Elementary and secondary education

Overview

In the 2001-02 school year, over 2 million students attended publicly funded elementary and secondary schools in Ontario.[8] Publicly funded elementary and secondary schools are governed by the *Education Act*[9] (the "*Act*") and its accompanying regulations. These schools are administered by local school boards throughout the province. Currently, there are 72 district school boards in Ontario: 31 English-language public boards, 29 English-language Catholic boards, 4 French-language public boards, and 8 French-language Catholic boards.[10]

Under the *Act*, the Ministry of Education is responsible for ensuring that all exceptional children in Ontario have available to them appropriate special education programs and services without payment of fees.[11] The Ministry is therefore responsible for requiring school boards to implement procedures for identifying student needs, and for setting standards for identification procedures.

The *Act* defines an "exceptional pupil" as one "whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program."[12]

Under Regulation 306 to the *Act*, school boards are required to provide special education programs and services to exceptional students. As part of this requirement, each school board must prepare a special education plan, to be reviewed annually.[13] School boards are also required to establish Identification, Placement and Review Committees and Special Education Appeal Boards.[14]

Under the *Ontarians with Disabilities Act*,[15] the Ministry of Education, as well as school boards, are required to prepare, update and make public accessibility plans that address the identification, removal and prevention of barriers to people with disabilities.

In the 2001-02 school year, 176,359 students at the elementary level and 100,735 students at the secondary level received special education programs and/or services in the publicly funded school system.[16]

Prior to 1998, the public education system was financed by a combination of government grants and money raised by school boards through local property taxes. In 1998, the provincial government introduced a new funding formula for Ontario's publicly funded school system. Under the new system, school boards no longer have the power to generate resources through taxation, and therefore depend on government grants to run the education system.[17]

Throughout the consultation, stakeholders stressed that many of the problems experienced by students with disabilities in accessing education are due to funding shortfalls. For instance, the Ontario Public School Boards' Association describes inadequate funding as "the foremost barrier to equal access to educational opportunities confronting students with disabilities."

In 2002, the provincial government established the Educational Equality Task Force, chaired by Dr. Mordechai Rozanski, to conduct an independent review of the education funding formula. As part of this review, the Task Force examined the current approach to funding special education and concluded that increased levels of funding are necessary to address problems in the system. The Task Force released its report, entitled *Investing in Public Education: Advancing the Goal of Continuous Improvement in Student Learning and Achievement* (the "Rozanski Report"), in December 2002.[18]

Students may also receive elementary and secondary education through private schools.[19] Private schools are operated independently and do not receive direct funding from government.[20] In 2001-02, 112,653 students attended private schools in Ontario. Of this number, 3,066 students received special education programs and/or services.[21]

In addition to the *Education Act* and its regulations, the Ministry of Education has developed numerous policy statements relating to the delivery of special education. Despite this extensive framework, stakeholders continue to express concerns about the accessibility and equality of educational services for students with disabilities. In many cases, stakeholders report that special education practices and procedures in school settings at the local level are not consistent with the Ministry of Education's own directives, and that this inconsistency is resulting in human rights violations.

The Ministry of Education has the authority to set its own education policies. At the same time, since the *Code* has primacy over all other pieces of legislation in Ontario (unless otherwise stated), these policies, as well as education practices and procedures, must be consistent with the *Code*. Under the *Code*, education providers in both the publicly funded system and in private schools have a legal duty to accommodate students with disabilities up to the point of undue hardship.

Access to Education

Barriers to education can take a variety of forms. They can be physical, technological, systemic, financial, or attitudinal. They can arise from an education provider's failure to make available a needed accommodation, or to provide one in a timely manner.

In *Eldridge v. British Columbia (Attorney General)*, the Supreme Court of Canada found that "once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner.... The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field."[22]
It is the Commission's policy position that this comment, while made in the context of health care, applies equally to the provision of educational services. As the Commission's *Disability Policy* states, "Governments have a positive duty to ensure that services available to the general public are also available to persons with disabilities."[23]

In order for persons with disabilities to receive equal treatment in education, they must have equal access to educational opportunities. The duty to accommodate includes identifying and removing barriers that impede the ability of persons with disabilities to access educational services. The Commission's *Disability Policy* affirms the duty of education providers to structure their programs and policies so as to be inclusive and accessible for persons with disabilities, and to take an active role in the accommodation process.

Physical Accessibility

Throughout the consultation, the Commission heard that students with disabilities continue to experience physical barriers to educational services. As stated by the KIDS' Coalition: "Students may be unable to attend their local school due to lack of physical accessibility. Many schools are multi-level and the installation of elevators may be impractical or too costly. Parts of the school may be inaccessible due to lack of ramps, heavy doors, site elevation or playground features. Many schools do not have washrooms suitable for students with disabilities (wide doors, higher toilets, grab bars, change tables, hoists or lifts, etc.)"

The Elementary Teachers' Federation of Ontario voiced similar concerns: "Ramps, elevators, washrooms, lab and counter tops which are appropriate for students with disabilities must be included in the design of the facility. This gives the message that inclusion is being taken seriously. In order for integration and full participation to occur, many existing school buildings must be altered. This may take the form of moving classrooms, building an elevator or perhaps a ramp. Currently, procedures do not exist that can readily

accommodate these changes. Students are often required to relocate to another accessible facility rather than attend their own local school."

It is the Commission's policy position, as outlined in the *Disability Policy*, that "when constructing new buildings, undertaking renovations, purchasing new computer systems, launching new Web sites, [or] setting up new policies and procedures... design choices should be made that do not create barriers for persons with disabilities."[24] This approach is referred to as "design by inclusion" or "inclusion by design".

Where barriers already exist, the duty to accommodate requires education providers to make changes up to the point of undue hardship to provide equal access for persons with disabilities. If, after making the required changes, persons with disabilities are still unable to participate fully, education providers have a duty to accommodate any remaining needs up to the point of undue hardship.

The Ontario *Building Code Act*[25] governs the construction of new buildings and the renovation and maintenance of existing buildings. It has become clear to the Commission that the accessibility requirements set out in the *Building Code* do not always result in equal access to persons with disabilities as required by the *Human Rights Code*. Those responsible for providing access often rely only on the requirements of the *Building Code* without due consideration of their obligations under the *Human Rights Code*. However, the *Human Rights Code* prevails over the *Building Code* and service-providers may be vulnerable to a human rights complaint to the extent that their premises continue to fall short of the requirements of the *Human Rights Code*. Reliance on relevant building codes has been clearly rejected as a defence to a complaint of discrimination under the *Human Rights Code*.[26]

In March 2002, the Commission provided extensive input to the Ministry of Municipal Affairs and Housing on the barrier-free access requirements of the *Building Code*.[27] The Commission's submission outlined ways in which the *Building Code* can incorporate human rights principles, and emphasized the need to achieve greater harmonization between the two *Codes*.

Actions Required:

- (1) That the Ontario *Building Code* be amended to reflect the legal requirements set out in the *Human Rights Code*.
- (2) That, irrespective of when the *Building Code* is amended, the Ministry of Education, schools, and school boards comply with the requirements of the *Human Rights Code* and the principles outlined in the *Disability Policy* when constructing buildings, making renovations, and designing programs and services.

Access to Accommodation[28]

Human rights law and policy establish that education providers have a duty to accommodate students with disabilities to the point of undue hardship. Without needed accommodations, students are often unable to access educational opportunities equally.

As previously mentioned, under the *Education Act*, the Ministry of Education is responsible for ensuring that all exceptional pupils in Ontario have available to them appropriate special education programs and services. When implementing a placement decision for a student who has been identified as exceptional, a school board is required to notify the student's principal of the need to develop an Individual Education Plan ("IEP") for the student.[29] An IEP is a working document that includes the specific educational expectations for the student, an outline of the special education programs and services to be provided to the student, and a statement of the methods by which the student's progress will be reviewed. In developing the IEP, the principal is required to consult with the student's parent and with the student where he or she is 16 or older.[30] If used properly, the IEP is a type of accommodation plan for the student.

During the consultation process, participants described many problems in the IEP process. There were reports of long waiting lists for professional assessments, delays in the preparation of IEPs, IEPs not accurately reflecting a student's needs, and IEPs being ignored entirely. The 2001 Annual Report of the Provincial Auditor confirms these reports. It concluded that IEPs "met neither the requirements of Regulation 181/98 under the *Education Act* nor the suggestions for good practice in the Ministry's *Individual Education Plan (IEP) Resource Guide (1998)*." [31] The Commission was told that, as a result of these problems, many students with disabilities are not receiving the accommodation they need to participate fully in the education curriculum and in school activities.

The Marsha Forest Centre reported: "It is routine that students with disabilities are required to begin school each year after other students do so, that some are told to remain at home when schools find themselves unable to provide necessary supports for various periods of time, and that others do not attend school due to disputes with schools over placement and supports."

Community Living London made similar observations: "To provide inclusive educational opportunities for children with intellectual disabilities, there must be classroom supports. The special education teacher must be given the tools to get the job done. There is a need for Educational Assistants to provide supports to students that will facilitate an environment conducive to learning...The need for in-class supports is urgent."

In order to have the opportunity to access education equally, students with disabilities may require various forms of accommodation. These accommodations may include: extra support in the classroom, adaptive technology, learning materials in alternative formats (*e.g.* Braille), transportation to school, extended test times, curriculum modifications, and assistance from specialized professionals (namely, psychologists, psychometrists, social workers, counsellors, educational assistants, speech and language pathologists, sign language interpreters, mobility instructors, and other professionals and paraprofessionals trained to work with students with special needs).

Participants in the consultation expressed concerns about the lack of alternative formats available to students whose disabilities may interfere with their ability to access print materials. Students with low vision or visual impairments and certain types of physical disabilities often require textbooks and other curriculum materials in alternate versions. In 2000, the Task Force on Access to Information for Print-Disabled Canadians published a report entitled *Fulfilling the Promise: Report of the Task Force on Access to Information for Print Disabled Canadians* which contained recommendations designed to improve access to information for the print-disabled community in Canada.[32] Yet, despite this work, consultees reported long delays in the transcription of textbooks, for example, with the result that students were left without the necessary course materials at the start of the school year.

