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ORIGINAL ARTICLE

Supporting Students With Communication Impairment in Australian Schools: Administering the Obligation to Make Reasonable Adjustment[†]

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Abstract

In this article, I address the problem that education support for students with communication impairment may be delivered in an inconsistent manner within schools, or school systems, exposing affected students to harm and affected schools to the risk of litigation. Analysis of relevant Australian disability discrimination legislation and related case law demonstrates that there is a legal obligation to make reasonable adjustment for students with communication impairment and that a fair and equitable system may be postulated to administer that obligation. The Australian Government has recently committed to a needs-based funding model for Australian schools but further work needs to be done to establish how resources that flow to schools under that model should best be applied. This article aims to provide some guidance to those who will make decisions within schools about the management of the sometimes scarce and often expensive support resources for students with communication impairment.

Keywords: communication impairment; reasonable adjustment; Australian law

There is an acknowledged scarcity of speech pathology support available for Australian school children (Australian Senate, Community Affairs References Committee, 2014, Chapter 5), with the result that students with communication impairment may languish at school without appropriate educational intervention. Communication impairment may affect voice, speech, receptive and expressive language, literacy, fluency, and social interaction and may be caused by a range of pathologies, such as neurodevelopmental disorders, physical impairments (e.g., cleft palate and vocal nodules), hearing impairment, and brain injury (Speech Pathology Australia, n.d.). Untreated, communication impairment compromises not only educational opportunity but also social inclusion and emotional wellbeing (Australian Senate, Community Affairs References Committee, 2014, p. 1).

Although '[d]ata on the prevalence of communication disorders in Australia is patchy' (Australian Senate, Community Affairs References Committee, 2014, section 3.2), it has been suggested that as many as 13% of Australian primary and secondary students are affected by communication impairment (McLeod & McKinnon, 2007, p. 37) and may need access to speech pathology services to maximise their educational opportunity. According to Speech Pathology Australia (2012), the education ramifications of communication impairment are that students are 'disadvantaged from the start as they cannot access the curriculum in ways that other children

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do … the importance of oral language to the development of literacy cannot be overemphasised' (p. 3).

The Disability Standards for Education 2005 (Cth) ('Standards') are a major focus of this article. They were implemented over a decade ago to promote education equality for students with disabilities (s. 1.3 Objects). Education providers are now obliged by the Disability Discrimination Act 1992 (Cth) ('DDA') and by the Standards to make reasonable adjustments to their policies and practices to maximise the accessibility of mainstream education. Communication is plainly a 'disability' for the purposes of the DDA and Standards (see DDA s. 4 and *Sievwright v. State of Victoria* [2012] FCA 118 ('Sievwright') at [73]). Moreover, the Standards in s. 7.2 indicate that reasonable adjustment may involve the provision of 'services provided by speech therapists'. Despite this law reform, and the passage of time, there is still significant concern that speech pathology support may not be sufficiently or equitably distributed.

The Standards are subject to mandatory reviews to be completed at intervals of 'not more than 5 years' (Standards s. 11.1). The report of the first review conducted in 2011 (Australian Government Department of Education, Employment and Workplace Relations, 2012, p. 22) noted a need for greater clarity in respect of the 'right' to therapy, the problems faced by education providers in delivering therapy, and the difficulty in determining the level of support required by individual students. The same report noted that service provision in the area of speech pathology could vary from jurisdiction to jurisdiction, sector to sector, and even school to school (pp. 51–52). The report of the more recent 2015 review of the Standards (Urbis, 2015, pp. 30–31, 35) suggested that little had changed in the period between the reviews and that lack of understanding of the Standards and inconsistency in the way they are implemented in the provision of specialist support for students are ongoing problems. The submission of Speech Pathology Australia to the 2015 review set out a blunt assessment of systemic inequity in access to and experience of education for students with communication impairment:

> *The variety of options for students to access educational based speech pathology services belies the reality that access is generally inadequate across the country, varies depending on the state/territory, varies according to the educational level of the student, varies according to the disability funding eligibility in that state or territory and is considerably worse for students in rural or remote parts of Australia. (p. 12)*

The 2016 report of an Australian Senate enquiry also highlighted systemic inequities in the support of students with disabilities. It noted, of particular relevance for this article, the problems faced by students with the language impairment dyslexia, 'the forgotten disability' (Australian Senate, Education and Employment References Committee, 2016, section 4.28). Although dyslexia is within the definition of disability for the purpose of the DDA and Standards (see, e.g., *Walker v. State of Victoria*, 2011, FCA 258), schools may not be funded to make adjustments for students affected by it, and as a corollary, the right to adjustments of those students may not be respected (for examples, see Australian Senate, Education and Employment References Committee, 2016, sections 2.15, 3.24, 4.30).

