaviour on the learning of peers was an unjustifiable hardship that outweighed any benefits he gained in a mainstream environment. Outcome: Lost.</td>
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<td>I obo BI</td>
<td>Behaviour as a manifestation of the disability.</td>
<td>Failure to attend school was seen as a manifestation of his disability.</td>
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<td>(Pagura Inglis)</td>
<td>The costs of providing additional support to a student whose mental health needs limited their ability to attend school to receive the benefits of those supports.</td>
<td>Court found school had over-stated the costs of providing the program.</td>
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<td>Outcome:  Won, with compensation awarded.</td>
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<td>Phu</td>
<td>Parent dissatisfied that full-time one-on-one support not provided to daughter, with a focus on providing restraint to prevent self-injury. School argued one-on-one support would limit student’s independence and opportunity to practice communication. Parent lodged second matter to allow him to observe his daughter in the classroom so he could monitor her behaviour and school’s actions. Hardship on an education authority to provide full-time one-on-one assistance for a student with significant disabilities.</td>
<td>Voice of school heard, with respondent ordered to ensure student was monitored. Court agreed that parent presence in the classroom was not in student’s best interests. Court found the student was not treated less favourably. Court found it was reasonable for the student to access her education without full-time individualised support, so unjustifiable hardship arguments did not need to be considered.</td>
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<td>Outcome:  Lost.</td>
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<td>Prendergast</td>
<td>Parent alleged school ignored medical advice and failed to provide adjustments needed by her son to accommodate his medical issues. School argued the written complaint had failed to draw a causal nexus between the actions of the school and the student’s medical needs. Parent alleged that she was rebuked by the school for tying her son’s shoelaces. School alleged they were attempting to teach the student to be independent. Parent alleged school ignored medical advice and failed to provide adjustments needed by her son to accommodate his medical issues. Parent alleged student should benefit from being retained in Kindergarten rather than being promoted to Year 1.</td>
<td>Father represented complainant during litigation.</td>
<td>Court found the written complaint was poorly constructed. Court supported the school’s actions finding the school was attempting to increase the student’s independence. Court found that the school had not treated the student less favourably. Court found the decision to promote the student to year one was not discriminatory.</td>
<td>Outcome: Lost.</td>
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| Purvis      | Behaviour as a manifestation of the disability.                          | No mention of Daniel’s level of involvement in decision making about adjustments at the school.  
Daniel did not give evidence during proceedings and declined an invitation to speak with the Commissioner at the end of the hearing. | Behaviour was considered a manifestation of his disability, but later overturned on subsequent appeals.  
Commissioner noted Daniel’s decision to not take part in proceedings was unfortunate.  
Commissioner found the program taught was inappropriate and expert advice was warranted. | Outcome: Won, with damages awarded, but overturned on all subsequent appeals. |
| Ross & Semple | Costs versus benefits of providing ongoing education to students who have reached the school-leaving age. Parents sought interim return to school while awaiting trial outcome. |                                                                                   | Agreed the students would benefit in the interim from ongoing education.  
Recommended continued enrolment while awaiting trial outcome. | Outcome: Won interim hearing; no published decision from final hearing. |
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<td>Sievwright</td>
<td>Meeting legislative definition of a disability but ineligible for additional educational resourcing.</td>
<td>Parent, supported by various medical and allied health professionals, and school disagreed on the types of adjustments provided to the student. Costs versus benefits of providing a full-time teacher aide to a student with learning and language difficulties.</td>
<td>Despite not meeting state eligibility requirements for funding, the disability met federal requirements as it caused the student to learn differently to their peers. Court found the adjustments made by the school were appropriate. The court also determined extra support as requested by the family would not have been beneficial to the student or sustainable for the school to deliver within their finite resources. Court found it was beyond the financial capacity of the school.</td>
<td>Outcome: Lost, with costs awarded to the Department.</td>
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Sutherland

Diagnosing cognitive impairment in a student who was non-verbal.

The unsuccessful trial of multiple communication methods for a student who was non-verbal resulted in less favourable treatment.

Parent complained school exempted her daughter from a state-wide literacy and numeracy assessment without consultation. School argued that even with adjustments the test wasn’t an appropriate measure for assessing the student’s skills, and exempted her from the test.

