

**INQUIRY INTO STUDENTS WITH A DISABILITY OR  
SPECIAL NEEDS IN NEW SOUTH WALES SCHOOLS**

**Organisation:** NSW Ombudsman

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Submission to the Legislative Council General  
Purpose Standing Committee No. 3 Inquiry  
into the provision of education to students  
with a disability or special needs in  
government and non-government schools in  
NSW

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**March 2017**

## 1. Background

Under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, the responsibilities of the NSW Ombudsman's office include a range of key functions targeted at improving the delivery of services to people with disability in NSW, including:

- receiving and resolving complaints about community services, and assisting people with disability to make complaints
- reviewing the pattern and causes of complaints, and making recommendations to improve how services handle and resolve complaints
- monitoring and reviewing the delivery of community services, and making recommendations for improvement
- inquiring into matters affecting people with disability and disability services, and reviewing the situation of people with disability in residential care
- reviewing the causes and patterns of the deaths of people with disability in residential care, and making recommendations to reduce preventable deaths, and
- overseeing and coordinating the Official Community Visitor scheme.

Under the *Ombudsman Act 1974*, our office also has a range of complaint, oversight and investigative functions in relation to public sector and certain non-government organisations.

Our submission is informed by:

- our work in relation to people with disability, including our consultations with families of students with disability, disability advocacy services, and peak organisations
- our handling of complaints about the Department of Education and related investigations, and
- our oversight of the handling of reportable conduct allegations against employees of government and non-government schools under Part 3A of the Ombudsman Act.

As the Committee is aware, we are currently undertaking an inquiry into behaviour management in government and non-government schools, and expect to be able to provide the Committee with a copy of our report from the inquiry in June 2017. As our inquiry includes a strong focus on students with disability, we have kept this submission brief.

## 2. Complaints

### Monitoring of complaints and identification of systemic issues

In our submission to the 2010 NSW Parliamentary Inquiry into the provision of education to students with a disability or special needs, we emphasised the need for the Department of Education to have robust systems to monitor access to, and the delivery of, programs and supports for students with disability and special needs across the state. In this regard, we raised concerns about the lack of systems in place to record the

numbers of complaints received across the department about particular issues, and noted that the absence of the central collection of this information meant that:

- the department was unable to monitor the number of complaints made about the support provided to students with disability, and
- it was difficult for the department centrally, or even regionally, to identify systemic issues and share information about approaches that work well.

While this issue has continued to remain a problem, the whole-of-government Complaint Handling Improvement Program (CHIP) provides an important opportunity to change the way Education (and other government agencies) handle and report on complaints.<sup>1</sup> The first stage of the CHIP involves cluster agencies adopting and implementing six *Commitments to Effective Complaint Handling* through their policies, procedures, and practices. The commitment to transparency will include agencies recording and analysing the following types of information in relation to their complaint handling processes:

- the number of complaints received
- the number of complaints finalised
- the percentage of complaints finalised within their KPIs
- the issues raised by complaints
- the actions taken in response to complaints
- systemic issues identified, and
- the number of requests received for internal and/or external review.

As part of its work to be compliant with the CHIP Commitments, we are aware that Education is developing a complaint-handling database in 2017/18, which is intended to provide a cluster wide system for capturing and analysing the above information.

### **The need for early intervention and a proactive approach to problem solving**

Complaints to our office about the Department of Education – particularly those involving students with disability – consistently highlight the critical importance of the relationship between school staff and families/carers.

Common issues that feature in complaints involving students with disability and the Department of Education include:

- families not being included in discussions regarding management and support
- school staff not implementing documented support plans
- students being suspended for behaviour despite school staff not implementing documented support plans/ strategies (or not having strategies)
- inadequate communication with families about the welfare and progress of their children (including not informing families in a timely way when their child is injured)
- school staff not taking adequate steps to obtain or seek additional support for the student

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<sup>1</sup> The NSW Ombudsman's office has partnered with the Customer Service Commissioner and the NSW Department of Finance, Services and Innovation to develop the CHIP as part of the Premier's Priority 12 to improve customer service across government.

- inadequate action by the school to address safety and welfare concerns (such as following an injury or incident involving a student), and to communicate this information to the family
- suspension of a student from school despite the behaviour being associated with their disability and inadequate steps having been taken by school staff to identify and implement appropriate supports, and
- families not receiving an adequate response to their concerns.