The Commission heard of instances in which assistive devices (for example, computer access technology, adaptive software, *etc.*) needed to allow students to access the educational curriculum were delivered to schools, only to be left sitting unused in boxes because nobody in the school knew how to use them. The recently released final report of the Learning Opportunities Task Force (LOTF) supports these accounts. In a key finding related to the access of students with learning disabilities to post-secondary education, the report concluded that the majority of pilot students "had no access in secondary school to assistive technology or other accommodations that would enable them to succeed in their studies."[33]

The Commission was told that students are not receiving the accommodations they need when writing the Grade 10 literacy test.[34] Students must pass in order to graduate, and in the 2001-2002 school year, 60% of students identified as having special needs failed the test. The failure rate for students without special needs for the same period was 25%. [35] The Education Quality Accountability Office published a *Guide for Accommodations, Special Provisions, Deferrals and Exemptions* which provides for the accommodation of students with disabilities.[36] However, participants told the Commission that this *Guide* is not being followed in the school setting. For instance, LOTF reported that "many students do not have much needed accommodations for the EQAO testing listed in their IEP, a pre-requisite for accommodation use during this

testing. Many other students find that when they get to the test location the accommodation that they expected to utilize is not available after all, is out of order, or there is no one to help them with using it. Others have not received prior training in the use of the accommodation, which is a particularly problematic situation for the use of adaptive technology." LOTF's final report recommended that when taking the test, students must be guaranteed access to the requisite accommodations listed in their IEP. And, where students fail the test, they must have access to diagnostic assessments to determine if a learning disability exists, and to review whether the student requires additional or differentiated teaching and/or accommodations.

The Commission was very concerned to hear from consultees that students with disabilities, particularly students with learning and cognitive disabilities, are doing poorly on the test, at least in part, because of the failure of the special education system to provide them with the accommodations they needed in the grades leading up to Grade 10.

It has also come to the Commission's attention that educators in Ontario are not always complying with human rights principles when administering other types of tests. For example, private schools in Ontario often require students to write the Secondary School Admission Test (SSAT) as an admission requirement. The Online Student Guide to the SSAT indicates that where a student received "special accommodation", the school score reports will indicate that the student was tested under "Non-standard conditions." Educators are not only required to accommodate students with disabilities up to the point of undue hardship, they are also required to maintain the confidentiality of these students. Distinguishing the score results of a student who received accommodation has the potential of revealing the existence of a disability and exposing that student to discrimination.

A number of organizations commented on the shortage of professional services for students with disabilities. In its October 2002 Report, People for Education[37] estimated that in Ontario's elementary schools, there are 39,700 students with disabilities on waiting lists for special education services. The Report states "Access to the support services of the psychologists, social workers and speech pathologists who work with special education students has decreased dramatically over the five years [1997-2002] of our study."[38]

In its 1993 Annual Report, the Office of the Provincial Auditor of Ontario recommended that the Ministry of Education establish minimum levels of support staff required in integrated classrooms.[39] In its 2001 Annual Report, the Provincial Auditor concluded that this recommendation had not been implemented. Further, when interviewed for the 2001 Annual Report, many educators reported that teacher assistants and experienced special education resource teachers continue to be in short supply. In all of the boards visited by the Office of the Provincial Auditor, there were backlogs for special education professional services. Further, the Provincial Auditor noted that the backlogged cases were dealt with according to a triage system with the less "serious" cases having a waiting period of between six to twelve months, if they were even dealt with at all. The 2001 Annual Report concluded that "service decisions are being made based on budgetary considerations, and there is no basis for either school boards or the Ministry [of Education] to evaluate the appropriateness of the service cut-off points currently in place."[40]

The Commission heard from consultees that current funding levels do not allow school boards to offer competitive salaries to specialized special education professionals, particularly given that these services are very much in demand. The Commission learned that parents who can afford to will often pay large amounts of money to by-pass waiting lists for special education services. In most cases, however, the result is that students are forced to go without the supports they need. Increasingly, it is left up to teachers themselves to assist students, often without the proper training or expertise.

Participants made it clear that the lack of professional services is particularly problematic in rural and remote areas. The Commission heard that the situation is most acute in South-western and Northern Ontario, and is equally problematic at both the primary and secondary school levels. The 2001 Annual Report of the Provincial Auditor reported similar findings, concluding that "significant provincial discrepancies in the accessibility of services was creating an inequitable situation depending upon the jurisdiction in which a family was living."[41]

Consultees also reported that students with disabilities, especially in rural areas, experience difficulties with transportation to and from school. ARCH (the Legal Resource Centre for Persons with Disabilities) highlighted examples of transportation policies that may raise human rights issues, for example, busing companies that have "no food or drink" rules and fail to accommodate students who may have disabilities that require them to eat or drink regularly. Others expressed concerns that the funding formula does not provide boards with sufficient funding for the transportation of students with disabilities. The Education Equality Task Force, hearing similar concerns from its consultees, recommended that the Ministry of Education develop a transportation policy for students with special needs.[42]

The Commission also heard information from consultees that indicates that some private schools may not understand their obligations with respect to students with disabilities, or may be failing to respect them. The Commission heard from parents about private schools which have turned away children with disabilities on the basis that the school "is not in the business of providing these types of services", have insisted that any accommodations be funded by the parents, or have refused to enter into the accommodation process. Private schools, like publicly funded schools, are bound by the *Code*. This includes the duty to provide equal services to students who have or are perceived to have disabilities, and to accommodate the needs of students with disabilities to the point of undue hardship.

Actions Required:

- (1) That the Ministry of Education review and consider the recommendations contained in the report of the *Task Force on Access to Information for Print-Disabled Canadians*, particularly item 15 which recommends that governments at all levels use "the force of procurement" to promote the adoption of universal design standards for accessibility. The report recommends that only materials complying with such standards should be purchased.
- (2) That school boards and schools decide their curriculum book lists in a timely fashion so that alternative formats may be arranged for students with disabilities.
- (3) That publishers provide electronic versions of school textbooks to school boards as part of their duty to accommodate persons with disabilities in the provision of services.
- (4) That school boards and schools make all classroom materials (handouts, *etc*.) available in alternative formats in a timely manner.
- (5) That the Ministry of Education ensure that educators receive proper training in the use of assistive devices.
- (6) That the Ministry of Education develop a system to better monitor the application of its *Guide for Accommodations, Special Provisions, Deferrals and Exemptions* in the administering of the Grade 10 literacy test, and that it ensure that students are accommodated in accordance with the *Code*.
- (7) That the Ministry of Education establish programs to recruit specialized professionals currently under-represented in the special education system. That this initiative provide incentives to encourage special education professionals to make their services available in rural and remote parts of Ontario.
- (8) That the Ministry of Education follow the recommendation of the Education Equality Task Force to "develop a funding policy for the transportation of students with special needs"[43] and that this policy be in compliance with the *Code*.
- (9) That private schools be required to submit accessibility plans to the Ministry of Education demonstrating efforts to the point of undue hardship to ensure equal access to their services for persons with disabilities.

Timeliness

Throughout the consultative process, the Commission heard many concerns about the time it takes for students with disabilities to receive the accommodations they need. Based on the feedback received, it appears that delay is occurring at many stages in the accommodation process.

Consultees told the Commission that students are waiting up to eighteen months for the professional assessments they need in order to be accommodated. In their 2002 Report, People for Education made similar

observations and concluded that "moderately-needy" students are ending up on long waiting lists for special education services. The report showed that since 1999-2000, the number of students on special education waiting lists has risen by 14 per cent, for a total of nearly 40,000 students. About 60 per cent of these students are waiting for assessments.[44]

Consultees described long delays at various stages of the Identification, Placement and Review Committee process,[45] and in the preparation and implementation of IEPs. The Commission heard that even where a student has been assessed, identified and a placement chosen, the student might have to wait a significant period of time before a classroom space becomes available to them. Then, if parents dispute the identification or placement of their child, there are often considerable delays in the appeals process.

The Commission was also told that a major backlog in the processing of Intensive Support Amount[46] applications is also resulting in students having to wait long periods of time for accommodation. In its submission, CUPE (Canadian Union of Public Employees) reported: "Many complaints have been registered about the huge amount of paperwork involved in the ISA claims-approval process, and the boards have struggled to meet the administrative demands. Frontline workers are being diverted from the classroom in order to comply with the Ministry's demands... Moreover, getting *re-assessments* of students is all but impossible given the waiting lists and limited resources." The Rozanski Report recommended that the Ministry of Education devise an approach to ISA funding that reduces the administrative burden of the current ISA claims process.[47] The ISA funding scheme is currently under review.

The Centre for Independent Living in Toronto expressed the view that "accommodation delayed is accommodation denied." Justice for Children and Youth described the effect of delayed accommodation on students as follows: "Children experience time differently than adults, for the disabled child a short time in an inappropriate setting where they cannot possibly succeed can seem like a lifetime."

Participants told the Commission that other reasons for delays in the special education system include: shortages of specialized staff, overworked teachers, an overly legalistic appeals process, and, in some cases, school staff not being sufficiently apprised of their accommodation obligations, or, not taking these obligations seriously enough. Of particular note was the number of participants who attributed delays and diminished service in general to a lack of adequate funding. Participants stated that, without appropriate funding, delays are inevitable.

Canada has ratified international human rights instruments that affirm the importance of education in the life of a child. Article 28 of the United Nations *Convention on the Rights of the Child*[48] recognizes the right of the child to education, and requires states to achieve this right progressively and on the basis of equal opportunity; and Article 29 sets out the aims of such education, including the development of the child's personality, talents and mental and physical abilities to their fullest, and the preparation of the child for responsible life in a free society. As well, the *Declaration of the Rights of Disabled Persons*[49] affirms the right of persons with disabilities to education.

In order to access educational services equally, students with disabilities require that accommodation be provided promptly. The Commission's *Disability Policy* states that accommodation providers are required to "grant accommodation requests in a timely manner."[50] Delays in the provision of accommodation have the potential to directly impede a student's ability to access and participate in the educational curriculum. As such, unreasonable delays may constitute discrimination under the *Code*, and the Ministry of Education and school boards may be vulnerable to having a human rights complaint filed against them.

Actions Required:

- (1) That the Ministry of Education review special education practices and procedures to determine ways in which delay can be minimized.

- (2) That the Ministry of Education review the adequacy of resources provided to school boards to ensure that school boards are able to provide timely access to appropriate accommodation for all students with disabilities.
- (3) That school boards and schools review local level practices to determine ways in which accommodation can be provided in a more timely manner.
- (4) That the Ministry of Education and school boards review whether students are being required unnecessarily to obtain professional assessments in cases where disability-related needs are already known and established. That, where possible, the Ministry of Education and school boards provide accommodation to students without requiring professional assessments.
- (5) That school boards and schools provide interim accommodation for students pending the completion of professional assessments.

Safe Schools Act

Many participants in the consultation provided comment on the discriminatory effects of the *Safe Schools Act* on students with disabilities.