The findings of two recent Australian state government reviews of education of students with disabilities have also suggested problems with speech pathology service delivery. A review conducted for the Queensland Department of Education and Training (Deloitte Access Economics, 2017) found that provision of specialist services such as speech pathology was an issue for parents and staff and that access to support was not guaranteed, particularly in rural and regional areas (p. 111). Moreover, it found that the 'current structure of internal service delivery leads to inefficiencies that decrease the benefits of these services' (p. 111). A Victorian Human Rights Commission review, released in July 2017 (Victorian Equal Opportunity and Human Rights Commission, 2017), found ongoing problems with the funding of support services, in particular with respect to the provision of support for disabilities that do not attract funding (which, as noted

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previously, may include dyslexia), and a lack of accountability and transparency as to how available funds are applied (p. 6).

It is clear that a fundamental brake on the provision of education services is that limited government funding is available. The difficulties faced by education providers in planning disability support, including speech pathology support, are compounded by ongoing uncertainty in respect of the funding mechanism for schools recently adopted by the Australian Government. The 'Gonski 2.0' reform package, named for David Gonski, the architect of the original funding reform proposal (Australian Government Department of Education and Training, 2011), will allocate funding according to a needs-based formula (Australian Education Amendment Act 2017 (Cth); Birmingham & Turnbull, 2017). However, the details of how that funding will be most efficiently managed at the school level are still under discussion and development (Birmingham & Turnbull, 2017). Both the 2015 review of the Standards (Urbis, 2015) and the 2016 Senate report (Australian Senate, Education and Employment References Committee, 2016) indicate that further uncertainty flows from the ramifications of the implementation of both the Nationally Consistent Collection of Data on School Students With Disability (NCCD) and the National Disability Insurance Scheme (NDIS). It is anticipated that the NCCD, which requires Australian schools to report the incidence of disability in their student populations, will 'inform' decisions about funding of special education from 2016 (Australian Senate, Education and Employment References Committee, 2016, section 4.39; Birmingham & Turnbull, 2017). The NDIS, which allocates Commonwealth Government support funding to Australian citizens with disability, will be 'rolled out' from 2016 to 2019 (Australian Government Department of Human Services, National Disability Insurance Agency, 2016, p. iii). Although the NDIS is not targeted at education support, there is potential for 'disruption to consistency and continuity of support' in respect of impairments such as communication impairment, where support may be required inside and outside of the school setting (Urbis, 2015, section 4.8.1). The ramifications of both schemes for funding of adjustments for students with impairments are unlikely to become clear until both schemes have been fully implemented (see Australian Senate, Education and Employment References Committee, 2016, sections 4.36–4.55; Urbis, 2015, sections 1.1.4, 4.8.1).

Although the problem of inequity in the delivery of speech pathology services may flow from funding uncertainties and inconsistencies, it may be managed by implementing obligations imposed by the Standards in a manner that promotes equity. Both the 2015 review of the Standards (Urbis, 2015, Recommendation 4) and the Senate Report (Australian Senate, 2016, Recommendation 7) emphasise the importance of the provision of information about and training in the Standards for education providers and their staff.

Research Aims and Methodology

The research aims underpinning this article were to analyse, explain, and illustrate the scope of relevant law that obliges reasonable adjustment for students with communication impairment. It should be emphasised at the outset that it was not a research aim to postulate the best educational support strategies for the delivery of educational opportunity to students with communication impairment – such an enquiry is beyond the expertise of the author.

The research method underpinning the article is doctrinal legal research, the 'core legal research method' (Hutchinson & Duncan, 2012, p. 85). Doctrinal research involves an analysis of legislation and case law in order to extrapolate commentary on how the law operates, explanation of areas of difficulty, and prediction of future developments (Pearce, Campbell, & Harding, 1987, p. 17).

Legislation, law made by parliament, and case law, law made by courts, are both primary sources of law. A variety of online resources were used to locate the law relevant to this article. The open access Federal Register of Legislation was used to access Commonwealth legislation.

