

To: Citizens with Disabilities Ontario

From: Arly Abramson, PBSC Student Volunteer

Date: March 31, 2022

Re: Legal Obligations to Young Ontarians with Disabilities

BACKGROUND:

As many know from lived experience, the law and Ontario's obligation to people with disabilities is complex. Yet, for youth in Ontario, legal obligations from the government to provide access and accommodation, and to ensure their rights are upheld, is made even more complex by the varying age-based definitions that exist within provincial legislation. It is also influenced by the way the government has implemented the programs which youth in Ontario have a right to access, and the government a corresponding duty to execute.

This memo will provide an overview of Ontario's purported legal obligation to youth with disabilities, and to whom it is specifically owed. The analysis will first illuminate the foundation for legal obligation in Ontario, rooted in international law, federal law, and broader Ontario human rights law. It will then shift focus to *who* is considered a youth in Ontario, and what benefits are received or not received based on these distinctions. It will examine the barriers that are both created and removed by Ontario's legal obligation to youth with disabilities in one crucial area: education. Education offers a concrete framework in which to consider broader of legal barriers and access points for youth in Ontario with disabilities. Due to the nature of Ontario's education system, the division between primary and secondary education and post-secondary education provides an opportunity to comprehensively account for the different legal frameworks that support youth under the age of majority, and those still considered youth in

the eyes of the law but having attained the age of majority. It is important to note that education is only one area to which the government owes youth with disabilities in Ontario a legal obligation. Important obligations are owed with respect to other areas including healthcare, financial assistance, and employment.

ISSUE: Does government have a legal obligation to young Ontarians with disabilities?

1. a with disabilities **Who are young Ontarians with disabilities?**
2. **What is the foundation for Ontario's legal obligation to young Ontarians with disabilities?**
3. **What legal obligations does government owe to young Ontarians with respect to education, healthcare, and benefits?**
4. **Do the definitions of age that guide Ontario's legal obligation to youth with disabilities create a barrier for access?**
5. **Do exceptions for young persons with disabilities remove the barrier to access or add more stigma to persons with disabilities?**

Despite a legal obligation, disabled youth and activists make it a reality

Legally, restraints with the law, socially, interests ignored

Exposing the barriers

SHORT ANSWER:

, (the *Code*)Look at:

-relating to persons With respect , six to seventeen. A variety of regulations govern which services the government will offer and to whom. These processes create access barriers. Nonetheless, the *Code* has primacy over any other provincial statute, imposing an obligation on the government to accommodate anyone's disability-related needs up to the point of undue hardship; otherwise, it would amount to discrimination on the grounds of disability in the delivery of a service. At the post-secondary level, accommodation for young people with disabilities is not subject to a robust legislative framework like it is at the primary and secondary level. Nonetheless, it is still governed by the *Charter* and the *Code*.

ANALYSIS:

This memo will address the legal obligations owed to youth in Ontario with respect to education.

1. What is the foundation for Ontario's legal obligation to young Ontarians with disabilities?

Ontario's legal obligation to youth with disabilities has a basis in international, federal, and provincial human rights legislation that protects anyone with disabilities, regardless of age.

a. International Legal Obligations

i. *United Nations Convention on the Rights of the Child*

Disabled youth in Ontario are protected by a general international legal obligation that children enjoy the right to have their needs met and the right to live life free of discrimination. This protection comes from the United Nations Convention on the Rights of the Child (UNCRC) which consists of fifty-four articles setting out children's rights. The articles provide guidance as to how governments should work to ensure these rights.¹ Article 2 states that rights set forth in

¹ *Convention on the Rights of the Child*, 20 November 1989, UNTS (entry into force 2 September 1990, in accordance with article 49(1)).