Many of the matters that are raised with us by families and carers go to important issues relating to the adequacy and quality of the support provided to their child to engage in learning, and the ability of their child to access a quality education on the same basis as other students. It is particularly significant that with a high proportion of the complaints, there has been a fundamental breakdown in communication, trust and respect between the involved schools and families. We have seen numerous matters where problems have escalated to a point where the issues in dispute become intractable, the relationships are fraught and adversarial, and legal action (on both sides) is taken or threatened. Importantly, many of the issues at the heart of these matters are relatively straightforward, and would have had a good chance of successful resolution if an effective resolution focused approach had been adopted.

From our work in relation to these matters, we have identified a number of key factors:

- a lack of understanding of what families can reasonably expect from the school and the Department in terms of processes, information and communication, as well as in relation to specific supports for their children and parental input into decisions about their children
- a lack of knowledge about where to go and how to raise concerns and questions about the support being provided to the involved children; this tends to result in the heightening of concerns – for example, we note that many families are not aware that they can complain to their network's Public Schools Director or Executive Director if they can't resolve their concerns with the Principal
- families being seen as a 'problem', or as unreasonable complainants, when they keep asking questions and challenging school decisions, and
- at times, schools have provided significant supports and taken substantial and appropriate action in response to concerns raised by families, but this has not been adequately communicated to the parents.

We note that there is considerable trauma in many of these matters for all of the parties, including the student with disability. In some cases, it does not appear that trauma that is being experienced by families is being adequately acknowledged or taken into account in the Department's response to concerns that the parents have raised. We also recognise the challenges for Principals in effectively resolving many of the complaints that are, at least in part, about them and their decisions.

We support approaches to strengthen early and local resolution of complaint issues. However, in addition to local resolution, there is a need to strengthen complaint processes beyond the local school and Principal in order to deal with situations where relationships at the local level are breaking down. Such matters require the input of specialist skills to resolve. In this regard, the system for resolving concerns needs to have a much stronger emphasis on creative problem-solving that is focused on repairing and maintaining the relationship between the student, family and school. We will explore these matters further in our behaviour management inquiry.

### **Case study 1**

The parent of a student with autism and anxiety complained to us that the local school was not providing appropriate support to their son. The student had been suspended on multiple occasions, and the parent complained that the school had not provided adequate support to the student, and had not taken his disability into account when considering disciplinary action. The parent also complained about the Principal's manner in responding to the concerns, including reportedly threatening to restrict the parent's access to the school under the *Inclosed Lands Protection Act 1901*.

We conciliated the complaint, noting the conflict and poor communication between the school and the parent, the impact on the student's education and anxiety, and the need to re-establish and improve the long-term relationship between the Department and the family. As the relationship between the Principal and parent had irretrievably broken down, the conciliation focused on how best to support the student in an alternative public school in the area.

As a result of the issues identified in this complaint, the Department proposed to conduct a review of what had been happening at the school over the previous four years in relation to students with high support needs (including the student in this complaint), with a view to developing recommendations for the school. We were advised that the review would also include consultation with the parent who made the complaint to us. We are continuing to monitor this work.

### **Case study 2**

We received a complaint from the parent of a student with autism about a public school's management of the behaviour of students in the Autism Unit, including the use of restraint. Among other things, the parent raised concerns about the resources allocated to the unit for staff training and safe time out areas for students who need it. The parent also complained that the school had not provided a reasonable response to their concerns.

Following our inquiries with senior staff in the Department, a meeting was held between the parent and a number of school and Departmental personnel to discuss the concerns and to develop an action plan for resolution. The agreed plan included actions to conduct a comprehensive review and develop recommendations to foster an inclusive education culture at the school; deliver autism specific training to staff; improve communication with families regarding incidents; and deliver whole school professional learning on the management and resolution of critical incidents.

### **Case study 3**

A parent made a complaint to us that a support unit in a public school had failed to prevent an assault on their young daughter by other students, had not informed the parent of the incident in a timely way, was providing inadequate support to students with disability, and had poor communication with families. The parent was concerned that they had not been told what action had been taken in response to the incident to prevent recurrence, and did not know how their child would be supported to return to school. The parent told us they were considering legal action against the Department.

Following the complaint, Departmental staff met with the parent to discuss support for the child in a different school, in accordance with the parent's wishes. The Director, Public Schools, worked closely with the Principal and Assistant Principal at the previous school to address the issues raised by the parent and others regarding support and communication. After holding meetings with parents of students in the support unit, the Director set up regular morning teas with parents to improve communication. We monitored the actions of the Department in assessing and managing risks to students following the incident.

