



**SHIBLEY RIGHTON** LLP  
*Barristers and Solicitors*

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**SUBMISSIONS TO THE  
ONTARIO HUMAN RIGHTS COMMISSION**

**IN RESPONSE TO ITS CONSULTATION PAPER**

**“EDUCATION AND DISABILITY:  
HUMAN RIGHTS ISSUES  
IN ONTARIO’S EDUCATION SYSTEM”**

**FILED ON BEHALF OF  
THE ONTARIO PUBLIC SCHOOL BOARDS’ ASSOCIATION**

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## **FILED ON BEHALF OF THE ONTARIO PUBLIC SCHOOL BOARDS’ ASSOCIATION**

### **INTRODUCTION**

1. The Ontario Public School Boards’ Association (“OPSBA” or the “Association”) represents the educational interests of more than 1.3 million elementary and secondary students from all regions of the province. The Association’s mission is to promote and enhance public education for the benefit of all students and citizens of Ontario. Public district school boards and school authorities in Ontario provide every individual with equal access to educational opportunities regardless of gender, race, religion, ethnicity, disability, place of residence and the other prohibited grounds of discrimination under the *Human Rights Code*.<sup>1</sup>

2. OPSBA is pleased to have the opportunity to provide the Ontario Human Rights Commission (“OHRC” or the “Commission”) with these, our submissions in response to the Commission’s Consultation Paper, “Education and Disability: Human Rights Issues in Ontario’s Education System” (the “Consultation Paper”). OPSBA applauds the Commission for its express recognition of the importance of these issues, as signalled by the Consultation Paper itself, the first formal consultative study by the Commission of the specific and often complex human rights issues affecting disabled students in Ontario’s public education system.

3. OPSBA looks forward to working with the Commission in what will hopefully be an ongoing review of disability issues in the education sector. OPSBA believes that the experiences of its member school boards will prove invaluable to the Commission and its Policy and Education Branch, as the Association's member school boards have been specifically responsible under Ontario law for accommodating the individual needs of special needs students for over twenty years now – ever since the passage in December 1980 of a statute that to this day is still known to educators as “Bill 82”,<sup>2</sup> the core elements of which remain intact in the current *Education Act*.<sup>3</sup>

4. OPSBA is also pleased to have the opportunity to make a presentation to the Commission at its public consultation sessions scheduled to be held, in Toronto, on November 21 and 22, 2002.

5. For present purposes, the scope of OPSBA's written submissions are limited to the Commission's review of relevant issues arising in the Primary and Secondary Education context.

#### **SUMMARY**

6. OPSBA recognizes that persons with disabilities may be excluded by many kinds of barriers in our society, whether they be physical, attitudinal or systemic. The problem of the systematic exclusion of disabled students was squarely addressed in the 1980's by Bill 82, which expressly imposed a mandatory statutory obligation on school boards to provide appropriate special education programs and services to their exceptional pupils.

7. In practice, most of the pressing “disability and education” human rights issues that currently confront Ontario educators involve disagreements about what constitutes

appropriate accommodation for individual special needs students. OPSBA's primary concern in the context of the issues addressed by the Consultation Paper is that the current provincial funding model is the root cause of many of the current barriers to equal access to educational opportunities faced by special needs students.

**8.** While OPSBA supports the framework of the funding model which is in present use, in OPSBA's view, the model is not the whole problem. The dollars within the model are the problem or, rather, the lack of dollars within the model.

**9.** OPSBA asks that in the application of its *Policy and Guidelines on Disability and the Duty to Accommodate*, the Commission remain sensitive to the fiscal realities confronting school boards under the current funding model.

**10.** Further, school boards no longer control the amount of funding required to provide the special education programs and services that the *Education Act* requires them to provide. That reality notwithstanding, school boards are generally considered to be solely responsible for the provision of special education in Ontario. OPSBA therefore submits that whenever a complaint of discrimination is filed with the Commission that alleges inadequate provision of special education services, the Ministry of Education must be involved.

**11.** The process for accommodation of the needs of disabled pupils is governed by the *Education Act* and the regulation thereunder regarding Identification, Placement and Review Committees ("IPRCs") and Individual Education Plans ("IEPs"). The scheme reflects a dedication to the continuous assessment and evaluation of exceptional pupils' needs and placement and stresses the individualized approach required by both the Supreme Court of Canada and the OHRC Guidelines.

**12.** For most special needs students the placement of a special needs students in a regular classroom with support will be the most appropriate; however, in some instances placement in a specialized class is more appropriate and is not discriminatory if it is in accordance with their best interests.

**13.** Commission should give further consider to whether, in appropriate cases, the comprehensive legislative-regulatory scheme under the *Education Act* and the IPRC regulation, pursuant to which special education programs and services are provided to exceptional pupils to assist them achieve equal opportunity in education, constitutes a special program within the meaning of s. 14(1) of the *Code*.

**14.** In some cases where a complaint against school boards in the education and disability context involves a dispute over what particular form of accommodation is appropriate to meet the individual needs of the disabled learner, fundamental issue will entail a pedagogical question . With respect, the Commission and the board of inquiry under the *Human Rights Code* do not possess the requisite functional expertise to adjudicate upon such education issues. In that event, the Commission would have no jurisdiction to properly address such complaints. Alternatively, the Commission should consider whether in appropriate cases it should exercise its discretion under clause 34(1)(a) of the *Human Rights Code* and refuse to deal with such complaints on the basis that it is “one that could or should be more appropriately dealt with under an Act other than [the *Code*]”, that is, the *Education Act*.

**15.** In describing the standard of accommodation required, section 17 of the *Human Rights Code* uses the term “undue hardship”, which the Supreme Court of Canada has ruled is tantamount to requiring “reasonable” accommodation.

**16.** OPSBA's overriding concern in respect of the application of the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate* in the education setting is that the Commission's Guidelines not be applied in a rigid or formalistic manner. Again, in our view, the Commission must remain sensitive to the fiscal realities confronting school boards under the current funding model.

**17.** OPSBA is particularly concerned with the test employed by the OHRC Guidelines test in respect of undue hardship, which requires that the costs of the requested accommodation must be "so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its *viability*". OPSBA is concerned that if the OHRC guidelines in respect of the treatment of costs and, in particular, the Commission's "viability" test, are applied too rigidly, without full appreciation of the funding realities faced by school boards, injustice will result.

**18.** OPSBA is also concerned about the application of the OHRC Guideline's "whole operation" concept in the education sector. An interpretation of the *Code* that suggests the appropriate basis for evaluating the relative cost of a given accommodation measure is the "whole operation" of the school board, that is, its entire global budget, is inconsistent with the strictures of the current funding model and a proper interpretation of the *Code*.

**19.** In evaluating the costs of any given accommodation measure, a global perspective, accounting for all of the school board's responsibilities and priorities, must be adopted. Isolated assessments of costs, based solely on the individual perspective of whether a school board has the resources to supply a given accommodation measure for a single student or one particular complainant, will very quickly lead to inequities throughout the board's establishment.

**20.** Effective September 30, 2002, the *Ontarians with Disabilities Act, 2001* requires school boards to prepare an annual accessibility plan with a view to reducing barriers to persons with disabilities. In light of the overlap of the two legislative schemes, it is important to ensure congruency of the expectations, requirements and results produced under each of the two distinct statutory regimes.

## ACCESS TO EDUCATION

**21.** The Association recognizes that persons with disabilities may be excluded by many kinds of barriers in our society, whether they be physical, attitudinal or systemic. However, in terms of the basic right to education, reflected in the various United Nations Conventions and other international documents referenced in the Consultation Paper (pp. 5-6), it bears emphasizing that the right of the disabled student to have access to education services, beginning with the right of special needs students to attend the publicly-funded school system, was long-ago addressed by the reforms to the public education system enacted by Bill 82 in the 1980s.

**22.** The chief barriers to universal access to the publicly funded school system and the fundamental changes implemented by Bill 82 have been well documented by various commentators, including one of the primary authors of these submissions, who described the previous state of “underinclusive education” as follows:

Under [the former *Education Act, 1974*], there was no mandatory obligation imposed on boards of education to provide special education to their exceptional pupils. In fact, the Act did not even speak of “exceptional” pupils at the time. All that the statute contemplated was a permissive power on the part of school boards to “establish, subject to the regulations, special education programs to provide special education services for children who require such services.”

