

March 26th, 2021

TO: Citizens With Disabilities Ontario

FROM: John Corrigan

SUBJECT: Do persons with disabilities have enforceable rights to equitable access to post-secondary education in Ontario?

This memo will discuss the rights of persons with disabilities throughout every stage of the post-secondary process. I will examine admissions, costs, academic accommodations, career training, and extra-curricular opportunities. In doing so, I hope to demonstrate the extent to which persons with disabilities enjoy equitable access to post-secondary education. Furthermore, I will point out areas of concern and indicate ways in which the provincial and federal governments may be failing to fulfill their obligations. More specifically, I will focus on the issue of costs and the higher levels of debt accrued by students with disabilities. I will also address the lack of access to career training and extra-curricular activities, the difficulties associated with obtaining an academic accommodation, and indicate ways in which admissions committees discriminate against applicants with disabilities.

Introduction

Definitions

All definitions sourced from The United Nations Convention on the Rights of Persons with Disabilities (CRPD)

- Persons with disabilities: Those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.
- Reasonable accommodation: Necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment on an equal basis with others of all human rights and fundamental freedoms.
- Discrimination on the basis of disability: Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. This includes all forms of discrimination, including denial of reasonable accommodation.
- Universal design: the design of products, environments, programmes and services to be useable by all people, to the greatest extent possible, without the need for adaptation or specialized design. Universal design shall not exclude devices for particular groups or persons with disabilities where this is needed.

Overview of Ontario's provincial, federal and international obligations to providing equitable access to post-secondary education

CRPD (Article 24): As a signatory of the CRPD, Canada is obligated to ensure that persons with disabilities are able to access all levels of education on an equal basis with others. Article 24 of the CRPD states that: "States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities."

Ontario Human Rights Commission (OHRC) Policy on Accessible Education for Students with Disabilities: The Ontario Human Rights Code (the code) guarantees the right to equal treatment in education without discrimination on the ground of disability. This protection applies to elementary and secondary schools as well as **colleges and universities**, both public and private. Furthermore, the code establishes a duty to provide accommodations in the way that best respects each student's dignity and individualized needs, while promoting inclusion and full participation.

Issues:

Issue one: If the CRPD were enacted to its fullest extent would persons with disabilities enjoy fully equitable access to post-secondary education; or are their gaps in the treaty which might prevent persons with disabilities from enjoying the same rights as others?

Issue two: What difficulties do persons with disabilities currently face when seeking equitable access to post-secondary education; and what progress has been made in removing these barriers?

Short Answers

Issue one: Yes. If the CRPD were enacted to its fullest extent there would still be gaps that would prevent persons with disabilities from receiving equal access to post-secondary education. To elaborate, the CRPD does not make any mention of the costs associated with post-secondary education. On average, persons with disabilities take longer to complete post-secondary programs and are thus forced to pay more for their education.

Additionally, the CRPD does not focus on access to career education services and extra-curricular activities. Recent research has suggested that many persons with disabilities have no access to career education services which are extremely helpful in providing work experience and career planning. These programs have largely not been made accessible as institutions have instead placed an emphasis on providing accessible academic programming.

Issue two: One of the primary barriers facing students with disabilities is the discrimination they face when seeking admission. Post-secondary institutions generally insist upon applicants meeting specific academic entrance requirements, and

admissions committees often neglect to consider how an individual's disability might have affected their previous academic performance. This becomes especially problematic when a student falls below an admissions threshold because of an improperly accommodated or unaccommodated disability.

With respect to progress, the Ontario Court of Appeal recently ruled that this type of discrimination is not permissible and that post-secondary admissions committees must consider the effect that an unaccommodated disability has had on an applicant's previous academic performance. Additionally, institutions across Ontario have recently begun to move away from an accommodation model that was primarily based on a disclosure of needs framework. Most Ontario institutions no longer require their students to legitimize their accommodation requirements by providing a diagnosis, and this shift in policy will help to alleviate some of the stress and fear of stigma associated with seeking an accommodation.

Discussion

Issue one:

When embarking upon the journey of post-secondary education, the issue of costs is at the forefront of every student's mind. For most students, it is enormously difficult to come up with the money to fund an education, and more than 50% of Canadian undergraduates are forced to rely on student loans. Unfortunately, for persons with

disabilities, these costs are often amplified, and students are forced to pay substantially more than their non-disabled peers. This is because, on average, students with disabilities take longer to finish their degrees and are thus forced to pay more tuition. The Canada Student Loan program (CSLP) is a common way for students across the country to finance their education. The CSLP works in conjunction with various provincial loan programs, and its constitutionality was the subject of recent litigation in the Ontario Superior Court.

