



Brief to the

Ontario Human Rights Commission

on its Review of the

'Guidelines on Accessible Education'

June 9, 2017

I. Introduction

In 2017, the Ontario Human Rights Commission announced its intention to revise its *Guidelines on Accessible Education* (the “Guidelines”).¹ The goal of the proposed revision is to update the Guidelines to reflect developments in disability and human rights law and disability studies since the guidelines were first introduced in 2004. For its time, the Guidelines were remarkably progressive and set a high standard for educational institutions to meet in fulfilling their human rights obligations.

ARCH Disability Law Centre extends its gratitude to the Commission for this invitation to make submissions, and for its undertaking to update and revise a document that has made a significant impact in advocacy efforts. ARCH endorses many of the standards set out in the current guidelines. The following represents a brief commentary on some of the areas in which the Guidelines could improve upon or clarify best practices for education providers to live up to their human rights obligations.

This submission relies largely on Article 24 of the *Convention on the Rights of Persons with Disabilities* (“CRPD”) (discussed below) as a starting framework. This Article outlines the obligations of States Parties with respect to the education system and largely identifies the conditions required to achieve a fully inclusive education system. This Brief will address the following issues:

- significant developments in human rights and education
- the right of children with disabilities not to be excluded
- ensuring appropriate supports and accommodations
- inclusive education is fundamental

II. About ARCH

ARCH Disability Law Centre (“ARCH”) is a specialty legal clinic dedicated to defending and advancing the equality rights of persons with disabilities in Ontario. ARCH is primarily funded by Legal Aid Ontario. For over 35 years, ARCH has provided legal services to help Ontarians with disabilities live with dignity and participate fully in our communities. ARCH provides summary legal advice and referrals to Ontarians with disabilities; represents persons with disabilities and disability organizations in test case litigation; conducts law reform and policy work; provides public legal education to disability communities and continuing legal education to the legal community; and supports community development initiatives.

Education and human rights for persons with disabilities was identified by ARCH as one of its priority areas in 2006. Since that time ARCH has done extensive work

¹ Ontario Human Rights Commission, *Guidelines on Accessible Education*, online: Ontario Human Rights Commission <http://www.ohrc.on.ca/sites/default/files/attachments/Guidelines_on_accessible_education.pdf>.

representing clients with disabilities in education related matters, providing summary advice and executing law reform projects related to the delivery of education services to persons with disabilities. ARCH currently has a number of law reform and research projects underway, many of which inform the content of this submission. More information about our work is available on our website: www.archdisabilitylaw.ca

III. Major Developments in the Legal Framework around Human Rights and Education

There have been a number of significant developments in education law and human rights for persons with disabilities since the OHRC's Guidelines were first published.

i) Convention on the Rights of Persons with Disabilities

One of those major developments was Canada's ratification of the *CRPD* which bound our country to a number of disability related obligations. This included Article 24, which recognizes the right of persons with disabilities to access inclusive education and obligates states parties to provide appropriate supports and services. Part 1 of Article 24 states that:

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

- a. The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
- b. The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
- c. Enabling persons with disabilities to participate effectively in a free society.²

Part 2 of the Article requires that states parties ensure, among other things:

- Article 24(2)(a) – Children with disabilities are not excluded from public primary or secondary education on the basis of disability;
- Article 24(2)(c), (d) and (e) – Effective individualized support measures and the accommodations required to maximize academic and social development are provided within the general education system; and

² *Convention on the Rights of Persons with Disabilities*, GA Res 61/601, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (14 January 2007) 65 at art 24(1) [*CRPD*].

- Article 24(2)(b) – Children with disabilities have equal access to inclusive and quality free primary education (Article 24(2)(b)).³

Overall, the Convention establishes that the goal for educators should ultimately be the *full* inclusion of students with disabilities in the educational system. This means ensuring that the exclusion of students with disabilities from the education system is prohibited and ensuring that students with disabilities are integrated into mainstream classrooms. General Comment No. 4 (2016) on the right to inclusive education further elaborates on Article 24 and lays out a rights based framework for achieving an inclusionary education system.⁴ Much of the following commentary is designed to make recommendations to further this aim; however, ARCH takes the position that any future revisions of the OHRC’s *Guidelines on Accessible Education* should integrate the Article 24 framework.

ii) *Supreme Court of Canada’s decision in Moore v. British Columbia*

Another major development in the area of education and disability occurred with the release of the Supreme Court’s decision in *Moore v. British Columbia*. In many ways this decision furthered the values of Article 24 and strengthened the protections that students with disabilities receive under the *Human Rights Code*. In particular, the Supreme Court articulated that students with disabilities must have “meaningful access” to education generally and not just special education.⁵ That is, school boards must ensure that they provide effective individualized supports to students with disabilities to ensure that they can fully access the general benefits of the education system. This is a sentiment which is echoed in General Comment No. 4 on Article 24 which states that “there is no “one size fits all” formula” for accommodations and that the goal of these accommodations must be to allow persons with disabilities to fully benefit from educational services.⁶