In 2001, the *Safe Schools Act* (Bill 81) amended the *Education Act* to add Part XIII, "Behaviour, Discipline and Safety."[51] The amendments created a new statutory scheme governing student discipline in Ontario's schools. Under the *Act*, students are to be suspended or expelled for a range of listed infractions, except where "mitigating factors" are present.[52] However, the *Act* does not explicitly recognize disability as a mitigating factor.

The Commission heard that the school system is not well-equipped to deal with students whose disabilities may manifest in disobedient or disruptive behaviour. Consultees told the Commission that, in many cases, students are suspended or expelled without due consideration of their right to accommodation.

Justice for Children and Youth observed: "Since the implementation of the *Safe Schools Act*...[there has been] an increase in the number of parents of students, and students reporting suspensions and expulsions to our offices. More specifically, there has been an increase in the number of reported cases of suspensions and expulsions by students identified by their particular boards of education as 'exceptional'. Quite often students are expelled or suspended for the very behaviour which makes them exceptional. For example, in two recent cases parents of students with Tourettes Syndrome reported to us that their children were being disciplined for swearing..., a behaviour which is beyond their control. In both of these cases, the student had been identified as exceptional."

Several consultees expressed the view that lack of access to accommodations in the classroom can lead to increased frustrations on the part of students, which then lead to an increased incidence of disobedient behaviour and emotional outbursts.

The Commission was told that, in some cases, parents are being pressured to "voluntarily" remove their children from school, that students with disabilities are being ostracized for behaviour that may be beyond their control, and that the suspension and expulsion provisions of the *Act* are not being interpreted or applied consistently throughout the province.

The Commission heard about restrictive disciplinary practices taking place in some classrooms. For example, the Commission heard that students with disabilities are subjected disproportionately to forced isolation - often in a room outside of the classroom - as a method of behaviour control. The Commission also heard that restraint procedures are sometimes being misused to the psychological and, in some cases, physical detriment of students.

One parent described the effect of these practices as follows: "When students with disabilities are arbitrarily removed, excluded, suspended or expelled from school it is an affront to their dignity and basic right to attend. The effects of being removed from society can be serious and long lasting. The effects on how students are

viewed by their peer groups can also be devastating. Students who are removed are not attaining or enjoying the same levels of performance, benefits and privileges experienced by others."

The view was also expressed that the *Safe Schools Act* is often applied more strictly to children with disabilities from racialized communities. For example, in its submission ARCH stated "it is the view of some racialized communities that their children are more likely to be suspended or expelled than white children and that the *Safe Schools Act* is applied differentially to them. In many instances, although the conduct giving rise to the reprisal is disability related, the student's needs are not identified or supported." Along the same lines, another consultee commented: "Black male students are particularly vulnerable to sanctions such as removals due to stereotypes involving aggressive behaviour."

In order to properly evaluate the adverse impact that the *Safe Schools Act* may be having on individuals and groups protected by the *Code*, it is necessary to obtain more information about which students are being disciplined under the *Act*. Collecting information about identity based on *Code* grounds, however, may lead to a concern that the information might be used to treat an individual or group differently. Data collection for monitoring and evaluation purposes is permitted by the *Code* in the context of a special program.[53] Such collection and use of data should only ever be undertaken for legitimate purposes not contrary to the *Code* such as ameliorating disadvantage, removing systemic barriers and promoting substantive equality for individuals and groups protected by the *Code*. There should always be a rational and objective connection between the nature of the information being collected and its intended use. The form that data collection takes should be the least intrusive alternative that most respects the dignity and confidentiality of individuals. Based on the large amount of feedback received from participants on this issue, it is the Commission's view that the collection of aggregate data on the application of the *Safe Schools Act* is both necessary and appropriate insofar as it is used only for the legitimate purposes already outlined. The Commission heard that some schools are already collecting this type of information, but that it is not being done consistently across the province, and where it is being collected, it is not always being analyzed.

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

Part 3.4 of the Commission's *Disability Policy* states: "Before terminating or sanctioning an employee for 'unacceptable behaviour', an employer might first consider whether the actions of the employee are caused by a disability, especially where the employer is aware or perceives that the employee has a disability." This principle applies equally to the educational context. Education providers have a duty to assess each student individually before they consider disciplinary measures under the *Safe Schools Act*. Specifically, they have an obligation to consider the effect that a student's disability may be having on his or her behaviour, to inquire into whether the student has accommodation needs, and where discipline of the student is warranted, to implement such discipline progressively and with discretion.

Some participants stressed that it can be very challenging for the school system to deal with students whose disabilities may result in uncontrollable, at times even violent, behaviour. School boards are in the difficult position of having to balance the right of a student with a disability to accommodation, preferably in the regular classroom, with the rights of other students to a safe educational environment and of school staff to safe working conditions.

Maintaining a safe learning environment for students, school staff and educators alike is an important objective. And where a student 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 issues, specifically, that the accommodation would pose a risk to public safety. However, the seriousness of the risk will be evaluated only *after* accommodation has been provided and only after appropriate precautions have been taken to reduce the risk. The onus of proof will be on the education provider to provide objective and direct evidence of this risk. As the Commission's *Disability Policy* states,

"A mere statement, without supporting evidence, that the... risk is 'too high' based on impressionistic views or stereotypes will not be sufficient."[54]

Actions Required:

- (1) That, consistent with the Commission's *Disability Policy*, educators be required to use discretion in their application of the *Safe Schools Act* and must assess whether appropriate accommodation has been provided to a student with a disability, and implement practices of progressive discipline, if discipline is appropriate, before that student can be either suspended or expelled.
- (2) That school boards collect and analyze data on suspension and expulsions under the *Safe Schools Act* to ensure that the *Act* is not having an adverse impact on individuals protected under the *Code*. School boards to ensure that individual data is collected in a manner that is provided for in the Commission's *Guidelines on Special Programs,* and is used only to address inequities and to promote compliance with the *Code*. School boards to take steps to ensure the confidentiality of students in this process.
- (3) That the Ministry of Education provide appropriate training to educators on how to deal effectively with students whose disabilities may cause them to be disruptive in school.

Disability and Other Forms of Discrimination

In recent years, human rights analysis has evolved to take into account the context in which discrimination occurs. Under the *Code*, individuals are protected from discrimination and harassment on numerous grounds, one of which is disability.[55] There is an increased recognition that discrimination is often based on more than one ground, and that these grounds may intersect thus producing unique experiences of discrimination.[56] For example, persons with disabilities may also experience discrimination on other grounds in addition to disability such as race and/or gender.

The Commission has explored this "contextualized" or "intersectional" approach to discrimination analysis at length in its Discussion Paper entitled *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*.[57] It is the Commission's view that a contextual approach is needed in order to fully appreciate and do justice to the complex and multifaceted ways in which many people experience discrimination.

In its Consultation Paper on disability and education, the Commission asked stakeholders to provide examples of ways in which students with disabilities are affected also by being members of other historically disadvantaged groups. The considerable response to this request confirms that an intersectional approach to analyzing discrimination against students with disabilities is both necessary and appropriate.

The Commission learned that students with disabilities who have recently immigrated to Canada have an especially difficult time in school. The KIDS' Coalition observed: "Children of new Canadians and landed immigrants who have disabilities are at a distinct disadvantage. In many cases their families will not have the time or resources to find out about community health and social services. The families may also have language difficulties and/or cultural perceptions that prevent them from getting the help they need." This situation is particularly worrisome considering that consultees repeatedly stressed to the Commission the importance of parental advocacy in navigating the special education system effectively. The Provincial Auditor's 2001 Annual Report also concluded that "it is up to parents to advocate for their child when they feel their child is not getting the assistance that he or she requires. However, the ability of parents to advocate for their child is variable depending on how well informed they are about available services and supports."[58]

In their 2002 Report, People for Education noted that cutbacks to English as a Second Language (ESL) programs have resulted in students who are new immigrants to Canada being "incorrectly placed into special education programs in an effort to provide them with additional support."[59] The Commission also heard that some of these students are being misdiagnosed as having learning disabilities.

The Commission heard that a student's gender may have an impact on their experience in the special education system. The Ontario Association of Speech-Language Pathologists and Audiologists expressed a concern that female students with language and/or speech-based disabilities may not receive appropriate special education services. They noted: "Female children with communication and language delays or disorders and whose behaviour may be unremarkable, often go undetected. Their disabilities may be misunderstood as shyness or part of a gender stereotype." Research also indicates that boys are much more likely than girls to be diagnosed as learning disabled or emotionally disturbed.

Consultees told the Commission that students in the French language education system have difficulty accessing special education services that are sensitive to their needs. For example, the Ottawa Francophone Chapter of the Ontario Autism Society commented that "Francophone children in the Ottawa area who are diagnosed with autism or P.D.D. [Pervasive Developmental Disorder] have virtually no access to specialized services in their mother tongue between the time they are diagnosed and the time they are eligible to attend school." The Rozanski Report also made note of "the difficulty of securing francophone specialists for programs and services, particularly in the area of special education.[60] Conseil des Écoles Catholiques de Langue Française du Centre-Est told the Commission that Francophone students with disabilities are also faring very poorly on the Grade 10 literacy test. They suggested that a working group be established to examine the issue. There is currently a case before the Human Rights Tribunal that will consider whether the lack of a specialized service in French resulted in discrimination against a Francophone child because of the combined effect of his minority language education rights and his disability. Although the *Code* does not explicitly identify "language" as a prohibited ground of discrimination, language can be an element of a complaint based on other grounds in accordance with the Commission's *Policy on Discrimination and Language*.

The Commission heard that students with disabilities from Aboriginal communities experience particular disadvantage in the education system. Research indicates that the incidence of disabilities amongst Aboriginal children is disproportionately higher than that of the general population. For example, the Canadian Policy Research Networks estimated that First Nations people are three times more likely to have diabetes than other Canadians, and that aboriginal peoples are also more likely to have hearing, sight and speech disabilities.[61] In 1996, a Federal Task Force on Disability Issues determined that an Aboriginal Canadian with a disability is significantly more disadvantaged than the average Canadian due to jurisdictional complexities in governance, inadequate funding, and a failure of mainstream programs to take into consideration the special needs of the Aboriginal community.[62] Concerns have also been raised that cultural biases inherent in standardized special education assessment tools have an adverse effect on Aboriginal students.[63]

Consultees also reported that students with disabilities from low income families encounter unique hurdles in the special education system. Parents of these children often find it extremely difficult, if not impossible, to take time out from work to advocate on their child's behalf. This situation is only exacerbated for single parents. Research also indicates that children with disabilities are over-represented in families with low income. One study suggests that this may be so "first, because the extra time required for care leaves less time for the parents to do paid work, and second, because these families face higher out-of-pocket expenses in order to look after children with disabilities."[64]

Actions Required:

- (1) That the Ministry of Education, school boards and schools develop programs and activities that promote awareness of the unique experience of students with disabilities who are also members of other historically disadvantaged groups.
- (2) That school boards and schools consider the unique situations of students with disabilities who are also members of other historically disadvantaged groups when assessing these students through the IPRC and IEP processes.
- (3) That school boards and schools design and deliver workshops for parents who are new Canadians and/or whose first language is not English to assist them in understanding and participating in the

special education system.

