

**Good news at last! The Ontario Human Rights Commission (OHRC)
released its Guidelines on Accessible Education November 30/04
~ An analysis from The Ontario Coalition for Inclusive Education ~**

This is an important document (applying to all educational levels and providers, including post secondary, and private schools) and should promote changes in education policy across Ontario and at each school board. We will try to think together about the ways this has an impact upon the role of SEACs in each Board, and the ways this helps SEAC reps and others in our advocacy for effective inclusive education.

The Ontario Human Rights Code supercedes all other legislation in the province. So the Education Act and Regulations 181, 464, 298 (concerning "special education") must conform to the Code, and are less important than it is. These Guidelines assist the Coalition's work by making clear the obligations of schools boards and the Ministry of Education, to improve educational opportunities for students with disabilities. The *Guidelines* can be reviewed at www.ohrc.on.ca

This is not just about better "special" education. The *Guidelines* promote inclusion - by defining it in the very broadest sense, and supporting our work to promote effective education policies and practices that benefit all students. This should encourage all educational planning and delivery to be done in a way that excludes and disadvantages no one because of disability.

On page 11, OHRC offers a wonderful quote from the United Nations Educational, Scientific and Cultural Organization - "***Inclusion is about the improving of schooling. Rather than being a marginal theme concerned (with) how a relatively small group of pupils might be attached to mainstream schools, it lays the foundations for an approach that could lead to the transformation of the system itself.***" (UNESCO. Salamanca, p.9, 1999)

Before considering special services, "*education providers must first make efforts to build or adapt educational services to accommodate students with disabilities in a way that promotes their inclusion and full participation*".

This involves both **preventing and removing barriers** - described here as a **3 step process** (pp. 12-14)
- all of which relates to and involves SEACs:

1. Promoting inclusive (or universal) design - of curriculum, teaching methods, evaluation; in constructing buildings, designing courses, etc. Schools must respect the differences among students and must not create barriers.
2. Removing physical, attitudinal, systemic and other barriers that already exist - schools have a duty to accommodate students with disabilities by removing barriers - up to the point of undue hardship
3. Accommodating remaining needs - where barriers still exist, temporary and alternative solutions must be found, if to do so would not result in undue hardship

The Ontario Human Rights Code sets out a high standard which school boards would have to meet in order to prove **undue hardship** and thus ever rightfully deny a student accommodation (pp. 34-40).

The Code looks at 3 things - cost, outside sources of funding, and health and safety requirements
- in assessing whether a cost presents too great a hardship.

School Boards bear the **burden of proof**. It is not up to the student/parent to prove that the accommodation required is affordable. An accommodation cannot be denied unless the school board proves it cannot afford it - with "*objective, real, direct and quantifiable*" evidence. Boards cannot just claim they do not have enough special education money. No single school or department should bear the cost alone. They would have to consider their global budget, other funding sources, phasing in costs over time, and to alert the provincial government funding source. (Since our provincial government now sets all school funding levels, they should also be named in Human Rights complaints against school boards, since they have the power to provide any additional funding an accommodation requires.)

Sometimes we hear that accommodations and learning opportunities are denied to students because the school determines there is a **health and safety risk**. The *Guidelines* set out how all the factors concerning risk must be evaluated - ways to assess its nature, severity, probability and scope. Even "*when a student with a disability engages in behaviour that impacts upon the well-being of others*",

schools are obliged to provide accommodations first and to try to reduce risks, before they can argue that the accommodation "would pose a risk to public safety" (pp.37-40). There must be no rushed decisions about risk, which could further harm the student with a disability. (In response to questions November 30th, OHRC staff said union collective agreements are said to be less important than students' human rights.)

Accommodation must respond to the unique circumstances of students – and involves 3 principles: dignity, individualization and inclusion.

"The most appropriate accommodation is one that most respects the dignity of the student with a disability, meets individual needs, best promotes inclusion and full participation, and maximizes confidentiality.

An accommodation will be considered appropriate if it will result in equal opportunity ..." (p. 25)

- **DIGNITY:** Accommodations are deemed appropriate only if they avoid the harm "*when individuals are marginalized, stigmatized, ignored or devalued*". This means educators must "*sensitize students about disability issues and model **respectful attitudes and behaviour** towards students with disabilities*" (p. 9). The *Guidelines* state that disability-related information about students should be provided where it is relevant, but must be safeguarded in specified ways, to **avoid social stigma and stereotyping**. (p. 22-25)
- **THE HARM OF "LABELS":** Page 9 states; "*There is no set formula for accommodations. Each student's needs are unique and must be considered afresh 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 solely rely on categories, labels and generalizations are not acceptable***". (Perhaps this is why we hear very little these days about the Ministry of Education's draft Program Standards for each exceptionality. Clearly, school board special education plans should not specify different ways to plan for students according to their disability labels, as we sometimes see. We wonder then why Regulation 181 requires that exceptionality labels be used.)
- **INCLUSION** is the broadly defined goal for all students with disabilities.