the Convention should be respected without discrimination.² Pertinent to our focus, Article 23 states that “a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.”³

b. Federal Legal Obligations

i. Charter of Rights and Freedom

There is a basis for the province’s obligations to young people within the federal legislative framework in Canada. Specifically, Canadians with disabilities are protected under the *Canadian Charter of Rights and Freedoms*. Under s.15 of the *Charter*, Canadians are to be considered equal, regardless of disability, and thus the government cannot discriminate on this ground in anything it does.⁴ Additionally, the government can also enact ameliorative programs or laws that improve the situation of those with disabilities under s.15(2) of the *Charter*.⁵

ii. Canadian Human Rights Act

The *Canadian Human Rights Act* protects Canadians from discrimination when they receive federal services or private services like from banks or telecommunications companies that are federally regulated.⁶ The Act prohibits discrimination on the ground of physical or mental disability. Evidently, the federal government has a legal obligation to disabled youth in Canada under these two important pieces of legislation.

iii. Accessible Canada Act

Finally, the *Accessible Canada Act* is federal accessibility legislation that applies to organizations under federal jurisdiction to remove barriers that prevent people with disabilities

² *Ibid* at art 2.

³ *Ibid* at art 23.

⁴ *Canadian Charter of Rights and Freedoms*, s15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.

⁵ *Ibid*.

⁶ *Canadian Human Rights Act*, RSC 1985, c H6.

from doing things like travelling on railways, airplanes or inter-provincial buses, and being employed by the government of Canada or banks.⁷ Additionally, the Act aims to reduce barriers to access of federal programs and federal buildings and using information and communications technologies like television and radio.

c. Provincial Legal Obligations

i. Ontario Human Rights Code

The province has a general legal obligation all Ontarians with disabilities under the *Ontario Human Rights Code* (the *Code*).

1. Equal treatment free from discrimination

The *Code* states that Ontarians have the right to equal treatment free from discrimination on the grounds of disability with respect to five social areas: services, housing, contracts, and employment, and when joining/belonging to a union or professional association.⁸ The definition of disability is broad, encompassing any degree of physical disability, condition of mental impairment or developmental disability, learning disability or dysfunction, mental disorder, injury or disability for which benefits were claimed as a “handicap” under the *Workplace Safety and Insurance Act*, and past and presumed disabilities.⁹

2. Duty to accommodate

Under s.17 of the *Code*, there is a duty to accommodate people with disabilities.¹⁰ However, the *Code* states that it is not discriminatory to refuse a service, housing or a job because the person is incapable of fulfilling the essential duties or requirements.¹¹ Nonetheless, a person will not be found incapable unless their disability-related needs cannot be accommodated

⁷ *Accessible Canada Act*, SC 2019, c 10.

⁸ *Human Rights Code*, RSO 1990, c H19.

⁹ *Ibid.*

¹⁰ *Ibid* at s 17.

¹¹ *Ibid.*

without undue hardship to those accommodating.¹² Further, under s.18 of the *Code*, special interest organizations can limit the right of membership and involvement to people with disabilities on the condition that they serve mostly people from this group.¹³

The duty to accommodate under the *Code* has both a substantive and procedural component. The procedural component is the steps taken to assess whether accommodations can be provided and the methods and approach to develop and implement that accommodation.¹⁴ The substantive component is the accommodation itself, referring to the appropriateness of the accommodation and if it cannot be provided because of undue hardship.¹⁵

ii. *Accessibility for Ontarians with Disabilities Act*

In addition to Ontario's obligations under the *Code*, the *Accessibility for Ontarians with Disabilities Act* creates standards to apply to persons and organizations to reduce barriers to those with disabilities in Ontario.¹⁶ The Act compels municipalities to establish an advisory committee and penalties are invoked where there is non-compliance with the Act. Like the *Code*, the definition of disability is very broad.

2. Who are young Ontarians with disabilities?

Before addressing the specific legal obligations owed to young Ontarians with disabilities, it is crucial to define who young Ontarians with disabilities are. There are a multitude of sources which provides different definitions, restrictions, and ranges.

In Ontario, the age of majority is eighteen; those under eighteen are minors and considered children.¹⁷ The Office of the Children's Lawyer, an independent law office in the Ministry of the

¹² *Ibid.*

¹³ *Ibid* at s 18.

