

**POLICY**

# Accessible education for students with disabilities



**Ontario  
Human Rights Commission**  
**Commission ontarienne des  
droits de la personne**

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Ontario Human Rights Commission

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## Executive summary

Education is vitally important to a person's personal, social and academic development. Achieving one's education potential affects a person's ability to take part in the labour market, live independently, participate meaningfully in society, and realize their full potential.

The Ontario *Human Rights Code* (*Code*) recognizes the importance of creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person can contribute fully to the development and well-being of the community and the Province. The *Code* guarantees the right to equal treatment in education, without discrimination on the ground of disability, as part of the protection for equal treatment in services. This protection applies to elementary and secondary schools, and colleges and universities, both public and private.

The Ontario Human Rights Commission (OHRC) has recognized for some time that, despite a highly regulated and complex education framework designed to address the "special needs" of students, students with disabilities continue to face obstacles in their attempts to access educational services in Ontario. "Disability" continues to be the most often cited ground of discrimination under the *Code* in human rights claims made to the Human Rights Tribunal of Ontario (HRTO), with significant systemic issues being raised in disability and education claims. Statistics Canada reports that Ontarians with disabilities continue to have lower educational achievement levels, a higher unemployment rate, and are more likely to have low income than people without disabilities.

While there have been some significant gains for people with disabilities in recent years, it is clear that students with disabilities continue to experience difficulties accessing services at all levels of Ontario's education system. Ongoing barriers include:

- ineffective communication to parents and students about their right to accommodation, and their right to be free from discrimination and harassment in education
- inadequate training for education providers on disability-related issues, and the duty to accommodate students with disabilities
- insufficient resources and supports in the classroom
- long waiting lists for assessments
- negative attitudes and stereotypes
- physical inaccessibility

- inappropriate requests for medical information
- ineffective dispute resolution processes
- outright denial of disability-related accommodations.

A student's experience may be further complicated when discrimination based on disability intersects with discrimination based on other grounds under the *Code*, such as race, sex, sexual orientation, age or another type of disability, *etc.* People with disabilities are also more likely to have low incomes than people without disabilities, and many people live in chronic poverty. A student's experience with low income may be highly relevant to understanding the impact of discrimination on a student with a disability, and this may result in specific experiences of discrimination.

Students with disabilities are a diverse group, and experience disability, impairment and societal barriers in many different ways. Disabilities are often "invisible" and episodic, with people sometimes experiencing periods of wellness and periods of disability. All students with disabilities have the same rights to equal opportunities under the *Code*, whether their disabilities are visible or not.

The OHRC is an independent statutory body whose mission is to promote, protect and advance human rights across the province as set out in the *Code*. To do this, the OHRC identifies and monitors systemic human rights trends, develops policies, provides public education, does research, conducts public interest inquiries, and uses its legal powers to pursue human rights remedies that are in the public interest.

The OHRC's policies reflect its interpretation of the *Code*, and set out standards, guidelines and best practice examples for how individuals, service providers, housing providers, employers and others should act to ensure equality for all Ontarians. The OHRC's *Policy on accessible education for students with disabilities* provides practical guidance on the legal rights and responsibilities set out in the *Code* as they relate to the ground of disability in the context of education. In particular, the policy addresses:

- the evolving legal definition of disability, and its implications for education providers
- the impact of ableism on the delivery of education and on the experiences of students with disabilities
- recognition of the central importance of inclusive design in the education context
- an emphasis on accommodations that promote integration and full participation



## Policy on accessible education for students with disabilities

- recognition that students with disabilities are individuals first, and should be considered, assessed and accommodated on an individual basis
- acknowledgement of the unique ways in which students who identify by the ground of disability, along with one or more additional *Code* grounds (e.g. race, ancestry, sex, sexual orientation, etc.) may experience discrimination (i.e. the concept of “intersectionality”)
- the duty of education providers, in certain circumstances, to inquire into whether a student has needs related to a disability, and to offer assistance and accommodation, even if the student has not made a specific accommodation request
- the type of medical/healthcare information that can be requested by education providers and should be provided by students to support an accommodation request
- the principle that accommodation is a responsibility shared by all parties to the process
- a reaffirmation of the high standard of undue hardship.

Educational institutions operating in Ontario have a legal duty to take steps to prevent and respond to breaches of the *Code*. This responsibility includes maintaining accessible, inclusive, discrimination and harassment-free education environments that respect human rights. It is not acceptable to choose to stay unaware of discrimination or harassment of a student with a disability, whether or not a human rights claim has been made.

The OHRC’s *Policy on accessible education for students with disabilities* will help education providers recognize and fulfil their obligations under the *Code*, design their facilities, policies and procedures more inclusively, respond appropriately and in a timely way to accommodation requests, and effectively address complaints related to disability before they escalate to human rights claims made to the HRTO.

The OHRC’s Recommendations to key education players to improve educational outcomes for students with disabilities are set out Appendix A. Students with disabilities deserve to feel that they are valued and that they belong. Ontario’s success and prosperity as a province depends upon its ability to ensure that all students are given the opportunity to reach their full potential and contribute meaningfully to their communities. Ontario’s educational institutions play a crucial role in achieving this objective.

## 1. Introduction

Education is vitally important to a person's personal, social and academic development. Achieving one's education potential affects a person's ability to take part in the labour market, realize their full potential, live independently, and participate meaningfully in society. A positive experience in elementary and secondary school increases a person's chances of going on to post-secondary education. Having post-secondary education is becoming increasingly important to a person's ability to attain a decent standard of living. Employment and Social Development Canada projects that two-thirds of job openings from 2011-2020 will be in occupations that generally require post-secondary education.<sup>1</sup>

School is the place where most children have their first interaction with a government institution or system. What students learn and experience in school will shape their perceptions – and expectations – of all other government systems. If students get the right start, they will learn to respect and support one another. They will feel included and see other government systems as supports, not barriers. Getting the wrong start in education can predispose children to think government systems and social services do not serve their interests, or even that they are designed specifically to entrench power and privilege, and maintain the status quo. This can lead to broader mistrust, suspicion, and exclusion from society.

The Ontario *Human Rights Code*<sup>2</sup> (*Code*) recognizes the importance of creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person can contribute fully to the development and well-being of the community and the Province. The *Code* guarantees the right to equal treatment in education, without discrimination on the ground of disability, as part of the protection for equal treatment in services. This protection applies to elementary and secondary schools, and colleges and universities, both public and private.

The Ontario Human Rights Commission (OHRC) has recognized for some time that, despite a highly regulated and complex education framework designed to address the “special needs” of students, a significant number of students with disabilities continue to face obstacles in their attempts to access educational services in Ontario. In 2003, the OHRC published *The opportunity to succeed: Achieving barrier-free education for students with disabilities*. The OHRC followed up this report in 2004 with the *Guidelines on accessible education (Guidelines)*, a comprehensive policy

document providing guidance to education providers<sup>3</sup> and students with disabilities on how to fulfil their duties and rights under the *Code*.

Since the release of the *Guidelines*, the OHRC has continued to use its mandate to address human rights issues facing students with disabilities. In 2005, the OHRC filed human rights claims against the Toronto District School Board and the Ministry of Education related to concerns that the “zero tolerance” approach of the *Education Act* was having a disproportionate effect on students with disabilities and racialized students. The OHRC negotiated settlements in both claims, which resulted in amendments to the *Education Act* that require principals and school boards to consider mitigating factors before suspending or expelling students. The Ministry also mandated the creation of alternative education programs for suspensions of longer than five days, and introduced new Policy and Program Memoranda on progressive discipline.

In 2012, the OHRC intervened in *Moore*,<sup>4</sup> a landmark Supreme Court of Canada case that dealt with the denial of meaningful access to education by a student with dyslexia. In 2015, we intervened in a human rights claim filed against York University that raised issues related to the type of medical documentation that needs to be provided to support a request for accommodation of a mental health disability. We worked with the university and the student who filed the discrimination claim to develop new documentation guidelines to access academic accommodations.<sup>5</sup> And, in 2017, we published *With learning in mind*,<sup>6</sup> an inquiry report on systemic barriers to academic accommodation for post-secondary students with mental health disabilities. We continue to engage in public education, communication, training, and promoting human rights throughout the education sector.

While there have been some significant gains<sup>7</sup> for people with disabilities in recent years, serious barriers to equality continue to exist throughout society, including in Ontario’s education system.<sup>8</sup> “Disability” continues to be the most often cited ground of discrimination under the *Code* in human rights claims made to the Human Rights Tribunal of Ontario (HRTO),<sup>9</sup> with significant systemic issues being raised in disability and education claims. Statistics Canada reports that Ontarians with disabilities continue to have lower educational achievement levels, a higher unemployment rate, and are more likely to have low income than people without disabilities.<sup>10</sup>

It is clear that students with disabilities continue to experience difficulties accessing services at all levels of the education system. Inadequate resources and supports in the classroom, long waiting lists for assessments, negative attitudes and stereotypes, physical inaccessibility, inappropriate requests for medical information, ineffective dispute resolution processes, and outright denial of disability-related accommodations are some of the barriers that many students with disabilities continue to experience in their attempts to get an education.

The *Policy on accessible education for students with disabilities*, 2018 updates the 2004 *Guidelines on accessible education* to take into account current social science research, case law developments, legislation and international human rights obligations.<sup>11</sup> The OHRC has maintained its policy positions in key areas, including:

- a definition of disability that recognizes the impact of “social handicapping”
- an emphasis on accommodations that promote integration and full participation
- recognition of the central importance of inclusive design in the education context
- recognition that students with disabilities are individuals first, and should be considered, assessed and accommodated on an individual basis
- acknowledgement of the unique ways in which students who identify by the ground of disability, along with one or more additional *Code* grounds (e.g. race, ancestry, sex, sexual orientation, etc.) may experience discrimination (i.e. the concept of “intersectionality”)
- the principle that accommodation is a responsibility shared by all parties to the process
- a reaffirmation of the high standard of undue hardship.

This policy also addresses new and emerging issues in the area of disability and education, including:

- the impact of ableism on the delivery of education and on the experiences of students with disabilities
- the evolving legal definition of disability, and its implications for education providers
- the duty of education providers, in certain circumstances, to inquire into whether a student has needs related to a disability, and to offer assistance

and accommodation, even if the student has not made a specific accommodation request

- the type of medical/healthcare information that can be requested by education providers and should be provided by students to support an accommodation request.

It is the OHRC's intention that the *Policy on accessible education for students with disabilities, 2018* will help education providers recognize and fulfil their obligations under the *Code*, design their facilities, policies and procedures more inclusively, respond appropriately and in a timely way to accommodation requests, and effectively address complaints related to disability. The policy can also help students and their families understand their rights and responsibilities under the *Code*, clarify what it means to take part appropriately in the accommodation process, and know where to find further resources.

## **2. Legal framework**

Education is a complex field, governed by many statutes and regulations, regulated by several government ministries, and involving many players. The OHRC's mandate is with respect to the human rights aspects of educational services, and what can properly be considered "discrimination" within the meaning of human rights law and policy. Not all aspects of education, or even of special education, fall within this mandate.

### **2.1 Ontario Human Rights Code**

#### **2.1.1 Protections**

Under section 1 of the *Code*, people with disabilities are protected from discrimination in "services." This protection includes education services.<sup>12</sup>

Section 9 of the *Code* prohibits both direct and indirect discrimination. Section 11 states that discrimination includes constructive or adverse effect discrimination, where a requirement, policy, standard, qualification, rule or factor that appears neutral excludes or disadvantages a group protected under the *Code*.<sup>13</sup>

Students with disabilities are also covered by the *Code* under section 8 if they experience reprisal or are threatened with reprisal for trying to exercise their human rights.<sup>14</sup>

People are also protected from discrimination based on their association with someone with a disability (Section 12). This could apply to friends, family or others – for example, someone advocating on behalf of a student with a disability.<sup>15</sup>

### 2.1.2 Defences and exceptions

The *Code* includes specific defences and exceptions that allow behaviour that would otherwise be discriminatory. An education provider that wishes to rely on these defences and exceptions must show it meets all of the requirements of the relevant section.

Where discrimination results from requirements, qualifications or factors that may appear neutral, but that have an adverse effect on students with disabilities, section 11 allows the education provider to show that the requirement, qualification or factor is reasonable and *bona fide*.<sup>16</sup> They must also show that the needs of the student affected cannot be accommodated without undue hardship.<sup>17</sup>

Section 14 of the *Code* protects “special programs” that are designed to address the historical disadvantage experienced by people identified by the *Code*. As a result, it is likely not discriminatory to implement programs designed specifically to assist students with disabilities, as long as an organization can show that the program is:

- designed to relieve hardship or economic disadvantage
- designed to help the disadvantaged group to achieve or try to achieve equal opportunity, or
- likely to help eliminate discrimination.

Section 17 sets out the duty to accommodate people with disabilities. It is not discriminatory to refuse an educational service because the student is incapable of fulfilling the essential requirements. However, a student will only be considered incapable if their disability-related needs cannot be accommodated without undue hardship.

Under section 18 of the *Code*, organizations such as charities, schools, social clubs, sororities or fraternities that want to limit their right of membership and involvement to people with disabilities can do this on the condition that they serve mostly people from this group.<sup>18</sup>

## 2.2 Education legislation

### 2.2.1 Primary and secondary education

The *Education Act*<sup>19</sup> and its accompanying regulations set out a structure for identifying and accommodating the “special needs” of students in Ontario’s publicly funded primary and secondary school system.

Under the *Education Act*, the Ministry of Education is responsible for ensuring that all “exceptional” children in Ontario have available to them appropriate special education programs and services, without payment of fees. The Ministry has required school boards to implement procedures for identifying the special needs of students, and for setting standards for identification procedures.

Section 1 of the *Act* defines an “exceptional pupil” as one “whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program.”

The principal of a school may, by his or her own decision, or at the request of a parent, refer a child to an Identification and Placement Review Committee (IPRC) for a decision on whether the child is “exceptional,” and if so, whether the child should be placed in a regular classroom with supports, or in a special education class.<sup>20</sup> In making these decisions, the IPRC shall consider educational, health and psychological assessments, as well as information submitted by the parents. The IPRC can also interview the student. Where placement in a regular classroom would meet the child’s needs and is consistent with parental preferences, the IPRC must place the child in the regular classroom.

The IPRC also has the power to make recommendations about special education programs and services for the student, but does not have decision-making power in this respect. Parents may appeal the decision of an IPRC regarding a determination of exceptionality, or the placement of a student to the Special Education Appeal Board. Recommendations on programs and services cannot be appealed.

If the decision of the IPRC is not appealed, the principal of the school the student will attend is notified to prepare an Individual Education Plan (IEP) for the student.<sup>21</sup> IEPs include the specific educational expectations for the student, an outline of the special education programs and services to be provided to the student, and a statement of the methods for reviewing the student's progress. For students aged 14 and over, the IEP must also contain a plan for transition to appropriate post-secondary school activities. In developing the plan, the principal must consult with the student's parent (or with the student, if they are aged 16 or older), and must consider any recommendations made through the IPRC process.<sup>22</sup>

It is important to note that, while the Ministry of Education has devised its own framework for identifying "exceptional pupils," it is the Ontario *Human Rights Code* and human rights case law that establishes that education providers have a legal duty to accommodate the disability-related needs of students to the point of undue hardship. This legal duty exists whether or not a student with a disability falls within the Ministry's definition of "exceptional pupil,"<sup>23</sup> and whether or not the student has gone through a formal IPRC process, or has an IEP.

**Example:** The OHRC has heard concerns from parents and advocacy organizations that some Ministry of Education documents fail to specifically name ADHD as an "exceptionality" and that, as a result, some education providers are failing to provide accommodation for this condition.<sup>24</sup> The definition of disability in the *Code*, and as interpreted in human rights case law, is broader than the Ministry of Education exceptionality categories. For example, human rights jurisprudence has explicitly recognized ADHD as a disability requiring accommodation under the *Code*.<sup>25</sup>

It is important to note that the *Code* has primacy over other legislation, including the *Education Act*.<sup>26</sup> This means that where there is an inconsistency between the *Code* and the *Education Act*, the *Code* will prevail.<sup>27</sup> And, in one case, the HRTO found that the Ministry of Education could be potentially liable for discrimination where its definition of exceptionalities prevented or delayed a student from receiving required accommodations.<sup>28</sup>



### **2.2.2 Post-secondary education**

Post-secondary education in Ontario is provided by a wide range of public and private institutions, including publicly funded universities and colleges, private vocational schools, and privately funded degree-granting institutions. The Ministry of Training, Colleges and Universities is responsible for post-secondary education in Ontario.

The accommodation of students with disabilities at the post-secondary level is not subject to the same detailed legislative structures as at the primary and secondary levels. Accommodation of students with disabilities is governed by the Canadian *Charter of Rights and Freedoms (Charter)*, and by provincial human rights statutes. Post-secondary institutions have developed a wide range of delivery methods and structures to meet these obligations, and colleges and universities have offices for students with disabilities to assist students with the accommodation process.

### **2.3 Canadian *Charter of Rights and Freedoms***

The *Charter* guarantees people's civil, political and equality rights in the policies, practices and legislation of all levels of government. The *Charter* applies to publicly-funded schools, colleges and universities. While human rights legislation in Canada is considered quasi-constitutional, it is subject to and must be considered in light of the *Charter*.<sup>29</sup>

Section 15 guarantees the right to equal protection under the law and equal benefit of the law, without discrimination based on disability, among other grounds. The equality rights guarantee in section 15 of the *Charter* is similar to the purpose of the *Code*.<sup>30</sup> Governments must not infringe *Charter* rights unless violations can be justified under section 1, which considers whether the *Charter* violation is reasonable in the circumstances.

### **2.4 *Accessibility for Ontarians with Disabilities Act***

Education providers also have obligations under the *Accessibility for Ontarians with Disabilities Act, 2005 (AODA)*, and its Integrated Accessibility Standard Regulations.<sup>31</sup> The *AODA* aims to address the right to equal opportunity and inclusion for people with disabilities throughout society. The *AODA*'s goal is to make Ontario fully accessible

by 2025. It introduces a series of standards (customer service, transportation, built environment, employment, and information and communications)<sup>32</sup> that public and private organizations must implement within certain timelines.

The *AODA* is an important piece of legislation for improving accessibility in the lives of people with disabilities. It complements the Ontario *Human Rights Code*, which has primacy over the *AODA*. The development and implementation of standards under the *AODA* must have regard for the *Code*, related human rights principles, and case law.<sup>33</sup> Compliance with the *AODA* does not necessarily mean compliance with the *Code*. Education providers must follow both. For example, even where an education provider meets all of its obligations under the *AODA*, it will still be responsible for making sure that discrimination and harassment based on disability do not take place in its operations, that it responds to individual accommodation requests, *etc.*

## **2.5 Convention on the Rights of Persons with Disabilities**

The United Nations' *Convention on the Rights of Persons with Disabilities (CRPD)* is an international treaty designed to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."<sup>34</sup> Canada ratified the *CRPD* in 2010. Under Article 24, the *CRPD* specifically recognizes the right of people with disabilities to education without discrimination and on the basis of equal opportunity.

International treaties and conventions are not part of Canadian law unless they have been implemented through legislation.<sup>35</sup> However, the Supreme Court of Canada has stated that international law helps give meaning and context to Canadian law. The Court said that domestic law (which includes the *Code* and the *Charter*) should be interpreted in a manner consistent with Canada's international commitments.<sup>36</sup>

The *CRPD* is an important human rights tool that puts positive obligations on Canada to make sure that people with disabilities have equal opportunity in all areas of life, including education. To meet the obligations under the *CRPD*, Canada and Ontario should make sure that adequate and appropriate community supports

and accommodations are in place to allow for equal opportunities for students with disabilities, and should evaluate legislation, standards, programs and practices to make sure rights are respected.<sup>37</sup>

### **3. Scope of application**

#### **3.1 Education is a “service” under the *Code***

Section 1 of the *Code* guarantees the right to equal treatment in services, without discrimination on the ground of disability. Education, in its broadest sense, is a “service” within the meaning of the *Code*.<sup>38</sup> The scope of “educational services” will include the mastery of knowledge, academic standards, evaluation and accreditation. It may also encompass the development of a student’s personality, talents, and mental and physical abilities to their fullest potential, and may include co-instructional activities such as school-related sports, arts and cultural activities, and school functions and field trips. At the lower grade levels, the service of education will typically be defined more broadly and may include the student’s overall social, physical and academic development in the education setting. At the higher levels of education, formal education services will be defined more narrowly and will focus increasingly on academic standards and accreditation.

#### **3.2 Applies to public and private education institutions**

The right to equal treatment and the duty to accommodate exist for publicly funded and privately funded<sup>39</sup> early childhood pre-schools (*i.e.* daycares), elementary and secondary schools, colleges and universities. This includes special schools such as hospital schools, care and treatment programs, schools in correctional facilities, and provincial schools.<sup>40</sup> It would also include separate schools, French-language schools, trade, business and professional accreditation courses, and, depending on the context, may also include experiential learning placements (*i.e.* “co-ops,” practicums, fieldwork).<sup>41</sup>

### **4. What is disability?<sup>42</sup>**

The term “disability” covers a broad range and degree of conditions. A disability may have been present at birth, caused by an accident, or developed over time. Section 10 of the *Code* defines “disability” as:

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental impairment or a developmental disability,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.

“Disability” includes both present and past conditions, as well as a subjective component, namely, one based on perception of disability.<sup>43</sup> It is the OHRC’s position that anticipated disabilities are also covered by the *Code*.<sup>44</sup> This would apply where a student does not currently have a disability, but they are treated adversely because of a perception that they will eventually develop a disability, become a burden, pose a risk, and/or require accommodation. The focus should always be on the current abilities of a student and the situation’s current risks rather than on limitations or risks that may or may not arise in the future.<sup>45</sup>

Although sections 10(a) to (e) of the *Code* set out various types of conditions, it is clear that they are merely illustrative and not exhaustive. It is also a principle of human rights law that the *Code* be given a broad, purposive and contextual interpretation to advance the goal of eliminating discrimination.<sup>46</sup>

A disability may be the result of combinations of impairments and environmental barriers, such as attitudinal barriers, inaccessible information, an inaccessible built environment or other barriers that affect a student’s full participation in the educational context.

The *CRPD* recognizes that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and

environmental barriers that hinder their full and effective participation in society on an equal basis with others.”<sup>47</sup>

This approach, often called the “social approach” to disability, or the “social model” of disability,<sup>48</sup> is also reflected in Supreme Court of Canada decisions. In a landmark human rights case, the Court used an equality-based framework of disability that took into account evolving biomedical, social and technological developments, and emphasized human dignity, respect and the right to equality. The Court made it clear that disability must be interpreted to include its subjective component, as discrimination may be based as much on perceptions, myths and stereotypes, as on the existence of actual functional limitations. The Court said:

[A] “handicap” may be the result of a physical limitation, an ailment, a social construct, a perceived limitation, or a combination of all these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a “handicap” for the purposes of the *Charter*.<sup>49</sup>

The focus should be on the effects of the distinction, preference or exclusion experienced by the student. In another case,<sup>50</sup> the Supreme Court of Canada confirmed that “social handicapping,” that is, society’s response to a real or perceived disability, should be the focus of the discrimination analysis. The social model of disability articulated by the Supreme Court of Canada has been followed in appellate court<sup>51</sup> and HRTO decisions.<sup>52</sup>

Disabilities may be temporary,<sup>53</sup> sporadic or permanent.

**Example:** In one case, the HRTO stated, “I...disagree with the assertion that in order to constitute a disability, the condition must have an aspect of permanence and persistence.” In that case, the HRTO found that injuries resulting from a slip and fall that took almost three weeks to heal, and a miscarriage, both constituted disabilities within the meaning of the *Code*.<sup>54</sup>

People’s experience of disability may result from bodily or mental impairments, or from limitations arising from impairments that affect people’s ability to function in certain areas of living.<sup>55</sup> However, people may not experience any limitations even when they have a medical diagnosis.<sup>56</sup>

Human rights decision-makers and education providers should consider how students with disabilities define their own experiences and related needs, as part of understanding the student's disability for the purposes of the *Code*.<sup>57</sup> At the same time, when determining if the student has had their rights violated under the *Code*, a human rights decision-maker may find it reasonable for an education provider to seek out objective information about the student's disability-related needs. This could include information setting out the student's needs and limitations from a third party, such as a medical or healthcare professional.<sup>58</sup>

#### 4.1 Ableism, negative attitudes, stereotypes and stigma

An "ableist" belief system often underlies negative attitudes, stereotypes<sup>59</sup> and stigma<sup>60</sup> toward students with disabilities. "Ableism" refers to attitudes in society that devalue and limit the potential of people with disabilities. According to the Law Commission of Ontario:

[Ableism] may be defined as a belief system, analogous to racism, sexism or ageism, that sees persons with disabilities as being less worthy of respect and consideration, less able to contribute and participate, or of less inherent value than others. Ableism may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture of a society. It can limit the opportunities of persons with disabilities and reduce their inclusion in the life of their communities.<sup>61</sup>

Ableist attitudes are often premised on the view that disability is an "anomaly to normalcy," rather than an inherent and expected variation in the human condition.<sup>62</sup> A great deal of discrimination faced by students with disabilities is underpinned by social constructs of "normality" which in turn tend to reinforce obstacles to integration rather than encourage ways to ensure full participation.<sup>63</sup>

"Everyone has a different normal. I used to think I was dumb and stupid but now I don't think that anymore."

– *Anonymous*, Student<sup>64</sup>

The belief that disability is an abnormality has been used to rationalize the exclusion, neglect, abuse and exploitation of people with disabilities in various different contexts. It may also inform paternalistic and patronizing behaviour toward students with disabilities.

Discrimination against people with disabilities is often linked to prejudicial attitudes,<sup>65</sup> negative stereotyping, and the overall stigma surrounding disability. All of these concepts are interrelated. For example, stereotyping, prejudice and stigma can lead to discrimination. The stigma surrounding disability can also be an effect of discrimination, ignorance, stereotyping and prejudice.

In its own consultations with people with disabilities, the Law Commission of Ontario reported:

...many participants talked about the suspicion and often contempt with which persons with disabilities are treated when seeking services and supports. Services which are designed to assist persons with disabilities in meeting their basic needs or improving their autonomy, independence and participation may in practice be implemented through an adversarial mindset, which assumes that those seeking services are attempting “to game” the system, or obtain benefits to which they are not entitled. This is particularly the case for persons with disabilities who are also poor.<sup>66</sup>

Students with disabilities may be perceived to be a “burden” on the educational system, teachers, instructors, fellow students, *etc.* Students with disabilities at the post-secondary level may be stereotyped as “child-like” and unable to make decisions in their own best interests. Where stigma, negative attitudes and stereotyping result in discrimination, they will contravene the *Code*.

Education providers have a legal obligation under the *Code* to not discriminate against students with disabilities, and to eliminate discrimination when it happens. These obligations apply in situations where discrimination is direct and the result of a person’s internal stereotypes or prejudices. They also apply when discrimination is indirect and may exist within and across educational institutions because of laws, policies and unconscious practices.

Stigma, negative attitudes and stereotypes can lead to inaccurate assessments of students’ personal characteristics. They may lead educational institutions to

develop policies, procedures and decision-making practices that exclude or marginalize students with disabilities. They can also create barriers for students with disabilities, with some students not feeling welcome or included in class activities, or social situations at school.

**Example:** A university professor asked a Deaf student to sit at the back of the lecture hall, so that his interpreter didn't distract the other students. The student was also told that he will not have interpreters in the "real world" so why should he get to have one at university.<sup>67</sup>

Education providers must take steps to make sure that negative attitudes, stereotypes and stigma do not result in discriminatory behaviour toward or treatment of students with disabilities.

**Example:** A university arranges sensitivity training for all faculty and academic staff on issues facing students with learning disabilities. The training focuses on creating greater awareness of different learning needs and addressing misperceptions and misinformation which in themselves can create barriers to equal access to educational services.

After conducting a consultation with students and their families, Ontario's Provincial Advocate for Children and Youth reported: "Students with learning disabilities told us that no one explained their 'learning disability' to them so they never understood that their way of learning was different from their peers. Without this awareness they just felt that something was 'wrong' with them or they found themselves isolated from their peers and felt 'stupid.' This fear of being 'different' became a cause of failure on its own as they struggled with why it took them longer to learn when their peers seem to learn so easily."<sup>68</sup>

## 4.2 Accounting for non-evident disabilities

Part of creating a welcoming learning environment involves being sensitive to the many ways a student's disability might manifest and the unique needs that may arise as a result. Some types of disabilities are not apparent to the average onlooker. This can be because of the nature of the specific disability in question: it may be episodic, its effects may not be visible, or it may not manifest consistently in all environments.



Other disabilities may become apparent based on the nature of the interaction, such as when there is a need for oral communication with a student who has hearing loss or a speech and language disability, or there is a need for written communication with someone who has dyslexia. A disability might reveal itself over time through extended interaction. It might only become known when a disability accommodation is requested, or the disability might remain “non-evident” because the student chooses not to divulge it for personal reasons.

**Example:** A young woman receives a breast cancer diagnosis in the middle of her spring semester at university. Because she is able to arrange her treatments so that they occur over the summer break, she does not require any academic accommodation and does not disclose her medical condition to anyone at the university.

In other cases, disclosing a disability may not be necessary because the disability may not have an impact upon a student’s study. This will especially be the case where educational institutions have designed their technology structures, curricula, programs and services inclusively, and adaptation or modification to meet the needs of students with disabilities is therefore unnecessary.<sup>69</sup>

Other examples of non-evident disabilities include mental health disabilities, learning disabilities, chronic fatigue syndrome, environmental sensitivities, diabetes, anaphylaxis and epilepsy.

Students with non-evident disabilities often face unique challenges in the education system. Because these disabilities are not “seen,” many of them are not well understood in society. This can lead to behaviour based on misinformation and ignorance, and may lead to a student’s disability being mislabeled and misunderstood.

**Example:** People who are deaf, deafened or hard of hearing are often misperceived as having mental health disabilities, even where this is not the case.<sup>70</sup>

For some students, requesting an accommodation may be especially difficult if a teacher or professor doubts the authenticity of the request because they cannot “see” it.<sup>71</sup>

Sensitivity and informed understanding on the part of educators, school staff, and fellow students can combat stereotypes, stigma and prejudice, all of which can have a discriminatory effect on students with non-evident disabilities.

#### 4.2.1 Mental health disabilities and addictions

Mental health disability is a form of non-evident disability that raises unique issues in the educational context.<sup>72</sup> Students with mental health disabilities and addictions may face a high degree of stigmatization and significant barriers. Stigmatization can foster a climate that exacerbates stress, and may trigger or worsen the student's condition. It may also mean that someone who has a problem and needs help may not seek it, for fear of being treated negatively. Much misinformation continues to exist about mental illness and too often people with mental health disabilities and addictions are labelled and judged according to inaccurate preconceptions and assumptions. Rules, preconditions, policies or practices that treat students with mental health disabilities and addictions differently from other people with disabilities may be discriminatory on their face.<sup>73</sup>

The distinct and serious issues faced by people with mental health disabilities and addictions prompted the OHRC to hold a province-wide consultation specifically on discrimination based on mental health. In 2012, the OHRC published its findings in a consultation report entitled *Minds that matter: Report on the consultation on human rights, mental health and addictions*.<sup>74</sup> The OHRC relied on these findings, as well as on developments in the law, international trends and social science research to inform its Policy on preventing discrimination based on mental health disabilities and addictions, which was released in 2014.<sup>75</sup> In 2015, the OHRC published *By the numbers: A statistical profile of people with mental health and addiction disabilities in Ontario*.<sup>76</sup> And in 2016, the OHRC conducted an inquiry into systemic barriers to post-secondary education for students with mental health disabilities. The findings of this inquiry were published in 2017 in *With learning in mind: Inquiry report on systemic barriers to academic accommodation for post-secondary students with mental health disabilities*.<sup>77</sup>

Education providers should educate themselves, school staff and students about non-evident disabilities, so they can provide a welcoming and safe environment for all students with disabilities. Schools should ensure that all students are provided with learning opportunities that foster an awareness and appreciation of diversity issues in the education environment, and combat negative attitudes and stereotypes.

Post-secondary institutions often find themselves on the front line in dealing with young adults who are facing mental health challenges. Research indicates that 75% of mental health disorders first appear in people between the ages of 18 and 24.<sup>78</sup> Colleges and universities across Ontario have reported a dramatic increase in the number of students experiencing mental health issues on campus in recent years.<sup>79</sup>

The Spring 2016 *National College Health Assessment (NCHA)*, a national online survey that collects information on students' health behaviours, attitudes and perceptions, indicated that depression, anxiety and suicide attempts are increasing among Ontario's post-secondary students:

- 46% of students reported feeling so depressed in the previous year it was difficult to function (increased from 40% in 2013)
- 65% of students reported experiencing overwhelming anxiety in the previous year (up from 58% in 2013)
- 14% had seriously considered suicide in the previous year (up from 11% in 2013)
- 2.2% of students reported a suicide attempt within the previous year (up from 1.5% in 2013)
- 9% indicated that they had attempted suicide, but not in the previous year.<sup>80</sup>

In its consultations with education stakeholders, the OHRC heard that post-secondary institutions have worked hard to make their services accessible, and to better accommodate increasing numbers of students with mental health disabilities. Nonetheless, systemic barriers to accommodating post-secondary students with mental health disabilities persist.<sup>81</sup> Given the unprecedented rise in requests for mental health-related accommodations on campuses across Ontario, it is crucial that the government take steps to make sure that post-secondary institutions are properly supported. It can do this by putting in place the necessary mental health services to meet the increased demand, and making sure there is coordination and continuity between all organizations that play a role in ensuring that young adults receive appropriate mental health support in a timely manner.

### **4.3 Evolving legal definition of disability**

Human rights law is constantly developing, and certain conditions, characteristics or experiences that have not historically been recognized as disabilities, may come to be commonly accepted as such due to changes in the law reflecting medical, social or ideological advancements.

Over time, new disabilities may emerge that take time to be widely recognized and well-understood. For example, in recent years, there have been reports of an increase in food-related anaphylaxis.<sup>82</sup> In Ontario, *Sabrina's Law* came into effect in June 2006.<sup>83</sup> This legislation requires every school board in Ontario to establish and maintain an anaphylaxis policy. It also requires school principals to develop an individual plan for each student at risk of anaphylaxis.<sup>84</sup> Human rights case law has recognized that anaphylaxis is a disability under the *Code*.<sup>85</sup> Therefore, education providers have a legal responsibility to accommodate students with potentially life threatening allergies, as they would any other person with a disability, to the point of undue hardship.

**Example:** A school board develops a comprehensive food allergy policy that includes procedures for training staff in dealing safely with food allergies, including how to recognize symptoms of anaphylaxis and respond appropriately to possible emergencies. Local schools are required to hold information sessions for parents and students to raise awareness about life-threatening food allergies and the importance of including all students in school activities, including students with anaphylaxis.

In some cases, the law is still not clear on whether certain conditions are disabilities within the meaning of the *Code*. It is important to note that even where human rights law has not recognized a specific condition as a disability, the *Code's* protections will be engaged if a student is perceived to have a disability,<sup>86</sup> or perceived to have functional limitations as a result.

Education providers should be aware that new and emerging disabilities may not yet be well-understood. In general, the meaning of disability should be interpreted broadly. It may be more challenging for a student with a less-recognized disability to have their disability verified by their family doctor, for example. It may be necessary for an education provider to consult with a specialist with expertise in the disability in question. The focus should always be on the needs and limitations of the student requesting the accommodation, rather than on a specific diagnosis.<sup>87</sup>

#### 4.4 When disability intersects with other *Code* grounds

Discrimination may be unique or distinct when it occurs based on two or more *Code* grounds. Such discrimination is said to be “intersectional.” The concept of intersectional discrimination recognizes that students’ lives involve multiple interrelated identities, and that marginalization and exclusion based on *Code* grounds may exist because of how these identities intersect.<sup>88</sup>

For example, the United Nations’ Committee on the Rights of Persons with Disabilities has noted the effects of intersectional discrimination on girls and women in school:

Intersectional discrimination and exclusion pose significant barriers to the realization of the right to education for women and girls with disabilities. States parties must identify and remove those barriers, including gender-based violence and the lack of value placed on the education of women and girls, and put in place specific measures to ensure that the right to education is not impeded by gender and/or disability discrimination, stigma or prejudice. Harmful gender and/or disability stereotypes in textbooks and curricula must be eliminated. Education plays a vital role in combating traditional notions of gender that perpetuate patriarchal and paternalistic societal frameworks. States parties must ensure access for and the retention of girls and women with disabilities in education and rehabilitation services, as instruments for their development, advancement and empowerment.<sup>89</sup>

In 2017, the OHRC’s Chief Commissioner wrote to the Minister of Education to highlight the intersectional needs of First Nations students with disabilities, particularly in relation to Ontario’s role in First Nations special education. The OHRC’s letter supported the concerns raised by, and the recommendations included in, the May 2017 Ontario First Nations Special Education Review Report.<sup>90</sup> Among other things, this report identifies serious human rights concerns with Ontario’s approach to First Nations children with special education needs attending provincial schools, and off-reserve First Nations students who wish to attend First Nations schools. Concerns include inequitable access to special education funding that directly affects the services available to First Nations children with special needs.<sup>91</sup>

Discrimination based on a disability could intersect with discrimination based on other *Code* grounds, including:

- race, colour or ethnic background
- creed (religion)
- ancestry (including Indigenous ancestry)
- citizenship (including refugee or permanent resident status)
- gender identity and gender expression
- sex (including pregnancy)
- family status
- marital status (including people with a same sex partner)
- another type of disability, including mental, learning, cognitive and intellectual disabilities
- sexual orientation
- age.