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The open access website of the Australian Legal Information Institute ('AustLII') and the searchable subscriber-only online legal database, Lexis Advance Pacific, were used to locate and access other Australian legislation and case law.

In respect of discrimination law, the research starting point was legislation that prohibits discrimination and creates the right to commence legal action for those who are the victims of discrimination. Such a legal action, if not resolved by conciliation between the parties involved, may progress to a court hearing where the court will decide whether unlawful discrimination has occurred. In order to reach its decision, the court must interpret the anti-discrimination legislation and apply it to the facts of the case. The decisions of courts interpreting and applying legislation create case law and must be read with the legislation to understand how the law has worked in a particular case and to inform advice about how the law may work in any future similar cases that may arise. By examining relevant anti-discrimination legislation and the decisions of courts called on to explain and interpret it, doctrinal legal research may inform good education policy, training, and best practice for the management of the delivery of a speech pathology service in schools.

Literature Review

In this section of the article, the law relevant to the obligation of Australian schools to accommodate students with disability is reviewed. It is not a literature review in the conventional sense in that its focus is on explaining the primary sources of the law so as to extrapolate the current position of the law in Australia. No relevant secondary sources, such as journal articles or books, could be identified that explicitly addressed the law as it applies to communication impairment.

Disability Standards for Education 2005 (Cth)

The Standards are Commonwealth subordinate legislation introduced in 2005 under the authority of the DDA s. 31. The DDA and Standards are binding on all schools and school systems across the government and independent sectors. An education provider (DDA s. 4; Standards s. 2.1) will likely be deemed liable for the wrongs of a staff member committed on behalf of the provider and 'within the scope of his or her actual or apparent authority' unless the provider 'took reasonable precautions and exercised due diligence to avoid the conduct' (DDA s. 123). An education provider that 'causes, instructs, induces, aids or permits' discriminatory acts may be directly liable (DDA s. 122). The weight of case law suggests that it will be rare for an education provider to escape liability for the discriminatory acts of one of its staff.

A student may choose to bring a complaint of discrimination under state legislation, such as the Anti-Discrimination Act 1991 (Qld) or Equal Opportunity Act 2010 (Vic), rather than under the DDA and Standards. Because of the operation of DDA s. 13(3A), which has the effect that state law, which is inconsistent with the operation of the Standards, is displaced, compliance with the Standards will be a relevant consideration for state courts and tribunals adjudicating upon complaints of discrimination brought under state law.

Disability

Disability is defined widely in the DDA s. 4 to encompass physical, behavioural, sensory, psychiatric, and learning impairments. The following aspects of that definition of disability are particularly relevant to communication impairment: (a) total or partial loss of the person's bodily or mental functions, and (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction.

The obligation to make reasonable adjustment

Achieving education equality may require students with disability to be treated differently from students without disability (see, e.g., DDA ss. 5(2) and 6(2)). As such, the Standards impose

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obligations to make reasonable adjustments in respect of five aspects of school life – enrolment, participation, curriculum, student support, and harassment and victimisation – so as to avoid unlawful discrimination.

The Standards explain that an adjustment is a 'measure or action' that will assist a student with a disability to apply for admission to enrolment, to participate in the courses in which they enrol, and to use school services and facilities on the same basis as a student without a disability (s. 3.3(a)). It is expressly contemplated in the Standards in s. 7.2 that the provision of 'speech therapy' may be an adjustment. An adjustment is reasonable 'if it balances the interests of all parties affected' (s. 3.4(1)). Reasonableness is to be determined after consideration of 'all the relevant circumstances and interests', including the relevant student's disability, his or her views, the effect of a proposed adjustment on him or her and on 'anyone else affected, including the education provider, staff and other students', and associated costs and benefits (s. 3.4(2)). Justice Tracey, in *Walker v. State of Victoria* [2011] FCA 258 at [284], makes it plain that 'There may ... 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'.

To support the determination of the regime of reasonable adjustments that will be put in place for a student with disability, the Standards mandate an ongoing process of consultation between the school and the student and/or the student's associates. Consultation must occur at the point of enrolment (s. 4.2(3)) and regularly throughout the term of enrolment (ss. 5.2(3), 6.2(3), 7.2(7)). Ongoing consultation is necessary because a disability may change over time and what adjustments are reasonable in response to a disability may change over time (s. 3.4(1) Note). Consultation may be initiated by either the school or the student.