¹⁴ Ontario, Ontario Human Rights Commission, *Policy on ableism and discrimination based on disability* (Toronto: Ontario Human Rights Commission, 2016), at s 8.

¹⁵ *Ibid.*

¹⁶ *Accessibility for Ontarians with Disabilities Act*, SO 2005, c 1.

¹⁷ *Age of Majority and Accountability Act*, RSO 1990, c A7.

Attorney General who delivers justice programs on behalf of children, uses the age of majority as a cut-off for legal representation. Children under the age of eighteen cannot sue or be sued in their own name in civil cases. As such, they represent the interests of Ontarians under the age of eighteen in legal matters and court cases in Ontario.¹⁸

Justice for Children and Youth (JFCY), a Toronto-based organization providing legal representation to children and youth in Toronto and its vicinity, gives additional guidance regarding the prevailing definitions of age in Ontario.¹⁹ JFCY recognizes the challenges that Ontarians over the age of eighteen face as they transition to majority in the eyes of the law, and as such, they define youth, and those to whom their services are directed, as those under the age of twenty-five.

The federal government has further cemented that those above the age of eighteen are considered youth in Canada. In a 2019 report, Statistics Canada identified youth in Canada as those between the ages of fifteen to thirty.²⁰ In 2021, Statistics Canada referred to Indigenous youth as those between the ages of fifteen and twenty-four.²¹ In “Canada’s first State of youth report: for youth, with youth, by youth,” youth is defined as a term referring to those in the stage of life from adolescence to early adulthood.²² Numerically, this is those between the ages of fifteen to twenty-nine.

Evidently, youth is a broad term. Indeed, for youth with disabilities, these finite cut-offs may be arbitrary and not wholly applicable. For example, the upper limit of eligibility for educational services for people with developmental disabilities is age twenty-one in the public

¹⁸ Ministry of the Attorney General, “Office of the Children’s Lawyer,” *Government of Ontario* (21 May 2021), online: <<https://www.ontario.ca/page/office-childrens-lawyer>>

¹⁹ Justice for Children and Youth, “About JFCY,” *Justice for Children and Youth* (2021), online: <<https://jfcy.org/en/about-us/>>

²⁰ Statistics Canada, *What matters to Canadian youth?* Catalogue 11-631-X (Ottawa: Statistics Canada, 2019).

²¹ Thomas Anderson, “Chapter 4: Indigenous Youth in Canada” (2021) *Portrait of Youth in Canada: Data Report*.

²² Canada, Canadian Heritage, *Canada’s first State of youth report: for youth, with youth, by youth* (2021).

school system in Ontario, whereas the majority of students will graduate at age eighteen.²³ As such, this memo will look to the obligations owed by the Ontario government to Ontarians ranging from birth to age thirty. Since there are variables that may make age distinctions too normative given the range of needs in the population of youth with disabilities in Ontario, this memo will not divide the analysis by age. Rather, the analysis will focus on the obligations the Ontario government owes youth in one crucial area: education. A focus on education brings to light the obligations that exist or do not exist for youth in the broad age range that this memo has identified, and consequently, the benefits that are received or not received.

3. What a legal obligation extend to young Ontarians in disabilities with the realm of education?

Certainly ys. Ontario has recognized the right to education for youth in various statutes. In *Eldridge*, a case concerned with the absence of sign language interpreters in hospitals, the Supreme Court of Canada recognized that absent equal access, one cannot be treated equally in society.²⁴ For young Ontarians with disabilities, the *Education Act* and the *Code* both create obligations from the government to have special education programs to create equal access to education and thus equal treatment. The *Code* guarantees the right to equal treatment in education without discrimination on the ground of disability. The *Education Act* focuses on the legal obligations of the provincial government to identify the needs of students and deliver services and accommodations in primary and secondary school.

²³ *Identification and Placement of Exceptional Pupils*, O Reg 181/98, s 16(3) [*O Reg 181/98*].

