

Accommodations for persons with disabilities: levelling the uneven playing field

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People with disabilities have been recognized for as long as there have been human societies living and working together. Historically, the focus was on individuals who were limited in the major physical activities of humanity, i.e., on people who were deaf, who were blind and who had orthopaedic disabilities. In most cases, such people were segregated from the main stream. In most cases, they had no access to education or employment opportunities. In fact, since they were not seen as able to contribute to the welfare of the group or tribe, i.e., in many cases they were not able to hunt, fish or fight, they were driven away or even left to die.

During the middle ages, people ridiculed those who were disabled. People with disabilities were allowed to become court jesters or participate in certain entertainment activities, such as circuses, as victims. In some cases they were even burned as witches.

Late in the nineteenth century, initially arising from pity and later from philanthropic impulses, initiatives were made to assist those who had disabilities. There were institutions and sheltered workshops for people with disabilities in the western world. By the 1900's, many people with physical disabilities were able to lead reasonably normal lives. During the First World War artificial body parts were developed to assist wounded veterans, which were also available to those who could benefit from these as a result of having a congenital or acquired physical disability.

Help and support for those whose disabilities were not in the physical domain appeared much later. Such support became particularly important in the field of education.

The provision of special education programming to students with special needs has been available to students with certain disabilities for many years in most developed countries. Schooling for students who are blind or deaf or who use crutches and/or wheelchairs, has been available, usually in a separate location, often in purpose-built buildings or facilities or even in a hospital setting. The use of braille or sign language for educational purposes was available, but was generally not a part of most mainstream services.

Services to students with developmental disabilities (mental retardation, as it is still called in some places) were usually not provided through the general public school system until much later and in fact in many places the legislation governing education allowed for the formal exclusion of such pupils.

Students with learning disabilities, who are today the single largest group of students with special needs at all levels of education, including colleges and universities,

students with psychiatric, emotional and/or behavioural problems were generally not recognized at all as having special educational needs and were likely to be excluded. The concept that such students and their non-disabled peers might both benefit from exposure to one another was simply not recognized.

When it comes to post-secondary education, the concept of providing services and programming to allow disabled students to attend and participate successfully in a programme leading towards a degree or diploma, the debate is still ongoing. While it is recognized and accepted that all children have the right to attend school, there is no such right governing post-secondary education in most countries. Certainly, in Canada, there is no equivalent legislation to the Provincial Education Acts which mandate the provision of services to all students between the ages of six and graduation or twenty-one, whichever comes first, no matter how complex or diverse the needs of that child are.

While there is legislation mandating the existence and funding of post-secondary educational institutions, there is no law related to what is taught, by whom or how. Those decisions are usually made by each institution. Such decisions are frequently made in light of the academic interests of faculty, the licensing requirements of certain professional bodies, rather than the best interests of students. Academic freedom is often cited as the reason to deny admission into post-secondary education or accommodation of certain groups of students with special needs within such studies.

In the U.S.A. the first steps towards the inclusion of persons with disabilities came about through the enactment of the Rehabilitation Act of 1973. In 1990, following the implementation of the **Americans with Disabilities Act**, the legislation providing civil rights protection to persons with disabilities, many, though not all universities and colleges began to establish special needs offices. The primary purpose of this was to enhance the accessibility of such institutions and their courses of study. As a result, the numbers of students with disabilities who entered and participated in post-secondary education was dramatically increased.

Among the key beneficiaries of this were students with learning disabilities, who prior to this legislation were not able to enter or succeed in college or university programs in the USA.

A key component of the legislation was the obligation of institutions or organizations to make reasonable accommodations for people with disabilities. Unfortunately, this legislation and others that have followed its directions or have been based on it, do not clearly define the term "reasonable". However, the term "accommodation" has become a widely used and accepted term, describing changes, strategies and modifications that alter the way in which persons with disabilities satisfy the educational requirements of a course or examination.

