

Education Law Notes: Your School and the Law

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Child Protection Case Studies

The NSW Ombudsman released his Annual Report recently. The published case studies provide useful lessons for schools throughout Australia seeking to implement best practice in child protection.

A non-government school investigated allegations that a teacher used inappropriate language and made a sexually inappropriate comment to a student. They sustained the allegations as sexual misconduct and notified the teacher to the CCYP under Category One. We did not agree that the teacher's actions, although inappropriate, met the threshold of reportable conduct. We asked the agency to review their finding and CCYP notification. They amended their finding to 'not reportable conduct' and withdrew the teacher's CCYP notification.

While the outcome was welcome for the teacher, the process was no doubt extremely stressful. We often "coach" school principals as they investigate allegations against staff to ensure they do not end up making basic mistakes.

A high school teacher had a sexual relationship with a 12 year old student over a three year period and was grooming other young students for sexual abuse. The investigation was lengthy and complex due to police involvement, the refusal of the teacher to cooperate with the investigation, and some reluctance by the alleged victim to be formally interviewed. The teacher was on alternative duties to mitigate risks to other students, but there was evidence he may have been grooming other children over the internet. To manage risk to

children while ensuring procedural fairness to the employee, we worked closely with the agency to improve timeliness without compromising the quality of the investigation. Ultimately the agency sustained the allegations and placed the teacher on the list of people never to be employed in NSW government schools.

Risk management is very important when allegations are made against staff. David Ford's paper *Risk Management when faced with Child Abuse Allegations* (download from Education page of our website) is a valuable guide in this area.

In another case study, the Ombudsman noted that he had reviewed the school's policies "which were outdated and contained no clear reference to the Ombudsman's jurisdiction." We continue to be surprised to find outdated and incomplete child protection policies sitting on school shelves. Not only does this put at risk school registration in some states; it also leaves school leaders and teachers in the dark when allegations are made and require investigation. Many NSW schools have solved the problem by investing in Emil Ford's proven Child Protection Policy, saving themselves hundreds of staff hours trying to DIY.

Finally, the Ombudsman notes that technology plays an increasingly significant role in many of the more serious allegations schools are asked to investigate. David Ford has assisted in many investigations involving misuse of technology. Later this month, David is attending Cyberspace 2008 in Europe and presenting a paper on cyber bullying.

New from the ATO

The Australian Taxation Office has released a new online guide to the goods and services tax (GST). The guide is designed to provide not-for-profit organisations, charities and gift-deductible entities with information to help them meet their GST obligations. In particular, the guide covers areas of GST administration that non-profit organisations often have difficulty with. It also provides handy references and links to more detailed GST information.

The ATO has also released a new version of its guide *Fundraising for non-profit organisations*, replacing the one issued in March 2005. The guide explains the tax treatment of various fundraising activities and the concessions available. It also outlines state, territory and local government requirements in relation to fundraising. The new version incorporates changes to the tax law including:

- new tax deductions for gifts and contributions of shares
- new deductible gift recipient (DGR) categories for the relief of victims of disasters
- changes to the gift fund requirements for DGRs
- changes to the limits for tax deductible contributions
- changes to the GST registration turnover and cash accounting thresholds, and
- changes to the fringe benefits tax minor benefits threshold.

Educational Negligence

In a recent English case, Anthony, a young man of 24 with schizophrenia, claimed damages for “educational negligence” by Mr Adams, an educational psychologist employed by the school authority. Anthony said that, when he was aged between 5 and 11:

1. Mr Adams failed to carry out a full and appropriate psychometric test on Anthony;
2. Mr Adams failed to advise that Anthony required intensive in-class specialist support for his language and learning difficulties;

3. Mr Adams’ assessments of Anthony failed to take account of the overwhelming evidence which pointed to language processing difficulties and to investigate accordingly;
4. Mr Adams failed to form the view that Anthony had speech and language difficulties that required a specialist placement in a school for children with speech and language difficulties.

After a detailed review of voluminous evidence, the Court found that these assertions couldn’t be sustained. The Court noted that Mr Adams had done his professional best within the structures created by the difficult circumstances of the late 80s and early 90s.

While the Court was sympathetic to the fact that Anthony had “slipped through the educational net”, this wasn’t the test for determining whether he could be compensated for negligence. There was no breach of duty. Further, even if Anthony had received some appropriate and active intervention, the Court said it could not be satisfied that this would have made the kind of difference that would lead to an award of damages. The evidence was that he was always going to develop schizophrenia and there was no proof that any “better” education than he received would have changed that.

So far, Australian courts have had limited opportunity to deal with an educational negligence claim like this one. A possible reason for this is that there are substantial problems of proof in educational negligence that are not dealt with in other kinds of professional negligence. For an Australian court to find educational negligence, it will need to decide whether the law will allow such a claim, whether the standard of care and its breach are proven and, importantly, whether there is sufficient evidence that the breach caused some quantifiable and particular loss so as to decide precisely what damages flow from the inadequate teaching.

Nevertheless, schools must be mindful of the possibility and should implement appropriate procedures to reduce the risk of an educational negligence claim.

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