

BLP BRIEF

Student Discrimination & Enrolment Contracts

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As we have discussed in a previous article, the duty of care owed to students by schools is non-delegable and imposes a duty to ensure that reasonable care is taken to protect the safety of staff and students at all times. In relatively recent times, there has been greater pressure on schools to go further in their duty and to protect staff and students from abuse and discrimination.

There are circumstances, however, where the duty to take reasonable precautions, particularly relating to discrimination, conflicts with a school's other obligations. For example where a student's disability poses a risk to staff and students. What, therefore, is a school's position when matters of discrimination and other duties collide?

Direct Discrimination v Indirect Discrimination: Disability

Direct discrimination

Direct Discrimination occurs in situations where a person with a disability is treated less favourably than a person without that disability in the same or similar circumstances.

There are a number of examples and cases where claims have been made against schools for direct discrimination.

A situation that has arisen consistently throughout those cases is situations whereby a disabled child is suspended or expelled by reason of behaviour that is linked to or caused by their disability.

Indirect discrimination

Indirect discrimination is characterised by conditions, requirements or practices that appear to provide for equal treatment but which actually disadvantage some people because of their disability.

Suspension and Expulsion

As with all students, before suspending or expelling a student with a disability, Principals must carefully consider all of the relevant circumstances of the incident(s).

If the suspension or expulsion is driven primarily by the existence of the student's disability, the school may be exposed to the risk of a claim for discrimination.

Therefore, when faced with a decision about suspending or expelling a disabled student, the principal should consider:

- the specific disability;
- the age of the student;
- the problem behaviour;
- the student's educational needs;
- the social conditions of the student;
- whether the school has a student management plan, and has implemented that plan to meet their needs;
- whether the school has made reasonable adjustments for the student in light of their disabilities.

Only after a detailed analysis of these factors may the principal then consider suspension or expulsion.

In order to avoid risk exposure, the school must be able to state that despite their best attempt at inclusion of the student and accommodation of their disability, the inappropriate behaviour has persisted and/or that the behaviour is so dangerous to staff or students that it would breach the schools obligation to their staff and/or students.

The Legislation

Under the *Equal Opportunity Act 2010* (Vic) and the *Disability Discrimination Act 1992* (Cth) and the *Disability Standards for Education 2005* (Cth) it is unlawful to discriminate against a student on the basis of their disability.

In practice this means not accepting an enrolment application because of disability or placing onerous terms on which enrolment of that student will be accepted is in breach of the relevant discrimination laws.

The legislation also requires schools to provide reasonable adjustments for disabled students so that they can participate in the school and their education in the same way as their peers without a disability.

CASE STUDY: Purvis v New South Wales (2003) 217 CLR 92

The case highlighted the conflict that schools may find themselves in when trying to balance providing a non-discriminatory educational setting and the duty to provide staff and students with a safe environment.

In this case the student in question had complex disabilities. The student was suspended for a time after exhibiting violent and dangerous behaviour.

A claim was made against the school for discrimination against the student.

In finding that the school had not infringed on the relevant discrimination laws, the Court gave guidance on the approach to be adopted when such questions arise. The Court stated that whether or not the actions of the school were discriminatory depended on how the school would have treated the student had they not been disabled.

The High Court stated, that "the central question will always be – why was the aggrieved person treated as he or she was?"

Refusing enrolment on the grounds of disability

There are, of course, some circumstances where a school can refuse an enrolment application on the basis that the school is not properly established or equipped to deal with the needs of a disabled student.

However, the obligations that arise from the relevant discrimination legislation mean that the question is not always that simple. Schools are required, in some circumstances, to take steps to provide for services or facilities which would accommodate and assist a student with a disability. Therefore, a school may in breach of the discrimination laws by failing to accept an enrolment

application if it would be reasonable for the school to implement or install the relevant facilities or services to accommodate the disabled student.

If your school is considering refusing enrolment on the basis of disability it is advisable to first seek legal advice.

To protect your school you should:

- Make sure your enrolment policy explains enrolment considerations, especially when it comes to students with disabilities
- Require the disclosure of medical and health conditions of child
- Consider the needs of the child and how the school can facilitate these

How can Brennan Law Partners assist?

Discrimination can be a difficult area to navigate and the answers are not always black and white.

If you have a question about an issue of potential discrimination, or if your enrolment policy needs reviewing, or you are unsure how your school should consider enrolment applications for students with disabilities, please feel free to contact us at any time so that we can assist you to comply with the equal opportunity law.

This is meant as a guide only.



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