The Court’s analysis of undue hardship was also extremely significant, in that it emphasized that school boards have an obligation to consider the needs of students with disabilities when making large scale systemic changes to their programming, especially when they are attempting to save money.⁷ The Court emphasized that special education services were not a “luxury” but were in fact essential services which were required to realize the goal of meaningful access for students with disabilities.⁸ School boards cannot just state that they do not have any money left in their budget for special education services; they must scour other areas of their budget to determine if the needed services can be funded. This point again echoes the General Comment which states that:

³ *Ibid*, art 24(2).

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

⁵ *Moore v British Columbia (Education)*, 2012 SCC 61 at para 28, [2012] 3 SCR 360 [*Moore*].

⁶ General Comment, *supra* note 4.

⁷ *Moore*, *supra* note 5 at para 51-3.

⁸ *Ibid* at para 5.

“..the availability of accommodations should be considered with respect to the larger pool of educational resources available in the education system and not limited to resources available at the academic institution in question; transfer of resources within the system should be possible.”⁹

Overall, the Moore decision, which was subsequently adopted by the Human Rights Tribunal in *R.B. v. Keewatin-Patricia District School Board*, has strengthened the protections that students with disabilities receive in the education system and should play a major role in the Commission’s revision of this policy, and its use of undue hardship within the education context.¹⁰

RECOMMENDATIONS:

- 1) In light of Canada’s commitment Inclusive Education in the *CRPD* and Article 24, the Guidelines should be renamed the ‘Inclusive Education Guidelines’;**
- 2) The Guidelines should reflect the content of Article 24 and General Comment No. 4 on the Right to Inclusive Education and the obligations it imposes upon education service providers;**
- 3) The Guidelines should provide an interpretation of ‘meaningful access’ that is in line with inclusive education and Article 24; and**
- 4) The Guidelines should revise the section on ‘undue hardship’ in light of the *Moore* decision and should provide examples of the undue hardship analysis using the principles that flow from the Supreme Court’s decision.**

IV. Exclusion of Students with Disabilities continues

Students with disabilities continue to face ableist barriers and either subtly or overtly, are denied full or partial access to meaningful education within the primary, secondary and post-secondary sphere. Article 24(2)(a) of the *CRPD* requires States Parties to refrain from excluding persons with disabilities from the general education system, “including through any legislative or regulatory provisions that limit their inclusion on the basis of their impairment or the degree of that impairment...”.¹¹ The issue of equal access to school is a long-standing one in the disability community. Children with disabilities have long been excluded from our educational institutions and even now this remains a pervasive problem. As noted above, Article 24 explicitly bans exclusion, yet this remains a significant problem in Ontario. ARCH Disability Law Centre, in partnership, recently conducted a survey of 280 parents of children with intellectual disabilities and found that their children experienced disproportionate rates of exclusion

⁹ General Comment, *supra* note 4.

¹⁰ *RB v Keewatin-Patricia District School Board*, 2013 HRTO 1436.

¹¹ *CPRD*, *supra* note 2, art 24(2)(a).

from the educational system.¹² In the primary and secondary school context, 66% of parents surveyed felt that their children were excluded from the curriculum that was appropriate for them, and 61% of parents reported that their children were excluded from extra-curricular activities. 62.5% of parents surveyed indicated that their children were receiving alternatives to education as opposed to modified or accommodated education, meaning that many children with disabilities are being denied a fulsome education.

Furthermore, 43% of parents reported they have had to keep their child home as a result of lack of accommodations and/or services. Even more troubling, approximately 11% of them reported that their child had been expelled from school for disability related reasons and 23% of these parents reported that their child had been suspended for disability related reasons. In many cases, children are excluded from school outside of the normal suspension/expulsion process; 25% of parents surveyed reported that they had simply been told not to bring their child to school.

Exclusions can manifest in other less obvious ways as well. Approximately one in two of surveyed parents indicated that their child's school day had been shortened. Of those, only 8% reported that this shortened day was related to their child's fatigue level. The majority of other parents indicated that their child's day was shortened as a result of a myriad of other administrative issues including staff shortages at key times and behaviour plans not being in place. On average their children's day was shortened by 2.71 hours out of the approximately 6 and a half hours a day children are normally in school.¹³

The above reports clearly indicate that the exclusion of children from school remains a significant issue in our public school system. This issue is often compounded for racialized minorities and/or individuals who experience language barriers. ARCH has received numerous calls from such individuals and has often found that these families have children who are excluded both more often and for a longer duration.