Negative Attitudes and Stereotypes

The Commission's *Disability Policy* emphasizes human dignity, respect and the right to equality. The *Policy* states:

> Human dignity encompasses individual self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. It is harmed when individuals are marginalized, stigmatized, ignored or devalued.[65]

Negative attitudes, ignorance, misinformation and stereotypes about the nature of specific disabilities, and/or about persons with disabilities themselves can be extremely damaging to an individual's sense of dignity, to their self-confidence, and to how they perceive themselves in the educational environment. In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* ["*Grismer*"], the Supreme Court of Canada stressed the importance of

> ...combating false assumptions regarding the effects of disabilities on individual capacities. All too often, persons with disabilities are assumed to be unable to accomplish certain tasks based on the experience of able-bodied individuals. The thrust of human rights legislation is to eliminate such assumptions and break down the barriers that stand in the way of equality for all.[66]

The *Code*'s protection against discrimination on the basis of disability includes a subjective element, namely, one based on perception of disability.[67] The Supreme Court has also made it clear that disability must be interpreted to include its subjective component, since discrimination may be based as much on perceptions, myths and stereotypes, as on the existence of actual, functional limitations.[68] Society's response to a real or perceived disability has been referred to as "social handicapping." In a recent decision, a British Columbia Human Rights Tribunal found discrimination to exist where a school's administration refused to re-enrol a student with a disability due to its belief that she did not belong at the school. The Tribunal found that

> Those beliefs were based on assumptions about [the student's] inability to excel in an academic environment. The beliefs were not informed by advice from personnel with expertise in the instruction of students with severe learning disabilities.[69]

The school setting can be an ideal place for young people to learn about diversity and be exposed to differences between themselves and their peers. Effective education can be the key to acceptance of these differences and to respectful and harmonious co-existence. As such, the Commission was very concerned to hear about the persistence of negative attitudes towards persons with disabilities in the education system.

The Spina Bifida and Hydrocephalus Association of Ontario told the Commission that "Accommodation for students with disabilities is often perceived as extra and an imposition on serving 'normal' students, rather than a basic right for all." A parent of a child with autism informed the Commission that "some children within the schools in Ontario still use words such as Retard, Stupid, Slow, and Dummies when referring to the developmentally challenged class."

ARCH noted that a "failure to adequately address bullying and taunting in the classroom and the schoolyard is a barrier to success for the student on the receiving end. At times it results in great anxiety and fear and the student's non-attendance altogether." If left unchecked, harassment can impede a student's ability to access educational services equally and to participate fully in the educational experience.

Consultees emphasized that the attitudes of educators towards disability issues will largely influence the way in which other students perceive and relate to students with disabilities. On this point, Community Living Toronto remarked: "While the principal sets the tone for the school, it is the teacher who must model attitudes and acceptance of all students within their class.... If teachers do not demonstrate respect for the rights of

every child to be enrolled in the classroom, how can we expect that students will accept people with differing abilities?" The KIDS' Coalition expressed a similar sentiment: "Teachers and principals who are knowledgeable about disability, and sensitive to the creation of inclusive classrooms and schools are the best protection that disabled students have against harassment and negative stereotyping." In *Trinity Western University v. British Columbia College of Teachers*, the Supreme Court of Canada stated

> ...teachers are a medium for the transmission of values. It is obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of society within which teachers operate and the reason why there is a need to respect and promote minority rights... Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance..."[70]

Participants expressed concerns that teachers may not be receiving appropriate training in working with students with disabilities, or in dealing with disability issues. For instance, ARCH commented: "In our communications with educators we frequently notice that the language they use with respect to disability repeats standard stereotypes. For example, a student is 'wheelchair bound' or 'suffers from a disability'." The Ontario Association of Speech-Language Pathologists and Audiologists suggested that a way to deal with this might be "Partnering schools, students and teachers from diverse school boards to develop and share experiences and effective practices in integrating children with differences and disabilities in the classroom and community."

The 2001 Provincial Auditor's Report also found that teacher training in disability issues was inadequate. The Report states "[g]iven that the Ministry expects students with special needs to be educated in the regular classroom wherever possible, all teachers need a strong foundation in special education service delivery. Nevertheless, at the time of our audit, efforts to ensure that all teachers had this strong foundation were not sufficient."[71] Due to the high retirement rate of teachers in recent years, there has been a big turnover in the profession. Consequently, there are fewer teachers with extensive teaching experience, particularly in the specialized area of special education.

The certification requirements for teachers in Ontario are undergoing major changes. In June 2001, the provincial government enacted the *Stability and Excellence in Education Act* which requires all teachers to complete a Professional Learning Program for the purpose of professional development in order to maintain their licence to teach in publicly funded schools in Ontario. The program was fully implemented in September 2002 and teachers have until 2007 to complete the required professional learning courses. The program requires teachers to take 14 courses every five years, seven of which are core courses. One of the core courses is dedicated to the subject of special education. This course includes information on:

- learning disabilities, learning exceptionalities, gifted students and other students with special needs
- students at risk of failing or dropping out for social, economic or emotional reasons
- teaching strategies for accommodating and modifying the curriculum for exceptional students and students at risk
- supporting students equitably and with respect
- the Identification, Placement and Review Committee (IPRC) process
- writing and using an Individual Education Plan (IEP)
- planning students' transition out of high school
- funding of special education programs.

In addition, another core course called "Student Assessment" includes a unit on accommodations for assessments. It would appear that this training, if conducted appropriately, has the potential to better train teachers in the publicly-funded school system to deal more effectively with disability issues.

Participants also expressed the view that teachers who have disabilities themselves can be highly effective in demystifying disability issues for students and school faculty alike. The National Federation of the Blind

commented: “The presence of more teachers who are blind or vision-impaired would act as role models to students in the regular school system, and would also help educate other teachers and administrators on the capabilities of persons who are blind. Not only must the education system do much more to encourage persons who are blind to consider the teaching profession as a viable career to pursue, it must also encourage teachers who encounter blindness later in life to remain in the profession.”

Actions Required:

- (1) That the Ministry of Education monitor its Professional Learning Program to determine its ability to prepare teachers to deal effectively with disability issues and to treat students with disabilities with dignity, respect and sensitivity.
- (2) That schools boards and school staff engage in educational activities designed to raise student awareness of disability issues and to combat negative attitudes and stereotypes about persons with disabilities.

Labelling

Throughout the consultation, many individuals and organizations voiced concerns about the practice of labelling students with disabilities in the education system. Participants told the Commission that labelling takes place at various stages in the special education system (*e.g.* the IPRC process). The Cornwall Parent Support Group stated its view that students “are judged against presumed group characteristics rather than being assessed by their own personal abilities.”

Labelling of students can result in pre-determining accommodation on the basis of stereotypical assumptions, rather than assessing the individual needs and strengths of each student. Moreover, preoccupation with labels and their accompanying stereotypes can lead to pedagogic and social interactions that can be detrimental to students with disabilities in ways that promote paternalism and are an affront to dignity and individuality.

It is the Commission’s policy position that when accommodations for persons with disabilities are being explored, the emphasis should be on assessing and accommodating each person’s unique needs and circumstances, rather than resorting to preconceptions or blanket generalizations about persons with a particular disability. At all levels, it is important that the focus remains on the individual, rather than on the category of disability. Concerns arise where labels are used in such a way that an individual’s unique characteristics, including their disability-related needs, are oversimplified, and their strengths and individuality are reduced by their designation in a fixed category.

Participants expressed numerous concerns about the Intensive Support Amount (“ISA”) funding process and its reliance on pre-set categories for determining funding levels. School boards receive money through Special Education Grants. These grants are designed to provide funding for the incremental costs of delivering special education programs and services. Other costs, (*e.g.* classroom teachers, heating and lighting) are to be covered through the basic grants that school boards receive for all students, including those with special needs. Special Education Grants have 2 components:

1. The Special Education Per Pupil Amount (“SEPPA”), which is based on a school board’s total enrolment (counting all students). This funding is used for special education programs and services that address the full range of exceptionalities.
2. The ISA, which is a variable amount related to the number of high-needs exceptional pupils in a board (*i.e.* students who require high-cost specialized equipment, programs and classroom supports).

There are 5 levels of ISA funding.[72] School boards file claims for ISA funding in relation to individual students. The claim form outlines criteria associated with various “profiles” (*e.g.* “behaviour,” “deaf/hard of hearing,” “autism/PDD,” “developmental/intellectual,” “blind/low vision”). School boards are expected to classify each high-needs student according to the profiles.

The Commission heard that the use of these profiles stereotypes students, fails to consider the individual needs of students, and demeans the dignity and sense of self-worth of students with disabilities. The Commission learned that throughout the school system, students are known as "ISA kids," meaning "high needs kids," and are identified more by their disabilities than by their individual characteristics. Consultees expressed concerns that the label precedes the student and creates fixed preconceptions about that student's capabilities.

The tiered structure of ISA funding means that the more "severe" a student's disability, the more money the school board will receive. Consultees stated that this system encourages school boards to exaggerate the disability-related needs of students in order to secure greater ISA funding, and discourages them from acknowledging a student's improvement. The Ontario Coalition for Inclusive Education remarked: "It pays to devalue students. Money is lost if strengths are documented. So where is the motivation to provide accommodations that promote learning?"