A limit to reasonable adjustment: Unjustifiable hardship

Proof of unjustifiable hardship creates an exception to the education provider's obligation to make reasonable adjustment. An education provider 'must comply with the Standards to the maximum extent not involving unjustifiable hardship' (s. 10.2(3)). Like reasonableness, unjustifiable hardship is also to be determined after consideration of 'all relevant circumstances' including benefits and detriments that may accrue to 'any persons concerned', the effect of the relevant disability and cost to and financial capacity of the education provider (s. 10.2). Case law suggests that evidence that the cost of making expensive adjustments would compromise a school's ability to deliver its services equitably to all students may support a finding of unjustifiable hardship (see, e.g., *State of Victoria v. Turner* [2009] VSC 66).

The Sievwright case

It is a legal system truism that every case 'turns on its own facts'. It is not possible to identify the scope of any obligation to provide speech pathology services for a specific person without access to specific facts. It is nevertheless possible to advise as to what decided cases have suggested is reasonable and as to the development of a system to work out what is reasonable in each case. While other cases have already been referred to, and will be referred to again in the Discussion, Sievwright is the case that aligns best with the issues relevant to the accommodation of students with communication impairment. As such, a more detailed explanation of its facts is warranted. Jade Sievwright had attended a series of schools operated by the Victorian Education Department during the period covered by her discrimination claim. Her teachers in prep (2004) and Year 1 (2005) were concerned that she displayed difficulties with language. In Year 1 she was referred for assessment by an education department psychologist and an education department speech pathologist. She was also assessed by a private neurologist. As a result of these assessments, Jade was diagnosed with communication impairment, specifically receptive and expressive language disorders and auditory processing problems.

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Jade did not receive the direct assistance of a school-based speech pathologist. When Jade was first diagnosed with communication impairment, her mother engaged a private speech pathologist when she was told that there would be a wait before Jade could see a school-based pathologist. Jade's mother rejected subsequent offers of school-based speech pathology support because she was concerned that the school-based therapy regime may conflict with the private regime of treatment. Jade's teachers, with the support of school officers, delivered a series of interventions to support Jade's access to the curriculum.

The Standards state that an adjustment may be 'an aid, a facility, or a service that the student requires because of his or her disability' (s. 3.3). A relevant service may include a 'specialised support' service (s. 7.2(2),(4)). Examples of such specialised support services are provided as follows: 'services in health, personal care and therapy, and services provided by speech therapists, occupational therapists, and physiotherapists' (s. 7.3).

An education provider cannot escape potential liability for providing such services by saying 'that is not part of what we offer'. It is plain from the terms of the Standards s. 7.2 that education providers that do not provide such a service must, if it reasonable to do so, arrange for the external provision of the service, where the service 'is necessary for the student to be able to participate in the activities for which he or she is enrolled' (see s. 7.2(2),(3)).

Jade's allegations of discrimination relevant to speech pathology support focused on two issues: first, Jade was told she would need to wait for access to a school-based speech pathologist; second, Jade challenged the quality of in-class support provided. There were further complaints arising from her schools' responses to her borderline intellectual disability, and in particular in relation to the refusal to withdraw Jade from class for extensive one-on-one interventions and the failure to provide her with full-time one-on-one aide support.

Ultimately, the Court found at [73] that although Jade had a disability, as defined in the DDA s. 4, there had been no discrimination against her and no breach of the Standards (at [242]):

> *The majority of the recommendations made in relation to Jade's education were implemented and extensive efforts were made to enable Jade to access her education. The schools made significant efforts to address Jade's learning difficulties, and to give her the best assistance they could, within budgetary limitations. Such efforts included modifying the curriculum, working one to one and in small groups with Jade and frequent contact with . . . [Jade's mother].*

Results and Discussion

In this section of the article, specific ramifications for schools of the application of the law to the accommodation of students with communication impairment are considered. These ramifications include the legal risks associated with the inconsistent treatment of students with communication impairment by a school or school system, the scope of an 'optimal' system for the accommodation of students with communication impairment, and funding ramifications for schools of that optimal system.