Exclusions are often achieved through several legislative mechanisms. These include the use of s. 265(1)(m) of the *Education Act*, inappropriate use of suspension or expulsion provisions, the use of *Regulation 298* of the *Education Act*, or simply via informal requests by school administrators to have parents remove their children.

¹² ARCH Disability Law Centre, Brock University, Community Living Ontario, Inclusive Education Canada, Western University, "If Inclusion Means Everyone Why Not Me?", (2017) [unpublished, archived at ARCH Disability Law Centre, Community Living Ontario].

¹³ Note we are including breaks and lunch in addition to the mandatory instructional time that students must receive under *Operation of Schools – General*, RRO 1990, Reg 298, s 3 [*Operation of Schools*].

i) *Denying Access to School - s. 265(1)(m) of the Education Act*

This section of the *Education Act* purports to provide a principal with the power to exclude a child from the school if they deem the child to be “detrimental to the physical or mental well-being of the pupils”.¹⁴ This provision is often used to inappropriately exclude children with disabilities outside of the regular suspension and expulsion process. It is frequently used on children who have behavioural issues and its use often occurs prior to proper accommodations being put in place. Schools will frequently justify its usage on the grounds of health and safety considerations and will impose a number of conditions on parents, such as obtaining lengthy assessments which can take months to get, before they will consider a transition back to school.

It is important to note that the use of this provision presents some significant concerns with respect to the procedural protections that parents and children are afforded. The regular suspension and expulsion process provides a number of procedural protections which can prevent improper disability-related exclusion from school. These include time limits on the length of suspensions¹⁵, requirements that principals consider a student’s disability and other mitigating factors in their decisions¹⁶, requirements that principals consider whether a student’s IEP has been properly implemented¹⁷, and notice requirements.¹⁸

Example: ARCH has received a number of calls from parents who were told by their school principal that their child was being excluded via s. 265(1)(m) for an indeterminate period of time. They did not receive a related letter explaining the decision or informing them of their right to appeal. In fact, in many cases this letter was not forthcoming even after several requests for one. In many of these cases a number of accommodations were either outstanding or improperly implemented.

ARCH takes the position that the Guidelines should specifically address the inappropriate usage of s. 265(1)(m) to exclude children with disabilities.

ii) *Unjustified Shortened School Days - Regulation 298*

Section 3(3) of *Regulation 298* under the *Education Act* allows for the shortening of school days to less than the required 5 hours a day of instruction “for an exceptional

¹⁴ *Education Act*, RSO 1990, c E.2, s 265(1)(m).

¹⁵ *Ibid*, s 306(4).

¹⁶ *Ibid*, 306(2); *Behaviour, Discipline and Safety of Pupils*, O Reg 472/07, s 3.

¹⁷ *Ibid*; *Education Act*, *supra* note 13 s 306(2).

¹⁸ *Ibid*, s 308(1).

pupil in a special education program”.¹⁹ Furthermore, in the previously published resource, *Special Education: A Guide for Educators*, the Ministry provided the following direction regarding the use of s. 3(3):

“A board should not use this section for its own benefit, for example because of a shortage of staff. This subsection applies to situations where it is for the benefit of the child that the instructional program be shortened. This might occur, for example, if the exceptional pupil does not have sufficient stamina to attend for a full school day, or is medically unable to attend for a full school day.”²⁰

This policy document, in conjunction with the human rights obligations of a school board, makes clear that it is inappropriate for schools to shorten the day of a student based on administrative concerns such as staff shortages at key times of the day. Despite the above guidance, this provision is often used to inappropriately reduce a student’s school day. ARCH takes the position that the Commission should address the issue of inappropriate usage of this section to shorten a child’s day as a human rights concern.

iii) *Suspensions and Expulsions*

Although suspensions and expulsions have a number of additional procedural protections which are designed to take into account disability and the provision of appropriate accommodations, it is worth noting that these protections are not always sufficient or properly adhered to. Since the 2004 Guidelines, Regulation 472/07 of the Education Act has since adopted mitigating and other factors to be considered prior to any disciplinary action being taken. A human rights interpretation of the factors listed in the Regulation in the revised Guideline would provide a needed and useful resource.

Students with disabilities often have much higher rates of suspension and/or expulsion than the average. In 2013, the Toronto District School Board reported that students with disabilities were suspended between two and three times as much as their peers.²¹ ARCH has received numerous calls from parents whose children have been suspended for disability related reasons. In many circumstances, these suspensions had occurred prior to appropriate accommodations being put into place for their child or in the context of a dispute with the school over the type of accommodation to be provided.

¹⁹ *Operation of Schools*, supra note 12, s 3(3).