²⁴ *Eldridge v. British Columbia (Attorney General)* [1997] 3 SCR 624 [*Eldridge*].

ELEMENTARY SCHOOL AND SECONDARY EDUCATIONPrimary

In their “2018 Annual Report on Ontario Schools,” People for Education reported that an average of 17% of students per elementary school and 27% per secondary school were receiving special education support.²⁵ They also noted that 66% of elementary schools and 53% of secondary schools reported a restriction on the number of students that could be assessed for special education each year.²⁶ This section will explore the government’s legal obligations to create access to education for youth with disabilities, as well as the barriers that prevent access.

Education Act

The *Education Act* is concerned with the public education system in Ontario. This section will focus on the government’s services to students in elementary and secondary school. Per the *Education Act*, children in Ontario are legally required to attend school from age six until age seventeen.²⁷ The *Education Act*, and its regulations, policy/program memoranda, and policy documents, make up the legal framework that governs special education programs and services for students in Ontario.²⁸ Section 8(3) of the Act outlines the scheme for special education in Ontario:

[The] Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement.²⁹

²⁵ People for Education, “2018 Annual report on schools: The new basics for public education,” *People for Education* (2018), online:
<<https://peopleforeducation.ca/report/2018-annual-report-on-schools-the-new-basics-for-public-education/>>

²⁶ *Ibid.*

²⁷ Justice for Children and Youth, “Education: Attendance Rights,” *Justice for Children and Youth* (2021), online:
<<https://jfcy.org/en/rights/right-to-attend-school/>>

²⁸ Ontario, Ministry of Education, *Special Education in Ontario: Kindergarten to Grade 12* (Peterborough: Ontario Public Service) at A1.

²⁹ *Education Act*, RSO 1990, c E2, s 8(3).

Furthermore, the Act requires “school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils” according to standards.³⁰ The goal of the special education program as defined in the Act is to ensure children have access to an educational program that is “based on and modified by the results of continuous assessment and evaluation and that includes a plan containing specific objectives and an outline of educational services that meets the needs of the exceptional pupil.”³¹ As such, the provincial government is legally obligated to ensure that disabled youth in Ontario, aged six to seventeen, have access to specialized education.

Under the *Education Act*, the government has a legal obligation to provide special education. There is a legislative and regulatory framework which sets forth a system to designate pupils as “exceptional” to provide special education. Regulation 181/98 of the *Education Act* mandates all school boards in Ontario to set up an Identification, Placement and Review Committee (IPRC).³² The IPRC decides whether a student should be identified as exceptional, identifies their areas of exceptionality, determines where a student should be placed, and annually reviews that identification and placement. The IPRC is composed of at least three people, one of whom must be a principal or supervisory officer of the school board.³³ An IPRC can be initiated two ways: first, if the principal receives a request from a student's parent(s)/guardian(s), the principal of the school must refer the student to an IPRC; second, the principal can also give written notice to the parent(s)/guardian(s), and refer the student to an IPRC.³⁴

³⁰ *Ibid* at s 8(3)(a).

³¹ *Ibid* at s 1.

³² *O Reg 181/98, supra* note 23 at s 10.

³³ *Ibid* at s 11(1).

³⁴ *Ibid* at s 14(1)(a)(b).

Students and parent(s)/guardian(s) have several rights in the IPRC process. Parent(s)/guardian(s) and students sixteen years of age or older have the right to attend the meeting and the *Education Act* legally requires the principal to consult with the parents and student.³⁵ The parent(s)/guardian(s) or student have the right to request that the IPRC discuss potential programs that will meet the student's needs. The parent(s)/guardian(s) have right to receive information about decisions and have the right to make submissions that committee must consider.³⁶ If the student is sixteen or older, they have a right to participate, to make submissions, and to make their own proposal, and the committee is required consider all their submissions.³⁷ However, even if a student is under the age of sixteen, they should be involved in the process. Finally, the IPRC gives the parent(s)/guardian(s) the right to appeal the decision.³⁸ First, parent(s)/guardian(s) should request a follow-up meeting with the IPRC to conduct a review. Second, they have a right to appeal the decision in writing to an Appeal Board set up by the school within thirty days of the IPRC decision. Finally, they have the right to further appeal to the Ontario Special Education Tribunal, if desired.³⁹