The express authority to provide special education was not added to the enumerated list of boards’ permissive powers until 1967; prior to then, a similar power could be found only in a separate part of *The Schools Administration Act*

which allowed, but not required, boards to establish and conduct “auxiliary classes” for children who were “unable to take proper advantage of the elementary or secondary school courses” by reason of any physical or mental cause. As the name implied, these services were seen as auxiliary to the boards’ chief obligations and, although perhaps no more than symbolically significant, such classes were historically governed by entirely separate legislation until 1954. Even where boards chose to establish auxiliary classes, a child’s admission thereto was permitted only upon the report and recommendation of an admissions committee, and even then, the statute contemplated that the nature of the services provided would be heavily influenced by a medical model of health care services. Moreover, if a child were considered to be a person “whose mental capacity is incapable of development beyond that of a child of normal mentality at eight years of age,” the legislation forbade that child’s admission into the auxiliary classes.

Thus, as demonstrated by the historical governance, the provision of special education was largely a matter of discretion for school boards, and this remained true under the 1974 Act: while some boards chose to provide special education, others did not. Apart from the permissive nature of the legislation, the financial reality was that provincial funding for special education, while available, did not exist at its current levels. Keeton records that as of 1978 as many as one-fifth of all school boards in Ontario did not offer special education at all.<sup>4</sup>

**23.** The “underinclusive problem”, with its systematic exclusion of many disabled students, was squarely addressed and remedied by the core components of Bill 82 – in particular, by Bill 82’s enactment of a mandatory duty on school boards to expressly require the provision of appropriate special education programs and services to all their exceptional pupils – all of which remain as central features of the comprehensive special education scheme under the current *Education Act*. The central provisions and principles of this scheme have been described as follows:

The core elements of Bill 82 are reflected in the current provisions of the *Education Act* and have remained intact, with very few exceptions, since they were first assented to in December 1980. Five features of the legislation are germane ... :

- (1) the terms “exceptional pupil”, “special education program” and “special education services” were finally defined in the legislation;
- (2) the discretionary power of school boards to offer special education was removed and supplanted by a mandatory obligation;
- (3) the legislation enshrined an overriding obligation on the Minister, firstly, to make available to all exceptional pupils in Ontario

“appropriate special education programs and special education services without payment of fees” and, secondly, to provide parents with an avenue “to appeal the appropriateness of the special education placement”;

(4) it provided for the establishment of a Special Education Tribunal and one or more regional tribunals to hear appeals from parents who are dissatisfied with the decision of the school authorities in respect of the identification and placement of their exceptional child, and further provided that the decisions of such tribunals were to be “final and binding” on the parties; and

(5) provision was made for the establishment of a special education advisory committee (“SEAC”), a particular committee of a school board empowered to make recommendations to the board in respect of a wide range of matters affecting special education policy and practice.

These core provisions of the Act must be considered in conjunction with the regulation that governs the Identification, Placement and Review Committee (“IPRC”) process. On a functional basis, it has been recognized that the IPRC is the “most important element of Bill 82” for it is the IPRC that “examines the case of students thought to have special needs, then decides whether they are exceptional or not, identifies them accordingly, recommends a placement, and undertakes to review the decision(s) on a periodic basis - all with parental involvement”.

This administrative scheme is commonly said to embody five fundamental principles: (a) universal access to the public school system; (b) at the public expense; (c) appropriate program; (d) continuous assessment; and (e) due process and the right to appeal. The first and most important is the principle of universal access, which connotes the right of all exceptional pupils to have access to special education programs and services. Closely related to this first legislative objective is the second principle of the provision of education at the public expense, that is, the right of an exceptional pupil to receive special education without payment of an additional fee by the pupil or her parent.

The third principle of appropriate program suggests that each exceptional pupil has a legitimate expectation in receiving an appropriate educational program, with necessary support services, so as to meet his or her special needs.

The remaining two principles inherent in Ontario’s special education framework reflect particular concerns of due process. The fourth principle requires the early and ongoing identification and continuous assessment of each exceptional pupil’s unique learning needs and abilities. This function lies at the heart of the IPRC process. The fifth principle entrenches the rights of the parent of an exceptional pupil to due process and appeal. More specifically, this entails the

right of an exceptional pupil to have his interests represented, the concomitant right of the parent to participate in the decision-making process, the right of the parent to require a review of the system's decisions concerning the identification and placement of the child and, finally, the right of the parent to appeal when dissatisfied with the decisions concerning identification and placement.<sup>5</sup>

In large measure the amendments delivered universal access without payment of fee by expressly requiring the publicly funded school system to provide special education to all exceptional pupils. These two fundamental and interdependent objectives [were recognized by the Ontario Court of Appeal in *Adler v. Ontario (Minister of Education)* (1994), 19 O.R. (3d) 1 at 29]. ... In this regard, even its critics concede that Bill 82 effected a “significant legal advancement” for all exceptional pupils in Ontario, especially the severely disabled, for it will be remembered that, prior to Bill 82, the absence of any mandatory obligation on school boards to provide special education had essentially permitted the “underinclusion problem” to flourish, and had effectively excluded many exceptional pupils from the publicly funded education system in Ontario.<sup>6</sup>

**24.** In sum, perhaps unlike the situations that may still confront the Commission in other contexts, like, for example, the employment context with some smaller privately-held corporate employers, the fundamental “access” problem is one that school boards were required to confront and resolve decades past. Currently, in practice, the real day-to-day “disability and education” issues that confront Ontario educators tend to involve disagreements about what constitutes appropriate accommodation for individual special needs students. That issue is addressed separately below.

**25.** That is not to say, of course, that all barriers in the education and disability context have been completely eradicated. Indeed, OPSBA's primary concern in the context of the issues addressed by the Consultation Paper is that *the current provincial funding model is short-changing our children's future and falls short of the real needs of Ontario's students*. The Association maintains that the problems with the funding model are the root cause of many of the current barriers to equal access to educational opportunities faced by

special needs students. The Association's position on the funding model and the problems it gives rise to in the education and disability context are addressed separately below.

**26.** The Consultation Paper also speaks of certain specific "concerns [that] have been raised regarding barriers to access to education for persons with disabilities" (pp. 15-16), and it is appropriate to comment briefly on these to assist the Commission in its full appreciation of these issues.

#### *Behavioural Issues and Student Discipline Policies*

**27.** The Consultation Paper states: "Where students have disabilities that are associated with behavioural issues, rigid expulsion policies may result in inability to access educational services" (p. 16). All public school boards in Ontario have in place a "safe schools policy" or equivalent, as specifically required by legislation, i.e., the *Safe Schools Act, 2000*.<sup>7</sup> That legislation, which is exacting in its requirements, provides for both *mandatory* expulsions and *mandatory* suspensions in certain enumerated instances. However, the regulations contemplated by the *Safe Schools Act, 2000*, and which are now in force, provide that "the expulsion of a pupil is not mandatory, if (a) the pupil does not have the ability to control his or her behaviour; (b) the pupil does not have the ability to understand the foreseeable consequences of his or her behaviour; or (c) the pupil's continuing presence in the school does not create an unacceptable risk to the safety of any person".<sup>8</sup> There are similar exemptions to the mandatory suspension provisions.<sup>9</sup> Those regulatory exemptions were designed, in part, with the special needs student in mind, and are available for consideration by the principal or board of trustees to temper any perceived "rigid expulsion policies" in appropriate cases.

**28.** At the same time, it must be recognized that the principal and school authorities are responsible under the law to provide a safe learning environment for *all*

students. Indeed, all school principals are expressly charged with a specific, mandatory statutory obligation “to give assiduous attention to the health and comfort of the pupils”.<sup>10</sup> Thus, in extreme situations where the conduct of any given student, including a student with disabilities, places in jeopardy the health or safety of either the student in question, the others students, or the school staff, those same statutory obligations may require and will authorize the provision of educational services in a temporary alternative setting, the removal of the student, or other appropriate measures, until the continued health and safety of all relevant parties is no longer at risk.

### *Non-attendance of Students During Accommodation Disputes*

**29.** The Consultation Paper states that: “In some cases, students have lost substantial school time because of disputes regarding the provision of appropriate accommodation” (pp. 15-16). Although parents and educators alike share a common goal – the best interests of the student – it remains an unfortunate fact that disputes regarding the provision of appropriate accommodation arise from time to time. The legislative-regulatory scheme contemplates this and provides, as part of the IPRC process, a multi-tiered appeal process through which parents may challenge decisions regarding the identification and placement of their special needs students, culminating in a full hearing before a provincial Special Education Tribunal.<sup>11</sup> That same scheme also contemplates, however, that the student shall continue in attendance at school while any appeal is being pursued.<sup>12</sup> Moreover, the general provisions in the *Education Act* requiring the compulsory attendance of school-age children do not list “disputes concerning appropriate accommodation” as a lawful excuse from attendance, whether those disputes are pursued as an appeal under the IPRC appeal process, a hearing before the Special Education Tribunal, or a complaint to the Commission under the *Human Rights Code*.<sup>13</sup>

**30.** But where parents make a decision to keep their child at home while a dispute is ongoing, the school board, obviously, does not control that decision of the parents, nor is it accountable for it. OPSBA and its member boards share the Commission's concern that some special needs students may risk losing substantial school time if parents choose to keep their children at home during a dispute over accommodation.

