



Accommodations in the Post-Secondary Setting

Catherine Peters

March 30, 2017



Recent Legal and Policy Developments in Accommodating Students with Mental Health Disabilities

Catherine Peters | Partner, Toronto

Objectives

- Review guiding principles endorsed by human rights decision-makers
- Discuss recent Ontario Human Rights Commission (OHRC) policy-making and outreach initiatives
- Discuss how the principles discussed should guide your accommodation strategies

Guiding Legal Principles

- Legal duty to accommodate post-secondary students on a number of grounds, including disability
- Increasingly treated as a proactive duty
- Includes both procedural and substantive obligations
- Individualized case-by-case consideration required
- Person seeking accommodation has duty to cooperate
- Extensive duty: Outer limit is “undue hardship”/”fundamental change in academic requirements”

Role of OHRC Policies

- OHRC mandate includes human rights promotion, prevention and policy development
- May involve itself in human rights litigation before Human Rights Tribunal of Ontario (HRTTO)
- Engages in outreach initiatives and inquiries as a means to secure voluntary compliance
- Bottom line: Policies not legally binding but need to be taken seriously

Noteworthy OHRC Policy Initiatives



Guidelines on Accessible Education (2004)

Policy on Preventing Discrimination based on Mental Health Disabilities and Addictions (June 2014)

Policy on Ableism and Discrimination based on Disability (June 2016)

Guidelines on Accessible Education

- Guiding principles are dignity, individualization, inclusion and full participation
- Express recognition of special challenges associated with non-evident disabilities, including mental health conditions
- Accommodation process requires meaningful dialogue and expert input
- Emphasizes confidentiality and limits on medical information requested
- Most appropriate accommodation required short of undue hardship
- Very high threshold of undue hardship
- No modification of standards or outcomes required but modification of evaluation mechanisms may be required
- Incorporates student's duty to cooperate with the accommodation process

Disability, Ableism and the Duty to Accommodate

- Social approach to disability
- Prevention of “ableism” and harassment based on disability
- Proactive and reactive component of duty to accommodate
- Duties of accommodation provider include novel items
- “Most appropriate accommodation” short of undue hardship must be provided
- Very high threshold of undue hardship
- Recognizes duty to cooperate but view of medical information that can be requested becoming increasingly restrictive

Mental Health Disabilities and Addictions

- Focuses on unique challenges faced by individuals with mental health disabilities and addictions
- Subjective perceptions vs. objective expert evidence
- Mere assertions of symptoms may not be sufficient to establish mental health disability
- Recognizes duty to inquire regarding accommodation needs
- Restrictive view of medical information that can generally be requested, but broader requests may be justifiable in exceptional cases
- Lack of available services may necessitate interim accommodations
- Not discriminatory to respond to actual behaviour that causes risk

Medical Documentation Guidelines/ Accommodation for Post-Secondary Students with Mental Health Disabilities

- Factual context:
 - *Dhanota v. York University* settlement
 - Academic Accommodations Report (Dr. Michael and Eleanor Condra)
 - OHRC media release regarding settlement
 - Initial attempt at collective university response resulted in use of inquiry power

Scope of Outreach Initiative

- Focus on post-secondary students with mental health disabilities
- No express change with respect to students with physical disabilities, learning disabilities, etc.
- Main thrust was to require post-secondary institutions to revisit the requirement to disclose specific DSM diagnosis to register for accommodations and supports
- Access to medical documentation identifying functional limitations is not affected

Scope of Outreach Initiative cont'd

- Acknowledgement that disclosure of diagnosis may still be required to obtain public or private scholarships, bursaries, grants
- Exceptions are contemplated for complex cases

Interim, Temporary and Permanent Accommodations

- Interim, temporary and permanent accommodations to be provided
- Reflects reality that significant time may be required to obtain appointment with a specialist, obtain diagnosis
- Functional limitations to be accommodated in the meantime based on “best information available, including how the student identifies their own needs”

“Retroactive Accommodation”

- Interruptions in student’s functioning may interfere with the student’s ability to access accommodation procedures in a timely way
- Accommodation procedures should contemplate possibility of post-recovery requests for “retroactive accommodation”
- Does not mean student is relieved from meeting academic requirements but creativity will be required

Limits on Disclosure of Personal Health Information

- Students should not be required to disclose personal health information more broadly than necessary to access accommodations/supports
- Specialized office is expected to handle all personal health information
- Students ought not to be required to disclose personal health information to professors, instructors, teaching assistants, etc.

Steps Required by September 6, 2016

- Clarify that disclosure of DSM diagnosis is no longer required to register with Office for Students with Disabilities (or equivalent)
- Clarify that interim accommodations are available pending receipt of medical documentation
- Clarify that both temporary and permanent mental health disabilities will be accommodated
- Remove any statement or implication that retroactive accommodation will not be considered

Steps Required by September 6, 2016 cont'd

- Do not require students to disclose private personal health information directly to professors, instructors, teaching assistants, etc.
- Clearly communicate these changes to students, faculty and staff
- Advise OHRC of steps taken to implement these requirements and provide OHRC with amended medical documentation guidelines/accommodation procedures

Aftermath of Outreach Initiative and Impact on Accommodation Strategies

- Successful initiative by OHRC, we are seeing similar examples elsewhere, expect similar initiatives in future
- OHRC policies provide useful guidance but not all aspects have been endorsed in the case law
- Be aware of the areas where flexibility exists, consider whether they raise issues of principle for your organization
- Understand the risks associated with departures from OHRC policy positions
- Choose the strategy which best balances competing factors

Questions & Answers





Accommodations in the Post-Secondary Setting

Catherine Peters

March 30, 2017