

# **Guideline on Accommodating Students with a Disability (K-12)**

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**HUMAN RIGHTS COMMISSION**  
**COMMISSION DES DROITS**  
DE LA PERSONNE DU NOUVEAU-BRUNSWICK

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***Please Note:***

The New Brunswick Human Rights Commission (“Commission”) develops guidelines as part of its mandate to prevent discrimination and educate the public. These guidelines are intended to help individuals understand their legal rights and responsibilities under the New Brunswick *Human Rights Act* (“Act”).

This guideline gives the Commission’s interpretation of the provisions of the *Act* relating to discrimination in services on the basis of physical or mental disability, as set out in section 6 of the *Act*.<sup>1</sup> This guideline is subject to decisions by boards of inquiry, tribunals and courts. Read this guideline in conjunction with those decisions and with the specific language of the *Act*. If there is any conflict between this guideline and the *Act*, the *Act* prevails. This guideline is not a substitute for legal advice. Direct any questions regarding this guideline to the Commission’s staff.

## **1. INTRODUCTION**

Section 6 of the New Brunswick *Human Rights Act* prohibits discrimination based on 16 grounds, including physical or mental disability, in “accommodation, services and facilities available to the public.” As such, services that are ordinarily available to the public cannot be delivered in a way that arbitrarily or unjustifiably excludes people because they possess one or more of the characteristics protected by the *Act*.<sup>2</sup> Educational institutions – regardless of whether they are privately or publicly operated – are considered service providers under section 6.

Discrimination does not need to be intentional or 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.

Complaints alleging discrimination based on disability are the most common complaints received by the New Brunswick Human Rights Commission. Though education providers must not discriminate on any of 16 grounds listed in the *Act*, the accommodation of students with disabilities can be complex. This guideline is meant to describe a legal framework so that students, parents, and education providers may understand their responsibilities under the *Act* with respect to students with disabilities.

This guideline sets out the Commission’s legal interpretation of the *Act* in relation to the duty to 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 accommodate disabled parents of students who may or may not have a disability.

It does not apply to schools that fall under federal jurisdiction, 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, or the relevant policies of the Department of Education and Early Childhood Development. Readers may wish to consult those documents in addition to this guideline.

## **2. WORDING OF THE HUMAN RIGHTS ACT**

The section of the *Act* that pertains to education is Section 6, which reads as follows:

- 6(1) No person, directly or indirectly, alone or with another, by himself, herself or itself or by the interposition of another, shall, based on a prohibited ground of discrimination,
- (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.

“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 resulting from bodily injury, illness or birth defect and includes, but is not limited to, a disability resulting from any degree of paralysis or from diabetes mellitus, epilepsy, amputation, lack of physical coordination, 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” includes

- (a) an intellectual or developmental disability,
- (b) a 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) a mental disorder.

### **3. MEANING OF DISABILITY**

A physical or mental disability does not have to be a permanent condition in order to be considered a disability under the *Act*. The *Act's* definition of disability applies to a number of situations where the disability is transient, episodic, temporary or non-evident. However, a common transitory ailment routinely experienced by most people (e.g. cold, flu, and strep throat) is not considered a disability.

A wide variety of conditions can constitute a physical disability as defined in the *Act*. Some of the more common ones are:

- acne;
- asthma;
- autoimmune disease;
- being blind or having low vision;
- cancer;
- chronic fatigue syndrome;
- colour blindness;
- Crohn's disease;
- being deaf or hard of hearing;
- deformities;
- environmental sensitivities;
- epilepsy or seizures;
- excessive breast growth;
- injuries to limbs and body parts, including broken bones and amputations;
- irritable bowel syndrome;
- lupus;
- migraine headaches;
- multiple sclerosis;
- muteness or speech impediments;
- nerve pain and/or nerve disorder;
- obesity;
- paralysis;
- seasonal allergies;
- spina bifida;
- thyroid disease.