An IPRC may or may not be beneficial for students. On the one hand, an IPRC is a legal avenue to challenge an identification or placement decision. It also ensures that an Individual Education Plan (IEP) will be developed. Within thirty days of the placement of a pupil identified as exceptional in a particular program, an IEP must be created.⁴⁰ On the other hand, an IPRC is a formal process which may take a long time. An alternative to the IPRC process may be to only create an IEP for a student, which does not require an IPRC decision identifying them as exceptional or placing them in a particular environment. They can still receive an IEP that

³⁵ *Ibid* at s 5(6)(a)(b).

³⁶ *Ibid* at s 15(8).

³⁷ *Ibid* at s 15(6).

³⁸ *Ibid* at s 26(1).

³⁹ *Ibid*.

⁴⁰ *Ibid* at s 6(8).

outlines the student's learning and expectations, and services, accommodations, or modifications they may need.⁴¹

An important aspect of the special education framework in Ontario is that Regulation 181/98 under the *Education Act*, governing the identification and placement of exceptional pupils, requires the IPRC to first consider the integration of the student into regular classes before placing a student in a special education class.⁴² The committee must consider whether placing the student in a regular classroom with the appropriate services and programs will meet their needs and be consistent with the parent(s)/guardian(s)' preferences.⁴³ Should the IPRC decide to place a student in a special education class, written reasons for the decision must be provided.⁴⁴

There are five broad categories of exceptionality and twelve definitions of exceptionality that inform the process.⁴⁵ The categories and definitions are designed for the IPRC process to address the range of conditions that may impact a student's ability to learn. They are as follows:

- Behaviour – behaviour
- Intellectual – giftedness, mild intellectual disability, developmental disability
- Communication – autism, deaf and hard-of-hearing, language impairment, speech impairment, learning disability
- Physical – physical disability, blind and low vision
- Multiple – multiple exceptionalities

Based on these categories of exceptionality, the IPRC and IEP will then determine the best course of accommodation for a student. Thus, there is a distinction created by the law between

⁴¹ "Advocacy for Inclusion," *Inclusive Education Canada* (2020), online: <<https://inclusiveeducation.ca/advocacy-for-inclusion/>>

⁴² *O Reg 181/98*, *supra* note 23 at s 17(1).

⁴³ *Ibid.*

⁴⁴ *Ibid* at s 18(2)(c).

⁴⁵ Ontario, Ministry of Education, *2021-22 Education Funding: A Guide to the Special Education Grant* (2021) at 2.

programs framed as accommodation for students with disabilities and educational accommodation designed as special education services and programs. The chart below outlines the possible outcomes of an IPRC decision.⁴⁶

Placement	Description
A regular class with indirect support	The student is placed in a regular class for the entire day, and the teacher receives specialized consultative services.
A regular class with resource assistance	The student is placed in the regular class for most or all of the day and receives specialized instruction, individually or in a small group, within the regular classroom from a qualified special education teacher.
A regular class with withdrawal assistance	The student is placed in the regular class and receives instruction outside of the classroom for less than 50 per cent of the school day, from a qualified special education teacher.
A special education class with partial integration	The student is placed by the IPRC in a special education class where the student-teacher ratio conforms to the standards in O. Reg. 298, section 31, for at least 50 per cent of the school day, but is integrated with a regular class for at least one instructional period daily.
A special education class full time	The student is placed by the IPRC in a special education class, where the student-teacher ratio conforms to the standards in O. Reg. 298, section 31, for the entire school day.

provincial schools, run by the Ministry of Education, for students who are Deaf, blind, or deafblind.⁴⁷ There are only four schools in Ontario that provide specialized placement programs for students from kindergarten to grade twelve who are blind, low vision, and Deafblind.⁴⁸ Additionally, the Ministry operates three Demonstration schools in Ontario; these schools are one-year placement programs for students diagnosed with severe learning disabilities.⁴⁹ These schools also serve as regional resource centres.