### *Irregular Attendance*

**31.** The Consultation Paper also speaks of cases where: "parents of children with disabilities in the primary and secondary public school system have reported situations where their children are unable to start school with their peers at the beginning of the school year" (p. 15). In an ideal world, school boards would have a generous amount of funding so that every special need of every exceptional pupil would be ideally accommodated at every neighbourhood school. It goes without saying, however, that that ideal world does not exist. Ideal funding certainly does not exist. And the standard required by the *Human Rights Code* is not ideal accommodation but, rather, reasonable accommodation.<sup>14</sup>

**32.** Obviously OPSBA is not privy to the specific details of the individual parents' concerns referenced in the Consultation Paper. Regrettably, there may be instances (and there is at least one actual complaint presently before the Commission where this issue is raised) where, for example, a severely disabled student's ability to attend school is effectively dependent upon the availability of high intensive support services, such as the provision of a full-time one-on-one educational aide; and there may be instances where that aide is simply unavailable whether by reason of illness, unforeseen absence, or other eventuality that contingency plans cannot reasonably foresee or adequately address. Certainly there has been much public attention to the numbers of students awaiting assessment for special education purposes. There are other cases where parents, for a variety of reasons, are reluctant, neglect or refuse to consent to certain assessments of the student that are required,

in some instances by law, which obviously delays if not defeats the IPRC assessment process altogether.

**33.** In those instances where the cause of the irregular attendance is caused by the illness of key personnel or is otherwise akin to an “act of God”, again, the standard is reasonable accommodation, not ideal accommodation, and one would hope that the Commission’s enforcement process would not be bogged down with numerous complaints of this nature. On the other hand, where irregular attendance is caused, at bottom, by a lack of available resources, OPSBA too has serious concerns for the consequences of inadequate funding, to which these submissions now turn.

#### **THE FOREMOST BARRIER TO EQUAL ACCESS TO EDUCATION: FUNDING**

**34.** The Consultation Paper asks, innocently enough, “What other barriers to education for persons with disabilities are you aware of?”. OPSBA has a singular response. Funding. While OPSBA supports the framework of the funding model which is in present use, the chronic under-funding of certain costs factors, including special education, within the funding model is the root cause of the foremost barrier to equal access to educational opportunities confronting students with disabilities.

**35.** As the Commission knows, the Ontario Government has appointed an Education Equality Task Force, chaired by Dr. Mordechai Rozanski, to conduct a review of the funding formula for Ontario’s publicly funded schools. OPSBA and other interested parties have recently filed submissions with the Task Force, and those submissions bear relevance for present purposes. The overall sense of OPSBA’s position may be gained by the following excerpt from the introduction to OPSBA’s submissions:

The primary purpose of an equitable and adequate funding model is to support student achievement. ... We believe, however, the current provincial funding

model is short-changing our children's future and falls short of the real needs of Ontario's students.

Much has been said recently about the issue of accountability. There is no doubt that the educational changes over the past five years in the areas of finance, governance and curriculum have left parents wondering who ultimately is accountable for their child's success at school. For trustees and school boards, the issue has always been clear. They will state time and time again, with emphatic certainty, that their primary focus is student success and achievement. They are accountable to many, including taxpayers, parents, school councils, their fellow board members and the government. But ultimately, school boards and trustees take the issue of student success and achievement as their most important objective.

When the provincial funding formula for education was introduced in 1998, its stated goal was to ensure that educational funding is fair, equitable, responsive to student needs, focused on the learner, and is responsible for promoting accountable decision making for student success. Under this model, the government dictates how much each board can spend and to a large extent, what the money must be used for. By seizing complete control of education funding, the provincial government assumed absolute responsibility for ensuring adequate funding of education.

The 1994 Report of the Royal Commission on Learning titled *For the Love of Learning*, Volume IV, Making It Happen, states:

Based on our public hearings, combined with insights from our research, it is clear that two issues are important to the future of school reform. The first is equity – the question of whether the system distributes available resources in a manner that is fair to all students in the province. The second issue is what we call adequacy – the question of what funding is required to provide the kind of school program we envision.

The issues of equity and adequacy in funding continue to plague the public education system. In fact, our financial analysis of the funding formula paints a disturbing picture of a model that is failing our children.

Ontario's citizens demand and deserve an effective and efficient public education system. Over the past ten years, however, the public education system has experienced fundamental and profound change. Local school boards have accommodated and contended with new governance structures, new legislative foundations, new curricula, new funding mechanisms, all the while striving to meet society's expectations for a vibrant and viable public education system.

Provincially-driven initiatives have forced boards to address public expectations within tightly restricted revenues.

To produce balanced budgets, essential programs and services have been lost. Boards which have balanced budgets have done so at the expense of programs that help students succeed. All public boards across the province are in deficit positions – be it a financial deficit, a program and services deficit or both.

The Ontario Public School Boards' Association knows that the “flexibility” funds currently provided by the province are not giving boards the ability to define educational priorities at the local level. Due to inadequacies throughout the model, these “flexibility” funds are used to fill funding gaps caused by incorrect costing assumptions and distribution formulae throughout the model. Examples of, and recommendations to overcome these inadequacies are identified throughout our submission.

Assumptions that all aspects of educational funding can be allocated on a per pupil basis must be challenged. Assumptions that funding prior to 1997 was adequate to form appropriate costing models for today's children also must be challenged. We submit, however, that the model is not the whole problem. The dollars within the model ARE the problem – or should we say the LACK of dollars within the model.<sup>15</sup>

**36.** OPSBA's submissions to Dr. Rozanski specifically addressed the area of the funding of special education. The summary of those submissions reads as follows:

OPSBA supports the framework of the funding model which is in present use. In this model the majority of students requiring additional supports to the regular classroom are funded by the per pupil grant identified as the SEPPA [Special Education Per Pupil Amount] grant, with additional funding granted through the ISA [Intensive Support Amount] process to cover the costs of providing for those students with very high needs in a variety of areas. The Association has always maintained that the model needs to recognize the difference in costs incurred to provide programs and services to students with very high needs since the incidence of these high needs students is not uniform across the province.

It is important to point out the impact that declining enrolment will have on the Special Education envelope. Boards are granted their SEPPA dollars on an FTE [Full Time Equivalent] per-pupil basis. As enrolment decreases, that funding decreases. However, the incidence rates of special needs does not decrease at a comparable rate, thereby leaving boards with less dollars for special needs students. This will hit boards particularly hard when the double cohort of secondary students leaves the system in June 2003.

Certainly there has been much public attention to the numbers of students awaiting assessment for special education purposes. But the additional problem facing boards of education is the need for adequate funding to provide programming for the qualified students. Boards need the flexibility to provide students with a broad range of programming options so that special education students can reach their full potential. The current funding model does not provide that flexibility.

**37.** The full text of OPSBA's September 2002 Submissions to the Education Equality Task Force is set out at Appendix "A". Ontario Public School Boards' Association respectfully submits them for review by the Commission in its consideration of the critical issues involved in the education of disabled students.

**38.** The Ontario Public Supervisory Officials' Association ("OPSOA") also filed submissions with Dr. Rozanski, which included specific submissions with particular reference to special education funding. OPSBA supports the recommendations of, and commends the good work by, OPSOA, and the OPSOA submissions were reiterated in the OPSBA submissions and attached as an appendix thereto. The full text of the OPSOA submissions are also attached to these submissions at Appendix "B". The Association specifically commends the OPSOA's submissions on special education funding to the Commission for its review. Highlights of some of the points addressed in the OPSOA submissions include:

- P Currently, there is a 71 million dollar cap on programs presently being funded by the Ministry. That cap is arbitrary and is not student based.
- P No new programs have been funded for the year 2002 - 2003.
- P In the past, new funding has been as a result of the closure of existing programs brought about through monitoring processes.
- P The Ministry of Education has made it clear that funding is a partnership process with other ministries and that education has always carried more than their share of the dollars.