The *Guidelines* restate and reinforce the Ontario Ministry of Education's policy position of June 9, 1994 - "***Before considering placing a student in a self-contained or specialized classroom, education providers must first consider inclusion in the regular classroom. In most cases, appropriate accommodation will be in the regular classroom with supports***" (p. 26)

Appropriate accommodation and placement must be considered on an individual basis.

Reference is made to the Supreme Court decision concerning Emily Eaton, which said **integration generally provides advantages, but "can be either a benefit or a burden depending on whether the individual can profit" from these known advantages.**

The *Guidelines* also state that "*a full range of placements, programs and services*" should be considered, when accommodations are planned for each individual student.

(However, the Eaton decision also means that considerable additional supports must be in place before a school board could ever prove that a student is not profiting in the regular classroom - for more information, please see

www.inclusive-education.ca/resources/documents/eaton_decision.php. And remember that Emily's family moved her into the Brant County Catholic Board where she was educated to everyone's satisfaction in a regular classroom, in spite of fact that the Brant County Public Board said this was impossible)

The *Guidelines* also state that "***the search for accommodation is a multi-party inquiry***", involving students, parents, educators, administrators, and other experts - all considering "*the best interests of the student in determining the most appropriate placement accommodation*". (It was alarming that the Supreme Court decision about Emily Eaton favoured the opinion of educators about what was best for her, and downplayed her parents' knowledge of her communication and responses.)

The *Guidelines* state that even where students are in segregated placements, schools must make "*reasonable efforts to include the student in school programs and activities with students without disabilities, wherever possible*" (p. 27). (How is this being done in the totally segregated schools - for students who have the label of developmental disability - still operated in 6 of Ontario's 72 school boards?)

"Geographical proximity of a placement to the student's home" is one of the factors schools must consider in decisions about accommodation, since "ideally, the student should be able to attend his or her **neighbourhood school**" (p. 26)

(Now is the time when SEACs should obtain and analyze their school boards' October Reports, which provide data to the Ministry of Education about numbers of students in various types of special education placements, according to exceptionality label)

In responding to questions on November 30th, when the *Guidelines* were released, OHRC personnel stated that **Accommodation Plans correspond to IEPs.**

The Ontario Coalition for Inclusive Education has written to OHRC Chief Commissioner Keith Norton, and sent him our Analysis of the Ministry of Education's new *IEP Resource Guide*, which was re-written since the OHRC consultation report was released last year, but before the Minister announced plans to improve outcomes in special education this summer. We have offered to help ensure that IEP processes across Ontario do not contravene the Human Rights Code, because this is now a very great problem, in several very important areas.

- It may confuse us that the Ministry of Education - in all of its work concerning IEPs - differentiates between "accommodations" and "modifications", which involve reductions in curriculum expectations and credits. **For OHRC purposes, accommodations include what the Ministry of Education calls modifications.**
- OHRC says that "**educational requirements**" can be set, which a student with a disability may not be capable of meeting. These may be more broadly defined in elementary (what OHRC mis-names "*primary*") and secondary schools, and more focused at the post-secondary level. And some requirements should be considered non-essential.
- But the OHRC also challenges schools to design **curriculum that is "universally accessible"**. Currently in Ontario, the provincial curriculum is designed for typical students, while those deemed not able to reach its objectives receive modifications but forfeit credits.
- However, educational "*requirements should not lightly be considered to be essential, but should be carefully scrutinized*" (p. 29) Assumptions and pre-judgement should not be made, and objective proof must be based on a fair trial.
- "*The onus is on the education provider to show that a student is incapable of performing the essential requirements of the educational service, even with accommodation*".
- The Coalition is concerned that the 2004 IEP Resource Guide could actually promote widespread discrimination by lowering learning expectations. The Guide is not clear enough about schools' obligations to provide accommodations before curriculum is modified. The Coalition has written to the Minister of Education and the Chief Commissioner of the Ontario Human Rights Commission, questioning the prejudgements expected of Principals concerning high school graduation, credits and EQAO exemptions, in the Ontario's 2004 IEP Resource Guide.
- Depending on students' individual circumstances, plans for accommodations may include "*a statement of the specific services and supports required by the student, the ordering of any necessary products and services... (and) a mechanism for review and re-assessment, where necessary, to determining whether the student's accommodation needs are being met*" (p. 31). **Schools must NOT "decide which accommodations are most appropriate for a student, based on financial considerations of budgetary constraints"** (p. 36). (The Coalition is alarmed that Ministry of Education staff say they advise schools to record in IEPs only those supports which they are prepared to provide that year, not those the student actually requires. And **the Ministry's IEP Standards seem to contravene the Ontario Human Rights Code** because they state that "*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.*")
- The Coalition thinks it will be important for SEACs to encourage school boards to **revise the way they generate IEPs through computer IEP "engines"** - which we understand were often designed with wording matching Intensive Support Amount (ISA) funding formula criteria and not suited to these OHRC *Guidelines*. Ministry staff have told us that school boards have contracts with the "engine" providers that cannot be terminated - SEAC reps should find out what this means. And now is a good time for SEACs to review their school board's performance concerning the writing of IEPs, most of which were to have been written by October 20, 2004.