People with disabilities are also more likely to have low incomes than people without disabilities, and many people live in chronic poverty. A student's experience with low income may be highly relevant to understanding the impact of discrimination on a student with a disability, and this may result in specific experiences of discrimination.

Education providers should take steps to make sure that participating in education, particularly at the post-secondary level, is not more financially onerous for students with disabilities (and their families). For example, students with disabilities should not experience negative financial consequences if they opt to study part-time as a result of their disability, or take a disability-related leave of absence.<sup>92</sup>

As part of the duty to maintain environments that are free from discrimination and harassment, education providers must take steps to design their programs, policies and environments inclusively, to take into account the needs of students from diverse backgrounds, with a range of unique identities.

**Example:** A university organization providing support services to lesbian, gay, bisexual and transgender students ensures that its literature is available in alternative formats that are accessible to students with visual disabilities.

Education providers should also take steps to make sure that their faculty and staff members have cultural competency skills.<sup>93</sup> The ability to interact comfortably and effectively with students from diverse cultural backgrounds is an important first step towards recognizing and meeting the human rights-related needs of different populations, including students with disabilities who also identify by other *Code* grounds.

Education providers should use an individualized approach that recognizes each student's unique identity and the fact that each student is uniquely situated to understand their own needs.

The OHRC is also concerned about reports of students being “streamed” into particular programs based on stereotypical assumptions about their capabilities due to their identification with the *Code* grounds of disability and race. For example, research indicates that in some jurisdictions, a disproportionate number of racialized students are put into special education classes, due to a perception that they have a disability.<sup>94</sup> Education providers need to ensure that unconscious biases and negative stereotypes are not influencing assessments of a student's capabilities.

Education providers need to be aware of the impact of discipline policies and practices on students who have or are perceived to have disabilities, and who are racialized. The OHRC has challenged the negative impact of such policies in the past, and will continue to be alert to situations where the intersection of these grounds negatively affects a student's access to education.

Education providers must ensure that testing and evaluation materials and procedures used to grade and place students with disabilities are not selected or implemented in a way that is racially or culturally biased, and do not otherwise infringe the rights protected by the *Code*.

Language can also be a factor in discrimination based on related *Code* grounds such as ancestry, ethnic origin, place of origin, race, citizenship and creed. Francophone students with disabilities, in particular, have official language minority rights under the *Charter* and Ontario's *Education Act*. Differential treatment might occur, for example, because of an intersection between French language minority rights and human rights legislation, when Francophones try to exercise these rights together. For example, students with disabilities in Ontario's French-language education system have reported difficulty accessing special education services and specialists in their language.<sup>95</sup>

## 5. What is discrimination?<sup>96</sup>

The *Code* does not provide a definition of discrimination. Instead, the understanding of discrimination has evolved from case law. To establish *prima facie* discrimination (discrimination on its face) under the *Code*, a student must show that:

- 1) they have a characteristic protected from discrimination (e.g. disability)
- 2) they have experienced an adverse impact within a social area (e.g. education) protected by the *Code*, and
- 3) the protected characteristic was a factor in the adverse impact.<sup>97</sup>

The student must show that discrimination occurred on a “balance of probabilities,” that is, it is more reasonable and probable than not that discrimination took place. Once a *prima facie* case has been established, the burden shifts to the education provider to justify the conduct within the framework of the exemptions available under the *Code* (e.g. *bona fide* requirement defence). If it cannot be justified, discrimination will be found to have occurred.

Discrimination does not have to be intentional. Intent is irrelevant for establishing that discrimination occurred.

### 5.1 Forms of discrimination

#### 5.1.1 Direct, indirect, subtle and adverse effect discrimination

Discrimination may take many different forms. For example, it may take place in a direct way. It can happen when education providers specifically exclude students with disabilities from educational services, withhold benefits that are available to others, or impose extra burdens that are not imposed on others, without a legitimate or *bona fide* reason. This discrimination is often based on negative attitudes, stereotypes and bias towards students with disabilities.

Discrimination may also happen indirectly. It may be carried out through another person or organization.

**Example:** A private school “indirectly” discriminates by instructing an admissions scout it has hired not to recruit students with disabilities who have costly accommodation requirements.



The organization or person that sets out discriminatory conditions, and the organization or person that carries out this discrimination, can both be named in a human rights claim and held responsible.

Discrimination is often subtle. Discriminatory remarks are not often made directly, and people do not usually voice stereotypical views as a reason for their behaviour. Subtle forms of discrimination can usually only be detected after looking at all of the circumstances to determine if a pattern of behaviour exists. Individual acts themselves may be ambiguous or explained away, but when viewed as part of a larger picture, may lead to an inference that discrimination based on a *Code* ground was a factor in the treatment a person received. An inexplicable departure from usual practices may establish a claim of discrimination.<sup>98</sup> Also, criteria that are applied to some students but not others may signal that students with disabilities are being singled out for different treatment and this may be evidence of discrimination.

Sometimes seemingly neutral rules, standards, policies, practices or requirements have an “adverse effect” on students with disabilities.

**Example:** A university policy of awarding scholarships only to students in full-time attendance would likely have an adverse effect on students whose disabilities only permit them to attend school on a part-time basis.

Many laws, requirements or standards are put in place without considering the unique needs or circumstances of students with disabilities. Education providers have a responsibility to understand where these may have a discriminatory effect, and to remove this effect where it occurs.

### 5.1.2 Harassment<sup>99</sup>

Part of an educational institution’s duty to maintain a safe learning environment for all students, including students with disabilities, includes addressing bullying and harassing behaviour. The *Code* defines harassment as “engaging in a course<sup>100</sup> of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.”<sup>101</sup> The reference to comment or conduct “that is known or ought reasonably to be known to be unwelcome” establishes both a subjective and an objective test for harassment.

The subjective part is the harasser's own knowledge of how his or her behaviour is being received. The objective component considers, from the point of view of a "reasonable" person, how such behaviour would generally be received. Determining the point of view of a "reasonable" person must take into account the perspective of the person who is harassed.<sup>102</sup> In other words, the HRTO can conclude based on the evidence before it that an individual knew, or should have known, that their actions were unwelcome.<sup>103</sup>

All students, including students with disabilities, have the right to be free from harassment in education. Section 1 of the *Code* guarantees the right to equal treatment in services without discrimination based on disability, among other *Code* grounds. Harassment based on disability, as a form of discrimination, is therefore prohibited in education services.<sup>104</sup> This protection would apply to sanction: (i) education providers who themselves harass students based on *Code* grounds, and (ii) education providers who know or ought to know that a student is being harassed based on *Code* grounds, and who do not take effective individualized and systemic steps to remedy that harassment.

If left unchecked, harassment can impede a student's ability to access education services equally and to fully take part in the educational experience.

**Example:** In a classroom, a student with Tourette's Syndrome is repeatedly subjected to taunting and teasing by a group of students. The same group of students exclude him from recess activities stating that he is "different" and "weird." It may be inferred from the particular circumstances that the treatment is due to his disability, even though none of the other students has ever made a direct reference to his disability. He begins to experience stomach aches in the morning and tells his parents he does not want to go to school. As a result of this harassment, his ability to access the education program is impaired.

There is no requirement that a student must object to the harassment at the time for a violation of the *Code* to exist, or for the student to claim their rights under the *Code*.<sup>105</sup> A student with a disability who is the target of harassment may be in a vulnerable situation, and afraid of the consequences of speaking out. Education providers have an obligation to maintain an environment that is free of discrimination and harassment, whether or not anyone objects.<sup>106</sup>

Some conduct or comments relating to disability may not, on their face, be offensive. However, they may still be “unwelcome” from the perspective of a particular student. If similar behaviour is repeated despite indications from the student that it is unwelcome, there may be a violation of the *Code*. Every student has the right to be free from humiliating or annoying behaviour that is based on their disability.

Students may experience “a course of unwelcome conduct” based on a disability, a past or perceived disability, their accommodation needs, the treatment they are receiving (e.g. medication or therapy), or the side-effects of treatment. Harassment could include:

- slurs, name-calling or pejorative nicknames based on disability
- graffiti, images or cartoons depicting people with disabilities in a negative light
- comments ridiculing people because of disability-related characteristics
- intrusive questioning or remarks about a student’s disability, medication,<sup>107</sup> treatment or accommodation needs
- singling out a student for teasing or jokes related to disability
- inappropriately disclosing a student’s disability to people who do not need to know
- repeatedly excluding students with disabilities from the social environment, or “shunning”
- circulating offensive material about people with disabilities at an educational institution by email, text, the Internet, *etc.*

Harassment based on *Code* grounds is occurring increasingly through online technology, including cell phone text messaging, social media, blogs and email.<sup>108</sup> While there are sometimes complex jurisdictional issues around the legal regulation of online harassment, education providers may be liable for a poisoned environment caused when online communications containing comment or conduct that would amount to harassment are accessed through technology operated by the educational institution, or by private electronic devices used on the institution’s premises.<sup>109</sup>

Harassment may take different forms depending on whether the affected person identifies with more than one *Code* ground.

**Example:** A female student who is blind is repeatedly asked out on dates by her university teaching assistant. Despite telling him she is not interested, he continues to approach her after the tutorial and on several occasions has waited for her outside of other classes she is taking. The student's experience of sexual harassment is exacerbated by the fact that, due to her disability, she is unable to detect his presence until he is in close proximity to her.

Courts and tribunals have established that schools have a duty to maintain a positive, non-discriminatory learning environment.<sup>110</sup> When students are harassed due to disability, it can impair their access to educational services and create a toxic learning environment. An education provider has a responsibility to take immediate remedial action once made aware of harassing conduct. If an allegation of harassment has been substantiated, this may include disciplinary action.

In 2016, the Provincial Advocate for Children and Youth published a report canvassing the lived experience of young people with special needs and their families in Ontario. The report states, "Many young people reported spending years in classrooms feeling like they didn't have what it took to be successful in school, some even reported being yelled at by teachers and educational assistants and being bullied by other youth. They wanted their teachers to protect them from harm and make them feel safe in class."<sup>111</sup>

Anti-harassment training for educators and school staff is an important first step in creating a climate of mutual respect in an education environment. Educators will then be in a position to appropriately address issues of bullying and harassment that arise in the classroom. Education providers should also take steps to educate students about human rights and implement strategies to prevent discrimination and harassment.

In a recent survey of parents of students with intellectual disabilities in Ontario, 64.9% of parents surveyed reported that their children "experienced some form of bullying related to their disability." They indicated that this was done "by other students, parents, and, at times, even school staff."<sup>112</sup>

Education providers can help to prevent incidents of bullying and harassment before they occur by:

- having clear policies and standards in place setting out expectations for appropriate behaviour and identifying prohibited behaviour
- exhibiting a clear attitude of non-tolerance towards bullying and harassment
- communicating clearly to the student body the consequences of bullying and harassment
- educating students about disability issues and encouraging awareness of differing needs and acceptance of diversity
- engaging in role-playing and exercises to help students develop increased compassion and a greater awareness of the impact that bullying behaviour may be having on others
- respecting the confidentiality of students who do report bullying (this will also encourage other students who are being harassed to report it in its early stages).

Education institutions can go a long way toward promoting a harassment-free environment for students with disabilities, and other individuals protected by the *Code*, by having a clear, comprehensive anti-harassment policy in place. In cases of alleged harassment, the policy will alert all parties to their rights, roles and responsibilities. Such a policy should clearly set out ways the harassment will be dealt with promptly and efficiently. See Appendix C for suggested contents of an anti-harassment policy.

All students and school staff should be aware of the existence of an anti-harassment policy and the procedures in place for resolving complaints. This can be done by:

- distributing policies to everyone as soon as they are introduced
- making new students aware of them by including the policies in any orientation material
- training educators and school staff on the contents of the policies, and
- providing ongoing education on human rights issues.

### 5.1.3 Poisoned environment

A poisoned environment is a form of discrimination. In the employment context, human rights tribunals have held that the atmosphere of a workplace is a condition of employment as much as hours of work or rate of pay. A “term or condition of employment” includes the emotional and psychological circumstances of the workplace.<sup>113</sup> These concepts also apply in education.<sup>114</sup>

A poisoned environment is created when unwelcome disability-related conduct or comments are pervasive within an institution, and result in a hostile or oppressive atmosphere for one or more people with a disability.

At times, there may be overlap between harassment and a poisoned environment – for example, harassing behaviour directed at students with disabilities may cause a poisoned environment.<sup>115</sup> However, “harassment” and “poisoned environment” are two distinct concepts.<sup>116</sup> A poisoned environment can occur where the behaviour would not amount to the legal definition of harassment. For example, on-campus graffiti mocking people with mental health disabilities can create a poisoned environment, but would not likely meet the legal test for harassment which generally requires the occurrence of more than one incident, and that the behaviour be directed at a specific individual. A poisoned environment is based on the nature of the comments or conduct and their impact on an individual, rather than on the number of times the behaviour happens.<sup>117</sup> Sometimes a single remark or action can be so severe or substantial that it results in a poisoned environment.<sup>118</sup>

**Example:** At the beginning of a lecture, a college instructor expresses irritation to his students about being asked to accommodate a student with a learning disability who is taking his course. He states, “learning disabilities do not exist, there are just lazy students who watch too much television.” This remark could be enough to cause a poisoned environment, not only for the student in question, but for other students with learning and other types of disabilities.<sup>119</sup>

A consequence of creating a poisoned environment is that certain people are subjected to terms and conditions in education that are quite different from those experienced by people who are not subjected to the comments or conduct. This gives rise to a denial of equality under the *Code*. In some circumstances, a person can experience a poisoned environment even if they are not a member of the group that is the target (*i.e.* the “spill-over” effects of harassment).

The comments or actions of any person, regardless their position of authority or status, may create a poisoned environment. Therefore, a teacher, faculty member, staff person, educational assistant, fellow student, *etc.* can all engage in conduct that poisons the environment of a student with a disability.

After conducting a consultation with students and their families, Ontario's Provincial Advocate for Children and Youth reported: "Many of the young people and parents who sent us submissions said that creating welcoming and safe learning environments – and providing educators with the skills needed to make it happen – should be the number one job of schools. Children who didn't feel emotionally safe couldn't learn, partly because unsafe classroom environments compromised their ability to trust. We heard a great deal from parents who often had to struggle for hours just to get their child ready or willing to attend school each day – only to have them go into an environment they experienced as hostile and unwelcoming, where their peers teased or taunted them or in which they could find no emotional support."<sup>120</sup>

Education providers have a duty to maintain a non-discriminatory environment, to be aware of a poisoned environment that exists, and to take steps to respond and eliminate it. Education providers in managerial or supervisory roles who know, or ought to know, of a poisoned atmosphere but allow it to continue are discriminating against the affected students even if they are not themselves actively engaged in producing that atmosphere.<sup>121</sup>

#### **5.1.4 Systemic discrimination<sup>122</sup>**

Discrimination based on disability exists not just in individual behaviour, but can also be systemic or institutionalized.<sup>123</sup> Systemic or institutional discrimination is one of the more complex ways that discrimination happens.<sup>124</sup> Education providers have a positive obligation to make sure that they are not engaging in systemic or institutional discrimination.

Systemic or institutional discrimination consists of attitudes, patterns of behaviour, policies or practices that are part of the social or administrative structures of an institution or sector, and that create or perpetuate a position of relative disadvantage for students with disabilities. The attitudes, behaviour, policies or practices may appear neutral on the surface but nevertheless have an "adverse effect" or exclusionary impact on students with disabilities.

**Example:** To apply for articling positions through a law society, a law student filled out an application that contained the question: “Have you ever been treated for schizophrenia, paranoia, or a mood disorder described as a major affective illness, bipolar mood disorder, or manic depressive illness?” He answered “yes,” because previously he had experienced a couple of episodes of depression, for which he sought treatment. Once he answered “yes,” conditions were placed on him so that each time he needed to re-apply to the law society for activities to advance his career, the issue of his mental competence was re-visited. Despite not having had further episodes of depression, after being admitted to the Bar, he was asked for multiple medical reports and required to see a psychiatrist, he was investigated by two private investigators, and he experienced delays not imposed on others. A human rights tribunal concluded that the question was discriminatory, and caused systemic discrimination against people with the named mental conditions. This was in part because the process following a “yes” answer to the question exposed applicants to a more intensive (and intrusive) evaluation than others. The tribunal also heard evidence that 77% of people who answered “yes” to the question had conditions put on their membership. The tribunal noted that the factors in the case were “sufficient to constitute an adverse impact, especially when viewed against the historical disadvantage and present-day social stigma experienced by people diagnosed with mental disabilities.”<sup>125</sup>

Systemic discrimination can also overlap with other types of discrimination. For example, a policy that has an adverse discriminatory effect can be compounded by the discriminatory attitudes of the person who administers it.

Systemic discrimination is often embedded in an institution or sector, and may be invisible to the people who do not experience it, and even to the people who may be affected by it. It may be “reinforced by the very exclusion of the disadvantaged group” because the exclusion fosters the false belief that it is the result of “natural” forces<sup>126</sup> (for example, that students with disabilities are just not as capable of succeeding academically). To combat systemic discrimination, it is essential for an education institution to design all aspects of its operations inclusively with the diverse needs of its users in mind, and to create a climate where negative practices and attitudes can be challenged and discouraged.



**Example:** When designing a new student residence complex, a university hires a design expert to ensure that all physical structures are built according to the principles of inclusive design and avoid barriers not covered by the Building Code regulations. This step ensures that the units and common areas are accessible to students with physical disabilities (and ensures they are accessible to families with small children and older people, as well).

It may not be necessary for multiple people to make complaints about an institution's policies or practices for their impact to be understood as causing systemic discrimination. Often, it can be inferred from the evidence in one person's case that many people from a *Code*-protected group will be negatively affected.

## 6. Discipline, safe schools and students with disabilities

Ensuring that learning environments are safe, respectful places, free of inappropriate behaviour is of paramount importance. Provincial legislation, regulations and related education policies have been designed and put in place to help education providers fulfil this crucial responsibility.<sup>127</sup> At the same time, in some cases, discipline policies may have an adverse effect on students with disabilities.

Despite amendments to the *Education Act* meant to ensure that mitigating factors<sup>128</sup> are considered before students with disabilities are disciplined, the OHRC continues to hear that, in many cases, students with disabilities continue to have much higher rates of suspension and/or expulsion than the average.<sup>129</sup> The Ministry of Education's own statistics for 2015-2016 indicate that 46.9% of suspensions and 45.8% of expulsions involved students with special education needs.<sup>130</sup>

Education providers need to make sure that they are abiding by their responsibilities under the *Code*, in addition to professional requirements under the *Education Act*. Under the *Code*, education providers have a duty to assess each student with a disability individually before imposing disciplinary sanctions. Disciplinary sanctions include detentions, exclusions, suspensions, expulsions, and other forms of punishment. Educators should attempt to determine whether the behaviour in question is due to the student's disability by considering:

- formal assessments and evaluations of the student
- relevant information supplied by the student and/or the student's parents/guardians

- observations of the student
- the student's accommodation plan, if there is one
- whether the accommodations provided for in the student's accommodation plan were appropriate, and whether these accommodations were being provided consistent with the student's accommodation plan, at the time of the behaviour in question
- whether the student's disability impaired his or her ability to understand the impact and consequences of the behaviour
- whether the student's disability impaired his or her ability to control the behaviour
- whether the student has undetected or undeclared disability-related needs that require accommodation.<sup>131</sup>

Under the *Code*, education providers have a legal obligation to accommodate students with disabilities up to the point of undue hardship.<sup>132</sup> All students with disabilities, even students whose behaviour is disruptive, are entitled to receive accommodation.

Educators must consider a range of strategies to address disruptive behaviour. Such strategies will include reassessing and, where necessary, modifying the student's accommodation plan, providing additional supports, implementing alternative learning techniques, and other forms of positive behavioural intervention.

Education policies and practices that have an adverse effect on students with disabilities are open to a human rights challenge under the *Code*.

If a student's behaviour is not due to a disability, that is, where there is no causal relationship between the student's disability and the behaviour in question, then that student would be subject to the normal consequences of their misconduct.<sup>133</sup> Where discipline for misconduct is warranted, it must be implemented with discretion and with regard to the student's unique circumstances.<sup>134</sup>

There may be rare situations where a student's behaviour, even where it is a manifestation of their disability, poses a health and safety risk to the student, other students, teachers and/or school staff. While an education provider in this type of situation continues to have a duty to accommodate the student up to the point of

undue hardship, it is recognized that there may be legitimate health and safety concerns that need to be addressed. This issue is discussed in more detail in the “Undue hardship” section of this policy under “Health and safety.”

## 7. Reprisal

Section 8 of the *Code* protects people from reprisal or threats of reprisal.<sup>135</sup> A reprisal is an action, or threat, that is intended as retaliation for claiming or enforcing a right under the *Code*.

Students with disabilities – or others on their behalf – may try to enforce their *Code* rights by objecting to discrimination, making an internal discrimination complaint to an educational institution, or making a claim at the HRTO. However, there is no strict requirement that someone who alleges reprisal must have already made an official complaint or application under the *Code*.<sup>136</sup> Also, to claim reprisal, a person does not have to show that their rights were actually infringed.<sup>137</sup>

The following will establish that a student has experienced reprisal based on a *Code* ground:

- an action was taken against, or a threat was made to, the student
- the alleged action or threat was related to the student having claimed, or trying to enforce, a *Code* right, and
- there was an intention on the part of the education provider to retaliate for the claim or the attempt to enforce the right.<sup>138</sup>

**Example:** A mother has many email exchanges with her son’s teacher because the supports identified in the boy’s accommodation plan are not being implemented. After being unable to resolve the issue, she escalates the matter by calling the school principal. The principal speaks with the boy’s teacher about the telephone call and what was discussed. The teacher then refuses to reply to the mother’s phone calls and emails, and the boy is repeatedly kept in for recess without explanation. The teacher’s behaviour could amount to reprisal under the *Code*.

People associated with a student with a disability who has complained about discrimination are also protected from discrimination and reprisal.<sup>139</sup>

## 8. Duty to accommodate

Under the *Code*, education providers have a legal duty to accommodate the needs of students with disabilities who are adversely affected by a requirement, rule or standard.<sup>140</sup> Accommodation is necessary to address barriers in education that would otherwise prevent students with disabilities from having equal opportunities, access and benefits.

In a recent survey of parents of students with intellectual disabilities in Ontario, 53.2% of parents surveyed reported that their child was not receiving proper academic accommodations; and 68.2% of parents reported that schools were “meeting half or less than half of their child’s academic needs.” In interviews, parents emphasized “the devastating effects of low expectations and lack of opportunity for engagement.”<sup>141</sup>

Education environments should be designed inclusively and must be adapted to accommodate the needs of a student with a disability in a way that promotes integration and full participation.

Accommodation does not mean lowering “*bona fide* academic requirements,” which are the skills or attributes that one has to meet to be eligible for admission, pass a class or course, graduate from a program, *etc.*

The duty to accommodate has both a substantive and a procedural component. The procedure to assess an accommodation (the process) is as important as the substantive content of the accommodation (the accommodation provided).<sup>142</sup> In a case involving the accommodation of a mental health disability in the workplace, the court said: “a failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the ‘procedural’ duty to accommodate.”<sup>143</sup>

Education providers are responsible for ensuring that they meet both the procedural and the substantive components of the duty to accommodate.<sup>144</sup> In one case, the HRTO stated:

The analysis is no different than an employer’s obligation to accommodate an employee’s disability. Procedurally, the [school board] is under an obligation, once a disability is identified, to determine what kind of modifications or accommodations might be required in order to allow a

student to fully participate in school. The substantive duty requires the respondent Board and each individual school, in this case, to make the modifications or provide accommodation necessary in order to allow a student to fully participate, such as academic modifications, accommodation and behavioural strategies, if required, up to the point of undue hardship.<sup>145</sup>

To fulfil the procedural component of the duty to accommodate, there needs to be meaningful interaction between the parties that focuses on the student's needs and consideration of whether the education provider can accommodate those needs.

**Example:** A school board was found to have failed in the procedural obligations of the duty to accommodate when it neglected to review the individual needs of a student with autism, and did not seriously consider whether it could meet those needs by modifying its transportation policy to permit the boy to attend school for part of the day.<sup>146</sup>

In Ontario, it is clear that a failure in the procedural duty to accommodate can lead to a finding of a breach of the *Code*, even if there was no substantive accommodation that could have been provided short of undue hardship. Failure to perform either component of the duty is a failure to carry out the duty to accommodate.<sup>147</sup>

An education provider will not be able to argue persuasively that providing accommodation would cause undue hardship if it has not taken steps to explore accommodation solutions, and otherwise fulfil the procedural component of the duty to accommodate.<sup>148</sup>

## 8.1 Principles of accommodation

The duty to accommodate is informed by three principles: respect for dignity, individualization, as well as integration and full participation.

### 8.1.1 Respect for dignity

The *Convention on the Rights of Persons with Disabilities* states: "...discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person."<sup>149</sup>

The duty to accommodate students with disabilities means accommodation must be provided in the way that most respects the dignity of the student, if doing so does not cause undue hardship.<sup>150</sup> Human dignity encompasses individual self-respect, self-worth and inherent worth as a human being. It includes physical and psychological integrity and empowerment.<sup>151</sup> It is harmed when students are marginalized, stigmatized, ignored or devalued. Privacy, confidentiality, comfort, individuality and self-esteem are all important factors.

Respect for a student's autonomy is also crucial, particularly at the secondary and post-secondary levels of education. Education providers should recognize a student's right to self-determination, to be treated without paternalism, and to make decisions in their own best interest with minimal interference. Education providers need to consider how an accommodation is provided and the student's own participation in the process.

Respect for dignity includes being considered as a whole person, not merely in relation to one's disability. It includes respecting and valuing the perspectives of students with disabilities, particularly when students speak about their own experiences.

Education providers should consider different ways of accommodating students with disabilities along a continuum, ranging from ways that most respect dignity and other human rights values, to those that least respect those values.

**Example:** An accommodation that shows little respect for the dignity of a student with a disability is an accessible entrance over a loading dock or through a service area or garbage room. Students who use mobility devices should have the same opportunity as others to enter a building in a pleasant and convenient way.

Education providers have a duty to maintain a positive school environment for all people they serve. The attitudes of educators towards disability issues play a major role in influencing how other students treat and relate to students with disabilities. Educators should make efforts to sensitize students about disability issues and to model respectful attitudes and behaviour towards students with disabilities. Education providers need to address any behaviour that may be damaging to the dignity of students with disabilities.

### 8.1.2 Individualization

There is no set formula for accommodation. Each student's needs are unique and must be considered afresh when an accommodation request is made. At all times, the emphasis must be on the individual student's needs and not on the type of disability.<sup>152</sup> Blanket approaches to accommodation that rely solely on categories, labels and generalizations are not acceptable.<sup>153</sup> Accommodations may need to be re-visited over time to make sure they continue to meet a student's needs appropriately.

Although many accommodations will benefit large numbers of students with similar needs, an accommodation solution that meets one student's requirements may not meet the needs of another. Students sharing the same condition often experience it in very different ways, with different symptoms, limitations and prognoses. For example, while some students with visual impairments read Braille, many do not. Different effects of a disability and different learning styles may call for different approaches.<sup>154</sup>

**Example:** An appropriate accommodation for a student who is deaf and whose primary language of communication is American Sign Language or Langue des signes québécoise might be a Provincial School for the Deaf or a sign language instructional program in a local community school. At the same time, an appropriate accommodation for another student, who is also profoundly deaf, and who primarily uses auditory-verbal communication, might be inclusion in a regular classroom with supports.

Individualized accommodation will also require education providers to be mindful of the fact that many students with disabilities will identify by other *Code* grounds, in addition to disability. Education providers need to consider how these interrelated identities may be relevant when they devise appropriate accommodation solutions.

**Example:** An eight-year-old boy with attention deficit hyperactivity disorder, whose family has recently immigrated to Ontario from Sri Lanka, registers at his neighbourhood public school. To help facilitate the accommodation process, the school principal provides the family with written information in Tamil, the family's first language, about the workings of the special education system and the resources available to students with disabilities.

### 8.1.3 Integration and full participation

Accommodations should be developed and implemented with a view to maximizing a student's integration and full participation. Achieving integration and full participation requires barrier-free and inclusive design, as well as removing existing barriers. Where barriers continue to exist because it is impossible to remove them at a given point in time, then individual accommodations should be provided, up to the point of undue hardship.

**Example:** At his parents' request, a children's swimming program at a daycare centre assigns an additional instructor to a class that includes a boy who has a mobility impairment, because the neighbourhood pool does not have an accessible ramp and handrails. This allows the boy to get the extra support he needs to access the service within the regular program.

Educational facilities should be built, and must be adapted, to accommodate the needs of students with disabilities in a way that promotes their integration and full participation. Education providers must take steps to include students with disabilities in classroom and extra-curricular activities, wherever possible. Education policies, programs, services and activities should be designed inclusively with the needs of all students in mind, so they do not exclude or single out any student. Education policies must take into account the diverse needs of the student population, and must plan for alternative measures to address the needs of students with disabilities.

**Example:** Workplace tensions have risen to the point where a labour strike by school staff appears imminent. Thinking ahead, the school board works together with school principals to draft a contingency plan for students that would permit them to continue attending school should there be a work stoppage. The plan includes specific provisions addressing the needs of students with disabilities, and includes a back-up plan in the event that educational assistants, special needs assistants and other special education staff are part of a walkout.

It is well-established in human rights law that equality may sometimes require different treatment that does not offend the person's dignity. In some circumstances, the best way to ensure the equality of students with disabilities may be to provide separate or specialized services. However, education providers should keep in mind



that segregated treatment in educational services for people with disabilities is less dignified and is unacceptable, unless it can be shown that integrated treatment would pose undue hardship or that segregation is the only way to achieve equality.<sup>155</sup>

## 8.2 Inclusive design

Ensuring integration and full participation means designing the education system for inclusiveness. The concept of inclusive or “universal” design<sup>156</sup> has been tailored to fit the education context. “Universal Design for Learning” (UDL)<sup>157</sup> emphasizes equal participation and recognizes that all students have varying abilities and needs. This method of design is a preferred approach to removing barriers or making “one-off” accommodations, which assume that existing structures may only need slight modifications to make them acceptable.<sup>158</sup>

Ontario’s Provincial Advocate for Children and Youth has recognized that “even the most dedicated and skillful teacher cannot help all students in a classroom when the ‘whole school’ environment is not designed and equipped to be welcoming and supportive of the unique needs of all learners.”<sup>159</sup>

It is important for education providers to note that the right to equality can be breached by a failure to address the needs of disadvantaged groups. The Supreme Court of Canada has observed:

[T]he principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.<sup>160</sup>

The Supreme Court has also noted the need to “fine-tune” society so that structures and assumptions do not exclude people with disabilities from taking part in society.<sup>161</sup> The Court has affirmed that standards should be designed to reflect all members of society, to the extent that this is reasonably possible.<sup>162</sup>

**Example:** A university develops a “Voluntary Leave of Absence” policy that sets out a formalized approach to situations where a student needs to take a temporary leave of absence from their studies (due to, for example, a mental health challenge, other health-related concern, sudden unexpected circumstance such as the death of a loved one, *etc.*). The policy begins with a

statement outlining the institution's commitment to fulfilling its legal obligation to accommodate the disability-related needs of students, and includes information on how to coordinate support services available to students, reduce financial penalties wherever possible, and facilitate successful resumption of studies when the student is able. By letting students, staff and faculty know that the policy exists, the university is helping to reduce organizational barriers to taking a temporary leave, de-stigmatize the decision to take a hiatus from studies, support student health and well-being, and ensure that more students return to their studies after a temporary leave and are able to graduate from post-secondary education.<sup>163</sup>

Education providers need to build in conceptions of equality to standards or requirements. This proactive approach is more effective because it emphasizes accessibility and inclusion from the start. Barrier prevention is much more preferable to barrier removal, and it is consistent with the notion of disability as a social model that conceptualizes "disability" as the outcome of socially constructed barriers and society's failure to accommodate difference.<sup>164</sup>

The United Nations' Committee on the Rights of Persons with Disabilities has expressed its support of UDL. It has encouraged States Parties to the *CRPD* to adopt the universal design for learning approach, which consists of a set of principles providing teachers and other staff with a structure for creating adaptable learning environments and developing instruction to meet the diverse needs of all learners.

Universal Design for Learning recognizes that each student learns in a unique way and involves:

1. developing flexible ways to learn
2. creating an engaging classroom environment
3. maintaining high expectations for all students while allowing for multiple ways to meet expectations
4. empowering teachers to think differently about their own teaching
5. focusing on educational outcomes for all, including persons with disabilities.

Curricula must be conceived, designed and implemented in a way that meets and adjusts to the requirements of every student, and provides appropriate educational responses. Standardized assessments must be replaced with flexible and multiple forms of assessments and the recognition of individual progress towards broad goals that provide alternative routes for learning.<sup>165</sup>

Education providers will likely find that inclusive design choices and barrier removal make practical sense and will benefit large numbers of the school community.

**Example:** A university makes its lecture content available via podcast. In addition to benefiting students with disabilities who use adaptive technologies to access course content, this delivery method also benefits students with learning disabilities, students whose first language is not English, and students who are unable to attend the lecture in person due to family status obligations. The podcasts also provide useful study tools for students with a range of learning styles and preferences, in preparation for exams, *etc.*

Certain individual accommodations can, in particular circumstances, be resource-taxing, require time-consuming oversight on the part of the education institution, pit disability advocates against faculty, and place undue burdens on students with disabilities and their families to navigate their educational experience and environment.<sup>166</sup> UDL fosters student independence and autonomy, avoids stigmatizing individual students, and creates a more inclusive and welcoming education setting for everyone.

UDL recognizes that people learn in a variety of ways. To optimize learning, education providers should provide flexible learning environments that emphasize the three principles of UDL and offer:

1. **Multiple means of representation** to give learners various ways of acquiring information and knowledge.
2. **Multiple means of expression** to provide learners alternatives for demonstrating what they know.
3. **Multiple means of engagement** to tap into learners' interests, challenge them appropriately, and motivate them to learn.

From The National Center on Universal Design for Learning:

[www.udlcenter.org/aboutudl/whatisudl/3principles](http://www.udlcenter.org/aboutudl/whatisudl/3principles) (date retrieved: October 20, 2017).

Education providers should incorporate UDL principles when developing or modifying curriculum and learning plans, constructing new buildings, undertaking renovations, buying new computer systems, launching new websites, designing

courses,<sup>167</sup> delivery methods and evaluation methodologies, and when they are setting up programs, services, policies and procedures.

**Example:** A school board takes steps to make sure that curriculum materials are available in electronic text format at the same time print materials are provided to all students, so that students who need alternative formats (e.g. students with visual impairments or learning disabilities) do not experience delay.

Education providers should never create new barriers when designing new systems or structures or revising old ones.<sup>168</sup> Education providers that knowingly create new barriers for people with disabilities, or take steps that perpetuate existing barriers, may violate the *Code*.<sup>169</sup>

Along with the expectation to prevent barriers at the design stage through inclusive design, education providers need to be aware of systemic barriers in systems and structures that already exist. They should actively identify and seek to remove these existing barriers.

**Example:** A school board reviews its website to identify possible barriers for people with disabilities. It unlocks several design elements so that people with low vision can increase the font size on their desktops and “pinch” out or zoom in closer on their mobile devices. It adds descriptive text tags to logos and images for users with very limited or no vision. It also modifies the presentation of the website’s content to ensure high colour contrast and clear “focus order.” This allows people with low vision and people who use assistive technologies to more easily access the information and navigate through content.

It is important to note that even where the principles of UDL have been fully implemented and schools have adopted a comprehensive approach to removing barriers, some barriers may continue to exist for students with disabilities.

Where the best known universal design standards have been applied, and barriers continue to exist because it is impossible to remove those barriers at a given point in time, then, as part of the duty to accommodate, next best alternatives or temporary solutions for individual students must be explored and implemented, if to do so would not result in undue hardship.

## Examples of UDL features:

### Course management system (CMS)

- implementation of a centralized electronic course management system
- allows timely communication with students
- can be accessed independently by students at any time.

### Power Point slides

- as a complement to lectures
- compatible with adaptive technology (e.g. screen reader software)
- available to students through CMS.

### Lectures

- recorded and made available through podcasts
- podcasts made available in multiple formats (audio, video + audio, plain text transcription)
- available to students through CMS
- collaborative note-taking process (student rotation); notes available through CMS
- could be made available on video with closed captioning.

### Textbooks and course materials

- available to all students in print and electronic formats, wherever possible.

### Communication

- course expectations (including *bona fide* academic requirements) communicated clearly to students in multiple ways (e.g. in course syllabi, verbally, electronically, with PowerPoint, etc.)
- changes and announcements to due dates, scheduling, etc. are included in the class podcast (then made available on the CMS), conveyed through group email, as well as communicated verbally in class.

### Assessment

- students provided with choice of assessment method (e.g. a 100% final exam, multiple quizzes, written papers, individual or group presentations, multi-media project, portfolios, service activity, etc.)
- test accommodations can include changes to test times, testing format, or the setting in which the test is taken
- all students given as much time as needed to complete exams (where restricted test-taking time is not a *bona fide* academic requirement).

Information adapted from Rachel E. Smith and Tara Buchanan, "Community Collaboration, Use of Universal Design in the Classroom," (2012) *Journal of Postsecondary Education and Disability*, 25(3), 259-265.

## 8.3 Accommodation process

### 8.3.1 Basic principles

In addition to designing inclusively and removing barriers, education providers must respond to individual requests for accommodation. The principles of respect for dignity, individualization, and inclusion and full participation apply both to the substance of an accommodation and to the accommodation process. The way an education institution provides and implements an accommodation is subject to human rights standards.