- P Ministry funding decisions are made at times which conflict with Board staffing timelines and collective agreement parameters.
- P Transportation costs are not recoverable by Boards.
- P Grants are not provided for computer technology, textbook, and staff professional development such as that required for the new curriculum.
- .
- P The current ISA file review process is a huge burden to school boards and has been well documented. The Ministry vision for the future is as yet unknown.
- P The ISA process is stated to separate the individual student file which generates grant, from the provision of service to that student by school boards. The process, however, raises the expectation of level of service by parents and school personnel. In some boards this is being approached as a Human Rights issue.
- P The criteria for qualification as an ISA 2 or ISA 3 claim include the provision of staff resources. Many boards do not have the funds to provide staff resources although the student meets all other qualifying criteria. These “Catch 22” students are not being provided with appropriate services.
- P Special Incidence Portion (SIP) costs exceed grant provision.
- P Many boards have exceeded their “proxy” ISA grant during the 2002 ISA process and have demonstrated needs based on the Ministry's own criteria. No additional ISA funding has been received by school boards.
- .
- P 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.
- P Overall declining enrolment has a significant impact on SEPPA dollars while enrolment of special education students does not decline at the same rate, and in some cases is increasing. There are higher proportions of students with high needs, e.g. autism, in the younger age cohorts.

- P Grant levels do not allow for competitive salary levels for professional support staff leading to significant shortages or complete absence of staff. This situation is particularly acute in rural and remote areas.
- P The lack of program standards prevents consistent definitions of levels of service and the ability to assign related costs and expenditures.
- P The incremental cost of special education transportation is not recognized in the transportation grant and leads to a reduced level of special education services to some students.
- .
- P Many schools were built at a time which predates contemporary views of accessibility and are prohibitively expensive or architecturally impossible to update. Elevators in particular are very expensive and can cost up to \$0.5M to retrofit.
- P Accessibility is not provided for within the facilities renewal grant.
- P Accessibility challenges are particularly acute in smaller or rural boards where accessible transportation is also an issue.
- P Students with special needs, including behaviour, require purpose-built accommodation.

**39.** OPSBA respectfully requests for the assistance and support of the Commission in the context of the Government’s review of the funding model. In any event, OPSBA asks that in the application of its *Policy and Guidelines on Disability and the Duty to Accommodate*, released March 2001 (the “OHRC Guidelines”), the Commission remain sensitive to the fiscal realities confronting school boards under the current funding model.

*Roles and Responsibilities*

**40.** The current funding model provides for a distinct separation of responsibilities as between school boards and the Ministry of Education. The boards no longer have the ability to raise their own revenue through direct municipal assessment, as was the case prior to the implementation of the current funding model by Bill 160’s

wholesale restructuring of the governance of education finance. At the same time, however, school boards remain statutorily responsible for the provision and delivery of appropriate special education programs and services to their exceptional pupils.<sup>16</sup>

**41.** On the other hand, as indicated in OPSBA's submissions to the Education Equality Task Force, "by seizing complete control of education funding, the provincial government [has] assumed absolute responsibility for ensuring adequate funding of education". Once determined by the Ministry, the board is given a fixed amount of money by the Ministry of Education to deliver its special education programs and services. Decisions about providing particular student supports, such as educational assistants, are made by the school board in conjunction with its staff and school administration. But as stated in the Ministry's published standards for development of Individual Education Plans, "the IEP reflects the school board's and the principal's commitment to provide the special education program and services, *within the resources available to the school board*, needed to meet the identified strengths and needs of the student".<sup>17</sup> The bottom line is that school boards no longer control the amount of funding required to provide the special education programs and services that the *Education Act* requires them to provide.

**42.** However, almost all complainants, and to date it would appear the Commission as well, regard the school board as being solely responsible for the provision of special education in Ontario. That is, it is the school board alone that is perceived as the "service provider" for the purposes of section 1 of the *Human Rights Code*. It is the school board alone that is named as a respondent to the discrimination complaint. And it is the school board alone that comes to the table when mediation is attempted.

**43.** OPSBA submits that if the programs and services provided by a school board are deemed by the Commission or held by the board of inquiry to be inadequate, the board alone is not legally responsible for the provision of programs and services that require

funding beyond the finite resources available to the board. To take an example that is the subject-matter of several complaints currently before the Commission, school boards are simply unable to provide full-time, one-on-one individual support by an educational assistant to all their exceptional pupils without an extraordinary increase in the level of special education funding from that which is currently provided by the Ministry of Education. Again, the boards no longer have the legal authority or ability to raise revenues through municipal taxation but, instead, must rely on the amount of funding allocated by the Ministry. Accordingly, where only a given level of service is available to the board as a result of the level of special education funding received, and that level of service is found to be inadequate to meet the needs of the board's exceptional pupils, as may be determined by the Commission or the board of inquiry, the ultimate responsibility and legal liability would lie with the Ministry.

**44.** In this regard, OPSBA directs the Commission's attention to the decision of the Saskatchewan Court of Queen's Bench in *Concerned Parents for Children with Learning Disabilities Inc. v. Saskatchewan (Minister of Education)*, [1998] S.J. No. 566, where the Court rejected the argument of the Government of Saskatchewan that because the Government merely provides funding but does not itself provide specific educational services, it could not be found liable for parental claims of failure to provide education "appropriate to the needs and circumstances of a child with a learning disability". Dismissing the Government objection that it was not a proper defendant to the lawsuit, the Court held:

*The defendant Government has argued that even if there is a duty to provide educational services to the infant plaintiffs on the basis of the Carlton Connection model, 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 on the basis of the Carlton Connection model, 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.* [Emphasis supplied.]

**45.** To the same effect is the decision of the British Columbia Supreme Court in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* (2000), which involved a claim brought against the Government of British Columbia by parents of various children who had been diagnosed with autism or autism spectrum disorder for a declaration that the Government's denial of funding for certain types of intensive behavioural intervention treatment and applied behavioural analysis techniques was contrary to section 15 of the *Canadian Charter of Rights and Freedoms*. The Court allowed the parents' claim that by failing to fund effective treatment for autism, the government had misinterpreted its legislative mandate to provide health care services, and had discriminated against the children by failing to make appropriate accommodation of their health care needs.<sup>18</sup>

**46.** OPSBA therefore submits that in 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.

**47.** In any event, OPSBA reiterates its request that in the application of its Guidelines, the Commission remain sensitive to the fact that school boards do not determine

for themselves their level of special education funding but must rely upon that which is provided to them by the Ministry of Education.

**48.** In respect of other parties to the accommodation process, and as referenced in the Consultation Paper (at p. 20), it is well settled that the person with disabilities shares some responsibility for the duty to accommodate. A person with a disability has a duty to assist the service-provider in arriving at an appropriate accommodation and to co-operate by making their needs known, providing information and facilitating the process.<sup>19</sup>

**49.** In the education context, the duty to co-operate in the accommodation process often if not usually will impose obligations on the parent or guardian of the special needs student. The different aspects of parents' obligations in this regard are too numerous to enumerate here, but will include, just to take an example mentioned previously, an obligation not to delay or hinder the accommodation-IPRC assessment process in cases where parents, for a variety of reasons, are reluctant, neglect or refuse to consent to certain assessments of the student that are required, in some instances by law.

**50.** In accordance with the Commission's important education function under s. 29 of the *Human Rights Code*, OPSBA respectfully requests the assistance of the Commission in educating the public, and specifically parents of special needs students, about the respective roles and responsibilities of the Ministry of Education and school boards, the reliance of school boards on the level of funding provided to them by the Ministry, and the inability of school boards to provide for accommodations beyond the resources made available to them.

## APPROPRIATE ACCOMMODATION

*The OHRC Guidelines and the Supreme Court of Canada's Decision in Eaton*

**51.** The Commission states in its Consultation Paper (at pp. 18-19) that:

The OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate* specifies 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 identification of the most appropriate accommodation in an educational setting raises a number of issues. For example, at the primary and secondary level, there is ongoing debate regarding decisions to place students in specialized settings as opposed to placing them in mainstream classrooms with supports.

**52.** The Commission has asked “what specific guideline should inform the determination of the most appropriate accommodation in an educational setting”. OPSBA submits that in the course of applying the OHRC Guidelines, the Commission should, of course, have regard for the rulings of the Supreme Court of Canada. In that the Consultation Paper speaks of what accommodation measures would “best promote integration” in the context of the ongoing pedagogical “debate regarding decisions to place students in specialized settings as opposed to placing them in mainstream classrooms with supports”, OPSBA reminds the Commission that the term “integration” usually bears a specific meaning in the context of that debate; it connotes a particular placement of disabled students in the “range of placements” model and, more specifically, placement in the regular or “mainstream” classroom with appropriate support.