One participant elaborated further: "This funding system also discourages the Boards from providing successful remedial and/or compensatory programs that will help the child to be included within the mainstream. More money is given to Boards that document poorer children's performances on cognitive and academic measures and document more severe behavioural problems. These Boards may be providing poorer services that contribute to the children's failure. They then get more money to continue to provide ineffective special educational support. Boards that successfully remediate the child are penalized with less funding."[73]

Some consultees saw the issue of labelling differently. The Centre for Equity and Human Rights at Seneca College stated: "Labels in themselves are not the problem. Misuse of labels is the problem." Some participants even saw value in labels. For example, the Autism Society Ontario expressed the view that "labelling of students with ASD [Autism Spectrum Disorder] can be positive. Students with ASD, particularly those with better language skills, are often seen as exhibiting intentionally poor behaviour. Other students may see them as 'weird'. Once these students are identified as having ASD, a neurological disorder, there is often greater acceptance of them. The label has helped to identify them as disabled and not as rude, offensive or weird." Expressing similar views, the Learning Opportunities Task Force stated: ""We have ample evidence that false delicacy on the part of the school system to avoid labelling has a terrible impact on students with learning disabilities. The use of identifying terminology is an essential component of ensuring the provision of ongoing appropriate programming, services and accommodations to students with disabilities."

Participants also expressed concerns that the current ISA funding process fails to recognize and account for the needs of students who have more than one disability. For example, the Special Education Advisory Committee of Ottawa Carlton Catholic School Board stated: ""If a child has two exceptionalities, the identification process does not allow for the funding of both exceptionalities – only one will be funded. Their unique needs as related to both exceptionalities must be met, however from a funding standpoint they only qualify under one set of criteria." This problem would seem to demonstrate the shortcomings of a system that over-relies on rigid categories to identify student needs.

Education providers have a duty to accommodate a student with a disability up to the point of undue hardship regardless of how neatly that individual may fit into administrative categories. As is stated in the Commission's *Disability Policy*: "There is no set formula for accommodating people with disabilities. Each person's needs are unique and must be considered afresh when an accommodation request is made."[74]

Individuals and organizations also had concerns about the "one envelope" style of funding ISA claims. ISA amounts generated by student-specific claims need not be spent on these specific students. Although school boards file ISA claims based on individual students, ISA funding (excluding ISA Level 1 and the SIP) is not allocated on a student-specific basis. Each board is permitted to use its total special education revenue to meet the needs of all of its students with special needs. Participants informed the Commission that this style of funding ISA claims does an indignity to persons with disabilities by pitting student against student and setting up a "triage" system in which the most funding goes to the student whose disability is considered the most "severe."

Participants also expressed concerns that while this funding structure encourages school boards to use the disability-related needs of students to generate funding, some students with disabilities, on whose behalf ISA claims have been made, fail to benefit directly from the money received. Community Living Upper Ottawa Valley observed that "The ability of boards to move funds in special education lends itself to inequities for children whose parents fail to understand or exercise their rights and find it difficult to advocate on their children's behalf in the ever-changing provincial educational system."

Actions Required:

- (1) That the Ministry of Education, school boards and school staff review special education practices and procedures to ensure that accommodation is governed by the principle of individualization rather than by generalizations about specific disabilities.
- (2) That the Ministry of Education ensure that any system of funding that it administers, ISA or otherwise, complies with human rights law and policy. Specifically, that such a system avoids labelling and focuses on the disability-related needs of each individual in its assessment process.

Accommodation Process

The principles of respect for dignity, individualization, and integration and full participation, as outlined in the Commission's *Disability Policy*, apply both to the substance of an accommodation and to the accommodation process. The manner in which an accommodation is provided and the methods by which it is implemented are subject to human rights standards.

The *Education Act*and its accompanying regulations set out a structure for the identification and accommodation of disability-related needs in the publicly funded school system. Under the *Education Act*, the Ministry of Education is responsible for requiring school boards to implement procedures for identifying student needs, and for setting standards for identification procedures.

Regulation 181/98, under the *Education Act*, requires all school boards to establish at least one Identification and Placement Review Committee ("IPRC"). An IPRC is composed of at least 3 people, one of whom must be a principal or supervisory officer of the board. The principal of a school may, by his or her own decision, or at the request of a parent, refer a student to an IPRC for a decision as to whether or not the student is "exceptional", and if so, whether he or she should be placed in a regular classroom with supports, or in a special education class.[75] In making these decisions, the IPRC must consider educational, health and psychological assessments, as well as information submitted by the parents.[76] The IPRC can also interview the student. The IPRC has the power to make recommendations about special education programs and services for the student, but does not have decision-making power in this respect as the recommendations are not binding. In addition to assessing students who have not previously been identified as "exceptional," the IPRC assesses students who are transferring from a demonstration school to the regular school system, and reviews existing student identifications and placements.

Throughout the consultation, consultees expressed many concerns about the IPRC process. In particular, the Commission heard that the process lacks an effective dispute resolution mechanism. While Regulation 181/98 provides for an appeal of IPRC decisions dealing with determinations of "exceptionality" and student placement, it does not provide an avenue for parents to appeal the IPRC's recommendations regarding special education programs and services for their child. As a result, disputes between parents and educators about IPRC recommendations regarding programs and services are increasingly ending up at the Commission as human rights complaints.

Consultees told the Commission that the appeal process for decisions regarding identification and/or placement is cumbersome, time-consuming and overly litigious. Parents may appeal these types of decisions to the Special Education Appeal Board. However, these decisions are not binding on the school board, and if the school board chooses not to implement the Board's decision, the parent or pupil will have to appeal another level to the Special Education Tribunal. Several consultees indicated that the first level of appeal is a

waste of valuable time since these decisions are not binding, and often end up being appealed to the Tribunal. Then, even if a parent gets a favourable decision from the Tribunal, more time may be spent in court if the school board applies to have the decision judicially reviewed.

Participants emphasized that every day lost in delays in the appeals process is a day that a child is not receiving the education they need. In some cases, the delay may even prevent the child from attending school at all. The Special Education Advisory Committee of the Huron-Superior Catholic District School Board recommended that "A body which provides direct access for parents to raise their concerns and address issues in a timely fashion should be formed." They observed that "The current IPRC appeal process is lengthy, expensive for School Boards and not user friendly. Parents find this process stressful, intimidating and often not objective or positive."

If the IPRC decision is not appealed, the school principal is notified to prepare an IEP for the student.[77] As mentioned previously, an IEP is a written summary of a student's strengths, interests and needs. It sets out the special education programs and services established to meet the student's needs, and describes how these programs and services will be delivered. It is a working document that allows for modifications in response to the student's growth and changing needs. In addition to serving as a guide for educators in monitoring the student's progress, it is also meant to serve as an accountability tool for the student, his or her parents, and others working with the student. In developing the plan, the principal must take into consideration any recommendations made through the IPRC process.

Participants in the consultation described many problems in the development and implementation of IEPs. The Commission heard that, in many instances, local level school practices do not comply with the standards set in legislation and in the Ministry of Education's special education policy statements.[78] In particular, consultees reported that, often, IEPs are not prepared in a timely fashion, that they are not an accurate reflection of a student's disability-related needs, and that the supports described as necessary in the IEP are not provided. And, as Justice for Children and Youth noted, "Without a clear right of appeal...parents have little recourse when the IEP fails to come up with a plan which adequately addresses the needs of the disabled pupil."

The Provincial Auditor's 2001 Annual Report supports the observations of consultees. The Report states that, despite legislative and policy requirements, many IEPs are not completed in a timely manner,[79] and many educators are not specifying in the IEP the services or supports that a student needs to meet his or her learning objectives, in part because "educators were concerned that they might not be able to provide a specified level of support" and might thus face legal action by parents.[80] The Report goes on to state that of the schools surveyed, "principals allocated the resources they were given based on their own judgment and that of their staff regarding the relative need of each student with special needs. They also noted that resource allocation was influenced by persistent advocacy by parents and not just by assessed needs."[81] Of particular note, the Report observes that neither the Ministry of Education nor the school boards had established the quality-assurance processes necessary to ensure that all exceptional students have appropriate programs and services available to them.

The Commission was also very concerned to hear from consultees that the IEP is sometimes used inappropriately as a tool to generate funding. Specifically, the Commission heard that, in some cases, exaggerated characterizations of a student's disability-related needs make their way into the student's IEP, as a way to "bolster" the student's ISA claim. The effects of this practice will be discussed further under "Appropriate Accommodation."

Throughout the consultation, many parents described feeling intimidated by and excluded from participating in the accommodation process. Although Regulation 181/98 requires IPRCs to consider information from parents in making their decisions and gives parents the right to have a representative with them at the IPRC meeting, many parents continue to find the whole process alienating. For example, in its submission Community Living Toronto stated: "The entire IPRC process is extremely intimidating to parents... Parents of children with an intellectual disability must sit through 'team meetings' and IPRCs with up to 12 professionals who may never have met their child. The process is not explained fully. Parents may not understand the

purpose of the meeting, the scope of the decisions that will be made, who will be in attendance and what their role in the meeting will be. Very seldom are translation services offered to families who have English as a second language. Parents often sign forms without understanding the far-reaching implications for the future." Similarly, the Canadian Council of the Blind, Ontario Division stated: "Parents, generally, are not adequately informed of their rights, and often think that the educational professionals must know what's best for their child."

Regulation 181/98 also requires principals to consult with parents in the development of a student's IEP. However, the Commission heard reports from several participants that this is not always happening. Some parents expressed feeling pressured to sign the IEP, even though they were not certain that it was in their child's best interest. Some even went so far as to say that they feared that if they did not go along with the opinions of school staff, their child would suffer reprisals.

In its *1993 Annual Report*, the Office of the Provincial Auditor of Ontario recommended that "Each school board should advise parents annually of the existence of the parents' guide, and in particular point out the parents' right to refer their child to the IPRC through the principal. The parents' guide should include a description of the full range of options for their child, including options available at provincial and demonstration schools."[82] In its *2001 Annual Report*, the Provincial Auditor concluded that this recommendation had only been partially implemented. It stated: "Regulation 181/98 requires a board's parents' guide to be provided to families of exceptional students and available at all schools and at the Ministry's district offices. However, it does not require that [the guide] be provided to parents in advance of IPRC meetings and in many cases they were not at the schools we visited."[83]

As stated in the Commission's *Disability Policy*, "Accommodation is a shared responsibility. Everyone involved should co-operatively engage in the process, share information, and avail themselves of potential accommodation solutions."[84] Since, in most cases, parents will have intimate familiarity with their own child's needs and abilities, parental involvement is invaluable in designing effective accommodation plans for students.

Actions Required:

- (1) That the Ministry of Education review the IPRC process and make any changes necessary to ensure that it meets both the procedural and substantive components of the duty to accommodate as mandated by the *Code* and the Commission's *Disability Policy*. .
- (2) That the Ministry of Education develop and implement an effective mechanism for resolving disputes that arise in the accommodation process.
- (3) That school boards and school personnel abide by human rights obligations when engaging in the accommodation process.
- (4) That the Ministry of Education provide to parents plain language guides on the accommodation process in multiple languages prior to the IPRC meeting.
- (5) That school boards arrange and conduct information seminars for parents on the accommodation process and aspects of the special education system more generally.