At the heart of the accommodation process is the responsibility, shared by all parties, to engage in meaningful dialogue about accommodation, and to seek out expert assistance as needed. Everyone involved should co-operatively engage in the process, share information, and avail themselves of potential accommodation solutions.

### 8.3.2 Sharing information

Information about accommodation procedures should be readily available to students, and where applicable, their parents/guardians.<sup>170</sup> Effective communication about accommodation procedures is an essential part of creating an education environment that encourages and supports accommodation requests.<sup>171</sup>

All students (and their parents/guardians, where applicable) should be informed that students with disabilities are entitled to accommodation, the process for requesting an accommodation, their right to take part in such a process, and any other information that may be helpful in making the accommodation process more understandable and accessible. The accommodation process should be part of the regular life and discourse of the education institution.

Education providers should make clear, consistent and regular declarations to staff, the student body, and parents/guardians, where appropriate, that the institution is committed to fulfilling its responsibilities under the *Code*, including its duty to accommodate students with disabilities. This message should be communicated early and often in application and registration materials, orientation packages, newsletters, on the institution's website, in course syllabi, by instructors verbally, *etc.* Links to policy references and other resources should be provided, including links to the OHRC's *Policy on accessible education for students with disabilities, 2018*,

other relevant institution policies (such as its human rights, accommodation and privacy policies), links to information about the institution's equity/human rights office, where appropriate, and training resources for faculty, staff and students.<sup>172</sup>

When communicating about the accommodation process, education providers should always take care not to violate the privacy of, or divulge confidential information about, individual students.

### 8.3.3 Timeliness

Accommodations must be provided in a timely manner. Delays in providing accommodation have the potential to directly impede a student's ability to access and take part in the curriculum.<sup>173</sup> Delayed accommodations may also contribute to disability-related behavioural issues and the challenges faced by front-line educators in dealing with these issues.<sup>174</sup> Unreasonable delays may be found to violate the procedural duty to accommodate, and thus constitute a breach of the *Code*.<sup>175</sup>

Examples of delays that students with disabilities may experience include:

- waiting long periods of time for textbooks and other academic materials in alternative formats<sup>176</sup>
- delays in receiving professional assessments
- delays in receiving interim accommodations
- delays in the provision of support staff (e.g. educational assistants, special needs assistants, sign language interpreters, etc.)
- waiting lists for other types of special education services (e.g. identification hearings, classroom placements, preparation of accommodation plans, implementation of accommodation plans, processing of claims for funding etc.)
- delays in receiving needed adjustments to accommodations.

When making accommodation requests, students have a responsibility to give education providers ample time to ensure that accommodations will be available when needed.

Where the most appropriate accommodation cannot be provided right away, education providers have a duty to provide for interim accommodation as the next best and timely solution while planning for a more appropriate and permanent solution. In the meantime, this will enable students to be as productive and involved as possible.

**Example:** A child in grade one has difficulty learning to read and shows signs of dyslexia. While on a waiting list for a professional assessment, the child's parents, together with the school, explore and implement known effective reading techniques for early intervention as an interim accommodation, such as the Empower Reading program developed at Toronto's Hospital for Sick Children. With inclusive design in mind, the school board also puts in place a new early screening program, as research indicates that early intervention is critical to developing reading skills, especially for children with learning disabilities.

**Example:** A student approaches his university's disability office, saying that he feels depressed, and is unable to eat or sleep, which is having a negative effect on his ability to concentrate in class. The disability office refers him to a medical professional to assess him for a disability and any accommodation needs. In the meantime, the disability office explores accommodation solutions with the student because there is a perception that the student may have a disability. These interim accommodations may change, depending on the assessment the student receives.

ARCH Disability Law Centre reported to us that it "has received a number of calls from parents of students with disabilities who have been excluded from school until they get a psychological assessment and a behaviour management plan from a specialized facility. In most of these cases, the waiting lists for these assessments were over a year and as a result many of the students did not attend school for many months."<sup>177</sup>

In a 2016 report, Ontario's Provincial Advocate for Children and Youth stated, "Families reported paying up to \$3,000 out of their own pockets for independent psychological assessments because they couldn't stand watching their children struggling while they waited for a diagnosis through the school. It's unfair and inequitable because not all families can afford to do this or have access to professionals who can conduct these assessments, especially in northern, remote and fly-in Aboriginal communities."<sup>178</sup>



Accommodating a student with a disability in a timely way may be hindered by a lack of appropriate disability support services in the community to identify the student's disability-related needs and limitations, or to assist with an accommodation. For example, waiting lists for professional assessments can be extremely long.

In its 2017 *Annual Report*, People for Education wrote that "61% of elementary principals and 50% of secondary principals report insufficient access to psychologists to meet the needs of their students. Almost half of schools report that they have access to a psychologist only on an on-call basis." The report goes on to state that, "[b]ased on available resources, some boards limit the number of students that principals can put forward for assessment each year."<sup>179</sup>

The lack of a formal assessment should not thwart a student's access to accommodation for their disability-related needs. In these cases, education providers should use the best information available to facilitate the accommodation, and consider:

1. how the student identifies their own needs
2. a history of formally identified disability
3. third-party reports
4. personal observations by the disability service professionals
5. screening tools
6. a history of academic accommodations
7. relevant documentation from previous educational institutions
8. proof of disability from non-medical sources.

Where the needs of a student are well-known and not in dispute, and accommodations can be put into place right away, education providers should consider whether they can waive the requirement for a professional assessment. Where a professional assessment is imperative, but not immediately available, education providers have a responsibility to explore, provide and evaluate interim accommodation while awaiting the assessment.

### 8.3.4 Accommodation after a deadline, test or course has been completed

Education institutions need to consider all requests for accommodation meaningfully on an individualized basis. Policies and practices that state or imply that education institutions will not consider requests for accommodation after the completion of a deadline, test, course, *etc.* raise human rights concerns.

Depending on the nature of a disability, a student may not be able to request accommodation in a timely way. For example, some types of mental health disabilities may leave a student unable to identify that they have a disability or that they have accommodation needs. A student may be experiencing a disruption in their functioning but may not be able to follow the institution's process for arranging accommodation. A student may not have prior warning that they will have accommodation needs, or they may find themselves in a situation where they are experiencing disability-related symptoms for the first time. In these circumstances, if a student has failed to meet performance expectations in a class, course, program, *etc.*, the institution has an obligation to consider accommodation after the fact.

Education institutions should establish a process to meaningfully consider requests to extend a deadline, redo a test or course, *etc.* If a process already exists, education providers should provide clear information to students, instructors and staff about that process.

**Example:** Three weeks into the second semester, a disability office receives an accommodation request from a student who wants to write a final exam that she missed from the previous term. The student makes the request as soon as she is able, saying that she missed the exam because of being hospitalized for a disability. She provides documentation to this effect. The school makes the arrangement for her to write the exam, and adjusts her final mark accordingly.

Students should communicate their needs to the institution as soon as they are able, and be prepared to provide documentation to support their request for accommodation. While an education provider has a responsibility to consider all accommodation requests in a meaningful way, the duty to accommodate is not limitless.<sup>180</sup> There may be narrow circumstances where it may not be reasonable or possible to accommodate a student's disability, such as, for example, where too much time has passed since the person took a course, attended the institution, *etc.*

### 8.3.5 Dispute resolution

Education providers need to provide an effective and transparent process to resolve disputes that arise in the accommodation process. The right to a mechanism for redress for students with disabilities has been recognized at the international level.<sup>181</sup>

The AODA Integrated Accessibility Regulation requires that service providers, including education institutions, establish a customer service feedback process for receiving and responding to feedback specifically about the way they provide accessible goods or services to people with disabilities. Obligated organizations must also make the information about their feedback processes available to the public. The processes must allow for feedback in a variety of ways including in person, by telephone, in writing or via email. The processes must also specify the actions that the organizations are required to take when complaints are received.<sup>182</sup>

The lack of an effective and timely dispute resolution mechanism at the primary and secondary levels of the public education system in particular is a serious, longstanding issue that has caused considerable discord in the relationships between education providers, students and their families.<sup>183</sup> The lack of such a mechanism has resulted in significant stress for parents/guardians, students with disabilities and teachers, and has caused students to miss crucial time in school. Currently, many of these disputes end up as human rights claims at the HRTO, due to the lack of an appropriate alternative.

In a recent survey, a majority of parents of students with intellectual disabilities in Ontario reported that “there had been conflict with the school over their children’s education and that the conflict resolution process available to them fell short in many ways. For instance, 69.1% of parents involved in a conflict reported that they were not given access to necessary information during the process and 63.7% of parents reported that their knowledge of their own child was not properly recognized by decision-makers.” A majority of parents involved in a conflict situation reported that “at one time or another, no appropriate conflict resolution process was available to them for accommodation issues (52.5%) or inclusion issues (58%).” The organizations conducting the survey wrote: “Parental narratives tell the story of poor information, misinformation or no information at all. A critical lack of productive, shared decision-making and collaboration seemed to be characteristic of the experiences of parents.”<sup>184</sup>

In keeping with the requirements of the *AODA* regulations,<sup>185</sup> primary and secondary students and their parents/guardians should have timely access to a mechanism that will hear and resolve issues related to identifying a student's disability-related needs, programs and services, and any other process issues that may arise.<sup>186</sup> The mechanism should comprise or have access to qualified individuals representing a range of interests. At the post-secondary level, students should also have an avenue to address and resolve accommodation disputes in a timely fashion.

The purpose of a dispute resolution mechanism should be to identify problems and determine ways to solve them that would permit the student access to educational services with a minimum of delay. Educational institutions should facilitate this process and provide reasonable assistance to students, and where applicable, their parents/guardians. Dispute resolution procedures that are not timely or effective could amount to a failure of the duty to accommodate.

## **8.4 Appropriate accommodation**

### **8.4.1 Basic principles**

The duty to accommodate requires that the most appropriate accommodation be determined and provided, unless this causes undue hardship. The most appropriate accommodation is one that most:

- respects the student's dignity
- responds to the student's individualized needs
- best promotes inclusion and full participation.

An accommodation will be considered appropriate if it will result in equal opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges enjoyed by others, or if it is proposed or adopted to achieve equal opportunity, and meets the student's disability-related needs. The appropriateness of an accommodation is not determined by whether or not the student succeeds in school.<sup>187</sup>

The aim of accommodation is the inclusion and full participation of students with disabilities in educational life.

**Example:** In one case, the HRTO, applying the Supreme Court of Canada's *Moore* decision, stated, "...if a special needs student is denied meaningful access to education, it is implicit that the accommodations provided were either inappropriate or inadequate."<sup>188</sup>

Ultimately, to be considered appropriate, accommodation must provide meaningful access to education.

**Example:** The parents of a boy with an intellectual disability are told that the local school cannot meet his needs. The school proposes busing him to another school a considerable distance from the boy's home. The only pick-up and drop-off times available to the boy are within the hours of a normal school day. As the bus ride can take up to an hour or more each way, this accommodation would likely not be considered appropriate as it significantly cuts into the student's education time.<sup>189</sup>

Education providers must make efforts to build or adapt education services to accommodate students with disabilities in a way that promotes their full participation. Barriers must be prevented or removed so that students with disabilities are provided with equal opportunities to access and benefit from their environment and face the same duties and requirements as everyone else, with dignity and without impediment.

At the same time, accommodations that are entirely outside of the education service being offered, or the mandate of the education provider, would likely not be considered appropriate.

**Example:** In one case, the HRTO stated, "While school boards are expected to modify their programs and services to meet the needs of their students and to accommodate the students' needs to the point of undue hardship, there is no obligation on them to develop and provide a service that is wholly different from their legislated mandate." The HRTO found that the *Education Act*, in describing the duties of teachers, does not call for teachers to go to the homes of students to motivate them to attend school. The HRTO found that the fact that this accommodation was not available to the student did not constitute a breach of the *Code*.<sup>190</sup>

### 8.4.2 Forms of accommodation

Many different methods and techniques will respond to the unique needs of students with disabilities. Accommodations may include modifying or changing an education provider's:

- buildings, facilities and services
- policies and processes
- procurement and third-party contracts
- performance standards, conditions and requirements, where they are not *bona fide* academic requirements<sup>191</sup>
- decision-making practices
- culture
- methods of communication.

Depending on a student's individual needs and the nature of the education service being provided, accommodations may include:<sup>192</sup>

- modifications to improve the physical accessibility of educational buildings, facilities, resources and student housing
- support services, such as assessment or advice on learning strategies
- a modified curriculum
- modifications to a student's individual learning plan
- modification to evaluation methodologies, such as extended time when taking tests<sup>193</sup> and completing assignments, or alternative evaluation formats
- academic materials in alternative formats (e.g. Braille, large print, digitized text, voice activated software, assisted hearing devices)<sup>194</sup>
- sign language interpretation services
- real-time captioning
- behaviour management plans
- referrals to internal and external support services (e.g. school social worker, counselling agency)
- provision of and training on adaptive technology
- assistance from specialized professionals
- in-class supports (e.g. tutors, interpreters, note-takers, educational assistants, personal readers)
- transportation to and from school<sup>195</sup>
- making attendance requirements flexible, where possible, if non-attendance can be shown to be linked to a student's disability

- modifying rules around non-compliance with deadlines, if non-compliance can be shown to be linked to a student's disability<sup>196</sup>
- considering requests for accommodation after a deadline, test or course completion
- modifying "no pets" policies to allow guide dogs<sup>197</sup> and other service animals<sup>198</sup>
- considering a student's disability as a mitigating factor when addressing behaviour that would otherwise warrant imposing sanctions<sup>199</sup>
- time off or leaves of absence (e.g. to attend treatment).

### **8.4.3 Placement**

At the primary and secondary levels, before considering placing a student in a self-contained or specialized classroom, education providers must first consider inclusion in the regular classroom.<sup>200</sup> In most cases, appropriate accommodation will be accommodation in the regular classroom with supports. However, every student with a disability is unique. To provide appropriate accommodation to all students with disabilities, education providers must, with the assistance of parental input, assess each student's particular strengths and needs, and consider these against a full range of placements, programs and services. Ultimately, appropriate accommodation will be decided on an individual basis.

In determining the most appropriate placement, education providers should consider factors such as:

- the student's preferred learning style
- the student's academic performance (grades and other signs of advancement or regression)
- the length of time the accommodation will take to arrange
- whether supports provided are compatible with accommodation supports used at home
- the geographical proximity of a placement to the student's home (ideally, students should be able to attend their neighbourhood school)<sup>201</sup>
- the extent to which a placement affords the student with opportunities to socialize and interact with other students
- the degree to which a placement addresses health and safety issues, where applicable.

In the *Eaton* decision, the Supreme Court of Canada established that equality may sometimes require different treatment that does not offend an individual's dignity.<sup>202</sup> Emily Eaton, a student with a disability, was initially placed in an integrated classroom. However, after three years, her teachers and assistants concluded that this placement was not in her best interests and she was moved to a specialized classroom. Her parents disputed the change and appealed the decision up to the Supreme Court of Canada. The Court stated that the failure to place Emily Eaton in an integrated setting did not create a burden or disadvantage for her, because such a placement was not in her best interests.

According to the Court,

While integration should be recognized as the norm of general application because of the benefits it generally provides, a presumption in favour of integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality .... Integration can be either a benefit or a burden depending on whether the individual can profit from the advantages that integration provides.

At the same time, the Supreme Court has also said that the search for accommodation is a multi-party inquiry.<sup>203</sup> In education, this means that students with disabilities, their parents/guardians, as well as educators, administrators and any necessary experts together must consider the best interests of the student in determining the most appropriate placement accommodation.

Where placement outside the regular classroom is determined to be the most appropriate accommodation, the education provider should still make reasonable efforts to include the student in school programs and activities with students without disabilities, wherever possible. For example, the student should be afforded the opportunity to take part in regular music and art classes, lunch, recess, gym, school trips, *etc.*

Education providers need to take steps to ensure that placement decisions are not influenced by negative attitudes toward, or stereotypes about particular students or communities.



#### 8.4.4 Accommodation process as a continuum

Accommodation is a process and is a matter of degree, rather than an all-or-nothing proposition, and can be seen as a continuum. At one end of this continuum is full accommodation that most respects the student's dignity and promotes confidentiality. Alternative accommodation (which would be less than "ideal") might be next on the continuum when the most appropriate accommodation is not feasible. An alternative (or "next-best") accommodation may be implemented in the interim while the most appropriate accommodation is being phased in or put in place at a later date when resources have been put aside.

The highest point in the continuum of accommodation must be achieved, short of undue hardship.<sup>204</sup> At the same time, human rights case law makes it clear that the purpose of the *Code* is to accommodate a person's needs, not their preferences<sup>205</sup> or expectations.<sup>206</sup>

The *Code* does not guarantee "perfect" accommodation,<sup>207</sup> nor does it guarantee the right to any one particular form of accommodation.<sup>208</sup> If there is a choice between two accommodations that respond equally to a student's needs in a dignified way, then the education provider is entitled to select the one that is less expensive or less disruptive.

**Example:** While in grades 1-3, a student with a developmental disability received one-on-one services from a full-time Educational Assistant (EA) as an accommodation. Based on a professional assessment of the nature and extent of the student's needs, a review of her academic and social progress that showed improved academic standing and increased independence, and input from the student's parents, the school board proposed a trial accommodation in grade 4 that involved the student sharing the support of a full-time EA with another student.

Before opting for the less expensive or disruptive option, however, an accommodation provider must first demonstrate, considering the student's specific needs, that the accommodations are in fact equally responsive and equally dignified.

Determining the "most appropriate" accommodation is a separate analysis from determining whether the accommodation would result in undue hardship. If a particular accommodation measure would cause undue hardship, the next-best accommodation must be sought.

#### 8.4.5 Meeting education requirements

Section 17 of the *Code* states that the right to be free from discrimination is not infringed if the person with a disability is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right. Once appropriate accommodation is received, students must still be able to perform the essential requirements of the education service. While courts and tribunals have provided little guidance on the nature of essential duties and requirements, terms that have been used include “indispensable,” “vital,” and “very important.”

Depending on the level of education in question, essential requirements may be defined quite differently. At the primary and secondary levels, for instance, there is a statutory right to education for all children. Each child is entitled to the opportunity to develop their unique abilities and talents. Therefore, the essential requirements of the education service at these levels would be defined broadly, and would likely include the student’s overall physical and social development, in addition to their academic performance.

At the post-secondary level of education, the education right would be defined more narrowly, and the essential requirements of the service at this level would likely be more focused on academic performance. An appropriate accommodation at the post-secondary level would enable a student to successfully meet the essential requirements of the program, with no alteration in *bona fide* standards or outcomes, although the way the student demonstrates mastery, knowledge and skills may be altered. In this way, education providers are able to provide all students with equal opportunities to enjoy the same level of benefits and privileges and meet the requirements for acquiring an education without the risk of compromising academic integrity.<sup>209</sup>

**Example:** A college policy requires students to fulfil a minimum number of in-class hours to receive credit for a course. However, in response to the needs of students whose disabilities make it difficult or impossible to attend school full-time, the policy states that the attendance requirements may be modified where appropriate.

Students and their advocates have told the OHRC that, at times, colleges and universities may be too quick to jump to the conclusion that a course requirement or standard is essential, without first exploring alternatives. An academic requirement should not lightly be considered to be essential, but should be

carefully scrutinized. For example, at the post-secondary level, it may likely be an essential requirement that a student master core aspects of a course curriculum. It is much less likely that it will be an essential requirement to demonstrate that mastery in a particular format, unless mastery of that format (e.g., oral communication) is also a vital requirement of the program.

**Example:** A university professor in a nursing program requires all students to demonstrate proficiency in her course by passing an in-class essay test worth 100% of the student's final grade. The primary aim of the course is to teach students clinical evaluation methodology. A student identifies that she has a disability that makes it difficult to process large amounts of written material under strict time constraints. The university's disability services office arranges for the student to complete an independent study over the course of the semester that allows her to show mastery of the material and proficiency in the course. In this way, the university is able to provide the student with an accommodation that allows her to enjoy the same level of benefits as other students and meet the requirements for acquiring an education, without the risk of compromising legitimate academic requirements.

The onus is on the education provider to show that a student is incapable of performing the essential requirements of the education service, even with accommodation.<sup>210</sup> Conclusions about inability to perform essential requirements must not be reached without actually testing the ability of the student. It is not enough for an education provider to assume that a student cannot perform an essential requirement. Rather, there must be an objective determination of that fact.<sup>211</sup> To this end, an individualized assessment will be necessary.<sup>212</sup>

**Example:** A doctor enrolled in a residency program required accommodation of his ADHD and other disabilities to complete his rotations within various teaching hospitals and community practices. A human rights tribunal found that the university offering the program discriminated against him when it decided, based on an "impressionistic conclusion," that providing the accommodation would fundamentally alter the program or lower its professional standards. There must be a substantive factual foundation to support a conclusion that a person cannot meet an essential requirement of a program.<sup>213</sup>

Non-essential requirements are requirements that would not detract from the main purpose of the educational service if they were waived. Accommodation for non-essential requirements may include finding another way for the student to meet the requirement, doing it differently, or dropping it altogether.

The duty to accommodate does not require an education provider to exempt a student from meeting *bona fide* academic requirements.

### The legal test

Section 11 of the *Code* prohibits discrimination that results from requirements, qualifications or factors that may appear neutral but that have an adverse effect on students with disabilities. Section 11 allows an education provider to show that a requirement, qualification or factor that results in discrimination is nevertheless reasonable and *bona fide* (legitimate). However, to do this, the education provider must show that the needs of the student cannot be accommodated without undue hardship.<sup>214</sup> In other words, an education provider must provide accommodation, up to the point of undue hardship, to enable a student to meet an essential requirement.

The Supreme Court of Canada has set out a framework for examining whether the duty to accommodate has been met.<sup>215</sup> If *prima facie* discrimination (or discrimination on its face) is found to exist, an education provider must establish on a balance of probabilities that the standard, factor, requirement or rule:

- 1) was adopted for a purpose or goal that is rationally connected to the function being performed (such as taking part in the education service)
- 2) was adopted in good faith, in the belief that it is necessary to fulfil the purpose or goal, and
- 3) is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the student without undue hardship.<sup>216</sup>

As a result of this test, an academic rule or standard itself must be inclusive of as many students as possible and must accommodate individual differences up to the point of undue hardship. This makes sure that each student is assessed according to their own personal abilities.<sup>217</sup> The ultimate issue is whether the education provider has shown that they have provided accommodation up to the point of undue hardship.

The following non-exhaustive factors should be considered during the analysis:<sup>218</sup>

- whether the education provider investigated alternative approaches that do not have a discriminatory effect<sup>219</sup>
- reasons why viable alternatives were not put in place
- ability to have differing standards that reflect group or individual differences and capabilities
- whether the education provider can meet their legitimate objectives in a less discriminatory way
- whether the standard is properly designed to make sure the desired qualification is met without placing undue burden on the students it applies to
- whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

An education provider cannot deny accommodations or otherwise avoid their obligations under the *Code* by citing fears about the dilution of academic integrity without first showing that they can meet the legal test set out above.

### ***Bona fide* academic requirements**

Ultimately, the onus is on an education provider to show that an academic requirement is *bona fide*. To do this, the education provider would have to show that the needs of the student could not be accommodated without causing undue hardship.

Once receiving appropriate accommodation, a student must be able to meet *bona fide* academic requirements, such as meeting academic standards for admission,<sup>220</sup> demonstrating specific skills, mastering the curriculum, and passing the class, course or program. In one case, the HRTO stated:

The purpose of accommodation is to allow students with disabilities to demonstrate their ability to master the content and skills required to successfully pass the course without disadvantage because of their disability... Accommodation does not alter the academic standards by which success in a course is determined.<sup>221</sup>

Education providers, particularly at the post-secondary level, should clearly set out what the *bona fide* academic requirements of a course or program are, to enhance transparency, consistency, fairness, and so that students know what is expected of them.

## 8.5 Accommodation planning

As part of the duty to accommodate, education providers are responsible for taking steps to plan for accommodating students with disabilities. Effective planning will take place both on an organizational level, and on an individual level in relation to each student with accommodation needs. Individual planning should also address the transition needs of a student as they move from one level or type of education to another.<sup>222</sup> Effective accommodation planning should include collecting and analyzing aggregate data on students with disabilities, to make sure that education policies and practices do not have an adverse effect on these students.<sup>223</sup>

Accommodation is an ongoing process and accessibility, accommodation and learning plans should be reviewed on a regular basis. As with any other plan, documenting progress in writing helps with monitoring, accountability and future planning. Where academic requirements or facilities change over time, education providers need to review, modify or upgrade accommodations. Plans should be revised as the individual's needs evolve, or the educational institution changes.

**Example:** A change in the computer network could interrupt a student's efficient use of a technical aid connected to the system. New equipment in the school or educational institution may require additional accommodation or modifications to existing accommodations.

### 8.5.1 Institutional accessibility policies and plans

Education providers must develop accessibility policies and plans and take steps to ensure that accessibility plans comply with the requirements of human rights law and policy.<sup>224</sup> To be effective, an accessibility plan should set out an education institution's specific commitments to providing equal access to education services for all students. Accessibility plans should:

- make a clear statement that the institution is committed to fulfilling its responsibilities under the *Ontario Human Rights Code*, including its duty to accommodate students with disabilities
- set goals, identify steps being taken and report on achievements the education institution has made in adhering to the principles of inclusive design, barrier removal, most appropriate or next-best or interim accommodation of remaining needs, individualization, confidentiality, and shared responsibilities in the accommodation process

- report on policies, procedures and mechanisms for implementation, monitoring, education and training, input, dispute resolution and accountability
- include timelines, performance measures and accountability structures; and respect the dignity and the right to inclusion and participation of students with disabilities in the process of planning for and implementing accessibility.

#### **How to achieve accessibility**

- develop an accessibility policy and student complaint procedure
- review and identify accessibility barriers across educational facilities
- develop a standardized accessibility plan for future locations based not only on the *AODA* and the Ontario *Building Code*, but also on the Ontario *Human Rights Code*, and current standards and best practices in barrier-free design
- for existing facilities, develop a plan, and begin removing barriers
- collect and analyze aggregate data on students with disabilities and accommodation
- monitor progress toward achieving accessibility
- make adjustments, as necessary.

#### **8.5.2 Individual accommodation plans**

Education providers should also develop an accommodation plan for each student with a disability who requires accommodation, in consultation with the student and/or their parents or guardians. At the primary and secondary levels, accommodation plans will likely be more prescriptive and structured and include learning objectives. At the post-secondary level, students might prefer to have more control over their accommodation planning, and plans would likely focus on specific accommodation services or modifications to evaluation methods, and would not be as tied to learning outcomes. Depending on the student's individual needs and preferences, an effective accommodation plan may include:

- a statement of the student's functional limitations and disability-related needs as they relate to accessing the service of education, including any necessary assessments and information from experts or specialists
- arranging for necessary assessments by a health or other professional
- identifying the most appropriate accommodation(s)
- identifying interim accommodations or early interventions
- a statement of the specific services and supports required by the student (e.g. assistive technology devices)
- ordering any necessary products or services

- the student's present levels of educational performance and a statement of current educational status (may not be required at the post-secondary level)
- a statement of annual goals (including specific performance indicators and short-term objectives)
- incorporating input from the student and/or parents/guardians
- identifying and developing, or making changes to, a student's learning plan, strategies and tools
- clear timelines for the various stages of the accommodation process
- specific steps to be taken to meet annual goals
- criteria, procedure and schedule to determine if the accommodation is facilitating the student's educational goals
- a mechanism for review and re-assessment, where necessary, to determine whether the student's accommodation needs are being met
- an accountability mechanism (for example, if the plan is not implemented, or is not implemented effectively, or in a timely fashion).<sup>225</sup>

A student with a disability is entitled to accommodation of their disability-related needs, regardless of whether the education provider has completed an individualized accommodation plan. Many students with disabilities do not have formal accommodation plans (IEPs, for example), but if they can verify through medical or healthcare documentation that they have a disability, they are entitled to accommodation under the *Code*.<sup>226</sup>

### **8.5.3 Transitioning to higher or different forms of education**

At the primary and secondary levels, accommodation plans should also include information outlining the student's transition needs.<sup>227</sup> For example, this might include a plan to have the student take specific courses designed to prepare him or her for post-secondary study, or it might outline a strategy to have the student take part in a vocational educational program or other type of "co-op" placement. The focus should be on how the student's education program can be planned to facilitate a successful transition to their goals after secondary school.<sup>228</sup> Each student is unique, and goals may include post-secondary schooling, vocational training, integrated employment, continuing and adult education, independent living, or community participation.

School staff should inform students that, where the student so desires, staff will communicate with the student's prospective educational institution or employer



about accommodation practices or effective learning strategies to help facilitate the student's transition.

Transition planning will also be appropriate in situations where students are transferring from one type of educational setting to another.<sup>229</sup>

**Example:** An 11-year-old girl with a history of behavioural difficulties has made significant progress in a section 23 program.<sup>230</sup> She has learned effective anger management techniques and is ready to be re-integrated into the regular school system with supports. Working together, her former and prospective teachers, her parents and medical professionals develop a plan to facilitate this transition.

## 8.6 Duties and responsibilities in the accommodation process

The accommodation process is a shared responsibility. Everyone involved should co-operatively engage in the process, share information and consider potential accommodation solutions. It is in everyone's best interests that congenial and respectful relationships be maintained throughout the accommodation process.<sup>231</sup>

A **student with a disability**, or their parent/guardian, has a responsibility to:

- make accommodation needs known to the best of their ability, preferably in writing, so that the education provider can make the requested accommodation<sup>232</sup>
- answer questions or provide information about relevant restrictions or limitations, including information from medical and health care professionals<sup>233</sup>
- take part in discussions about possible accommodation solutions<sup>234</sup>
- co-operate with any experts whose assistance is required to manage the accommodation process or when information is needed that is unavailable to the student with a disability
- meet *bona fide* academic requirements, once accommodation is provided
- work with the education provider on an ongoing basis to manage the accommodation process<sup>235</sup>
- advise the education provider of difficulties they may be experiencing in accessing educational services, including problems with arranged accommodations.

The **education provider** has a responsibility to:

- advise students, and their parents/guardians, of available accommodations and support services, and the process for accessing these resources
- be alert to the possibility that a person may need an accommodation even if they have not made a specific or formal request<sup>236</sup>
- accept a student's request for accommodation in good faith (even when the request does not use any specific formal language), unless there are legitimate reasons for acting otherwise
- get expert opinion or advice where needed (but not as a routine matter)
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated,<sup>237</sup> and canvass various forms of possible accommodation and alternative solutions<sup>238</sup>
- consult with the student to determine the most appropriate accommodation
- communicate regularly and effectively with the student (or their parents/guardians, where appropriate), providing updates on the status of the accommodation and planned next steps<sup>239</sup>
- take steps to include students with disabilities in in-class and extra-curricular activities
- keep a record of the accommodation request and action taken
- maximize a student's right to privacy and confidentiality, including only sharing information about the student's disability with those directly involved in the accommodation process
- limit requests for information to those reasonably related to the nature of the need or limitation, and only to facilitate access to education services
- implement accommodations in a timely way,<sup>240</sup> to the point of undue hardship
- bear the cost of any required medical information or documentation (for example, the education provider should pay for doctors' notes, assessments, letters setting out accommodation needs, *etc.*)<sup>241</sup>
- bear the cost of required accommodation<sup>242</sup>
- make sure that the school environment is welcoming and that all students treat one another with respect
- take immediate remedial action in situations where bullying and harassment are or may be taking place
- educate all faculty (*e.g.* teachers, instructors, professors, *etc.*), staff and students about disability-related issues.

On an institutional level, the **education provider** has a responsibility to:

- review the accessibility of the educational institution as a whole, including all education services<sup>243</sup>
- design and develop new or revised facilities, services, policies, processes, courses, programs or curricula inclusively, with the needs of students with disabilities in mind
- make sure that the costs of accommodation are spread as widely as possible throughout the institution.<sup>244</sup>

**Unions, professional associations, and third party educational service providers** are required to:

- take an active role as partners in the accommodation process
- facilitate accommodation efforts
- support accommodation measures regardless of collective agreements,<sup>245</sup> unless to do so would create undue hardship.

Although the student seeking accommodation has a duty to assist in identifying appropriate accommodation that will meet their needs, they are not responsible for originating a solution<sup>246</sup> or leading the accommodation process. They are also not required to discuss their disability-related needs with anyone other than the people directly involved in the accommodation process.<sup>247</sup> It is ultimately the education provider's responsibility to implement solutions, with the co-operation of the student seeking accommodation (or their parent/guardian, where appropriate).

If the accommodation is required to allow the student to be able to take part in the education services without impediment due to disability, the education provider must arrange and cover the cost of the accommodation needed,<sup>248</sup> unless this would cause undue hardship.

Where a student requires assistance for their disability beyond what is required to access education services equally, such as an assistive device for daily living, the education provider would not generally be required to arrange or pay for it, but is expected to allow the student to access this type of accommodation without impediment.

### 8.6.1 Duty to inquire about accommodation needs

In general, the duty to accommodate a disability exists for needs that are known or ought to be known. Education providers are not, as a rule, expected to accommodate disabilities they are unaware of. However, in some circumstances, the nature of certain disabilities may leave students unable to identify that they have a disability, or that they have accommodation needs.<sup>249</sup>

**Example:** A third-year university student begins to exhibit erratic behaviour. Although she has been a successful student to date, she begins missing classes and fails to submit her coursework on time. In the middle of a lecture, she suddenly starts shouting inexplicably. The university professor arranges to meet with the student after class to inquire into her situation. As a result of this discussion, the professor contacts the university's Office for Students with Disabilities (OSD/DSO). A meeting is arranged and the student is offered assistance. The university helps arrange counselling and support services for the student who, ultimately, is diagnosed with schizophrenia. The Office for Students with Disabilities then works with the student and her professors to arrange academic accommodations.

Education providers should also be aware that students who know that they have a disability may be reluctant to disclose it, due to the considerable stigma surrounding some disabilities, particularly mental health issues and addictions.<sup>250</sup>

In some cases, an education provider may be required to pay special attention to situations that could be linked to a mental health disability. Mental health disabilities and addictions should be addressed and accommodated in the education context like any other disability.

Education providers must attempt to help a student who is clearly unwell or perceived to have a disability by inquiring further to see if the student has needs related to a disability, and offering assistance and accommodation.<sup>251</sup> Even if an education provider has not been formally advised of a disability, the perception of such a disability will engage the protection of the *Code*.

Where an education provider is aware, or reasonably ought to be aware, that there may be a relationship between a disability and a student's behaviour or academic performance, the education provider has a "duty to inquire" into that possible relationship before making a decision that would affect the student adversely.<sup>252</sup>

This includes providing a meaningful opportunity to the student (and/or their parent/guardian, where appropriate) to identify a disability and request accommodation. A severe change in a student's behaviour or academic performance could signal that the situation warrants further examination.

ARCH Disability Law Centre reported that it has "been contacted by clients about the duty to inquire in a number of circumstances. For instance, in one case a student who had been diagnosed with schizophrenia was having a number of interpersonal issues with his peers due to his alleged "odd behaviour." The university held a meeting with the student about his behaviours and subsequently unenrolled him from the program without inquiring about the presence of a disability."<sup>253</sup>

Where a student exhibits inappropriate behaviour due to a disability, education providers have a duty to assess the student individually before imposing measures that may affect the student negatively. Such measures might include withdrawing services (for example, excluding the student from school) or imposing discipline. Before sanctioning a student for misconduct or "unacceptable behaviour," an education provider must first consider whether the actions of the student are caused by a disability, especially where the education provider is aware or perceives that the person has a disability.<sup>254</sup> The student's disability must be considered in determining what, if any, sanctions are appropriate, unless this causes undue hardship.

**Example:** A boy in grade 2 regularly interrupts his classmates and disrupts the teacher's lessons. When repeated reminders do not improve the problem, the teacher considers her options. Before escalating the situation, she contacts his parents to make further inquiries. Together, they arrange for an educational assessment which reveals that the boy has autism spectrum disorder. They are then able to take steps to put the appropriate supports in place to help him succeed at school.

Frequent and visible declarations<sup>255</sup> of the institution's commitment to uphold its responsibilities under the Ontario *Human Rights Code* can go a long way toward making students and their families feel comfortable asking for accommodations. Education providers should always inform students, and their parent(s)/guardian(s) where appropriate, that a disability-related assessment (such as a medical assessment) or accommodation can be provided as an option to address academic

performance issues, and any other issues related to the student's participation in education. Education providers should have an up-to-date list of community and support services that specialize in assisting people with disabilities and their families. These resources should be circulated widely and posted publicly so that students with disabilities and their families know of their existence.

Inquiries about possible disability-related needs must be balanced with respect for a student's dignity and their right to confidentiality.<sup>256</sup> A respectful way to inquire would be to ask whether there is anything a student needs in the way of support to help them participate effectively at school. Education providers should document the steps they take to fulfil the duty to inquire. Students should not be pressured to share more information than they are comfortable sharing.

Where a student (or their parent/guardian) denies the existence of a disability, or refuses to participate or cooperate in the accommodation process by providing relevant information about their needs, an education provider's duty to inquire (and broader duty to accommodate) may come to an end.<sup>257</sup> Education providers should not continue to inquire about a student's possible needs where the student has reacted negatively.<sup>258</sup> Overly-intrusive, unwanted or repeated inquiries where a student has indicated that such questions are unwelcome may constitute harassment.<sup>259</sup>

Where the student's behaviour is not related to a disability, sanctions or discipline will generally apply, as usual.<sup>260</sup>

Once disability-related needs are known, the legal onus shifts to the education provider.<sup>261</sup> Support or referral through the special education system, for example, or the Offices for Students with Disabilities at the post-secondary level, can help students get the support they need and to which they are legally entitled.

