New Brunswick Human Rights Commission

Guideline on Accommodating Students with a Disability

Adopted on October 15, 2007

The New Brunswick Human Rights Commission develops guidelines as part of its mandate to prevent discrimination by offering opportunities for people to understand their legal rights and responsibilities under the Human Rights Code.

This guideline is subject to decisions by human rights boards of inquiry and by the courts, and should be read in conjunction with those decisions and with the specific language of the Human Rights Code. If there is any conflict between this guideline and the Code, the Code prevails. This guideline is not a substitute for legal advice. The Commission's staff is available to answer any questions regarding this guideline.

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SUMMARY

(Cross-references to the relevant sections of this guideline are shown in parentheses)

All students, including students with a physical or mental disability, have a right to an education. Students with a disability must be individually assessed and accommodated so that they are given the opportunity to meet their individual potential. (Section 5)

Public schools and other education providers that serve the public **must identify and accurately assess students who, due to a disability, require reasonable accommodation** in order to receive an effective instruction and fully benefit from the educational service they provide. (Section 5)

Public schools and other education providers that serve the public have a **legal obligation to accommodate students and parents with a disability to the point of undue hardship**. Damages and other remedies may be ordered by Human Rights Boards of Inquiry against education providers, such as district education councils, that fail to reasonably accommodate a student with a disability. (Section 5)

The duty to reasonably accommodate includes an obligation to **include students with a disability in regular classrooms** (Section 6), to **permit absences from school due to a disability** (Section 8) and to **protect students with a disability from harassment** by staff and other students (Section 7). It also includes an obligation to **reasonably accommodate disabled parents** of students who may or may not have a disability (Section 5.1).

Students and parents have a legal obligation to cooperate with the education providers when determining the appropriate accommodation. (Section 11.1)

This guideline has been written to help education providers, students and parents understand these legal obligations.

The limits to this duty to reasonably accommodate are set out in the Meiorin Test. This legal test describes three conditions used to determine if reasonable accommodation has been made. They are that the standard (e.g. rule, practice, equipment, facilities) that has a discriminatory effect was (1) adopted for goals that are rationally connected to the function being performed, (2) adopted in good faith, and (3) reasonably necessary in the sense that the discrimination could not be avoided without causing undue hardship. (Section 10)

This guideline is **not intended to be an interpretation of the *Education Act*** and its regulations. **Should there be a conflict between the *Human Rights Code* and the *Education Act* and its regulations, the *Code* prevails.** (Section 1 and the Appendix)

The *Code* defines physical disability and mental disability. Case law has identified a large number of conditions that meet these criteria. (Sections 3 & 4)

Discrimination is differential treatment of, or **a failure to accommodate**, an individual on the basis of the individual's actual or presumed membership in or association with a class or group of persons as set out the *Code*, rather than on the basis of personal merit. (Section 5)

Discrimination need not be intentional and need not involve differences in treatment. On the contrary, **a lack of accommodation can constitute discrimination.** (Section 5)

Accommodation of students with a disability involves making adjustments to their educational environment, or providing alternative arrangements, to eliminate any discriminatory effect they would otherwise have on the students because of their disability. (Section 5.1)

The goal of accommodating students with a disability is to ensure their fullest possible participation, in a timely manner and to the same extent as non-disabled students, not only in the classroom, but in all aspects of the educational experience, including co- and extra-curricular activities, and to ensure that they have the opportunity to meet their individual potential. Educational administrators must consider the full range of the pupil's needs, including emotional, social, physical and personal safety needs. (Section 5.1)

Reasonableness is a consideration in accommodation cases. Persons seeking accommodation are entitled to **reasonable accommodation to the point of undue hardship, not necessarily the perfect solution nor their desired accommodation.** (Section 5.1)

Medical practitioners, educators, psychologists and parents must work together to determine the appropriate accommodation. The determination should be based primarily on the opinion of experts as to what is in the best interest of the student, and this may not coincide with the wishes of the parent(s) or student. (Section 5.1)

Accommodation must take into account the principles of dignity, individualization and inclusion. (Section 5.2)

Education providers must accommodate in a manner that **respects the dignity** of students with a disability. They must maintain a safe learning environment for students with a disability. **They may be liable if they know or ought to know that a student is harassed by other students. They must take steps to prevent harassment**, such as implementing programs to oppose bullying and celebrate all differences, and immediately address bullying and harassment that occurs. (Sections 5.2 & 7)

Blanket approaches to accommodation that rely solely on categories, labels and generalizations are not acceptable. **The emphasis must be on the individual student** and not on the category of disability. (Section 5.2)

Inclusion of students with a disability in regular classrooms is the norm. Every effort short of undue hardship must be made to provide support to assure that students with a disability can achieve educational goals while included in the regular classroom. (Sections 5.2 & 6)

In exceptional circumstances, it may be in the best interest of a student with a disability to receive one-on-one or small group instruction for all or part of the day. In such cases, the overarching goal should be to provide reasonable accommodations to ensure that students can return to the regular classroom as quickly as possible. Timelines should be put into place for re-assessing students to determine if they may return to regular classrooms. **Assessments should be frequent and should be made on an individual basis.** (Section 5.2)

Barrier prevention is preferable to barrier removal. When constructing new buildings, undertaking renovations, purchasing new computer systems, launching new web sites, designing courses, setting up programs, services, policies and procedures, education-providers should keep in mind the principles of **universal design**. (Section 5.4)

In some cases, discipline policies, especially zero-tolerance policies, may have an adverse effect on students with a disability. All students with a disability, even those whose behaviour is disruptive or constitutes bullying or harassment, are entitled to receive accommodation up to the point of undue hardship. Education providers have a duty to **assess each student with a disability individually before imposing disciplinary sanctions.** (Section 8)

Students with a disability must not be disciplined for absences resulting from a disability. However, students with a disability may be required to meet minimum learning outcomes even when their ability to meet them may be affected by absenteeism due to a disability, provided their disability was accommodated short of undue hardship. (Section 8)

The courts are quite demanding as to what constitutes undue hardship, and the evidence required to prove it. The evidence must be objective, and in the case of cost, quantifiable. Impressionistic evidence is insufficient. (Section 11.2)

What constitutes undue hardship depends on several factors. The most commonly recognized are excessive costs (Section 11.3)**, serious risk to health or safety** (Section 11.4) **and impact on other people and on programs** (Section 11.5)**.** Another factor is the conduct of the student with a disability and his or her parents; a failure to cooperate may impose an undue hardship on the education provider and thus lead to the dismissal of a human rights complaint. (Section 11.1)

The impact on other students of accommodating a student with a disability is an element of undue hardship. Provided an appropriate process has been followed and all other options have been eliminated, a potential accommodation of a student with a dis-

ability may be rejected where it can be proven that it would cause undue hardship as a result of its impact on other students. (Section 11.5)

The cost factor is very stringent. A high standard applies when arguing that accommodation would create undue hardship due to excessive costs. **For excessive costs to justify a failure to accommodate a student in public schools, they must be so high as to create an undue hardship to the provincial government.** (Section 11.3)

Unions must cooperate in the accommodation process to the point of undue hardship, and are liable under the *Human Rights Code* if they fail to do so. However, according to the Meiorin Test**, the impact on unions and their members is one of several factors that must be considered** when determining whether an accommodation would cause undue hardship. (Section 11.5)

The responsibilities of students, parents, education providers, unions, professional associations and others are set out in section 9. The Appendix includes a summary of the case law on accommodation of students with a disability in school.

1. INTRODUCTION

Section 5 of the New Brunswick *Human Rights Act* (also called the *Human Rights Code*) prohibits discrimination based on 14 grounds, including physical or mental disability, in "accommodation, services and facilities available to the public." This includes educational institutions that are privately or publicly operated.

Complaints alleging discrimination based on disability are the most common complaints received by the New Brunswick Human Rights Commission. Some of these complaints concern the duty to accommodate students in school. Though education providers must not discriminate on any of 14 grounds listed in the *Code*, it was considered to be necessary to develop a guideline focused only on disability because of the prevalence and complexity of the issues that disability raises in the educational system.

New Brunswick has been a leader in the inclusion of students with a disability in regular classrooms, and the Province has made a great deal of headway in accommodating students with a disability, and education providers should be congratulated for this. Nevertheless, there remains room for improvement. This guideline is meant to describe a legal framework so that education service providers may understand their responsibilities under the *Human Rights Code*.

This guideline sets out the Commission's legal interpretation of the *Human Rights Code* in relation to the duty to reasonably accommodate students with a physical or mental disability from kindergarten to grade 12 in privately or publicly operated schools, including denominational schools, that are open to the public. It applies to prospective and current students, as well as to former students who are eligible to return to school (e.g. students who left school and previous graduate ("post-grad") students)

This guideline also applies to the duty to reasonably accommodate **disabled parents of students** who may or may not have a disability.

It does not apply to schools that fall under federal jurisdiction,[1] including schools operated by First Nations, but it applies to Aboriginal students in educational institutions that fall under provincial jurisdiction.

This guideline is **not intended to be an interpretation of the *Education Act*** and its regulations, nor an exhaustive identification of the relevant sections of the *Education Act* or the relevant policies of the Department of Education. In addition to this guideline, readers may wish to consult the *Education Act* and its regulations and the policies and other publications of the Department of Education.

The New Brunswick Human Rights Commission wishes to express its appreciation to the Ontario Human Rights Commission for permission to reproduce and adapt several

[1] For a fuller explanation, see http://www.chrc-ccdp.ca/discrimination/federally_regulated-en.asp

sections of its *Guidelines on Accessible Education*[2]. Readers wishing to reproduce the sections of this guideline that came from the Ontario guideline must seek permission from the Province of Ontario.

The development of this guideline was also facilitated by Dr. Wayne MacKay's comprehensive report on inclusive education in New Brunswick.[3]

2. ROLE OF THE HUMAN RIGHTS COMMISSION

The New Brunswick Human Rights Commission is responsible for the administration of the New Brunswick *Human Rights Act*. With respect to the accommodation of students with a disability, its role is to:

1. receive and investigate complaints of discrimination with respect to the duty to reasonably accommodate students with a disability, and close, dismiss, conciliate and/or refer such complaints to a human rights Board of Inquiry;
2. conduct educational activities directed at parents, students, educational service providers and other stakeholders to inform them about the duty to reasonably accommodate students with a disability.