Legal Risks Associated With Differential Treatment

A combination of limited speech pathology resources and the devolution of decision-making as to the use of support funds to individual schools appears to have resulted in the development of a variety of scenarios in respect of the identification and management of students with communication impairment by Australian schools (Australian Government Department of Education, Employment and Workplace Relations, 2012, Speech Pathology Australia, 2012, 2015; Victorian Equal Opportunity and Human Rights Commission, 2012):

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- Some students will be assessed by a school or school system–based speech pathologist and have their verification process managed by a school or system-based speech pathologist.
- Some students who do not have access to school or system-based pathologists will be supported by their school to access external speech pathology services. There may or may not be discussion between a school or system-based speech pathologist and the relevant external speech pathologist about those students.
- Some students will be supported by classroom teachers with or without the guidance of a program of adjustments designed by a school or system-based pathologist or other speech pathologist.
- Other students may remain unassessed, undiagnosed, and unsupported, despite the fact that their teachers suspect a disability.

As already noted, the reasonable adjustments to be made for each student must be worked out in consultation with him or her – reasonable adjustment will be individualised for each student according to need and nature of the disability and availability of resources. However, Australian schools, and school systems, are potentially exposed to legal action if they continue to offer arbitrarily differential levels of speech pathology support to their students with communication impairment. Although it may be appropriate for some students at a particular school, or within a particular school system, to receive more support than others if their needs for support are greater, it is not appropriate for some students to be provided with good speech pathology support and some students to get no speech pathology support. It is particularly risky from a legal point of view for students assessed with the same level of need to be resourced differently.

A student who is not being appropriately supported may argue a breach of the Standards in the failure to make reasonable adjustment necessary for the student to be able to participate in the activities for which he or she is enrolled. A case of indirect discrimination may also be advanced along the following lines (DDA s. 6):

- A condition is imposed on a student that he or she access his or her education without access to speech pathology services
- The student cannot comply with that condition because of his or her communication impairment
- The condition disadvantages the student because his or her education opportunity is compromised.

The important question for proof of both a breach of the Standards and of unlawful indirect discrimination is the reasonableness of the treatment of the student by his or her school: a school must make only reasonable adjustments, and indirect discrimination is only unlawful if the condition imposed is not reasonable.

The reasonableness problem faced by a school or school system in the differential treatment of its students is that there may be evidence that it is already supporting some students. The appropriate concern, therefore, is that it would be difficult to prove that an adjustment is unreasonable if it is already in place for others with similar disability and need for adjustment.

'Optimal' Management of Speech Pathology Support

As noted at the outset, detail of the practical and professional elements of an optimal speech pathology service to be implemented by Australian schools is beyond the scope of this article. The focus is instead on aspects of the management of an optimal service that should be put in place to limit liability for breaches of discrimination law.

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A minimum standard for staff–student ratio

Speech Pathology Australia has called for a minimum standard for staff–student ratios (2012). It has already been suggested in this article that any support system must be responsive to individual student needs and not mandate a one-size-fits-all policy. However, failure to resource a reasonable ratio of speech pathologists to students will make it difficult for speech pathologists to have an effective role in supporting students and may expose schools to complainants arising from deficiencies in the implementation of the support system. Improving the speech pathologist–student ratio may be expensive. The implications of cost for reasonable adjustment will be considered under the heading 'Unjustifiable Hardship'.

Diagnosis/verification

For some Australian education systems, funding to support a student with disability does not flow until his or her disability has been 'verified' by the education provider. As a result, student support may not flow until funding is assured. It is risky to delay the delivery of appropriate support until after a verification process as the obligation to make reasonable adjustment arises once an education provider knows about a disability. Some varieties of communication impairment, especially those where no physical or neurological cause is obvious, may be difficult and time consuming to diagnose (Georgopoulos, Malandraki, & Stylios, 2003; Jerger & Musiek, 2000), and, by implication, for a school to 'verify'. Despite this, the provider will likely know that some disability exists from its manifestations, and before it is formally 'tagged' as communication impairment, and an obligation to make reasonable adjustment will have commenced at that point. In the Sievwright case, for example, the Federal Court held at [77] that Jade's school knew that she had a disability upon receipt of its education psychologist's report 'that Jade's receptive vocabulary was extremely low and that her level of intellectual functioning was in the low average range overall' [13].

Each Australian school should consider whether current support funding arrangements are sufficient to comprehend the need to provide support to students with suspected communication impairment before verification occurs and government funding attaches to the student. It may well be that there will be an opportunity to reassess funding formulae in response to changed reporting arrangements under the NCCD and changed Commonwealth school funding arrangements.

