

Guideline on Accommodating Students with Disabilities in Post-Secondary Institutions

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HUMAN RIGHTS COMMISSION

COMMISSION DES DROITS
DE LA PERSONNE DU NOUVEAU-BRUNSWICK

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Overview

Because post-secondary institutions are considered a service for the public under Section 6 of the *Human Rights Act*, they have a legal obligation to accommodate students with a disability short of undue hardship.

The duty to accommodate is not mentioned in legislation, but comes from case law (the decisions rendered by courts and tribunals) interpreting the meaning of discrimination in section 15 of the *Canadian Charter of Rights and Freedoms* and in the various human rights (anti-discrimination) laws that apply in Canada.

Discrimination is differential treatment of, or a failure to accommodate, an individual on the basis of the individual's actual or presumed membership in, or association with, a class or group of persons as set out in the *Act*, rather than on the basis of personal merit.

Discrimination doesn't have to be intentional; not providing an equalized opportunity through accommodation can be discrimination. Further, discrimination doesn't have to involve differences in treatment. In fact, treating everyone the same when they aren't the same can result in discrimination.

Wording of the Human Rights Act

The section of the *Act* that pertains to education is Section 6, which reads as follows:

- 6(1) No person, directly or indirectly, alone or with another, by himself, herself or itself or by the interposition of another, shall, based on a prohibited ground of discrimination,
- (a) deny to any person or class of persons any accommodation, services or facilities available to the public, or
 - (b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public.

Physical disability” and “mental disability” are defined in Section 2:

“physical disability” means any degree of disability, infirmity, malformation or disfigurement of a physical nature resulting from bodily injury, illness or birth defect and includes, but is not limited to, a disability resulting from any degree of paralysis or from diabetes mellitus, epilepsy, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair, cane, crutch or other remedial device or appliance.

“mental disability” means

- (a) an intellectual or developmental disability,
- (b) a learning disability, or dysfunction in one or more of the mental processes involved in the comprehension or use of symbols or spoken language, or
- (c) a mental disorder.

Many conditions can be considered a disability. A condition found to be a disability in one case may not be a disability in other cases because of differences in the severity of the condition, in how it is perceived, in what the person is attempting to do and in what kind of situation. The focus is on how the person is treated and the impact of how the person is treated, rather than the actual limitations that person may have.

Basic Principles of Accommodation

The Human Rights Commission considers that accommodation involves three principles: dignity, personalization and inclusion.

Students with a disability have the right to receive educational services in a manner that is respectful of their dignity. Human dignity is individual self-respect and self-worth. When individuals are treated with dignity, they are less likely to see their limitations as

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barriers to achievement. When individuals are marginalized, stigmatized, ignored or devalued, they experience discrimination.

Education providers must provide accommodation solutions in a way that respects the dignity of students with a disability. Respect for dignity also includes how an accommodation is provided and the student's own participation in the process.

Accommodation must be personalized. Each student's needs are unique and must be looked at when an accommodation request is made. At all times, the emphasis must be on the individual student and not on the category of disability. Blanket approaches to accommodation that rely only on categories, labels and generalizations are not acceptable. Different effects of a disability may call for different approaches.

Reasonable Accommodation

Accommodation of students with disabilities in post-secondary education is a cooperative process. Medical practitioners, educators, psychologists, service providers and students must work together to determine the right accommodation. The appropriate accommodation should be based on the opinion of experts in collaboration with the student and the educational institution, rather than on just the wishes of the student or the convenience or preference of the program or instructor.

Accommodation of students with a disability involves making adjustments to their educational environment, or providing alternative arrangements, to eliminate any discriminatory effect on the student because of his or her disability.

The goal of accommodating students with a disability is to ensure their full participation as much as possible, in a timely manner and to the same extent as students without disabilities, not only in the classroom, but in all aspects of the educational experience, and to ensure that they have the opportunity to meet their individual potential.

Human Rights Boards of Inquiry and the courts have constantly stated that reasonableness is a consideration in accommodation cases. **Persons seeking accommodation are entitled to reasonable accommodation short of causing undue hardship to the provider; they are not necessarily entitled to the perfect solution or what they want as accommodation.**

Undue Hardship

While education providers should try to accommodate students with disabilities in their regular environment, there are times when this is not possible. In those instances it may be reasonable to move students with disabilities to an alternate setting.