²⁰ Ministry of Education, *Special Education: a guide for educators*, online: Ontario Teachers’ Federation < <http://www.peopleforeducation.ca/wp-content/uploads/2011/09/Special-Education-Guide-for-Educators.pdf>>.

²¹ Toronto District School Board, *Suspension Rates by Students’ Demographic and Family Background Characteristics*, online: Caring and Safe Schools Issue 3, June 2013 < <http://www.tdsb.on.ca/Portals/research/docs/reports/CaringSafeSchoolsCensus201112.pdf>>.

iv) *Informal Requests to withdraw students*

In ARCH's experience, school administrators will often simply ask parents to keep their children home largely because of behavioural issues or alleged shortages in school resources. In these circumstances, parents often feel as though they have no choice but to acquiesce to the school. ARCH takes the position that the Guidelines should specifically address the issue of inappropriate requests from service provider personnel to keep their children home.

RECOMMENDATIONS:

- 1) **The Commission should review the prevalence and nature of practices relating to exclusion, denial of access and/or threats of exclusion of students with disabilities and make general recommendations based on these findings. These recommendations could include the following topics:**
 - a. **The appropriate considerations in a decision to exclude, which may include whether accommodation plans have been implemented or other mitigating factors;**
 - b. **The need for an immediate review of a student's disability related needs;**
 - c. **The appropriate education services which would be offered during an exclusion;**
 - d. **The need for a clear timeline for re-entry; and**
 - e. **The need for priority access to necessary supports to allow for re-entry.**
- 2) **The Guidelines should include a recommendation that school boards track exclusions and/or denial of access to students with disabilities and that they make these records public.**
- 3) **The Guidelines should include recommendations related to mandatory review dates for exclusions which exceed a certain time period.**
- 4) **The OHRC should review the impact of exclusion of students with disabilities who are also part of a racialized minority or who may fall under other *Code* grounds.**
- 5) **The Guidelines should include guidance on the proper implementation of procedural protections for students with disabilities in the suspension and expulsion process.**
- 6) **The Guidelines should provide a clear statement that the use of exclusionary methods to avoid or side step accommodation obligations, or due to a failure to appropriately accommodate, is a discriminatory practice.**

V. Need for additional guidance on ensuring Appropriate Supports and Accommodations

Article 24(2)(c), (d) and (e) of the *CRPD* require that educators provide the appropriate accommodations for students with disabilities and “adequate, continuous and personalized support”²² to ensure that students with disabilities can access the full benefit of their education. However, there remain a number of significant barriers in Ontario’s education system which often prevents these goals from being realized. In ARCH’s recent survey of parents with children who have intellectual disabilities, approximately 38% of parents reported that schools were meeting below half of their child’s academic needs. The following is a discussion of some of the more prominent barriers which ARCH has seen or continues to see since the publications of the Guidelines in 2004.

i) *Health and Safety Requirements and the Rights of Students with Disabilities*

Health and safety concerns in the context of special education are an evolving area and a number of changes have been made to workplace safety statutes since the publication of the Commission’s 2004 Guidelines. In particular significant amendments to the *Occupational Health and Safety Act* (“*OHSA*”) were made regarding workplace violence and harassment.²³ The amendments were essentially designed to address the issue of workers’ exposure to “hazardous people” in the workplace, which under the definition used by the Act may include students with disabilities who have difficulty controlling their behaviour.²⁴

In particular, s. 43 of the Act introduced a right to refuse to work when workplace personnel are in a situation “where workplace violence is likely to endanger himself or herself”.²⁵ This change has created a number of potential issues for students with disabilities in primary and secondary education and represents a significant barrier to the inclusive goals set out by Article 24 of the *CRPD*. ARCH has encountered several situations where employees have initiated work refusals due to an alleged risk posed by a student with a disability.

In these situations, educational workers’ rights are often framed as being in opposition with those of the student. The perception is often that a student’s right under the *Code*

²² General Comment, *supra* note 4 at para 33.

²³ *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, SO 2009, c 23.

²⁴ Victoria Réaume & Christopher Perri Perri, *Health and Safety: The Intersection of Perspectives on What Makes a School Safe: the rocky road ahead: balancing competing interests*, online: Cavalluzzo <<http://www.cavalluzzo.com/resources/publications/details/bill-168.-health-and-safety-the-intersection-of-perspectives-on-what-makes-a-school-safe>>.

²⁵ *Occupational Health and Safety Act*, RSO 1990, c O.1, s 43.

and the *Education Act* to go to school and to be properly accommodated are being pitted against a worker's right to be safe under the *OHS Act*. However, despite this dominant perception ARCH takes the position that properly implemented, the obligations under these Acts operate harmoniously with one another.