Appropriate Accommodation

The Commission's *Disability Policy* stipulates that an accommodation for a person with a disability will be considered appropriate if it respects the dignity of the individual with a disability, meets individual needs, best promotes integration and full participation, and ensures confidentiality. The Commission will consider an accommodation appropriate if it will "result in equal opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges enjoyed by others, or if it is proposed or adopted for the purpose of achieving equal opportunity, and meets the individual's disability-related needs."[85] Once appropriate accommodation is received, students must still be able to perform the essential requirements of the service, that is, they must still be able to pass the school curriculum.

Human rights law has clearly established that equality may sometimes require different treatment that does not offend an individual's dignity. In *Eaton v. Brant County Board of Education*, the Supreme Court of Canada ruled on the appropriate placement for a student with a disability.[86] Emily Eaton, a 12-year old student with a disability, was initially placed in an integrated classroom. After three years, her teachers and assistants concluded that this placement was not in her best interests, and that she should be placed in a specialized classroom. Her parents disagreed. An IPRC determined that Emily Eaton should be placed in a specialized setting. Her parents appealed the decision up to the Supreme Court of Canada. The Court ruled that the decision of the tribunal to place Emily Eaton in a special education class, contrary to the wishes of her parents, did not violate the equality rights provisions of the *Charter.*

The Court stated that the failure to place Emily Eaton in an integrated setting did not create a burden or disadvantage for her, because such a placement was in her best interests. According to the Court,

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

The Court found that the tribunal had sought to determine the placement that would be in the best interests of Emily Eaton, had considered her special needs, and had striven to fashion a placement that would accommodate those needs and enable her to profit from the services that an educational program offers.

As the Commission noted in its *Disability Policy* "in some circumstances, the best way to ensure the dignity of persons with disabilities may be to provide separate or specialized services."[87] However, education providers must first make efforts to build or adapt educational services to accommodate students with disabilities in a way that promotes their integration and full participation. It is the Commission's view that, before considering placing a student in a self-contained, or specialized classroom, education providers must first consider inclusion in the regular classroom. In most cases, appropriate accommodation will be accommodation in the regular classroom with supports. However, every student with a disability is unique. In order to provide appropriate accommodation to all students with disabilities, education providers must, with the assistance of parental input, assess each student's particular strengths and needs, and consider these against a full range of placements, programs and services. Ultimately, appropriate accommodation will be decided on an individual basis.

The Ministry of Education has articulated its policy position on this issue stating its commitment to the principle that "the integration of exceptional students should be the normal practice in Ontario, when such a placement meets the pupil's needs and is in accordance with parental wishes."[88]

Regulation 181/98 also requires an IPRC to consider the placement of a student with a disability in a regular class with appropriate special education services before it considers placing that student in a special education class.[89] If the IPRC decides that a student should be placed in a special education classroom, it must give written reasons for its decision.[90]

For those students whose needs cannot be met entirely in the regular classroom, an IPRC may consider a range of possible options:

- **A regular class with indirect support.** The student is placed in a regular class for the entire day, and the teacher receives specialized consultative services.
- **A regular class with resource assistance.** The student is placed in the regular class for most or all of the day and receives specialized instruction, individually or in a small group, within the regular classroom from a qualified special education teacher.
- **A regular class with withdrawal assistance.** The student is placed in the regular class and receives instruction outside of the classroom for less than 50 per cent of the school day, from a qualified special

education teacher.

- **A special education class with partial integration.** The student is placed by the IPRC in a special education class with a regulated student-teacher ratio, for at least 50 per cent of the school day, but is integrated with a regular class for at least one instructional period daily.

- **A special education class full-time**. The student is placed by the IPRC in a special education class, where the student-teacher ratio conforms to Regulation 298, section 31, for the entire school day.[91]

In some cases, there may be a need to apply for admission to a Provincial School for students who are blind, deaf, or deaf-blind, or, a Demonstration School for students who have severe learning disabilities. The Ministry of Education also maintains a number of hospital schools, as well as care and treatment centres at various locations in the province, and schools in a number of correctional facilities. The programs at these locations have an educational component, but they will also concentrate on broader aspects of a student's development.

Feedback received throughout the consultation indicates that consultees are sharply divided on the issue of appropriate accommodation. The widely divergent input received from consultees indicates that there is ongoing debate regarding decisions to place students in specialized settings as opposed to placing them in mainstream classrooms with supports.

Many, if not most, consultees expressed their preference that students with disabilities be included in regular classrooms. The Commission heard that inclusion in the regular classroom facilitates greater interaction between students of varying abilities, that it develops positive attitudes and relationships, and that it is less likely to stigmatize people with disabilities. For example, Community Living Ontario wrote: "If a child with a disability begins life with an expectation of inclusion, she is much more likely to seek out, and be accepted in, inclusive environments and activities later in life. It is equally true, that when a student that does not have a disability is educated in an inclusive environment, inclusion will most likely remain her cultural expectation throughout life."

Expressing her preference for inclusion, one parent wrote: "School is a training ground for life. Students learn academics and skills, but they also learn about people, all kinds of people, and how to relate to them. If students are 'different,' do we include them by having a place for them at the back of the school, perhaps with a separate lunch schedule? Have them arrive after school begins and depart before school officially ends? Have them enter and exit in their own separate door? Have them travel exclusively on their own segregated buses? How can other students gain understanding and acceptance if students with exceptionalities are treated in such a separate fashion?"

VOICE for Hearing Impaired Children, an organization committed to supporting deaf and hard of hearing children who communicate orally and who rely upon assistive listening devices to augment their ability to use residual hearing, also supports the inclusion of deaf students into the regular classroom.

The Commission heard, however, that placement in a regular classroom will not, in and of itself, result in inclusion in the educational and social components of student life. Consultees stressed that true inclusion requires that properly trained teachers and special education staff work together to adapt the classroom and school curriculum to meet the diverse needs of all students. Several participants expressed the view that true inclusion also depends in large part on adequate funding. For example, in its submission, the Dufferin Peel Educational Resource Workers' Association wrote: "Although the school board strives for maximum inclusion, the reality is poor physical facilities within schools, reduced funding for special programming, and depleted or non-existent professional development or specialized training opportunities for staff. Resources that have been reduced to the minimum cannot create an inclusive environment."

The Commission also heard that, despite a legislative and policy framework which officially supports inclusion, parents feel they have to fight to have their child placed in a mainstream classroom. Participants indicated that, in some cases, even an IPRC decision indicating that a student should be placed in a regular classroom with supports is not enough to secure that type of accommodation.

On the other side of the debate are those who stress the benefits of a specialized educational setting outside the mainstream classroom. The Commission heard that in the regular classroom, opportunities for intense one-on-one instruction for students with disabilities are reduced, educators are less able to teach and reinforce crucial special skills, and that the quality of education for the class as a whole suffers as a result. For example, The Autism Society Ontario wrote "...segregated classes can offer the opportunity to complete high school or learn skills that are not taught in typical classrooms but will allow [students] to function more fully in the community as adults. If integration during the school years is not the best way to produce adults who can meaningfully participate in the community, then it is not in the best interest of the child."

Along the same lines, one parent described the experience of her son in a specialized setting as follows: "[My son was] IPRC'd directly into an age appropriate Language Learning Disability (LLD) class.... He was happy, learning like a sponge, and didn't feel badly that he 'talked funny', because everyone in the class also made mistakes when finding, or saying, the right words, in the right order. He felt just like everyone else, and was unselfconsciously plugging along, a bit at a time, but definitely learning to read and count." She went on to write: "I sincerely ask you NOT to discount the immense value of homogeneous groupings of children with similar disabilities...*i.e.* congregated or specialized classes. Some people who insist on integration/inclusion above all, call them 'segregated classes,' and chastise us, sometimes cruelly. Many of us vehemently disagree, having seen the value of 'congregating' our children with others who learn the same things, the same way, and thus allowing them to feel part of a group."

The Parents of Deaf-Plus Ontarians wrote: "It has been accepted for many years now in Ontario that Deaf citizens comprise a unique minority in their own language, rich culture and history. The recognized language of the Deaf is American Sign Language (ASL). Schools for the Deaf have played a huge role in fostering that language and culture, and all Deaf children should have the right to that education in their own language and culture."

Disputes about appropriate accommodation, particularly differences of opinion about what constitutes a child's best interest, are increasingly ending up at the Commission as human rights complaints. Some cases have stemmed from the IEP process, particularly where an IEP contains an exaggerated assessment of a student's disability-related needs in order to make that student eligible for greater levels of ISA funding. The IEP is meant to be an accurate gauge of the student's needs. When the IEP is used inappropriately in this way, it skews the official record of the student's disability-related needs, and in many cases it raises the expectations of parents and students about the accommodations the student will receive. The discrepancy between the content of the IEP and the actual accommodation received by students has been the basis for several human rights complaints at the OHRC. When IEPs are used for improper purposes, it can be very difficult to assess what the student's needs actually are, and whether the school board has provided that student with appropriate accommodation.

Actions Required:

1. That the Ministry of Education ensure that educators are developing and implementing an accommodation plan for each student with a disability, in accordance with the *Code* and the Commission's *Disability Policy*, either through the IEP process, or otherwise.
2. That the Ministry of Education collect and analyze data on placements of students with disabilities, in accordance with the Commission's *Guidelines on Special Programs*. That this data be used only for the purposes of addressing inequities and promoting compliance with Commission policy and the *Code*. This data could include: numbers of students in mainstream classrooms versus self-contained classrooms, number of students in each placement according to type of disability, number of students who also belong to other historically disadvantaged groups, *etc*. That the Ministry report its findings to the public.