Similarly, there are numerous conditions that constitute a mental disability. Some of the more common ones are:

- adjustment disorder;
- Attention Deficit Hyperactivity Disorder (ADHD);
- anxiety;
- autism;
- bi-polar disorder

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- depression;
- dyslexia;
- intellectual disabilities;
- kleptomania;
- learning disabilities;
- obsessive-compulsive disorder;
- paranoid schizophrenia.

Note that that these are not exhaustive lists, and other medical conditions could be considered physical or mental disabilities under the *Act*. A condition found to be disability in one case may not be a disability in other cases due to differences in the severity of the condition, in how it is perceived, in what the person was attempting to do and in what kind of situation.

Some types of disabilities are “invisible” disabilities, in that they are not readily apparent to the average onlooker. Examples of such disabilities include learning disabilities, chronic fatigue syndrome, environmental sensitivities, being deaf or hard of hearing, and epilepsy.

The *Act* also provides protection for anyone who is perceived as having either a physical or mental disability. This includes:

- individuals whose disability does not actually result in any functional limitations but who experience discrimination because others believe their disability makes them less able;
- individuals who have recovered from a disability but are discriminated against because of their past disability;
- individuals who are discriminated against based on the real or perceived *possibility* that they may develop a disability.

## **4. DUTY TO ACCOMMODATE**

All students, including students with a physical or mental disability, have a right to meaningful access 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 effective instruction and fully benefit from the educational service they provide. They also have a legal obligation to accommodate 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 that fail to reasonably accommodate a student or parent with a disability.

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The duty to reasonably accommodate is not specifically mentioned in legislation, but comes 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*<sup>3</sup> and in the various human rights (anti-discrimination) laws that apply in Canada.

### **4.1 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, including:

- intellectual and academic needs;
- communication needs;
- emotional and social needs; and
- physical and personal safety needs.<sup>4</sup>

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, 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 the 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.

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**Example:** A school requires that all students in a course pass an in-class essay test worth 100% of the student's final grade. A student with a learning disability has difficulty processing large amounts of written material under strict time constraints, and provides medical documentation indicating a need for accommodation with respect to the 100% essay. As the 100% essay was not an essential requirement of the course and potentially discriminatory under the circumstances, the instructor modifies the method of assessment for the student. The student is given several assignments throughout the term, and is provided additional time to complete them.

**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 the community and employment. A school does not deny such requests for admission from students with disabilities, and accommodates their needs in a manner similar to other students with disabilities.

The role of parents of students in public schools is recognized by the *Education Act*.<sup>5</sup> 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 interactions 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 consistently stated that reasonableness is a consideration in accommodation cases. Persons seeking accommodation are entitled to reasonable accommodation to the point of undue hardship, and not necessarily the perfect solution or 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.

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When a lack of accommodation is alleged, many factors are considered by the Commission to determine whether reasonable accommodation has been offered. They include, but are not 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;
- whether the accommodation requirements conflict with the accommodation requirements of other students or staff members;
- the ability of the education provider to provide all of the recommended or requested accommodations to the point of undue hardship;
- accommodations offered by the education provider compared to those recommended by the relevant professionals, and those requested by the student or parent; and
- accommodations accepted or refused by the student and/or parent(s).

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 parent(s).

**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.

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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.

### **4.2 Basic Principles of Accommodation**

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.** Education providers must fashion accommodation solutions in a manner that respects the dignity of students with a disability.<sup>6</sup> 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.<sup>7</sup> Respect for dignity also includes taking into account how an accommodation is provided, including the level of involvement by the student (and/or parent(s) or guardian(s)) in the process.