### **3. Leadership and a culture of inclusion**

We recognise that adequate resourcing is an important element in schools delivering appropriate and responsive support to students with disability or additional needs. However, we are conscious that funding is not always the primary factor in determining whether a student with disability receives the support they need, or whether there is genuine inclusion and integration in a school.

In this regard, we note that in a range of complaints we have recently handled relating to support for students with disability, there has been a significant improvement in the student's circumstances (including engagement in learning, and inclusion and participation in school life), and a better relationship between the school and the student's family, as a result of a change in schools, or a change in Principal or other school executive personnel. In some cases, the difference has been stark. For example, a student who was frequently and repeatedly suspended, and reportedly excluded from school activities such as sports and excursions due to their behaviour, changed schools on commencing secondary school. Since changing schools, the student has not had the same experience – both the student and their family have reported a remarkable difference in the way they are treated; and the student is engaged in learning and involved in school activities. However, there was no change in the student's support needs, and there was no change in the funded support provided – when the student was asked what had made the difference, they stated '[the school staff] care about me'.

In our recent consultations with parents of students with disability, some have shared similar examples: including notable improvements in student engagement and wellbeing, and inclusion of the student in the school, following a change in school and/or leadership. The importance of school leadership on the experience and outcomes of students overall, and particularly those who require additional support, cannot be overstated. From our consultations, we have been consistently and repeatedly advised that Principals set the tone and culture for the school, and their attitude and views as to what is important and valued flow through the school community. Perhaps the most significant feedback we have received from our consultations is that it is the leaders who demonstrate support for, and strong commitment to, inclusion who provide a solid platform for broader cultural change.

We appreciate the benefits of schools and Principals having greater autonomy under the Local Schools, Local Decisions education reform, and we recognise the work that has been undertaken by the Department to train staff in the Disability Standards for Education.<sup>2</sup> However, there remains a need to ensure that this training is consistently

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<sup>2</sup> We note that the Audit Office of NSW's performance audit report on *Supporting students with disability in NSW public schools* (May 2016) includes a recommendation to encourage more teachers to complete both modules of the disability standards training.

translated into practice, and that Article 24 of the UN Convention on the Rights of Persons with Disabilities – the right to inclusive education – is upheld across all NSW schools. At present, whether a student with disability is able to access a genuinely inclusive education is highly dependent on individual schools and individual leaders.

## **4. Behaviour management**

Issues in relation to behaviour management in schools have featured in many matters brought to our office over an extended period of time, including those involving students with disability. In 2007/08, we conducted an investigation into the Department's policy and procedure for long suspensions, and made a range of recommendations aimed at improving practice in this area.

More recently, we have received information through a range of sources that has raised questions about behaviour management guidance and practice in government and non-government schools, and the associated impact on the educational outcomes of the students concerned. Sources of information have included reportable conduct notifications and complaints to our office; issues raised by external stakeholders, including families, disability advocates, residential out-of-home care providers and Official Community Visitors; and media reports.

Among other things, the information has raised questions about:

- the use of time-out or seclusion rooms and other enclosed spaces
- the use of restrictive practices
- the use of suspensions, partial attendance, and distance education as behaviour management strategies
- staff awareness and implementation of documented behaviour management strategies for individual students
- the adequacy of systems and processes for developing, monitoring and reviewing behaviour management strategies
- the adequacy of training of staff in behaviour management, including positive behaviour support
- access to appropriate guidance and expertise in the development of management strategies
- the adequacy of actions to promote and uphold a culture of inclusion
- the adequacy of guidance and support at the local, regional/district, and sector levels regarding behaviour management
- the adequacy of systems and processes across the school sectors to record, and effectively respond to, complaints and allegations relating to behaviour management practices and related issues, and
- the adequacy of engagement and communication with parents/carers in relation to behaviour management strategies and related issues.

We have therefore initiated an inquiry into behaviour management in government and non-government schools. While the above issues are relevant to all children in schools, they are particularly pertinent for those children with disability who require behaviour support, children in out-of-home care whose past experiences can result in them presenting with behaviour challenges, and other children who have faced trauma and



significant disadvantage, including (but not limited to) those Aboriginal children who have faced these experiences.

The inquiry has three main areas of focus:

1. Best practice in relation to behaviour management in government and non-government school settings.
2. The adequacy of the policy and practice frameworks across NSW government and non-government school sectors in relation to the development, implementation, monitoring and review of evidence-based behaviour management.
3. The adequacy of current complaint management and appeal arrangements across NSW government and non-government school settings in relation to behaviour management practices.