Several recent court rulings in the USA, including the Boston University class action suit and other cases such as *Kirkingburg* and *Sutton*, have appeared to have reduced the

effectiveness of the Americans with Disabilities Act, especially when it comes to the provision of services, supports and accommodations for individuals with disabilities within the post-secondary educational field. The Supreme Court has ruled that individuals with specific impairments, especially invisible disabilities which may be ameliorated through accommodations, such as learning disabilities, psychiatric disabilities, etc., may be denied the protection of the ADA. It stated that individuals who, **with the use** of compensatory strategies, medication and/or accommodations are able to perform specified major life activities, such as participate successfully in post-secondary educational studies as well as most other people, are not entitled to being deemed disabled under the ADA. There is no question, that these decisions are controversial and are linked, at least in part, to the questionable interpretation of the term “reasonable accommodations”.

The Australian **Disability Discrimination Act** appears to follow many of the components of the **Americans with Disabilities Act**. Should you anticipate a similar backlash against accommodating students with disabilities in their studies in Australia’s tertiary educational system? Let me share with you the Canadian experience.

In Canada, we have followed a substantially different path. Here the **Charter of Rights and Freedoms**, an integral part of Canada’s Constitution, guarantees certain equality rights to **all** persons. Key among these rights is the guarantee of freedom from discrimination on a number of specified grounds including disability (handicap). There is no disability-specific legislation, separate from the total human rights picture. While this has some negative connotations, especially given our geographical proximity to the USA and the high profile of the ADA, we also know that it would be very hard for any government to eliminate the Charter in its entirety, given that it affects all Canadians.

Section 15(1) of the Charter states that:

Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national and ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15(2) goes on to state:

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Sexual orientation has recently been added to the above list of prohibited grounds.

For many years the disability discrimination component of the **Charter** was used from time to time by students with disabilities to enter post-secondary education, provided they clearly fulfilled the entry requirements and were able to participate in most or all

parts of the programme. They were able to request and were granted certain supports on a case by case basis. As a result, some very bright and assertive students qualified in certain professions. They also established some excellent precedents, thereby paving the way for those who came later. Given the significant autonomy of universities and colleges in setting policy, there was not much more expected in terms of programming for students with disabilities.

However, since education in Canada is a Provincial initiative, most of the Provinces have embarked on major efforts to support and accommodate students with disabilities in their education system. For example, a number of changes occurred in the early 1980s in the Province of Ontario.

In 1980, legislation was introduced to mandate the provision of appropriate special education programs and services for all students with special needs. As a result, Ontario has a diverse and far reaching system of special education services. In 1981/82, the **Ontario Human Rights Code** was enacted, based on the Charter, but going significantly further in its expectations.

The **Ontario Human Rights Code**, 1981, prohibits discrimination on the grounds of a handicap. What that means is that services, (a term which includes education) goods and facilities, cannot be denied to someone because they have a disability. In the **Interpretation and Application** section of the **Code**, handicap is defined as:

“for the reason that the person has or has had or is believed to have or have had,

- (1) *any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, muteness or speech impediment or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,*
- (2) *a condition of mental retardation or impairment,*
- (3) *a learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, or*
- (4) *a mental disorder”.*

Colleges and universities are expected to consider the **Code** as applying to them in terms of admitting and programming for students with disabilities. The intended effect is to balance the rights of persons with disabilities with the rights of universities and colleges to manage their operations effectively and to maintain their standards of education. In the mid-1980s this expectation was formalized through the establishment of a specialized funding envelope for the creation and administration of a special needs office in each institution. It is also expected that each institution has a written special

needs policy governing access to and programming within the institution for students with special needs. The institution, its faculty and its student body are expected to abide and function in accordance with this policy.

The focus of such policies tends to be the way in which the institution can meet the individual and differentiated needs of students with disabilities so that they can achieve within the programmes of the institution in the same way and as well as their non-disabled peers.

What does this mean in practice?

In addition to the above caveats related to discrimination or exclusion, the **Human Rights Code** mandates the establishment and implementation of special programs or services, designed to relieve hardship or economic disadvantage, especially where such programs or services are likely to contribute to the elimination of actual or potential discriminatory practices.