Educators have a duty to maintain a positive educational environment for all persons they serve.<sup>8</sup> 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.<sup>9</sup>

Reasonable accommodation is fact-specific and not easily defined. Each case must be considered based on its own facts to determine whether a service provider has taken

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reasonable measures to accommodate a disability.<sup>10</sup> For 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. In another situation, 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 a disability that causes muscle weakness and imbalance requires parental assistance to get to school and into his classroom. The school accommodates him by:

- giving his parents a key to the school entrance that is closest to a designated handicapped parking spot and the student's classroom; and
- setting up a footwear change station (with a chair and floor mat) near the entrance used by the student and his parents.<sup>11</sup>

To fulfil their obligation to identify and accurately assess students who need accommodation, 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).

An education provider is entitled to have sufficient information about the needs of the student requiring accommodation.<sup>12</sup> The focus should be on the student's functional limitations, such as his or her capacities and symptoms, and how those functional limitations interact with academic requirements and the school environment.<sup>13</sup> The education provider may require documentation from a medical professional outlining the student's functional limitations and the type of accommodation required for the student's disability, but it is unnecessary for the documentation to include a diagnosis of the disability. Students and/or parent(s)/guardian(s) may nevertheless disclose the disability if they choose to do so.

In most cases, the duty to accommodate will arise after a request for accommodation has been made. However, in some instances the duty to accommodate will arise without an accommodation request. If the education provider has reason to believe a student is experiencing difficulties as a result of a disability, the education provider has a duty to inquire about the situation. Care must be taken with such inquiries, as inappropriate or unfounded inquiries could constitute discrimination on the basis of a perceived disability.

**Example:** A high school student struggles in her classes and teachers notice that she has a physical issue that may be affecting the quality of her work. As neither the student nor her parents have ever mentioned that she has a disability or needs accommodation, staff never ask the student about it. The student fails several classes. The education provider did not fulfil its duty to accommodate as it knew of the disability but did nothing.

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**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 reassessing students to determine if they may return to regular classrooms. Assessments should be frequent and should be made on an individual basis.

**Example:** An elementary school student with ADHD and a mild intellectual disability shared an Educational Assistant (EA) for 310 minutes per day in Grade 1, during which time his grades and behaviour improved. In Grade 2, the student's time with the EA was reduced by 50% as a result of the progress the student had made and due to reduced funding. The decision was made without consulting the student's parent or conducting an objective assessment of the impact the reduced EA time would have on the student. The student's behaviour worsened during his Grade 2 year, and the 310 minutes of EA support resumed in Grade 3.

The reduction of EA support in Grade 2 was found to be discriminatory. By failing to conduct an objective assessment before making the changes in Grade 2, the school did not know whether the student's progress in Grade 1 had been due to the EA support he received. With input from the student's parent and physician, the school could have sought a trial period with the reduced EA support to gauge the impact of that support, but the school had not done so. The reduced EA support therefore denied the student of a meaningful education.<sup>14</sup>

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 often 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 an EA to ensure that he gets extra help with his assignments and does not leave the classroom unattended. The EA 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 personalized learning plan and whether or not he requires a modified program or an accommodated program.

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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. The ultimate goal should be the return of the student to his or her regular class.

**The student with a disability and his or her parent(s) must help to facilitate the accommodation process.** This includes working with the education provider to develop an accommodation and facilitating its implementation. A failure to cooperate may impose an undue hardship on the education provider and lead to the dismissal of a human rights complaint. A failure to cooperate may include:

- refusing to provide information relevant to the accommodation process;
- refusing to consent to assessments of the student; and
- refusing to acknowledge a need for accommodation.<sup>15</sup>

The conduct of the student and his or her parent(s) are relevant when determining whether an education provider has fulfilled its obligation to the student. **The student and his or her parent(s)/guardian(s) have an obligation to accept a reasonable accommodation.** There is no obligation on an education provider to provide a “perfect” accommodation. If an education provider has offered a reasonable accommodation under the circumstances, and that accommodation was turned down by the student and/or parent(s)/guardian(s), then the education provider has discharged its duty under the Act.<sup>16</sup>