3. WORDING OF THE HUMAN RIGHTS CODE

The section of the New Brunswick *Human Rights Code* that pertains to education is Section 5, which reads as follows:

> *5(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall*
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> *(a) deny to any person or class of persons any accommodation, services or facilities available to the public, or*
> *(b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public,*
>
> *because of race, colour, religion, national origin, ancestry, place of origin, age,* ***physical disability, mental disability,*** *marital status, sexual orientation, sex, social condition, political belief or activity.*

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[2] Ontario, Ontario Human Rights Commission, *Guidelines on Accessible Education;* http://ohrc.on.ca/english/publications/accessible-education-guide.shtml

[3] MacKay, A. Wayne, (2006), *Connecting Care and Challenge: Tapping our Human Potential, Inclusive Education: A Review of Programming and Services in New Brunswick,* AWM Legal Consulting, 347 pp. http://www.gnb.ca/0000/publications/mackay/MACKAYREPORTFINAL.pdf

"Physical disability" and "mental disability" are defined in section 2*:*

> *"physical disability" means any degree of disability, infirmity, malformation or disfigurement of a physical nature caused by bodily injury, illness or birth defect and, without limiting the generality of the foregoing, includes any disability resulting from any degree of paralysis or from diabetes mellitus, epilepsy, 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 on a wheelchair, cane, crutch or other remedial device or appliance.*
>
> *"mental disability" means*
> *(a) any condition of mental retardation or impairment,*
> *(b) any learning disability, or dysfunction in one or more of the mental processes involved in the comprehension or use of symbols or spoken language, or*
> *(c) any mental disorder.*

4. MEANING OF DISABILITY

A **wide variety of conditions can constitute a physical disability** as defined in the *Code*. Some of the more common ones are blindness or visual impairment; deafness or hearing impairment; environmental sensitivities; epilepsy or seizures; injuries to limbs and body parts; obesity; paralysis; and spina bifida. In addition, the following illnesses or medical conditions, in alphabetical order, have also been found to constitute a physical disability: acne; AIDS; amputation; arthritis; asthma; autoimmune disease; back injury; broken arm, foot, limbs, etc; bronchitis; cancer; chronic fatigue syndrome; chronic pain syndrome; Crohn's disease; color blindness; diabetes; deformed arm or other limb; degenerative disc disease; excessive breast growth; gall bladder problems; Graves' disease; heart conditions; hepatitis A, B and C; hypertension; irritable bowel syndrome; kidney stones; lupus; migraine headaches; meningitis; missing finger; multiple sclerosis; muteness or speech impediments; knee pain; nerve pain and/or nerve disorder; perceived disability; permanent strain injury; seasonal allergies; shoulder injury; smoking; spinal injury; tendonitis; and thyroid disease.

Similarly, there are **numerous conditions that constitute a mental disability**. Some of the more common ones are: ADD; ADHD; anxiety; autism; depression; dyslexia; intellectual disability; and learning disability. In addition, the following illnesses or medical conditions, in alphabetical order, have been found to constitute a mental disability as defined under the *Code*: adjustment disorder with depressed mood; agoraphobia and panic attacks; alcoholism; an acute psychiatric attack; anxiety and depression with conversion syndrome; bipolar affective disorder; bipolar mood disorder with paranoid personality disorder; delusional disorder; depressive psychiatric condition; depressive state of mind; fear of heights; generalized depression; kleptomania; manic depression; hysterical personality; globus hystericus; any mental disorder that impairs one's ability to act rationally (personality disorder with A or B traits); mixed anxiety disorder with fea-

tures of obsessive-compulsive disorder and generalized anxiety; nervous breakdown; nervous condition; nervous depression, panic disorder; paranoid schizophrenia; paranoid schizophrenic delusions; pre-existing personality and emotional psyche; pyromania; reactive depressive disorder; severe depression and delusional thinking; sexual deviation; situational depression; and being a slow learner.

Note that that these are not exhaustive lists, and other medical conditions could be considered physical or mental disabilities under the *Code*. Also note that a condition that was found to be disability in one case may be found not to be a disability in other cases due to differences in the severity of the condition, in how it is perceived, in the effects of the distinction being made, and in the wording of the relevant statute.

Some types of disabilities are not apparent to the average onlooker. Examples of non-evident disabilities include mental disabilities, learning disabilities, chronic fatigue syndrome, environmental sensitivities, hearing impairments and epilepsy.

The Supreme Court of Canada has established that a disability may be "the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all these factors." **Discrimination may be based as much on perceptions, myths and stereotypes, as on the existence of actual functional limitations**[4]. The focus is on the effects of the preference, exclusion or other type of differential treatment experienced by the person, and not on proof of physical limitations or the presence of an ailment.

> **Example:** A probationary police officer has Crohn's disease. Though this disease does not limit what he can do on the job, the employer dismisses him out of concern that he will have a higher degree of absenteeism. In this case, Crohn's disease is a disability, despite the absence of any functional limitation, because of the employer's perceptions and assumptions about the disease, and how they became a barrier to the officer's employment.

5. REASONABLE ACCOMMODATION

All students, including students with a physical or mental disability, have a right to an education. Students with a disability must be individually assessed and accommodated so that they are given the opportunity to meet their individual potential.

Public schools and other education providers that serve the public **must identify and accurately assess students who, due to a disability, require reasonable accommodation** in order to receive an effective instruction and fully benefit from the educational service they provide.

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[4] *Quebec (Commission des droits de la personne et des droits de la jeunesse)* v. *Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse)* v. *Broisbriand (City*), [2001] 1 S.C.R. 655 at para. 79 & 39: http://scc.lexum.umontreal.ca/en/2000/2000scc27/2000scc27.html

Public schools and other education providers that serve the public have **a legal obligation to accommodate students and parents with a disability to the point of undue hardship**. A similar duty applies to all the grounds mentioned in the *Human Rights Code.*

Damages and other remedies may be ordered by Human Rights Boards of Inquiry against education providers, such as district education councils, that fail to reasonably accommodate a student with a disability.

The duty to reasonably accommodate is not specifically mentioned in legislation. It arises from case law (the decisions of courts and tribunals) interpreting the meaning of discrimination in section 15 of the *Canadian Charter of Rights and Freedoms* and in the various human rights (anti-discrimination) laws that apply in Canada.

In simple terms, discrimination is differential treatment of**, or a failure to accommodate**, an individual on the basis of the individual's actual or presumed membership in or association with a class or group of persons as set out the *Code*, rather than on the basis of personal merit.

Discrimination need not be intentional and need not involve differences in treatment. On the contrary, **a lack of accommodation can constitute discrimination.** It is the discriminatory effect of an action or policy that makes it discriminatory.

5.1 What is Accommodation?

The process for ensuring that all persons are treated equitably is called accommodation.

Accommodation of students with a disability involves making adjustments to their educational environment, or providing alternative arrangements, to eliminate any discriminatory effect they would otherwise have on the students because of their disability.

The goal of accommodating students with a disability is to ensure their fullest possible participation, in a timely manner and to the same extent as non-disabled students, not only in the classroom, but in all aspects of the educational experience, and to ensure that they have the opportunity to meet their individual potential.

The duty to reasonably accommodate students with a disability extends beyond formal learning outcomes. **Educational administrators must also consider the full range of the pupil's needs**[5]:

- intellectual and academic needs,
- communication needs,
- emotional and social needs,
- physical and personal safety needs.

The duty to reasonably accommodate also extends to co- and extra-curricular activities. This means selecting and supporting school activities that assure the highest degree of access for all students for school sports and cultural activities, field trips and class projects. This may require arranging appropriate transportation requirements, extra personal support and other steps to minimize barriers to participation.

Here are a few examples of accommodation of students:

Example: While in grade 3, a student with dyslexia received 60 minutes of small group (3 to 4 students) instruction with a resource teacher each day. Based on an assessment of the nature and extent of the student's needs, along with a review of her academic and social progress, this level of intensive support was determined to be no longer necessary once the student was in grade 4. The time with the resource teacher was reduced to three times a week.

Example: A school requires that all students in a course pass an in-class essay test worth 100% of the student's final grade. Unless it can be shown that the 100% essay mode of evaluation is an essential requirement of the course, this may be found to discriminate against students with learning disabilities and other types of disabilities that make it difficult to process large amounts of written material under strict time constraints.

Example: A school has arranged to bus a class of students to a zoo outside the school district and charge them $20 each for the bus transportation, which covers the actual cost of the bus. However, there is no wheelchair accessible bus that can accommodate all the students. The school books a separate wheelchair accessible bus for the two students who use a wheelchair. A few other students can also sit in that bus. However, that bus costs $40 per person. The school accommodates the students in a wheelchair by charging everyone $20 each.

Example: Under certain circumstances, students who have already graduated may be re-admitted into public high schools as "previous graduate students." They might want to do this to improve their grades to be admitted to university, to increase literacy or communication skills, or to increase skills needed to transition to

[5] *Eaton* v. *Brant County Board of Education* [1997] 1 S.C.R. 241 at paras. 17 to 20 (Supreme Court of Canada); http://scc.lexum.umontreal.ca/en/1997/1997rcs1-241/1997rcs1-241.html

the community and employment. It would be inappropriate to deny such a request for such an admission, or the accommodation needed by the student, because the student has a disability unless this would cause undue hardship.

The role of parents of students in public schools is recognized by the *Education Act*[6]. Parents provide a very important form of support to their children's education. For minor students to fully benefit from an educational service, their parents must be free from discrimination in their interaction with education providers. Accordingly, **education providers must reasonably accommodate disabled parents so that their children, who may or may not have a disability, have the same educational opportunity as other students**.

Example: A mother informs her children's teachers in elementary school that the mother is deaf and needs a sign language interpreter to communicate. The school arranges for a sign language interpreter at parent-teacher meetings so that the parent can fully participate.

Human rights Boards of Inquiry and the courts have constantly stated that reasonableness is a consideration in accommodation cases. **Persons seeking accommodation are entitled to reasonable accommodation to the point of undue hardship, not necessarily the perfect solution nor their desired accommodation.**

Medical practitioners, educators, psychologists and parents must work together to determine the appropriate accommodation. The determination should be based primarily on the opinion of experts as to what is in the best interest of the student, and this may not coincide with the wishes of the parent(s) or student.

When investigating complaints of an alleged lack of accommodation, many factors must be considered when determining when reasonable accommodation has been offered. They include, but may not be limited to, the following:

- accommodations recommended by health care professionals (physicians, psychologists, psychiatrists, physiotherapists, occupational therapists, speech therapists, chiropractors, etc);
- accommodations recommended by education professionals (resource teachers, school and district specialists, etc);
- whether there are conflicting accommodation requirements for a student because of one or more disabilities;
- the ability of the education service provider to provide all of the recommended or requested accommodations to the point of undue hardship;
- accommodations offered by the education service provider compared to those recommended by the relevant professionals, and those requested by the student or parent;
- accommodations accepted or refused by the student and/or parent.

[6] *Education Act*, R.S.N.B. c. E-1.12, s. 13; http://www.gnb.ca/0062/acts/acts/e-01-12.htm

After a review of the relevant information, the Commission may close a complaint file if reasonable accommodation had been offered but was refused by the student and/or parents.

Example: A student with an environmental illness has provided medical documentation that states she requires: a clean environment with a 100% fresh air ventilation system at all times if possible; a classroom with no scents (perfumes, laundry soaps, chalk, markers, musty books, etc,); clean transportation (non-diesel); and a modified class schedule.

Because of the curriculum, students must change classrooms for each course. The school closest to the student's home is in an older, larger building that does not have the capacity to supply 100% fresh air for the entire school year in any of its classrooms. However, a school a few kilometres away and within the same District has the necessary capacity. The District Education Council, at the request of the student's parents, transfers the student to the other school, and provides clean transportation to bring her there.