Example: A student with a physical disability uses voice dictation software as she is unable to type on a computer. An in-class test is scheduled to be written on a computer. It is determined that it would be a distraction for the other students if the student using voice dictation software were to write the test in the same classroom. A computer is set up in another room for the student to write her test.

It may be challenging for an education provider to accommodate a particular student, but this does not necessarily mean that the accommodation would result in undue hardship. The conclusion that there would be undue hardship must be based on an objective assessment of the facts and evidence, not on guesswork. The assessment may require examining the costs of the accommodation, the essential requirements of the program, statistical data, the opinions of experts, or other relevant factors. What is considered undue hardship may vary between education providers and is affected by the size of the institution. A larger education provider may be in a better position to absorb the costs associated with the accommodation than a smaller provider.

Education providers cannot use limited resources or budgetary restrictions as a defence to the duty to accommodate without first meeting the formal test for undue hardship based on costs. Further, education providers are not to decide which accommodations are most appropriate for students based on financial considerations or budgetary constraints. **Whether an accommodation is “appropriate” is different and separate from whether the accommodation would result in “undue hardship.”** If the accommodation meets the student’s needs and does so in a way that respects their dignity, then a determination can be made as to whether or not this “most appropriate” accommodation would result in undue hardship.

It is also important to note that inconvenience, workload, collective agreement items and preferences are not considered undue hardship.

As part of the duty to accommodate, education providers have a duty to initiate discussions about potential accommodation if they believe a student may have a disability that requires it, even if the student has not previously raised the issue. However, providers may not impose an accommodation if a student refuses it.

Example: A student with a physical disability applies to a trade school, but does not indicate on the application that she has a disability, nor does she state that she requires accommodation. The student struggles in her courses and instructors notice that she has a physical issue that may be affecting the quality of her work. As the student has never mentioned that she has a disability or that she needs accommodation, the instructors never ask the student about it. The student is dropped from the program for poor performance, and the school is found to have failed in its duty to accommodate as it knew of the disability, but did nothing.

If an educational institution perceives that a student has a disability, it may be engaging in discrimination if it treats the student differently on the basis on that perception.

Example: Instructors at a college notice that one of their students is struggling with his courses and suspect he may have depression. The student, however, has not mentioned anything about it to the instructors or the college. An instructor approaches the student after class to discuss the issue privately, but the student says he is fine and does not require accommodation. However, the college refuses to place the student in a practicum setting because they worry he may be unstable. The college is later found to have discriminated against the student on the basis of perceived disability by treating him differently.

Safety Considerations

Maintaining a safe learning environment for students, staff and educators alike is important. If there is a possibility that the required accommodation could put the safety of other students and staff at risk, the education provider may be able to claim that the accommodation would pose an undue hardship, depending on the nature and degree of risk involved. In evaluating the seriousness or significance of risk, the following factors may be considered:

- The nature of the risk: What could happen that would be harmful?
- The severity of the risk: How serious would the harm be if it occurred?
- The probability of the risk: How likely is it that the potential harm will actually occur? Is it a real risk, or merely hypothetical or speculative? Could it occur frequently?
- The scope of the risk: Who will be affected by the event if it occurs?

If the potential harm is minor and not very likely to occur, the risk should not be considered serious. If there is a risk to public safety, consideration will be given to the increased numbers of people potentially affected and the likelihood that the harmful event may occur.

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When a specific health or safety requirement is a barrier to students with disabilities, an education provider should look at whether it could modify or waive the requirement without creating significant risks that would outweigh the student's right to accommodation. After the education provider has made all attempts to reduce the risk, it can evaluate whether modifying or waiving a health or safety requirement creates a significant risk by considering the following:

- Is the student willing to assume the risk where the risk is solely to his or her own health or safety?
- Would changing or waiving the requirement be reasonably likely to result in a serious risk to the health or safety of other students, educators or other staff?
- What other types of risks are assumed within the institution or sector, and what types of risks are tolerated within society as a whole?