As many of the matters that have been raised with our office relating to behaviour management in schools have involved students with disability, we intend to provide our inquiry report to the Parliamentary Committee in June 2017, to inform its work.

## 5. Reportable conduct involving students with disability

In 1999, a system was established for the Ombudsman to oversight the handling of allegations of a child protection nature against employees of government and certain non-government agencies (the 'reportable conduct' scheme). Part 3A of the Ombudsman Act requires and enables the Ombudsman to:

- **receive and assess notifications** concerning reportable allegations or convictions against an employee
- **scrutinise agency systems** for preventing reportable conduct by employees, and for handling and responding to allegations of reportable conduct and convictions
- **monitor and oversight** agency investigations of reportable conduct
- **respond to complaints** about inappropriate handling of any reportable allegation or conviction against employees
- **conduct direct investigations** concerning reportable allegations or convictions, or any inappropriate handling of, or response to, a reportable notification or conviction
- **conduct audits and education and training** activities to improve the understanding of, and responses to, reportable allegations, and
- **report on trends and issues** in connection with reportable conduct matters.

As at 30 June 2016, 28% of all reportable conduct notifications closed involved a child with disability or additional support needs. Of the notifications involving the education sectors, 19% involved a child with disability or additional support needs.<sup>3</sup>

Under section 25CA of the Ombudsman Act, the Ombudsman may exempt any class or kind of conduct of employees of an agency from being reportable conduct (and therefore exempt them from having to be notified to our office). We have made 'class or kind'

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<sup>3</sup> Data is for the period 1 July 2013 – 30 June 2016

determinations in relation to each of the education sectors. In relation to the Department, the determination exempts certain allegations of physical assault, neglect and ill-treatment from needing to be notified, with a range of exceptions.<sup>45</sup>

At the time that we commenced implementation of the current class and kind determinations with the education sectors, we had not considered the impact the determinations might have on notifications involving children with disability. Recognising the additional vulnerabilities in play, there is an argument that we should require *all* reportable conduct allegations to be notified to our office that relate to children with disability (especially those children who are non-verbal or have other communication difficulties) – particularly conduct involving assault or ill-treatment. However, we note that the resourcing implications of making this decision would be significant. This is because these matters often require intensive work, focused on delivering positive, strong, child-focused outcomes through building and restoring partnerships between parents and school leaders.

## 6. Other matters

In May 2013, we tabled a special report to Parliament on HSC disability provisions, following our investigation involving the (then) Board of Studies and the Department of Education. While the report was largely focused on the disability provisions applications that are made to the (now) NSW Education Standards Authority (NESA), it also noted that:

'Getting it right for students with disabilities and other learning needs should not be about what happens in Year 12 when a student is about to sit their HSC exams. Schools with a strong pastoral care ethos and robust understanding of their obligations under the Disability Discrimination Act identify and make adjustments for students who need learning support and assistance from Year 7. An application during the HSC is then just one element of the ongoing support provided to the student throughout their school career.'

A number of complaints and other contacts with our office have raised questions about the alignment between the process by which schools approve provisions for examinations up to, but excluding, the HSC, and the process followed by NESA for the HSC. In particular, we have handled a number of matters in which schools have made specific provisions for students (such as the use of computers) that were subsequently not approved by NESA, resulting in significant distress to the students and their families, and arguably disadvantage to the students in question.

Subsequent to our investigation recommendations, NESA increased the information on its website regarding the approval process, including revising and expanding the range of case studies it provides, with a focus on why certain provisions may be declined, or alternative provisions approved. However, from the matters raised with us, it is not clear

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<sup>4</sup> For example, no allegation of neglect or ill-treatment need be notified to the Ombudsman unless: a) the allegation is made in connection with other reportable allegation(s) that are not exempted under the determination or with reportable conviction(s); b) the employee is the subject of an incomplete reportable conduct investigation that is being monitored by the Ombudsman; c) the allegation is preceded by a pattern or series of similar allegations; d) the subject employee is at any time charged with a criminal offence in connection with the allegation or a similar allegation(s).

<sup>5</sup> Sexual offences and sexual misconduct allegations must be notified to our office and are not included in any of our class or kind determinations.

that this guidance adequately informs the decisions made by schools regarding provisions for the preceding examinations. We will take a closer look at issues relating to disability provisions for examinations, to ascertain what further work may be required.

Contact: Kathryn McKenzie, Director Disability