However, the student later develops an anxiety disorder with depression on top of her environmental illness, and requests to be returned to the older, larger school with specific accommodation, including a modified classroom that will provide her with 100% fresh air.

The District has the student's medical specialist inspect the older school and all of the student's classrooms. The specialist's suggestions include removing clutter from classrooms, sitting the student at certain locations in the classrooms, posting no-scent policies in the school, clean transportation, and having the current air ventilation systems in each classroom running at full capacity whenever possible.

The District agrees to provide these accommodations, but the parents request that it modify a classroom by installing a ventilation system able to provide 100% fresh air at all times, and have teachers move from classroom to classroom and not the students. The District maintains that it is unable to do this for a variety of reasons, including disruption to other students, the inability to have teachers move from classroom to classroom due to course schedules, and its inability to provide a new ventilation system in a short period of time.

The District offers to meet the accommodations recommended by the medical specialists, or if that is not acceptable to the parents, to transfer the student back to the newer, smaller school which has the fresh air capability. The parents refuse the transfer. The Human Rights Commission closes the complaint file as reasonable accommodation had been offered and been refused by the parents.

5.2 Basic Principles of Accommodation

The Human Rights Commission considers that accommodation involves three principles: dignity, individualization and inclusion.

Students with a disability have the right to receive educational services in a manner that is **respectful of their dignity**. Human dignity encompasses individual self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. It is harmed when individuals are marginalized, stigmatized, ignored or devalued.

Education providers must fashion accommodation solutions in a manner that respects the dignity of students with a disability.[7] Accommodations should be considered along a continuum, starting with those that most respect a student's right to privacy, autonomy and dignity. Accommodations that do not take into account a student's right to respectful and dignified treatment will not be appropriate[8]. Respect for dignity also includes taking into account **how** an accommodation is provided and the student's (and/or their parent(s)' or guardian(s)') own participation in the process.

Educators have a duty to maintain a positive educational environment for all persons they serve.[9] Attitudes of educators towards disability issues play a major role in influencing how other students treat and relate to students with a disability. Without violating the confidentiality of students, or with the consent of their parents, teachers should make efforts to sensitize students about disability issues and to model respectful attitudes and behaviour towards students with a disability. Education providers need to address any behaviour that may be injurious to the dignity of students with a disability. See Section 7 of this guideline for information about addressing bullying and harassment.

Accommodation must be individualized. 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 and not on the category of disability. Blanket approaches to accommodation that rely solely on categories, labels and generalizations are not acceptable. Different effects of a disability and different learning styles may call for different approaches.[10]

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[7] *Granovsky v. Canada (Minister of Employment and Immigration),* [2000] 1 S.C.R. 703 at para.74; http://scc.lexum.umontreal.ca/en/2000/2000scc28/2000scc28.html

[8] *Law v. Canada (Minister of Employment and Immigration*), [1999] 1 S.C.R. 497; http://scc.lexum.umontreal.ca/en/1999/1999rcs1-497/1999rcs1-497.html; *Granovsky v. Canada (Minister of Employment and Immigration),* [2000] 1 S.C.R. 703 at para.74; http://scc.lexum.umontreal.ca/en/2000/2000scc28/2000scc28.html

[9] *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, 25 C.H.R.R. D/175; http://scc.lexum.umontreal.ca/en/1996/1996rcs1-825/1996rcs1-825.html; see also *Education Act*, R.S.N.B. c. E-1.12, paras. 27(1)(b) & (d)) and 28(2)(c); http://www.gnb.ca/0062/acts/acts/e-01-12.htm

[10] *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241 at para. 69 (Supreme Court of Canada); http://scc.lexum.umontreal.ca/en/1997/1997rcs1-241/1997rcs1-241.html

Reasonable accommodation is fact-specific and not easily defined. The Supreme Court of Canada, in *Central Okanagan School District No. 23* v. *Renaud,*[11] noted that each case must be determined on its own facts to determine whether an employer or service provider has taken reasonable measures to accommodate a disability.

> **Example**: An appropriate accommodation for a student who has a significant hearing loss and primarily uses auditory-verbal communication might be inclusion in a regular classroom with support. An appropriate accommodation for a student who is profoundly deaf and whose primary language of communication is American Sign Language or Langue des signes québécoise might be full support by a sign language interpreter in the regular classroom, access to a resource room or services in a specialized setting.
>
> **Example:** A student with an environmental illness has adverse physiological reactions at her school that have a negative impact on her ability to attend school. Reasonable accommodation could include, but is not limited to, the following:
> - modifying the classroom by reducing clutter, and other items to which the student has a reaction;
> - installing or using a clean air ventilation system in the classroom or school;
> - enforcing a "no scents" policy within the classroom and the school;
> - using cleaners and paints to which the student has little or no reaction;
> - reducing the student's exposure to areas of the school that cannot be modified.

Education providers must identify and accurately assess students who, due to a disability, require reasonable accommodation in order to receive an effective instruction and fully benefit from the educational service they provide. Education providers must put into place a process to assess student needs and to identify and implement strategies to meet those needs (e.g. case conferencing).

Individualized assessment includes being aware of the ways in which students with a disability are affected by also being members of other historically disadvantaged groups. These grounds may "intersect," thus producing a unique experience of discrimination.

Inclusion of students with a disability in regular classrooms is the norm. Every effort short of undue hardship must be made to provide support to assure that students with a disability can achieve educational goals while included in the regular classroom. In exceptional circumstances, it may be in the best interest of a student with a disability to receive one-on-one or small group instruction for all or part of the day. In such cases, the overarching goal should be to provide reasonable accommodations to ensure that students can return to the regular classroom as quickly as possible. Timelines should be put into place for re-assessing students to determine if they may return to regular class-

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[11] *Central Okanagan School District No. 23* v. *Renaud* [1992] S.C.R. 970; http://scc.lexum.umontreal.ca/en/1992/1992rcs2-970/1992rcs2-970.html

rooms. **Assessments should be frequent and should be made on an individual basis**. For further information about inclusion, see section 6 of this guideline.

The limits to the duty to accommodate are set out in the Meiorin Test, which is explained in section 10 and the appendix of this guideline.

5.3 Potential Consequences of a Lack of Reasonable Accommodation

The potential consequences of a lack of reasonable accommodation of a student with a disability include:

1. the negative effect on a student who fails to meet their educational potential;
2. the negative effect on the student's family;
3. conflict between the educational institution and the student's family;
4. future costs to the service provider or government; and
5. possible legal costs (lawyer's fees, monetary settlements, damage awards) against the service provider.

It has been well established through various educational reports (Professor Wayne MacKay's report[12] being the most recent in New Brunswick) that early intervention and remediation is the best method of addressing disability-related issues in the education sector. As well, in the *Moore*[13] decision, the British Columbia Human Rights Tribunal found that early identification and remediation could make the difference as to whether students will be able to overcome the effect of their disability and meet their potential, both academically and socially.

Early intervention and remediation is the best method of minimizing the negative impact that a disability may have on a student's ability to learn. If it does not take place in a timely fashion, accommodating the student in an effective manner at a later stage may become more difficult, require additional resources and incur additional costs to the education provider.

Furthermore, students who are unable to meet their potential, both academically and socially, may require government support in one form or another on a long term basis, which could have been avoided had appropriate accommodation measures been taken in school.

If a human rights complaint is filed and is ultimately referred to a human rights Board of Inquiry, a lack of reasonable accommodation could result in a human rights award against the education service provider, union and/or third party service provider respon-

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[12] MacKay, A. Wayne, (2006), *Connecting Care and Challenge: Tapping our Human Potential, Inclusive Education: A Review of Programming and Services in New Brunswick,* AWM Legal Consulting, 347 pp. http://www.gnb.ca/0000/publications/mackay/MACKAYREPORTFINAL.pdf

[13] *Moore* v. *B.C. (Ministry of Education) and School District No. 44*, 2005 BCHRT 580; http://www.bchrt.bc.ca/decisions/2005/pdf/Moore_v_BC_(Ministry_of_Education)_and_School_District_No_44_2005_BCHRT_580.pdf

sible for the lack of accommodation. In addition to general damages for injury to dignity, feelings and self-respect, the Tribunal in *Moore* required that the respondents pay for the complainant's private education until the completion of grade 12[14].

5.4 Universal Design

Barrier prevention is preferable to barrier removal. Whenever possible, facilities, programs, policies and services should be structured and **designed at the outset to avoid any discriminatory impact** on students with a disability, instead of relying on case-by-case after-the-fact adjustments, modifications and exceptions. This approach is referred to as "inclusive design" or "universal design."

Course curriculum, delivery methods and evaluation methodologies should be designed inclusively from the outset. This may mean creative use of technology, such as putting materials online, or selecting software that is compatible with screen readers. When courses are online, web-based or CD based, accessibility issues should be addressed up-front, in the development stage.

When constructing new buildings, undertaking renovations, purchasing new computer systems, launching new web sites, designing courses, setting up programs, services, policies and procedures, education-providers should keep in mind the principles of universal design. New barriers should never be created in the construction of new facilities or in the renovation of old ones. Rather, design plans should incorporate current accessibility standards such as the Canadian Standards Association's *Accessible Design for the Built Environment*[15] and the principles of universal design.

Where barriers already exist, the duty to reasonably accommodate requires education providers to make changes up to the point of undue hardship to provide equal access for students with a disability. Where it is impossible to completely remove barriers at a given point in time, then next best alternatives or temporary solutions must be explored and implemented, if to do so would not result in undue hardship.

6. INCLUSION OF STUDENTS WITH A DISABILITY

Full participation in regular school programs with non-disabled peers is the goal set explicitly by the *Education Act*[16] and the *Convention on the Rights of Persons with Disabilities*[17] as well as by case law under the *Canadian Charter of Rights and Freedoms*[18] and the *Human Rights Code.* Education providers and teachers must be provided with sup-

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[14] See the appendix for a discussion of the *Moore* case

[15] http://www.csa-intl.org/onlinestore/GetCatalogItemDetails.asp?mat=000000000002015478

[16] *Education Act*, R.S.N.B. c. E-1.12, sub. 12(3); http://www.gnb.ca/0062/acts/acts/e-01-12.htm

[17] *Convention on the Rights of Persons with Disabilities,* article 24; http://www.un.org/disabilities/convention/conventionfull.shtml

[18] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; http://laws.justice.gc.ca/en/charter/index.html

ports sufficient to assure that students with a disability can achieve educational goals, and do so side-by-side with their peers in community schools.

In *Eaton* v. *Brant County Board of Education,* in 1997, the Supreme Court of Canada made clear that **"integration" or inclusion "should be recognized as the norm of general application** because of the benefits it generally provides …"[19]. The Court went on to assert that there is still a requirement to provide "special education" where it is needed to "achieve equality"[20].

The more or less routine placement of students with a disability into special or separate classes for students with a disability may be considered to be discriminatory as it represents a failure to accommodate, since the individual requirements of each student are not considered.

Accommodation to the point of "undue hardship" should be directed at allowing students with a disability to be included in regular schools and classrooms. The courts are quite strict as to what constitutes undue hardship, and the evidence required to prove it. For further information about undue hardship, see section 11 of this guideline.