## **8.7 Medical information to be provided**

The provision of medical information by students with disabilities – the type, the scope and to whom – has privacy implications for students.<sup>262</sup> At the same time, education providers must have enough information to allow them to meet their duty to accommodate.

When requesting accommodation from an education provider, students (and/or their parent/guardian) have a responsibility to provide sufficient information about their disability-related needs to facilitate the accommodation. Education services at the lower levels of education are broad and may include cultivating aspects of the student's development beyond those which are strictly academic. Since the accommodations that younger students may require will often relate to their overall well-being, it may be appropriate for education providers at the primary and sometimes at the secondary levels to require more extensive and detailed information about a student's disability-related needs. At the higher levels of schooling, where educational services are defined more narrowly and the focus is more on academic standards and accreditation, accommodations will generally be related to the student's academic needs and the degree and type of information required by education providers will not likely be as broad.

In an ideal world, all students, including students with disabilities, would be comfortable discussing all aspects of their personal identities in an open manner without fear of discrimination and/or harassment. However, in reality, some students may be reluctant to disclose their disabilities at school, particularly at the secondary and post-secondary levels, for fear of being stigmatized, denied opportunities, having the information "follow" them, or arousing unwanted curiosity and unnecessary concern from others.<sup>263</sup> Some students will have had bad experiences in the past that may have included being on the receiving end of intolerant attitudes and other forms of discriminatory treatment.

An education provider is required to take requests for accommodation in good faith.<sup>264</sup> A student with a disability does not have to meet an onerous standard for initially communicating that a disability exists to trigger the education provider's duty to accommodate. Education providers should limit requests for information to those reasonably related to the nature of the limitation or restriction, to assess needs and make the accommodation.

The type of information that students may generally be expected to provide to support an accommodation includes:

- that the student has a disability<sup>265</sup>
- the limitations or needs associated with the disability

- whether the student can perform the essential academic requirements, with or without accommodation
- the type of accommodation that may be needed to allow the student to fulfill the essential academic requirements.

**Example:** A student calls the disability services office (DSO) at his university to say he has been hospitalized suddenly due to a disability, and cannot submit an essay assignment by the deadline. Knowing that the person is in hospital, the university does not require confirmation that the student has a disability, but asks for information to indicate that his need is temporary in nature, and that he will be able to complete his assignment once he is released. The student provides this information, and the DSO works with the student's professor to make an allowance for the missed deadline.

Where there is a reasonable basis to question the legitimacy of a student's request for accommodation or the adequacy of the information provided, the education provider may request confirmation or additional information from a qualified health care professional to get the needed information.<sup>266</sup>

Where more information about a student's disability is needed, the information requested must be the least intrusive of the student's privacy while still giving the education provider enough information to make the accommodation. Students should not be asked to give blanket consent for the release of medical information or to authorize ongoing discussions between the education provider and the student's medical or healthcare professionals. If further information is justifiably needed to make an accommodation, the student can be asked to provide express and voluntary informed consent to release that information.

In the rare case where an education provider can show that it legitimately needs more information about the student's disability to make the accommodation (as opposed to just the needs related to the disability), it could ask for the nature of the student's illness, condition or disability<sup>267</sup> (for example, is it a mental health disability, a physical disability, a learning disability?), as opposed to a medical diagnosis.

Education providers are not expected to diagnose illness or "second-guess" the health status of a student with a disability. An education provider is not entitled to substitute its own opinion for that of documentation provided by a doctor or other healthcare specialist.<sup>268</sup> Similarly, an education provider must not ask for more



confidential medical information than necessary because it doubts the student's disclosure of their disability based on its own impressionistic view of what a specific disability should "look like."<sup>269</sup>

Generally, the education provider does not have the right to know a student's confidential medical information, such as the cause of the disability, diagnosis, symptoms or treatment,<sup>270</sup> unless these clearly relate to the accommodation being sought, or the student's needs are complex, challenging or unclear and more information is needed.<sup>271</sup>

In rare situations where a student's accommodation needs are complex, challenging or unclear, the student may be asked to co-operate by providing more information, up to and including a diagnosis.<sup>272</sup> In such situations, the education provider must be able to clearly justify why the information is needed.

However, wherever possible, an education provider must make genuine efforts to provide needed accommodations without requiring a student to disclose a diagnosis, or otherwise provide medical information that is not absolutely necessary.

**Example:** A woman living with HIV provides medical verification that she has a disability to her university's office for students with disabilities. The office helps her set up a schedule that avoids early morning classes, due to the insomnia and fatigue she experiences as a side effect of her medication. Neither the office nor the woman's professors need to know the exact nature of her disability to make this accommodation.

To implement appropriate accommodations that respect the dignity and privacy interests of people with disabilities, the focus should always be on the functional limitations associated with the disability, rather than a person's diagnosis.

Accommodation requires individualized assessment. The definition of disability under the *Code* is flexible and encompasses new and emerging disabilities and disabilities for which a precise diagnosis is unclear or has not yet been determined. Accordingly, the duty to accommodate can be triggered even when there is no specific diagnosis. Furthermore, a diagnosis does not necessarily help determine what accommodations need to be provided and may foster reliance on assumptions and stereotypes about particular disabilities.<sup>273</sup>

Education providers should also keep in mind that diagnoses may change over time and may result in vastly different symptoms and experiences for different people. Therefore, a general statement that a person has a disability and that outlines their functional limitations will generally be far more helpful to the accommodation process than a diagnosis.

There will be some cases where there may be overlap between a description of the student's needs and an actual diagnosis. In these circumstances, it may be necessary for an education provider to require a diagnosis to appropriately accommodate a student.

**Example:** In the course of providing information to her school principal to facilitate the provision of accommodation, a grade 11 student provides an assessment of her learning needs from an outside expert. The assessment outlines the learning supports she requires, and in doing so, identifies the student as having a learning disability.<sup>274</sup>

The staff in offices for students with disabilities (OSDs/DSOs) at colleges and universities typically have expertise in dealing with accommodation issues in the academic environment, and can play a vital role in assisting with the accommodation process. Students may choose to provide these offices with more detailed information about their disabilities, including, for example, a diagnostic assessment, where they believe that to do so would facilitate the provision of accommodation. Educational institutions should make it clear to students that a diagnostic disclosure is purely voluntary, and is not required for a student to be eligible for any of the services and supports provided by the education provider, including those offered by a DSO.<sup>275</sup> The institution should not imply that accommodations will be quicker or better if a diagnosis is provided.

Government, and other entities, should not require students to disclose a diagnosis to establish eligibility for student funding programs.<sup>276</sup>

In situations where a diagnosis is necessary, the education institution is responsible for implementing procedures to make sure that student confidentiality is maximized.<sup>277</sup>

Where a student's needs are unclear, they may be asked for additional medical information or an independent medical assessment. However, there must be an objective basis for concluding that the initial medical information provided is

inaccurate or inadequate. A request for more medical information should not be used to “second-guess” a student’s request for accommodation.<sup>278</sup> Requests must be warranted, take into account a student’s particular disability-related needs, and respect individual privacy to the greatest extent possible.<sup>279</sup>

**Example:** A female student in the Department of Chemical Engineering and Applied Chemistry at a university is required to complete a research project in a laboratory, an environment that is considered “safety sensitive.” Her instructor notices that she often has trouble focusing on her work, often makes mistakes, and has had to excuse herself from the lab several times saying that she is feeling dizzy. When the instructor inquires further, the student says that she recently began taking medication for hypertension, but insists that she is fine, and that her doctor has cleared her to continue her studies. If the symptoms continue, the education institution may be justified in asking the student to attend an independent medical examination.<sup>280</sup>

No one can be made to attend an independent medical examination or assessment, but failure to respond to reasonable requests may delay the accommodation until such information is provided, and may ultimately frustrate the accommodation process.

Mere assertions of symptoms, such as statements that a student experiences “stress,” “anxiety,” “pain,” or “feels unwell” – things that many people commonly experience – may not be enough to establish a disability within the meaning and protection of human rights legislation. If choosing to disclose such information in writing, individuals and doctors should make it clear that these symptoms relate to a disability.<sup>281</sup>

**Example:** At exam time, a college notices a sharp increase in the number of students asking for disability-related accommodations, citing stress and anxiety. The college is entitled to ask for more information to ascertain whether the symptoms described are linked to a disability.

However, where these types of assertions exist alongside other indicators that the student is experiencing health problems, and where an education provider perceives that a student may have a disability, the *Code’s* protection will be triggered.

Where a student provides disability-related information that an education provider deems “insufficient” to enable it to provide accommodation, the education provider cannot use its own failure to ask for additional information to deny the accommodation or to otherwise subject the student to negative treatment.<sup>282</sup>

If the student does not agree to provide additional medical information, and the education provider can show that this information is needed, the student could be found to not have taken part in the accommodation process and the education provider would likely be relieved of further responsibility.<sup>283</sup>

In some cases, two medical experts may provide conflicting information. For example, a student’s own doctor or specialist may outline different accommodation needs than an independent medical examiner’s report. Deciding which report to follow will depend on the facts of the situation and certain factors, such as which expert has more relevant experience and expertise, the degree of interaction with the student, and the methods used for the assessment, among others.<sup>284</sup>

## **8.8 Confidentiality and protecting disability-related information**

It is important that an education provider take steps to ensure that students feel safe disclosing a disability. To avoid labelling or stereotyping, it is essential that education-providers take precautions to safeguard the disability-related information of students. This is especially important for people with disabilities that continue to carry a strong social stigma, such as mental health disabilities, addictions or HIV/AIDS.

Maintaining confidentiality for students with disabilities is an important procedural component of the duty to accommodate. The degree of confidentiality afforded to students will likely vary according to the level of education being offered. For example, confidentiality may be less of an issue for students at the primary school level where the education service being offered is broad, parents/guardians are more involved, and student autonomy is less of an issue.

At the more competitive secondary and post-secondary levels of education, privacy and confidentiality will be of greater importance, particularly as students in most cases are developing greater independence and will often be more in control of managing their own accommodation needs. Accommodation requests should be handled centrally [for example, through an Office for Students with Disabilities

(OSD/DSO]. DSOs should take steps to maintain strict confidentiality and safeguard privacy (for example, by keeping medical and healthcare documentation in locked filing cabinets and/or in password-protected databases or files). To protect the student's privacy, personal information that either directly or indirectly identifies that a student has a disability should remain exclusively with designated personnel away from the student's academic record. This is meant to protect the institution from allegations of discrimination, as well as the student from potential discriminatory practices.

**Example:** Students who volunteer at a university's Office for Students with Disabilities should not have access to the confidential information of students who have files with the office.

Students at the post-secondary level should not be required to reveal their private medical information to, or seek accommodation directly from, their professors, instructors, teaching assistants, administrative staff, *etc.* as a condition of receiving academic accommodations. Students should also not be required to deliver accommodation letters directly to professors, instructors, *etc.* While students can be provided with the option to engage directly with instructors about their accommodation needs, requiring students to do so can create barriers for access to appropriate accommodations.<sup>285</sup>

The institution as a whole is responsible for ensuring that the medical information in its possession is secure, and the student's right to privacy and confidentiality is protected. It is essential that the information requested is limited to what is specifically needed for the accommodation, and the information is disseminated only to the people responsible for administering the program.

**Example:** In the day-to-day activities of the education institution, education providers must take care to avoid disclosing a student's disability. For example, faculty should not speak about a student's disability in front of their class or other students, disclose a student's personal disability information without permission to other faculty/staff, leave written information about a student's disability in a public place or in plain view, or use names when discussing general disability issues.

Any data collected on students with disabilities should be collected in the aggregate, and must not include any information that would reveal a student's identity. Education institutions must ensure that disability-related information (including accommodations requested or received) does not appear on academic documents including test results, transcripts, student records, or graduation documentation. Distinguishing the score results of a student who received accommodation has the potential of revealing the existence of a disability and exposing that student to discrimination.

**Example:** Transcripts, entrance test result forms, or licensing exam result forms should not indicate that a student received accommodation, or that academic requirements were met under "special" or "non-standard conditions."<sup>286</sup>

In cases where there are compelling circumstances affecting the health and safety of an individual, it may be necessary to disclose information about a student's health to others. This should be done in accordance with privacy laws. More information about privacy laws and how they apply to education providers can be found at the Office of the Information and Privacy Commissioner of Ontario and the Office of the Privacy Commissioner of Canada.<sup>287</sup>

## 9. Undue hardship

Education providers have a legal duty to accommodate students with disabilities to the point of undue hardship. Some degree of hardship may be expected – it is only if the hardship is "undue" that the accommodation will not need to be provided.<sup>288</sup>

In many cases, it will not be difficult to accommodate a student's disability. Accommodation may simply involve making policies, rules and requirements more flexible. While doing this may involve some administrative inconvenience, inconvenience by itself is not a factor in assessing undue hardship.

The OHRC has heard from some education providers of challenges they face in meeting their duty to accommodate. For example, school boards often feel that they are insufficiently funded by the Ministry of Education to cover all of the costs related to accommodation requests. Universities and colleges have stated that they are struggling to deal with the increase in student requests for mental health-related accommodations. School principals, teachers, and post-secondary faculty

and staff have also expressed the feeling that they are inadequately trained to meet the disability-related needs of students, particularly where there is a perception that the student's behaviour may pose a risk to themselves or others. These concerns need to be addressed by the Ministry of Education and the Ministry of Training, Colleges and Universities, particularly where education providers feel that these challenges are impairing their ability to meet their legal duty to accommodate students with disabilities to the point of undue hardship.

The *Code* prescribes only three considerations when assessing whether an accommodation would cause undue hardship:

- cost
- outside sources of funding, if any
- health and safety requirements, if any.

No other considerations can be properly taken into account under Ontario law.<sup>289</sup> Therefore, factors such as business or institutional inconvenience,<sup>290</sup> student or instructor morale,<sup>291</sup> third-party preferences,<sup>292</sup> and collective agreements<sup>293</sup> are not valid considerations in assessing whether an accommodation would cause undue hardship.<sup>294</sup>

**Example:** A union opposes the hiring of a specialized educational professional to assist in accommodating a student with a learning disability because the professional is not part of the bargaining unit. Unless the union can show that the hiring will cause undue hardship based on one of the three elements set out in the *Code*, disruption to the collective agreement will not, in and of itself, be enough to establish undue hardship.

Where education providers attempt to argue undue hardship based on factors that are not specifically listed in the *Code*, decision-makers should treat these arguments with skepticism.<sup>295</sup>

To claim the undue hardship defence, the education provider has the onus of proof.<sup>296</sup> It is not up to the student with a disability to prove that an accommodation can be accomplished without undue hardship.

The nature of the evidence required to prove undue hardship must be objective, real, direct and, in the case of cost, quantifiable. The education provider must

provide facts, figures and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship. A mere statement, without supporting evidence, that the cost or risk is “too high” based on speculation or stereotypes will not be sufficient.<sup>297</sup>

Objective evidence includes, but is not limited to:

- financial statements and budgets
- scientific data, information and data resulting from empirical studies
- expert opinion
- detailed information about the activity and the requested accommodation
- information about the conditions surrounding the activity and their effects on the person or group with a disability.

## 9.1 Elements of the undue hardship defence

### 9.1.1 Costs

The Supreme Court of Canada has said “one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment.”<sup>298</sup> The cost standard is therefore a high one.

Costs will amount to undue hardship if they are:

- quantifiable
- shown to be related to the accommodation, and
- so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability<sup>299</sup>

The costs that remain after all benefits, deductions and other factors have been considered will determine undue hardship. All projected costs that can be quantified and shown to be related to the proposed accommodation will be taken into account.<sup>300</sup> However, mere speculation (for example, about financial losses that may follow the accommodation of a student with a disability) will not generally be persuasive.<sup>301</sup>



In determining whether a financial cost would alter the essential nature or substantially affect the viability of the education institution, consideration will be given to:

- The size of the institution – what might prove to be a cost amounting to undue hardship for a small educational institution will not likely be one for a larger educational institution.
- Can the costs be recovered in the normal course of operation?
- Can other divisions, departments, *etc.* of the education institution help to absorb part of the costs?
- Can the costs be phased in – so much per year?
- Can the education provider set aside a certain percentage of money per year to be placed in a reserve fund to be used for accommodation issues?<sup>302</sup>
- Will the education programs and services for all students be substantially and permanently altered?

The government is required to make sure that school boards have access to sufficient funding to ensure equal access to education. School boards, in turn, have a responsibility to provide adequate funding to schools to enable the provision of accommodations. Where an education provider receives funding from government to promote accessibility and meet the needs of students with disabilities, the education provider should track accommodation data and alert the government to any funding deficiencies that exist.

Education providers cannot use limited resources or budget restrictions as a defence to the duty to accommodate without first meeting the formal test for undue hardship based on costs. Further, education providers cannot decide which accommodations are most appropriate for a student based on financial considerations or budget constraints. Whether an accommodation is “appropriate” is a determination completely distinct and separate from whether the accommodation would result in “undue hardship.” If the accommodation meets the student’s needs and does so in a way that most respects dignity, then a determination can be made as to whether this “most appropriate” accommodation would result in undue hardship.

If an accommodation exceeds an education provider’s pre-determined special education budget, the education provider must look to its global budget, unless to do so would cause undue hardship.<sup>303</sup>

**Example:** A publicly-funded school informs the parents of a student with a learning disability that they cannot provide their son with the services of a special needs assistant. The school principal states that he only has a certain amount of resources to fund accommodations to students with disabilities, and that he has already spent the money on the “most needy” students. The school board in this instance would be required to review its overall budget before supporting a conclusion that the accommodation could not be provided without causing undue hardship based on costs.

Education providers may have to manage and accommodate the disability-related needs of more than one student at any given time. It is not appropriate or acceptable for education providers to triage students with disabilities according to perceptions about a student’s level of need relative to other students. Under the *Code*, every student with a disability is entitled to accommodation up to the point of undue hardship. In a human rights case where an education provider tried to argue that it could not accommodate a student with a disability because there were other students “who had higher needs” that required its resources, the HRTO commented:

The fact that there are other students with disabilities in a class who require a high level of accommodation does not absolve the respondent from its duty under the *Code* to accommodate [the claimant’s] disability-related needs, short of evidence of undue hardship.<sup>304</sup>

Costs of accommodation should be distributed as widely as possible within the education system so that no single part of the system is disproportionately burdened. The appropriate basis for evaluating the costs is based on the budget of the education system as a whole.<sup>305</sup>

**Example:** A college student requires the services of a sign language interpreter in his classes. The college has received several accommodation requests in the given academic year and has depleted its disability accommodation budget. Before denying the student’s request, however, the college reviews its overall budget and finds a surplus in the budget of the business department which is then used to fund the student’s request.

### 9.1.2 Outside sources of funding

Where possible, an education provider must take steps to recover the costs of accommodation.<sup>306</sup> This can be done, for example, by obtaining grants, subsidies and other outside sources of funding,<sup>307</sup> as well as investigating possible cost-sharing options which can help to offset accommodation expenses. Tax deductions and other government benefits flowing from the accommodation must also be considered. In addition, inclusive design and other creative design solutions can often avoid expensive capital outlay.

Before being able to claim that it would be an undue hardship based on costs to accommodate a student with a disability, an education provider would have to show that they took advantage of any available government funding (or other) program to help with such costs.

A student seeking accommodation is also expected to avail themselves of any available outside sources of funding to help cover expenses related to their own accommodation.<sup>308</sup> Resources such as government services or programs might be available to accommodate the needs of students with disabilities. These resources could also aid them at school.

**Example:** A private career college informs all students of a bursary offered by a disability service organization to help fund the cost of assistive devices that might be needed to facilitate participation in the college's programs. Affected students would be expected to apply for the bursary to help offset the cost of such devices.

### 9.1.3 Health and safety

Maintaining a healthy and safe learning environment is an objective of the utmost importance. Education providers have an obligation to protect the health and safety of all students (including students with disabilities), school staff and educators, as part of fulfilling their legal requirements under Ontario's health and safety laws. The *Code* recognizes that the right to be free from discrimination must be balanced with health and safety considerations.

Health and safety issues will arise in various educational contexts, and have the potential to affect individual students with disabilities, other students, educators

and school staff. Depending on the nature and degree of risk involved, it may be open to an education provider to argue that accommodating a student with a disability would amount to an undue hardship, based on health and safety risks.

However, education providers have a responsibility to take precautions to ensure that the health and safety risks in their facilities or services are no greater for students with disabilities than for others. Where a health and safety requirement creates a barrier for a student with a disability, the education provider should assess whether the requirement can be waived or modified. However, modifying or waiving health and safety requirements may create risks that have to be weighed against the student's right to equality.

**Example:** A teacher has reservations about allowing a student who uses a wheelchair to accompany the class on a field trip to a local zoo because of her belief that it will be too dangerous. The school principal decides to make further inquiries, including contacting the zoo's management, and determines that most of the facility is accessible, and that patrons who use wheelchairs and other motorized devices regularly visit the premises without incident. It is important to substantiate the actual degree of risk in question, rather than acting on inaccurate or stereotypical perceptions that may have little to do with a student's actual limitations.

An education provider may believe that an accommodation that would result in modifying or waiving a health or safety requirement could place the student at risk. The education provider is obliged to explain the potential risk to the student or their parent/guardian, where appropriate. The student or parent/guardian will usually be in the best position to assess the risk. This applies only if the potential risk is to the student's health or safety alone. Where the risk that remains after considering alternatives and after accommodation is so significant that it outweighs the benefits of enhancing equality, it will likely be considered to be undue hardship.

Where modifying or waiving a health or safety requirement is believed to result in a risk to the health or safety of others, the degree of risk must be evaluated. A potential risk created by accommodation should be assessed in light of those other more common sources of risk in the educational institution. The seriousness of the risk of accommodation should be judged based on taking suitable precautions to reduce it.

An education provider can determine whether modifying or waiving a health or safety requirement creates a significant risk by considering:

- Is the student (or their parent/guardian) willing to assume the risk in circumstances where the risk is solely to their own health or safety?
- Would changing or waiving the requirement be reasonably likely to result in a serious risk to the health or safety of other students, educators or school staff?
- What other types of risks are assumed within the institution or sector, and what types of risks are tolerated within society as a whole?

In evaluating the seriousness or significance of risk, consider the following factors:

- The nature of the risk: What could happen that would be harmful?
- The severity of the risk: How serious would the harm be if it occurred?
- The probability of the risk: How likely is it that the potential harm will actually occur? Is it a real risk, or merely hypothetical or speculative? Could it happen often?
- The scope of the risk: Who will be affected by the event if it occurs?

If the potential harm is minor and not very likely to occur, the risk should not be considered serious. If there is a risk to public safety, consideration will be given to the increased numbers of people potentially affected and the likelihood that the harmful event may occur.

Where a student with a disability engages in behaviour that affects the well-being of others, an education provider may be able to argue that to accommodate the student would cause undue hardship based on health and safety concerns, specifically, that the accommodation would pose a risk to public safety. However, the seriousness of the risk will be evaluated only *after* accommodation has been provided and only after appropriate precautions have been taken to mitigate the risk.

Where policies or procedures implemented in the name of minimizing risk intrude on the dignity and equality of students with disabilities, the education provider will need to show that the policy, procedure, *etc.* is a *bona fide* and reasonable requirement.<sup>309</sup>

Education providers must consider a range of strategies to address the behaviour. Strategies will include assessing, and where necessary, reassessing and modifying any accommodations that are already in place for the student, and/or providing or

arranging for additional supports. Appropriate and timely accommodation can often significantly alleviate risk and make the environment safer for everyone.

**Example:** A boy in grade 5 with ADHD has been sent to the principal's office repeatedly for acting out, initiating rough physical contact with other students, and on one occasion throwing a stapler against a wall. The principal sets up a meeting with the boy, his parents and his teacher. Together, they review the boy's accommodation plan to make sure that he is receiving appropriate accommodation. They arrange to increase the level of EA (Educational Assistant) support in the classroom; they develop a behavioural management plan with a clear implementation strategy; and they agree on a schedule for ongoing communication. Over the remainder of the term, there is a marked improvement in the boy's behaviour.

The onus is on the education provider to establish that it cannot accommodate a student due to dangers related to health and safety.<sup>310</sup> Assessment of whether an accommodation would cause undue hardship based on health and safety must reflect an accurate understanding of risk based on objective and direct evidence rather than stereotypical views. Undue hardship cannot be established by relying on suspicions, impressionistic or anecdotal evidence, or after-the-fact justifications.<sup>311</sup> Anticipated hardships caused by proposed accommodations should not be sustained if based only on speculative or unsubstantiated concern that certain adverse consequences "might" or "could" result if the person is accommodated.<sup>312</sup>

Where an education provider excludes a student from school for disability-related behaviour because of alleged health and safety risks without objective and direct evidence, and without being able to meet the undue hardship test set out in the *Code*, this will raise human rights concerns.

ARCH Disability Law Centre reported that it "has received a number of calls from parents who were told by their school principal that their child was being excluded via s. 265(1)(m) [of the *Education Act*] for an indeterminate period of time. They did not receive a letter explaining the decision or informing them of their right to appeal. In fact, in many cases this letter was not forthcoming even after several requests for one. In many of these cases a number of accommodations were either outstanding or improperly implemented." In other cases, "school administrators will often simply ask parents to keep their children home largely because of behavioural issues or alleged shortages in school resources. In these circumstances, parents often feel as though they

have no choice but to acquiesce to the school.”<sup>313</sup> In a recent survey, parents described the hardships experienced by families when students are excluded from school in this way. Specific consequences included loss of work, financial strain and increased conflict.<sup>314</sup>

A claim of undue hardship must stem from a genuine interest in maintaining a safe learning environment for all students and staff, rather than as a punitive action. Even where a student with a disability poses a risk to him or herself or the safety of others, an education provider still has a duty to canvass other accommodation options, including separate services, where possible and appropriate.

Where a student is placed in an education setting outside the regular classroom due to health and safety risks, they are entitled to periodic reassessment to determine, in cases where their status changes, whether re-inclusion in the regular educational program is appropriate.

**Example:** A university student with epilepsy is unable to continue his practicum placement as an emergency response nurse due to symptoms, including seizures, related to his condition. After a period of medical treatment and with the aid of medication, he is able to manage his disability effectively. At this point, the university arranges to meet with and reassess the student’s accommodation needs. The duty to accommodate is dynamic and ongoing and must be responsive to changes in the nature of a student’s disability.

Ultimately, an education provider must balance the rights of the student with a disability with the rights of others. There may be situations where a student poses a health and safety risk to him or herself or to others that would amount to an undue hardship, or an otherwise appropriate accommodation is impossible to implement in the particular circumstances. However, it is important that education providers not rush to such a conclusion. Further training for staff or further supports for the student may resolve the issue.<sup>315</sup> The accommodation process must be fully explored, to the point of undue hardship.

The dignity of the student must be considered when addressing health and safety risks. Even where behaviour is correctly assessed to pose a risk, education providers should apply a proportionate response. If a real risk exists, the least intrusive means to address the risk must be used.

High probability of substantial harm to anyone will constitute an undue hardship. In extreme cases, it may be undue hardship to attempt to mitigate risk, such as where the risk is imminent and severe.<sup>316</sup>

## 9.2 Minimizing undue hardship

Education providers must consider strategies to avoid undue hardship and meet their duty to accommodate under the *Code*. For example, making reasonable changes to institutional practices or obtaining grants or subsidies can offset the expense of accommodation.

Education providers are expected to consider whether accommodating the needs of a student with a disability may improve an institution's productivity, efficiency or effectiveness.

**Example:** An accommodation that affects a significant number of students with disabilities, such as installing an elevator and automatic door-opener, could make the institution more accessible generally. By installing an elevator, more people will be able to access the institution, including older people and people with strollers.

Creative design solutions, as part of a broader inclusive design strategy or in response to the needs of one student, can often avoid expensive capital outlay. This may involve specifically tailoring design features to a student's functional capabilities.

Where undue hardship is claimed, cost and risk estimates should be carefully examined to make sure they are not excessive in relation to the stated objective. If they are, an education provider should determine if a less expensive or lower risk alternative exists that could accomplish the accommodation (either as an interim measure to a phased-in solution or permanently) while still fully respecting the dignity of the student with a disability.



Some accommodations will be very important but will be difficult to accomplish in a short period of time. In these situations, undue hardship should be avoided by phasing in the accessible features gradually.

Some accommodations will benefit large numbers of students with disabilities, yet the cost may prevent them from being accomplished. Hardship may be reduced by spreading the cost over several years.

**Example:** A university decides to renovate its aging student residences. Working with a consultant to ensure that all physical structures are built according to the principles of inclusive design, it develops a three-year plan to renovate four buildings. When completed, the facilities will be accessible to students with a range of physical disabilities, as well as to people with small children and older people, either as students or visitors.

Education institutions will need to provide interim accommodation for students while long-term accommodation is being phased in over an extended period of time. If both short- and long-term accommodation can be accomplished without causing undue hardship, then both should be considered at the same time.

Where an undue hardship analysis anticipates assessing substantial capital or operating expenditures or procedural changes (for example, in making physical alterations to a building, or changing health and safety requirements), it might be advisable for the education institution to obtain a proposal and estimate from experts in barrier-free design and construction.

## **10. Other limits on the duty to accommodate**

While the *Code* specifies that there are only three factors that will be considered when determining whether the test for undue hardship has been met (cost, outside sources of funding and health and safety issues), in some cases, courts and tribunals have recognized that even where these three factors are not at issue, there is not a limitless right to accommodation.<sup>317</sup> There may be other narrow circumstances where it may not be possible to accommodate a person's disability. These exceptions are discussed below.

However, an education provider must not jump to the conclusion that accommodation is not possible or required. It must still meet its procedural duty to accommodate by examining issues on a case-by-case basis, and seeking out next-best solutions, such as phased-in or interim accommodation. The onus will be on an education provider to show the steps they have taken and the concrete reasons why accommodation is not possible. Situations where the duty to accommodate might be limited may include:

**1. No accommodation is available that allows the student to fulfil *bona fide* academic requirements**

There may be limited circumstances where a measure identified as a potential accommodation, that would not otherwise constitute an undue hardship based on cost and health and safety, is still not required. This is because the measure would fundamentally alter the nature of the education service,<sup>318</sup> or because it would still not allow the student to “fulfill the essential duties attending the exercise of the right.”<sup>319</sup> This may be the case even after the institution has been inclusively designed, barriers to participation have been removed, and accommodation options examined. Or, after accommodation has been tried and exhausted, there may be no further accommodation available that will help the student to fulfil essential academic requirements. In such instances, the education provider may have fulfilled its duty to accommodate.

In extreme situations – for example, where disability-related absences from a workplace have spanned several years or more – human rights case law has established limits on the duty to accommodate. In such situations, it has been held that “the duty to accommodate is neither absolute nor unlimited.”<sup>320</sup>

**Example:** A 26-year-old woman is diagnosed with depression and a generalized anxiety disorder. Upon reflection, she believes that she has been exhibiting symptoms for years, and attributes her inability to complete the last year of her college diploma, four years earlier, to the fact that she was not accommodated for these conditions. She contacts the college and asks to re-take her final exams in the courses she was enrolled in for the last year of her diploma. Given the amount of time that has passed, the fact that some of the courses are no longer being offered, and faculty members have moved on, the college declines this request, but offers to admit her back to the program and give her the opportunity to retake the courses she did not complete.

In the workplace, human rights case law establishes that potential accommodations that would fundamentally alter the nature of the employment relationship need not be provided. The same would likely be true in the education context.

**Example:** Throughout elementary and secondary school, a girl with a learning disability, who had an accommodation plan and was receiving disability-related supports, had difficulty passing her classes. In grade 12, she applied to a university and was not accepted. She and her parents contacted the university's academic admissions office and asked for the decision to be reconsidered, stating that the university should not consider her transcripts in their eligibility assessment because, due to her disability, the grades were not reflective of her true abilities. The university would likely be justified in declining this request. Human rights case law has established that in post-secondary education, all students are required to demonstrate the ability to meet academic standards for admission, as this is recognized as a reliable indicator of future academic success.<sup>321</sup>

Therefore, not every accommodation will be required even where providing it might not constitute an undue hardship in terms of cost and health and safety. An education provider's duty to accommodate may come to an end where a student is not capable of meeting *bona fide* academic requirements, even with accommodation.

## **2. Where a student (or their parent/guardian) does not participate in the accommodation process**

The duty to accommodate is a multi-party, collaborative process. All responsible parties are expected to work co-operatively throughout the process. In some cases, an education provider may have fulfilled its procedural and substantive duty to accommodate, because the student requesting accommodation (or their parent/guardian) may not have taken part in the process. For example, a student (or their parent/guardian) may be considered to have not taken part if they refuse to comply with reasonable requests for information necessary to establish disability-related needs,<sup>322</sup> or where they refuse to take part in developing accommodation solutions.<sup>323</sup>

**Example:** In one case, a student at a college showed behaviour at school such as "abusive outbursts," incidents of unexplained crying, incoherent speech, and strange accusations directed towards classmates. Students and teachers became concerned about her

well-being. The administration believed that she might have an undisclosed mental health disability that required accommodation, and approached her to talk about her behaviour. The student did not consider her behaviour to be inappropriate and did not seek any accommodation. The HRTO stated that when an organization perceives a person to have a disability but the person denies it, it is unclear whether the duty to accommodate arises and precisely what form any such duty would take. It was the student's obligation to take part in the efforts at accommodation, and because she did not take part, the HRTO found she could not claim she suffered discrimination owing to a disability.<sup>324</sup>

Before concluding that a student (or their parent/guardian) has not co-operated, education providers should consider if there are any disability or *Code*-related factors that may prevent the student from taking part in the process. These factors may then need to be accommodated. The education provider should also consider whether an accommodation plan needs to be adjusted because it is not working.

It may be challenging for education providers when they perceive that a student has a disability and needs an accommodation, but the student denies having a disability. In these cases, education providers should still attempt to start the accommodation process, offer accommodation as appropriate, and document the steps they take. However, there will be a limit to the extent that an education provider can accommodate a student's disability in the absence of the student's participation.

### **3. Balancing the duty to accommodate with the rights of other people**

Generally, when a student makes an accommodation request, the education provider will be able to provide the accommodation without it affecting the legal rights of other people in the educational environment.

Sometimes, however, a request for accommodation may turn out to be a "competing human rights" situation. This will be the case if, while dealing with an accommodation request, it becomes clear that the legal rights of another person or group might also be affected. This complicates the normal approach to resolving a human rights dispute where only one side claims a human rights violation.

**Example:** A woman with a disability uses a service dog to perform her work duties as a teacher, but a student in the classroom has her disability (allergies) triggered by the presence of the service dog. The *Code* requires employers to accommodate the needs of employees with disabilities, and it also requires education institutions to accommodate the needs of students with disabilities. The *Code* does not prioritize these needs or requirements – one is as important as the other. However, these competing rights claims might be resolved by assessing the needs of both parties. The employer/education provider would first need to look at the accommodation needs of both the employee and the student in the context of the classroom to find out if the needs of the two parties are actually in conflict. In what ways is the service dog assisting the employee in the classroom? Are there other ways that support could be provided without the service dog? Alternative options for meeting the student’s needs should be similarly looked at. In this case, there may be other instructors the student can study with, or other sessions she could attend. The employer/education provider should explore a combination of solutions for accommodating both, allowing each to enjoy their rights.

Education providers have a legal duty to take steps to prevent and respond to situations involving competing rights. The OHRC’s *Policy on competing human rights*<sup>325</sup> sets out a framework for analyzing and addressing competing human rights situations. It also provides concrete steps on how education providers can proactively take steps to reduce the potential for human rights conflict and competing rights situations.

## 11. Preventing and responding to discrimination

The ultimate responsibility for maintaining an educational environment free from discrimination and harassment rests with education providers. It is not acceptable to choose to stay unaware of discrimination or harassment of a student with a disability, whether or not a human rights claim has been made.

Education providers operating in Ontario have a duty to take steps to prevent and respond to breaches of the *Code*. They must make sure they maintain accessible, inclusive, discrimination-free and harassment-free educational environments that respect human rights.

Education providers violate the *Code* where they directly or indirectly, intentionally or unintentionally infringe the *Code*, or where they authorize, tolerate or adopt behaviour that is contrary to the *Code*.

There is also a clear human rights duty not to condone or further a discriminatory act that has already happened. To do so would extend or continue the life of the initial discriminatory act. This duty extends to people who, while not the main actors, are drawn into a discriminatory situation through contractual relations or in other ways.<sup>326</sup>

Depending on the circumstances, education providers may be held liable for failing to respond to the actions of third parties (such as service users, contractors, *etc.*) who engage in discriminatory or harassing behaviour.<sup>327</sup>

Human rights decision-makers have found organizations liable, and assessed damages, based on the organization's failure to respond appropriately to address discrimination and harassment.<sup>328</sup>

An education institution may respond to complaints about individual instances of discrimination or harassment, but they may still be found to have not responded appropriately if the underlying problem is not resolved. There may be a poisoned environment, or an institutional culture that condones discrimination, despite punishing the individual perpetrators. In these cases, education institutions must take further steps, such as training and education, to better address the problem.

Some things to consider when deciding whether an education provider has met its duty to respond to a human rights claim include:

- policies and procedures in place at the time to deal with discrimination and harassment
- the promptness of the institution's response to the complaint
- how seriously the complaint was treated
- resources made available to deal with the complaint
- whether the institution provided a healthy environment for the student who complained
- how well the action taken was communicated to the student who complained.<sup>329</sup>

The following steps are some ways that education providers can prevent and eliminate discrimination against students with disabilities in their institutions.

Education providers should develop strategies to prevent discrimination based on all *Code* grounds, but should give specific consideration to students with disabilities.