Undue Hardship Standard

As described above, in 1998, the provincial government implemented a new funding formula for Ontario's publicly funded school system. Under the new formula, the Ministry of Education provides school boards with a base level of funding for each student through a Foundation Grant. In addition, the Ministry also provides additional funding through ten special purpose grants, one of which is the Special Education Grant. Currently, all school boards receive the Special Education Grant. Boards must use special education funding for the special education needs of their students, including such expenses as special education teachers, teaching assistants, and other specialized professionals. Any money remaining after these needs have been met must be placed in a special education reserve fund. As mentioned previously, Special Education Grants include both the Special Education Per Pupil Amount (SEPPA) and the Intensive Support Amount (ISA). The SEPPA is allocated to boards on the basis of total student enrolment. The ISA covers the costs of programs and services for very high needs students, as well as specialized equipment.
In the 2002-03 school year, it was projected that grants to school boards would total $14.26 billion. Of this amount, approximately $1.37 billion was to be spent on the Special Education Grant.[92] In December 2002, the provincial government announced $250 million in additional funding for special education, bringing the total amount of funding for special education to $1.6 billion annually. This announcement was made in response to recommendations made by the Education Equality Task Force in the Rozanski Report.
Throughout the consultation, the Commission heard extensively from consultees that the current funding levels for special education are inadequate. Participants expressed the view that insufficient resources are resulting in delays at many stages of the special education system, misuse of the ISA application process, and students with disabilities not receiving the accommodations to which they are entitled. As already mentioned, in its report entitled *Special Education and the Funding Formula: Emergency Service Only*, People for Education observed that the funding formula "has created a triage system of special education in which only the most needy are served."[93]

In its submission to the Commission, OPSBA (the Ontario Public School Boards' Association) wrote: "Special education revenue for all exceptionalities has not kept pace with costs over time and does not match current expenditures. Furthermore, current expenditures do not meet student support needs. Services to students have therefore declined."
CUPE (The Canadian Union of Public Employees), Ontario Division expressed its view that inadequate funding interferes with the proper functioning of the IPRC and IEP processes: "It is incongruous that the Individual Placement and Review Committee recommends particular supports for approved students, but does not have the power to ensure that those supports are provided. School principals, who are responsible for preparing the Individual Education Plans of special education students, are left with the unenviable task of balancing the needs of IEP students and the recommendations of the IPRC against insufficient resources."

Under the *Code*, every student with a disability is entitled to accommodation up to the point of undue hardship. The *Code* sets out three factors that may be considered in assessing whether an accommodation would cause undue hardship: cost; outside sources of funding, if any; and, health and safety requirements, if any.

Consultees told the Commission that school boards frequently cite limited resources as a reason for not being able to provide appropriate accommodations to students with disabilities. The Commission's *Disability Policy* makes it clear that "whether an accommodation is 'appropriate' is a determination completely distinct and separate from whether the accommodation would result in 'undue hardship'."[94] The legal duty of a school board to accommodate students with disabilities is not discharged unless the school board can make out an undue hardship defence based on costs. In order to claim the undue hardship defence, the school board has the onus of proof. As stated in the Commission's *Disability Policy*, "The nature of the evidence required to prove undue hardship must be objective, real, direct, and, in the case of cost, quantifiable. The person responsible for accommodation must provide facts, figures, and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship."[95]

The Supreme Court of Canada has said that, "*one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal*

treatment".[96] The cost standard is therefore a high one.

It is not sufficient for an education provider to fail to provide an accommodation because the costs of that accommodation may exceed the provider's pre-determined special education budget. The Commission's *Disability Policy* is clear on the threshold that a respondent to a human rights complaint must meet in order to successfully claim undue hardship based on costs. Part 4.4.2 of the *Policy* states: "Costs of accommodation must be distributed as widely as possible within the organization responsible for accommodation so that no single department...is burdened with the costs of accommodation. The appropriate basis for evaluating the costs is based on the budget of the organization as a whole, not the branch or unit in which the person with the disability...has made an application. In the case of government, the term 'whole operation' should refer to the programs and services offered or funded by the government."[97]

The *Disability Policy* also states that larger organizations, in particular governments, "may be in a better position to set an example or provide leadership in accommodating persons with disabilities. Accommodation costs will likely be more easily absorbed by larger organizations."[98]

The Commission heard that even though the Ministry of Education is in charge of a centralized system of funding for special education, and even though school boards no longer have control over the level of this funding, it is the school board that is most frequently considered responsible when students do not receive accommodations, and it is the school board that is most often named as the respondent in human rights complaints alleging discrimination on the basis of disability.

While an alleged shortcoming on the part of the Ministry of Education does not excuse the school board from its own substantive and procedural duty to accommodate under the *Code*, the Ministry of Education has responsibility for supplying adequate funding to school boards to allow them to provide appropriate accommodation to students with disabilities, as part of the duty to accommodate up to the point of undue hardship. In *Concerned Parents for Children with Learning Disabilities Inc. v. Saskatchewan (Minister of Education)*, a case involving the duty of the Saskatchewan Ministry of Education and various school boards to provide education and educational services appropriate to the needs and circumstances of a child with a learning disability, the government brought a preliminary application arguing that it was not a proper defendant. The Saskatchewan Court of Queen's Bench disagreed stating:

> The defendant Government has argued that even if there is a duty to provide educational services to the infant plaintiffs...this is the obligation of the defendant Boards, who are responsible for the delivery of specific special education services, and the plaintiffs do not have reasonable prospect of success in this action against the Government of Saskatchewan, which, by statute, sets general policy and provides partial funding, but does not deliver specific services.
>
> I cannot accept this argument. ...[T]he Government has and exercises the obligation to set policy and standards, evaluate programs and provide funding to school boards for certain types of expenditures. If the plaintiffs should be successful in establishing at trial that they have a constitutional entitlement to widespread provision of educational services... then it will also be open to them, in my view, to establish, if they can, that the general policy standards and guidelines, and the funding parameters set by the defendant Government, fail to meet the constitutional standard. Arguably, policy standards that do not mandate compliance with the minimum constitutional standard are themselves constitutionally deficient. Similarly, funding that is insufficient to support services at a minimum constitutional standard may itself be shown to be constitutionally deficient.[99]

In its submission, OPSBA recommended that "[I]n the interests of both fairness to the parties and the complete adjudication of all relevant issues, whenever a complaint is filed with the Commission alleging inadequate provision of special education programs and services, the Commission should place the Ministry of Education on notice of the complaint, consider adding the Ministry as a party respondent, and give the Ministry an opportunity to reply to the complaint."

In order to assess an undue hardship defence based on costs, it is necessary to consider financial statements and budgets. However, the Provincial Auditor's 2001 Annual Report concluded that "the Ministry did not have the procedures in place to ensure that school boards provide comparable and reliable information about their special education expenditures in order to facilitate meaningful analysis and support funding decisions... The information available on school-board spending by activity or program is insufficient for management at school boards to manage costs effectively. As a result, the Ministry, trustees, Special Education Advisory Committees, and parents cannot assess how effectively management has spent special education funds."[100]

The Commission heard that the lack of available and precise financial information is having a detrimental effect on the provision of accommodation to students with disabilities. As mentioned previously, the Provincial Auditor's 2001 Annual Report noted that decisions regarding the provision of professional services to special needs students are being made based on budgets, and there is "no basis for either school boards or the Ministry to evaluate the appropriateness of the service cut-off points currently in place."[101] Consultees told the Commission that without this information, it is extremely difficult to challenge a school board's decisions. As the Ontario Association for Families of Children with Communication Disorders wrote in its submission: "One of the challenges of special education is that we do not know the true costs of adequate accommodation. By requiring school boards to document the services and programs they can't afford to provide, we will have the opportunity to discuss which additional expenditures are reasonable and how else we can fund the accommodations."

In its *1993 Annual Report*, the Office of the Provincial Auditor of Ontario recommended that "The Ministry of Education and Training should establish procedures that enable it to monitor the costs and effectiveness of special education programs and services delivered by school boards and facilitate the sharing of best practices among school boards."[102] In its *2001 Annual Report*, the Provincial Auditor concluded that this recommendation had not been implemented and made a further recommendation in this area.

Actions Required:

- (1) That the Ministry of Education review the adequacy of resources provided to school boards to ensure that school boards are able to provide timely access to appropriate accommodation for all students with disabilities.
- (2) That the Ministry of Education implement and report back on the Provincial Auditor's recommendation that it establish procedures to monitor the costs and effectiveness of special education programs and services.

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[8] Information provided by the Ministry of Education indicates that the exact number of students enrolled in publicly funded elementary and secondary schools in Ontario for 2001-02 was 2,163,108 (1,448,270 in elementary, and 714,838 in secondary). This data includes public and Roman Catholic schools, but excludes hospital/provincial schools, and care and treatment facilities.

[9] *Education Act*, R.S.O. 1990 c. E.2.

[10] Information taken from *Student Focused Funding: Parents Guide 2002-03* (Ministry of Education, Spring 2002) available at http://www.edu.gov.on.ca/eng/funding/eguide02.pdf

[11] *Education Act*, *supra*, note 9, ss. 8(3).

[12] *Ibid*. s. 1.

[13] *Special Education Programs and Services*, R.R.O. 1990, Reg. 306, ss. 2(2),(3).

[14] *Identification and Placement of Exceptional Pupils*, O. Reg. 181/98.

[15] *Ontarians with Disabilities Act*, *2001*, S.O. 2001, c. 32, s. 15

[16] Information supplied by the Ministry of Education. This data includes public, Roman Catholic, and hospital/provincial schools, but excludes care and treatment facilities.

[17] For more information on the funding formula as it relates to special education, see the section of this Report entitled "Undue Hardship Standard."

[18] Most of the Report's recommendations, if implemented, would come into effect in the 2003-04 school year as part of a three year funding plan. See *Investing in Public Education: Advancing the Goal of Continuous Improvement in Student Learning and Achievement*, Report of the Education Equality Task Force, 2002, available at http://www.edfundingreview.on.ca.

[19] In addition to the publicly funded primary and secondary school system in Ontario, there is an extensive network of private schools. These include religious-based schools, alternative education institutions such as the Montessori and Waldorf schools, girls' or boys' only schools, and numerous other independent schools. These schools range widely in size, mandate, finances, facilities, and governance structures. The *Education Act* defines private schools simply as institutions at which "instruction is provided at any time between the hours of 9 a.m. and 4 p.m. on any school day for five or more pupils who are of or over compulsory school age in any of the subjects of the elementary or secondary school courses of study" and that is not operated either by a school board or by the Ministry of Education (s.1). Private schools are required, under the *Education Act*, to submit to the Ministry of Education an annual notice of intention to operate (s.16). The Ministry has the power to require schools to file returns providing statistical information about their enrolment, staff and programs, and to inspect private schools and private school teachers. Other than this, however, the *Education Act* does not apply to private schools. Thus, private schools are not required to implement the IPRC process or to develop and implement IEPs.

[20] As a result of the Equity in Education Tax Credit, announced by the Ontario government in May 2003, private schools will now benefit from public funds as a result of a tax credit.

[21] Information provided by the Ministry of Education.

[22] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 73 and 78.

[23] *Disability Policy*, *supra*, note 5 at Part 4.3.2.

[24] *Ibid*., Part 3.1.3(a).

[25] *Ontario Building Code Act*, S.O. 1992, c. 23.