### **4.3 Potential Consequences of a Lack of Reasonable Accommodation**

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

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

It has been well established through various educational reports that early intervention and remediation is the best method of addressing disability-related issues in the education sector<sup>17</sup> and 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 provider, union and/or third party service provider<sup>18</sup> responsible for the lack of accommodation. In addition to general damages for injury to dignity, feelings and self-respect, under the *Act* a Board of Inquiry may “compensate a party adversely affected by the violation for any consequent expenditure, financial loss or deprivation of benefit” it considers appropriate.<sup>19</sup> While a Board of Inquiry cannot award legal costs, its authority to compensate someone who has been discriminated against is quite broad. In one case a school district was required to pay for a student’s private education until the completion of grade 12.<sup>20</sup>

#### **4.4 Inclusion and Universal Design**

Full participation in regular school programs with non-disabled peers is the goal set explicitly by the *Education Act*<sup>21</sup> and the *Convention on the Rights of Persons with Disabilities*<sup>22</sup> as well as by case law under the *Canadian Charter of Rights and Freedoms*<sup>23</sup> and the *Human Rights Act*. The Supreme Court of Canada has stated that “integration” or inclusion “should be recognized as the norm ... because of the benefits it generally provides”.<sup>24</sup>

Education providers and teachers must be provided with supports sufficient to assure that students with a disability can achieve educational goals, and do so side-by-side with their peers in community schools. This includes professional support and planning and development of teaching strategies.

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*, and the principles of universal design.

#### **4.5 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 affected his or her ability to understand the impact and consequences of the behaviour subject to disciplinary action;
- whether the student's disability affected 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 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. They should also consider mitigating factors prior to suspending students and should provide alternative education opportunities for suspended students. From a system-wide standpoint, it may be prudent to implement safeguards to protect students with a disability from being disciplined for behaviour that is disability-related.

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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, other students and/or 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.

**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. Education providers must also reasonably accommodate students who cannot complete tests or assignments in the standard time period due to 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.

**Example:** An education provider's policy requires that students 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.

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 (i.e. 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.

## **5. THE *MEIORIN* TEST**

The limits to the duty to accommodate are set out in what is called the *Meiorin* Test, a three-part test spelled out by the Supreme Court of Canada. To justify a standard, practice or policy that results in a discriminatory level of service, a service provider must show that all three *Meiorin* conditions have been met, namely:

1. it adopted the standard for a purpose or goal that is **rationaly 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

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3. the standard is **reasonably necessary** to accomplish its purpose or goal, in the sense that the service provider cannot accommodate persons with the characteristics of the claimant without incurring **undue hardship**.<sup>25</sup>

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

1. Rational connection:
  - a. What is the purpose of the education policy, rule or standard (e.g. safety, efficiency, or other purpose)?
  - 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?
2. Adopted in good faith:
  - a. What were the circumstances surrounding the adoption of the policy, rule or standard by the education 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. Reasonable necessity and undue hardship:
  - a. Is the policy based on facts or unsupported assumptions made by the education provider?
  - b. Does the policy adversely affect some groups of students more than others?
  - c. Does it arbitrarily exclude groups of students with a disability?
  - d. Has the policy been designed to minimize its discriminatory effect on students?
  - e. Has the education provider considered alternatives, such as individual assessment of students, staff and student support, and staff training?
  - f. Would accommodation amount to undue hardship for the education provider?

## **6. LIMITS TO THE DUTY TO ACCOMMODATE: UNDUE HARSHIP**

### **6.1 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. 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 service provider, the economic situation, market conditions, the climate of labour relations, the nature of the work or the reliability of recommended technological or adaptive devices. The Supreme Court of Canada has

stated that “[t]he use of the term ‘undue’ infers that some hardship is acceptable; it is only ‘undue’ hardship that satisfies this test”.<sup>26</sup>

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 6.3, 6.4 and 6.5 of this guideline.

## **6.2 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 actually 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.

**Example:** A medical doctor “prescribes” that an Educational Assistant (EA) be provided for a student with a disability. School officials decide that an educational perspective was needed before making this determination. They consult a multidisciplinary team before deciding whether an EA was required.