Education 'support' not 'treatment'

Schools should develop systems that make it clear that, although there may be some overlap between 'therapy' and 'support', the role of speech pathologists in schools should be to facilitate access to education, not to 'treat' the communication impairment. Moreover, reasonable adjustment does not guarantee the provision of every specialist service that may be sought and that may be available. In *Kiefel v. State of Victoria* [2013] FCA 1398, which concerned, inter alia, allegations of failure to make reasonable adjustment in the provision of speech therapy and applied behavioural analysis, Justice Tracey made it plain at [247] that the Standards do 'not require an education provider to seek additional specialist expertise for the student's benefit, provide the student with remedial assistance, or to facilitate medical input in developing the student's program'. The relevant obligation upon the school is, rather, to 'take reasonable steps to ensure that the student has access to the service' where it is demonstrated that 'a specialised support service is necessary for a student to participate in the activities in which the student is enrolled' (at [250]). By analogy, the speech pathologist's role in a school setting should be to develop and administer education support strategies, not to administer 'therapy' as such.

Student access to speech pathology support

Despite clear evidence that delayed access to specialist speech pathology advice may be detrimental (Australian Senate, Community Affairs References Committee, 2014, Chapter 5), case law

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suggests that it is nevertheless likely to be appropriate to ask a student to join a waiting list for access for speech pathology support, provided that the waiting list is prioritised according to need. During the wait for access to a speech pathologist there should be reasonable adjustment made to support the student's participation in response to manifest difficulties with access to the curriculum. This may require the development of, and staff training in, generic strategies for support of students displaying learning behaviours consistent with communication impairment. Ideally, speech pathology advice would be involved in the development of these strategies and speech pathologist and disability staff support would be available to classroom teachers required to implement them.

The Sievwright case expressly addressed the issue of whether it is appropriate to require a student to wait for access to speech pathologist support. The Court held at [214] that it is reasonable to expect a student to wait for access provided any wait is prioritised according to need and acknowledged that a school must manage its resources to accommodate the needs of all its students.

One option that a school may contemplate in order to maximise its support of students with communication impairment is to establish a system for the management of student support to be shared with speech pathologists funded by parents of the affected students. Shared responsibility of this kind is already occurring in respect of some students as a corollary of the devolution of decision-making as to the use of support resources to individual schools. Indeed, even if a school were to determine that shared responsibility is not ideal, it may not be able to avoid shared responsibility arrangements as concerned parents may seek both external speech pathology support and in-school support. The Standards also indicate that there may be circumstances where it will be appropriate for a school to 'arrange for it [a service] to be provided by another person or agency' (s. 7.2(2)). A shortage of speech pathologists in a particular district, for example, might mean that different schools and school systems have to share the expertise of a limited pool of speech pathologists.

Some general comments can be made about the risks attaching to shared responsibility. Although it may, in theory, be workable to allocate different aspects of the assessment/verification/intervention process to school-based and external pathologists, it may, in practice, be problematic. The problems are not so much legal as administrative. However, administrative problems may mature to legal problems if obligations are not met as a result. Some of the risks of shared responsibility are as follows:

- External speech pathologists may not be expert in the education environment.
- Shared responsibility for the student will require close consultation between external speech pathologists and school-based pathologists and teaching and support staff.
- Shared responsibility magnifies the potential for 'turf wars' and 'service gaps' to occur.

The Sievwright case suggests that careful management of shared responsibility, informed by clear and consistently applied protocols, will be important so that problems with shared service delivery do not expose schools to legal action. Jade's mother arranged for her to see a private speech pathologist so that she would not have to wait for support from an education department speech pathologist. The private speech pathologist subsequently recommended 'that having two speech therapists could confuse Jade and result in regression of her progress', and on that advice, Jade's mother refused support from an education department speech pathologist (at [28]). At one stage, Jade's mother rejected the opportunity for Jade to be enrolled in a specialist support program because 'it might interfere with Jade's progress' with the private speech pathologist (at [50]). Education department staff liaised with the private speech pathologist, allowed her observation access at school on one occasion, and 'implemented ... [her] ... recommendations in the classroom as much as possible' (at [134]). The decision to access the private pathologist and refuse a school-based pathologist was the parent's decision, but there is little doubt that the disconnect between her private treatment and her schooling contributed to the dissatisfaction that triggered the decision to sue. Jade Sievwright sought reimbursement for the amount paid for private speech

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pathology support, but the Court did not order reimbursement – her mother had repeatedly refused to accept school-based speech pathologist support (at [131]–[137]).