⁴⁶ Ontario, Ministry of Education, *Special Education in Ontario (Draft Version, 2017)* (2022).

⁴⁷ *Ibid.*

⁴⁸ Ministry of Education, “Schools,” *Provincial and Demonstration Schools Branch* (2022), online: <<https://pdsbnet.ca/en/schools/>>

⁴⁹ *Ibid.*

It must be noted, however, that s.5(1) of the *Education Act* provides that “t” of the Act.⁵⁰ Section 2(b) states that a person’s attendance is excused when it is by reason of sickness or unavoidable cause.⁵¹ The implication of s.5(1) is that these identified disabilities are no reason for a student to be excused from attendance at school. As such, this incentivizes the government to fulfill their obligations and ensure students have access to the services and specialized education programs they need and have the right to in order to attend school. If a student is not able to attend school because of a lack of accessible services, it would contradict this very clause in the Act.

The Code

Although the government is legally obligated to accommodate students through the IPRC process and IEPs under the *Education Act*, the *Code* and the *Accessibility for Ontarians with Disabilities Act* must still be followed. As such, to be accommodated in school, it should not matter whether a student has an IPRC or an IEP; the *Code* states that in Ontario, anyone’s disability-related needs must be accommodated by the school board. The IPRC and IEP process raises questions about the government’s duty to accommodate students within the classroom under the *Code*.

The Ontario Human Rights Commission (OHRC) is “an independent statutory body whose mission is to promote, protect and advance human rights across the province as set out in the *Code*.”⁵² To do this, the OHRC “identifies and monitors systemic human rights trends, develops policies, provides public education, does research, conducts public interest inquiries, and uses its legal powers to pursue human rights remedies that are in the public interest.”⁵³

⁵⁰ *Education Act*, *supra* note 29 at s 5(1).

⁵¹ *Ibid* at s 2(b).

⁵² Ontario, Ontario Human Rights Commission, *Policy on accessible education for students with disabilities* (Toronto: Ontario Human Rights Commission, 2018) [*Policy on accessible education*].

⁵³ *Ibid*.

In their policy report titled “Accessible education for students with disabilities,” the OHRC outlines that under the *Code*, educational institutions in Ontario have a legal duty to take steps to prevent and respond to discrimination on the grounds of disability (breaches of the *Code*).⁵⁴ The policy states that “the responsibility includes maintaining accessible, inclusive, discrimination- and harassment-free education environments that respect human rights.”⁵⁵ Education is considered a “service” under s.1 of the *Code*, meaning that the law applies to any public or privately funded early childhood pre-school, elementary and secondary school, college or university.⁵⁶ This also includes hospital schools, care and treatment programs, schools in correctional facilities, provincial schools, French-language schools, trade schools and professional accreditation courses, and could include co-op programs.⁵⁷ As such, the policy identifies that the *Code* has primacy over other legislation, including the *Education Act*.⁵⁸ Where an inconsistency between the *Code* and the *Education Act* arises, the *Code* prevails.

Access Barriers

The legislative framework for ensuring access to education under the *Education Act* is one which can simultaneously provide for the needs of some and neglect the needs of others. For example, in *Davidson v Lambton Kent District School Board*, the Human Rights Tribunal of Ontario recognized that the Ministry of Education could be liable for discrimination if its definition of exceptionalities prevented or delayed a student from receiving the accommodations they required.⁵⁹ Furthermore, in *Eaton v. Brant County Board of Education*, the Supreme Court of Canada recognized that disability as a ground for discrimination is highly variable depending

⁵⁴*Ibid* at 6.

⁵⁵*Ibid*.

⁵⁶*Ibid* at 16.