In *Simpson v Canada*, the applicant, Jasmin Simpson argued that the operation of the CSLP discriminated against her on the basis of her disability and that the program should be declared unconstitutional as contrary to section 15(1) of the Canadian Charter of Rights and Freedoms. Section 15(1) states that “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Ms. Simpson argued that the CSLP violated her s. 15(1) rights because it provides loan’s on a per-year basis. This, she argued, discriminated against persons with disabilities because students with disabilities tend to take longer to finish their degrees and thus accrue more debt. In support of this notion, Ms. Simpson relied on the expertise of Adele Furrie, a management consultant who worked for Statistics Canada. Ms. Furrie found that 24% of students with disabilities had debts accruing over five or more years at the time of consolidation. For students without a disability this number dropped to 16.6%. Furthermore, although the respondent forwarded evidence which seemed to

contradict Ms. Furrie's claims, the Court accepted Ms. Furrie's evidence that, on average, students with disabilities take longer to complete their educations and accrue more debt

Although the Court allowed Ms. Simpson's personal claim, it held that the CSLP was not unconstitutional. The court held that the operation of the CSLP, in this specific instance, had violated Ms. Simpson's s.15(1) rights, but that no broad declaration could be made about Canada's student loan process discriminating against persons with disabilities. Although it was accepted that, on average, the operation of the CSLP results in persons with disabilities accruing more student debt, the Court claimed that various safeguards, such as grants for persons with disabilities were in place, and that these safeguards had simply failed Ms. Simpson. The Court further stated that it was the obligation of the federal and provincial governments, and not the court, to "fashion appropriate and responsive administrative mechanisms to ensure that the operation of the CSLP redresses the adverse effects for others in Ms. Simpson's situation." Unfortunately, the result of this decision is that the CSLP will continue to offer loans on a per-year basis, and persons with disabilities will likely continue to accrue more debt.

This result is especially unfortunate given that an appealing alternative to the per-year loan structure were suggested by Ms. Simpson. Her suggestion, which was supported by public policy expert Dr. David Lewis, was the introduction of student loan program which provides loans on a per-degree basis as opposed to a yearly basis. This would

ensure that the cost of an education is consistent for each student in a given degree program and eliminate the cost-based discrimination faced by students with disabilities.

The current structure of the CSLP results in an increased debt load for students with disabilities, and the Ontario Superior Court has indicated that it is not willing to mandate changes to this program. As a result, persons with disabilities will continue to face cost-based discrimination when financing their educations. Furthermore, because the CRPD makes no mention of educational costs, the discriminatory effects of the CSLP will not prevent Canada from claiming that it is fully compliant with this convention.

One additional gap in the CRPD exists in relation to the non-academic aspects of a post-secondary education. To elaborate, studies have shown that students with disabilities lack access to career training opportunities such as internships, co-op programs, and job skills training. According to the National Education Association of Disabled Students (NEADS), post-secondary institutions have primarily focussed on providing effective accommodations in an academic setting and accommodations for career training services have lagged behind. The unfortunate result has been that students with disabilities are less prepared to enter the workforce. In fact, in 2011 the employment rate of university graduates who had a disability was 71.8%. Conversely, the employment rate for all university graduates in Canada was 83.2%. This discrepancy can likely be at least partially attributed to a lack of accessible career training services, and this is a key example of the inequity faced by students with disabilities on post-secondary campuses.

In addition to the scarcity of accessible career training services, NEADS has identified a lack of access to extracurricular activities as a pressing issue for students with disabilities. Intramural sports, clubs, and volunteer opportunities are all essential aspects of campus life for many post-secondary students and being unable to participate in these activities can have a significant negative impact on one's post-secondary experience. As was the case with career training services, NEADS has found that many institutions have failed to prioritize the full participation of students with disabilities in extracurriculars, opting to instead place an emphasis on academic accommodations. While there is no doubt that academic accommodations are essential, access to higher education cannot be considered truly equitable for persons with disabilities until there can be full participation in all aspects of the post-secondary experience.

Issue Two

In order to assess whether persons with disabilities receive equitable access to post-secondary education, it is essential to identify aspects of the post-secondary experience where students with disabilities have commonly faced discrimination. While persons with disabilities can encounter discrimination in a multitude of different settings, the admissions process is an area of particular concern. An inequitable admission process can lead to applicants with disabilities being denied the opportunity to even begin their post-secondary experience. Accordingly, there is perhaps no stage of the

higher education process where equity is more important. One of the primary ways in which the admissions process can be discriminatory is the strong emphasis that many institutions place on an applicant's previous academic results. This can result in students with disabilities being unfairly turned away in instances where they may have achieved lower marks due to an improperly accommodated or unaccommodated disability. This issue, along with the failure of institutions to consider other aspects of an application which indicate that an applicant could be successful, was the topic of the recent case of *Longueépée v. University of Waterloo*.