Delivery of interventions

Although it is appropriate that speech pathologists should design and monitor the implementation of interventions for students with communication impairment, it is likely that it will not be necessary, in most cases, for them to deliver those interventions personally. In most cases, it will be enough to satisfy the legal obligation to make reasonable adjustment that the speech pathologist should monitor the implementation of the interventions he or she has designed and check for any need to adjust those interventions. Training of relevant teachers and school officers to implement any interventions is also important to the successful operation of a design/monitor/adjust model. In the Sievwright case the court, for example, rejected the proposition that a remedial literacy and numeracy program be implemented for Jade and that this 'should be delivered to Jade by a person formally trained by someone "expert in language disorders and language disabilities"' (at [213]). The court explicitly accepted at [213] that 'formal training [was] not required' and that 'a lay person could be trained to implement [the program]'.

Any system that is developed must have the inherent flexibility to accommodate the needs of specific students. A 'one-size-fits-all' design/monitor/adjust model has the potential to expose a school to a complaint, from a student who does not fit the model, that reasonable adjustment has not been made. To adopt the language of the Standards, schools are obliged to make reasonable adjustments in the provision of services that are 'necessary for the student to be able to participate in the activities for which he or she is enrolled' (s. 7.2). The decision in *Hurst v. State of Queensland* [2006] FCAFC 100 ('Hurst'), where the Full Federal Court ordered that a student with a profound hearing impairment should have access to expensive support in the form of an Auslan interpreter, indicates that there is the potential for an order for access to be provided to speech pathology services should it be proved that it is necessary to facilitate student participation in education. In Hurst, the Full Federal Court of Australia at [134] was prepared to order the provision of Auslan support because there was evidence that the complainant would suffer serious educational disadvantage without it. The court made it plain at [125] that it was not enough to discharge a school's obligation to a student with a disability if that student could 'cope' with the level of support provided.

Withdrawal from class or support in the classroom

Another potential problem with one-on-one assistance is that it may take the student from the classroom environment thus disrupting the goals of inclusive education. If a schedule of one-on-one interventions does disrupt participation, then it may not be a reasonable adjustment as it may have a detrimental effect on the student. The Standards state that the effect on the student of an adjustment is a relevant consideration in working out the reasonableness of a proposed adjustment (s. 3.4(2)(c)). It was acknowledged in the Sievwright case that too frequent withdrawal from class for therapy may have a negative impact on a student by interfering with his or her ability to participate in the inclusive classroom environment. The Court accepted evidence at [211] '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'.

The Standards also provide for consideration of the effect on other students of a proposed adjustment (s. 3.4(2)(d)). One-on-one support that occurs in the classroom, but which is not integrated into the regular flow of a class, may have the capacity to interfere with the learning environment of other students, and this too should be taken into account in determining adjustments to be made.

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Funding and Unjustifiable Hardship and Speech Pathology

Extra fees for students with communication impairment

As noted earlier, it may be that there will be an opportunity for schools to reassess funding formulae in response to changed reporting arrangements under the NCCD and changed Commonwealth school funding arrangements. In the meantime, it may be tempting to consider the imposition of an extra fee upon students with communication impairment to fund their support. However, this approach would almost certainly be unlawful. The imposition of such a fee could be construed as direct discrimination: less favourable treatment of a student on the basis of his or her disability. Direct discrimination is unlawful pursuant to DDA s. 5. Moreover, it is not unusual for students to 'cost' a system more than their fee – gifted students, students who excel at sport, and students with behaviour problems are all, potentially, more expensive to educate than the 'average' student.

If a parent volunteers extra money to fund his or her child's support, it may not be inappropriate for a school to accept it. In the case *Clarke v. Catholic Education Office* [2003] FCA 1085, for example, parents of Jacob Clarke, who needed Auslan interpretation support, offered to contribute $10,000 towards the training of an Auslan interpreter to work at their son's school. Justice Madgwick held at [81] that despite theoretical concerns about potential inequities that may flow from accepting a donation from parents who could afford it, 'there would have been no real problem in accepting the Clarkes' contribution for that year'. If money is offered, specific legal advice should be sought as to relevant supporting documentation and as to the terms upon which the money can be accepted.