In considering how to accommodate students with a disability**, the first consideration is what supports and strategies are necessary to allow the students to be included in the regular classroom. Every effort short of undue hardship must be made to provide support so that the students may be included**.

The critical factors and the process to be followed (except in case of crisis[21]) for inclusion are shown in Flow Chart A. As shown in the chart, reasonable accommodation of the student requires the educational system to support the school, the teacher and the student as follows:

1. To the school: to ensure the classroom and other school facilities are accessible.
2. To the teacher: to support the teacher so they can teach each student appropriately. This includes professional support and planning and development of teaching strategies
3. To the student: to provide the accommodations required for the individual student, including teacher assistant support to follow up on the teacher's instruction where needed.

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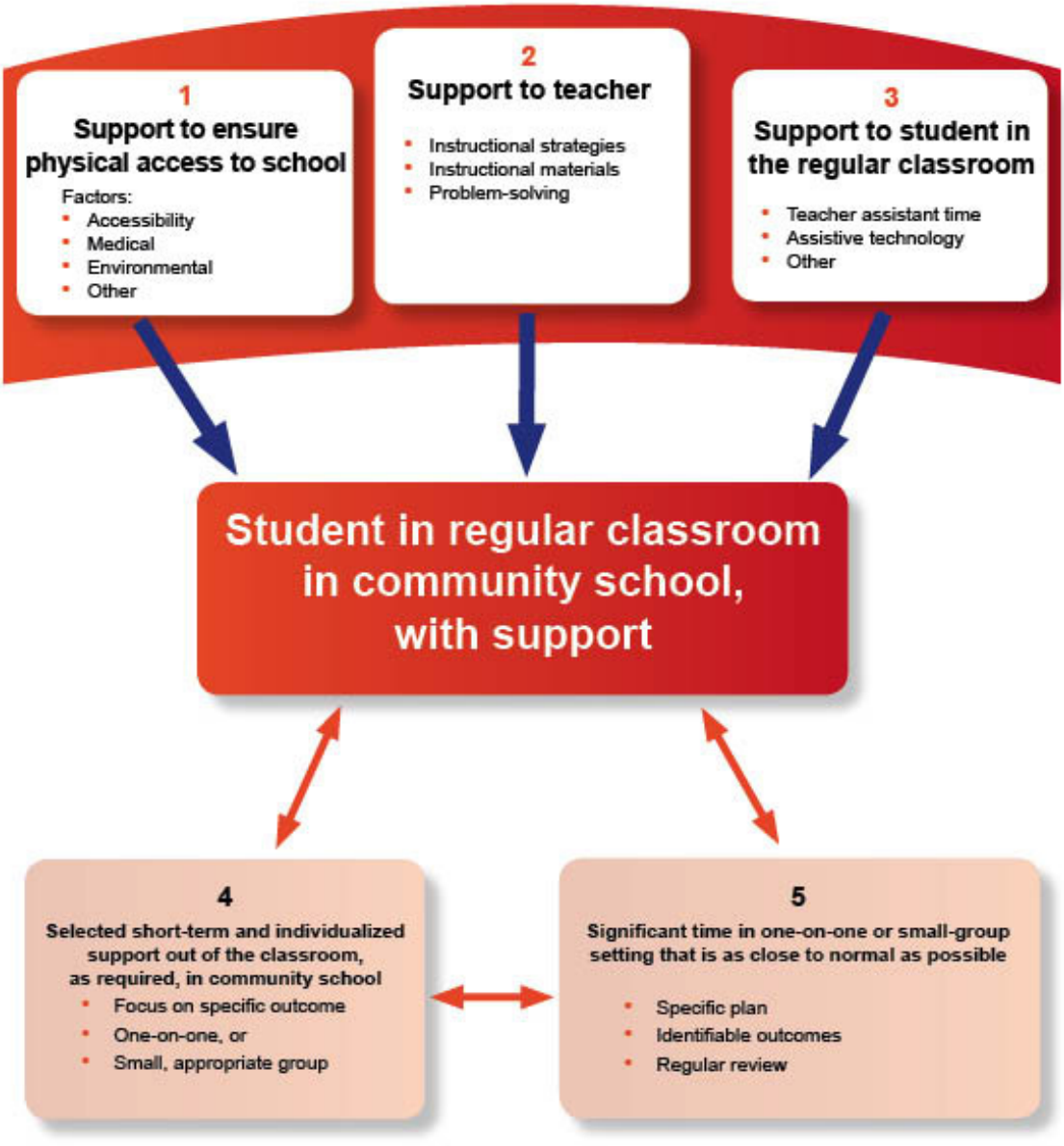
[19] *Eaton* v. *Brant County Board of Education* [1997] 1 S.C.R. 241 at paras. 17 to 20 (Supreme Court of Canada); http://scc.lexum.umontreal.ca/en/1997/1997rcs1-241/1997rcs1-241.html

[20] It should be noted that, in the New Brunswick school system, special education is mainly directed at supporting inclusion.

[21] It is understood that, in a crisis, education providers will do what is necessary to protect the safety of all students.

Flow Chart A
Inclusion Process



Where all the other options fail, it may be necessary to provide some students with individual accommodation outside the regular classroom. As with all accommodations, this is based on an assessment of their needs. Such accommodations may be of a short-term nature or for part of the regular day. They would occur in the student's neighbourhood or school area, on a one-on-one basis or as part of a small group.

> **Example:** A grade 2 student with autism is placed in the regular classroom, but has difficulty due to the noise level and the level of the curriculum. Because of the noise level, he becomes overwhelmed and usually leaves the school unnoticed and wanders the neighbourhood unattended. As well, the curriculum causes the student to become frustrated and agitated as he struggles with his classroom assignments. Specialists recommend that the student receive the assistance of a Teacher's Assistant to ensure that he gets extra help with his assignments and does not leave the classroom unattended. The TA also takes the student to a quiet room when he starts to react to the noise. The student is also assessed to determine the appropriate Special Education Program and whether or not he requires a modified program or an accommodated program.

The need for significant periods of time outside the regular class and away from peers in a one-on-one or small group basis should occur only after reasonable efforts short of undue hardship have been made to provide needed support in Options #1 to # 4 as shown in Flow Chart A. As noted above, the point of departure is that these interventions occur in the child's neighbourhood or natural school and that " … this should occur for a limited time period and with a goal oriented plan focused on returning the child to his/her regular class. "[22]

7. BULLYING AND HARASSMENT OF STUDENTS WITH A DISABILITY

For students with a disability to fully benefit from inclusion, their emotional, social and safety needs must be met. **Education service providers must maintain a safe learning environment for students,** free from bullying and harassment and must take immediate steps to intervene when bullying or harassment may be taking place. This is required not only by the underlying educational rationale of inclusion, but by human rights case law[23].

Students who are harassed are entitled to the *Code*'s protection where the harassment is based on one of the grounds covered under the *Code*. Education providers are responsible when staff harass students based on any of the *Code*'s grounds. **They are also responsible when staff know or ought to know that a student is being har-**

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[22] New Brunswick, Department of Education, "1988 Working Guidelines on Integration", 1988, 13 pp. at page 11; http://www.gnb.ca/0000/publications/ss/Integration-guidelines.pdf

[23] For students in public schools, the *Education Act* and its regulations also set out specific duties of teachers and principals in relation to discipline and positive learning environments; *Education Act*, R.S.N.B. c. E-1.12; http://www.gnb.ca/0062/acts/acts/e-01-12.htm

assed by other students[24] based on any of the *Code*'s grounds. They must take effective individualized and systemic steps to prevent and remedy harassment.

> **Example**: A student with Tourette's syndrome is repeatedly taunted and teased by a group of students for no specific identifiable reason apparent to teachers. The same group excludes her from recess activities, stating that she is "different" and "weird". It may be inferred from these particular circumstances that the treatment is due to the student's disability even though none of the students ever made a direct reference to her disability. As a result of this harassment, the student's opportunity to access the educational program is impaired.
>
> **Example:** A student with a mental disability is bullied by some of the other students. They call him derogatory names related to his disability and physically push and hit him because of his disability. The student and his parents have informed school personnel of this and stressed that the bullying needs to stop. The Province and its personnel are under an obligation to adequately address the situation, since bullying based on one of the grounds (mental disability) covered by the *Human Rights Code* is discrimination and is a violation of the *Code*. The school may attempt to resolve the issue by:
>
> - identifying and speaking with the offending students and their parents to advise that this behaviour will not be tolerated and what the consequences may be if it continues;
> - working with the offending students to help them develop empathy and appropriate social skills;
> - following through with the appropriate action if the behaviour continues;
> - providing the bullied student with a mechanism for reporting the bullying as it occurs, thereby allowing for immediate intervention by school personnel; and
> - developing an anti-bullying program and giving presentations to the student population on this issue.

Students who are a target of harassment may be in a vulnerable situation. As such, in situations where the conduct is or should have been known to be unwelcome, there is no requirement that they formally speak out against the behaviour before a violation of the *Code* can be considered to have taken place.

Education service providers **must take steps to prevent harassment, such as implementing programs to oppose bullying and celebrate all differences**. In *Jubran* v. *Board of Trustees*[25], the British Columbia Human Rights Tribunal found a school board

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[24] *Jubran* v. *Board of Trustees*, [2002] B.C.H.R.T. 10, http://www.bchrt.bc.ca/decisions/2002/pdf/jubran_v_board_of_trustees_2002_bchrt_10.pdf (British Columbia Human Rights Tribunal); affirmed [2005] B.C.J. No. 733, 2005 BCCA 201, http://www.courts.gov.bc.ca/Jdb-txt/CA/05/02/2005BCCA0201err2.htm (British Columbia Court of Appeal)

[25] *Jubran* v. *Board of Trustees*, [2002] B.C.H.R.T. 10, http://www.bchrt.bc.ca/decisions/2002/pdf/jubran_v_board_of_trustees_2002_bchrt_10.pdf (British Columbia Hu-

liable for discriminatory harassment by students toward another student. School personnel had responded to the situation with detentions and suspensions of the individual harassers, and they had meetings with the parents. However, they had failed to implement a school-wide anti-bullying programme early enough to stop the harassment experienced by the complainant. This decision was affirmed by the British Columbia Court of Appeal in April of 2005.

An anti-harassment policy can be an effective means of preventing harassment, provided students and staff are well informed about it. In fact, the Department of Education has adopted policies that address harassment and other non-professional conduct by adults and harassment and other problem behaviours by students.

Please also refer to the following section when bullying or harassing behaviour is a manifestation of a student's disability.

8. DISCIPLINE OF STUDENTS WITH A DISABILITY

In some cases, discipline policies, especially zero-tolerance policies, may have an adverse effect on students with a disability.