Example: A private trade school terminates the enrollment of a student after learning she has a communicable disease, despite the risk of her transmitting the disease being quite low. The school has a requirement that its students be free of communicable diseases for safety purposes. The school is found to have discriminated against the student as it did not explore whether the requirement was necessary to maintain a safe environment, or whether other measures (such as wearing gloves and ensuring that equipment was properly sterilized) would be effective.

For Students

The accommodation of students with a disability is an ongoing process that starts from the moment the need for accommodation is identified, and ends when the student either leaves the post-secondary institution or no longer requires accommodation.

Students have a number of responsibilities to ensure that their needs will be met.

Students have an obligation to inform their post-secondary institution of the need for accommodation. As students are entitled to privacy, there is no requirement to disclose the specific disability to the education provider. The provider may require students to provide a letter from a medical professional outlining the student's functional impairments or capabilities and the type of accommodation required, but it is unnecessary for the letter to include a diagnosis of the disability.

It is important for students to raise the issue of accommodation early in order to give the education provider sufficient time to make the appropriate arrangements. If it is not possible for the provider to provide the agreed upon accommodation right away, it may make alternate arrangements to accommodate the student on a temporary basis.

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In order to find the appropriate accommodation, students need to work with their education provider, as well as any medical and/or psychological professionals that may be involved.

An education provider may wish to develop an individual accommodation plan with each student with a disability. The accommodation plan will identify the specific needs of the student regarding the delivery of the educational content to the student and the execution of the assessments of the academic content (if necessary). It may also include specific goals for the student and methods to periodically evaluate how the plan is working.

After informing the education provider of the need for accommodation, students may still need to handle aspects of the arrangements (such as an application for grant funding) or follow-up with certain people to ensure that the accommodation is put into place. As a result, it is important for students to become informed about the provider's accommodation policies, as well as the programs and services it may have available to students with disabilities.

Example: A student with a physical disability is planning to start university in the fall. She requires accommodation of her disability in the classroom. In order to ensure that her needs are met, she contacts the university in the spring to discuss the arrangements that need to be made before she can begin classes. She takes a proactive approach, asking questions on what the university has available and what she needs to do to access the appropriate services and getting information on anything that is unclear.

If a student has received accommodation for a disability, the student must alert the education provider if the accommodation is not working effectively. Accommodation is an ongoing process that requires periodic review, and it is important for the student and staff members at the post-secondary institution to maintain open lines of communication.

It is important to note that reasonable accommodation is not necessarily the same thing as perfect accommodation. If the education provider is offering the student a reasonable accommodation of the disability, the student cannot refuse the accommodation simply because it is less than the ideal accommodation. If the ideal accommodation would result in undue hardship for the education provider, the provider is permitted to consider "next-best" options.

For Education Providers

When a need for accommodation has been identified, the education provider has a duty to gather the relevant information and explore how the student may be accommodated short of undue hardship. Reasonable accommodation may require something as simple

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as giving the student preferential seating in a classroom, or more widespread changes in the structure such as offering a part-time option or extending time limits.

What is considered reasonable accommodation short of undue hardship depends on the circumstances. Accommodation is an individualized process as no two students have exactly the same needs, even if they have the same disability. Education providers should avoid making generalizations and instead focus on finding the best ways to accommodate a particular student.

The education provider will need to work with the student and any medical and/or psychological professionals involved to develop an appropriate accommodation plan. The accommodation plan will outline the student's particular needs and any required changes to the delivery of the academic content (e.g. handouts, practicum requirements) to the student. It may also include goals, timelines or benchmarks to gauge the success of the plan, and when the plan is to be reevaluated. The duty to accommodate extends to practicum assignments or other off-site training, and this must be kept in mind when developing the accommodation plan.

Accommodation requests must be dealt with promptly. While delays do sometimes occur, an education provider should have procedures in place to minimize them and ensure that the accommodation process is a smooth one. Providing an alternate form of accommodation may be an acceptable short-term solution if there are delays in providing the agreed upon accommodation. An unreasonable delay in providing the required accommodation may be found to be discriminatory.