⁵⁷*Ibid*.

⁵⁸*Ibid* at 13.

⁵⁹ *Davidson v Lambton Kent District School Board*, 2008 HRTO 294 (CanLII), at para 33–38 [*Davidson*].

on the individual and context, and as such can have vastly different meanings.⁶⁰ In this case, a twelve-year-old girl with cerebral palsy was identified as an exceptional pupil and placed in a special education class contrary to the wishes of her parents.⁶¹ Regarding her *Charter* rights, the Court held that the tribunal's decision to place her in the class was not a violation of s.15 of the *Charter*, as it did not impose a burden or disadvantage, nor was it withholding benefit or advantage from her.⁶² The Court highlighted that the nature of disability – the variability of needs among members of society – causes a “difference dilemma.” In this situation, placement in a segregated special education classroom could be both protective of equality for one, but violative of equality for another, depending on the person and their disability.⁶³

Eaton and *Davidson* both highlight the duty to accommodate, as outlined earlier in the first section of this memo. The OHRC policy states that,

Under the *Code*, education providers have a legal duty to accommodate the needs of students with disabilities who are adversely affected by a requirement, rule or standard. Accommodation is necessary to address barriers in education that would otherwise prevent students with disabilities from having equal opportunities, access and benefits.⁶⁴

Thus, as discussed earlier, an educational institution in Ontario is legally obligated to accommodate a student's needs up until the point of undue hardship; if the school will not experience undue hardship, they cannot refuse a student access to services because the student is incapable of fulfilling essential requirements.

Indeed, the Ministry of Education's exceptionality categories are narrower than the *Code*'s definition of disability, which is broad and generously interpreted in the human rights case law in the province.⁶⁵ Since the *Code* has primacy over the *Education Act*, the legal duty to

⁶⁰ *Eaton v. Brant County Board of Education* [1997] 1 SCR 241 [*Eaton*].

⁶¹ *Ibid* at para 6-8.

⁶² *Ibid* at 80.

⁶³ *Ibid* at 69.

⁶⁴ *Policy on accessible education*, *supra* note 51 at 41.

⁶⁵ *Ibid* at 13.

accommodate disability-related needs up until the point of undue hardship exists whether or not a student is identified as an “exceptional pupil” through the formal IPRC process or has an IEP, and regardless of whether the student is in the public school system.

Finally, it is important to note that during the pandemic, rights to special education have not changed; students continue to have a right to special accommodation, and lesson plans are expected to account for students requiring modifications and support for their varying needs.⁶⁶ In their “2020-2021 Annual Report on Ontario Schools,” People for Education reported that principals noted a skyrocketing demand for mental health and educational supports, yet no corresponding increase in human resources.⁶⁷ The report says that principals noted “a shortage of social workers, school psychologists, child/youth counsellors, special education services, occasional teachers, educational assistants, and speech language pathologists.”⁶⁸ The result of these shortages is that students will enter a new school year with a variety of challenges that will require support, but which is unavailable where resources and staff are lacking. The report cites that community connections decreased, teachers struggled to deliver lessons that benefited groups learning in person and online simultaneously, and access to technological supports and internet services put strains on families and exacerbated pre-existing inequities.⁶⁹

The practical implications of virtual learning and hybrid school as a result of the pandemic have yet to be studied in depth. It is likely that it too creates a difference dilemma. For some, learning from home or online may have many benefits. For others, this change could result

⁶⁶ Justice for Children and Youth, “Education: Special Education,” *Justice for Children and Youth* (2021), online: <<https://jfcy.org/en/rights/special-education/>>

⁶⁷ People for Education, “Challenges and Innovations 2020-21 Annual Report on Ontario Schools” *People for Education* (2021), online: <<https://peopleforeducation.ca/wp-content/uploads/2021/10/2020-21-AOSS-Final-Report-Published-110721.pdf>> at 15.

⁶⁸ *Ibid.*

⁶⁹ *Ibid* at 16.

in reduced access to special services and have potential drawbacks for students with varying needs.