Unjustifiable hardship

As noted, the Standards acknowledge that the cost of an adjustment is relevant to its reasonableness (s. 3.2(4)(e)). Moreover, the financial resources of an education provider are relevant to proof of unjustifiable hardship (DDA s. 11; Standards s. 10.2). If a school or school system cannot fund speech pathologist support for all, then it should be prepared to argue unjustifiable hardship in the cost of implementing such a system in the event that a student successfully proves a failure to make reasonable adjustment. Proof of unjustifiable hardship would necessarily involve exposing accounts and funds allocation systems to scrutiny.

Recent case law suggests that courts may be receptive to arguments of hardship even from the State and by implication, therefore, from schools and school systems in the independent sector (see, e.g., Sievwright, [207]–[210]; *State of Victoria v. Turner* [2009] VSC 66, [102]–[104]). Proof of unjustifiable hardship may require evidence as to the system-wide impact of an order, for example, that one student receives extensive one-on-one therapy support. Equity would demand that if one student is to be supported to that extent, then so should other similarly situated students in the system. Indeed, other students may sue to force provision of the same support. Although the system may be able to afford to make those extensive and expensive provisions for one student, it may impose unjustifiable hardship to make them for every student in its schools with a similar level of need. The flow-on effect of a court order for expensive adjustments to be made for one student was acknowledged in Sievwright at [207]–[210] as a reason for rejecting such an order:

> *The obligations of the State in respect of individual children must be considered alongside the wider legal responsibilities which teachers and administrators owe to all students … [Evidence was given] about the enormous cost that would be associated with providing a full time aide to all students who had a IQ in the vicinity of Jade's before she qualified for the PSD [funded support] … Jade's teachers made significant efforts to implement the recommendations made by experts in relation to Jade, to the extent that was practical and within budget constraints.*

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Conclusion

In order to minimise risk of discrimination against students with communication impairment, it is important that any system implemented for their support should be transparent, clearly communicated to relevant school staff, and consistently applied. Such a system will require the cooperation of teaching and teaching support staff, disability support staff, and speech pathology staff.

Classroom teachers should be trained to identify students displaying learning behaviours consistent with communication impairment and to report those students for assessment. While students await assessment, generic strategies should be implemented by the classroom teacher to support learning. Early identification and intervention is essential so that a school is not exposed to complaints that it knew of the communication impairment, in that its effects on learning were apparent, but failed to make reasonable adjustment. Suspicion of communication impairment must be reported so that appropriate further action may be taken and so that reasonable adjustment is commenced as soon as practicable. The Standards require adjustment to be made within a reasonable time (s. 3.7). For quality assurance reasons, it is also important that teachers and school officers relied on to deliver interim support strategies are trained in that delivery.

Upon establishing a reasonable likelihood of communication impairment, speech pathology staff should develop a support plan for implementation by the classroom teacher or aide and, where necessary for student access to education, by a speech pathologist. A speech pathologist should monitor the implementation of the support plan to check for compliance with the plan, its effectiveness, and any need to make further or different adjustments. Where a student is receiving speech pathology outside of the school system, it is also advisable that the school-based speech pathologist liaise with the external speech pathologist. It will also be important for the school-based speech pathologist, and any external speech pathologist, in person or via reports, to be included in the consultation process mandated by the Standards.

These aspects of the speech pathologist's role in supporting students with communication impairment are important so that there can be confidence that adjustments are actually made and that they are, and continue to be, reasonable. The Standards acknowledge that what is reasonable may change over time (s. 3.4 Note). Further, a trial-and-error approach towards working out appropriate adjustments is a recognised feature of communication impairment (Georgopoulos, Malandraki, & Stylios, 2003; Jerger & Musiek, 2000). The consultation process is an essential element of the monitoring of reasonable adjustment for each student. The Standards mandate ongoing consultation (ss. 4.2(3), 5.2(3), 6.2(3), 7.2(7)) and acknowledge that external experts and their reports may have an advisory role in respect of the determination of reasonable adjustments (s. 3.4 Note).

Not having the resources to deliver an optimal service for every student does not mean that a school should not seek to implement an affordable version of the suggested system set out under the heading, '"Optimal" Management of Speech Pathology Support'. In an education system where stretched resources are the norm, schools need to be adept at making the most of the staff and money they are allocated to support students with disabilities. Australian law recognises that what schools can do for students is limited by the extent of the available resources, and support that is unreasonable, or that imposes unjustifiable hardship on the school community, will not be required. However, the law also demands that available resources should be applied fairly and consistently so as to avoid discrimination against vulnerable students, such as those with communication impairment.

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