The OHRC *Guidelines* look at a variety of ways in which students' rights must be protected - against direct and "adverse effect" discrimination, for both evident and non-evident disabilities, etc.

Schools must create "a welcoming (not "poisoned") environment" by preventing and stopping bullying and harassment (pp. 14-19), **and ensuring that discipline or safe schools policies and practices take into account the student's individual circumstances and accommodation needs** - and don't create additional disadvantages. (Asked about reference on page 19 to health and safety risks possibly requiring removal of some students from mainstream classrooms, OHRC staff said this should never be considered at the outset without other options tried first). Again, the *Guidelines* say schools must attempt accommodation and prove undue hardship, before students with disabilities can be removed from school for behaviour deemed to be unsafe.

The Coalition is aware that the Ministry of Education anticipated in 1997 that certain provisions that became part of its subsequent Safe Schools Act might actually promote discrimination against students with disabilities. The **Ministry's draft Monograph #5** contained "Guidelines for the Implementation of the Ministry of Education and Training's Violence-Free School Policy with respect to Exceptional Pupils and Others with Special Needs" which were never implemented.

OHRC makes suggestions about what should be contained in an Anti-Harassment Policy in educational settings (p. 43).

It will be very important for SEACs to make recommendations concerning changes needed in School Board Special Education Plans related to the *Guidelines*, especially concerning "**Institutional Accessibility Plans**" (p. 30).

There are also important considerations about **Data Collection** (pp. 32-34) "*for the purpose of monitoring, preventing and ameliorating systemic and adverse discrimination*", under certain circumstances and with certain safeguards - where schools believe, or are told this is happening, or intend to remedy it. (For example, Toronto District School Board has been asked to check into the effects of Safe Schools policies on students with disabilities who come from racial minorities. The State of New Jersey recently found that more African American students with disabilities are placed in segregated special education settings.)

There is much more that could be said about the Ontario Human Rights Commission *Guidelines on Accessible Education*. We will be thinking about ways we can promote changes in schools, school boards and the Ministry that will ensure students' rights are protected. School boards have already attended legal education seminars to consider whether action is required. Ministry staff are now preparing recommendations for the Minister about how this might affect provincial policies.

However, we are concerned that these are (just) *Guidelines* and that the legal meaning of the Ontario Human Rights Code cannot be adequately determined unless there is precedent-setting legal action. Much depends on the outcome of legal action in the future. It is an unfortunate reality that the Ontario Human Rights Commission apparently has not accepted any education-related complaints for consideration of the **Human Rights Tribunal** in about 10 years (other than the many that have come forward about access to autism treatment). The *Guidelines* were produced by the OHRC's Policy and Education Branch. We were concerned that no one from the OHRC **Investigations Branch** was present when the *Guidelines* were released November 30th. And concern has been expressed that the Commission has changed its complaints process and offers fewer resources to assist complainants.

It is unfortunate that there seems to have been next to no media attention paid to the release of these *Guidelines on Accessible Education*. **It is up to all of us to help ensure that the very positive news they contain is communicated and noticed. There are some very encouraging statements in the *Guidelines* - statements that can be quoted to promote changes in school board practices at your SEAC, and statements that can promote better educational opportunities for individual students.**

It is in all of our best interests to use these statements to prevent costly legal action and improve education, proactively – RIGHT AWAY.

The Coalition has offered its help to the Ministry of Education and the Ontario Human Rights Commission.

Please let us know how we can help you.

*For more information, contact the Ontario Coalition for Inclusive Education
www.inclusive-education.ca or email inclusion@sympatico.ca or phone 416-531-8553*