Mr. Longueépée applied to The University of Waterloo in 2013 after having previously attended Dalhousie University without obtaining a degree. While at Dalhousie, and throughout grade school, Mr. Longueépée suffered from undiagnosed and unaccommodated disabilities which had a substantial negative impact on his grades. When applying to Waterloo, Mr. Longueépée's grades fell below the minimum standards for transfer students, and, as a result, the admissions committee chose not to admit him. Mr. Longueépée explained to the admissions committee that his low grades were a result of his undiagnosed disabilities and the committee accepted this as true. However, the committee still denied his application. Upon receiving the admission committee's decision Mr. Longueépée brought an action in the Human Rights Tribunal of Ontario (HRTTO) alleging discrimination under section 11(1) of the Ontario Human Rights Code. This section prohibits discrimination through requirements that result in the exclusion of an individual with a disability. Mr. Longueépée argued that his rights were infringed when Waterloo applied the minimum grade requirement to him in order to exclude him

from the university. Although his grades were quite low, Mr. Longueépée had exhibited the ability to be successful when his disabilities had been properly accommodated. In fact, Mr. Longueépée had received provincial recognition for his work on institutional child abuse. He had published several articles and papers, given presentations, and even founded his own organization, Restoring Dignity, which helps to support survivors of abuse. Despite all of these achievements, the Waterloo admission committee claimed that Mr. Longueépée had not demonstrated an ability to succeed at university. The HRTO denied Mr. Longueépée's claim and held that the admissions committee had reasonably accommodated the applicant even though the admissions decision was anchored on unaccommodated grades.

Fortunately, this decision was overturned by The Ontario Superior Court (OSC), a decision which The Ontario Court of Appeal upheld. The OSC acknowledged that minimum grade requirements can be discriminatory against persons with disabilities and admissions committees are required to accommodate persons with disabilities by analysing more than just their grades. As a result, the Court allowed Mr. Longueépée's claim and held that he had been discriminated against when the admissions committee anchored its decision on unaccommodated grades. While this result is certainly a positive sign, The Court did not lay out any specific guidelines detailing how institutions should analyze applications that include unaccommodated grades. As a result, it is likely that future applicants will be discriminated against in similar fashion. Furthermore, while the HRTO may now be more inclined to find in favour of an applicant with a similar claim, the process generally takes years and there is no province-wide system or set of

guidelines in place to prevent discrimination against persons with disabilities throughout the application process.

Once beyond the admission process, the next step for students with disabilities is often acquiring academic accommodations. Fortunately, this is an area in which positive steps have recently been taken. Until 2018 the accommodation model at most of Ontario's post-secondary institutions was based on a disclosure of needs framework. To elaborate, a student would not be granted an academic accommodation unless their request was accompanied by an official diagnosis from a medical professional. In requiring that students legitimize their accommodation requirements, institutions were adding unnecessary stress, and potentially the fear of stigma, to the accommodation process. In fact, the added pressure associated with disclosing a diagnosis was often enough to prevent students from seeking out accommodations. This model created an unnecessary barrier to acquiring academic accommodation and created a post-secondary experience that was unnecessarily challenging and stressful for many students with disabilities.

Fortunately, based on recommendations from the OHRC and NEADS, Ontario's higher education institutions have now moved away from a diagnosis disclosure model. It is now possible to receive an academic accommodation without disclosing one's diagnosis, and most institutions simply require a recommendation by a medical professional. While this change is undoubtedly a positive step, NEADS points out that there is still plenty of work to be done surrounding academic accommodations. In 2018,

30% of Canadian institutions had no formal policy on academic accommodations and many other institutions had out-dated policies which were not updated with sufficient frequency. Accordingly, many students are unclear about what they need to do to receive an accommodation and about what types of accommodations might be available to them. While policies around academic accommodations have improved in recent years, it is imperative that changes continue to be made, and Institutions should routinely update their accommodation policies while ensuring that this information is effectively communicated to students.

Conclusion

Although the rights of persons with disabilities to receive equitable access to post-secondary are entrenched by multiple acts and treaties, these rights do not always exist in practice. Accordingly, while we can say that these rights exist, they are not always enforced in practice. As explained above, this can happen for two reasons. First, there can be gaps in legislation, surrounding issues such as costs and extracurricular involvement, which allow governments and institutions to skirt their responsibilities while claiming to be compliant. Alternatively, institutions can simply choose not to be compliant with legislation. When this occurs, there are often few, if any, consequences for an institution and this helps to explain why discrimination against persons with disabilities remains so common on post-secondary campuses. While Canada and Ontario have taken commendable first steps in ensuring that persons with disabilities are treated equitably, the journey is far from over, and it will not be complete until there

exists a nation-wide dedication to treating all people with the respect and dignity they deserve.