[26] *See*, *for e.g*., *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474. (Ont.Bd.Inq.)

[27] The Commission's full submission to the *Building Code* consultation is available on the Commission Website at www.ohrc.on.ca.

[28] The provision of accommodation is covered in this section because it is an issue which can directly limit a student's access to education. In the interest of clarity, it is dealt with separately from the topic of "Appropriate Accommodation" (*i.e*. the assessment of what type of accommodation is most suitable for a student), even though, it is acknowledged, an inappropriate form of accommodation may also limit a student's access to education.

[29] *Supra*, note 14, ss. 6(2).

[30] *Ibid*., ss. 6(6).

[31] Provincial Auditor's *2001 Annual Report, supra*, note 1 at 126.

[32] For more information and the full report, see www.nlc-bnc.ca/accessinfo/s36-200-e.html.

[33] *See* Learning Opportunities Task Force Final Report, pg. 13. The full report is available at www.lotf.ca. The report provides a comprehensive overview of the LOTF's research and pilot projects, and includes key findings and 24 recommendations for enhancing access to education for persons with learning disabilities.

[34] In 1999, the Ministry of Education implemented the Ontario Secondary Schools Literacy Test (the "OSSLT", or "Grade 10 literacy test") to test the reading and writing skills acquired by students up to the end of Grade 9. Passing the OSSLT is a requirement for receiving an Ontario Secondary Schools Diploma. The test is administered through the Education Quality Accountability Office ("EQAO").

[35] Source: Education Quality and Accountability Office, *Ontario Secondary School Literacy Test, February 2002 – Report of Provincial Results*, September 2002, Queen's Printer for Ontario.

[36] Education Quality and Accountability Office, *Guide for Accommodations, Special Provisions, Deferrals and Exemptions*, *Ontario Secondary School Literacy Test,* October 2002.

[37] People for Education describes itself as "a group of parents from public and separate schools in Ontario working together in support of fully publicly-funded education." For more information see: http://www.peopleforeducation.com.

[38] People for Education, *Special Education and the Funding Formula: Emergency Service Only* (October 2002) at 9.

[39] Provincial Auditor's *2001 Annual Report, supra*, note 1 at 151.

[40] *Ibid*., at 135.

[41] *Ibid*., at 136.

[42] *Investing in Public Education*, *supra*, note 18 at 45.

[43] *Ibid*., at 57.

[44] *Special Education and the Funding Formula*, *supra*, note 38.

[45] The Identification, Placement and Review Committee process is covered in the section of this report entitled "Accommodation Process."

[46] The Intensive Support Amount is a component of the Special Education Grants provided by the Ministry of Education to school boards. The Intensive Support Amount is discussed more fully in the section of this report entitled "Labelling."

[47] *Investing in Public Education*, *supra*, note 18 at 47.

[48] Entry into force September 2, 1990, ratified by Canada December 13, 1991.

[49] Proclaimed by the General Assembly, Resolution 3447 (XXX) of December 9, 1975.

[50] *Disability Policy*, *supra*, note 5 at Part 3.4.

[51] The *Safe Schools Act* came into effect in September 2001. It amended the *Education Act* to add Part XIII, "Behaviour, Discipline and Safety." The amendments create a new statutory scheme to govern the suspension and expulsion of pupils. Section 306 of the *Education Act* now provides for mandatory suspension if a pupil commits any of the following infractions: uttering a threat to inflict serious bodily harm on another person; possessing alcohol or illegal drugs; being under the influence of alcohol; swearing at a teacher or at another person in a position of authority; committing an act of vandalism that causes extensive damage to school property at the pupil's school or to property located on the premises of the pupil's school; and, engaging in another activity that, under a policy of the board, is one for which a suspension is mandatory. Section 309 provides for mandatory expulsion if a pupil commits any of the following infractions: possessing a weapon, including possessing a firearm; using a weapon to cause or to threaten bodily harm to another person; committing physical assault on another person that causes bodily harm requiring treatment by a medical practitioner; committing sexual assault; trafficking in weapons or in illegal drugs; committing robbery; giving alcohol to a minor; and engaging in another activity that, under a policy of the board, is one for which expulsion is mandatory.

[52] The circumstances which may constitute "mitigating factors" are prescribed by regulation under the *Education Act*. Section 1 of Regulation 106/01 provides that the suspension of a pupil is not mandatory if the pupil does not have the ability to control his or her behaviour; the pupil does not have the ability to understand the foreseeable consequences of his or her behaviour; or, the pupil's continuing presence in the school does not create an unacceptable risk to the safety or well-being of any person. Section 2 of Regulation 37/01 provides that the expulsion of a pupil is not mandatory if the pupil does not have the ability to control his or her behaviour; the pupil does not have the ability to understand the foreseeable consequences of his or her behaviour; or, the pupil's continuing presence in the school does not create an unacceptable risk to the safety of any person.

[53] Special programs are programs that are designed to relieve hardship, to assist disadvantaged persons or groups to achieve equality, or are likely to contribute to the elimination of the infringement of rights protected under the *Code*. Section 14 of the *Code* allows special programs to be implemented that might otherwise be considered discriminatory under the *Code*. The collection of data by school boards could be considered a special program, if done in accordance with the Commission's *Guidelines on Special Programs*. The *Guidelines* are available online at www.ohrc.on.ca.

[54] *Disability Policy*, *supra*, note 5 at Part 4.2.

[55] The *Code* protects individuals from discrimination and harassment on the basis of sixteen grounds (for example, disability, race, sex, sexual orientation, age, etc.).

[56] The concept of 'intersectionality' has been defined as "intersectional oppression [that] arises out of the

combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone..." M. Eaton, "Patently Confused, Complex Inequality and *Canada v. Mossop*" (1994) 1 Rev. Cons. Stud. 203 at 229.

[57] *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims* was released in 2001 and is available online at www.ohrc.on.ca.

[58] Provincial Auditor's *2001 Annual Report, supra*, note 1 at 131.

[59] *Special Education and the Funding Formula*, *supra*, note 38 at 4.

[60] *Investing in Public Education*, *supra*, note 18 at 25.

[61] Michael J. Prince, *Governing in an Integrated Fashion: Lessons from the Disability Domain*, Canadian Policy Research Networks (June 2001) at page 48.

[62] *Equal Citizenship for Canadians with Disabilities: The Will to Act*, Federal Task Force on Disability Issues, Ottawa (October 1996) available at http://www.hrdc-drhc.gc.ca/hrib/sdd-dds/odi/documents/taskForce/english/report/.

[63] Prince, *supra*, note 61 at 48.

[64] *Ibid*., at ii.

[65] *Disability Policy*, *supra*, note 5 at Part 3.1.1.

[66] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ["*Grismer*"] at para. 2.

[67] *Ontario Human Rights Code*, *supra*, note 3 at ss. 10(3).

[68] See *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27 (3 May 2000), online: Supreme Court of Canada http://www.lexum.umontreal.ca/csc-scc/en/index.html.

[69] *Robb v. St. Margaret's School*, (2003), CHRR Doc. 03-11, 2003 *BCHRT 4* at para 270.

[70] *Trinity Western University v. British Columbia College of Teachers*, 2001 1 SCC 31, [2001] 1 S.C.R. 772, [39 C.H.R.R. D/357] (Para 13 of on-line QL version).

[71] Provincial Auditor's *2001 Annual Report, supra*, note 1 at 141.

[72] ISA Level 1 provides funds for specialized equipment for individual students with high needs. ISA Levels 2 and 3 provide funds to boards based on the number of students with very high needs, for the provision of specialized programs and services (intensive supports in the classroom). ISA Level 4 provides funds for educational programs offered to children and youth admitted to care, treatment, or correctional facilities. The Special Incidence Portion (SIP) provides funds for staff support for students with extraordinarily high needs to ensure safety in the classroom.

[73] *See* "The Fatal Flaws in Special Education: A Legal Challenge," Mark Handley-Derry, et al. for the Ontario Coalition for Educational Reform, at page 3.

[74] *Disability Policy*, *supra*, note 5 at Part 3.1.2.

[75] In some cases, particularly where there is no dispute about a student's needs, school boards will not require the student to be formally identified through the IPRC process. Even without an IPRC assessment, a student has a right to equal treatment in educational services without discrimination on the basis of disability.

[76] O. Reg. 181/98, *supra*, note 14, s.15.

[77] Regulation 181/98 requires principals to ensure that an IEP is developed for each student who has been identified as "exceptional" by an IPRC within 30 days of the student's placement in a special education program. For a student returning to a special education program, an IEP must be prepared within 30 days of the start of the school year.

[78] Legislative requirements for IEPs are set out in Reg. 181/98 under the *Education Act*. See also the Ministry of Education's policy document *Individual Education Plans: Standards for Development, Program Planning, and Implementation, 2000*.

[79] The Report notes that of the IEPs reviewed, only 17% were completed within the required 30 day period. *See* Provincial Auditor's *2001 Annual Report, supra*, note 1 at 129.

[80] *Ibid*., at 128, 132.

[81] *Ibid*., at 132.
[82] *Ibid*., at 149.
[83] *Ibid*., at 150.
[84] *Disability Policy*, *supra*, note 5 at Part 3.4.
[85] *Ibid*., at Part 3.3.
[86] Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241.
[87] *Disability Policy*, *supra*, note 5 at Part 3.1.3.
[88] *See* MEDU Memorandum dated June 9, 1994 to directors of education, superintendents of special education, and principals as quoted in Ministry of Education, *Special Education: A Guide for Educators*, 2001 at D10.
[89] O. Reg.181/98, *supra*, note 14, s. 17.
[90] *Ibid*., at ss. 18(2)(c).
[91] Information taken from: http://www.edu.gov.on.ca/eng/general/elemsec/speced/identifi.html.
[92] *Student Focused Funding*, *supra*, note 10 at 3, 5.
[93] *Special Education and the Funding Formula*, *supra*, note 38 at 1.
[94] *Disability Policy*, *supra*, note 5 at Part 3.3.
[95] *Ibid*., at Part 4.2.
[96] *Grismer, supra*, note 66 at para. 41
[97] *Disability Policy*, *supra*, note 5 at Part 4.4.2.
[98] *Ibid*., at Part 4.3.1.
[99] *Concerned Parents for Children with Learning Disabilities Inc. v. Saskatchewan (Minister of Education)*, [1998] S.J. No. 566 at paras. 63-64.
[100] Provincial Auditor's *2001 Annual Report, supra*, note 1 at 127.
[101] *Ibid*., at 135.
[102] *Ibid*., at 149.