A complete strategy to prevent and address human rights issues should include:

- a diagnostic assessment of the overall culture of the institution
- a barrier prevention, review and removal plan
- anti-harassment and anti-discrimination policies
- an education and training program
- an internal complaints procedure
- an accommodation policy and procedure.

In its publication entitled *A policy primer: Guide to developing human rights policies and procedures*,<sup>330</sup> the OHRC provides more information to help organizations meet their human rights obligations and take proactive steps to make sure their environments are free from discrimination and harassment.

Here are some things education providers should consider with respect to students with disabilities when implementing barrier prevention, review and removal plans, developing human rights policies and procedures, and in education and training programs.

### **11.1 Barrier prevention and removal**

Ensuring full accessibility means making sure that barriers to education for students with disabilities are not embedded into new institutions, facilities, services or programs. It also means identifying and removing barriers where they already exist. A barrier removal process should include reviewing an institution's physical accessibility, policies and practices, including dispute resolution and decision-making processes and overall culture.

Under the *Accessibility for Ontarians with Disabilities Act*, education providers, as employers and service providers, are required to comply with accessibility standards set out in regulation. Part of complying with the standards means that education institutions have to develop accessibility policies for meeting the standards. They also have to develop plans to prevent and remove barriers to

accessibility. In their policies, obligated organizations are required to include a statement on the organization's commitment to meet the accessibility needs of people with disabilities in a timely way.<sup>331</sup>

When designing inclusively and removing barriers, education institutions should consult with students with disabilities to gain a greater understanding of students' diverse needs, and how to most effectively meet them. It is important that students with disabilities have the opportunity to provide input into information-gathering processes and are consulted about the barriers that affect them.

**Example:** A school board reviews its operations to identify barriers for students with disabilities. As part of this, it conducts a written survey and follow-up interviews with students and their families to solicit feedback on how well the school board is doing on specific accessibility issues, including the accommodation process and areas where it could make improvements.

When identifying barriers, educational institutions should take into account that discrimination based on disability may intersect with discrimination based on other *Code* grounds, including race, sex, sexual orientation, *etc.* As well, a student may experience different barriers based on their level of income. Compared to other students, someone who has a disability, low income, and identifies as an Indigenous person, for example, may experience unique barriers when trying to access education. When collecting information about barriers, educational institutions should include ways to allow students to tell the organization about all of the circumstances that may prevent them from participating equally, if they so choose.

## 11.2 Data collection and monitoring

Effective planning requires education providers to make sure that education policies and practices do not have an adverse impact on students with disabilities, or other individuals protected by the *Code*. To make sure that education environments are free from social phenomena widely recognized as discriminatory, such as profiling, institutionalized barriers, socio-economic disadvantage or unequal opportunity based on protected *Code* grounds, education providers should collect statistical information to monitor, identify, prevent and ameliorate systemic and adverse discrimination.<sup>332</sup>



Collecting data – both quantitative and qualitative – can help an education institution understand the barriers that exist, and identify and address concerns that may lead to systemic discrimination.<sup>333</sup> Organizations should collect and analyze data when they have, or ought to have, reason to believe that discrimination, systemic barriers or historical disadvantage may exist. For example, data collection would be warranted where there are persistent allegations or perceptions of systemic discrimination, or where it is an organization’s intent to prevent or ameliorate disadvantage already known to be faced by persons with disabilities. Where problems are identified, data analysis can provide useful direction for remedies to address systemic discrimination as well as evaluate the success of such measures. This is in keeping with the remedial purpose of the *Code*, and with human rights jurisprudence that finds organizations have an obligation to take into account a person’s already disadvantaged position within Canadian society.<sup>334</sup>

Data collection and the use of data should only ever be undertaken for legitimate purposes not contrary to the *Code*, such as ameliorating disadvantage, removing systemic barriers and promoting substantive equality for individuals and groups protected by the *Code*. Students may perceive that the collection of data related to *Code* grounds (e.g. disability, race, sex, etc.) will be used in a discriminatory way.

To address such concerns, education providers should take measures to make sure they collect and use data in a legitimate and appropriate way.<sup>335</sup> For example, students should be told how their information will be used, how it will be stored, and how it will be kept private.

**Example:** At the primary and secondary levels, data collected could include: number of students in mainstream classrooms versus self-contained classrooms, number of students in each placement according to type of disability, number of students with disabilities who also identify by additional *Code* grounds (e.g. sex, race, etc.), number of students with disabilities who are disciplined or excluded from school, and whether these students also identify by *Code* grounds other than disability (e.g. race and related grounds), etc. At the post-secondary level, data collected could include lengths of time taken to provide accommodations, length of time it takes students with disabilities to complete their programs, number of students with a disability who leave their programs before graduating, etc.

Where an analysis of this data reveals significant disparities or disproportionalities with respect to trends in identification, placement, disciplinary action, graduation and/or drop-out rates, education providers should review and revise their policies, practices and procedures accordingly to make sure they comply with the *Code*. Often, further data collection is needed to help probe, identify and better understand the factors potentially contributing to the observed unequal outcomes.

**Example:** Education providers might wish to prepare and make public a formal report outlining their commitment to providing accessible education for all students. The report might include the education institution's accessibility plan, and the findings of data collection and analysis. Where the data reveals disparities or disproportionalities, the report could also set out steps that will be taken to address inequities and bring the education provider's practices into compliance with the *Code* and OHRC policy.

Information about barriers to accessibility, discrimination and harassment can be monitored by collecting periodic data over time. Data collection can also help an educational institution understand if its efforts to combat discrimination, such as putting a special program in place, are helping or need to be modified.

Some situations that may warrant data collection include:

- persistent allegations or complaints of discrimination or systemic barriers; for example, an education provider that receives multiple claims under an internal human rights policy, through human rights claims made to the HRTO, *etc.*
- a widespread public perception of discrimination or systemic barriers, such as concerns that students with disabilities are being "streamed" into non-academic programs, or that a disproportionate number of racialized students are being placed in special education programs due to negative attitudes and stereotypes about their academic capabilities
- observed unequal distribution of students with disabilities; for example, low graduation rates
- objective data or research studies demonstrating the existence of discrimination or systemic barriers; for example, studies that show increased drop-out rates in education
- evidence from other institutions or jurisdictions that a substantially similar policy, program or practice has had a disproportionate effect on students with disabilities.

Collecting and analyzing data may be a component of the duty to take action to prevent violations of the *Code*.

**Example:** School discipline policies appear to be having a disproportionate impact on students with disabilities, and to be further exacerbating their already disadvantaged position in society. Empirical research from other jurisdictions shows that students with disabilities are negatively affected by suspension and expulsion practices. Based on this information, the government requires all school boards to collect and analyze data on the application of school discipline policies to all students, so it can take steps to counter the negative effects of these policies on students with disabilities, and other students identified by *Code* grounds.

Where a *prima facie* claim of discrimination is made out, a decision-maker should consider the failure to collect and analyze data as part of its analysis of whether an education provider has met its duty to ensure it is not in violation of the *Code*. In cases where collecting data was clearly warranted, the failure to collect accurate and reliable data may foreclose a respondent from making a credible defence that it did not discriminate.

On the other hand, if an education institution collects and analyzes data it may also show that discrimination or systemic barriers do not exist. Effective efforts to monitor the education environment may help an education institution to show that it has met its duty to protect and uphold human rights.

There may be other situations where an education institution may not have reason to believe that a problem exists within its own area of responsibility, but may nevertheless wish to voluntarily collect data to advance the objectives of the *Code*.

**Example:** Census data shows that people with disabilities have lower education levels than people without disabilities. While not thinking that this is a trend within its own institution, an education provider decides to start collecting data to monitor for systemic barriers that may be impeding the educational success of students with disabilities.

### 11.3 Developing human rights policies and procedures

Developing anti-harassment and anti-discrimination policies, an internal human rights procedure, and an accommodation policy and procedure are part of an effective overall human rights strategy.

Policies and procedures should always be developed with the needs of students with disabilities in mind. For example, in procedures dealing with human rights concerns or accommodation requests, the education provider should outline how it will maintain the confidentiality of students' private medical information.

Lack of knowledge about their rights and fear of reprisal are factors that may contribute to students not knowing how to complain or avoiding making a complaint, even if they feel their human rights are being violated. Education institutions should create safe environments for students to come forward with their disability-related needs and concerns, including by making sure they provide adequate information and training about complaint procedures,<sup>336</sup> and clearly outline that students will not experience reprisal for making a complaint.<sup>337</sup>

**Example:** A college develops a pamphlet outlining its human rights complaint procedure. In addition to putting the pamphlet online, it consults with disability groups to explore other ways to achieve maximum accessibility. It distributes the pamphlet in its application and acceptance packages and makes it available at its office for students with disabilities.

### 11.4 Education and training

Staff education and training are critical supports that an education institution can provide in the accommodation process. Disability awareness education and training should be available on an ongoing basis throughout the school year,<sup>338</sup> and should be mandatory parts of professional training for teachers, post-secondary faculty, and all staff in schools, school boards, colleges and universities. The student being accommodated, and the education staff involved in the accommodation process, should learn about disability issues and accommodation.

Education and training on disability issues and human rights are essential to developing a "human rights culture" within an institution that supports the values and principles of the *Code*. Without an understanding of human rights issues

relating to students with disabilities, and support for human rights principles, human rights policies and procedures will be less likely to succeed.<sup>339</sup>

**Example:** A school board implements training to enable teachers to deal effectively with disability issues in the classroom. The training is designed to educate teachers, and to help teachers educate students, about issues of diversity and difference.

Education and training are often seen as a panacea to all human rights problems. However, in isolation from other initiatives, education and training are unlikely to succeed in fostering a non-discriminatory environment. Similarly, inadequate education and training are not likely to be effective in bringing about a change in attitudes or behaviour.

To bring about real organizational change, the education institution will also need to engage in regular, independent monitoring and evaluation to assess whether education and training initiatives are effective, appropriate, timely, and are meeting the objectives described above. Monitoring could include consultation with local disability communities, as well as a survey of the attitudes of staff receiving the training, to assess whether the training has been effective in increasing understanding or changing attitudes about ableism, barriers confronting students with disabilities, the importance of accommodation, and student experiences of discrimination and harassment.<sup>340</sup>

The following items could be integrated into a human rights training program on disability issues:

- the types of barriers that students with disabilities face in education (e.g. ableism, structural impediments, stereotypes)
- the institution's human rights strategy and human rights policies and procedures, such as complaint procedures and anti-discrimination and anti-harassment policies, and how these relate to students with disabilities
- how the institution accommodates people with disabilities
- how the institution or its staff, and other students can be part of a broader cultural shift to be more inclusive of students with disabilities
- the specific obligations that an education provider has to uphold people's *Code* rights and ways it can do this
- the rights of students with disabilities under the *Code*
- the human rights system in Ontario, including how to file a human rights claim.

Human rights education should not be a one-time event. Ongoing training should be provided to address developing issues, and regular refreshers provided to all staff. Training should be repeated if changes in the education institution or in the student's accommodation plan make it necessary to modify the accommodation.

**Example:** At the post-secondary level, computer systems staff may need to learn about the interaction of a new access device with the organization's computer system.

The best defence against human rights claims is for educational institutions to be fully informed about their responsibilities under the *Code*, and to take proactive steps to prevent and remove potential barriers for students with disabilities. By complying with their responsibilities under the *Code*, education institutions will reduce the chances of human rights claims being filed against them, and save the time and expense needed to defend against them.

As the Supreme Court of Canada has stated, "Adequate special education ... is not a dispensable luxury."<sup>341</sup> Students with disabilities deserve to feel that they are valued and that they belong. Ontario's success and prosperity as a province depends upon its ability to ensure that all students are given the opportunity to reach their full potential and contribute meaningfully to their communities. Ontario's educational institutions play a crucial role in achieving this objective.

**For more information on the human rights system in Ontario, visit:**

[www.ontario.ca/humanrights](http://www.ontario.ca/humanrights)

The human rights system can also be accessed by telephone at:

Local: 416-326-9511

Toll Free: 1-800-387-9080

TTY (Local): 416-326 0603

TTY (Toll Free) 1-800-308-5561

To file a human rights claim (called an application), contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY: 416-326-2027 or Toll Free: 1-866-607-1240

Website: [www.hrto.ca](http://www.hrto.ca)

To talk about your rights or if you need legal help with a human rights claim, contact the Human Rights Legal Support Centre at:

Telephone: 416-597-4900

Toll Free: 1-866-625-5179

TTY: 416-597-4903 or Toll Free: 1-866-612-8627

Website: [www.hrlsc.on.ca](http://www.hrlsc.on.ca)

For human rights policies, guidelines and other information, visit the Ontario Human Rights Commission website at [www.ohrc.on.ca](http://www.ohrc.on.ca)

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Facebook: [www.facebook.com/the.ohrc](http://www.facebook.com/the.ohrc)

Twitter: [@OntHumanRights](https://twitter.com/OntHumanRights)

**See also:**

ARCH Disability Law Centre

[www.archdisabilitylaw.ca](http://www.archdisabilitylaw.ca)

Ontario Child Advocate (Provincial Advocate for Children and Youth)

[advocacy@provincialadvocate.on.ca](mailto:advocacy@provincialadvocate.on.ca)

Justice for Children and Youth

[www.jfcy.org](http://www.jfcy.org)

## Appendix A: Recommendations to improve education outcomes for students with disabilities

\* These Recommendations are meant to be read in conjunction with the *Policy on accessible education for students with disabilities*.

### Principles

For the education system to function effectively it must be inclusive and allow students with disabilities to thrive. In particular, key players in the education system must take all necessary steps to:

- remove barriers in the disability accommodation process
- ensure transparent oversight and accountability for the timely and effective accommodation of students with disabilities
- implement Universal Design for Learning (UDL) across all education systems, while continuing to provide accommodation based on individual needs
- provide effective training and education for education providers on human rights, disability rights and accommodation
- put students with disabilities at the centre of all decision-making processes.

To accomplish these goals, the OHRC recommends the following specific actions that should be implemented in consultation with education partners possessing pertinent expertise and communities with lived experience.

### Recommendations to the government of Ontario

1. Communicate effectively to students, parents, guardians, support persons, *etc.* through multiple platforms and forums about the right to disability-related accommodation, the right of students and parents to participate in the accommodation process, the primacy of the Ontario *Human Rights Code*, the applicable legislation and requirements, and the dispute resolution options.
2. Address and resolve persistent delays in the provision of accommodation to students with disabilities, including barriers caused by long waiting lists for professional assessments.



3. Monitor and support education providers to respond appropriately to new or changing demands in the provision of educational services (e.g. an increase in the number of accommodation requests related to mental health disabilities).
4. As an alternative to existing formal adjudicative processes, establish a timely and effective dispute resolution mechanism at the local level to resolve conflict that may arise at any stage of the accommodation process (e.g. disputes about particular forms of accommodations, delays in the provision of accommodation, disciplinary actions taken against students with disabilities, etc.)
5. Require school boards, colleges and universities to collect and provide to the government intersectional, demographic data on students with disabilities and accommodations provided. This data should also identify the nature of the disability (e.g. physical, developmental/intellectual, mental health, etc.), and be disaggregated to determine whether the student identifies with any other *Code* ground (e.g. sex, race, Indigenous ancestry, etc.). Data collected should include:
  - i. number of students with disabilities in mainstream classrooms versus self-contained classrooms (primary and secondary levels only)
  - ii. number of students with disabilities who are disciplined or excluded from school
  - iii. length of time taken to provide interim and final accommodations from the date of the accommodation request (or when the need is known)
  - iv. length of time taken to resolve accommodation-related disputes
  - v. length of time taken for students with disabilities to complete their programs
  - vi. number of students with a disability who leave their programs before graduating
  - vii. information that would allow for an analysis of disparities in availability of special education supports for students in urban, wealthy school districts versus students from rural, Northern, remote, Indigenous, and/or impoverished school districts (primary and secondary levels only)
6. Analyze demographic data received from school boards, colleges and universities to identify barriers and address concerns that may lead to systemic discrimination. Data should be made available to the public.

7. Require school boards, and colleges and universities respectively to implement Universal Design for Learning (UDL) across all of their education systems.

***Primary and secondary education***

8. Ensure that communications to students and parents make it clear that education providers have a legal obligation to accommodate all students with disabilities, not just those students whose disabilities are listed in the Ministry's "special education" or "exceptionality" categories.
9. Identify and end the practice of exclusion wherein principals ask parents to keep primary and secondary students with disabilities home from school for part or all of the school day (and the role that an improper use of section 265(1)(m) of the Education Act may be playing in this practice).
10. Work with First Nations partners to implement the recommendations in the May 2017 Ontario First Nations Special Education Review Report.
11. Evaluate existing funding structures and levels to ensure adequate resources are provided to school boards to meet the identified needs of all primary and secondary students with disabilities, provide timely and appropriate accommodation, and provide effective and current training for teachers and staff.
12. Develop an effective public accountability mechanism to track and audit how school boards spend special education funding.
13. Work with the Ontario College of Teachers to review all aspects of the curriculum for teachers' colleges to ensure that prospective teachers and administrators have sufficient and practical instruction on disability issues (including specific training on common disabilities such as autism, ADHD, learning disabilities including dyslexia, mental health disabilities, etc.), the requirements of the *Code*, and UDL.
14. Work with the Ontario College of Teachers to provide regular and ongoing mandatory professional development opportunities for all teachers and administrators on how to fulfil their human rights obligations.

### ***University and colleges***

15. Work with post-secondary institutions to ensure that all students, staff and faculty understand the rights and responsibilities set under the *Code*, the principles of UDL, and are properly trained to respond to disability issues that arise in the post-secondary educational experience.

### **Recommendations to school boards and private educational providers**

16. Communicate effectively to students, parents, guardians, support persons, *etc.* through multiple platforms and forums about the right to disability-related accommodation, the right of students and parents to participate in the accommodation process, the primacy of the Ontario *Human Rights Code*, the applicable legislation and requirements, and the dispute resolution options.
17. Provide timely and effective accommodation (*e.g.* by providing early assessment, early intervention or interim accommodation while waiting for a professional assessment), and refrain from obstructing or delaying the accommodation process by rigidly insisting on formalities, unnecessary professional assessments, or diagnosis information.
18. Monitor and support education providers to respond appropriately to new or changing demands in the provision of educational services (*e.g.* an increase in the number of accommodation requests related to mental health disabilities).
19. Ensure that all staff and faculty understand the rights and responsibilities set under the *Code*, the principles of UDL, and are properly trained to respond to disability issues that arise in the primary and secondary educational experience.
20. Identify and end the improper use of exclusions wherein principals ask parents to keep primary and secondary students with disabilities home from school for part or all of the school day (and the role that an improper use of section 265(1)(m) of the *Education Act* may be playing in this practice).
21. Ensure that money currently geared toward the accommodation of students with disabilities is used to remove barriers to inclusive participation and provide supports to all students with disabilities and their teachers.
22. Implement Universal Design for Learning (UDL) across all education systems, while continuing to provide accommodation based on individual needs.

23. Collect, analyze and make publicly available intersectional, demographic data on students with disabilities and accommodations provided. This data should also identify the nature of the disability (e.g. physical, developmental/intellectual, mental health, etc.), and be disaggregated to determine whether the student identifies with any other *Code* ground (e.g. sex, race, Indigenous ancestry, etc.). Data collected should include:
- i. number of students with disabilities in mainstream classrooms versus self-contained classrooms (primary and secondary levels only)
  - ii. number of students with disabilities who are disciplined or excluded from school
  - iii. length of time taken to provide interim and final accommodations from the date of the accommodation request (or when the need is known)
  - iv. length of time taken to resolve accommodation-related disputes
  - v. length of time taken for students with disabilities to complete their programs
  - vi. number of students with a disability who leave their programs before graduating
  - vii. information that would allow for an analysis of disparities in availability of special education supports for students in urban, wealthy school districts versus students from rural, Northern, remote, Indigenous, and/or impoverished school districts

### **Recommendations to colleges and universities**

24. Communicate effectively to students, parents, guardians, support persons, etc. through multiple platforms and forums about the right to disability-related accommodation, the right of students and parents to participate in the accommodation process, the primacy of the Ontario *Human Rights Code*, the applicable legislation and requirements, and the dispute resolution options.
25. Ensure that all staff and faculty understand the rights and responsibilities set under the *Code*, the principles of UDL, and are properly trained to respond to disability issues that arise in the post-secondary educational experience.
26. Provide timely and effective accommodation, and refrain from obstructing or delaying the accommodation process by rigidly insisting on formalities, unnecessary professional assessments, or diagnosis information.

27. Support education providers so they can respond appropriately to new or changing demands in the provision of educational services (e.g. an increase in the number of accommodation requests related to mental health disabilities).
28. Implement Universal Design for Learning (UDL) across all education systems, while continuing to provide accommodation based on individual needs
29. Collect, analyze and make publicly available intersectional, demographic data on students with disabilities and accommodations provided. This data should also identify the nature of the disability (e.g. physical, developmental/ intellectual, mental health, etc.), and be disaggregated to determine whether the student identifies with any other *Code* ground (e.g. sex, race, Indigenous ancestry, etc.). Data collected should include:
  - i. number of students with disabilities who are disciplined or excluded from school
  - ii. length of time taken to provide interim and final accommodations from the date of the accommodation request (or when the need is known)
  - iii. length of time taken to resolve accommodation-related disputes
  - iv. length of time taken for students with disabilities to complete their programs
  - v. number of students with a disability who leave their programs before graduating.

## Appendix B: Purpose of this policy

The OHRC's policies inform and support the breadth of the work that the OHRC does under its mandate, including public communications, public education and outreach, public interest inquiries, and litigation.

Section 30 of the *Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*. The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.<sup>342</sup> Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the HRTO may consider policies approved by the OHRC in a human rights proceeding before the HRTO. Where a party or an intervenor in a proceeding requests it, the HRTO *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject matter of a human rights application, parties and intervenors are encouraged to bring the policy to the HRTO's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the HRTO is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the HRTO to have the HRTO state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of courts interpreting the *Code*. OHRC policies have been given great deference by the courts and the HRTO,<sup>343</sup> applied to the facts of the case before the court or the HRTO, and quoted in the decisions of these bodies.<sup>344</sup>

## Appendix C: Anti-harassment policy

The following are suggested contents for an anti-harassment policy that is broad enough to cover all forms of harassment in an education setting.<sup>345</sup>

- A statement setting out the education provider's commitment to a fair and equitable learning environment free of discrimination and harassment and that discrimination/harassment will not be tolerated by the educational institution.
- A statement of rights and obligations, including:
  - student rights
  - education provider, educator and school staff obligations
  - a statement indicating that no reprisals are permitted or will be taken against a student making a complaint.
- A list of the prohibited grounds of discrimination listed in the *Code*.
- The *Code* definitions of "harassment" and of "sexual harassment/solicitation."
- An explanation of the concept of a "poisoned environment" as a violation of the *Code*.
- Description/examples of unacceptable behaviour, such as:
  - examples of harassment based on a ground listed in the *Code*
  - refusal to evaluate fairly based on a ground listed in the *Code*
  - examples of what would constitute sexual harassment, *etc.*
- How internal complaints will be handled, including:
  - to whom the complaint should be made
  - confidentiality
  - length of time for complaint to be investigated, *etc.*
- Disciplinary measures that will be applied if a claim of harassment or discrimination is proven.
- Remedies that will be available if the claim of harassment or discrimination is proven, such as:
  - an oral or written apology from the harasser/person who discriminated and educational institution
  - recovery of lost class time, fair evaluation, or academic credit that was denied
  - compensation for injury to dignity.
- A statement reinforcing the right of students to file a claim with the Human Rights Tribunal of Ontario at any time during the internal process, as well as an explanation of the one-year time requirement in the *Code*.

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## Endnotes

<sup>1</sup> See: <http://occupations.esdc.gc.ca/sppc-cops/c.4nt.2nt@-eng.jsp?cid=39> (date retrieved: October 5, 2017).

<sup>2</sup> Ontario *Human Rights Code*, R.S.O.1990, c. H.19 [Code].

<sup>3</sup> “Education providers” include, but are not limited to, school boards, school staff, educators, post-secondary institutions (including instructors, teaching assistants, administrative staff, staff in offices for students with disabilities, etc.), and where appropriate, government. Other related service providers that are captured by the Code, and therefore responsible for accommodating disability-related needs, include daycare providers, after-care programs, etc.

<sup>4</sup> *Moore v. British Columbia (Education)*, [2012] 3 SCR 360, 2012 SCC 61 (CanLII) [Moore].

<sup>5</sup> See: [www.ohrc.on.ca/en/news\\_centre/new-documentation-guidelines-accommodating-students-mental-health-disabilities](http://www.ohrc.on.ca/en/news_centre/new-documentation-guidelines-accommodating-students-mental-health-disabilities). In keeping with its mandate to address systemic discrimination, the OHRC sought to spread the positive results achieved at one university to all public colleges and universities in Ontario. To that end, in 2016 we wrote to all public colleges and universities in Ontario, asking them to implement six specific measures to reduce systemic barriers to post-secondary education for students with mental health disabilities. To date, many colleges and universities have reported encouraging changes to their policies and practices aimed at removing barriers to accessing appropriate accommodations.

<sup>6</sup> Ontario Human Rights Commission, *With learning in mind: Inquiry report on systemic barriers to academic accommodation for post-secondary students with mental health disabilities*, (2017) [With learning in mind]; available online: [www.ohrc.on.ca/sites/default/files/With%20learning%20in%20mind\\_inquiry%20report%20on%20systemic%20barriers%20to%20academic%20accommodation\\_accessible\\_2017.pdf](http://www.ohrc.on.ca/sites/default/files/With%20learning%20in%20mind_inquiry%20report%20on%20systemic%20barriers%20to%20academic%20accommodation_accessible_2017.pdf)

<sup>7</sup> For example, in Ontario, the provincial government passed the *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11 [AODA] to improve accessibility standards for Ontarians with physical and mental disabilities in all public establishments by 2025. In 2010, Canada ratified the United Nations' *Convention on the Rights of Persons with Disabilities*, (2006), 13 December 2006, U.N.T.S. vol. 2515, [CRPD], (entered into force 3 May 2008, accession by Canada 11 March 2010). Available online at: [www.un.org/disabilities/documents/convention/convention\\_accessible\\_pdf.pdf](http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf). Parties to the Convention are required to promote and protect the full enjoyment of human rights by people with disabilities and ensure that they enjoy full equality under the law. There have also been notable advancements made through litigation: see, for example, *Moore, supra* note 4; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 SCR 650, 2007 SCC 15 (CanLII) [Via Rail]; *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 (CanLII) [Lane], upheld in *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC) [ADGA].



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<sup>8</sup> In its 2010 annual report, the Office of the Auditor General of Ontario commented on the state of the province's special education system at the elementary and secondary levels: "None of the school boards we audited in 2008 had established procedures to assess the quality of the special education services and supports at their schools. This made it difficult for both individual schools and the boards to know what kinds of improvements were needed to better serve students with special education needs." See: Office of the Auditor General of Ontario, *2010 Annual Report*, section 4.14 "Special Education" at 387; available online at: [www.auditor.on.ca/en/content/annualreports/arreports/en10/2010ar\\_en.pdf](http://www.auditor.on.ca/en/content/annualreports/arreports/en10/2010ar_en.pdf) (dated retrieved: June 20, 2017). Many of the written submissions made to the OHRC in 2017 by education stakeholders, as part of the policy development process, indicated ongoing challenges faced by students with disabilities at all levels of the province's education system. Excerpts from these written submissions are included, where applicable, throughout this policy. In February 2018, a research partnership involving Community Living Ontario, University of Western Ontario, Brock University, ARCH Disability Law Centre, Brockville and District Association for Community Involvement, and Inclusive Education Canada released preliminary results of a research study undertaken to, among other things, assess the effectiveness of Ontario's education system for students with intellectual disabilities. The preliminary results indicate ongoing serious barriers for students with intellectual disabilities, including a lack of disability-related accommodations, high rates of suspensions and expulsions, bullying, and an inadequate dispute resolution process. The research partners plan to release their full report [CLO, *et al.* Research partnership]. See: [www.archdisabilitylaw.ca/sites/all/files/Media%20Release%20-%20Ontario%E2%80%99s%20Education%20System%20is%20Failing%20Students%20with%20Disabilities.pdf](http://www.archdisabilitylaw.ca/sites/all/files/Media%20Release%20-%20Ontario%E2%80%99s%20Education%20System%20is%20Failing%20Students%20with%20Disabilities.pdf) (date retrieved: March 6, 2018).

<sup>9</sup> The HRTO's 2015-2016 Annual Report indicates that "disability" was cited as a ground of discrimination in 55% of the applications filed within that period, making it by far the most cited ground of discrimination. The HRTO's previous annual reports show that this is a consistent trend: the ground of disability was cited in 56% of cases in 2014-2015 and 54% in 2013-2014. See: [www.sjto.gov.on.ca/documents/sjto/2015-16%20Annual%20Report.html](http://www.sjto.gov.on.ca/documents/sjto/2015-16%20Annual%20Report.html) (date retrieved: November 30, 2017).

<sup>10</sup> Statistics Canada, Special tabulation, based on the *Canadian Survey on Disability, 2012*, as cited by the OHRC's publication, *By the numbers: A statistical profile of people with mental health and addiction disabilities in Ontario, 2015* [By the numbers] at 48 (available online at: [www.ohrc.on.ca/sites/default/files/By%20the%20numbers\\_Statistical%20profile%20of%20people%20with%20mental%20health%20and%20addiction%20disabilities%20in%20Ontario\\_accessible\\_5.pdf](http://www.ohrc.on.ca/sites/default/files/By%20the%20numbers_Statistical%20profile%20of%20people%20with%20mental%20health%20and%20addiction%20disabilities%20in%20Ontario_accessible_5.pdf)). These findings are exacerbated for people with mental health disabilities and addictions. See also, Statistics Canada's Correction Notice dated February 15, 2017: [www.statcan.gc.ca/pub/89-654-x/89-654-x2015001-eng.htm](http://www.statcan.gc.ca/pub/89-654-x/89-654-x2015001-eng.htm). For more information, see *By the numbers*, and the OHRC's *Policy on preventing discrimination based on mental health disabilities and addictions, 2014*, [Mental health policy] available online at: [www.ohrc.on.ca/sites/default/files/Policy%20on%20Preventing%20discrimination%20based%20on%20mental%20health%20disabilities%20and%20addictions\\_ENGLISH\\_accessible.pdf](http://www.ohrc.on.ca/sites/default/files/Policy%20on%20Preventing%20discrimination%20based%20on%20mental%20health%20disabilities%20and%20addictions_ENGLISH_accessible.pdf) [Mental Health Policy].

<sup>11</sup> For a full understanding of how the OHRC approaches disability issues, this policy should be read in conjunction with the OHRC's *Mental health policy*, *ibid.*, and the 2016 *Policy on ableism and discrimination based on disability* [*Disability policy*], available online at: [http://ohrc.on.ca/sites/default/files/Policy%20on%20ableism%20and%20discrimination%20based%20on%20disability\\_accessible\\_2016.pdf](http://ohrc.on.ca/sites/default/files/Policy%20on%20ableism%20and%20discrimination%20based%20on%20disability_accessible_2016.pdf).

<sup>12</sup> Harassment based on disability is a form of discrimination, and is therefore also prohibited in services: *Haykin v. Roth*, 2009 HRTO 2017 (CanLII).

<sup>13</sup> For more information, see "The legal test" in section 8.4.5 of this policy.

<sup>14</sup> See section 7 of this policy on "Reprisal" for more information.

<sup>15</sup> See, for example, *Knibbs v. Brant Artillery Gunners Club*, 2011 HRTO 1032 (CanLII) [*Knibbs*] (discrimination because of association with a person who had filed a disability discrimination claim).

<sup>16</sup> See section 8.4.5 of this policy on "Meeting education requirements" for more information on *bona fide* academic requirements.

<sup>17</sup> See section 9 of this policy on "Undue hardship" for more information. See also *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 (SCC) [*Meiorin*].

<sup>18</sup> The National Educational Association of Disabled Students (NEADS) is an example of a social-educational organization within the meaning of section 18 of the *Code*. NEADS's stated purpose is to promote post-secondary education for persons with disabilities in accordance with the issues of concern to disabled consumers as expressed by the consumers. All voting members of the organization must be a student with a disability currently enrolled in a post-secondary program, or have been a student within five years of applying for membership, or an authorized person acting on behalf of a student with a disability.

<sup>19</sup> *Education Act*, R.S.O. 1990, c. E.2

<sup>20</sup> *Identification and Placement of Exceptional Pupils*, O. Reg. 181/98. The Ministry of Education reports that "In the 2014/2015 school year (the most recent figures available), more than 178,500 students were identified by an IPRC as exceptional pupils. A further 162,000 students who were not formally identified were provided with special education programs and services": see [www.edu.gov.on.ca/eng/general/elemsec/speced/ontario.html](http://www.edu.gov.on.ca/eng/general/elemsec/speced/ontario.html) (date retrieved: November 30, 2017).

<sup>21</sup> The Ministry of Education defines an IEP as "a written plan describing the special education program and/or services required by a particular student, based on a thorough assessment of the student's strengths and needs that affect the student's ability to learn and demonstrate learning." See: [www.edu.gov.on.ca/eng/general/elemsec/speced/ontario.html](http://www.edu.gov.on.ca/eng/general/elemsec/speced/ontario.html) (date retrieved: November 30, 2017).

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<sup>22</sup> In some cases, education providers are providing accommodations to some students with disabilities without conducting an IPRC process, and without a formal IEP in place.

<sup>23</sup> In *D.S. v. London District Catholic School Board*, 2012 HRTO 786 (CanLII) [D.S.], the HRTO stated at para. 62: “[T]he issue of whether or not a child is an ‘exceptional student’ as that term is defined under the *Education Act* is not co-extensive with the issue of whether that child has a ‘disability’ within the meaning of the *Code* even where that child’s disability requires accommodation under the *Code*. To take a simple example, a child with a mobility impairment may not require placement in a special education program, but may nonetheless require accommodation to access school services. Similarly, a child who is gifted and thereby may be designated as an ‘exceptional student’ under the *Education Act* and require a special education program is not likely to be regarded as having a ‘disability’ under the *Code*.”

<sup>24</sup> Note that the approach of the Ministry, school boards and school staff is inconsistent. For example, while parents and students are frequently having to fight with front-line educators and school administration to have ADHD recognized and accommodated, the Ministry itself issued a memorandum to school boards, dated December 19, 2011, which states that the explicit inclusion of medical conditions (*i.e.* autism) in the categories of exceptionalities is not intended to exclude other medical conditions, specifically mentioning ADHD. The Ministry further states that the determining factor for the provision of special education programs is the needs of a student, and not a diagnosed/undiagnosed medical condition:

Inclusion of some medical conditions (*e.g.* autism) in the Guide's definitions of the five categories of exceptionalities is not intended to exclude any other medical condition that may result in learning difficulties, such as (but not limited to) Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder (ADD/ADHD), Fetal Alcohol Syndrome, Tourette Syndrome, Myalgic Encephalomyelitis, Chronic Fatigue Syndrome, and Fibromyalgia Syndrome.

For example, a student with ADD/ADHD may present learning needs in many ways in the school setting and the student may be identified as exceptional within one or more of the categories of exceptionalities (including, Behaviour, Communication, Intellectual, Physical and/or Multiple) depending on the presentation, and the degree of the impact that ADD/ADHD has on that student's learning.

See: Ministry of Education, “Categories of Exceptionalities,” *Memorandum to Directors of Education, et al*, December 19, 2011; available online: [www.edu.gov.on.ca/eng/general/elemsec/speced/2011CategoryException.pdf](http://www.edu.gov.on.ca/eng/general/elemsec/speced/2011CategoryException.pdf) (date retrieved March 7, 2018).

<sup>25</sup> See, for example, *Gaisiner v Method Integration Inc*, 2014 HRTO 1718 (CanLII) [Gaisiner]; *Cohen v Law School Admission Council*, 2014 HRTO 537 (CanLII) [Cohen]; *D.S., supra note 23*; *Binkley v Blue Mountain Resorts*, 2010 HRTO 1997 (CanLII); *Kelly v UBC (No 3)*, 2012 BCHRT 32 (CanLII) [Kelly], upheld on merits on judicial review in *University of British Columbia v. Kelly*, 2016 BCCA 271 (CanLII); *Ryan v Spratt Shaw Community College*, 2018 BCHRT 30 (CanLII); *Dewart v Calgary Board of Education*, 2004 AHRC 8 (CanLII); *A and B obo Infant A v School District C (No. 5)*, 2018 BCHRT 25 (CanLII). See also: *C.M. v. Toronto District School Board*, 2012 HRTO 1853 (CanLII) [C.M.]; *L.B. v Toronto District School Board*, 2015 HRTO 1622 (CanLII) [L.B.], reconsideration refused 2016 HRTO 336 (CanLII); *C.T. v Greater Essex County District School Board*, 2017 HRTO 665 (CanLII); *R.B. v Keewatin-Patricia District School Board*, 2013 HRTO 1436 (CanLII).

<sup>26</sup> Section 47(2) of the *Code*.

<sup>27</sup> As was stated by the HRTO in *L.B.*, *supra* note 25, at para. 98, “Since the *Code* has primacy over all other legislation in the Province, it is expected and must be assumed that school boards implement the *Education Act* in accordance with their *Code* obligations.” See also: *Torrejon v. 114735 Ontario*, 2010 HRTO 934 (CanLII), upheld on judicial review in *1147335 Ontario Inc., o/a Weston Property Management v. Torrejon*, 2012 ONSC 1978 (CanLII).

<sup>28</sup> [Davidson v Lambton Kent District School Board](#), 2008 HRTO 294 (CanLII), at paras 33–38.