**53.** Clearly, for most special needs students that placement will be the most appropriate and is in fact the most common in Ontario public schools. The pedagogical

presumption in favour of the integrated placement has been codified in law and is properly reflected in subsection 17(1) of the IPRC regulation, which states:

When making a placement decision on a referral under section 14, the committee shall, before considering the option of placement in a special education class, consider whether placement in a regular class, with appropriate special education services,

- (a) would meet the pupil's needs; and
- (b) is consistent with parental preferences.<sup>20</sup>

**54.** Nevertheless, in some instances placement in the regular class will not be appropriate for some individuals even if it may be thought to promote integration. Placement of disabled students in a specialized class is not discriminatory, if it is in accordance with their best interests. That was of course the express ruling of the Supreme Court of Canada in *Eaton v. Brant County Board of Education*.<sup>21</sup> As the Commission expressly noted earlier in its Consultation Paper (at p. 8):

The Court stated that 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.<sup>22</sup>

**55.** Accordingly, the OHRC Guidelines ought not to be applied without regard to the Supreme Court of Canada's ruling in *Eaton* and, more particularly, ought not to be applied in a manner that suggests that the most appropriate accommodation of every individual student will always be the integrated placement because, *inter alia*, it may appear to "best promote integration", or that suggests that placement in a specialized setting where it would be in the best interests of the student is discriminatory, as this was expressly rejected by the Court in *Eaton*.

*Special Program under Section 14 of the Code*

**56.** Subsection 14(1) of the *Human Rights Code* provides that:

A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

**57.** The Commission has published *Guidelines on Special Programs* to assist the public in a better understanding of the definition of special programs and the important role to be played by special programs in the removal of discriminatory barriers in our society. However, s. 14 has seen very little use in practice: despite its some 20 years' existence, there are only approximately six reported cases dealing with the special programs provisions of the *Code*.

**58.** OPSBA submits that the Commission should consider whether, in appropriate cases, the comprehensive legislative-regulatory scheme under the *Education Act* and the IPRC regulation, pursuant to which special education programs and services are provided to exceptional pupils to assist them achieve equal opportunity in education, constitutes a special program within the meaning of s. 14(1) of the *Code*.

**59.** Although s. 14(1) is thought to provide for an "exception or defence" to the rights under Part I of the *Code*, its purpose is to permit and foster the expansion of the rights of disadvantaged persons. As this purpose is consonant with the greater objectives of the *Code*, the purposive approach to interpretation indicates that s. 14(1) is equally deserving of the large and liberal interpretation which is the *Code*'s due.<sup>23</sup>

**60.** In particular, the term “special program” as used in s. 14(1) of the *Code* is not confined to those programs, commonly referred to as “affirmative action”, designed to, inter alia, ameliorate the effects of past discrimination. This is evident upon an examination of the legislative history of s. 14(1) and the predecessor of then s. 13(1), which was much more restrictive in scope. In any event, the term “affirmative action” was not used by the Legislature in describing the elements of a “special program” in s. 14(1).<sup>24</sup>

**61.** There are very few cases that have considered the proper interpretation of s. 14(1) of the *Code*. In *Broadley v. Steel Co. of Canada, Inc.*,<sup>25</sup> an Ontario board of inquiry considered a clause in a collective agreement providing for pre-retirement vacations for those employees who were at least 61 years of age and had 25 or more years of service. The Complainant had the required seniority, but was not 61 years of age, and was therefore not eligible for the additional pre-retirement vacation periods. The complainant alleged that the complainant’s right to equal treatment without discrimination on the basis of age was infringed when some employees were granted a benefit not available to the complainant solely because of a difference in age. It was common ground that the complainant’s right under the *Code* was infringed, unless it could be said that s. 14 [then s. 13] of the *Code* applied.

**62.** The Board of Inquiry upheld the provision in the collective agreement as a special program under the *Code*, despite the fact that it found that it was clear that the program did “not involve a meticulously designed, elaborate, detailed and carefully monitored special program such as that described in the Ontario Human Rights Commission’s Guidelines on Special Programs (1990)”. The Board found that the “key rationale” in support of the program was that it allowed employees aged 61 to 65 to “gradually prepare for their exit from the workforce” and to “soften the effect of an employee’s retirement”.<sup>26</sup>

**63.** In *Broadley*, the board of inquiry went on to consider the relationship between the Commission’s Guidelines on Special Programs and s. 13(1) of the Code, as follows:

However, the fact that the provision might not have met all of the suggested standards in the Guidelines is not fatal to the company’s argument. First, the Commission itself (in the Guidelines at p. 3) “recognizes that not all special programs will meet the standards” and states (at p. 3) that “the Commission will be flexible in determining whether a program constitutes a special program that would be protected by section 13(1).” In other words, the Commission acknowledges that the Guidelines do not articulate minimum standards but rather ideal ones which the Commission will simply take into account in assessing a program. Secondly, the Commission’s Guidelines, even if they purported to set minimum standards do not have the force of law. The legal standard for the evaluation of the extended pre-retirement vacation provision is set by s. 13 of the Code.<sup>27</sup>

**64.** The rationale for the special program in *Broadley* was grounded in the interest in alleviating “the difficulty that older workers often experience in the transition from full employment to full retirement”. It is submitted that if that rationale was sufficient to constitute a special program in *Broadley*, then *a fortiori* the Ontario special education scheme in issue here satisfies the elements of a special program. Indeed, all parties must surely agree that the education of special needs youngsters is “critically important”.

**65.** The scope of s. 14(1) of the Code was also considered in the *Roberts* case, which involved an Assistive Devices Program (“ADP”) operated by the Ontario Ministry of Health. The complainant, who was legally blind, applied for financial assistance under the ADP in order to purchase a particular device that would assist him in performing tasks requiring fine visual acuity. The complainant was 71 years old at the time, and it was conceded that “but for his age, Roberts would have qualified for funding from this special program”. Roberts filed a complaint under the Code alleging discrimination in the provision of public services because of age.<sup>28</sup>

**66.** The complaint was heard before Prof. Constance Backhouse sitting as a board of inquiry under the Code. Prof. Backhouse found that there had been discrimination contrary to s. 1 of the Code, but upheld the ADP as a special program within the meaning of s. 13(1). That holding was unanimously affirmed on appeal to the Divisional Court, the Chief Justice of the Ontario Court delivering brief reasons. On further appeal to the Ontario Court of Appeal, the finding of special program was reversed, with Finlayson, J.A. dissenting, and all three Justices of Appeal delivering separate reasons for judgment.<sup>29</sup>

**67.** In separate concurring judgments, Houlden and Weiler JJ.A. held that the ADP could not be considered a special program under the *Code* because the ADP drew a discriminatory distinction amongst those disabled persons whom it was designed to benefit based on a prohibitive ground of discrimination, age, which was not rationally or logically connected to the provision of services under the program. Houlden, J.A. likened it to an employer's disability plan that discriminated on the basis of sex. The respondent Ministry of Health conceded that there was no rational connection between age and the provision of services under the ADP.<sup>30</sup>

**68.** It is submitted that the Court of Appeal's decision in *Roberts* is distinguishable from the instant case in that the Ontario special education scheme does not contain an additional element or extraneous factor that discriminates on a prohibitive ground that it is not rationally or logically connected to the scheme.

**69.** Further, it is significant that, absent the presence of the discriminatory factor of age in *Roberts*, Houlden J.A. expressly held that the ADP would have been upheld as a special program under the Code. In his dissenting judgement, Finlayson J.A. would also have upheld the ADP as a special program in any event. In other words, absent the discriminatory factor of age, a majority of the Ontario Court of Appeal would have upheld the ADP as a special program. Put another way, considering the various decisions at all levels in *Roberts*,

it is apparent that six of the seven judges or adjudicators who reviewed the circumstances of the ADP would have upheld it as a special program under the Code, absent the presence of the extraneous factor of age. As Mr. Justice Houlden stated:

Extending financial aid to handicapped persons so that they may achieve a quality is, in my opinion, rationally connected to the provision of services under the ADP, and I agree with the board that it is protected by s. 14(1). It is the discriminatory ground of “age” that causes the difficulties in this case.<sup>31</sup>

**70.** In sum, it is submitted that the test for establishing the elements of a special program under s. 14(1) of the *Code* was set out by Houlden J.A. in the *Roberts* case as follows:

In order to interpret s. 14(1) in a manner that removes discrimination and achieves equality for disadvantaged persons and groups, a special program *must be passed for one of the objects set out in the subsection*, and in addition, *there must, in my judgement be a rational or logical basis for the discrimination*. If there is not, the program is not protected by s. 14(1). [Emphasis supplied.]