All students with a disability, even those whose behaviour is disruptive or constitutes bullying or harassment, are entitled to receive accommodation up to the point of undue hardship. **Education providers have a duty to assess each student with a disability individually before imposing disciplinary sanctions.**

Educators should attempt to determine whether the behaviour in question is a manifestation of the student's disability by considering:

- formal assessments and evaluations of the student,
- relevant information supplied by the student or the student's parents,
- observations of the student,
- the student's accommodation plan,
- whether the accommodations provided for in the student's accommodation plan were appropriate, and whether they were being provided consistent with the plan,
- whether the student's disability impaired his or her ability to understand the impact and consequences of the behaviour subject to disciplinary action,
- whether the student's disability impaired his or her ability to control the behaviour subject to disciplinary action, and
- whether the student has undetected disability-related needs that require accommodation.

Once it has been determined that a student is prone to problem behaviour that is a manifestation of a disability, this should be communicated to school personnel who may

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man Rights Tribunal); affirmed [2005] B.C.J. No. 733, 2005 BCCA 201, http://www.courts.gov.bc.ca/Jdb-txt/CA/05/02/2005BCCA0201err2.htm (British Columbia Court of Appeal)

be involved in implementing discipline policies in relation to that student, so that they may take this into consideration and make reasonable accommodation.

With respect to behaviour that is a manifestation of the student's disability, 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.

Again, with respect to behaviour that is a manifestation of the student's disability, education providers should consider **progressive discipline** instead of mandatory suspensions should consider **mitigating factors** prior to suspending students and should provide **alternative education opportunities** for suspended students.

> **Did You Know:** Other jurisdictions have adopted safeguards to protect students with a disability from being disciplined for behaviour that is disability-related. For example, as a result of human rights complaints in Ontario, the Ministry of Education and a number of school boards have agreed to revise the application of their safe-schools policies and to take several other steps[26].

There may be rare situations in which a student's behaviour, even where it is a manifestation of a disability, poses a health and safety risk to the student, to other students and/or to teachers and other 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, legitimate health and safety concerns may need to be addressed. In some situations, placement in a mainstream classroom may not be the most appropriate accommodation. This is discussed in sections 6 and 11.4 of this guideline.

Students must not be disciplined for absences resulting from a disability. Education providers must reasonably accommodate students who miss classes, assignments and tests because they are too ill to attend school or because they need to meet health professionals, take medical tests or undergo therapy, counselling, rehabilitation or other treatments as a result of a physical or mental disability. Education providers may need to schedule a separate test for a student or extend deadlines for assignments. However, students with a disability may be required to meet minimum learning outcomes even when their ability to meet them may be affected by absenteeism due to a disability, provided their disability was accommodated short of undue hardship.

> **Example:** An education provider's policy requires students to fulfil a minimum number of in-class hours in order to receive credit for a course. However, in response to the needs of students whose disabilities make it difficult or impossible for them to attend school full-time, the policy states that the attendance requirements may be modified where appropriate. Education providers must also reasonably ac-

[26] http://www.ohrc.on.ca/en/resources/news/backgroundedsettlement

commodate students who cannot complete tests or assignments in the standard time period due to a disability.

Students with a behavioural problem that is a manifestation of a disability have a responsibility to take action to mitigate the problem.

If a student's behaviour is not a manifestation of 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 his or her misconduct.

9. RESPONSIBILITIES

9.1 Responsibilities of Education Providers

Education service providers have a responsibility[27] to:

1. review the accessibility of educational institutions as a whole, including all educational services;
2. when they design and develop new or revised facilities, services, policies, processes, courses, programs or curricula, do so while keeping in mind the needs of persons with a disability in mind;
3. ensure that collective agreements do not conflict with the need to reasonably accommodate students with a disability short of undue hardship;
4. ensure that staff have appropriate training on the duties to reasonably accommodate and to prevent harassment/bullying, and on practices and strategies to implement these duties, including inclusion of students with a disability in regular classrooms;
5. put into place a process to assess student needs and to identify and implement strategies to meet those needs (e.g. case conferencing);
6. put in place a process for the continual reassessment of the programme of any students who has been placed outside the regular classroom; the process should also provide for the reassessment of students who have been returned to the regular classroom;
7. advise students, or their parent(s)/guardian(s), of available accommodations and support services, and the process by which these resources may be accessed;
8. deal with accommodation requests in a timely manner;
9. identify and accurately assess students who, due to a disability, require reasonable accommodation in order to receive effective instruction and fully benefit from the educational service they provide;
10. take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possi-

[27] In addition, for public schools, there are specific responsibilities set out under the *Education Act* and its regulations; see Education Act, R.S.N.B. c. E-1.12; http://www.gnb.ca/0062/acts/acts/e-01-12.htm

ble accommodation and alternative solutions, as part of the duty to reasonably accommodate;
11. prepare, maintain and follow a special education program for students with a disability[28];
12. take steps to include students with a disability in class, extra-curricular and co-curricular activities;
13. obtain expert opinion or advice where needed, and bear the costs of any required disability-related information or assessment;
14. co-operate with any experts whose assistance is required;
15. base decisions on objective and quantifiable, not impressionistic, information[29];
16. maximize a student's right to privacy and confidentiality, for example by sharing information regarding the student's disability only with those directly involved in the accommodation process;
17. limit requests for information to those reasonably related to the nature of the need or limitation, and only for the purpose of facilitating access to educational services;
18. maintain proper documentation of all aspects of the student's academic and special needs assessments and progress;
19. ensure that educational environments are welcoming and that all students treat one another with respect; take immediate remedial action in situations where bullying and harassment may be taking place.

9.2 Responsibilities of Unions, Professional Associations and Third Party Educational Service Providers

Unions (see section 11.5 for more information), professional associations, and third party educational service providers[30] are also part of the accommodation process. As a result, they are required to:

1. take an active role as partners in the accommodation process;
2. facilitate accommodation efforts;
3. ensure that collective agreements do not conflict with the need to reasonably accommodate students with a disability short of undue hardship;
4. interpret and apply collective agreements, classifications, seniority lists, bargaining unit certifications and service contracts in a way that permits reasonable accommodation of students with a disability short of undue hardship);
5. deal with accommodation requests in a timely manner; considering the extent and complexity of the accommodation;

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[28] *B.C.* v. *New Brunswick (Department of Education)* [2004] N.B.H.R.B.I.D. No. 2, No. HR-003-01

[29] *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights*), [1999] 3 S.C.R. 868 at para. 41 ("Grismer case"); http://scc.lexum.umontreal.ca/en/1999/1999rcs3-868/1999rcs3-868.html

30 Third party educational service providers include government departments and agencies – like the regional health authorities that provide speech and other therapies; Family and Community Services that provides social work; and Mental Health clinics might provide counselling services. Third party educational service providers also include non-governmental service providers, such as companies that provide IT or transportation services.

6. ensure that members and staff have appropriate training on the duties to reasonably accommodate and to prevent harassment/bullying, and on practices and strategies to implement these duties, including inclusion of students with a disability in regular classrooms;
7. maximize a student's right to privacy and confidentiality, for example by sharing information regarding the student's disability only with those directly involved in the accommodation process;
8. limit requests for information to those reasonably related to the nature of the need or limitation, and only for the purpose of facilitating access to educational services;
9. ensure that educational environments are welcoming and that all students treat one another with respect; take immediate remedial action in situations where bullying and harassment may be taking place;
10. co-operate with any experts whose assistance is required;
11. fulfill agreed upon responsibilities, as set out in the accommodation plan.

9. 3 Responsibilities of Students and Parents

Students with a disability (or their parent/guardian) have the right to expect reasonable accommodation to the point of undue hardship from education service providers. They also have corresponding responsibilities to:

1. advise education providers of the need for accommodation related to a disability;
2. make their needs known to the best of their ability, in order that education providers may make the requested accommodation[31];
3. answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed;
4. participate in discussions regarding possible accommodation solutions;
5. co-operate with any experts whose assistance is required;
6. fulfill agreed upon responsibilities, as set out in the accommodation plan;
7. work with education providers on an ongoing basis to manage the accommodation process; and
8. advise education providers of difficulties they may be experiencing in accessing educational life, including problems with arranged accommodations.

10. MEIORIN TEST

The limits to the duty to accommodate are set out in what is called the Meiorin Test, which was spelled out by the Supreme Court of Canada in 1999 in the Meiorin[32] and Grismer[33] cases.

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[31] *B.C.* v. *New Brunswick (Department of Education)* [2004] N.B.H.R.B.I.D. No. 2, No. HR-003-01

[32] *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU* [1999] 3 S.C.R. 3 ("Meiorin case"); http://scc.lexum.umontreal.ca/en/1999/1999rcs3-3/1999rcs3-3.html

The Meiorin Test has three parts. To justify a practice or policy that results in a discriminatory level of service, a service provider must show that all three Meiorin conditions have been met, that is:[34]

(1) it adopted the standard for a purpose or goal that is **rationally connected to the function** being performed;
(2) it adopted the standard in **good faith**, in the belief that it is necessary for the fulfillment of the purpose or goal; and
(3) the standard is **reasonably necessary** to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring **undue hardship.**

When applying the Meiorin Test to an educational service, the following questions correspond to the above three requirements:

1. (a) What is the purpose of the education policy, rule or standard—safety, efficiency, other?
   (b) Is the policy, rule or standard a logical way to meet that purpose?
   (c) Does it set requirements that are irrelevant or that are higher than necessary to achieve that purpose?
   (d) Does it arbitrarily exclude groups of students with a disability?

2. (a) What were the circumstances surrounding the adoption of the policy, rule or standard by the education service provider?
   (b) When was the policy, rule or standard created, by whom, and why?
   (c) What other considerations were included in the development of the policy, rule or standard?

3. (a) Is the policy based on facts or unsupported assumptions made by the education service provider?
   (b) Does the policy adversely affect some groups of students more than others?
   (c) Has the policy been designed to minimize its discriminatory effect on students?
   (d) Has the education service provider considered alternatives, such as individual assessment of students, staff and student support, and staff training?
   (e) Would accommodation amount to undue hardship for the education service provider?

For more information about applying the Meiorin Test in the educational context, see the *Moore* case in the Appendix.

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[33] *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights*), [1999] 3 S.C.R. 868 ("Grismer case"); http://scc.lexum.umontreal.ca/en/1999/1999rcs3-868/1999rcs3-868.html

[34] *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights*), [1999] 3 S.C.R. 868at para. 20 ("Grismer case"); http://scc.lexum.umontreal.ca/en/1999/1999rcs3-868/1999rcs3-868.html

11. LIMITS TO THE DUTY TO ACCOMMODATE: UNDUE HARDSHIP

11.1 Elements of Undue Hardship

The courts and boards of inquiry have intentionally set standards that, while demanding, are flexible and adaptable to the circumstances of each case. The Supreme Court of Canada has emphasized also that reasonable accommodation and undue hardship are not independent criteria but alternate ways of expressing the same concept.[35]

Accommodation would amount to undue hardship only if it would alter the essential nature or substantially affect the viability of the service.

What constitutes undue hardship will vary significantly from one case to the next depending on a range of factors, such as the size of the employer, the economic situation, market conditions, the climate of labour relations, the nature of the work or the reliability of recommended technological or adaptive devices.