For instance, in cases where a student has exhibited a number of problematic behaviours, the *Human Rights Code* often mandates that a school board develop a behavioural support plan and a safety plan for the student which is designed to reduce these behaviours and keep the student safe. This mirrors their obligations under the *OHS Act* which at s. 27(2)(b) requires supervisors (principals) to "provide a worker with written instructions as to the measures and procedures to be taken for the protection of the worker".²⁶ Both Acts essentially require the same action; the creation of a plan to manage behaviours.

Example: ARCH represented a family in a recent case involving a work refusal. Several Educational Assistants were refusing to work with a student during transport to and from school unless the student could be put in restraints. Several professionals had indicated that this was not an appropriate accommodation for the student and was indeed physically painful and counterproductive when it came to managing the student's behaviour. After extensive negotiations with the school board, they agreed to relinquish the use of restraints and provide training from professionals regarding the implementation of the student's behavioural support plan/safety plan in the transportation setting. Several months after the implementation, safe transportation was being achieved without the use of restraints.

In ARCH's experience, a great number of safety concerns, like the one outlined above, are the result of a failure to quickly mobilize the appropriate resources to accommodate a student. Many parents calling ARCH have expressed repeated frustration due to extended disruptions in their child's education because schools wait months for results of professional assessments or to implement training for their staff related to behaviour management. These delays often lead to an escalation of behaviours and more draconian responses to them (such as the use of restraints or exclusion). These types of responses often exacerbate the situation and the problematic behaviours making it more difficult to provide appropriate accommodation later on.

Best Practice Example: In order to implement a proper behavioural support plan as an accommodation for a student and a safety plan for an educational assistant, a professional assessment is required. The waitlist

²⁶ *Ibid*, s 27(2)(b).

for such assessments is several years long. To avoid the behavioural complications that a delay would cause, the school board retains a private assessor outside of regular channels to assist in the production of the behavioural support and safety plan.

RECOMMENDATION:

- 1) The Guidelines should address the issue of work refusals and the necessity for school boards to consider a student's right to education and whether they're being appropriately accommodated when they are dealing with a work refusal;**
- 2) The Guidelines should include a statement requiring school boards to immediately reprioritize resources to address health and safety issues which may create conditions leading to a work refusal, especially if a student's right to education or right to be appropriately accommodated may be impaired. This may include obtaining private assessments outside of the traditional process.**

ii) Academic Integrity

The use of academic integrity to justify denials of accommodation has become a significant barrier for students with disabilities in post-secondary institutions. ARCH has encountered many students who have had difficulties getting accommodations because the institution they attend claims that a given accommodation would impair their ability to maintain meaningful academic standards.

Example: ARCH heard from students who experience barriers to program admission, such as language requirements. The academic institution stated that this requirement was required in order to maintain the academic integrity of the program.

Academic integrity is an ill-defined concept in the jurisprudence at the Human Rights Tribunal and few decisions have directly addressed it. This has not prevented institutions from invoking this rationale on a regular basis with little to no evidence regarding how a particular accommodation would actually interfere with the "academic integrity" of the institution.

Given the limited guidance available as to how academic integrity fits into a human rights framework, ARCH believes that further clarification of this concept is necessary. In some circumstances, it appears as though academic institutions are using this developing concept to create a novel and independent new defense against human rights complaints, separate from the BFOR test as articulated in Supreme Court of

Canada jurisprudence. This is problematic because the *Human Rights Code* clearly spells out all available defenses for a refusal to accommodate. A novel new defense, untethered to those outlined in the *Code*, would detract from the effectiveness of the human rights framework in achieving its overall purpose.

Primary and Secondary Context

The issue of academic integrity often appears in a different guise in the primary and secondary context. For instance, students with disabilities are often streamed into programs, for which they do not receive a diploma. Instead they often receive other types of certificates, such as a Certificate of Accomplishment. This essentially means that one of the chief benefits of a public education is denied to students with disabilities.

The rationale often invoked in favour of this policy is that school systems are required to maintain the ‘academic integrity’ of the diploma. That is, the diploma is a signal to society that a particular student has achieved a particular academic standard and that giving this diploma to students with disabilities who have not met this standard would devalue the diploma itself.

This argument is problematic for several reasons. Firstly, the reason that students with disabilities cannot meet a particular academic standard is often the result of poor accommodation by an educational service provider. Students with disabilities have often not been given a full opportunity to achieve their potential.

Secondly, it is also notable that having received a diploma does not actually guarantee that a student has met any particular standard. Indeed, many students graduate from high school with varying levels of knowledge and achievement in different realms. There is essentially a continuum of achievement, yet all mainstream students still get the same diploma.

It is notable that at section 6.8.1 of New Brunswick’s Policy 322 on Inclusive Education, New Brunswick has abolished this practice and has instituted a system in which students are given one diploma for completion of their individualized program.