The establishment of special programmes has been a controversial issue within the post-secondary sector, even if it has been clearly shown that the students can only be successful in such programmes. For example, programming delivered through ASL to deaf students can be highly beneficial to such students and can enable them to graduate from college or university. Many institutions limit the availability of such special programmes or the availability of remedial or academic upgrading programming. However, this approach is no longer maintained as rigidly as has been the case in the past.

In fact, in 1997, the Ontario Government established an arms length body to develop and evaluate a series of special programs for students with learning disabilities. This has led to a significantly different provincial climate as far as specialized programs were concerned within the post-secondary educational sector.

In 1989, the **Ontario Human Rights Code** was further amended by the introduction of a set of **Guidelines for Assessing the Accommodation Requirements for Persons with Disabilities**.

The thrust of these **Guidelines** is the **duty** to provide accommodations such, that persons with disabilities are enabled to carry out the essential duties of a job and that they have choices about pursuing their individual goals and purposes in life, including the situations in which they work, study, live, travel, eat, shop, play and are entertained.

The standards established for accommodation are as follows:

1. The needs of persons with disabilities must be accommodated in a way that most respects their dignity, if to do so does not create "*undue hardship*".
2. The phrase "*respects their dignity*" means to act in a way that recognizes the

privacy, confidentiality, comfort, autonomy and self-esteem of persons with disabilities, which maximizes their integration and which promotes their full participation in society.

Inevitably, the question arises as to what is undue hardship.

Undue hardship is defined in the **Code** and the **Guidelines** in terms of costs and/or health and safety risks for the individual, organization or institution which is being asked to provide the accommodation.

“Costs will amount to undue hardship if they are:

1. *Quantifiable;*
2. *Shown to be related to the accommodation of the individual;*
3. *(A) so substantial that they would alter the essential nature of the enterprise, or (B) so substantial that they would substantially affect the viability of the enterprise.”*

Certain physical changes may prove to be so expensive as to amount to undue hardship. However, most concerns that are heard in this regard do not relate to physical changes to plant or buildings. For educational and training programs and institutions the concern is more often whether the accommodation calls for or allows an interference with the integrity of the program or the institution. In other words, are they being asked to lower the standards?

It is important to note that the onus for establishing the potential or actual undue hardship claim is on the institution. The individual who is seeking the accommodation is not required to prove that his or her request does not represent undue hardship.

The special needs policies of all post-secondary institutions in Ontario have been expanded to cover the issue of accommodation. Most institutions will offer the following:

- X the adaptation of the institution’s stated requirements, so that the individual with the disability can be successful at meeting the requirements, such as modified programming, reduced workload requirements or different admission policies or procedures;
- X the availability of accommodations so that the student with disabilities can meet the essential requirements, by doing things differently or through some alternative methods.

The types of accommodation for enabling persons with disabilities to be successful in a university, college or training program setting may include:

- X Physical alterations of the facility to ensure that the student can actually enter and participate in the class, lab or presentation;

- X Access to assistive devices, such as computers, calculators, tape recorders, etc.
- X Access to extra time to carry out time related tasks such as the writing of examinations, etc.
- X Access to an alternative formats for assignments and examinations, such as oral testing, question clarification, elimination of multiple choice formats, etc. based on the individual student's strengths and needs.
- X Access to support systems such as a scribe, a reader, a note taker, the ability to hand in assignments for a preview, an alternative or reduced reading list, sign language interpreter, etc.
- X Access to tutoring, remedial programming, if needed, special courses, diagnostic assessments, counselling, advocacy support and a reduced course load.

As stated earlier, the concern that these accommodations will lead to lowered standards or some other compromising situation for the institution or the individual who allows or provides it is still heard occasionally. This is a false concern, since none of the above examples or other potential accommodation practices should or in fact do alter the academic standards or requirements. In other words, fewer credits, lowered pass marks or the elimination of essential program components are not a form of accommodation, nor should people with disabilities need or ask for them.