Therefore, in primary and secondary education, students have a right to services, programs and accommodations that support their specialized education needs. Under legislative and regulatory frameworks through the *Education Act* and the protection of the *Code*, the government is obligated to ensure these needs are met.

a. POST SECONDARY EDUCATION

The government's obligations with respect to education change once a student has aged out of the protections of the *Education Act*. At the post-secondary level, accommodation for students with disabilities is not vulnerable to the same robust legislative framework as primary and secondary education in Ontario.⁷⁰

The *Education Act* provides some guidance as to transitions between school systems. Under Regulation 181/98, section 6(4) of the *Education Act* mandates that “where the pupil is [fourteen] years of age or older,” and identified for an exceptionality other than giftedness, “the individual education plan must also include a plan for transition to appropriate post- secondary school activities, such as work, further education, and community living.”⁷¹

Nonetheless, at the post-secondary level, any accommodations for students with disabilities are dependent on the specific delivery methods and structures that each institution has developed to meet student needs. Indeed, the *Ontarians with Disabilities Act* requires all colleges and universities to prepare and make public annual accessibility plans, in consultation with persons with disabilities.⁷² Additionally, like primary and secondary school, all accommodations

⁷⁰ Ontario, Ontario Human Rights Commission, *Consultation paper: Education and disability - Human Rights issues in Ontario's education system* (Toronto: Ontario Human Rights Commission, 2022).

⁷¹ *O Reg 181/98*, *supra* note 23 at s 6(2)-(8) and s 8.

⁷² Ontario, Ontario Human Rights Commission, *The opportunity to succeed: Achieving barrier-free education for students with disabilities* (Toronto: Ontario Human Rights Commission).

for students with disabilities at the post-secondary level will be governed by the *Charter* and by Ontario human rights legislation.⁷³ As such, the Ontario government owes the same obligation to student at post-secondary institution to accommodate up to the point of undue hardship, and institutions must be compliant with the *Code*. The difference between the primary and secondary systems and the post-secondary system may be that the distinction between accommodation and special services and programs for students with disabilities is not as rigid. While, on the one hand, this could provide barriers to students by making it more difficult to have needs met, on the other hand, it may validate students' needs by creating a more integrated framework of educational accommodation.

Street Youth Legal Services – provides for ages 16-25

Child Youth Family Services Act (CYFSA)

COVID

POST-SECONDARY EDUCATION

CONCLUSION:

⁷³ Ontario, Ontario Human Rights Commission, *Consultation paper: Education and disability - Human Rights issues in Ontario's education system* (Toronto: Ontario Human Rights Commission, 2022).

The Ontario government owes a legal obligation to young Ontarians with disabilities, from birth to age thirty. These obligations are informed by international human rights legislation, the *Charter*, and federal human rights and disability-focused legislation. At the provincial level, the *Code* and accessibility legislation govern Ontario's obligation to accommodate those with disabilities in the province. The *Education Act* and the *Code* both obligate the government to ensure that students in primary and secondary school have access to the specialized education they need, as the government has a duty to fulfill students' right to education under the Act and to accommodate under the *Code*. Nonetheless, access barriers persist as the result of challenges with definitions, difference dilemmas, and lack of resources. At the post-secondary level, the government is not obligated to accommodate students under a legislative framework, but the *Code* and accessibility obligations for institutions will apply.

There is room for much more research on the effects of the government's legal obligations to young Ontarians with disability and whether these frameworks are truly meeting the needs of the population. Particularly, research from the past two school years would provide an excellent case study for how students are experiencing online, hybrid, and in-person learning during the pandemic, and how this type of learning might be beneficial or harmful. I advise that we continue to address the gaps in the legislation. Furthermore, I encourage continued robust education regarding the rights that young Ontarians with disabilities have. Beyond the scope of education, research on the obligations that are owed with respect to other areas including healthcare, financial assistance, and employment, would greatly benefit youth and their families.