<sup>29</sup> Section 52 of the *Charter* acts to make sure that any law that is inconsistent with the *Charter* is, to the extent of the inconsistency, of no force or effect.

<sup>30</sup> Human rights legislation and section 15 of *Charter* contain “conceptual parallels”: (*Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, at para. 83) and are “aimed at the same general wrong” (*Meiorin*, *supra* note 17, at para. 48).

<sup>31</sup> *AODA*, *supra* note 7.

<sup>32</sup> In December 2016, the Government of Ontario made a public commitment to develop an accessibility standard for education under the *AODA*. See: [www.edu.gov.on.ca/eng/policyfunding/memos/july2017/accessibility\\_standard\\_engagement\\_en.pdf](http://www.edu.gov.on.ca/eng/policyfunding/memos/july2017/accessibility_standard_engagement_en.pdf). See also, Accessibility for Ontarians with Disabilities Alliance, “What an Ontario Education Accessibility Standard Could Include? – A Discussion Paper,” [*AODA Alliance Discussion Paper*] available online at: [www.aoda.ca/spread-the-word-about-the-aoda-alliances-new-discussion-paper-on-what-an-education-accessibility-standard-can-and-should-include/](http://www.aoda.ca/spread-the-word-about-the-aoda-alliances-new-discussion-paper-on-what-an-education-accessibility-standard-can-and-should-include/) (date retrieved: April 16, 2018)

<sup>33</sup> The OHRC has prepared an eLearning video to help organizations understand the relationship between the *AODA* and the *Human Rights Code*. Working Together: The Ontario *Human Rights Code* and the *Accessibility for Ontarians with Disabilities Act*: [www.ohrc.on.ca/en/learning/working-together-ontario-human-rights-code-and-accessibility-ontarians-disabilities-act](http://www.ohrc.on.ca/en/learning/working-together-ontario-human-rights-code-and-accessibility-ontarians-disabilities-act).

<sup>34</sup> *CRPD*, *supra* note 7 at Article 1.

<sup>35</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*], at para. 69.

<sup>36</sup> *Baker*, *ibid*, at para. 70; *R. v. Hape*, [2007] 2 SCR 292, 2007 SCC 26 (CanLII), at para. 53. The UN has said that ratifying the *CRPD* creates a “strong interpretive preference in favour of the Convention. This means that the judiciary will apply domestic law and interpret legislation in a way that is as consistent as possible with the Convention.” UN, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (Geneva: United Nations, 2007) at 107.

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<sup>37</sup> In June 2016, the Canadian Association of Statutory Human Rights Agencies (CASHRA), which includes the OHRC, issued a public statement calling for all levels of government to enact laws that fully implement the *CRPD*, including the right to education, as well as accessible facilities and services. CASHRA also called on Canada to sign the Optional Protocol to the *CRPD*, which would allow the United Nations to consider communications from Canadian individuals or groups alleging violations. CASHRA also called on the federal government to designate an independent mechanism to monitor implementation of the *CRPD* and to ensure people with disabilities and their representative organizations are able to fully take part in the process. In November 2017, Canada announced that it had tabled the Optional Protocol in the House of Commons. As of April 2018, it had not yet been ratified.

<sup>38</sup> *Peel Board of Education v. Ontario (Human Rights Commission)* (1990), 12 C.H.R.R. D/91 (Ont. S.C.)

<sup>39</sup> See *Rawala v. Devry Institute of Technology*, (1982) 3 C.H.R.R. D/1057, at para. 41; *Brown v Trebas Institute Ontario Inc.*, 2008 HRTO 10 (CanLII) [*Brown*].

<sup>40</sup> Provincial schools are residential schools geared to students with specific exceptionalities (for example, students who are blind, deaf, deafened or hard of hearing). In a letter dated April 6, 2016, the OHRC wrote to the Ministry of Education regarding concerns about the lack of supports and specialized programming in community schools, especially if provincial schools were to close. See: [www.ohrc.on.ca/en/letter-ministry-education-regarding-provincial-and-demonstration-schools-consultation](http://www.ohrc.on.ca/en/letter-ministry-education-regarding-provincial-and-demonstration-schools-consultation).

<sup>41</sup> Article 24, section 5 of the *CRPD*, *supra* note 7 states that “States Parties shall ensure that person with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.” Schools should not partner with organizations offering experiential learning placements that are not accessible to students with disabilities.

<sup>42</sup> For a full understanding of how the OHRC approaches disability issues, this policy should be read in conjunction with the OHRC’s *Mental health policy*, *supra* note 10, and the *Disability policy*, *supra* note 11.

<sup>43</sup> Sub-section 10(3) of the *Code*, *supra* note 2.

<sup>44</sup> This is consistent with *Hinze v. Great Blue Heron Casino*, 2011 HRTO 93 (CanLII) [*Hinze*], in which the HRTO stated that the definition of disability extends to the actual or perceived possibility that a person may develop a disability in the future. See also *Hill v. Spectrum Telecom Group Ltd.*, 2012 HRTO 133 (CanLII) [*Hill*]; *Davis v. Toronto (City)*, 2011 HRTO 806 (CanLII), request for reconsideration denied, 2011 HRTO 1095 (CanLII); *Chen v. Ingenierie Electro-Optique Exfo*, 2009 HRTO 1641 (CanLII) [*Chen*]; *Boodhram v. 2009158 Ontario Ltd.*, 2005 HRTO 54 (CanLII) [*Boodhram*]. It is also consistent with the multi-dimensional approach recommended by the Supreme Court of Canada in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 SCR 665, 2000 SCC 27 (CanLII) [*Mercier*]. In that case, the Court recognized that “[b]y placing the emphasis on human dignity, respect, and the right to equality

rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a ‘handicap.’ In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes.” (at para. 77).

<sup>45</sup> The OHRC is concerned about possible discrimination based on a person’s genetic characteristics. While the issue has not been litigated extensively before human rights tribunals, it is the OHRC’s view that the *Code’s* prohibition on discrimination based on perceived disability could include subjecting a person to unequal treatment because of a belief that the person, due to genetic characteristics, is likely to or will develop a disability in the future.

<sup>46</sup> *Mercier, supra* note 44; *Chen, supra* note 44; *McLean v. DY 4 Systems*, 2010 HRTO 1107 (CanLII).

<sup>47</sup> From the Preamble (e) to the *CRPD, supra* note 7 at p. 3.

<sup>48</sup> In *Hinze, supra* note 44, the HRTO stated (at para. 19): “The social model conceptualizes ‘disability’ as the outcome of socially constructed barriers and discriminatory customs and norms and seeks to eliminate those barriers and prejudicial attitudes. The social model asserts what is truly the disadvantage is not the physical or mental condition, but rather society’s response, which characterizes the condition as an impairment, and society’s failure to accommodate difference. Under the social model, disabled people are not intrinsically disadvantaged because of their conditions, but rather they experience discrimination in the way we organize society.”

<sup>49</sup> *Mercier, supra* note 44.

<sup>50</sup> *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, 2000 SCC 28 (CanLII) [*Granovsky*]. In that case, the Supreme Court of Canada recognized that the primary focus of the disability analysis in the context of the Canadian *Charter of Rights and Freedoms* is on the inappropriate legislative or administrative response (or lack thereof) of the State (at para. 39). The Court said (at para. 33):

Section 15(1) ensures that governments may not, intentionally or *through a failure of appropriate accommodation*, stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfillment in a world relentlessly oriented to the able-bodied. [Emphasis added.]

Although in *Granovsky* the focus was on State action, similar principles apply to organizations responsible for accommodation under human rights law: Office for Disability Issues, Human Resources Development Canada, Government of Canada, *Defining Disability: A complex issue*, Her Majesty the Queen in Right of Canada, 2003 at p. 39.

<sup>51</sup> See for example *Newfoundland (Human Rights Commission) v. Companion*, 2002 NFCA 38 (CanLII); *Lane, supra* note 7, upheld in *ADGA, supra* note 7. The Federal Court of Appeal, applying *Mercier, supra* note 44 and *Granovsky, ibid.*, stated that “disability in a legal sense consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment.” This was in relation to a dispute about whether a woman’s chronic headaches were in fact a disability under the

*Canadian Human Rights Act*. The Court found that they were: *Ottawa (City) v. Canada (Human Rights Comm.) (No. 2)* (2005), 54 C.H.R.R. D/462, 2005 FCA 311 at para. 15 (CanLII), leave to appeal refused [2005] S.C.C.A. No. 534.

<sup>52</sup> See, for example, *Boodhram, supra* note 44; *Hinze, supra* note 44; *Hill, supra* note 44. *Devoe v. Haran*, 2012 HRTO 1507 (CanLII) [*Devoe*].

<sup>53</sup> Whether a temporary condition amounts to a disability will depend on the facts of each case. In *Mercier, supra* note 44 at para. 82, the Supreme Court of Canada held that everyday illnesses or normal ailments, such as a cold, are not generally disabilities under human rights legislation. The HRTO has applied this holding in several decisions, and some adjudicators have expressed the concern that to consider commonplace, temporary illnesses as disabilities would trivialize the *Code's* protections: see, for example, *Valmassoi v. Canadian Electrocoating Inc.*, 2014 HRTO 701 (CanLII); *Davidson v. Brampton (City)*, 2014 HRTO 689 (CanLII). However, the fact that a physical condition is of a temporary nature does not exclude it from coverage under the *Code*: see *Hinze, supra* note 44 at para. 14; *Mou v. MHPM Project Leaders*, 2016 HRTO 327 (CanLII) [*Mou*]. Temporary injuries for which benefits were claimed or received under the *Workplace Safety and Insurance Act*, S.O. 1997 c. 16 Sch. A [*WSIA*] are clearly protected by the *Code*: see *Deroche v. Recycling Renaissance International Inc.*, 2005 HRTO 26 (CanLII). And human rights tribunals in other jurisdictions have also found temporary conditions to constitute disabilities. For example, the tribunal in *Wali v. Jace Holdings Ltd.*, 2012 BCHRT 389 (CanLII) stated at para. 82: "It is not necessary that a disability be permanent in order to constitute a disability for the purposes of the *Code*. The *Code's* protection also extends to persons who suffer from temporarily disabling medical conditions: *Goode v. Interior Health Authority*, 2010 BCHRT 95 (CanLII). Whether a temporary condition constitutes a disability is a question of fact in each case."

<sup>54</sup> *Mou, ibid.* at para. 23.

<sup>55</sup> In *J.L. v. York Region District School Board*, 2013 HRTO 948 (CanLII), the HRTO found that while *pes planus* (flat feet) can be a disability in some cases, the applicant's experience of this condition did not amount to a disability as it did not present any obstacles to full participation in society. Similarly, in *Anderson v. Envirotech Office Systems*, 2009 HRTO 1199 (CanLII), the HRTO found that there was no evidence that the applicant's bronchitis was chronic or became a chronic condition. The kind of bronchitis experienced by the applicant was commonly experienced by many and had no impact on his ability to participate fully in society. Thus, the HRTO found that it was not a disability under the *Code*.

<sup>56</sup> In *Granovsky, supra* note 50, a case that involved a challenge to the Canada Pension Plan disability pension which arose under s. 15 of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada rejected a notion of disability that would focus only on impairment or functional limitation. The Court said (at para. 29):

The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many important aspects of life the so-called "disabled" individual may not be impaired or limited in any way at all.

<sup>57</sup> See, for example, *Dawson v. Canada Post Corp.* 2008 CHRT 41 (CanLII) [*Dawson*] at paras. 90-98.

<sup>58</sup> It generally would not include a medical diagnosis. For more information about the kinds of information that organizations can ask for, see section 8.7 of this policy entitled, "Medical information to be provided."

<sup>59</sup> Stereotyping is when generalizations are made about individuals based on assumptions about qualities and characteristics of the group they belong to. The Supreme Court of Canada has said "Stereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities": *Quebec (Attorney General) v. A*, [2013] 1 SCR 61, 2013 SCC 5 (CanLII) at para. 326.

<sup>60</sup> A person is stigmatized when they possess an attribute that "marks" them as different and leads people to be devalued in the eyes of others: see Brenda Major and Laurie T. O'Brien, "The social psychology of stigma," *Annu. Rev. Psychol.* 2005 56:393-421 at 394-395. Inherent in this is the idea that people are seen as "deviant" from what society has deemed as the "norm": see Schur, Edwin M. 1971. *Labelling Deviant Behaviour: Its sociological implications*. New York: Harper & Row, Publishers, as cited by the Centre for Addiction and Mental Health, *The Stigma of Substance Abuse: A Review of the Literature* (18 August 1999).

<sup>61</sup> Law Commission of Ontario, *A Framework for the Law as it Affects Persons with Disabilities*, (September 2012) [LCO, "Framework"] at 100, available online at: [www.lco-cdo.org/en/disabilities-final-report-framework-introduction](http://www.lco-cdo.org/en/disabilities-final-report-framework-introduction).

<sup>62</sup> Marcia H. Rioux and Fraser Valentine, "Does Theory Matter? Exploring the Nexus Between Disability, Human Rights, and Public Policy," in *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law*, (Vancouver: UBC Press), 2006, 47 at 51. The authors write that the "human rights approach to disability...identifies wide variations in cognitive, sensory, and motor ability as inherent to the human condition and, consequently, recognizes the variations as expected events and not as rationales for limiting the potential of persons with disabilities to contribute to society." This approach recognizes "the condition of disability as inherent to society, not some kind of anomaly to normalcy." (at page 52)

<sup>63</sup> Many in the disability rights movement have pointed out that people without disabilities are merely "temporarily able-bodied." One author writes, "...[E]veryone is subject to the gradually disabling process of aging. The fact that we will all become disabled if we live long enough is a reality many people who consider themselves able-bodied are reluctant to admit." See Rosemarie Garland-Thomson, "Disability, Identity, and Representation: An Introduction," in *Rethinking Normalcy*, Tanya Titchkosky and Rod Michalko, eds. (Toronto: Canadian Scholars' Press Inc.) 2009, 63 at 70.

<sup>64</sup> Provincial Advocate for Children and Youth, "We Have Something to Say: Young people and their families speak out about special needs and change," (2016), at p. 55, available online: [www.provincialadvocate.on.ca/initiatives/we-have-something-to-say/resources/we-have-something-to-say-report-en.pdf](http://www.provincialadvocate.on.ca/initiatives/we-have-something-to-say/resources/we-have-something-to-say-report-en.pdf) (date retrieved: March 6, 2018).



<sup>65</sup> In this context, prejudices may be defined as deeply held negative perceptions and feelings about people with disabilities.

<sup>66</sup> LCO, "Framework," *supra* note 61 at 43.

<sup>67</sup> Example adapted from Canadian Hearing Society, "Canadian Hearing Society's Position Paper on Challenges and Issues Affecting Access to Post-Secondary Education for Deaf and Hard of Hearing Students," at 6; available online: [www.chs.ca/position-paper-challenges-and-issues-affecting-access-post-secondary-education-deaf-and-hard-hearing](http://www.chs.ca/position-paper-challenges-and-issues-affecting-access-post-secondary-education-deaf-and-hard-hearing) (date retrieved: July 19, 2017).

<sup>68</sup> PACY, "We Have Something to Say..." *supra* note 64.

<sup>69</sup> See section 8.2 of this policy on "Inclusive design" for more detailed information.

<sup>70</sup> Information taken from a written submission to the OHRC made by the Canadian Hearing Society (April 2015). The CHS states that the lack of widespread supports such as sign language interpretation and closed captioning contributes to this problem.

<sup>71</sup> Research conducted at the post-secondary level in the United States suggests that faculty are more likely to have negative attitudes toward students with invisible disabilities, including learning disabilities and mental health disabilities, and may question the legitimacy of requests for accommodation: see Jessica L. Sniatecki, *et al.*, "Faculty Attitudes and Knowledge Regarding College Students with Disabilities," (2015) *Journal of Postsecondary Education and Disability*, 28(3), 258-279. Some students with invisible disabilities, including emotional or learning disabilities, have decided not to request academic accommodations they are entitled to due to a belief that they are not "disabled enough": see Michael Lyman, *et al.*, "What Keeps Students with Disabilities from Using Accommodations in Postsecondary Education? A Qualitative Review," (2016) *Journal of Postsecondary Education and Disability*, 29(2), 123-140 at 129. See also, Derrick Kranke, *et al.*, "College Student Disclosure of Non-Apparent Disabilities to Receive Classroom Accommodations," (2013) *Journal of Postsecondary Education and Disability*, 26(1), 35-51.

<sup>72</sup> Mental health is a major determinant of student success. Needs related to mental health disabilities, if not met, can pose a significant barrier to a student's ability to access post-secondary education. See Gail MacKean, "Mental health and well-being in post-secondary education settings: A literature and environmental scan to support planning and action in Canada," (2011): <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.737.6978&rep=rep1&type=pdf> (date retrieved: August 7, 2018).

<sup>73</sup> For example, see *Gibbs v. Battlefords and Dist. Cooperative Ltd.* [1996] 3 S.C.R. 566, 27 C.H.R.R. D/87 [*Gibbs*].

<sup>74</sup> The OHRC's *Minds that matter: Report on the consultation on human rights, mental health and addictions*, 2012, is available on the OHRC's website at:

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[www.ohrc.on.ca/sites/default/files/Minds%20that%20matter\\_Report%20on%20the%20consultation%20on%20human%20rights%20mental%20health%20and%20addictions\\_accessible.pdf](http://www.ohrc.on.ca/sites/default/files/Minds%20that%20matter_Report%20on%20the%20consultation%20on%20human%20rights%20mental%20health%20and%20addictions_accessible.pdf)

<sup>75</sup> See the OHRC's *Mental health policy*, *supra* note 10.

<sup>76</sup> *By the numbers*, *supra* note 10.

<sup>77</sup> *With learning in mind*, *supra* note 6.

<sup>78</sup> Kessler, R.C., *et al.* (2005), "Lifetime prevalence and age-of-onset distributions of DSM-IV disorders in the National Comorbidity Survey Replication." *Archives of General Psychiatry*, 62(6), 593-602.

<sup>79</sup> In written submissions to the OHRC (June 2017), Colleges Ontario and the Council of Ontario Universities described many of the challenges they are facing due to the increase in the numbers of requests for mental health supports and services from students.

<sup>80</sup> This information is taken from: "In It Together: Taking Action on Student Mental Health," (2017), a joint publication from the College Student Alliance, the Ontario Undergraduate Student Alliance, Colleges Ontario, and the Council of Ontario Universities, available online: <http://cou.on.ca/wp-content/uploads/2017/11/In-It-Together-PSE-Mental-Health-Action-Plan.pdf> (date retrieved: November 20, 2017).

<sup>81</sup> In *With learning in mind*, *supra* note 6, the OHRC described key systemic barriers at the post-secondary level and developed six specific measures for colleges and universities to implement to help ensure that students with mental health disabilities are able to access post-secondary education without impediment.

<sup>82</sup> A 2010 Canadian study reported that "[t]he incidence rate of anaphylaxis is increasing, and recent U.S. reports suggest that it may be as high as 49.8 per 100,000 person-years. Foods are primary inciting allergens for anaphylaxis, and hospitalizations because of food-induced anaphylaxis are reported to have increased by 350% during the last decade." See Moshe Ben-Shoshan, *et al.*, "A population-based study on peanut, tree nut, fish, shellfish, and sesame allergy prevalence in Canada," *Journal of Allergy and Clinical Immunology*, 2010, available online at: [www.med.mcgill.ca/epidemiology/joseph/publications/medical/benshoshan2010.pdf](http://www.med.mcgill.ca/epidemiology/joseph/publications/medical/benshoshan2010.pdf) (date retrieved: March 8, 2016). Food Allergy Canada reports that food allergies, one of the most common causes of anaphylaxis, now affect more than 960,000 Ontarians (information compiled by Food Allergy Canada and included in a written submission to the OHRC in April 2015). The Toronto District School Board reported that it has seen "an increase in these food-related allergies and requests for accommodation within the TDSB (e.g. peanuts, milk, other foods)" (information taken from a written submission made by the TDSB to the OHRC in June 2017).

<sup>83</sup> *An Act to protect anaphylactic pupils, 2005* – S.O. 2005, Chapter 7 ("*Sabrina's Law*"). As of September 2018, school boards in Ontario will also be required to have policies in place to improve the safety of students with anaphylaxis, asthma, diabetes and epilepsy. Boards will be required to provide students with these medical conditions with a plan of care, which outlines contacts and procedures tailored to the individual needs of the student. See: PPM 161- *Supporting Children and Students with Prevalent*

*Medical Conditions (Anaphylaxis, Asthma, Diabetes, and/or Epilepsy) in Schools*, draft version available online: [www.edu.gov.on.ca/extra/eng/ppm/ppm161.pdf](http://www.edu.gov.on.ca/extra/eng/ppm/ppm161.pdf) (date retrieved: November 30, 2017).

<sup>84</sup> People may also be at risk for anaphylaxis due to allergies to medication, insect stings, latex, etc.

<sup>85</sup> *Rutledge v. Fitness One Peter Inc.*, 2010 HRTO 2039 (CanLII); *Subotic v. Jellybean Park Langley Campus Inc.*, [2009] B.C.H.R.T.D. No. 260, 2009 BCHRT 260. For American cases dealing with food allergies, see *Ridley School District v. M.R.*, 680 F.3d 260, 2012 U.S. App. LEXIS 9908 (QL) (U.S. Court of Appeals for the Third Circuit); *T.F. et al. v. Fox Chapel Area School District*, 2014 U.S. App. Lexis 18066 (U.S. Court of Appeals for the Third Circuit).

<sup>86</sup> See *Turner v. Canada Border Services Agency*, 2014 CHRT 10 (CanLII) in which the Canadian Human Rights Tribunal found that the respondent had discriminated against the complainant, in part, because of a perception that he had a disability due to obesity.

<sup>87</sup> For more detailed information, see section 8.7 of this policy entitled “Medical information to be provided.”

<sup>88</sup> The OHRC has explored this “contextualized” or “intersectional” approach to discrimination analysis at length in its discussion paper entitled *An intersectional approach to discrimination: Addressing multiple grounds in human rights claims* (2001), available online at the OHRC’s website: [www.ohrc.on.ca](http://www.ohrc.on.ca).

<sup>89</sup> Committee on the Rights of Persons with Disabilities, “General Comment No 4 (2016) on the right to inclusive education,” General Comment on *United Nations Convention on the Rights of Persons with Disabilities*, (2016) [General Comment No 4] CRPD/C/GC/4, at para. 46.

<sup>90</sup> Ontario First Nations Special Education Review Report (May 2017), available online: <http://mncfn.ca/wp-content/uploads/2017/05/EMBARGOED-Ontario-First-Nations-Special-Education-Review-Report-May-2017.pdf> (date retrieved: April 10, 2018). See OHRC letter dated November 20, 2017: [www.ohrc.on.ca/en/re-implementing-recommendations-first-nations-special-education](http://www.ohrc.on.ca/en/re-implementing-recommendations-first-nations-special-education). In Appendix A, the letter includes a detailed breakdown of the recommendations included in the Ontario First Nations Special Education Review Report.

<sup>91</sup> See also, Chiefs of Ontario, Special Education Position Paper, (2017): <http://education.chiefs-of-ontario.org/upload/documents/17-06-02-2017-special-education-position.pdf> (date retrieved: April 10, 2018).

<sup>92</sup> Canadian Human Rights Commission, “Submission to the Committee on the Rights of Persons with Disabilities in Advance of its Consideration of Canada’s 1<sup>st</sup> Periodic Report” (July 2016).

<sup>93</sup> Cultural competence has been defined as “a set of congruent behaviors, attitudes and policies that come together in a system or agency or among professionals that enables that system, agency or professionals to work effectively in cross-cultural situations”: Cross, T. L., Bazron, B. J., Dennis, K. W., & Isaacs, M. R. (1989). “Towards a culturally competent system of care,” Washington, DC: CAASP Technical

Assistance Center. Cultural competence, in this view, includes not only attitudes, awareness, knowledge, and skills at the interpersonal level, but also policies and structures at the institutional and systemic level that enable people and organizations to work effectively in cross-cultural situations. Cross *et al.* define culture as “the integrated pattern of human behavior that includes thoughts, communication styles, actions, customs, beliefs, values, and institutions of a racial, ethnic, religious or social group” (1989:13). More recent literature also refers to LGBTQ “cultures” among other sub-cultural communities.

<sup>94</sup> For example, the Toronto District School Board reported in 2013 that students who identify as Black are the largest racial category represented in congregated Special Education schools (they are over doubly-represented at 30.2%), and are notably under-represented in Gifted, International Baccalaureate (IB), Advanced Placement (AP), and Elite Athlete programs. See Toronto District School Board, “Facts, Selected School-Wide Structures: An Overview,” Issue 9, December 2013 (TDSB) at 3; and, Toronto District School Board, “Facts, Selected In-School Programs: An Overview,” Issue 8, December 2013 (TDSB) at 3. The OHRC has also heard from members of the community that Indigenous students are similarly over-represented in special education placements.

<sup>95</sup> The OHRC heard about these concerns during its 2016 strategic planning consultations. Also, see *Lang v. Ontario (Community and Social Services)*, 2003 HRTO 8 (CanLII), an interim decision that examined the interaction between the *French Language Services Act* and the *Human Rights Code*. The case eventually settled without a final hearing or decision. See also, OHRC Policy statement on Francophones, language and discrimination: [www.ohrc.on.ca/en/policy-statement-francophones-language-and-discrimination#\\_edn11](http://www.ohrc.on.ca/en/policy-statement-francophones-language-and-discrimination#_edn11).

<sup>96</sup> For a more detailed discussion, see section 5, entitled “Establishing discrimination” in the OHRC’s *Disability policy*, *supra* note 11.

<sup>97</sup> See *Moore*, *supra* note 4; *Peel Law Association v. Pieters*, 2013 ONCA 396 (CanLII).

<sup>98</sup> See *McCarthy v. Kenny Tan Pharmacy* 2015 HRTO 1303 (CanLII) at para. 90 for an example of a case where deviations from normal practice supported a finding of race discrimination.

<sup>99</sup> For a more detailed discussion, see section 6.2, entitled “Harassment” in the OHRC’s *Disability policy*, *supra* note 11.

<sup>100</sup> Human rights case law has established that, depending on the circumstances, one incident could be significant enough or substantial enough to be harassment: see *Murchie v. JB’s Mongolian Grill (No. 2)*, 2006 HRTO 33 (CanLII) [*Murchie*]; *Haykin*, *supra* note 12; *Wamsley v. Ed Green Blueprinting*, 2010 HRTO 1491 (CanLII) [*Wamsley*]; *Ford v. Nipissing University*, 2011 HRTO 204 (CanLII); and *Gregory v. Parkbridge Lifestyle Communities Inc.* 2011 HRTO 1535 (CanLII) [*Gregory*].

<sup>101</sup> Section 10(1) of the *Code*, *supra* note 2.

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<sup>102</sup> See *Reed v. Cattolica Investments Ltd. and Salvatore Ragusa*, [1996] O.H.R.B.I.D. No. 7 [Reed]. See also, *Gregory*, *supra* note 100 at para. 87 citing *Ghosh v. Domglas Inc. (No. 2)* (1992), 17 C.H.R.R. D/216 (Ont. Bd. Inq.) [Ghosh] at paras. 43 to 48; and *Dhanjal v. Air Canada*, (1996), 28 C.H.R.R. D/367 at p. 50 (C.H.R.T.) [Dhanjal].

<sup>103</sup> *Reed*, *ibid.* See also, *Gregory*, *ibid.*

<sup>104</sup> *Janzen v. Platy Enterprises Ltd.*, [1989] 2 S.C.R. 1252; *Haykin*, *supra* note 12.

<sup>105</sup> In *Harriott v. National Money Mart Co.*, 2010 HRTO 353 (CanLII), a sexual harassment case, it was confirmed that a person is not required to protest or object to the harassing conduct (at para. 108).

<sup>106</sup> In the case of employment, amendments to the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1 [OHS] require all employers with over five employees to establish policies on harassment and violence in the workplace and to review these annually.

<sup>107</sup> If it is necessary for an education provider to ask about medication, questions should relate only to the effects of medications on academic functioning and not about the details of the medication prescribed.

<sup>108</sup> See, for example, *Perez-Moreno v. Kulczycki*, 2013 HRTO 1074 (CanLII) that deals with posting discriminatory comments on Facebook, and *C.U. v. Blencowe*, 2013 HRTO 1667 (CanLII) that deals with harassing text messages.

<sup>109</sup> See the OHRC's *Policy on preventing sexual and gender-based harassment*, 2013, available online at: [www.ohrc.on.ca/sites/default/files/policy%20on%20preventing%20sexual%20and%20gender-based%20harassment%202013\\_accessible\\_1.pdf](http://www.ohrc.on.ca/sites/default/files/policy%20on%20preventing%20sexual%20and%20gender-based%20harassment%202013_accessible_1.pdf), for more information.

<sup>110</sup> See *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, 25 C.H.R.R. D/175 [Ross]; *Quebec (Comm. Des droits de la personne) c. Deux-Montagnes, Comm. Scolaire*, (1993), 19 C.H.R.R. D/1 (T.D.P.Q.); *Jubran v. North Vancouver School District No. 44*, (2002), 42 C.H.R.R. D/273, 2002 BCHRT 10. In *Jubran*, the Tribunal held that the School Board (1) had a duty to provide an educational environment that did not expose students to discriminatory harassment, (2) knew that students were harassing another student, and (3) was liable for not taking adequate measures to stop that harassment. The B.C. Supreme Court quashed the Tribunal's decision on other grounds. However, the B.C. Court of Appeal reversed the Divisional Court decision and also held that the school board was liable for the discriminatory conduct of students, and that the board had not provided an educational environment free from discrimination: see *North Vancouver School District No. 44 v. Jubran*, [2005] B.C.J. No. 733 (C.A.), leave to SCC refused, 2005 BCCA 201 (No. 30964).

<sup>111</sup> PACY, "We Have Something to Say..." *supra* note 64, at p. 54.

<sup>112</sup> See CLO, *et al.* Research partnership, *supra* note 8.

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<sup>113</sup> See, for example, *Smith v. Menzies Chrysler Inc.*, 2009 HRTO 1936 (CanLII); *Dhillon v. F.W. Woolworth Co.* (1982), 3 C.H.R.R. D/743 at para. 6691 (Ont. Bd. Inq.); *Naraine v. Ford Motor Co. of Canada (No. 4)* (1996), 27 C.H.R.R. D/230 at para. 50 (Ont. Bd. Inq.); and *Cugliari v. Telefficiency Corporation*, 2006 HRTO 7 (CanLII).

<sup>114</sup> *Ross*, *supra* note 110.

<sup>115</sup> Similarly, an education provider's failure to address a situation of harassment may also amount to a poisoned environment: see *McKinnon v. Ontario (Ministry of Correctional Services)*, [1998] O.H.R.B.I.D. No. 10; *Vanderputten v. Seydaco Packaging Corp.*, 2012 HRTO 1977 (CanLII).

<sup>116</sup> See *George v. 1735475 Ontario Limited* 2017 HRTO 761, at paras. 49-61, where the adjudicator elaborates on the distinction between harassment and a poisoned environment.

<sup>117</sup> In general, a finding of harassment requires a "course of conduct," that is, more than one incident. But see, for example, *Murchie*, *supra* note 100 where the HRTO found that a single incident was egregious enough to justify a finding of harassment.

<sup>118</sup> In *Dhanjal*, *supra* note 102, the Tribunal noted that the more serious the conduct, the less need there is for it to be repeated. Conversely, the Tribunal held the less serious the conduct, the greater the need to show its persistence. See also *General Motors of Canada Limited v. Johnson*, 2013 ONCA 502 (CanLII).

<sup>119</sup> Example adapted from a written submission made by the Inter-University Disability Issues Association to the OHRC's 2002 disability and education consultation.

<sup>120</sup> PACY, "We Have Something to Say..." *supra* note 64, at p. 69-70.

<sup>121</sup> *Ghosh*, *supra* note 102 at para. 76 [as cited in *McKinnon v. Ontario (Ministry of Correctional Services)*, [2002] O.H.R.B.I.D. No. 22]; *Welykyi v. Rouge Valley Co-operative Homes Inc.*, 2016 HRTO 299 (CanLII).

<sup>122</sup> For detailed information on how to identify systemic discrimination, see section 4.1 of the OHRC's *Policy and guidelines on racism and racial discrimination* (2005) [*Racism policy*], available online at: [www.ohrc.on.ca/sites/default/files/attachments/Policy\\_and\\_guidelines\\_on\\_racism\\_and\\_racial\\_discrimination.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_racism_and_racial_discrimination.pdf).

<sup>123</sup> As one author notes, "...the philosophical and ideological foundations upon which discrimination against disabled people is justified are well entrenched within the core institutions of society." See: Colin Barnes, "A Brief History of Discrimination and Disabled People," in *The Disability Studies Reader*, 3<sup>rd</sup> ed., Lennerd J. Davis, ed. (New York: Routledge), 2010, 20 at 31. While the author's observations relate to discrimination against people with disabilities in the United Kingdom, it can be argued that much of what he describes pertains to the situation for people with disabilities in Canada.

<sup>124</sup> In *Moore*, *supra* note 4, the Supreme Court of Canada reaffirmed its earlier definition of systemic discrimination set out in its seminal 1987 decision *Canadian National Railway Co. v. Canada (Human*

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*Rights Commission*), [1987] 1 S.C.R. 1114 [CNR] as, “practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics” (at pp. 1138-1139). The OHRC uses “systemic discrimination” when referring to individual institutions, or a system of institutions, that fall under the jurisdiction of the *Code* (e.g. the education system).

<sup>125</sup> *Gichuru v. Law Society of British Columbia* (No. 6) (2009), 68 C.H.R.R. D/305, 2009 BCHRT 360 [Gichuru] at para. 469.

<sup>126</sup> *CNR*, *supra* note 124 at para. 34.

<sup>127</sup> In 2000, the Ontario Legislature passed the *Safe Schools Act*. The *Act* gave principals, teachers and school boards more authority to suspend and expel students and involve the police. The *Safe Schools Act* specified infractions that required mandatory suspensions, expulsions and police involvement. It also permitted school board policies to add infractions for which suspensions or expulsions are either mandatory or discretionary. The discriminatory effect of safe schools legislation and policies on individuals protected by the *Code* was a prominent concern raised during the OHRC’s disability and education consultation in 2002, and is discussed at length in [The Opportunity to Succeed](#). This issue was also raised extensively in the OHRC’s inquiry into racial profiling, and is discussed in the OHRC’s report entitled [Paying the price: The human cost of racial profiling](#). Both documents are available online at the OHRC’s website: [www.ohrc.on.ca](http://www.ohrc.on.ca). In 2005, the OHRC filed human rights claims against the Toronto District School Board and the Ministry of Education related to a strong perception that the “zero tolerance” approach of the safe schools provisions of the *Education Act* was having a disproportionate effect on students with disabilities and racialized students. The OHRC negotiated settlements in both claims. In 2008, the government amended the *Education Act*. The amendments mandate a “progressive discipline” approach to inappropriate behaviour in schools, and require that students who are disciplined have opportunities to continue their education. They also require that professional supports, programming supports, and training for teachers and principals be provided. Additional amendments made in 2010 require that staff working directly with students respond to all serious school incidents, and that such incidents are reported to the principal and communicated to parents. For more information, see the *Education Act*, R.S.O. 1990, c. E.2, Part XIII; O. Reg. 472/07: Behaviour, Discipline and Safety of Pupils; Ministry of Education, *Policy/Program Memorandum No. 145*, (December 5, 2012); Ministry of Education, *Caring and Safe Schools in Ontario: Supporting Students with Special Needs Through Progressive Discipline, Kindergarten to Grade 12*, (2010) available online at: [www.edu.gov.on.ca/eng/general/elemsec/speced/Caring\\_Safe\\_School.pdf](http://www.edu.gov.on.ca/eng/general/elemsec/speced/Caring_Safe_School.pdf) (date retrieved: July 31, 2017).

<sup>128</sup> Under O. Reg. 472/07, the mitigating and other factors that education providers need to take into account before disciplining students include: “whether the behaviour was a manifestation of a disability identified in the pupil’s individual education plan” and “whether appropriate individualized accommodation has been provided.”

<sup>129</sup> In a written submission to the OHRC (June 2017), ARCH Disability Law Centre wrote: “Although suspensions and expulsions have a number of additional procedural protections which are designed to take into account disability and the provision of appropriate accommodations, it is worth noting that these protections are not always sufficient or properly adhered to.” ARCH also reported that they have

received many calls from parents whose children have been suspended for disability-related reasons. In many cases, these suspensions occurred before appropriate accommodations were put into place for students, or in the context of a dispute with the school over the type of accommodation to be provided. In 2013, the Toronto District School Board reported that students with disabilities were suspended between two and three times as much as their peers: see Toronto District School Board, *Suspension Rates by Students' Demographic and Family Background Characteristics*, online: Caring and Safe Schools Issue 3, June 2013, [www.tdsb.on.ca/Portals/research/docs/reports/CaringSafeSchoolsCensus201112.pdf](http://www.tdsb.on.ca/Portals/research/docs/reports/CaringSafeSchoolsCensus201112.pdf).

<sup>130</sup> Ontario Ministry of Education, "Safe Schools: Suspension and expulsion facts, 2015-2016," available online at: <http://www.edu.gov.on.ca/eng/safeschools/facts1516.html> (date retrieved: March 6, 2018).

<sup>131</sup> See sub-section 8.6.1 of this policy entitled, "Duty to inquire about accommodation needs."

<sup>132</sup> See section 9 of this policy, entitled "Undue hardship," for more information.

<sup>133</sup> See, for example, *C.M.*, *supra* note 25, at para. 142; *Saskatchewan Human Rights Commission v. Mahussier*, 2009 SKCA 19 (CanLII).