**71.** It is apparent from the “objects” set out in s. 14(1) of the Code that the provision contemplates at least four kinds of special programs. A program constitutes a special program within the meaning of the Code if: (a) it is designed to relieve hardship; (b) it is designed to relieve economic disadvantage; (c) it is designed to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity; or (d) it is likely to contribute to the elimination of the infringement of rights under Part I of the *Code*.<sup>32</sup>

**72.** It is submitted that the Ontario special education scheme constitutes a special program as defined in (a) and (c) above, in that, it was designed to relieve hardship of disabled pupils or was designed to assist disabled pupils to achieve or attempt to achieve equal opportunity.

**73.** Indeed, the Divisional Court of Ontario in the *Lanark, Leeds* case has already found that the Ontario special education scheme was developed or “designed” to assist

disadvantaged persons to attempt to achieve equal opportunity, as required by s. 14(1). That case involved children who had been identified by an IPRC as “trainable retarded”, a term no longer used by the *Education Act*. In the course of its judgment, the Divisional Court reviewed the “comprehensive scheme to provide for the education of handicapped children in Ontario”, and commented upon that scheme as follows:

In December of 1980, the Province of Ontario brought into force a comprehensive scheme to provide for the education of handicapped children in Ontario. The *Education Amendment Act*, 1980 (Ont.), c. 61 (now incorporated into the *Education Act*, as amended), commonly referred to as “*Bill 82*” provided for the inclusion of “trainable retarded” youngsters in Ontario’s education system and provided for the basis on which their special needs would be attended to.

The general principle of “Bill 82” is set out in s. 8(2) of the *Education Act*, that “all exceptional children” are to have access to “appropriate special education programs and special education services without payment of fees . . .”.

It has been recognized that mental handicap is developmental and that with proper programming and proper supports, mentally handicapped people can reach levels of potential just like everyone else. *Thus, a system of a highly specialized kind of education was developed to take into account the different levels.* [Emphasis supplied.]

**74.** OPSBA believes that to date too little attention has been given to the question of special programs under s. 14(1) of the *Human Rights Code* and that the Commission should consider or be prepared to entertain submissions in an appropriate case whether the comprehensive special education scheme under the *Education Act* constitutes a special program for the purposes of s. 14(1) of the *Code*.

## THE ACCOMMODATION PROCESS

### *The IPRC Process: The Essence of Accommodation is Individualization*

75. The process for accommodation of the needs of disabled pupils is governed by the *Education Act* and the regulation thereunder respecting IPRCs. The scheme reflects a definite dedication to the continuous assessment and evaluation of exceptional pupils' needs and placement, which is evident in the very definition of "special education program", which requires, *inter alia*, "an educational program that is based on and modified by the results of continuous assessment and evaluation". It is this function that lies at the heart of the IPRC's existence. In practice, where either the principal or parents of a child believe the pupil to have special educational needs that must be addressed, they may refer the pupil's circumstances to an IPRC of their board. The IPRC bears the twin responsibilities of identification and placement; it must identify the pupil's needs and, hence, determine whether or not the child is an exceptional pupil and, if so, make a recommendation as to placement. In the course of making its determination, the IPRC must obtain and consider an educational assessment of the pupil, may consider a health or psychological assessment if the parent consents, may interview the pupil if the parent consents, and shall interview the parent unless the parent refuses or waives this requirement. The scheme's insistence on continuous evaluation is reflected in the mandatory, annual review process: where an exceptional pupil is placed in a special education program, the IPRC Regulation requires that the placement be reviewed by the IPRC not less than once a year or at such earlier time as the parent may request.

76. As both the Supreme Court of Canada and the OHRC Guidelines have noted, "the essence of accommodating people with disabilities is individualization".<sup>33</sup> In turn, the determination of individualized accommodation is the essence of the IPRC process and the IEP. To paraphrase the Guidelines, the IPRC process and the IEP development process

recognizes that “there is no set formula for accommodation – each [student] has unique needs and it is important to consult with the person involved”. Hence the scheme’s emphasis on the due process rights of parents; the IPRC regulation is replete with provisions which seek to ensure the participatory rights of parents in the decision-making process respecting the education of their exceptional children.

**77.** But while the legislative-regulatory has given parents extensive opportunities to participate and exert influence in decisions as to identification and placement of their children and the development of their IEPs, it does not grant parents ultimate control over the special educational decision-making process, in the sense of granting to parents an absolute right to have their children receive a specific type of accommodation, i.e., a specific type of special education programs or services.

**78.** In practice, many if not most of the complaints that are filed with the Commission against school boards in the education and disability context involve disputes over what particular form of accommodation is appropriate to the individual needs of the disabled learner.

*Competence of the Commission: The Lack of Functional Expertise*

**79.** It is often but not always the case that at the core of such complaints lies a dispute that is essentially a question of pedagogy. To inquire what “best practices” most appropriately meet the learning needs of a disabled student is to ask a pedagogical question. To inquire into, as the Consultation Paper puts it, the “ongoing debate regarding decisions to place students in specialized settings as opposed to placing them in mainstream classrooms with supports” (pp. 18-19) is to enter that pedagogical debate. In such instances, with respect, it is not a question of discrimination, nor is it a question in respect of which either the Commission or the Board of Inquiry is competent to assess. In such instances, the

Commission and Board of Inquiry will not possess the requisite functional expertise to adjudicate upon such education issues. In that event, the Commission would have no jurisdiction to properly address such complaints.

**80.** Alternatively, the Commission may well consider whether in appropriate cases it should exercise its discretion under clause 34(1)(a) of the *Human Rights Code* and refuse to deal with such complaints on the basis that it is “one that could or should be more appropriately dealt with under an Act other than [the *Code*]”, that is, the *Education Act*. A complaint that engages, again as the Consultation Paper puts it, the “ongoing debate regarding decisions to place students in specialized settings as opposed to placing them in mainstream classrooms with supports” is a complaint that plainly deals with a placement decision, and such decisions may be appealed through the IPRC appeal process, ultimately to the Special Education Tribunal. A blanket decision by the Commission never to resort to its discretion under section 34 in such instances would be, with respect, inconsistent with the intent of the Legislature and, in appropriate cases, subject to challenge in the courts by way of judicial review.

**81.** In this regard, we note that the even the superior courts of the province have repeatedly recognized the limits of their own jurisdictional competence and functional expertise, and just by way of the most recent example, we refer the Commission to the recent judgment of the British Columbia Supreme Court in *Auton v. British Columbia (Ministry of Health)*, [2001] B.C.J. No. 215, where, in dealing with the claim by parents of autistic children that the B.C. Government’s denial of funding for certain types of intensive behavioural intervention treatment and applied behavioural analysis techniques was contrary to the *Charter*, the Court held that:

The effective treatment of autistic children must be delivered within a framework that is necessarily constrained by the resources available and the need to allocate those resources equitably in response to competing demands.  
... While the Government’s programs and policies are subject to review by the

Courts to ensure constitutional compliance, the judiciary cannot dictate what treatment programs should or should not be implemented, nor can it dictate how limited financial resources should be allocated. It is not the role of the Court to undertake the nature and degree of supervision of the delivery of Early IBI treatment suggested by the petitioners. An overly robust judicial approach may interfere with legitimate policy-making choices.

## THE UNDUE HARDSHIP STANDARD

### *The Standard is Reasonable Accommodation*

**82.** Subsections 17(1) and (2) of the *Human Rights Code* provide:

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap. 1986, c. 64, s. 18(9).

(2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside source of funding, if any, and health and safety requirements, if any.

**83.** In describing the standard of accommodation required for persons with disabilities, subsection 17(2) of the *Human Rights Code* uses the term “undue hardship”, which the Supreme Court of Canada has ruled is tantamount to requiring “reasonable” accommodation. As the late Mr. Justice Sopinka observed in *Renaud v. Board of Education of Central Okanagan No. 23 and Canadian Union of Public Employees, Local 523* (1992): “These are not independent criteria but are alternative ways of expressing the same concept”.<sup>34</sup>

**84.** Having said that, we note that nowhere in the specific discussion of the “Undue Hardship Standard” at pp. 20-21 of the Consultation Paper does the Commission use the word “reasonable” or acknowledge that the standard required is reasonable

accommodation. We hope and trust that this is a matter of mere inadvertence or the authors' insistence on brevity, rather than a telling omission.

**85.** OPSBA's overriding concern in respect of the application of the OHRC Guidelines on undue hardship in the education setting is that the Commission's Guidelines not be applied in a rigid or formalistic manner. Again, in our view, the Commission must remain sensitive to the fiscal realities confronting school boards under the current funding model.