In its decision in *Meiorin*[36], the Supreme Court of Canada cited with approval its earlier decision in *Renaud* to emphasize again that "[t]he use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test". The Court went on to make the following comments on how to determine the point of undue hardship:

> Among the relevant factors are the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. … The various factors are not entrenched, except to the extent that they are expressly included or excluded by statute. In all cases, … such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case".[37]

While several factors may be considered when establishing undue hardship**, the most commonly recognized factors are:**

- **excessive costs,**
- **serious risk to health or safety, and**
- **impact on other people and on programs.**

These factors are discussed in sections 11.3, 11.4 and 11.5 of this guideline.

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[35] *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970; http://scc.lexum.umontreal.ca/en/1992/1992rcs2-970/1992rcs2-970.html

[36] *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU* [1999] 3 S.C.R. 3 at para. 62 ("Meiorin case"); http://scc.lexum.umontreal.ca/en/1999/1999rcs3-3/1999rcs3-3.html

[37] *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU* [1999] 3 S.C.R. 3 at para. 63 ("Meiorin case"); http://scc.lexum.umontreal.ca/en/1999/1999rcs3-3/1999rcs3-3.html

Another factor is the conduct of the student with a disability and his or her parents. As explained in section 9.3 of this guideline, the student and parent must cooperate in the accommodation process. A failure to cooperate may impose an undue hardship on the education provider and lead to the dismissal of a human rights complaint. In the *Renaud* case, the Supreme Court of Canada said that there is a duty on a complainant to assist the service provider or employer in securing an appropriate accommodation. The Court said[38]:

> "When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation… The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all of the circumstances is turned down, the employer's duty is discharged."

11.2 Proving Undue Hardship

Education providers have the onus of proof to claim the undue hardship defence. Students requesting accommodation do not have to prove that the accommodation can be accomplished without undue hardship. **The evidence required to prove undue hardship must be objective, real, direct and, in the case of cost, quantifiable**. Education providers 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 impressionistic views or stereotypes will not be sufficient.

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, and
- information about the conditions surrounding the activity and their effects on the person or group with a disability.

Medical practitioners, educators, psychologists and parents must work together to determine the appropriate accommodation. The determination should be based primarily on the opinion of experts as to what is in the best interest of the student, and this may not coincide with the wishes of the parent(s) or student. With respect to the programme put in place for a student, an expert medical opinion without input and guidance from an educational and/or psychological perspective is insufficient.

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[38] *Central Okanagan School District No. 23* v. *Renaud* [1992] S.C.R. 970 at para. 44; http://scc.lexum.umontreal.ca/en/1992/1992rcs2-970/1992rcs2-970.html

> **Example:** A medical doctor "prescribed" that a Teacher Assistant be provided for a student with a disability. School officials decided that an educational perspective was needed before making this determination. They consulted a multidisciplinary team before deciding whether a Teacher Assistant was required.

It is important that educational service providers document their efforts to accommodate. Evidence of long term planning to improve accommodation will greatly assist in supporting a defence of undue hardship. One of the critical questions is whether the decision maker has explored all other reasonable and less discriminatory options.

11.3 Excessive Costs

While many forms of accommodation are not costly, other forms of accommodation may be excessively costly. However**, a high standard applies** when arguing that undue hardship would result due to excessive costs.

The Supreme Court of Canada has said that, "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".[39]

What constitutes excessive costs depends in part on the size and budget of the educational institution in question**.** The relevant institution in the case of public schools is the provincial government and the relevant budget is the provincial budget. In the *Moore* case, the British Columbia Human Rights Tribunal said[40]:

> "The funding arrangements for education are similar to those for hospitals in *Eldridge*.... In *Eldridge*, it was the government that was found not to have reasonably accommodated the needs of the deaf by failing to fund interpretation services.
>
> "...In my view, the responsibility for the provision of educational services in B.C. falls on the Province. The fact that the Province has chosen to fulfill that responsibility by creating a statutory scheme which gives school boards responsibility for the delivery of the service does not change that responsibility."

For excessive costs to justify a failure to accommodate a student in a public school, they must be so high as to create an undue hardship to the provincial government.

Education providers cannot use limited resources or budgetary restrictions as a defence to the duty to accommodate without first meeting the formal test for undue hardship based on costs. Further, education providers are not to decide which accommodations

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[39] *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights*), [1999] 3 S.C.R. 868 at para. 41 ("Grismer case"); http://scc.lexum.umontreal.ca/en/1999/1999rcs3-868/1999rcs3-868.html

[40] *Moore* v. *B.C. (Ministry of Education) and School District No. 44*, 2005 BCHRT 580, para. 706 & 714; http://www.bchrt.bc.ca/decisions/2005/pdf/Moore_v_BC_(Ministry_of_Education)_and_School_District_No_44_2005_BCHRT_580.pdf

are most appropriate for students based on financial considerations or budgetary constraints. **Whether an accommodation is "appropriate" is 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 or not this "most appropriate" accommodation would result in undue hardship.

In determining whether a financial cost would "alter the essential nature or substantially affect the viability" of the educational 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 (e.g. a small private school) will not likely be one for a larger educational institution (e.g. the provincial government, in the case of public schools);
- The size of the school building;
- Interchangeability of workforce;
- Interchangeability of facilities and ease with which facilities can be adapted;
- Whether costs can be recovered in the normal course of operation;
- Whether other divisions, departments, etc. of the educational institution can help to absorb part of the costs;
- Whether the costs can be phased in over a few years. This should be considered only after the accommodation provider has demonstrated that the most appropriate accommodation could not be accomplished immediately;
- The possibility of setting aside a certain percentage of money per year to be placed in a reserve fund to be used for accommodation issues. Again, this should be considered only after it has been demonstrated that the most appropriate accommodation could not be accomplished immediately;
- Whether the educational programs and services for all students would be substantially and permanently altered. For example, would a district education council be forced to cancel its music programs to fund an accommodation?

Where the most appropriate accommodation would result in undue hardship, education providers should consider "next best" alternatives, or interim measures while the most appropriate accommodation is being phased in or implemented at a later date.

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. Costs of accommodation must be distributed as widely as possible within the institution responsible for accommodation so that no single school or department is disproportionately burdened with the costs of accommodation. The appropriate basis for evaluating the costs is based on the budget of the institution as a whole[41], not the department in which the student with the disability has requested an accommodation.

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[41] In the case of public schools in New Brunswick, the relevant institution is the entire provincial government. *Moore* v. *B.C. (Ministry of Education) and School District No. 44*, 2005 BCHRT 580, para. 708, 713-714;

Where education providers receive funding from government to promote accessibility and meet the needs of students with a disability, they should track accommodation data and alert the government to any funding deficiencies that exist.

> **Example**: A student needs a teacher assistant. However, her parent is informed that all the teacher assistants have full caseloads and are unable to take an additional student without withdrawing support from an existing student. The parent contacts the District Education Council. It determines that the entire budget for Teacher Assistants has been committed, but a surplus is likely in the transportation budget. It uses that anticipated surplus to hire an additional Teacher Assistant, and advises the Department of Education of the shortfall in funding for Teacher Assistants.

Larger organizations, in particular governments, may be in a better position to set an example or provide leadership in accommodating persons with a disability. Accommodation costs will likely be more easily absorbed by larger organizations.

The relevant institution for public schools is the government of New Brunswick[42] since the government is required to ensure that district education councils have access to sufficient funding to ensure equal access to education. The councils, in turn, have a responsibility to provide adequate funding to schools to enable the provision of accommodations.

Tax deductions and other government benefits flowing from the accommodation must also be considered.

It should be noted that implementing universal design principles during building construction can avoid potentially expensive after-the-fact adaptations.

11.4 Serious Risk to Health or Safety

Maintaining a safe learning environment for students, school staff and educators alike is an important objective. Health and safety issues will arise in various educational contexts and have the potential to affect individual students with a disability, other students, educators, and school staff. Depending on the nature and degree of risk involved, it may be open to education providers to argue that accommodating a student with a disability would amount to an undue hardship.

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http://www.bchrt.bc.ca/decisions/2005/pdf/Moore_v_BC_(Ministry_of_Education)_and_School_District_No_44_2005_BCHRT_580.pdf

[42] *Moore* v. *B.C. (Ministry of Education) and School District No. 44*, 2005 BCHRT 580, para. 708, 713-714; http://www.bchrt.bc.ca/decisions/2005/pdf/Moore_v_BC_(Ministry_of_Education)_and_School_District_No_44_2005_BCHRT_580.pdf

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 modified or waived. However, modifying or waiving health and safety requirements may create risks that have to be weighed against the student's right to equality.

It is important to substantiate the actual degree of risk in question, rather than act on inaccurate or stereotypical perceptions that may have little to do with a student's actual limitations.

> **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 she believes that it will be too dangerous. The principal makes 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 zoo without incident.

Where a student is placed in an educational setting outside the regular classroom due to health and safety risks, the student is entitled to periodic reassessment to determine whether a return to the regular educational program is appropriate. The student should continue to be re-assessed after being returned to the regular classroom.

> **Example**: A student with bi-polar disorder is unable to attend school due to uncontrollable and violent outbursts associated with her disability. After a period of medical treatment, she is able to manage her disability effectively. At this point, the school arranges to meet with the student and reassess her accommodation needs. As a result, the student is returned to the regular classroom, and later reassessed. The duty to reasonably accommodate is dynamic and ongoing and must be responsive to changes in the nature of a student's disability.

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

- Is the student (or his or her parents) willing to assume the risk where the risk is solely to his or her own health or safety? Risk is evaluated after all accommodations have been made to reduce it.
- 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? Risk is evaluated after all accommodations have been made to reduce it.
- 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, the following factors may be considered:

- 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 occur frequently?
- 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.

Parents of a student with a disability should be consulted in decisions that concern the safety of their child. They may need to sign a consent form.

Where a student with a disability engages in behaviour that impacts upon the well-being of others, it may be open to education providers to argue that to accommodate that student would cause undue hardship on the basis of 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 reduce the risk. It will be up to the education provider to provide objective and direct evidence of the risk. Suspicions or impressionistic beliefs about the degree of risk posed by a student, without supporting evidence, will not be sufficient.

A claim of undue hardship must stem from a genuine interest in maintaining a safe learning environment for all students, rather than as a punitive action. Even where a student 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 and increased staff support, where possible and appropriate.

Ultimately, education providers must balance the rights of students 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 where 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. The accommodation process must be fully explored, to the point of undue hardship.

11.5 Impact on Other People and on Programs

In the *Grismer* case, Judge McLachlin of the Supreme Court of Canada stated:

> "This decision stands for the proposition that those who provide services subject to the *Human Rights Code* must adopt standards that accommodate people with disabilities where this can be done **without sacrificing their legitimate objectives** and without incurring undue hardship.[43]"

Provided an appropriate process has been followed and all other options have been eliminated, **educational providers may also refuse an accommodation if it would create an undue hardship as a result of its impact on other students, on staff or on the general public.** The proposed accommodation must not significantly interfere with the rights of others.

> **Example:** A student in grade 6 diagnosed with ADHD has a serious behavioural problem. His classroom teacher finds it impossible to deal with him and teach other students. When the teacher receives the support of a school team in developing a "plan" for working with the student, as well as the help of a teacher assistant for several hours a day, she is able to keep the student in class and teach effectively.