<sup>134</sup> The Ontario Court of Appeal has commented that discipline measures pursuant to the regulations under the *Education Act* must take into account a student's individual circumstances: see *Bonnah (Litigation Guardian of) v. Ottawa-Carlton District School Board* (2003), 64 O.R. (3d) 454 (Ont. C.A.) at para. 37.

<sup>135</sup> Section 7(3)(b) of the *Code*, *supra* note 2, also specifically prohibits reprisal for rejecting a sexual solicitation or advance, where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

<sup>136</sup> *Noble v. York University*, 2010 HRTO 878 at paras. 30-31, 33-34 (CanLII) [*Noble*].

<sup>137</sup> *Ibid.* See also *Bertrand v. Primary Response*, 2010 HRTO 186 (CanLII).

<sup>138</sup> *Noble*, *supra* note 136 at paras. 30-31.

<sup>139</sup> *Knibbs*, *supra* note 15.

<sup>140</sup> See section 17 of the *Code*, *supra* note 2. Requirements under the *CRPD* also provide that States Parties, including Canada, must take steps to make sure that people with disabilities are provided with accommodation (for example, to ensure equal access to education): see *CRPD*, *supra* note 7 at Article 13(1), Article 24(2)(c), and Article 27(1)(i), respectively. "Reasonable accommodation" is covered under Article 5 generally.

<sup>141</sup> See CLO, *et al.* Research partnership, *supra* note 8.



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<sup>142</sup> See *Meiorin*, *supra* note 17 at paras. 65-66 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646, [1999] 3 S.C.R. 868, at paras. 22 and 42-45 [Grismer]. In *Gourley v. Hamilton Health Sciences* 2010 HRTO 2168 (CanLII), the adjudicator stated (at para. 8): "The substantive component of the analysis considers the reasonableness of the accommodation offered or the respondent's reasons for not providing accommodation. It is the respondent who bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate the employee to the point of undue hardship..." See also *Lee v. Kawartha Pine Ridge District School Board*, 2014 HRTO 1212 (CanLII) [Lee]; *McCarthy v. Caesar's Plumbing and Heating Ltd.*, 2014 HRTO 1795; *Philomen v. Jessar Eglinton Ltd. (c.o.b. Aaron's Sales and Lease to Ownership)*, 2014 HRTO 1794.

<sup>143</sup> *ADGA*, *supra* note 7 at para. 107.

<sup>144</sup> *C.M.*, *supra* note 25, at para. 109; *M.O. v. Ottawa Catholic District School Board*, 2010 HRTO 1754 (CanLII) [M.O.], at para. 87; *Longuepée v. University of Waterloo*, 2017 HRTO 575 (CanLII) [Longuepée], at para. 37; *Baber v. York Region District School Board*, 2011 HRTO 213 (CanLII) [Baber]; *Y.B. v. Conseil des écoles publiques de l'Est de l'Ontario*, 2017 HRTO 492 (CanLII) [Y.B.]; *Worthington v. Algonquin College of Applied Arts and Technology*, 2012 HRTO 715 (CanLII) [Worthington]; *J.F. v. Waterloo Catholic District School Board*, 2017 HRTO 1121 (CanLII) [J.F.].

<sup>145</sup> *C.M.*, *supra* note 25, at para. 109.

<sup>146</sup> *M.O.*, *supra* note 144 at para. 87.

<sup>147</sup> In *Lane*, *supra* note 7, the HRTO held at para. 150 that a failure to meet the procedural dimensions of the duty to accommodate is a form of discrimination in itself because it "denies the affected person the benefit of what the law requires: a recognition of the obligation not to discriminate and to act in such a way as to ensure that discrimination does not take place." The HRTO's decision was confirmed on appeal: *ADGA*, *supra* note 7. See also *Lee*, *supra* note 142.

<sup>148</sup> *Gaisiner*, *supra* note 25 at para. 149.

<sup>149</sup> From the Preamble (h) to the *CRPD*, *supra* note 7.

<sup>150</sup> The Supreme Court of Canada has confirmed that dignity is a factor to be considered in determining disability accommodation in the education context. In commenting on its decision in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 [Eaton], the Court stated:

...Emily's claim might have succeeded if ...the Court had been persuaded that the Board's response to the challenge posed by Emily's placement [the accommodation] **had itself violated Emily's dignity as a human being equally deserving of consideration**, or placed discriminatory obstacles in the way of her self-fulfillment. [Emphasis added.]

*Granovsky*, *supra* note 50, at para. 74, making reference to the *Eaton* decision.

<sup>151</sup> See *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 (SCC), (CanLII), at para. 53.

<sup>152</sup> Article 24, section 2(e) of the *CRPD*, *supra* note 7, states that States Parties shall ensure that “Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of inclusive education.”

<sup>153</sup> The United Nations’ Committee on the Rights of Persons with Disabilities has stated “There is no ‘one size fits all’ formula to reasonable accommodation, as different students with the same impairment may require different accommodations.” See *General Comment No 4*, *supra* note 89 at para. 30.

<sup>154</sup> In the *Eaton* decision, the Supreme Court of Canada recognized the unique nature of disability and emphasized the need for individualized accommodation because the ground of disability “means vastly different things depending upon the individual and the context,” *Eaton*, *supra* note 150 at para. 69.

<sup>155</sup> In *Eaton*, *ibid.*, the Supreme Court of Canada stated that “integration should be recognized as the norm of general application because of the benefits it generally provides” (at para. 69). However, the Court found that in Emily Eaton’s circumstances, segregated accommodation was in her best interests. The Court was of the view that this was one of those unusual cases where segregation was a more appropriate accommodation.

<sup>156</sup> The *CRPD*, *supra* note 7 states at Article 2, “‘Universal design’ means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. ‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.”

<sup>157</sup> The Universal Design for Learning framework was first developed by David Rose, Ed.D. of the Harvard Graduate School of Education and the Centre for Applied Special Technology (CAST) in the 1990s. For more information, see *Universal Design for Learning in the Classroom: Practical Applications*, Tracey E. Hall, Anne Meyer, and David H. Rose, eds. Guilford Press, 2012; *The Universally Designed Classroom: Accessible Curriculum and Digital Technologies* (2005), David H. Rose, Anne Meyer, and Chuck Hitchcock, eds. Cambridge, MA: Harvard Education Press; *A Practical Reader in Universal Design for Learning* (2006), David H. Rose and Anne Meyer, eds. Cambridge, MA: Harvard Education Press.

<sup>158</sup> See *AODA Alliance Discussion Paper*, *supra* note 32.

<sup>159</sup> PACY, “We Have Something to Say...” *supra* note 64, at p. 51.

<sup>160</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, 1997 CanLII 327 (SCC) [*Eldridge*], para. 78.

<sup>161</sup> *Eaton*, *supra* note 150 at para. 67.

<sup>162</sup> *Meiorin*, *supra* note 17 at para. 68.

<sup>163</sup> In January 2018, the OHRC's Chief Commissioner wrote to the University of Toronto to raise human rights concerns related to a proposed University-Mandated Leave of Absence Policy. A specific concern related to the failure of the institution to recognize in the policy its duty to accommodate students with mental health disabilities to the point of undue hardship. See: <http://www.ohrc.on.ca/en/re-university-mandated-leave-absence-policy-%C2%ADraises-human-rights-concerns>. When developing institutional policies and practices, education providers need to be mindful of their responsibilities under the *Code*.

<sup>164</sup> See *Hinze*, *supra* note 44, at para. 19.

<sup>165</sup> *General Comment No 4*, *supra* note 89 at para. 26.

<sup>166</sup> Rachel E. Smith and Tara Buchannan, "Community Collaboration, Use of Universal Design in the Classroom," (2012) *Journal of Postsecondary Education and Disability*, 25(3), 259-265.

<sup>167</sup> See Katherine Terras, *et al.* "Disability Accommodations in Online Courses: The Graduate Student Experience," (2015) *Journal of Post-Secondary Education and Disability*, Volume 28(3), 351-368.

<sup>168</sup> In *VIA Rail*, *supra* note 7, the Supreme Court of Canada stated at para. 186: "...while human rights principles include an acknowledgment that not every barrier can be eliminated, they also include a duty to prevent new ones, or at least, not knowingly to perpetuate old ones where preventable."

<sup>169</sup> Education providers should also be aware of their responsibilities under the *AODA*, *supra* note 7, and the accessibility provisions of the Ontario *Building Code Act*, 1992, S.O. 1992, c. 23 which governs the construction of new buildings and the renovation and maintenance of existing buildings. If accessibility standards under the *AODA* fall short of requirements under the *Code* in a given situation, the requirements of the *Code* will prevail. Similarly, organizations cannot rely only on the requirements of the Ontario *Building Code*, but must consider their obligations under the *Human Rights Code*. The *Human Rights Code* prevails over the *Building Code* and organizations may be vulnerable to a human rights claim if their premises fall short of the requirements of the *Human Rights Code*. Relying on relevant building codes has been clearly rejected as a defence to a complaint of discrimination under the *Human Rights Code*: see, for example, *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 [*Quesnel*].

<sup>170</sup> The issue of special education information being elusive and inaccessible to students and their families is longstanding and continuing. The OHRC has heard concerns about this dating as far back as our province-wide disability and education consultation in 2002. In 2015, in the *Toronto District School Board Governance Advisory Panel Report*, the Panel noted: "Parents expressed frustration at their inability to advocate for their children's special education needs in an effective way. They feel isolated, afraid and unsure of how to work with the school board administration to support their children's learning needs. They also said that the specific information they require to be informed about the options available to support students is not easily accessible on the website or from any other source." Available online: [www.edu.gov.on.ca/eng/new/2015/TDSB2015.html#\\_Toc427062651](http://www.edu.gov.on.ca/eng/new/2015/TDSB2015.html#_Toc427062651) (date retrieved: July 17, 2017). In its Concluding Observations on the Initial Report of Canada, the United Nations' Committee on the Rights of Persons with Disabilities also expressed concerns about inadequate access to information

for people with disabilities, and recommended in paragraph 40(a) that Canada “[r]ecognize, in consultation with organizations of deaf persons, American Sign Language and Quebec Sign Language (Langue des signes Québécoise) as official languages and their use in schools, and establish jointly with organizations of deaf persons a mechanism to certify the quality of interpretation services and ensure that opportunities for continuous training are provided for sign language interpreters,” and at paragraph 40(b), that Canada “[p]romote and facilitate the use of easy-read and other accessible formats, modes and means of communication and grant persons with disabilities access to information and communications technology, including through the provision of software and assistive devices to all persons with disabilities.” (May 2017) Available online: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FCAN%2FCO%2F1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FCAN%2FCO%2F1&Lang=en) (date retrieved: July 19, 2017).

<sup>171</sup> In *R.B.*, *supra* note 25, the HRTO recognized, at para. 257, the importance of communication throughout the accommodation process stating: “...communication is an integral part of education, especially for a student with high needs.”

<sup>172</sup> At the post-secondary level, for example, links could be provided to an online video series on accommodating post-secondary students with mental health disabilities: [www.stlawrencecollege.ca/about/mental-health-research-project/content-of-the-videos/](http://www.stlawrencecollege.ca/about/mental-health-research-project/content-of-the-videos/).

<sup>173</sup> In a written statement to the OHRC (June 2017), the Provincial Parent Association Advisory Committee on Special Education Advisory Committees wrote: “Timely access to accommodation, curriculum and services is critical to all students. Access delayed, is access denied.” In *L.B.*, *supra* note 25, the HRTO stated at para. 129: “Where services, supports and accommodations, such as the referral for social work and attendance counselling support or discussion of alternative placements are delayed significantly or do not take place at all, the accommodations are clearly inadequate. These are services that are within the mandate of all school boards. Thus, denying or substantially delaying access to these services, in my view, can amount to a substantive breach of the *Code*.”

<sup>174</sup> In a written submission made to the OHRC (June 2017), ARCH Disability Law Centre wrote: “In ARCH’s experience, a great number of safety concerns...are the result of a failure to quickly mobilize the appropriate resources to accommodate a student. Many parents calling ARCH have expressed repeated frustration due to extended disruptions in their child’s education because schools wait months for results of professional assessments or to implement training for their staff related to behaviour management. These delays often lead to an escalation of behaviours and more draconian responses to them (such as the use of restraints or exclusion). These types of responses often exacerbate the situation and the problematic behaviours making it more difficult to provide appropriate accommodation later on.”

<sup>175</sup> See *Gamache v. York University*, 2012 HRTO 2328 (CanLII) [*Gamache* #1]; *Gamache v. York University*, 2013 HRTO 693 (CanLII) [decision on remedy] [*Gamache* #2]; *L.B.*, *supra* note 25, at para. 129.

<sup>176</sup> See *Gamache #1, ibid.* The United Nations' Committee on the Rights of Persons with Disabilities has noted its concern about "the widespread lack of textbooks and learning materials in accessible formats and languages, including sign language." It has stated that "States parties must invest in the timely development of resources in ink or Braille and in digital formats, including through the use of innovative technology." See *General Comment No 4, supra* note 89 at para. 23. The Learning Disabilities Association of Ontario has written: "The timeliness of any of these processes depends on the instructor making a list of required course materials available well before the course starts. Otherwise students are put at a disadvantage when they do not have their required course materials at the same time as other students." See: Learning Disabilities Association of Ontario, "Accommodating Students with LDs in Postsecondary Studies," (June 2012) at 5, available online: [www.ldadr.on.ca/AboutLD/Transition/Accommodating\\_Students\\_with\\_LD\\_s\\_in\\_Postsecondary\\_Studies.pdf](http://www.ldadr.on.ca/AboutLD/Transition/Accommodating_Students_with_LD_s_in_Postsecondary_Studies.pdf) (date retrieved: July 26, 2017). And, in a written submission to the OHRC (June 2017), the Toronto District School Board wrote: "All books on the Ministry approved Trillium list should automatically be available in alternate formats. Publishers who want their books used in a school should be required to provide braille-ready files (or at least, digitally prepared files that can be easily converted to braille-ready files) before the book contract with the school board is signed."

<sup>177</sup> Information taken from a written submission made by ARCH Disability Law Centre to the OHRC (June 2017).

<sup>178</sup> PACY, "We Have Something to Say..." *supra* note 64, at pp. 54-55.

<sup>179</sup> See People for Education, *Competing Priorities (Annual Report on Ontario's Publicly Funded Schools 2017)*. Toronto, ON: People for Education, 2017 at 6 and 20. In a written submission to the OHRC (June 2017), the Learning Disabilities Association of Ontario also raised the issue of significant delays in the professional assessment process. And, also in a written submission to the OHRC (June 2017), the Ontario Psychological Association stated, "it is important to recognize that not all communities have access to the appropriate professionals and/or that resources are limited."

<sup>180</sup> See *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000* (SCFP-FTQ), 2008 SCC 43 (CanLII) [*Hydro-Québec*]; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 (CanLII), [2007] 1 SCR 161, 2007 [*McGill*].

<sup>181</sup> The United Nations' Committee on the Rights of Persons with Disabilities has stated: "States parties must ensure that independent systems are in place to monitor the appropriateness and effectiveness of accommodations and provide safe, timely and accessible mechanisms for redress when students with disabilities and, if relevant, their families, consider that they have not been adequately provided or have experienced discrimination." See *General Comment No 4, supra* note 89 at para. 31.

<sup>182</sup> See, Access ON, "A Guide to the Integrated Accessibility Standards Regulation," (April 2014): <https://dr6j45jk9xcmk.cloudfront.net/documents/4845/guidelines-to-iasr-english.pdf>; and section

80.50 of O. Reg. 191/11, "Integrated Accessibility Standards," under the AODA: [www.ontario.ca/laws/regulation/110191#BK154](http://www.ontario.ca/laws/regulation/110191#BK154).

<sup>183</sup> For example, ARCH has commented: "The current system places an undue burden on students and their families to ensure that their accommodation needs are being fulfilled. If their efforts fail, they are afforded insufficient statutory protections for resolution. Families are led in an adversarial direction, forced at times to take their disputes to courts and tribunals which leads to further dissolution of relationships and increased tension between schools and families." See: ARCH Disability Law Centre, "Submission to the Ministry of Education in Response to the Call for Submissions as Part of the Ministry's Project Entitled, 'From Great to Excellent: the Next Phase in Ontario's Education Strategy'" at 2-3 (November 29, 2013); available online: [www.archdisabilitylaw.ca/node/806](http://www.archdisabilitylaw.ca/node/806) (date retrieved: July 25, 2017).

<sup>184</sup> See CLO, *et al.* Research partnership, *supra* note 8.

<sup>185</sup> In particular, section 80.50 of O. Reg. 191/11, "Integrated Accessibility Standards," under the AODA: [www.ontario.ca/laws/regulation/110191#BK154](http://www.ontario.ca/laws/regulation/110191#BK154).

<sup>186</sup> The lack of an effective dispute resolution mechanism at the primary and secondary levels of education is something that continues to be a serious concern: see for example, *AODA Alliance Discussion Paper*; *supra* note 32; and KPMG, "Accessibility Directorate of Ontario: Research Services – Accessibility in Education, Final Report," (2015).

<sup>187</sup> For example, in *E.P. v. Ottawa Catholic School Board*, 2011 HRTO 657 (CanLII), the HRTO stated at para. 62: "Test results do not prove or disprove the adequacy of accommodation." And, in *Worthington*, *supra* note 144, the HRTO stated at para. 78: "The measure of whether or not reasonable accommodation was provided cannot be the applicant's success or failure in the program, as that would be to suggest that an educational institution must not just take reasonable steps to establish a level playing field for students with disabilities, in order to ensure their access to educational opportunities, but to ensure their ultimate success. That is too high a standard, and would ignore the other factors which contribute to, and detract from, student success."

<sup>188</sup> *R.B.*, *supra* note 25, at para. 216.

<sup>189</sup> Example adapted from information included in a written submission made to the OHRC by Community Living Toronto (June 2017). The United Nations' Committee on the Rights of Persons with Disabilities has stated that "persons with disabilities must be able to attend primary and secondary schools in the communities where they live. Students should not be sent away from home. The educational environment must be within safe physical reach for persons with disabilities and include safe and secure means of transportation": see *General Comment No 4*, *supra* note 89 at para.27.

<sup>190</sup> *L.B.*, *supra* note 25, at paras. 111-112.

<sup>191</sup> For more detailed information, see "Meeting education requirements" in section 8.4.5 of this policy.

<sup>192</sup> The United Nations' Committee on the Rights of Persons with Disabilities has identified different forms of academic accommodations, including "changing the location of a class; providing different forms of in-class communication; enlarging print, materials and/or subjects in signs, or providing handouts in an alternative format; and providing students with a note taker or a language interpreter or allowing students to use assistive technology in learning and assessment situations. Provision of non-material accommodations, such as allowing a student more time, reducing levels of background noise (sensitivity to sensory overload), using alternative evaluation methods and replacing an element of the curriculum with an alternative must also be considered." See *General Comment No 4, supra* note 89 at para. 30.

<sup>193</sup> In *Fisher v. York University*, 2011 HRTO 1229 (CanLII) [*Fisher*], the HRTO stated at para. 45: "The purpose of accommodation is to allow students with disabilities to demonstrate their ability to master the content and skills required to successfully pass the course without disadvantage because of their disability. Examination accommodation such as increased time allows students to do just that. The accommodation takes into consideration the impact of the disability on the ability to write tests and examination."

<sup>194</sup> Educational institutions also have obligations under section 15 of O.Reg. 191/11, "Integrated Accessibility Standards" Regulation under the AODA, *supra* note 7.

<sup>195</sup> See UN Committee's comments at *supra* note 189. The HRTO has also stated: "There is no question that transportation to and from school and the provision of home instruction, where these are determined to be necessary as a temporary or even permanent accommodation to meet the needs of an exceptional pupil, are accommodations mandated under the duties of school boards": see *L.B., supra* note 25, at para 106. The HRTO has found that bus transportation provided by school boards is a "service" under the *Code*; see: *M.O., supra* note 144, at para. 59; *J.O. v. London District Catholic School Board*, 2012 HRTO 732, at para. 48. Also of note, in *Contini v. Rainbow District School Board*, 2011 HRTO 1340 (CanLII) (Interim Decision), the HRTO found that a service relationship existed between a school board and a parent with a mobility disability in the context of the bus transportation the board provided to the parent's children (at paras. 26, 27).

<sup>196</sup> *Allen v. Ottawa (City)*, 2011 HRTO 344 (CanLII) and *Kelly v. CultureLink Settlement Services*, 2010 HRTO 977 (CanLII). Note that delays must be shown to be related to a disability and must be made in good faith: see *Arcuri v. Cambridge Memorial Hospital*, 2010 HRTO 578 (CanLII); *Vallen v. Ford Motor Company of Canada*, 2012 HRTO 932 (CanLII); and *M.C. v. London School of Business*, 2015 HRTO 635 (CanLII).

<sup>197</sup> See *Smolak v. 1636764 Ontario*, 2009 HRTO 1032 (CanLII); *Hill v. Bani-Ahmad*, 2014 HRTO 937 (CanLII); *Bourdeau v. Kingston Bazar*, 2012 HRTO 393 (CanLII). But see also, *J.F. supra* note 144.

<sup>198</sup> Students with disabilities who use service animals to assist them with disability-related needs (such as anxiety) are also protected under the definition of "disability" in section 10 of the *Code*. Service animals do not have to be trained or certified by a recognized disability-related organization. However, where it is not immediately obvious that the animal is performing a disability-related

service, a person must be able to show evidence (such as a letter from a doctor or other qualified medical professional) that they have a disability and that the animal assists with their disability-related needs. Service providers and others who receive such documentation should not use their own assumptions and observations to second-guess this verification. See: *Allarie v. Rouble*, 2010 HRTO 61 (CanLII); *Sweet v. 1790907 Ontario Inc. o/a Kanda Sushi*, 2015 HRTO 433 (CanLII); *Sprague v. RioCan Empress Walk Inc.*, 2015 HRTO 942 (CanLII); *Schussler v. 1709043 Ontario*, 2009 HRTO 2194 (CanLII); *Kamis v. 1903397 Ontario Inc.*, 2015 HRTO 741 (CanLII). But see also *J.F.*, *supra* note 144, in which the HRTO failed to uphold a claim of discrimination where a student with Autism Spectrum Disorder, who requested to have a service animal present with him at school, was not able to show how the animal would meet his educational needs, or that not having the animal in school would have an adverse impact on his ability to access education. The HRTO emphasized at para. 196, however, that its decision was based on the facts of that particular case and stated: “the disability-related needs of all students who may be asking to have their guide or service dog attend at school must be determined on an individual case by case basis.” There may be some situations where the use of guide dogs or other service animals in school could potentially conflict with the rights of other people. The OHRC’s *Policy on competing human rights* provides a framework for analyzing competing rights situations. Steps should be taken to minimize conflict, wherever possible, through cooperative problem-solving, proper training of staff and students, and raising public awareness of the education provider’s legal obligations relating to the use of service animals.

<sup>199</sup> For example, some disabilities may result in “acting out” behaviours. Education providers and other responsible organizations need to take into account whether behaviours that would otherwise warrant discipline are related to a disability.

<sup>200</sup> On its website, the Ministry of Education states “The regulation governing the identification and placement of exceptional pupils directs the IPRC to consider the integration of exceptional pupils into regular classes. Before considering the option of placing a student in a special education class, the committee must first consider whether placement in a regular class, with appropriate special education programs and services, would meet the student’s needs and be consistent with the parent’s preferences.” Available online at: [www.edu.gov.on.ca/eng/general/elemsec/speced/identifi.html](http://www.edu.gov.on.ca/eng/general/elemsec/speced/identifi.html) (date retrieved: November 25, 2017).

<sup>201</sup> See UN Committee’s comments at *supra* note 189.

<sup>202</sup> *Eaton*, *supra* note 150.

<sup>203</sup> *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 [*Renaud*] at para. 43.

<sup>204</sup> *Quesnel*, *supra* note 169 at para. 16.

<sup>205</sup> *Graham v. Underground Miata Network*, 2013 HRTO 1457 (CanLII) at para. 31; and, *L.C. v. Toronto District School Board*, 2011 HRTO 1336 (CanLII), in which the HRTO stated at para. 55: “the issue is not whether the accommodation provided was the ideal accommodation, or what the parents may have preferred. The issue is whether the respondent failed to reasonably accommodate a disability-related



need, denying him the right to equal access to education services.” See also, *D.S.*, *supra* note 23, where, in the context of a dispute about the appropriate placement for a student, the Tribunal stated at para. 25: “...a parent’s belief, however well-intentioned, is not the same as having the evidence of a medical or health practitioner....”

<sup>206</sup> See *Schafer v. Toronto District School Board*, 2010 HRTO 403 (CanLII), at para. 48, where the HRTO stated “a failure to accommodate within the meaning of the *Code* does not mean that the school fails to meet the parent’s expectations.”

<sup>207</sup> In *Fisher*, *supra* note 193 at para. 56: “The respondent’s process for determining accommodation was not perfect but the human rights standard is not one of perfection.” See also, *Worthington*, *supra* note 144, at para. 78; *De Luca v. McMaster University*, 2017 HRTO 644 (CanLII), at para. 28. Note, however, that while students may not be entitled to perfect accommodation, they are entitled to appropriate and timely accommodation: see *Gamache #1*, *supra* note 175, where the HRTO stated at para. 117: “I also am well aware of the case law which indicates that ‘perfect’ accommodation is not required... However, I do not regard it as a requirement for ‘perfect’ accommodation to expect that a student with a visual disability such as the applicant would receive her required reading materials in alternate format at a much earlier point in the academic year than late November, or that, if any further information was required in order for such materials to be prepared, that such requirement would be clearly communicated to the student. In my view, neither happened in the circumstances of this case.”

<sup>208</sup> Human rights tribunals have held that education providers are not required to implement specific programming where there is no evidence or scientific basis to support its effectiveness, despite what the student or the student’s parents prefer: see, for example, *Jobb v. Parkland School Division No. 70*, 2017 AHRC 3, at para. 263. When requesting specific accommodations, there has to be sufficient evidence of disadvantage that would result if the accommodation is not provided. Discrimination will likely not be found where a student’s disability-related needs are met in ways other than the specific way that the student or his or her parents prefer: *A.N. v. Hamilton-Wentworth District School Board*, 2013 HRTO 67.

<sup>209</sup> For a more detailed discussion on academic integrity, see [The Opportunity to Succeed](#), at pages 61-62.

<sup>210</sup> In employment, human rights case law has established that the onus is on an employer to show that an employee cannot perform the essential duties of the job. For example, in *Gaisiner*, *supra* note 25 at para. 142, the HRTO stated, “In order to avail itself of the defence set out in s. 17, a respondent has the evidentiary onus of showing not only that an applicant is incapable of performing the essential duties of his or her job because of his or her disability, but that he or she is incapable of performing these essential duties even if accommodated up to the point of undue hardship.” It is the OHRC’s position that this principle would also apply to education providers when assessing *bona fide* academic requirements in the context of accommodating students with disabilities. See, *R.B.*, *supra* note 25, at para. 214.

<sup>211</sup> *Grismer*, *supra* note 142; *Cameron v. Nel-gor Nursing Home* (1984), 5 C.H.R.R. D/2170 at D/2192 (Ont. Bd. of Inq.). See also *Crabtree v. 671632 Ontario Ltd. (c.o.b. Econoprint (Stoney Creek)*, [1996] O.H.R.B.I.D. No. 37 (QL) (Ont. Bd. Inq.); *Gaisiner*, *supra* note 25.

<sup>212</sup> *Gaisiner*, *ibid.*

<sup>213</sup> *Kelly*, *supra* note 25.

<sup>214</sup> The test for undue hardship is set out fully in section 9 of this policy.

<sup>215</sup> *Meiorin*, *supra* note 17 at para. 54.

<sup>216</sup> See *Hydro-Québec*, *supra* note 180, for the Supreme Court of Canada's comments on what the third part of this test means, in a practical sense, in the context of a disability accommodation in the workplace.

<sup>217</sup> *Grismer*, *supra* note 142 at para. 20.

<sup>218</sup> *Meiorin*, *supra* note 17 at para. 65.

<sup>219</sup> See *Moore*, *supra* note 4 at para. 49. See also, *M obo C v. PS and A*, 2014 BCHRT 217 (CanLII), where a human rights tribunal found that a child with diabetes was discriminated against when he was refused registration to a pre-school. The pre-school had a nut-free policy and the child's emergency kit contained peanut butter. The child's mother offered to remove the peanut butter from the emergency kit. However, the respondent falsely informed her that the class was full, which foreclosed any discussion about what the parent needed to do to make it acceptable for her child to attend school. The Tribunal found that the pre-school had a duty to examine whether the child's disability could be accommodated to the point of undue hardship. Citing *Moore*, the Tribunal found that the pre-school should have looked in more depth at alternative approaches to make sure that the *prima facie* discriminatory conduct of denying enrolment to the child "was reasonably necessary to accomplish the broader goal of protecting other students from exposure to peanuts." (at para. 58)

<sup>220</sup> In *Longuepée*, *supra* note 144, the HRTO stated at para. 51: "The respondent has academic standards for admission because it believes past academic performance is the best indicator of future academic performance. The applicant challenged the respondent's use of grades as a measure of his ability to succeed. The difficulty is that in an academic setting, the ability to succeed is measured by grades: there is no other measure to evaluate success. In this way, academic standards are different from other standards that may be assessed in a number of different ways. All students, including students with disabilities, must provide sufficient information to show that they have the ability to succeed."

<sup>221</sup> *Fisher*, *supra* note 193 at para. 45.

<sup>222</sup> Regulation 181/98 under the *Education Act* requires that IEPs include a transition plan for appropriate post-secondary school activities for students age 14 and over. The United Nations' Committee on the Rights of Persons with Disabilities has stated that "Individualized education plans must address the transitions experienced by learners who move from segregated to mainstream settings and between levels of education": see *General Comment No 4, supra* note 89 at para. 33. Education providers should also be aware of their obligations regarding student transition planning in Reg. 181/98 under the *Education Act*.

<sup>223</sup> See section 11.2 of this policy on "Data collection and monitoring" for more detailed information.

<sup>224</sup> Note that educational institutions also have obligations in this regard under the [AODA's Integrated Accessibility Standard](#).

<sup>225</sup> ARCH writes: "Outside of numeracy and literacy testing there is no system to ensure that accommodations are being enforced, monitored or are effective": ARCH Disability Law Centre, "Submission to the Ministry of Education in Response to the Call for Submissions as Part of the Ministry's Project Entitled, 'From Great to Excellent: the Next Phase in Ontario's Education Strategy'" at 4 (November 29, 2013); available online: [www.archdisabilitylaw.ca/node/806](http://www.archdisabilitylaw.ca/node/806) (date retrieved: July 25, 2017).

<sup>226</sup> In a written submission to the OHRC (June 2017), Community Living Algoma raised the concern that students and parents have been told they are not eligible for accommodation when undergoing provincial testing (e.g. EQAO/OSSLT) unless an IEP is in place. Under the *Code*, a student with a disability is entitled to accommodation, whether or not an IEP exists. See also the Education Quality and Accountability Office's publication, "Administration and Accommodation Guide," (2017) at 15; available online: [www.eqao.com/en/assessments/assessment-docs-elementary/administration-guide-elementary.pdf#search=accommodation](http://www.eqao.com/en/assessments/assessment-docs-elementary/administration-guide-elementary.pdf#search=accommodation) (date retrieved: August 1, 2017).

<sup>227</sup> In *L.B.*, *supra* note 25, the HRTO stated that students with disabilities are entitled to a planned transition between schools – it is not acceptable to take a "wait and see" approach (paras. 132, 133). Education providers should also be aware of their obligations related to transition planning set out in Reg. 181/98 under the *Education Act*.

<sup>228</sup> The Learning Disabilities Association of Ontario writes: "Transition activities should be promoted by guidance counsellors and special educators at the secondary level, so that students have the correct information and understanding about the essential requirements of their chosen careers." See Learning Disabilities Association of Ontario, "Accommodating Students with LDs in Postsecondary Studies," (June 2012) at 6, available online: [www.ldadr.on.ca/AboutLD/Transition/Accommodating\\_Students\\_with\\_LD\\_in\\_Postsecondary\\_Studies.pdf](http://www.ldadr.on.ca/AboutLD/Transition/Accommodating_Students_with_LD_in_Postsecondary_Studies.pdf) (date retrieved: July 26, 2017).

<sup>229</sup> One study conducted in the American context showed that for many students with disabilities, having a faculty mentor could significantly help the transition from high school to post-secondary education, particularly if the mentor had a disability themselves: see Shawn Patrick and Roger D.

Wessel, "Faculty Mentorship and Transition Experiences of Students with Disabilities," (2013) *Journal of Postsecondary Education and Disability*, 26(2), 105-118.

<sup>230</sup> The TDSB's Section 23 programs serve students who benefit from "intensive wrap around supports" and provide individualized programming in classrooms within hospitals, agency centres and community schools. Students in Section 23 Programs are day treatment clients of the agency, taught by TDSB teachers using the Ontario Ministry of Education curriculum. See: Toronto District School Board, "Special Education Plan 2017," (July 31, 2017); available online: [www.tdsb.on.ca/Portals/0/EarlyYears/docs/SpecialEducationPlan.pdf](http://www.tdsb.on.ca/Portals/0/EarlyYears/docs/SpecialEducationPlan.pdf) (date retrieved: November 25, 2017).

<sup>231</sup> Cases have come before the HRTO where conflict between an education provider and a student, or an education provider and the student's parent(s)/guardian(s), has played out in the accommodation process. The HRTO has made it clear that an education provider must not punish a student, or delay or deny disability-related accommodations because of a conflictual relationship with a student's parent(s) or guardian(s). For example, in *R.B.*, *supra* note 25, at para. 261, the HRTO stated: "There may well be examples of parental conduct that prevents the accommodation process from occurring. For example, if a parent refuses to provide relevant information concerning a child's disability, refuses to acknowledge the child needs accommodation, and refuses to consent to an assessment of the child, that conduct may interfere with the accommodation process and prevent a school from meeting that child's needs." But the HRTO emphasized that "a school board has a high burden to prove it cannot educate a student because of the conduct of a parent" (at paras. 254, 259). It concluded on the facts before it that, "...at the end of the day, [the student] was denied meaningful access to the education provided to students in Ontario because of the respondent's relationship with his mother and not because the respondent was unable to meet his needs. This is not an appropriate basis to justify the discrimination": (para. 266). In its reconsideration decision, the HRTO clarified that, for the parent's conduct to be relevant, "it must relate to the respondent's ability to accommodate [the student]": see *R.B. v. Keewatin-Patricia District School Board*, 2013 HRTO 1920 (CanLII), at para. 31. In *L.B. v. Toronto District School Board*, 2015 HRTO 132 (CanLII), at para. 20(d), the HRTO cited *R.B.* and affirmed "that a parent's 'fierce advocacy' for his or her child must not and cannot prevent a school board from accommodating the child's needs to the point of undue hardship." It went on to say "While I accept that the school's staff found the applicant's mother a difficult and demanding parent to work with, this does not justify the lack of proactive steps being taken to ensure that L.B. was accommodated to the point of undue hardship": *L.B.*, *supra* note 25 at para. 139.

<sup>232</sup> See section 8.6.1 of this policy on "Duty to inquire about accommodation needs" for information on when an education provider is expected to inquire about accommodation needs, even when a student may not have made a specific request.

<sup>233</sup> In employment, the HRTO found that even if the duty to accommodate was triggered, the employer had fulfilled its duty to accommodate because the employee failed to co-operate in the accommodation process by refusing reasonable requests for information that would confirm her needs. She consistently refused to provide the necessary medical information. The HRTO found that the employer did not breach its duty to accommodate her when it terminated her employment: *Baber*, *supra* note 144.

<sup>234</sup> *Y.B.*, *supra* note 144; *Fisher*, *supra* note 193; *Cohen*, *supra* note 25; *Worthington*, *supra* note 144. See also, *Wang v. Humber Institute of Technology and Advanced Learning*, 2011 HRTO 29 (CanLII) [*Wang*].

<sup>235</sup> *Fisher*, *supra* note 193.

<sup>236</sup> See section 8.6.1 of this policy entitled “Duty to inquire about accommodation needs” for more information.

<sup>237</sup> *Meiorin*, *supra* note 17 at paras. 65-66.

<sup>238</sup> *Conte v. Rogers Cablesystems Ltd.*, (1999) 36 C.H.R.R. D/403 (C.H.R.T.); *Mazuelos v. Clark* (2000) C.H.R.R. Doc. 00-011 (B.C.H.R.T.); *Lane*, *supra* note 7; *Krieger v. Toronto Police Services Board*, 2010 HRTO 1361 (CanLII) [*Krieger*]; *Hodkin v. SCM Supply Chain Management Inc.*, 2013 HRTO 923 (CanLII) [*Hodkin*]; *MacLeod v. Lambton (County)*, 2014 HRTO 1330 (CanLII) [*MacLeod*].

<sup>239</sup> *Hodkin*, *ibid.*

<sup>240</sup> *Turnbull v. Famous Players Inc.*, 2001 CanLII 26228 (Ont. Bd. of Inq.). See also, *L.B.*, *supra* note 25, at para. 129.