**86.** The Commission must also remain sensitive to the fact that OPSBA's member boards bear statutory duties to *all* students – it goes without saying that all children, and not merely exceptional pupils, have a right to expect that their school board will provide appropriate education services, within the resources available to the board. So, by way of only one example, take the question posed by the Consultation Paper (at p. 20): “What does health and safety mean in the classroom setting?” In discharging their duty to provide reasonable accommodation to special needs pupils, school boards attempt to provide appropriate special education programs and services to the disabled learner while still maintaining a reasonable balance of the interests of all children and staff, and in that regard, they are not legally required by the *Human Rights Code* to provide for every measure of accommodation if that accommodation would threaten the health or safety of others for whom the board is responsible, including, especially, the disabled student or other children in the class. It bears repeating that subsection 17(2) of the *Human Rights Code* expressly singles out “health and safety” as factors that are to be used to determine when the standard of accommodation has been met.

*The Commission's “Viability” Test*

**87.** OPSBA notes the statement of the Commission in its Consultation Paper (at p. 4) that, “it is not the intent of this consultation to re-evaluate or reconsider [the] principles” expressed in the OHRC Guidelines. To be frank, given that the present effort constitutes the first formal consultative study by the Commission of the specific and often complex human rights issues affecting disabled students in Ontario’s public education system, the Commission’s refusal to even consider whether its Guidelines are appropriately applied in their present form to the special education context is worrisome. The Association respectfully requests the Commission to reconsider its position.

**88.** To illustrate OPSBA’s concerns, we refer to section 4.3 of the OHRC Guidelines on the elements of the undue hardship standard and, in particular, section 4.3.1., where the Commission sets out its position on the type or nature of costs that will amount to undue hardship for the purposes of subsection 17(2) of the *Code*. The Commission is of the opinion that, *inter alia*, the costs of the requested accommodation must be “so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its *viability*”. This of course is exactly the same language that the Commission employed in its previous *Guidelines for Assessing Accommodation Requirements for Persons With Disabilities*, published August 1989. That version came under scrutiny by the board of inquiry in the *Barber v. Sears Canada Inc.* decision, where the tribunal, in commenting upon the requirement in the 1989 Guidelines that persons with disabilities “must be accommodated in a manner that most respects their dignity” – which language, again, is precisely the same as in the current OHRC Guidelines (section 3.1.1) – held that:

It is clear that in the Commission’s view “accommodation” is a relative term, and that “full” accommodation is that which most respects dignity. Further, the standard of accommodation is that which most respects dignity.

I believe the Commission has here conflated the categorical and comparative senses of respecting dignity, and in doing so has provided a different standard from that of the *Code*.

The needs of persons with disabilities must be accommodated in a manner which respects their dignity. In many cases this may well be the manner which in the given case most respects their dignity. But, contrary to the position prescribed by the *Guidelines*, it need not be so in every case. In some cases there may be various accommodations all of which meet the needs and respect the dignity of persons with disabilities. Even if one should be the most respectful of dignity, it does not follow that the others will be in contravention of ss. 1 or 11 of the *Code*. To require respect for dignity is to make a high demand on behaviour. To adopt the requirement of the *Guidelines* would be to set an even higher standard and one which goes beyond that of the *Code*.<sup>35</sup>

**89.** In a similar vein, OPSBA is concerned that if the OHRC guidelines in respect of the treatment of costs and, in particular, the Commission's "viability" test, are applied too rigidly, without full appreciation of the funding realities faced by school boards, injustice would result. OPSBA respectfully submits that, as the tribunal said in the *Barber* case with respect to the guidelines' insistence on the "most appropriate" accommodation, to adopt the Commission's viability test "would be to set an even higher standard and one which goes beyond that of the *Code*." In its plain and ordinary meaning, the word "viability" means "the quality or state of being viable", the term "viable" being adopted from the French *vie* or "life", originally from the Latin *vita*, meaning "life".<sup>36</sup> The OHRC Guidelines, then, in adopting a viability test, have indicated that the Commission expects that a service-provider, such as a school board, must by law provide the specific accommodation measure in question unless to do would "substantially affect" the school board's life as an on-going enterprise. Plain and simple, that is a bankruptcy test. The Commission, in effect, is saying that unless it would bankrupt the school board, the accommodation must be provided. With respect, that is not at all what the Supreme Court of Canada had in mind when it affirmed that the required standard under the *Human Rights Code* is *reasonable* accommodation.

*Assessing Costs on the Basis of the “Whole Operation” of the Board*

**90.** At section 4.4.2. of its Guidelines, the Commission states:

The appropriate basis for evaluating the cost is based on the budget of the organization as a whole, not the branch or unit in which the person with disability works or to which the person 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.

**91.** OPSBA is concerned about the application of the Commission’s “whole operation” concept in the education sector. An interpretation of the *Code* that suggests the appropriate basis for evaluating the relative cost of a given accommodation measure is the “whole operation” of the school board, that is, its entire global budget, is completely inconsistent with the strictures of the current funding model (which, generally speaking, entails prescriptive funding, that is, funds are allocated into certain envelopes, and as a general rule, boards must spend within the envelopes). And again, with great respect, such an interpretation lies beyond that which is required by the legislation.

**92.** To take but one aspect of this problem, as set out in OPSBA’s submissions to the Education Equality Task Force (Appendix “A”, p. 35), the amounts available from the Government in respect of each validated ISA claim – i.e., the special funding of high needs students – is \$12,000 per ISA 2 claim and \$27,000 per ISA 3 claim. “These amounts have not changed since the 1998 funding year and do not reflect current costs of providing a “basket” of services to high needs students. As a result of this, the vast majority of boards have overspent the funding envelope for special education in order to preserve the services required by these students. This overspending has resulted in cuts other areas of the board budget.” But to suggest that, in addition to these realities, the board must make available its global budget for its “whole operation” is to go beyond what is required of the Supreme Court of Canada’s standard of *reasonable* accommodation.

### *Isolated Assessments of Costs Are Inequitable*

**93.** It follows from the considerations outlined above that in evaluating the costs of any given accommodation measure, a global perspective, accounting for all of the school board's responsibilities and priorities, must be adopted. Isolated assessments of costs, based solely on the individual perspective of whether a school board has the resources to supply a given accommodation measure for a single student or one particular complainant, will very quickly lead to inequities throughout the board's establishment. The complaint process under the *Code*, like litigation generally, is conducted on an individual, *ad hoc* basis. One complainant may file a complaint in respect of his or her own interests, where, perhaps, several other persons in essentially the same position with the same demands may not. But school board of course are responsible for the provision of appropriate education to all students.

**94.** Accordingly, in assessing whether, for example, the provision of a full-time one-on-one educational assistant to a special needs student of given abilities would cause the board to suffer undue hardship within the meaning of the *Code*, the assessment cannot be conducted in isolation, on the basis of the single complainant who came forward, without regard for whether the board also has the resources to fund the same support services to all of its students in the same circumstances. We cannot have an accommodation process that awards "the first off the mark" but ignores the needs of those remaining and the balance of resources available to them. The inequities entailed in such isolated assessments are self-evident.

## OTHER ISSUES: THE *ONTARIANS WITH DISABILITIES ACT, 2001*

### *The Need for Congruency*

**95.** As the Commission is aware, the *Ontarians with Disabilities Act, 2001*<sup>37</sup> (“ODA”) was recently enacted for the stated purpose of supporting the right of all persons with disabilities to enjoy equal opportunity and to participate fully in the life of the province. Effective September 30, 2002, section 15(1) of the ODA requires school boards under the *Education Act* to prepare an annual accessibility plan and consult with persons with disabilities in so doing.

**96.** In preparing such a plan, a school board must take steps to identify, remove and prevent barriers to persons with disabilities and must report on these steps, as well as the steps that the board intends to take in this regard in the upcoming year. The board must take measures to ensure that the organization assesses proposals for by-laws, policies, programs, practices and services to determine their impact on accessibility for persons with disabilities and report on these measures. The board must also specify which of the above the board will be reviewing in the upcoming year to identify barriers.

**97.** It is clear from the legislation, its guidelines and other supporting documentation that it is not expected that all barriers to individuals with disabilities be removed overnight. Firstly, the legislation is not drafted in mandatory language which requires the immediate removal of all barriers. Further, it is recognized that the removal of barriers which requires significant cost may be phased in over a number of years.

**98.** Given that the scope and subject-matter of the ODA overlaps to a degree with the Ontario *Human Rights Code* in respect of obligations of accommodation in the education sector, it is important to consider the ODA when determining the guidelines that will govern

this accommodation process. Further, in light of the overlap of the two legislative schemes, it is important to ensure congruency of the expectations, requirements and results produced under each of the two distinct statutory regimes. There is a potential for inconsistent expectations, requirements and results (e.g., where a school board files an accessibility plan under the ODA that specifies the measures the board intends to take in the coming years to remove physical access-barriers to a school, but is then faced with a discrimination complaint to the Commission under the *Human Rights Code* because the board had been unable to implement those changes previously), and if that potential were realized, the intent and purpose of either legislative scheme would be undermined.