The policy states that:

“In accordance with Education Act and Policy 316 – Graduation Requirements, a single version of the New Brunswick High School Diploma must be granted to students who successfully complete a

program of studies prescribed by the Minister. This includes completion of an individually prescribed PLP [Personalized Learning Plan].”²⁷

ARCH takes the position that the Commission should investigate the above practice and promote more inclusive ones, such as the one adopted in New Brunswick, in its update of the Guidelines.

RECOMMENDATION:

- 1) The Accessible Education Guidelines should be revised to better define the concept of academic integrity, how it fits into the human rights framework, and to confirm that the ‘Meiorin’ test applies in this situation;**
- 2) Once defined, the Guidelines should include a statement that academic institutions are required to provide empirical evidence as to how academic integrity would be diminished by a particular accommodation;**
- 3) A statement in the policy clarifying that the duty to accommodate still applies to educational service providers who are rationalizing a denial of accommodation on the basis of academic integrity; and**
- 4) A statement that the academic integrity is not a new defense under the Code and that it does not supplant the undue hardship standard;**
- 5) A statement promoting inclusive practices in the surrounding the Graduation requirements for students with disabilities.**

iii) Duty to Inquire

Post-Secondary Education

In many cases, the nature of a person’s disability makes it difficult to identify and disclose to an education service provider. The duty to inquire has developed in response to this issue and has significant bearing in the post-secondary context. Currently, the duty to inquire arises in a situation where an organization is aware, or reasonably ought to be aware, that there may be a relationship between a disability and a person’s ability to access educational services. It is often relevant when psychosocial disabilities, among others, will manifest unexpectedly producing a marked change in a student’s ability to engage with their curriculum and limiting their ability to recognize their own disability. In these circumstances it is incumbent on the organization to inquire into whether that person requires disability accommodations.

Example: ARCH has been contacted by clients about the duty to inquire in a number of circumstances. For instance, in one case a student who

²⁷ Department of Education and Early Childhood Development, *Policy 322: Inclusive Education*, online: Government of New Brunswick < <http://www2.gnb.ca/content/gnb/en/departments/education/k12/content/policies.html>>.

had been diagnosed with schizophrenia was having a number of interpersonal issues with his peers due to his alleged 'odd behaviour'. The university held a meeting with the student about his behaviours and subsequently unenrolled him from the program without inquiring about the presence of a disability.

The above situation is a clear example where a student's disability was or reasonably ought to have been known to administrators and that they should have inquired about whether the student had a disability and required accommodations.

Primary and Secondary Education

In the context of primary and secondary education, school boards have a legislated duty to proactively inquire into whether a child has a disability. Section 8(3) of the *Education Act*, imposes a duty on school boards to identify students with disabilities and to use that identification to provide appropriate services.

8. (3) The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,

(a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and

(b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause. R.S.O. 1990, c. E.2, s. 8 (3).

This obligation is typically thought or assumed to be fulfilled by school boards through the Identification, Placement and Review Committee (IPRC) as per *O. Reg.* 181/91. This somewhat archaic process requires a Committee identify students with 'exceptionalities' and to subsequently make identification and placement decisions, and programming recommendations. However, there are a number of problems with this approach. In particular, the IPRC process is very bureaucratic and the decisions it

creates often yield information that is of limited use to educators in developing programming for a child.

Furthermore, it is also notable that the IPRC is a medicalized process which runs directly counter to the social model of disability. It relies heavily on diagnostic information from medical practitioners and does not adequately take account of the many systemic barriers which exist in the educational system. It attempts to fit students into somewhat arbitrary categories and as a result often does not produce recommendations about meaningful, individualized accommodations. This ultimately impedes a student's ability to gain meaningful access to education. Based on the foregoing, ARCH takes the position that the IPRC process, by itself, does not fulfill a school board's obligations under the duty to inquire.

iv) Accommodation Plan Development

In the primary and secondary context, ARCH has found that in many cases the development process for Individual Education Plans (IEP) lacks meaningful consultation with parents and children. In a survey of parents, ARCH and its partners found that approximately 31% of parents felt that they were not meaningfully involved in the development of the IEP. In many cases, parents reported that they felt the IEP was developed without their input and that they were expected to simply rubber stamp the accommodations contained within it. Furthermore, when parents are unwilling to simply sign off on a pre-determined plan, they often find that aside from informal discussion with the school, there is no appropriate conflict resolution process available to them to resolve the matter. Approximately 1 in 3 parents found that they had no conflict resolution process available to them when there was a dispute about an accommodation issue.