Unions must cooperate in the accommodation process to the point of undue hardship[44], and are liable under the *Human Rights Code* if they fail to do so. Clauses in collective agreements that conflict with the *Human Rights Code* are invalid. Human rights legislation sets a standard below which parties cannot contract. The substantive rights and obligations of human rights laws are part of each collective agreement, and a labour grievance arbitrator has the power to enforce them as if they were part of a collective agreement.[45]

This may mean that a union may need to allow a member (e.g. with special skills or other qualifications required for accommodating a student with a disability) to perform tasks that are outside their classification or bargaining unit, or to occupy a position to which they would not be normally be entitled due to their bargaining unit or lack of seniority.

However, according to the Meiorin Test**, the impact on unions and their members is one of several factors that must be considered** when determining whether an accommodation would cause undue hardship.

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[43] *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights*), [1999] 3 S.C.R. 868 at para. 44 ("Grismer case"); http://scc.lexum.umontreal.ca/en/1999/1999rcs3-868/1999rcs3-868.html

[44] *Central Okanagan School District No. 23* v. *Renaud*, [1992] 2 S.C.R. 970; http://scc.lexum.umontreal.ca/en/1992/1992rcs2-970/1992rcs2-970.html

[45] *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*, [2003] 2 S.C.R. 157 (Supreme Court of Canada); http://scc.lexum.umontreal.ca/en/2003/2003scc42/2003scc42.html

Example: A school determines that a middle school student with autism who is moving on to high school would be best served if his existing teacher assistant was transferred to the high school because the assistant has specialized training relating to autism. However, the teacher assistant refuses the reassignment, citing her collective agreement, which gives teacher's assistants the right to select work locations based on seniority. According to the Meiorin Test, the impact on the teacher assistant and the labour union is one of several factors (including the availability of other teacher assistants with similar training) that must be considered when determining whether not transferring the teacher assistant would constitute undue hardship.

A minor disruption of a collective agreement is not undue hardship, but a substantial departure from the normal operation of a collective agreement may amount to undue hardship.

Educational service providers who claim undue hardship may cite the failure of a union to cooperate in accommodation as a factor.

12. FILING A COMPLAINT

Any person claiming to be a victim of discrimination (including a failure to reasonably accommodate) or harassment may file a complaint with the Human Rights Commission. If the complaint is made in bad faith, or if it was filed more than 12 months after the incident of discrimination, the Commission may decide not to deal with it.

There is no charge for filing a complaint, and staff members of the Commission are available to discuss potential complaints over the telephone or in person. Persons who have any questions or require further information regarding the *Code* are encouraged to contact the Commission.

The human rights complaint process usually involves investigation and mediation. The parties are encouraged to resolve disputes through mediation. Only a few cases are referred to a tribunal for a Human Rights Board of Inquiry. Damages and other remedies may be ordered by a Board of Inquiry against education providers that fail to reasonably accommodate a student with a disability.

In the case of harassment, discrimination and other non-professional conduct by adults in public schools, a separate complaint process is currently provided by a Department of Education policy. A complaint can be filed with the Human Rights Commission whether or not a complaint was filed under that policy.

13. FOR MORE INFORMATION

For further information about the *Human Rights Code* or this guideline, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

The Commission has also published the following related publications:

- Guideline for BFOQ's and BFQ's and the Duty to Accommodate (Adopted November 9, 2001); www.gnb.ca/hrc-cdp/e/Guideline-BFOQs-BFQs-Duty-Accommodate-New-Brunswick.pdf
- Guideline on Accommodating Physical and Mental Disability at Work (Adopted April 22, 2004); www.gnb.ca/hrc-cdp/e/Guideline-on-Accommodating-Disability-at-Work.pdf
- Accommodation at Work; Assuring the Continued Employment of New Brunswickers after a Permitted Leave or Workplace Accident; Rights, Obligations and Best Practices under the Workers' Compensation Act, Employment Standards Act and Human Rights Act (October 2006); www.whscc.nb.ca/docs/DTAAccommodationatwork_e.pdf

Additional information is available at the Commission's website at www.gnb.ca/hrc-cdp or e-mail hrc.cdp@gnb.ca.

Appendix

Legal Framework

INTERPRETATION PRINCIPLES

The Human Rights Commission gives the *Human Rights Code* a broad and purposive interpretation consistent with international law, the *Canadian Charter of Rights and Freedoms*[46], and the approach taken by courts and tribunals in Canada with respect to the interpretation of human rights legislation.

The Commission is guided in part by international human rights case law and the treaty obligations that apply to New Brunswick as a result of international human rights treaties that have been ratified by Canada, such as the *Convention on the Rights of the Child*[47] and the *Convention on the Rights of Persons with Disabilities*[48].

The courts have recognized that human rights laws have a quasi-constitutional nature and take precedence over ordinary laws in case of conflict,[49] and must be given a broad and purposive interpretation. **Should there be a conflict between the *Human Rights Code* and the *Education Act* and its regulations, the *Code* prevails.**

Human rights legislation sets a standard below which parties cannot contract. The substantive rights and obligations of human rights laws are part of each collective agreement, and a labour grievance arbitrator has the power to enforce them as if they were part of a collective agreement.[50]

CASE LAW: THE MOORE CASE

The *Moore* v. *B.C. (Ministry of Education) and School District No. 44*[51] case is one of the leading cases on accommodation of students with a disability. It was decided by the British Columbia Human Rights Tribunal in 2005.

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[46] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.; http://laws.justice.gc.ca/en/charter/index.html

[47] *Convention on the Rights of the Child;* http://www.unhchr.ch/html/menu3/b/k2crc.htm

[48] *Convention on the Rights of Persons with Disabilities;* http://www.un.org/disabilities/convention/conventionfull.shtml

[49] *Newfoundland Association of Public Employees* v. *Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3, at para. 20 (Supreme Court of Canada); http://scc.lexum.umontreal.ca/en/1996/1996rcs2-3/1996rcs2-3.html

[50] *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*, [2003] 2 S.C.R. 157 (Supreme Court of Canada); http://scc.lexum.umontreal.ca/en/2003/2003scc42/2003scc42.html

[51] *Moore* v. *B.C. (Ministry of Education) and School District No. 44*, 2005 BCHRT 580; http://www.bchrt.bc.ca/decisions/2005/pdf/Moore_v_BC_(Ministry_of_Education)_and_School_District_No_44_2005_BCHRT_580.pdf

In that case, the complainant had alleged that the respondents failed to identify his son's disability, dyslexia, soon enough and had failed to provide him with the support he required to properly access educational services. He also alleged that they systemically discriminated against children with severe learning disabilities.

The Tribunal stated that access to the public education system entails more than simply being able to attend public school. Students must be provided with the required supports and accommodations in order for the access to be beneficial.

The Tribunal found[52] that the respondents had failed to accommodate the son's learning needs. It found that the District had discriminated against the complainant's son by:

- failing to ensure that he received early intensive intervention;
- not providing him with an individual needs-based assessment;
- not providing an Orton-Gillingham or alternative program within the district;
- not following its own recommendation that he attend the District Diagnostic Centre (DC1), a specialized learning environment with intensive remediation services; and
- not ensuring that, following the DC1 closure, other sufficiently intense and effective interventions were in place to replace it.

The Tribunal found that the District systemically discriminated against all students with Severe Learning Disabilities (SLD) by:

- closing the DC1 without ensuring that other sufficiently intensive interventions were available thereafter;
- not ensuring that there was a range of services for SLD students adequate to their needs; and
- disproportionately cutting core services for SLD students.

Further, the Tribunal found[53] that the Ministry had systemically discriminated against all students with SLD by:

- establishing a funding cap that limited the available funding for SLD students, which resulted in under-funding of SLD students;
- under-funding the District until after the District experienced a financial crisis that resulted in significant cuts to the services provided to SLD students; and

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[52] *Moore* v. *B.C. (Ministry of Education) and School District No. 44*, 2005 BCHRT 580 at paras. 903 to 905; http://www.bchrt.bc.ca/decisions/2005/pdf/Moore_v_BC_(Ministry_of_Education)_and_School_District_No_44_2005_BCHRT_580.pdf

[53] *Moore* v. *B.C. (Ministry of Education) and School District No. 44*, 2005 BCHRT 580 at para. 887; http://www.bchrt.bc.ca/decisions/2005/pdf/Moore_v_BC_(Ministry_of_Education)_and_School_District_No_44_2005_BCHRT_580.pdf

- focusing its monitoring only on spending and fiscal concerns, while failing to ensure that early intervention and a range of services for SLD students was mandatory.

The Tribunal found that neither the District nor the Ministry had established that they could not accommodate the complainant's son and other SLD students without undue hardship. The Tribunal ordered the respondents to reimburse the complainant for his son's attendance at private schools until the completion of grade 12. It also awarded $10,000 for the injury to the complainant's son's dignity. Further, the Tribunal made an order to the District and the Ministry with regard to funding, delivery of services and early intervention.

Discussion: How the Meiorin Test was applied in the *Moore* case[54]

What standard was applied?

> "The Ministry and the District will provide support and accommodation services to Jeffrey, and other SLD students, to allow appropriate and meaningful access to the benefits of the educational system, based on then known best practices and available resources."

Was the standard for a purpose rationally connected to the function being performed by the Department and the District?

> "[Yes, the standard] is rationally connected to the provision of educational services. Neither the District nor the Ministry can be expected to provide services on other than what were the then known best practices. Further, it must be acknowledged that government funds are not infinite and some limits on funding have to be established to ensure that the District and the Ministry are able to carry out the function of providing educational services as balanced against the Province's other constitutional responsibilities."

Was the standard adopted in good faith?

> Yes, the standard was adopted in good faith.

Could the Department and the District accommodate the complainant and other learning disabled students without undue hardship?

> To establish undue hardship, the Department and the District had to lead evidence that they considered and rejected all viable forms of accommodation to meet the needs of the complainant and other learning disabled students. In this

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[54] *Moore* v. *B.C. (Ministry of Education) and School District No. 44*, 2005 BCHRT 580, paras. 916 to 941; http://www.bchrt.bc.ca/decisions/2005/pdf/Moore_v_BC_(Ministry_of_Education)_and_School_District_No_44_2005_BCHRT_580.pdf

case, the evidence did not support that they had done so. As well, the Department had failed to provide evidence outlining a cost defence.

OTHER CASE LAW

Below are summaries of the most recent court and tribunal decisions involving educational services at the elementary, middle, high and post-secondary levels, in alphabetical order.

B.C. v. *New Brunswick (Department of Education)*[55] (2004) (New Brunswick Human Rights Board of Inquiry)

The complainant's son was diagnosed with ADHD. She alleged that his educational needs were not being met by the Department of Education. She alleged that, after years of receiving inadequate educational services within the public education system in New Brunswick, her son was functioning at least two to four years behind his peers in most subjects. As a result, she requested that the Department of Education pay for him to attend a private school in Nova Scotia. This private school specializes in teaching children with learning disabilities and provides nearly one-on-one instruction. The Department refused to send him to this school despite the fact that they had previously paid for such attendance by other students. Prior to the complainant's son attending the school, when the Department began to implement inclusion in schools, it had made a decision not to continue to pay for this type of service (a private, segregated school).