99. OPSBA thanks the Commission for its consideration of these submissions.

**SUBMITTED  
PUBLIC SCHOOL**

**ALL OF WHICH IS RESPECTFULLY  
ON BEHALF OF THE ONTARIO  
BOARDS' ASSOCIATION  
THIS 7<sup>th</sup> DAY OF OCTOBER, 2002**

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**J. Paul R. Howard**

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**Jennifer E. Trépanier**

**OF SHIBLEY RIGHTON LLP**

## ENDNOTES

1. *Human Rights Code*, R.S.O. 1990, c. H.19, as amended.
2. Bill 82, *An Act to amend the Education Act, 1974*, 4th Sess., 31st Leg., Ontario, 1980 [hereinafter Bill 82]. It received first reading on 23 May 1980, second reading on 17 June 1980, was referred to the Standing Committee on Social Development, received third reading on 2 December 1980, and royal assent on 12 December 1980; it then became S.O. 1981, c. 61.
3. *Education Act*, R.S.O. 1990, c. E.2, as amended.
4. J.P.R. Howard, *The Special Education of Mentally Disabled Pupils: Full Inclusion's Use of Equality Rights Arguments* (LL.M. Thesis, Osgoode Hall Law School, 1995) [unpublished] at 14-16 [citations in quoted text omitted].
5. *Ibid.*, at 38-42 [citations in quoted text omitted].
6. *Ibid.*, at 44-45 [citations in quoted text omitted]. In *Adler v. Ontario*, *supra* at 29, Dubin C.J.O. stated:

The purpose of the amendments was to guarantee access to public education for handicapped children and to oblige the public education system to provide appropriate forms of education for such students. . . .

The Bill requires every school board within the Province to assume responsibility for providing special education programs and services for all exceptional children of school age. Included in this provision will be children with intellectual, communication, physical and behavioural exceptionalities as well as those with multiple handicaps.
7. *Education Act*, s. 302(1), as enacted by *Safe Schools Act, 2000*, S.O. 2000, c. 12 (assented to 23 June 2000).
8. O. Reg. 37/01, "Expulsion of a Pupil", s. 2.
9. O. Reg. 106/01, "Suspension of a Pupil", s. 1.
10. *Education Act*, s. 265(j).
11. See, for example, O. Reg. 181/98, "Identification and Placement of Exceptional Pupils", Part VI - Appeals from Committee Decisions, ss. 26-31.
12. See, for example, O. Reg. 181/98, s. 31.

13. *Education Act*, s. 21(2). The compulsory attendance sections also set out provisions respecting enforcement, including “truancy prosecutions”, pursuant to which students (s. 30(5)), and parents or guardians (s. 30(1)) may face prosecution of a provincial offence for “neglecting or refusing to cause the child to attend school”. Resort to these provisions is not always appropriate.
14. *Renaud v. Board of Education of Central Okanagan No. 23 and Canadian Union of Public Employees, Local 523* (1992), 141 N.R. 185 at p. 197, ¶ 19 (S.C.C.) *per* Sopinka J.
15. Ontario Public School Boards’ Association, “Submissions to the Education Equality Task Force” (September 2002), at 1-2. See Appendix “A” for the full text of OPSBA’s submissions.
16. *Education Act*, s. 170(1), para. 7.
17. Ministry of Education, *Individual Education Plans: Standards for Development, Program Planning, and Implementation*, 2000, p. 4, para. 2.
18. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2000] 8 W.W.R. 227 at 252 *et seq.* (B.C.S.C.); appeal to the British Columbia Court of Appeal pending.
19. See *Renaud, supra*; *Bonner v. Ontario Ministry of Health, Insurance Systems Branch* (1992), 16 C.H.R.R. D/485 (Ont. Bd. Inq.); and *Gohm v. Domtar Inc.* (1992), 89 D.L.R. (4th) 305 (Ont. Div. Ct.).
20. O. Reg. 181/98, s. 17(1).
21. *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.
22. See also, to the same effect, the position of the Saskatchewan Human Rights Commission and the decision of the Saskatchewan Court of Appeal in *Trofimenkoff v. Saskatchewan (Minister of Education)*, [1991] 6 W.W.R. 97 at 409-410:

Counsel for the plaintiffs wrote to the Saskatchewan Human Rights Commission requesting that the commission receive a complaint from the plaintiff and conduct an investigation into the merits of the complaint. The letter included the following paragraph:

To be clear about our position, it is not the closure of the School per se that we find offensive and discriminatory. Rather, it is the abolition of the educational program that is offered at the School for the Deaf and the complete lack of comparable alternative program that is in our view offensive and discriminatory.

The letter from the Saskatchewan Human Rights Commission in reply, included the following paragraphs:

*We can agree that a segregated school setting can be one form of affirmative action for insuring that disadvantaged students receive equal treatment in their education.* However, this is an option open to very few sectors at this time. By contrast for example, there is only one or two segregated schools for students of Indian ancestry and they too have a strong argument for special measures. To date, our focus has been to require that the main stream school system do anything and everything possible to ensure that special need students receive equal treatment in our schools. ...

*The reply by the Saskatchewan Human Rights Commission to the plaintiffs' complaint of discrimination would seem to be a complete answer, at this time, to the allegation of discrimination contrary to s. 13 of the Saskatchewan Human Rights Code. [Emphasis supplied.]*

**23.** *Roberts v. Ontario (Ministry of Health)* (1989), 10 C.H.R.R. D/6353 at pp. D/6373-6374, paras. 45166-45167 (Ont.Bd.Inq., Backhouse); aff'd (1990), 14 C.H.R.R. D/1 (Ont.Div.Ct.); rev'd [sub nom. *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387(C.A.) at 426 per Houlden J.A., and at 417-418 per Findlayson J.A., dissenting [hereinafter *Roberts*]. See also J. Keene, *Human Rights in Ontario*, 2d ed. (Toronto: Carswell, 1992) at pp. 165-166.

**24.** *Roberts, supra* at D/6357, paras. 45075-45077 (Ont.Bd.Inq., Backhouse); *Roberts, supra* at 397 per Weiler J.A., and at 417 per Findlayson J.A., dissenting. See also Keene, *Human Rights in Ontario*, at 165-166. The predecessor of the current s. 14(1) was *Ontario Human Rights Code*, R.S.O. 1980, c. 340, s. 8, which provided:

8. Notwithstanding the provisions of this Part, the Commission may, upon conditions or limitations and subject to revocation or suspension, approve in writing any special plan or program by the Crown or any agency thereof or any person to increase the employment of members of a group or class of persons because of the race, creed, colour, age, sex, marital status, nationality or place of origin of the members of the group or class of persons.

**25.** *Broadley v. Steel Co. of Canada, Inc.* (1991), 15 C.H.R.R. D/408 (Ont.Bd.Inq., Hovius) .

**26.** *Broadley, supra* at D/412, paras. 23 and 24.

**27.** *Broadley, supra* at D/412, para. 23.

**28.** *Roberts, supra* at 390-391 per Weiler, J.A. (C.A.).

**29.** *Roberts, supra* at D/6371-6375 (Ont.Bd.Inq., Backhouse); *Roberts, supra* at D/1 (Ont.Div.Ct.); *Roberts, supra* (C.A.).

30. *Roberts, supra* at 423g, 425f, 426a, 427d and 429c per Houlden J.A., and 404d and 406f per Weiler, J.A..
31. *Roberts, supra* at 423f per Houlden J.A..
32. *Roberts, supra* at 425b per Houlden J.A. See also *Roberts, supra* at D/6372, para. 45157 (Ont.Bd.Inq., Backhouse).
33. OHRC Guidelines, section 3.1.2.
34. *Renaud v. Board of Education of Central Okanagan No. 23 and Canadian Union of Public Employees, Local 523* (1992), 141 N.R. 185 at 197, ¶ 19 (S.C.C.) per Sopinka J.
35. *Barber v. Sears Canada Inc.* (1994), 22 C.H.R.R. D/415 at D/419-420, ¶¶24-37 (Ont.Bd.Inq., Bassford), albeit the tribunal did not specifically comment on the Guidelines' treatment of the issue of costs.
36. *The Shorter Oxford English Dictionary on Historical Principles*, 3d ed., vol. 2 (Oxford: Clarendon Press, 1973) at 2471.
37. *Ontarians with Disabilities Act, 2001*, S.O. 2001, c. 32 (assented to 14 December 2001; proclaimed in force, in part, 7 February 2002; provisions respecting school boards proclaimed in force 30 September 2002).