The lack of formal dispute resolution forum is largely related to the structure of the *Education Act*. The only place that appears to provide a forum for disputing IEP content is at IPRC meetings, which are largely made up of Board personnel. There are a number of limitations related in this process, one of which is that Committees only have the ability to make 'recommendations' to a school board about accommodations which should be put in place.²⁸ This leaves parents with very little recourse beyond an informal process with school boards for getting an independent review of the accommodations outlined in their child's IEP.

²⁸ *Identification and Placement of Exceptional Pupils*, O Reg 181/98, s 16(2).

RECOMMENDATION:

- 1) **The Guidelines should state that school boards and other education providers have an obligation to provide an impartial and expeditious dispute resolution forum for accommodations above and beyond the forums mandated by the *Education Act*.**
- 2) **The Guidelines should provide a more comprehensive analysis of the duty to consult that school boards must discharge within the IEP development, implementation and review process.**

v) *Medical Documentation and Other Assessments*

In both the primary/secondary and post-secondary context, medical documentation can become a barrier when it comes to obtaining timely accommodation. Parents and/or students are often told that they cannot be accommodated until time-consuming assessments have been completed. As a result, students are frequently left without any accommodations at all.

Example: ARCH has received a number of calls from parents of students with disabilities who have been excluded from school until they get a psychological assessment and a behaviour management plan from a specialized facility. In most of these cases, the waiting lists for these assessments were over a year and as a result many of the students did not attend school for many months.

Furthermore, education providers often request more information than is necessary to provide the required accommodations. In these circumstances, providers will ask for a wide range of medical and/or diagnostic information which is not strictly relevant for providing accommodations. These requests can be intrusive and can also have the effect of stigmatizing a student because of a particular diagnostic label. ARCH has in the past been approached by a number of parents who were concerned about having their child labelled in such a manner.

Example: ARCH has worked with several clients who for various reasons wished to refrain from disclosing their specific diagnosis to an education provider. Often this was related to fear of being stigmatized or labelled. In many of these cases, the education service provider ultimately agreed to drop their request for diagnostic information and to use only the information necessary to accommodate the disability.

RECOMMENDATION:

- 1) **Guidelines should make clear that interim accommodation measures should be provided while awaiting medical documentation and/or assessment information.**
- 2) **Guidelines should integrate the new medical disclosure requirements as outlined in the OHRC's new "Policy on Ableism and Discrimination based on Disability".**

vi) Barriers resulting from Collective Agreements

Collective agreements often contain a number of different barriers which can pose problems for students with disabilities. For instance, over the past several years ARCH has received a number of complaints from parents of children with disabilities related to work-to-rule actions interfering with the accommodations their child needs to attend school. In many cases, the child is required to stay home while their peers without a disability continue to attend school.

Example: ARCH received several calls from parents and has represented parents who were experiencing problems as a result of work-to-rule actions by several unions representing educational assistants. In almost all of these cases, parents had been told that the school board could not accommodate their child until the labour action ceased. In all of these cases their peers continued to attend school during the work-to-rule action.

Another barrier often present in collective agreements are those related to seniority and/or the selection process for determining which employee gets a particular position. In many cases, this selection process is often unrelated to the degree to which the employee has the necessary skills to properly implement the accommodations a student requires. As a result, students are often deprived of the support of an employee who does possess the necessary skills.

Example: ARCH recently represented a parent who wished to have an outside behavioural specialist, fully qualified and already working with the family, to provide training to educational assistants on the implementation of a behavioural support plan. The school board objected and opted for another professional with similar qualifications but who had limited experience with the student and limited experience implementing the specialized plan which had been developed for the student. Their objection was based on the acceptability of the less qualified professional to the union.

ARCH takes the position that the disability specific needs of a student should be a primary consideration with respect to selecting the appropriate employee to work with a child with a disability.

RECOMMENDATION:

- 1) The Guidelines should include commentary fulsomely discussing labour issues and the steps that school boards must take to mitigate their impact on students with disabilities. This may include integrating the OHRC's fact sheet on "Equal access to education for students with disabilities during strikes" into the Guidelines and expanding its content to address professionals beyond educational assistants;**
- 2) The Guidelines should include a statement outlining the need for school boards to consider the specific disability related needs of a student and the ability of an employee to meet those needs when they are assigning an employee to that student;**

vii) The Definition of Disability

As noted above, the *Education Act* requires school boards to 'identify' students with disabilities. However, the system of identification (the IPRC model) uses very rigid and archaic definitions of disability. These definitions are often misunderstood by educators who will at times assume that students who have not been identified with exceptionality are not entitled to be accommodated or receive specialized support services.

Furthermore, ARCH has noticed that in practice certain school boards will link certain programs with a particular identification. This often means that students who do not fit into the rigid definitional category but who may benefit from a particular program will be denied access to that program. This means that the IPRC model can have the effect of limiting the degree to which a Board will individualize the accommodations provided to a student.