Academic Standards

Accommodation does not mean that education providers are required to lower their academic standards. On the contrary, students with disabilities are expected to develop the same essential skills as their classmates. The manner in which those skills are developed may differ, however. If a certain course requirement poses a particular difficulty for students with disabilities, the education provider should examine that requirement and determine whether it is truly necessary to meet the educational objectives of the program, and whether it would be possible to waive or modify the requirement without affecting those objectives.

Ultimately, an education provider should develop curricula with an eye toward inclusion. This may include putting course materials online, ensuring that they are available in alternate formats from the outset or implementing universal design principles. By designing its programs in ways that permit students with disabilities to fully participate, an education provider can not only promote an inclusive educational environment, but may also make the accommodation process a smoother one for both the provider and the students. The education provider should also provide guidance to its instructors and support staff on working with students with disabilities and providing an environment that is welcoming, inclusive and free of discrimination.

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An education provider's policies should be designed to provide sufficient flexibility to accommodate students with disabilities. Existing policies may also need to be adjusted if they create barriers for such students.

Example: A student with a physical disability has regular appointments with his doctor that sometimes conflict with his class schedule. The school's policy states that students may face academic penalties if more than a certain number of classes are missed. Recognizing that some students with disabilities may be adversely affected by the attendance requirements, the school modifies the policy to permit exceptions on a case-by-case basis.

If an education provider has services available for students with disabilities (e.g. an accessibility centre for writing exams), it should provide students with the details on what is provided and how the services may be accessed. If students are required to make some of the arrangements for the services, this should be clearly communicated to ensure that students are able to gain the benefit of these services.

Example: A part-time student with a learning disability wishes to write an exam at the school's accessibility centre. The exam is scheduled for the evening, but the centre is not normally open during the evenings. While it is not unreasonable for the school to attempt to schedule an alternate time for the student to write the exam, the school fails to disclose that the accessibility centre's hours are sometimes extended into the evenings when necessary. This results in the student having to take time off work to write the exam and this could be discriminatory.

Education providers need to respect the privacy of students and ensure that information related to the disabilities of students is kept confidential. If students receive accommodation, that information should not appear on test results, transcripts, student records or graduation documents.

Example: A university student with a learning disability requires extra time on exams. The student only discloses his learning disability when it is absolutely necessary as he does not wish to face discrimination or be stigmatized because of it. The university only discloses the fact that the student has a disability to those who need to be made aware in order to get their cooperation for the accommodation process, and takes steps to ensure that the precise nature of the disability is not disclosed without the student's consent.

For Instructors

Instructors have a significant role to play in the accommodation of students with disabilities as they are the ones who primarily design and deliver the educational services for post-secondary institutions.

Instructors have a duty to maintain a positive educational environment for all persons they serve. Attitudes of instructors towards disability issues play a major role in influencing how other students treat and relate to students with a disability.

An instructor may be required to provide course materials in alternative formats. Maintaining handouts, assignments and tests in an electronic format for all students will make it easier to convert these materials into more accessible formats when necessary.

Example: A student with a visual impairment has difficulty reading PowerPoint slides when they are projected onto a screen at the front of a classroom. Instructors that use slides during lectures provide him with a copy of the slide deck with enlarged print before each class so that he may view them on his laptop computer.

Instructors are not required to lower their academic standards in order to accommodate students with disabilities. Students with disabilities are expected to learn the same material and demonstrate the same level of skill as other students. However, instructors should be mindful of the fact that the structure of a course may create barriers for students with disabilities. If an instructor becomes aware that a particular component of a course is problematic for students with disabilities, the instructor should examine whether it is truly necessary to include that component, or see if the educational aims could be achieved through alternate means.

Example: A school requires that all students in a course pass an in-class essay test worth 100% of the student's final grade. Unless it can be shown that the 100% essay mode of evaluation is an essential requirement of the course, this may be found to discriminate against students with learning disabilities and other types of disabilities that make it difficult to process and/or produce large amounts of written material under strict time constraints.

Similarly, instructors should create an inclusive classroom environment. If in-class participation is expected, instructors should ensure that students with disabilities are given the same opportunities to participate as other students.

Most educational institutions have services or programs designed to assist instructors in fostering an accessible learning environment for their students.

For More Information

For further information about the *Act* or this guideline, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at <http://www.gnb.ca/hrc-cdp> or email us at hrc.cdp@gnb.ca

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