Parent alleged the school failed to advance the goals set for her daughter, and this diminished her educational outcomes. Parent further claimed the modified curriculum, taught, at times, in a withdrawal space by a teacher aide, had further attributed to her daughter’s academic delays. School argued the adjustments provided were tailored to the student’s ability to allow her to be successful in her learning.

On expert advice, the court accepted the student most likely had a significant cognitive impairment that was not assessed due to her language difficulties.

Failure to find an appropriate communication system was attributed to student’s difficulties rather than any inappropriate actions by the school.

Court found the failure to consult was regrettable but the student was not treated less favourably.

Court accepted the school’s evidence that it would have been unrealistic for the student to be taught using the same goals as set for her peers.

Outcome: Lost.
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<td>Complainant alleged a behavioural incident that led to a school suspension would have been prevented if the school had provided social skills instruction.</td>
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<td>Tribunal concluded life skills support provided to the student most likely included social skills instruction despite a lack of written evidence from the school.</td>
<td>Lost.</td>
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<td>Turner</td>
<td>Complainant desired a full-time teacher aide to alleviate the impact of language and learning disabilities and mental health/behavioural conditions, some of which did not meet eligibility criteria for additional educational resourcing or fell in and out of funding ranges over time. Complaint also used litigation strategically to attempt to change policy so that all students with disabilities that fluctuate resulting in falling in and out of funding ranges would continue to be eligible for additional resourcing. Parent alleged the failure of the school to provide adjustments caused her daughter to fall behind, and that school reporting of her daughter’s progress was incorrect and/or misleading. School produced evidence of extensive adjustments provided to the student.</td>
<td>Student found not to have met disability definition throughout some period of the claim, and court cautioned that each case turns on its own facts related to the complainant, not all students with that particular disability. Court criticised the school for some of its record keeping. Court felt at times the school had exaggerated the student’s progress in reports, but out of concern for the student’s self-esteem and confidence. Court found student was given adequate assistance during some years, but not during others. Goal setting in IEPs was the main criticism, with vague strategies and ad hoc unplanned approaches also criticised.</td>
<td>Outcome: Won, with costs awarded to the family. Outcome of a subsequent appeal is unknown.</td>
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<td>USL</td>
<td>Parent alleged school didn’t allow her son to attend a camp and excursion due to concerns regarding his behaviour. She further suggested other adjustments such as a behaviour plan and PSG meeting would have alleviated the impact of his behaviour.</td>
<td></td>
<td>Court found behaviours exhibited by the student went beyond those considered manifestations of his disability. Found it was these inappropriate behaviours that caused the school to not allow him to attend the camp and excursion. Found school provided adjustments, but parent may not have been aware of the provision of these.</td>
<td>Lost.</td>
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<td>Walker</td>
<td>Parent sought a wide range of adjustments with school failed to make, and school placed conditions on student’s enrolment, participation and attendance. Parent alleged the school’s requirement for good behaviour as a condition for attendance on excursions, special events and camps was discriminatory.</td>
<td></td>
<td>Court agreed with school that Walker did not require the level of adjustments that he sought, but on appeal, noted the school does have an obligation to consult and that this consultation can take many different forms.</td>
<td>Lost.</td>
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<td>YB</td>
<td>Question as to whether certain learning disabilities were disabilities as defined in federal legislation. The request for specific adjustments to alleviate the impact of his learning disabilities.</td>
<td>During the first hearing, the student was represented by his mother. During the second hearing, the student took over proceedings on the second day as he had turned 18.</td>
<td>Disabilities diagnosed by qualified practitioners accepted, but those diagnosed by unqualified practitioners rejected. School produced evidence that a broad range of adjustments were provided, and tribunal ruled parent complaint was to justify student’s disappointing results. Some criticisms of lack of record-keeping by family. Court noted it was not in his best interests for the student to be represented by his mother (due to ongoing health problems), and ordered that he seek legal representation.</td>
<td>Outcome: Lost.</td>
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<td>Zygorodimos</td>
<td>Parents of a student who attended a school of Deaf students felt that instruction in spoken English, rather than Auslan, would have alleviated the impact of his behaviour. Costs versus benefits of instruction in Signed and spoken English, rather than in Auslan.</td>
<td>Court found it impossible to determine which causes contributed to the complainant’s behaviours. School encouraged to find the best way to communicate their practices with families. Court found family chose to enrol their child in a school knowing the language of instruction was Auslan.</td>
<td>Outcome: Lost.</td>
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