

Human Rights in Special Education

Human rights represent one of the most important tools we have when it comes to combating racism, ableism, and other oppressive practices in our school system. The right to access an education, without discrimination, is one such human right, and it is enshrined in a number of international conventions including the *Convention on the Rights of the Child* (United Nations, 1989, art. 2, 23, 28, 29) and the *Convention on the Rights of Persons with Disabilities* (United Nations, 2007, art. 5, 24). These conventions endow all children with the right to access a meaningful education geared towards realizing their full potential.

This international legal obligation has largely been implemented in this province via Ontario's *Human Rights Code* (the *Code*), which lays out the specific human rights obligations that are relevant to educators. The *Code* is a provincial law that, in the context of education, aims to create an inclusive educational system that is responsive to the individual needs of its students. It guarantees all students equal access to education and prohibits discrimination on the basis of certain protected characteristics (e.g. disability, race, gender, sexual orientation) (*Human Rights Code*, R.S.O. 1990, c. H.19 at s. 1).

Under the *Code*, in order to establish whether or not discrimination in education has occurred in a given circumstance, an individual must demonstrate that (a) they have a protected characteristic;¹ (b) they have experienced an adverse impact in the education system; and (c) their protected characteristic was a factor in the adverse impact (*Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 at para. 33).

For many students, the very structure of the education system means that they experience this type of discrimination on a regular basis. The education system, as it currently stands, is not set up to meet their needs in a seamless manner and, as a result, these students often require accommodations and/or modifications to their learning environment to ensure that they can access meaningful education. In fact, the Supreme Court of Canada has stated that special education is a means by which students with disabilities can get “meaningful access” to educational services that are available to all students (*Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 at para. 28). As such, providing special education represents one strategy

¹ Note that this includes students who may be *perceived* as having a protected characteristic, whether they have that characteristic or not. 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] 1 S.C.R. 665.

by which school boards can meet their legal obligation to avoid discriminating against students with disabilities.

Under the *Code*, school boards have a legal duty to provide timely and individualized accommodations and supports to students with disabilities up to the point of undue hardship. Undue hardship is a legal term that takes several considerations into account including the cost of particular accommodations, outside sources of funding for such accommodations, and any relevant health and safety considerations. It is a very high standard. Outside of these specific considerations, factors like inconvenience, student or instructor morale, third-party preferences, and collective agreements are not legally relevant considerations when determining whether the hardship imposed by a particular accommodation is “undue” (See the *Code* ss. 11, 17; OHRC, 2018). Providing support by means of education assistants (EAs), instructional materials in alternate formats, behavioural management plans, or modified methods of instruction all represent forms of accommodation that may be required by law depending on the needs of the student (for a list of potential accommodations, see OHRC, 2018).

Disputes Over Accommodations

In practice, sometimes there are disputes over the type of accommodations that should be put into place. In these situations, it is important to remember that no one person has ultimate authority over the type of accommodations a student should receive. The law instead conceptualizes the process of developing accommodations as a collaborative one where educators must consult with students and families about the type of accommodation that should be put into place. This collaborative process typically takes place during the development of a student’s IEP. It should be emphasized that one of the most common complaints from family members about the accommodation process is that they do not feel involved in the development of the IEP and often are asked to sign a completed document into which they had no input (Reid et al., 2018; Underwood, 2010). As a result, one of the most important things that educators can do to adhere to their human rights obligations is to make the IEP development process as inclusive of students and their families as possible, while recognizing that the legal responsibility to properly accommodate students remains with the school board. Many strategies may be required to promote effective family participation including scheduling sufficient time to review the IEP with the family; providing family members with detailed information about the various accommodations/modifications, educational pathways, and services available to the student; and ensuring that feedback from the student and family on the IEP is seriously considered in the decision-making process.

Additional Human Rights Obligations Related to Race and Disability

Individual educators play an important role when it comes to delivering special education services and properly accommodating disabled students. However, avoiding discriminatory treatment involves more than just properly accommodating students. There are many forms of discrimination prohibited under the *Code*. For example, educators, principals, and other school administrators must exercise their professional discretion in a non-discriminatory manner. This includes situations where they are making decisions about anything that could potentially disadvantage an individual because of a protected characteristic (e.g. identification or placement decisions, assessments of ability).

This requirement is particularly relevant when it comes to issues like school discipline for disabled students. Under the *Code*, educators have a duty to assess each student with a disability based on their individual needs and circumstances prior to imposing any discipline. Educators risk violating students' human rights where they use their disciplinary discretion to punish students for unaccommodated or inadequately accommodated disability-related behaviours.² This includes both classroom discipline and more serious forms of discipline like suspension and expulsion. It is also imperative that, barring undue hardship, disability be considered in the development or implementation of any consequences.

The requirement to avoid discriminatory decision-making is also relevant for Indigenous and racialized students. For example, under the *Code*, educators have an obligation to ensure that they are not disciplining Indigenous or racialized students more often or more harshly than other non-Indigenous or non-racialized students for similar behaviours (*B.C. v. Durham Catholic District School Board*, 2014 HRT0 42 (CanLII); *J.B. v. Toronto District School Board*, 2011 HRT0 1985 (CanLII) at para. 41–43). Furthermore, before punishing a student, educators should also consider whether his or her behaviour was a response to experiences of bullying, harassment, or other forms of discrimination linked to any protected characteristics.

In addition to the types of discrimination discussed here, there are several other forms of discrimination that are prohibited under the *Code* (e.g. harassment, poisoned environment). For more information on how educators can meet their *Code* obligations to prevent and respond to discrimination, see OHRC (2018).

² See also *Education Act*, R.S.O. 1990, c. E.2., O. Reg. 472/07: *Behaviour, Discipline and Safety of Pupils* at ss. 2–3, which lays out the mitigating factors that must be considered by principals and vice-principals when contemplating suspending or expelling a student. These sections specifically advise principals and vice-principals to consider whether the “pupil does not have the ability to control his or her behaviour,” whether the “pupil does not have the ability to understand the foreseeable consequences of his or her behaviour,” and, in the case where an IEP has been developed, “whether appropriate individualized accommodation has been provided.”

Best Practices to Meet Your Obligations Under the Code

It should be emphasized that many of the practices described in this guide, like Universal Design for Learning or Differentiated Instruction, represent best practices for meeting one's obligations under the *Code*. That is, they often prioritize preventing barriers through inclusive design and eliminating discriminatory barriers before they become a problem rather than focus only on individualized accommodations and after-the-fact solutions. After-the-fact solutions can be time consuming to implement and may provide an imperfect access to the educational environment. If an educational environment is instead designed in an inclusive manner, in accordance with the practices described below, educators can be far more confident that they are meeting their obligations under the *Code*.

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