It is important that educational service providers document their efforts to accommodate students with disabilities. Evidence of long-term planning to improve accommodation will greatly assist in supporting a defence of undue hardship, as one of the critical

questions is whether the decision maker has explored all other reasonable and less discriminatory options.

### **6.3 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. Typically, for the cost of the accommodation to amount to undue hardship, it would need to be so high that it would affect the education provider's viability or alter its essential character.<sup>27</sup> The Supreme Court of Canada has said that, "[o]ne must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment".<sup>28</sup>

In determining whether a financial cost would "affect the education provider's viability or alter its essential character," one relevant consideration is the size of the institution. For example, 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.

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 are most appropriate for students based on financial considerations or budgetary constraints.

**Example:** Facing budgetary shortfalls, a school district closed its diagnostic centre which had provided intensive services and individualized assistance to students with severe learning disabilities. An elementary school student with a severe learning disability (dyslexia) needed intensive remediation, but was unable to get the level of assistance he required in public schools. As the diagnostic centre was no longer available, the student's parents enrolled him in a private school that specialized in teaching students with learning disabilities.

The school district's closure of the diagnostic centre was found to be discriminatory. The district had failed to consider the consequences of the diagnostic centre's closure, and the student was denied meaningful access to a public education as a result. The district had not explored alternative ways of accommodating students with severe learning disabilities before closing the diagnostic centre. Other cost reduction measures, such as cutting discretionary initiatives like an outdoor school, similarly were not considered.<sup>29</sup>

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, only then

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can a determination be made as to whether or not this “most appropriate” accommodation would result in undue hardship.

Other considerations may include:

- the size of the school building;
- 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; and
- whether the educational programs and services for all students would be substantially and permanently altered (e.g. a music program would need to be cancelled to fund the accommodation).

In the event the education provider has demonstrated that the most appropriate accommodation cannot be accomplished immediately due to the upfront costs associated with the accommodation, the education provider may consider:

- whether the costs can be phased in over several years; and
- 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.

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 personalized learning 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.

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 an EA. However, her parent is informed that all the EAs 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 EAs has been committed, but a surplus is likely in the transportation budget. It uses that anticipated surplus to hire an additional EA, and advises the Department of Education and Early Childhood Development of the shortfall in funding for EAs.

Larger organizations, particularly 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.

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The relevant institution for public schools will depend on the circumstances. However, 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.

### **6.4 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 undue hardship.

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. The duty to reasonably accommodate is dynamic and ongoing and must be responsive to changes in the nature of a student's disability.

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**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.

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?
- Would changing or waiving the requirement be reasonably likely to result in a serious risk to the health or safety of other students, educators or school staff?
- What other types of risks are assumed within the institution or sector, and what types of risks are tolerated within society as a whole?

In evaluating the seriousness or significance of risk, 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, in most cases 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

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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. 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.

### **6.5 Impact on Other People and on Programs**

The Supreme Court of Canada has stated 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”.<sup>30</sup>

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 an EA 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,<sup>31</sup> and are liable under the *Act* if they fail to do so. Clauses in collective agreements that conflict with the *Act* are invalid. It is not possible to contract out of the *Act*'s applicability. 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.<sup>32</sup>

This may mean that a union will 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 his or her classification or bargaining unit, or to occupy a position to which he or she would not normally be entitled due to the bargaining unit or a 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.

**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 EA was transferred to the high school because the EA has specialized training relating to autism. However, the EA refuses the reassignment, citing her collective agreement, which gives EA the right to select work locations based on seniority. The impact on the EA and the labour union must then be considered when determining whether transferring the EA 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.

## **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 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.<sup>33</sup>

Students who are harassed are entitled to the *Act's* protection where the harassment is based on one of the grounds covered under the *Act*. Education providers are responsible when staff harass students based on any of the *Act's* grounds. They are also responsible when staff know or ought to know that a student is being harassed by other students<sup>34</sup> based on any of the *Act'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 affected.