The most important ongoing requirement is the establishment and maintenance of mutual respect between the learner with the disability and the educational or training institution and its staff. Learners should be enabled to maintain their personal dignity and should not be exposed to ridicule, harassment or other inappropriate treatment because they need to have certain accommodations to be successful in reaching their goals. They should not be obligated to keep offering proof that they still have disabilities or that they still need to be accommodated, although clearly the onus of disclosure and self-advocacy is on them.

Frequently, the accommodation is readily provided when the faculty members can see the disability that the student has.

However, other disabling conditions such as psychiatric disabilities or learning disabilities are much less readily accepted and/or accommodated. The old myths relating to the intellectual capabilities of such students still often get in the way. At the same time, there is a reluctance on the part of institutions to order professors or lecturers to offer the requisite accommodations, even though there is no question that the accommodations are needed by the student and do not represent an undue hardship for the institution or the faculty member in question.

Institutions sometimes deny access to certain programmes to students with disabilities or deny requested accommodations on the grounds that the individual is unlikely to be

able to find employment in the field, given their disabilities, or are unlikely to be able to meet any future professional licensing requirements. These are not valid grounds for the refusal of accommodations.

When it comes to the issue of professional licensing examinations administered by the various bodies, such as the College of Nurses, etc., each body has its own process. However, that process cannot exempt them from abiding by the legislation of the Province in which they are located. Therefore, in Ontario, for example, the **Human Rights Code** clearly applies.

Sometimes, the undue hardship issue that arises relates to public safety. For example, should a nurse be licensed who cannot accurately dispense medication due to her tendency to reverse digits in a number? Should a firefighter be approved to work on a pumper when he or she cannot reliably assemble a hose and its couplings?

It is not easy to offer an absolute and all-encompassing answer, since each case has to be considered and judged on its own merits. The efforts of the training institution and the individual should go toward enhancing the training, offering extra time, alternative formats for training materials, etc. However, if the candidate cannot, with reasonable and significant accommodation, fulfill the essential job duties, then they should be helped to work in a different capacity, but preferably still using their skills.

It is important that all students, faculty members as well as the administration of the university or college recognize and accept their legal obligations arising from the **Human Rights Code** to accommodate students with disabilities. In this regard, accommodations are identified as the strategies necessary to equalize the opportunity of a person with a disability in meeting the essential requirements of applying for and achieving the learning outcomes of a course or program. Accommodations extend significantly beyond the standard level of service provided to the general population, but do not result in lowered standards or reduced achievements.

In the last few years, similarly to the USA, there have been numerous court challenges in Canada that relate directly or sometimes indirectly to the accommodation needs of persons who function differently. However, rather than weakening the impact of the available legislation, these court rulings have actually strengthened the situation of those who are looking for specific accommodations.

In *Eldridge v. British Columbia Attorney General*, 1997, the Supreme Court of Canada ruled that governments and government funded agencies as well as institutions delivering publicly funded services must take special measures to ensure that disadvantaged groups are able to benefit equally from these services. It clarified that failure to take positive steps is a form of discrimination and is therefore unacceptable. The failure to provide sign language interpretation where it is necessary for effective communication is a violation of the rights of a deaf person. The key issue is to provide equal access to services that are available to all.

In *Terry Grismer v. British Columbia Council of Human Rights, 1999*, the Supreme Court of Canada ruled that denying someone a drivers' licence on the grounds of having a particular medical condition, in spite of passing all the requisite driving tests is an unacceptable form of discrimination. Further, all those who are governed by human rights legislation must accommodate the characteristics of affected groups within their standards, rather than absolute standards that are not linked to the specific circumstances or the essential requirements of a situation or a job.

There are legal precedents in Canada for the provision of accommodations to enable students with disabilities to succeed in their post-secondary education. Denying such much needed accommodations to students with disabilities is the most unacceptable form of discrimination within our colleges and universities.

In conclusion, although we have come a long way in Canada in supporting and accommodating persons with disabilities within the post-secondary educational sector. However, we still have a long way to go, until the provision of accommodations for all those who need them becomes a an automatic process. Fortunately, we are on our way!