ARCH also notes that since the publication of the Guidelines, the OHRC has published a revised "Policy on ableism and discrimination based on disability". ARCH believes that this policy should be integrated into the new Guidelines.

RECOMMENDATION:

- 1) **The Guidelines should make clear that receiving accommodations or support services should not be dependent on IPRC identification.**
- 2) **The Guidelines should include a statement reinforcing that access to particular programs should not be dependent on being designated with a particular exceptionality but should instead rely on whether the program would meet a student’s disability-related needs.**
- 3) **The Guidelines should be revised to reflect the OHRC’s policy on Ableism and Discrimination based on Disability.**

VI. Inclusive Education for Children with Disabilities

To a large extent many of the issues preventing fully inclusionary education, the goal imagined in Article 24(2)(b) of the *CRPD*, are inextricably linked to the issues outlined above. Children with disabilities are often excluded from the benefits of the education system as a result of a poor accommodation process, a lack of supports or because of explicit exclusion. It follows that by tackling these issues we will be taking great strides toward inclusion.

However, this by itself is not sufficient. The only way to achieve a fully inclusionary education system is by explicitly rejecting educational philosophies which prize segregation over inclusion. Indeed many studies demonstrate that an inclusionary approach to education often has significant positive results for students. In one large scale international review of trends in special education, it was found that “[t]he evidence of inclusive education is mixed but generally positive, the majority of studies reporting either positive effects or no differences for inclusion, compared with more segregated provisions”.²⁹ This, in conjunction with Canada’s obligations under Article 24 suggests that inclusionary education strategies are more in line with the human rights obligations of education providers.

i) Segregated Classrooms

Parents have called ARCH numerous times to complain that their child is being pushed by a school board into a segregated setting. In many cases, the rationale is that the segregated setting has greater resources or is better equipped to accommodate some aspects of the student’s disability. This situation reflects the systemic barriers students with disabilities face when attempting to gain access to a mainstream classroom. At

²⁹ David Mitchell, *Education that Fits: review of international trends in the education of students with special needs education*, online: New Zealand Government Education Counts < https://www.educationcounts.govt.nz/publications/special_education/education-that-fits-review-of-international-trends-in-the-education-of-students-with-special-educational-needs/chapter-thirteen-teacher-education>.

many school boards the education system is structured to provide accommodations only in a segregated setting.

Example: A previous caller to ARCH was very concerned about the effect that a segregated classroom had on her son's emotional health. He had previously been in an inclusionary classroom from K-6 but upon transferring to a new school in grade 7, he was placed in a segregated classroom. He quickly became very depressed. Upon bringing this issue up with the school, the parent was told that if he was to be enrolled in a mainstream classroom, he would not have access to the same supports he would in the segregated classroom. They recommended that he stay in his current placement despite his mother's concerns.

It is important to note that racialized minorities and those with a lower socio-economic status experience much higher rates of segregation than the average population. A report by the Toronto District School Board demonstrated that "[s]tudents who self-identified as Black were over-represented in congregated Special Education...[and] notably under-represented in Gifted, IB, AP, Elite Athlete, and slightly under-represented in French Immersion"³⁰ and are the "largest racial category represented in Special Education schools (30.2%) where they are over doubly represented."³¹

VII. Conclusion

ARCH again applauds the Commission for undertaking this needed review of the Guidelines. As with the Commission's Policy on ableism and discrimination based on disability, ARCH also views this as an opportunity to redefine terms and set expectations for the use of language that is more in line with human rights law in this Province, and the *CRPD*. ARCH suggests that the Commission consider renaming its policy to reflect this change and to incorporate concepts such as ableism and inclusive education.

³⁰ Toronto District School Board, "Facts, Selected In-School Programs: An Overview", Issue 8, December 2013 (TDSB) at 3.

³¹ Toronto District School Board, "Facts, Selected School-Wide Structures: An Overview", Issue 9, December 2013 (TDSB) at 3.

A rights based approach to education must be inherently inclusive and traditional “special” education and the jargon and approaches that come with it should be jettisoned.³² Terms such as “special education” and “exceptionalities” should be replaced with more inclusive and rights based language.

As stated by former Education Minister of New Brunswick, Jody R. Carr:

Transformation to inclusive education should be understood as providing additional support for teachers and students. It is about respecting human rights, international and legal obligations, but also about improving the quality of education, based on sound 21st century research and best practices.³³

A stronger statement on the removal of ableist barriers and the creation of inclusive learning cultures in primary, secondary and post-secondary education can have a significant impact on education service delivery and respect for human rights in Ontario.

³² Jody R. Carr, “A Conceptual and Legal Framework for Inclusive Education” (December 2016) at 13 online: www.archdisabilitylaw.ca

³³ *Ibid* at 3.