**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 Act* is discrimination and is a violation of the *Act*.

A school may attempt to resolve bullying issues 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 *Act* can be considered to have taken place.

Education providers must take steps to prevent harassment, such as implementing programs to oppose bullying and celebrate all differences. Education providers have been found liable under human rights law for discriminatory harassment by students toward other students.<sup>35</sup> An anti-harassment policy can be an effective means of preventing harassment, provided students and staff are well informed about it.

## **8. SUMMARY OF RESPONSIBILITIES**

This guideline has discussed the responsibilities various parties have in the accommodation of students with disabilities. What follows is a summary of some of those responsibilities. For a more detailed discussion of responsibilities, please consult the previous sections of this guideline.

### **8.1 Responsibilities of Education Providers**

With respect to providing reasonable accommodation:

- put in place a process to assess student needs and to identify and implement strategies to meet those needs (e.g. case conferencing);
- put in place a process for the continual reassessment of the programme of any students who have been placed outside the regular classroom; the

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process should also provide for the reassessment of students who have been returned to the regular classroom;

- 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;
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions, as part of the duty to reasonably accommodate;
- prepare, maintain and follow a personalized learning plan for students with a disability;<sup>36</sup>
- obtain expert opinion or advice where needed, and bear the costs of any required disability-related information or assessment;
- co-operate with any experts whose assistance is required;
- base decisions on objective and quantifiable, not impressionistic, information;<sup>37</sup> and
- maintain proper documentation of all aspects of a student's academic and special needs assessments and progress.

With respect to communication:

- advise students, or their parent(s)/guardian(s), of available accommodations and support services, and the process by which these resources may be accessed;
- deal with accommodation requests in a timely manner;
- 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; and
- 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.

With respect to collaborating with staff:

- ensure that collective agreements do not conflict with the need to reasonably accommodate students with a disability short of undue hardship; and
- 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.

With respect to universal design:

- review the accessibility of educational institutions as a whole, including all educational services;
- when designing and developing new or revised facilities, services, policies, processes, courses, programs or curricula, do so while keeping in mind the needs of persons with a disability;

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- take steps to include students with a disability in class, extra-curricular and co-curricular activities; and
- 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.

### **8.2 Responsibilities of Unions, Professional Associations and Third Party Educational Service Providers**

With respect to facilitating the accommodation process:

- take an active role as partners in the accommodation process;
- deal with accommodation requests in a timely manner, considering the extent and complexity of the accommodation;
- 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;
- 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;
- 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;
- co-operate with any experts whose assistance is required; and
- fulfill agreed upon responsibilities, as set out in the accommodation plan.

With respect to staff and collective bargaining:

- ensure that collective agreements do not conflict with the need to reasonably accommodate students with a disability short of undue hardship;
- 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); and
- 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.

### **8.3 Responsibilities of Students and Parents**

With respect to facilitating the accommodation process:

- participate in discussions regarding possible accommodation solutions;
- co-operate with any experts whose assistance is required;
- fulfill agreed upon responsibilities, as set out in the accommodation plan; and

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- work with education providers on an ongoing basis to manage the accommodation process.

With respect to communication:

- advise education providers of the need for accommodation related to a disability;
- make their needs known to the best of their ability, so that education providers may make the requested accommodation;<sup>38</sup>
- answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed; and
- advise education providers of difficulties they may be experiencing in accessing educational services, including problems with arranged accommodations.

## 9. 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.

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 and Early Childhood Development policy. A complaint can be filed with the Human Rights Commission whether or not a complaint was filed under that policy.

## 10. FOR MORE INFORMATION

For further information about the *Act* 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.