<sup>241</sup> Human rights decision-makers have not always been consistent on the issue of who is responsible for the costs of accommodation (or what types of expenses are included in “the costs of accommodation”). See *Iley v. Sault Ste. Marie Community Information and Career Centre*, 2010 HRTO 1773 (CanLII) where the HRTO ordered the applicant to obtain medical information and stated: “The respondents are... directed to reimburse the applicant for the costs of such a production, since it is being done at their request.” But also see *Drost v. Ottawa-Carleton District School Board*, 2012 HRTO 235 (CanLII) where, in the context of a hearing in which the parties are subject to the HRTO’s rules that require that they disclose all arguably relevant documents, the HRTO placed on the applicant the onus of covering the costs of medical information for both establishing a disability and outlining the accommodation needs. It is the OHRC’s position that the procedural component of the duty to accommodate – which includes obtaining all relevant information and considering how to accommodate – includes a responsibility to pay the costs necessary to facilitate accommodation, such as medical assessments and doctor’s reports, unless to do so would cause undue hardship. This position is consistent with the human rights principle that the *Code* be given a broad, purposive and contextual interpretation to advance the goal of eliminating discrimination.

<sup>242</sup> *Eldridge*, *supra* note 160.

<sup>243</sup> Education providers should be aware of their obligations in this regard under the *AODA*, *supra* note 7.

<sup>244</sup> See section 9.1.1 “Costs” of this policy for more detailed information.

<sup>245</sup> For more information, see section 9.1 “Collective agreements” of the OHRC’s *Disability policy*, *supra* note 11.

<sup>246</sup> *Renaud*, *supra* note 203.

<sup>247</sup> See, for example, *Ravi DeSouza v. 1469328 Ontario Inc.*, 2008 HRTO 23 (CanLII).

<sup>248</sup> *Eldridge*, *supra* note 160.

<sup>249</sup> For example, people with mental health disabilities experiencing the first episode of a disability may be unaware that they are experiencing impairment. Also, denying the presence of a disability may be an aspect of having an addiction. For more information on mental health disabilities and addictions, see the OHRC's *Mental health policy*, *supra* note 9.

<sup>250</sup> The Supreme Court of Canada has recognized that the stigma and embarrassment of mental illness may discourage disclosure: *Gibbs*, *supra* note 73 at para. 31. See also: *Mellon v. Canada (Human Resources Development)*, 2006 CHRT 3 (CanLII) [*Mellon*] at para.100.

<sup>251</sup> In *Sears v. Honda of Canada Mfg.*, 2014 HRTO 45 (CanLII) [*Sears*], the HRTO found that an employer discriminated against a male employee with a visual impairment when it failed to inquire into whether he needed accommodation even after it became aware that he was experiencing difficulties on the job due to his disability. Even though the man did not formally request accommodation, the HRTO stated at para. 114: "...the procedural duty to accommodate indicates that an employer cannot passively wait for an employee to request accommodation where it is aware of facts that indicate that the employee may be having difficulties because of disability; there is a duty to take the initiative to inquire in these circumstances." It is the OHRC's position that this principle also applies in education. See also, *Lane*, *supra* note 7; *ADGA*, *supra* note 7; *Krieger*, *supra* note 238; *Mellon*, *supra* note 250 at paras. 97-98; *MacLeod*, *supra* note 238.

<sup>252</sup> See: *Sears*, *ibid* at para. 114; *Wall v. The Lippé Group*, 2008 HRTO 50 (CanLII) [*Wall*]; *Davis v. 1041433 Ontario Ltd. (No. 2)*, 2005 HRTO 37 (CanLII), at paras. 67-68; *Lane*, *supra* note 7; *Krieger*, *supra* note 238; *Mellon*, *supra* note 250; *Willems-Wilson v. Allbright Drycleaners Ltd. (1997)*, 32 C.H.R.R. D/71 (B.C.H.R.T.); *Zaryski v. Loftsgard (1995)*, 22 C.H.R.R. D/256 (Sask. Bd. Inq.).

<sup>253</sup> Information taken from a written submission made by ARCH to the OHRC (June 2017).

<sup>254</sup> See *Krieger*, *supra* note 238 at para. 157; *Bowden v. Yellow Cab and others (No. 2)*, 2011 BCHRT 14 (CanLII); *Trask v. Nova Scotia (Correctional Services) (No. 1)* (2010), 70 C.H.R.R. D/21 (N.S. Bd. Inq.); *Fleming v. North Bay (City)*, 2010 HRTO 355 (CanLII) [*Fleming*]; *Walton Enterprises v. Lombardi*, 2013 ONSC 4218 (CanLII) [*Lombardi*]; *McLean v. Riverside Health Care Facilities Inc.*, 2014 HRTO 1621 (CanLII) at para. 27.

<sup>255</sup> On the institution's website, in curriculum materials and handouts, in orientation packages, in welcome statements made directly to students by teachers and instructors, *etc.*

<sup>256</sup> In written submissions to the OHRC made in June 2017, the Toronto District School Board, Colleges Ontario, and the Assessment & Resource Centres of Ontario raised concerns that inquiring about disability-related needs puts education providers in a vulnerable position, and is disrespectful of a student's privacy and dignity. Depending on the age of the student, an education provider may be directing inquiries to a student's parent(s)/guardian(s). At the post-secondary level of education, inquiries are likely best handled by Offices for Students with Disabilities, where disability-related information can be centralized and kept confidential.

<sup>257</sup> See *Wang, supra* note 234; *A.J.J. v. Toronto District School Board*, 2013 HRTO 1189 (CanLII). For more detailed information, see Section 10 of this policy entitled "Other limits on the duty to accommodate," sub-section "Where a student (or their parent/guardian) does not participate in the accommodation process."

<sup>258</sup> If there is objective evidence to indicate that a student's behaviour could pose a health and safety risk to him or herself, or to other people, an education provider may be able to ask for medical documentation to confirm fitness to participate in the education service. For more information about assessing health and safety risks, see section 9.1.3 of this policy.

<sup>259</sup> For an employment case where the employer's handling of the accommodation process amounted to harassment, see *Dawson, supra* note 57.

<sup>260</sup> See *Fleming, supra* note 254; *Lombardi, supra* note 254; and *Wright v. College and Association of Registered Nurses of Alberta* (Appeals Committee), 2012 ABCA 267, leave to appeal refused [2012] S.C.C.A. No. 486.

<sup>261</sup> In *Morris v. British Columbia Railway Co.* (2003), 46 C.H.R.R. D/162, 2003 BCHRT 14 [*Morris*], in employment, a tribunal found that if performance problems related to a disability are a reason for the termination, the disability is a factor in the termination. Knowing of the employee's condition, the employer should have considered whether the disability was affecting his performance and sought further medical assessment. It failed to do so. The case also confirms that an employer can't "blind itself to its observations of an employee's behaviour...All relevant factors must be considered by an employer dealing with an employee with a disability, including medical evidence, its own observations, and the employee's own comments and concerns" (at para. 238). These principles would also apply in education.

<sup>262</sup> Many disabilities continue to be highly stigmatized (e.g. mental health disabilities, addictions, HIV and AIDS), and many people may be justifiably worried that sharing personal medical information will make them vulnerable to discrimination.

<sup>263</sup> In the American post-secondary education context, one author noted, "Disclosure involves sharing potentially harmful information and is inherently risky," and "Some students, using an instinctual form of information management, simply choose not to disclose because it seems safer": Jack Trammell, "Red-Shirting College Students with Disabilities," (2009) *The Learning Assistance Review*, 14(2), 21-31 at 23 and 27, respectively.

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<sup>264</sup> *Morris*, *supra* note 261; *Yeats v. Commissionaires Great Lakes*, 2010 HRTO 906 (CanLII) at paras. 47-8.

<sup>265</sup> The following criteria should be used to determine whether a disability exists: the student experiences functional limitations due to a health condition that impairs the student's academic functioning while pursuing their studies.

<sup>266</sup> In a written submission to the OHRC (June 2017), the Executive Director of Counselling & Disability Services at York University expressed concern about students "self-identifying" their disability. While students are often best-suited to identify their own disability-related needs, education providers are entitled to medical or health care documentation confirming that a disability exists.

<sup>267</sup> In *Providence Care, Mental Health Services v. Ontario Public Service Employees Union, Local 431*, 2011 CanLII 6863 (ON LA), the arbitrator distinguishes the "nature of disability" from a "diagnosis" by saying at para. 33: "However, I continue to be of the view that nature of illness (or injury) is a general statement of same in plain language without an actual diagnosis or other technical medical details or symptoms. Diagnosis and nature of illness are not synonymous terms, but there is an overlap between them, such that a description of the nature of an illness or injury may reveal the diagnosis and in others it will not."

<sup>268</sup> See *Duliunas v. York-Med Systems*, 2010 HRTO 1404 (CanLII) [*Duliunas*]; *Devoe*, *supra* note 52; and, *Eagleson Co-Operative Homes, Inc. v. Théberge*, 2006 CanLII 29987 (Ont. Div. Ct.). However, where the information provided is insufficient or outside the practitioner's area of expertise, an education provider is entitled to ask for further information, clarification, *etc.* For example, in a written submission to the OHRC (June 2017), Seneca College raised concerns about "regulated health professionals that may make recommendations that go beyond their expertise" and provided the example of a chiropractor treating a patient for back pain who provides functional impact statements related to long term memory, executive functioning, *etc.*

<sup>269</sup> See *Morris*, *supra* note 261; *Russell v. Indeka Imports Ltd.*, 2012 HRTO 926 (CanLII). But also see *Oak Bay Marina Ltd. v. British Columbia (Human Rights Tribunal) (No. 2)* (2002), 43 C.H.R.R. D/487, 2002 BCCA 495 [*Oak Bay*]. The OHRC has heard concerns about the reliability of some professional assessments for learning disabilities and attention deficit hyperactivity disorder, citing in particular the lack of universally accepted diagnostic criteria (for example, the Assessment & Resource Centres of Ontario raised this issue in a written submission to the OHRC in June 2017). In Condra, M. & Condra E, M. (2015) [\*Recommendations for Documentation Standards and Guidelines for Academic Accommodations for Post-Secondary Students in Ontario with Mental Health Disabilities\*](#), Queen's University and St. Lawrence College Partnership Project, Kingston, Ontario, the authors recommended that the Ministry of Training, Colleges and Universities, in collaboration with the College of Psychologists of Ontario, create a task force to look at creating standardized diagnostic standards for learning disabilities and attention deficit hyperactivity disorder. The OHRC supports this recommendation.



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<sup>270</sup> In *Simpson v. Commissionaires (Great Lakes)*, 2009 HRTO 1362 (CanLII), in the context of employment, the HRTO stated at para. 35:

For the purposes of a request for employment accommodation, generally the focus should be on the functional limitations of the employee's condition (capacities and symptoms) and how those functional aspects interact with the workplace duties and environment. Consequently, an employer need not be informed of the specific cause of the employee's condition or the exact diagnosis in order to be put on notice that an employee has disability-related needs requiring accommodation.

Similarly, in *Cristiano v. Grand National Apparel Inc.*, 2012 HRTO 991 (CanLII), the HRTO stated at para. 20: "There are limits on what a respondent can require of its employees claiming a need for a medical leave. For example, in most instances, an employer is not entitled to a diagnosis. But an employer is entitled to know enough to make some assessment of the *bona fides* of the leave request and sufficient information to determine what if any accommodations might be made..." See also *Wall*, *supra* note 252; *Mellon*, *supra* note 250; *Leong v. Ontario (Attorney General)*, 2012 HRTO 1685 (CanLII); *Noe v. Rane Management*, 2014 HRTO 746 (CanLII); *Ilevbare v. Domain Registry Group*, 2010 HRTO 2173 (CanLII); *Jarrold v. Brewers Retail Inc. (c.o.b. Beer Store)*, 2014 HRTO 1070 (CanLII); *Easthom v. Dyna-Mig*, 2014 HRTO 1457(CanLII).

<sup>271</sup> A person may have more rigorous obligations to disclose medical information in the context of litigation. In *Hicks v. Hamilton-Wentworth Catholic District School Board*, 2015 HRTO 1285 (CanLII), in employment, the HRTO stated at paragraph 17: "Where there is a dispute about the medical status of an employee further medical information may be required and where, as in these circumstances, there is litigation with respect to the dispute the parties will be entitled to much more fulsome disclosure of the medical documentation than might be the case in other circumstances." See also *Fay v. Independent Living Services*, 2014 HRTO 720(CanLII).

<sup>272</sup> Where there is a reasonable basis to question the legitimacy of a student's request for accommodation or the adequacy of the information provided, an education provider may be entitled to medical confirmation that a diagnosis exists, though this would not normally include disclosure of a student's specific diagnosis. See *Mellon*, *supra* note 250 at para. 99: "An individual with a disability...may not know the exact nature and extent of that disability at the time they are experiencing the symptoms. In such circumstances, we cannot impose a duty to disclose a conclusive medical diagnosis." Some people may present with a set of symptoms, but without a specific diagnosis. See *Ball v. Ontario (Community and Social Services)*, [2010 HRTO 360 \(CanLII\)](#).

<sup>273</sup> Education providers should also keep in mind that a student may have difficulty accessing disability services in a timely way, and reaching a conclusive diagnosis may take up to 18 months or may never be possible. In these instances, a student may have functional limitations associated with a disability that require accommodation even if a diagnosis has not yet been determined. In such cases, the education provider is responsible for providing interim accommodation.

<sup>274</sup> In a written submission to the OHRC (June 2017), the Learning Disabilities Association of Ontario wrote: "There is significant overlap between learning disabilities and both ADHD and mental health

issues. In such complex situations, it may be important to have diagnoses in order to develop appropriate accommodation plans.”

<sup>275</sup> See [www.ohrc.on.ca/en/news\\_centre/new-documentation-guidelines-accommodating-students-mental-health-disabilities](http://www.ohrc.on.ca/en/news_centre/new-documentation-guidelines-accommodating-students-mental-health-disabilities), *supra* note 5.

<sup>276</sup> In 2016, in response to concerns raised by the OHRC, the Ministry of Advanced Education and Skills Development (now the Ministry of Training, Colleges and Universities) removed the requirement that a student disclose their diagnosis to establish eligibility for disability-related financial assistance under OSAP, including the BSWD and CSG-PDSE.

<sup>277</sup> See section 8.8 on “Confidentiality and protecting disability-related information” for more detailed information.

<sup>278</sup> See *Canadian Union of Public Employees, Local 831 v. Brampton (City)* [2008] O.L.A.A. No. 359 [C.U.P.E.].

<sup>279</sup> In employment, the Canadian Human Rights Tribunal found that requests for a person with autism to undergo a psychiatric examination after asking for a leave of absence because of workplace harassment was in itself a form of harassment. It stated, “Indeed, the evidence shows that the Respondent remained deaf to the pleas of Ms. Dawson who did not want to see a physician whom she did not know and who knew nothing about autism, of her union representatives who expressed concern and consternation about Ms. Dawson having to submit to a medical examination by a Canada Post designated physician, but more importantly, of her treating physician who stated that she was very concerned that this could provoke a serious emotional reaction from Ms. Dawson. ...However well-intended Canada Post management was in seeking a medical evaluation, the Tribunal finds that, in the present circumstances, the general behaviour of those Canada Post employees who were involved in the medical evaluation process constitutes harassment.” See *Dawson*, *supra* note 57, at paras. 216 and 219. For arbitration cases that have found that treatment requirements imposed by employers interfered with employees’ privacy, see: *Central Care Corp. v. Christian Labour Assn. of Canada, Local 302 (Courtney Grievance)*, [2011] O.L.A.A. No. 144; *Federated Cooperatives Ltd. v. General Teamsters, Local 987 (Policy Grievance)* (2010), 194 L.A.C. (4th) 326; and, *Brant Community Healthcare System v. Ontario Nurses’ Assn. (Medical Form Grievance)*, [2008] O.L.A.A. No. 116, in which the arbitrator stated: “Treatment modalities are a matter for the doctor and the patient.”

<sup>280</sup> See, for example, *Oak Bay*, *supra* note 269.

<sup>281</sup> In one case, a doctor’s note stating that a woman had a “medical condition” was considered insufficient to establish that she had a disability as per the meaning of the *Code*: see *Simcoe Condominium Corporation No. 89 v. Dominelli*, 2015 ONSC 3661 (CanLII). Medical professionals have an important role to play when students with disabilities seek accommodation to allow them to benefit equally from and take part in education services. To implement appropriate accommodations, education providers often rely on the expertise of medical professionals to understand the functional limitations and needs associated with a disability. Students seeking

accommodations often rely on physicians or other medical professionals to provide clear, timely information about their disability-related needs, while still respecting their privacy interests. It has come to the OHRC's attention that there may be some confusion about the type and scope of medical information that needs to be provided to support an accommodation request. In some cases, students with disabilities have been unable to gain equal access to education because of ambiguous or vague medical notes that do not provide enough information to allow for appropriate accommodations to be meaningfully implemented. For more information, see the OHRC's [Policy position on medical documentation to be provided when a disability-related request is made.](#)

<sup>282</sup> *Alberta (Human Rights and Citizenship Comm.) v. Federated Co-operatives Ltd.* (2005), 53 C.H.R.R. D/496, 2005 ABQB 58; *Duliunas, supra* note 268 at para. 77; and, *Pridham v. En-Plas Inc.*, 2007 HRTO 8 (CanLII). See also *Liu v. Carleton University*, 2015 HRTO 621 (CanLII). Education providers should be aware that, given a shortage of family physicians and long wait times to receive appointments with family physicians and specialists, not all students may be in a position to provide documentation from a specific physician or other healthcare specialist when their accommodation needs arise. Furthermore, students who move away from home to attend college or university may rely on medical and healthcare professionals other than their treating family physician. Unless there are *bona fide* (legitimate) reasons to question the information provided, documentation from a licensed medical or healthcare professional should not be refused because it is not completed by a student's family physician, or a specialist.

<sup>283</sup> See *Baber, supra* note 144 and *C.U.P.E., supra* note 278.

<sup>284</sup> See section 4.9.g) in the OHRC's publication *Human Rights at Work* for a more detailed description of these factors, available online at: [www.ohrc.on.ca/en/human-rights-work-2008-third-edition?page=human-Contents.html](http://www.ohrc.on.ca/en/human-rights-work-2008-third-edition?page=human-Contents.html).

<sup>285</sup> These barriers arise because students may find approaching individual instructors intimidating, and fear stigma, discrimination or a negative response from their instructor. Furthermore, instructors may not be well-positioned to respond to direct requests for accommodation.

<sup>286</sup> See *Gichuru, supra* note 125.

<sup>287</sup> See: [www.ipc.on.ca/english/Home-Page/](http://www.ipc.on.ca/english/Home-Page/) and [www.priv.gc.ca/index\\_e.asp](http://www.priv.gc.ca/index_e.asp).

<sup>288</sup> *Renaud, supra* note 203 at para. 984.

<sup>289</sup> Cases originating from other jurisdictions have included other factors such as employee morale, or conflict with a collective agreement. For example, the Supreme Court of Canada considered additional undue hardship factors in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* (1990), 72 D.L.R. (4<sup>th</sup>) 417 (S.C.C.) [*Central Alberta*] and *Renaud, ibid.* However, both of these cases were decided under legislation that does not set out enumerated factors for undue hardship (Alberta, and British Columbia, respectively). See also *Hamilton-Wentworth District School Board v. Fair*, 2016 ONCA 421 (CanLII), which references *Central Alberta*. The Ontario legislature enacted a higher standard by specifically limiting undue hardship to three particular components as set out in the

*Code*. In *Meiorin*, *supra* note 17, the Supreme Court of Canada stated at para. 63 that “The various factors [in assessing undue hardship] are not entrenched, **except to the extent that they are expressly included or excluded by statute**” [emphasis added]. For HRTO cases following this approach, see *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306(CanLII) [*McDonald*] at paras. 35 and 42; *Dixon v. 930187 Ontario*, 2010 HRTO 256 (CanLII) at para. 42; *Noseworthy v. 1008218 Ontario Ltd.*, 2015 HRTO 782 at para. 55 (CanLII). Cases decided under the *Code* before it was amended to limit the undue hardship factors to costs, health and safety and outside sources of funding, such as *Roosma v. Ford Motor Co. of Canada (No. 4)*, (1995), 24 C.H.R.R. D/89 and *Ontario (Human Rights Commission) v. Roosma*, 2002 CanLII 15946 (ON SCDC), do not reflect the legislature’s later decision to expressly limit the undue hardship factors.

<sup>290</sup> “Business inconvenience” is not a defence to the duty to accommodate. In amending the *Code* in 1988, the Legislature considered and rejected “business inconvenience” as a possible enumerated factor in assessing undue hardship. If there are demonstrable costs attributable to decreased productivity, efficiency or effectiveness, they can be taken into account in assessing undue hardship under the cost standard, providing they are quantifiable and demonstrably related to the proposed accommodation.

<sup>291</sup> *Meiorin*, *supra* note 17. In some cases, accommodating a student may generate negative reactions from teachers, instructors, school staff, other students, the parents of other students, *etc.* who are either unaware of the reason for the accommodation, oppose the accommodation, or who believe that the student is receiving an undue benefit. The reaction may range from resentment to hostility. However, those responsible for providing accommodation should make sure that the education community is supportive and is helping to foster an environment that is positive for all students. It is not acceptable to allow discriminatory attitudes to fester into hostilities that poison the environment for students with disabilities. In *McDonald*, *supra* note 289, in the context of a workplace, the HRTO stated at para. 43: “If a respondent wishes to cite morale in the workplace as an element of undue hardship, it should also be able to cite its own efforts to quell inaccurate rumours that accommodation is being requested unreasonably.” It is the OHRC’s position that this principle also applies to the educational context. Students with disabilities have a right to accommodation with dignity, and it is an affront to a person’s dignity if issues of morale and misconception stemming from perceived unfairness are not prevented or dealt with. In such cases, those responsible will not have met their duty to provide accommodation with dignity. See also, *Backs v. Ottawa (City)*, 2011 HRTO 959 (CanLII), at para. 58, in which the HRTO disregarded morale issues as a factor in the undue hardship analysis.

<sup>292</sup> See *Qureshi v. G4S Security Services*, 2009 HRTO 409 at para. 35 (CanLII). The issue of customer, third-party and employee preference is also discussed in J. Keene, *Human Rights in Ontario*, 2<sup>nd</sup> ed. (Toronto: Carswell, 1992) at 204-5.

<sup>293</sup> The *Code* prevails over collective agreements. Collective agreements or other contractual arrangements cannot act as a bar to providing accommodation. To allow otherwise would be to permit the parties to contract out of the provisions of the *Code* under the umbrella of a private agreement, and would run counter to the purposes of the *Code*. For more detailed information, see section 9.1 “Collective agreements” in the OHRC’s *Disability policy*, *supra* note 11.

<sup>294</sup> Note that in rare cases the HRTO has indirectly considered other factors as part of costs or health and safety. See, for example, *Munroe v. Padulo Integrated Inc.*, 2011 HRTO 1410 (CanLII); *Wozenilek v. City of Guelph*, 2010 HRTO 1652 (CanLII); *Espey v. London (City)*, 2009 HRTO 271 (CanLII).

<sup>295</sup> *Westfair Foods Ltd. v. United Food & Commercial Workers International Union, Local 1000A (Walkosz Grievance)*, 2014 CanLII 31669 (ON LA); *Re Mohawk Council of Akwesasne and Ahkwesasne Police Association* (2003), 122 L.A.C. (4<sup>th</sup>) 161 (Chapman).

<sup>296</sup> *Grismer*, *supra* note 142 at para. 42.

<sup>297</sup> *Meiorin*, *supra* note 17 at para. 78-79; *Grismer*, *ibid.* at para. 41; *Miele v. Famous Players Inc.* (2000), 37 C.H.R.R. D/1 (B.C.H.R.T.).

<sup>298</sup> *Grismer*, *supra* note 142 at para. 41.

<sup>299</sup> To determine whether a financial cost would alter the essential nature or substantially affect the viability of the education institution, consideration should be given to:

1. the ability of the institution to recover the costs of accommodation in the normal course of business
2. the availability of any grants, subsidies or loans from the federal, provincial or municipal governments or from non-government sources, which could offset the costs of accommodation
3. the ability of the institution to distribute the costs of accommodation across the whole operation
4. the ability of the institution to amortize or depreciate capital costs associated with the accommodation according to generally accepted accounting principles
5. the ability of the institution to deduct from the costs of accommodation any savings that may be available as a result of the accommodation, including tax deductions and other government benefits, an improvement in productivity, efficiency or effectiveness, *etc.*

<sup>300</sup> The financial costs of the accommodation may include:

- capital costs, such as for installing a ramp, buying screen magnification or software, *etc.*
- operating costs such as sign language interpreters, personal attendants or additional staff time
- costs incurred as a result of restructuring that are necessitated by the accommodation, and
- any other quantifiable costs incurred directly as a result of the accommodation.

<sup>301</sup> More information about how to offset costs can be found in sections 9.1.2 and 9.2 of this policy.

<sup>302</sup> Establishing a reserve fund should be considered only *after* the accommodation provider has shown that the most appropriate accommodation could not be accomplished immediately, or phased in gradually.

<sup>303</sup> *Moore*, *supra* note 4. The United Nations' Committee on the Rights of Persons with Disabilities has also stated "The availability of accommodations should be considered with respect to a larger pool of educational resources available in the education system and not limited to resources available at

the academic institution in question; transfer of resources within the system should be possible”: see *General Comment No 4, supra* note 89 at para. 30.

<sup>304</sup> *D.S., supra* note 23 at para. 110.

<sup>305</sup> *Moore, supra* note 4. *Gamache #1, supra* note 175 at para. 116; *Gamache #2, supra* note 175 at para. 17.

<sup>306</sup> See *Dunkley v. University of British Columbia*, 2015 BCHRT 100 (CanLII) [*Dunkley*]; upheld on judicial review in *Providence Healthcare v. Dunkley*, 2016 BCSC 1383 (CanLII).

<sup>307</sup> Outside sources of funding may include:

- **Funds that may be available to the student only, provided through government programs and that are linked to the student’s disability.** Students might be expected to take advantage of these programs when making accommodation requests of an education provider. However, such resources should most appropriately meet the accommodation needs of the student, including respect for dignity.
- **Funds that would help education providers to defray the costs of accommodation.** Other outside accommodation resources might be available to a student with a disability when more than one organization has an overlapping or interconnected sphere of responsibility for the duty to accommodate.
- **Funding programs to improve accessibility for persons with disabilities – a corporate or organizational responsibility.**

<sup>308</sup> Such resources should most appropriately meet the accommodation needs of the individual, including respect for dignity. Also note that the primary responsibility for accommodation remains with the education institution. For example, in *Howard v. University of British Columbia (No. 1)*, (1993), 18 C.H.R.R. D/353 (B.C.C.H.R.), the complainant, who was deaf, wished to obtain his teaching certificate from the University of British Columbia. To do so, he required interpretation services during lectures, which would have cost \$9,000 for his prerequisite courses, and \$40,000 per year during the teachers’ program. He was unable to obtain funding from the government’s Vocational Rehabilitation Services. The University provided him with \$1,000 towards the cost of interpretation, and he obtained a \$2,000 forgivable loan from the Ministry of Advanced Education. Unable to obtain funding, he withdrew from the program. Before the Tribunal, the University argued that providing funding for interpretation was the responsibility of the government, not the University. The Tribunal ruled that denial of interpretation amounted to denial of access to the University’s education services. The Tribunal noted that while it may have been open to the complainant to allege discrimination against the government with respect to gaps in funding for interpreters, this did not absolve the University from responsibility. The Tribunal concluded that while the cost to the University of providing for these types of services from its discretionary funds would be significant, the University did not provide evidence to show that its operations would have been seriously affected had it provided interpretation services to the complainant. See also *Dunkley, supra* note 306; upheld on judicial review in *Providence Healthcare v. Dunkley*, 2016 BCSC 1383 (CanLII).

<sup>309</sup> *Meiorin*, *supra* note 17. See *Radek v. Henderson Development (Canada) Ltd. (No. 3)* (2005), 52 C.H.R.R. D/430, 2005 BCHRT 302.

<sup>310</sup> *Ouji v. APLUS Institute*, 2010 HRTO 1389 (CanLII); *Brown*, *supra* note 39.

<sup>311</sup> See *Ontario Human Rights Commission v. Etobicoke*, 1982 CanLII 15 (SCC), [1982] 1 SCR 202; *VIA Rail*, *supra* note 7 at para. 226; *Buttar v. Halton Regional Police Services Board*, 2013 HRTO 1578 (CanLII) at para. 132; *R.B.*, *supra* note 25.

<sup>312</sup> *Lane*, *supra* note 7; *ADGA*, *supra* note 7. See also *Bobyk-Huys v. Canadian Mental Health Assn.*, [1994] O.J. No. 1347 (Gen Div.).

<sup>313</sup> In a written submission to the OHRC (June 2017), ARCH Disability Law Centre reported that it has received reports of some principals excluding students from school, ostensibly under s. 265(1)(m) of the *Education Act*. That section of the *Act* allows a principal “subject to an appeal to the board, to refuse to admit to the school or classroom a person whose presence in the school or classroom would in the principal’s judgment be detrimental to the physical or mental well-being of the pupils.” Principals and other education providers should be reminded that if the student in question has a disability, they are protected by the Ontario *Human Rights Code* and entitled to accommodation. The principal would need to be able to show, with objective evidence, that they are not able to accommodate the student without experiencing undue hardship based on health and safety risks, before excluding that student from school. As stated previously, the *Code* has primacy over the *Education Act*, so where there is a conflict between these two statutory schemes, the *Code* and its requirements will prevail. ARCH also noted in its “Submission to the Ministry of Education in Response to the Call for Submissions as Part of the Ministry’s Project Entitled, ‘From Great to Excellent: the Next Phase in Ontario’s Education Strategy’” at 9 (November 29, 2013); available online: [www.archdisabilitylaw.ca/node/806](http://www.archdisabilitylaw.ca/node/806) (date retrieved: July 25, 2017), that it has heard that “failures to appropriately accommodate can lead to significant consequences including suspensions, and the student’s exclusion from school altogether pursuant to section 265(1)(m) of the *Education Act*.”

<sup>314</sup> See *CLO, et al. Research partnership*, *supra* note 8.

<sup>315</sup> In a written submission to the OHRC (June 2017), the Ontario Secondary School Teachers’ Federation (OSSTF) emphasized the importance of mandatory, face-to-face training for all staff to ensure consistency and effectiveness in dealing with students with significant behavioural challenges. The OSSTF also stressed the need for better supports, particularly more qualified and trained adults in schools, to ensure a safe, inclusive environment for student learning and success.

<sup>316</sup> See *Barton v. Loft Community Centre*, 2009 HRTO 647 (CanLII).

<sup>317</sup> See *Hydro-Québec*, *supra* note 180; *McGill*, *supra* note 180.

<sup>318</sup> See *L.B.*, *supra* note 25 at paras. 111-112.

<sup>319</sup> Section 17 of the *Code*, *supra* note 2.

<sup>320</sup> *McGill*, *supra* note 180 at para. 38. See also *Keays v. Honda Canada*, [2008] 2 S.C.R. 362 in which the Supreme Court overturned a lower court award of punitive damages that was awarded in a wrongful dismissal case where the employer had required an employee with a disability to take part in an attendance management program. The Court found that the conduct of the employer was not punitive, and accepted that the need to monitor the absences of employees who are regularly absent from work is a *bona fide* work requirement in light of the very nature of the employment contract and the employer's responsibility to manage its workforce. While these statements made by the Supreme Court are significant, they must be considered in the context of the type of claim that was before the Court. The issue was whether the conduct of the employer was sufficiently "harsh, vindictive, reprehensible and malicious" to justify an award of punitive damages in the context of a wrongful dismissal lawsuit. The Court found that creating a disability management program such as the one at issue could not be equated with a malicious intent to discriminate. The employer's conduct was not sufficiently outrageous or egregious for there to be an award of punitive damages.

<sup>321</sup> See *Longuepée*, *supra* note 144; *Fisher*, *supra* note 193.

<sup>322</sup> *R.B.*, *supra* note 25, at para. 261; *Rodgers v. SCM Supply Chain Management*, 2010 HRTO 653 (CanLII); *Sugiono v. Centres for Early Learning – Seneca Hill*, 2013 HRTO 1976 (CanLII) (reconsideration on evidentiary ground denied in *Sugiono v. Centres for Early Learning – Seneca Hill*, 2014 HRTO 72 (CanLII)); *Tiano v. Toronto (City)*, 2014 HRTO 1187 (CanLII); *Cohen*, *supra* note 25; *Remtulla v. The Athletic Club (Trainyards) Inc.*, 2014 HRTO 940 (CanLII); *Y.B.*, *supra* note 144.

<sup>323</sup> *Y.B.*, *ibid.*; *Fisher*, *supra* note 193; *Cohen*, *supra* note 25; *Worthington*, *supra* note 144. See also, *Wang*, *supra* note 234

<sup>324</sup> *Wang*, *ibid.*

<sup>325</sup> Available online at: [www.ohrc.on.ca/en/policy-competing-human-rights](http://www.ohrc.on.ca/en/policy-competing-human-rights).

<sup>326</sup> See *Payne v. Otsuka Pharmaceutical Co. (No. 3)* (2002), 44 C.H.R.R. D/203 (Ont. Bd. Inq.) at para. 63: The nature of when a third party or collateral person would be drawn into the chain of discrimination is fact specific. However, general principles can be determined. The key is the control or power that the collateral or indirect respondent had over the claimant and the principal respondent. The greater the control or power over the situation and the parties, the greater the legal obligation not to condone or further the discriminatory action. The power or control is important because it implies an ability to correct the situation or do something to ameliorate the conditions.

<sup>327</sup> See, for example, *Wamsley*, *supra* note 100.

<sup>328</sup> See, for example, *Selinger v. McFarland*, 2008 HRTO 49 (CanLII).



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<sup>329</sup> *Wall v. University of Waterloo* (1995), 27 C.H.R.R. D/44 at paras. 162-67 (Ont. Bd. Inq.). These factors help to assess the reasonableness of an organization's response to harassment, which can affect the legal consequences that flow from the harassment. See also *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30.

<sup>330</sup> Available online at: [www.ohrc.on.ca/en/policy-primer-guide-developing-human-rights-policies-and-procedures](http://www.ohrc.on.ca/en/policy-primer-guide-developing-human-rights-policies-and-procedures).

<sup>331</sup> The Ontario Government has made a commitment to develop new accessibility standards for education in Ontario. See joint letter of the OHRC and the Office of the Provincial Advocate for Children and Youth dated November 17, 2017: [www.ohrc.on.ca/en/re-development-new-accessibility-standard-education](http://www.ohrc.on.ca/en/re-development-new-accessibility-standard-education).

<sup>332</sup> The United Nations' Committee on the Rights of Persons with Disabilities identified a "lack of disaggregated data and research (both of which are necessary for accountability and programme development), which impedes the development of effective policies and interventions to promote inclusive and quality education" as a barrier that impedes access to inclusive education for people with disabilities. See *General Comment No 4*, *supra* note 89 at para. 4(d).

<sup>333</sup> For more information on data collection, see the OHRC's guide: *Count me in! Collecting human rights-based data*, (2010), available online at [www.ohrc.on.ca/en/count-me-collecting-human-rights-based-data](http://www.ohrc.on.ca/en/count-me-collecting-human-rights-based-data).

<sup>334</sup> The notion that substantive differential treatment can result because of a distinction, exclusion or preference, or because of a failure to take into account a person's already disadvantaged position within Canadian society, was first articulated in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The approach has been affirmed in several subsequent cases, most notably two cases dealing with discrimination based on disability: *Mercier*, *supra*, note 44, and *Granovsky*, *supra*, note 50.

<sup>335</sup> For more information, see the OHRC's [Guidelines for collecting data on enumerated grounds under the Code](#).

<sup>336</sup> Information about a student's right to accommodation, their right to not experience discrimination or harassment based on disability in education, and their options for redress should they feel these rights are not being upheld, should be communicated early and often in application and registration materials, orientation packages, newsletters, on the institution's website, in course syllabi, by instructors verbally, *etc.* Links to policy references and other resources should be provided, including links to the OHRC's *Policy on accessible education for students with disabilities, 2018*, other relevant institution policies (such as its human rights, accommodation and privacy policies), links to information about the institution's equity/human rights office, where appropriate, and training resources for faculty, staff and students.

<sup>337</sup> See section 8 of the *Code*, *supra* note 7.

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<sup>338</sup> In its Concluding Observations on the Initial Report of Canada, the United Nations' Committee on the Rights of Persons with Disabilities recommended at Article 44(c) that Canada "[e]nsure that teachers are trained in inclusive education at all levels and in sign language and other accessible formats of information and communication." (May 2017) Available online: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FCAN%2FCO%2F1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2FC%2FCAN%2FCO%2F1&Lang=en) (date retrieved: July 19, 2017).

<sup>339</sup> For example, research has indicated a correlation between targeted training for post-secondary educators on disability issues and positive faculty attitudes towards students with disabilities and disability accommodation. See, for example, Sandra Becker and John Palladino, "Assessing Faculty Perspectives About Teaching and Working with Students with Disabilities," (2016) *Journal of Postsecondary Education and Disability*, 29(1), 65-82 at 70.

<sup>340</sup> For more detailed information about creating organizational change, see section 7 of the OHRC's *Racism policy*, *supra* note 122; and, the OHRC's *Human rights and policing: Creating and sustaining organizational change*, (2011) available online at: [www.ohrc.on.ca/sites/default/files/attachments/Human\\_rights\\_and\\_policing%3A\\_Creating\\_and\\_sustaining\\_organizational\\_change.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Human_rights_and_policing%3A_Creating_and_sustaining_organizational_change.pdf).

<sup>341</sup> *Moore*, *supra* note 4 at para. 5.

<sup>342</sup> Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that take place after a document's publication date will not be reflected in that document. For more information, contact the OHRC.

<sup>343</sup> In *Quesnel*, *supra* note 169, the Board of Inquiry applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4<sup>th</sup> Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

<sup>344</sup> For example, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45 (Sup.Ct.).

<sup>345</sup> Post-secondary education institutions should also be aware of their obligations to create a sexual violence and sexual harassment policy under the *OHS*, *supra* note 106.