The majority of the Board of Inquiry found that the Department had met the needs of the complainant's son, and therefore a prima facie complaint of discrimination had not been set out. The majority found that the Department's effort to accommodate had been reasonable, and that the complainant had failed in her duty under the *Education Act* to communicate effectively with educational officials and provide all pertinent information about her son. However, it must be noted that the minority decision stated that the Department had failed to meet the educational needs of the complainant's son.

Eaton v. *Brant County Board of Education*[56] (1996) (Supreme Court of Canada)

The complainant's daughter was a 12 year old student with cerebral palsy who was unable to communicate through speech, sign language or other communication systems. She had disabilities related to vision and mobility that resulted in her mainly using a wheelchair. She was defined as an exceptional student by an identification placement and review committee, and her parents requested that she be placed in a neighbourhood school on a trial basis instead of a special education class. She was provided with a full-time assistant whose principal function was to attend to her needs. However, after three years, it was decided, based on the information provided by the teachers and as-

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[55] *B.C.* v. *New Brunswick (Department of Education)* [2004] N.B.H.R.B.I.D. No. 2, No. HR-003-01

[56] *Eaton* v. *Brant County Board of Education* [1997] 1 S.C.R. 241 (Supreme Court of Canada); http://scc.lexum.umontreal.ca/en/1997/1997rcs1-241/1997rcs1-241.html

sistants, that the placement was not in the best interests of the complainant's daughter and in fact may harm her.

One of the issues before the Supreme Court of Canada was whether the school board and Special Education Tribunal had contravened section 15 of the *Canadian Charter of Rights and Freedoms.* The Court ruled that they had balanced the pupil's various educational interests appropriately, had taken into account her special needs, and had included the requirement of ongoing assessment of her best interests so that any changes in her needs could be reflected in her placement. The Supreme Court stated that a decision reached after such an approach could not be considered a burden or a disadvantage imposed on a child and, therefore, the decision of the Tribunal had not violated her equality rights under Section 15 of the *Charter*.

The Supreme Court further noted that the parents and school board had a continuing obligation to work together to meet the complainant's present and future needs, and that the parents' view of their child's best interests is not dispositive of the question.

***Eldridge v. British Columbia (Attorney General)*[57] (1997) (Supreme Court of Canada)**

The appellants were born deaf and their preferred means of communication was sign language. They maintained that absences of interpreters in hospitals impaired their ability to communicate with their doctors and other health care professionals, thus increasing the risk of misdiagnosis and ineffective treatment. They sought a declaration from the court that the failure of the Province to provide sign language interpreters as an insured benefit to assist them in their communication with their doctors and health care providers violated their rights under section 15 of *the Canadian Charter of Rights and Freedoms*.

The Province did not provide any health services directly, as it paid for them to be delivered by medical health care providers on a fee-for-service basis, and hospitals were funded through a global lump sum payment. Health care providers were reimbursed for specific services that were provided for through the Medical Services Plan.

The Supreme Court of Canada found that the failure of the Medical Services Commission and hospitals, and hence the Province, to provide sign language interpretation where it was necessary for effective communication violated s. 15(1) of the *Charter* with regard to the rights of deaf persons.

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[57] *Eldridge v. British Columbia (Attorney General)* [1997] S.C.J. No. 86; http://scc.lexum.umontreal.ca/en/1997/1997rcs3-624/1997rcs3-624.html

Hannaford v. *Douglas College*[58] (2000) (British Columbia Human Rights Tribunal)

The complainant was enrolled in classes with the goal of becoming a child and youth care counsellor. She claimed to have a visual and reading disability related to Graves disease and a cognitive and learning disability related to a childhood fall. The College provided her with extra time to write her exams and an access aide who assisted her in obtaining information from the library and organizing her materials. She was also seeing a psychologist and an educational therapist.

The complainant informed the College that she did not want any more contact with the educational therapist. In response, the College withdrew all services, saying that the complainant had received more services than she needed based on her marks and what she described as her disability. The complainant alleged that the College withdrew services she needed in order to accommodate her cognitive and learning disability.

The Tribunal found that she did not have a cognitive and learning disability, nor did she inform the College of it. The Tribunal also found that the College had reasonably accommodated the complainant for her reading and visual disability.

Howard v. *University of British Columbia (No. 1)*[59] (1993) (British Columbia Council of Human Rights)

The complainant is profoundly deaf. His native language is American Sign Language. He requested that the university provide him with a sign language interpreter for a number of courses he needed in order to obtain a teaching certificate. The University refused to provide him with the level of interpretive services necessary to complete his teaching certificate.

The Council of Human Rights found that a university education was a service customarily available to the public and that sign language interpreters are an accommodation required by deaf students to enable them to use the University's educational services.

Finally, the Council concluded that the University had failed to accommodate the complainant to the point of undue hardship. The Council agreed that absorbing the cost of the interpreter would have some impact on the University's budget, but found that there was no evidence that it would cause more than a minor interference with the operations of the University.

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[58] *Hannaford* v. *Douglas College* (2000), 37 C.H.R.R. D/336, 2000 BCHRT 25, British Columbia Human Rights Tribunal; http://www.bchrt.bc.ca/decisions/2000/pdf/hannaford_v_douglas_college_2000_bchrt_25.pdf

[59] *Howard* v. *University of British Columbia (No. 1)* (1993), 18 C.H.R.R. D/353, British Columbia Council of Human Rights.

***School District No. 44 (North Vancouver) v. Jubran*[60] (2005) (British Columbia Court of Appeal)**

The complainant alleged that during the five years that he attended secondary school, he was verbally and physically assaulted by other students because of his perceived homosexuality. He alleged that he was called "homo, faggot, and gay" and was spat on, shoved, kicked and punched by the other students, and that the school board was aware of this harassment but failed to provide him with a safe, harassment-free school environment. The school board acknowledged that it was aware of some of the harassment, but argued that it should not be held responsible for failing to eradicate discrimination among the student population.

The student had complained to the school and school board and at first school personnel did not feel that the harassment was unusual, as many students complained that they were being picked on. However, school personnel did identify three students who were the main perpetrators and spoke to them about their inappropriate behaviour and possible consequences if the behaviour continued, including expulsion.

Approximately one year later, the school developed and formalized a Code of Conduct policy that was in accordance with the guidelines set by the school board. This Code of Conduct identified the principles of student conduct and certain forms of prohibited conduct, such as fighting and plagiarism. However, one year later, the complainant was still being subjected to the same behaviour and he reported it to school personnel.

After the complainant had filed his human rights complaint, the students were advised by school personnel that if their behaviour continued, it could result in a suspension. Some behaviour did continue and some students received suspensions. In one incident, a student burned a hole in the complainant's shirt while the complainant was wearing it. This student was not permitted to go on a class camping trip, but, while on the trip, other students urinated on the complainant's tent and spoke about dipping a student in acid. The school stated that they could not investigate the incident because, when the students talked about dipping a student in acid, they did not refer to the complainant by his name (they referred to a student who had a hole burned in his shirt).

The British Columbia Human Rights Tribunal found that the complainant had been discriminated on the basis of sexual orientation; it was not necessary that he consider himself to be a homosexual or that his harassers believe that he was a homosexual. The Tribunal also found that the school board was liable for the discrimination. While school personnel had responded to the situation with detentions and suspensions of the individual harassers and had had meetings with the parents, they had failed to implement a school-wide anti-bullying programme early enough to stop the harassment experienced by the complainant.

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[60] *Jubran* v. *Board of Trustees*, [2002] B.C.H.R.T. 10, http://www.bchrt.bc.ca/decisions/2002/pdf/jubran_v_board_of_trustees_2002_bchrt_10.pdf (British Columbia Human Rights Tribunal); affirmed [2005] B.C.J. No. 733, 2005 BCCA 201, http://www.courts.gov.bc.ca/Jdb-txt/CA/05/02/2005BCCA0201err2.htm (British Columbia Court of Appeal)

The Tribunal awarded the complainant $4,000 as general damages. It noted that the largest general damages award in British Columbia at that time was $7,500 and that the complainant had not established that the school and school board were aware of the harassment during the entire five year period. The British Columbia Court of Appeal affirmed the Tribunal's decision.

***Justice Institute of British Columbia* v. *British Columbia (Attorney General)*[61] (1999) (British Columbia Supreme Court)**

The complainant was a trainee police constable who was removed from training when he performed unsatisfactorily in the course testing. He had not identified himself to his instructors as someone with a learning disability, nor had he requested accommodation. After his unsatisfactory test performance, he was assessed as having a learning disability. The doctor who completed the complainant's neuropsychological assessment said that, if the complainant were able to write exams in a private room and given additional time, he would be able to complete the required training successfully. Even with this assessment information, the Justice Institute continued to refuse to let the complainant carry on in the program. The Court ruled that the complainant had a learning disability that could be accommodated by allowing him to take examinations in an alternate way, such as having more time to write an exam.

***Robb* v. *St. Margaret's School*[62] (2003) (British Columbia Human Rights Tribunal)**

The complainant was a grade three student enrolled in a private school. She was assessed during her grade three year as having a severe learning disability involving deficits in symbolic processing, nonverbal reasoning and visual-motor co-ordination. The assessor determined that she needed a comprehensive individual education plan, remedial reading instruction, adaptations for reading in the classroom, bypass strategies for writing (for example, scribing and voice dictation), a modified math program, reduced quantity of assigned work, opportunities to advance conceptually, and strategies for management of her attention patterns. Two months later, the school informed the complainant's parents that the complainant would not be able to enrol in the school for the next school year. The Tribunal found that re-enrolment was withheld because of her learning disability. It found that the school's decision to withhold enrolment was made by someone with no expertise in learning disabilities, based on vague criteria and on the advice of staff who lacked experience in dealing with students with severe learning disabilities. The Tribunal concluded that it would not have been an undue hardship to resolve the situation by less drastic means, and that it was discriminatory to deny the complainant enrolment at the school.

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[61] *Justice Institute of British Columbia* v. *British Columbia (Attorney General)* (1999) B.C.J. no. 1571; (1999) 17 Admin. L.R. (3d) 267 (British Columbia Supreme Court); http://www.courts.gov.bc.ca/jdb-txt/sc/99/10/s99-1048.txt

[62] *Robb* v. *St. Margaret's School* (2003), 45 C.H.R.R. D/276, 2003 BCHRT 4, British Columbia Human Rights Tribunal; http://www.bchrt.bc.ca/decisions/2003/pdf/robb_v_st_margarets_school_2003_bchrt_4.pdf

CONCLUSION

Legal principles from the case law provide direction on a wide range of issues important to the provision of services in the education sector. The general duty to accommodate requires that service providers accommodate to the point of undue hardship.

From *Grismer* and *Meiorin*, it is apparent the law requires that all policies include a process for accommodating persons to the point of undue hardship. The process must include individual testing of persons who are negatively treated by the policy to see if they can meet the requirements of the policy with reasonable accommodation.