You can also visit the Commission's website at <http://www.gnb.ca/hrc-cdp> or email us at [hrc.cdp@gnb.ca](mailto:hrc.cdp@gnb.ca)

New Brunswick Human Rights Commission  
P.O. Box 6000  
Fredericton, NB E3B 5H1  
Fax 453-2653

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<sup>1</sup> The New Brunswick Human Rights Commission wishes to express its appreciation to the Ontario Human Rights Commission for permission to reproduce and adapt several sections of its *Guidelines on Accessible Education*. Readers wishing to reproduce the sections of this guideline that came from the Ontario guideline must seek permission from the Province of Ontario.

<sup>2</sup> *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 26 [*Moore*].

<sup>3</sup> *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 [*Charter*].

<sup>4</sup> *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at paras. 17 to 20 [*Eaton*].

<sup>5</sup> *Education Act*, R.S.N.B. c. E-1.12, s. 13 [*Education Act*].

<sup>6</sup> *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at para.74 [*Granovsky*].

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<sup>7</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Granovsky, ibid.* at para.74.

<sup>8</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, 25 C.H.R.R. D/175; see also *Education Act*, *supra* note 5, paras. 27(1)(b) & (d) and 28(2)(c).

<sup>9</sup> *Eaton, supra* note 4 at para. 69.

<sup>10</sup> *Central Okanagan School District No. 23 v. Renaud*, [1992] S.C.R. 970 [*Renaud*].

<sup>11</sup> *Holy Trinity Roman Catholic School Division (c.o.b. Ecole St. Margaret School) v. Prisciak*, 2013 SKCA 87.

<sup>12</sup> *MacDonald v. Cornwall Public Library*, 2011 HRTO 1323.

<sup>13</sup> *Simpson v. Commissionaires (Great Lakes)*, 2009 HRTO 1362 at para. 35.

<sup>14</sup> *R.B. (Next friend of) v. Keewatin-Patricia District School Board*, 2013 HRTO 1436 at para. 254; request for reconsideration denied in 2013 HRTO 1920.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Renaud, supra* note 10 at para. 44.

<sup>17</sup> 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, pp. 259-62.

<sup>18</sup> Third party educational service providers include government departments and agencies (e.g. regional health authorities that provide speech and other therapies; Social Development that provides social work; and mental health clinics that provide counselling services). Third party educational service providers also include non-governmental service providers, such as companies that provide IT or transportation services.

<sup>19</sup> *Human Rights Act*, R.S.N.B. 2011, c. 171, s. 23(7)(e).

<sup>20</sup> *Moore, supra* note 2.

<sup>21</sup> *Education Act, supra* note 5, s. 12(3).

<sup>22</sup> UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I, article 24.

<sup>23</sup> *Charter, supra* note 3.

<sup>24</sup> *Eaton, supra* note 4 at para. 69.

<sup>25</sup> *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [*Grismer*], at para. 20.

<sup>26</sup> *Renaud, supra* note 10 at para. 19.

<sup>27</sup> *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15 at para. 132; *Quesnel v. London Educational Health Centre*, (1995), 28 C.H.R.R. D/474 at para. 59.

<sup>28</sup> *Grismer, supra* note 25 at para. 41.

<sup>29</sup> *Moore, supra* note 2.

<sup>30</sup> *Grismer*, *supra* note 25 at para. 44.

<sup>31</sup> *Renaud*, *supra* note 10.

<sup>32</sup> *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*, [2003] 2 S.C.R. 157.

<sup>33</sup> 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*, *supra* note 5.

<sup>34</sup> *Jubran v. Board of Trustees*, [2002] B.C.H.R.T. 10; affirmed [2005] B.C.J. No. 733, 2005 BCCA 201.

<sup>35</sup> *Ibid.*

<sup>36</sup> *B.C. v. New Brunswick (Department of Education)* [2004] N.B.H.R.B.I.D. No. 2, No. HR-003-01 [B.C.]

<sup>37</sup> *Grismer*, *supra* note 25 at para. 41.

<sup>38</sup> *B.C.*, *supra* note 36.