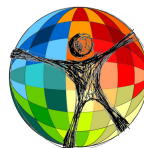


VOL. 9 | NO. 1 | SUMMER 2020

# COVID-19, "Learn at Home," & Students with Disabilities in Ontario

*Kayla Maria Rolland*

McGill Centre for  
Human Rights  
and Legal Pluralism



Centre sur les droits de la  
personne et le pluralisme  
juridique de McGill



**McGill** FACULTY OF  
Law

# ABOUT CHRLP

Established in September 2005, the Centre for Human Rights and Legal Pluralism (CHRLP) was formed to provide students, professors and the larger community with a locus of intellectual and physical resources for engaging critically with the ways in which law affects some of the most compelling social problems of our modern era, most notably human rights issues. Since then, the Centre has distinguished itself by its innovative legal and interdisciplinary approach, and its diverse and vibrant community of scholars, students and practitioners working at the intersection of human rights and legal pluralism.

CHRLP is a focal point for innovative legal and interdisciplinary research, dialogue and outreach on issues of human rights and legal pluralism. The Centre's mission is to provide students, professors and the wider community with a locus of intellectual and physical resources for engaging critically with how law impacts upon some of the compelling social problems of our modern era.

A key objective of the Centre is to deepen transdisciplinary collaboration on the complex social, ethical, political and philosophical dimensions of human rights. The current Centre initiative builds upon the human rights legacy and enormous scholarly engagement found in the Universal Declaration of Human Rights.

# ABOUT THE SERIES

The Centre for Human Rights and Legal Pluralism (CHRLP) Working Paper Series enables the dissemination of papers by students who have participated in the Centre's International Human Rights Internship Program (IHRIP). Through the program, students complete placements with NGOs, government institutions, and tribunals where they gain practical work experience in human rights investigation, monitoring, and reporting. Students then write a research paper, supported by a peer review process, while participating in a seminar that critically engages with human rights discourses. In accordance with McGill University's Charter of Students' Rights, students in this course have the right to submit in English or in French any written work that is to be graded. Therefore, papers in this series may be published in either language.

The papers in this series are distributed free of charge and are available in PDF format on the CHRLP's website. Papers may be downloaded for personal use only. The opinions expressed in these papers remain solely those of the author(s). They should not be attributed to the CHRLP or McGill University. The papers in this series are intended to elicit feedback and to encourage debate on important public policy challenges. Copyright belongs to the author(s).

The WPS aims to meaningfully contribute to human rights discourses and encourage debate on important public policy challenges. To connect with the authors or to provide feedback, please contact [human.rights@mcgill.ca](mailto:human.rights@mcgill.ca).

# ABSTRACT

Following the unprecedented challenges of the COVID-19 pandemic, schools in Ontario closed in mid-March 2020, later shifting to a “Learn at Home” initiative for the remainder of the 2019-20 school year. Students with disabilities have faced significant barriers in accessing equal educational opportunities in Ontario for decades, despite guarantees for the full inclusion of students with disabilities in schools under Canada’s numerous international commitments, the Ontario Human Rights Code, and the provincial Education Act. During the “Learn at Home” period, these barriers took on new forms. This paper addresses the experiences of students with disabilities (from Junior Kindergarten to Grade 8) in Ontario’s publicly funded schools from March to June 2020, during the Learn at Home period. When reviewing the experience of children with disabilities through a rights-based approach, it is clear that the provincial government, school boards, and other parties often failed to respect the rights of children with disabilities during this period. This frequently included a failure in the duty to accommodate students. While some instances of a failure to accommodate may have been justified by undue hardship, educational providers often failed to fulfil the procedural requirement of their duty to accommodate. The lessons that can be extrapolated from this period may, however, assist in “building back better,” to produce more inclusive schools, and better prepare for future instances of emergency learning.

# CONTENTS

<b>INTRODUCTION</b>	<b>6</b>
<b>EDUCATION AND THE GLOBAL CHALLENGES OF COVID-19</b>	<b>7</b>
<b>THE RIGHT TO EDUCATION FOR STUDENTS WITH DISABILITIES IN ONTARIO</b>	<b>8</b>
<b>THE EXPERIENCE OF STUDENTS WITH DISABILITIES IN ONTARIO DURING "LEARN AT HOME"</b>	<b>16</b>
<b>BENEFITS &amp; SUCCESSES</b>	<b>23</b>
<b>ANALYZING THE EXPERIENCE OF STUDENTS WITH DISABILITIES DURING THE LEARN AT HOME THROUGH A RIGHTS-BASED APPROACH</b>	<b>24</b>
<b>LESSONS LEARNED</b>	<b>29</b>
<b>CONCLUSION</b>	<b>34</b>
<b>BIBLIOGRAPHY</b>	<b>36</b>

"I will teach you in a room.  
I will teach you now on ZOOM.  
I will teach you in your house.  
I will teach you with a mouse.  
I will teach you here and there.  
I will teach you because I care.  
So just do your very best.  
And do not worry about the rest."<sup>1</sup>

## Introduction

The poem above circulated on social media among educators in Ontario during Spring 2020. As COVID-19 posed one of the most significant impacts on global education in history, schools in Ontario closed in mid-March 2020, later shifting to a "Learn at Home" initiative for the remainder of the 2019-20 school year.<sup>2</sup> While many educators made significant efforts to foster a positive learning environment during this period, some students faced continued worries. Despite guarantees for the full inclusion of students with disabilities in schools under Canada's numerous international commitments, the *Ontario Human Rights Code*, and the provincial *Education Act*, students with disabilities have often faced significant barriers in accessing equal educational opportunities in Ontario.<sup>3</sup> In the shift to the Learn at Home model in Spring 2020, these barriers evolved to take on new forms, with many families feeling as if children with disabilities were an "afterthought."<sup>4</sup> This paper will explore the experiences of children with disabilities (from Junior Kindergarten to Grade 8) in Ontario's publicly funded schools during the Learn at Home period from March to June 2020, concentrating on the challenges and successes experienced by

---

<sup>1</sup> "I Will Teach You Now on ZOOM Poem for Kids" (31 March 2020), online: TeachersMag < [teachersmag.com](https://www.teachersmag.com) >.

<sup>2</sup> Kristy Timmons et al, "Examining the implementation and impact of the COVID-19 remote teaching initiative in Ontario early primary education contexts" (2020) at 2, online (pdf): Queen's University Faculty of Education < [static1.squarespace.com](https://static1.squarespace.com) >.

<sup>3</sup> *Ibid* at 5-6.

<sup>4</sup> Osobe Waberi, "Students with disability face more obstacles amid coronavirus: advocates" *Global News* (22 August 2020), online: < [globalnews.ca](https://globalnews.ca) >.

students. Analyzing the experience of children with disabilities through a rights-based approach, it is clear that the provincial government, school boards, schools, and educators often failed to respect the rights of children with disabilities during this period. Educational providers often failed in their duty to accommodate students. While some instances of a failure to accommodate may have been justified by undue hardship, educational providers often failed to sufficiently engage with families, failing to fulfil the procedural requirement of their duty to accommodate. The lessons that can be extrapolated from this period may, however, assist in “building back better,” to produce more inclusive and equitable schools. Moreover, these lessons may assist governments in better preparing for future instances of emergency learning.

## Education and the Global Challenges of COVID-19

COVID-19 represented one of the most significant challenges to education in history. By April 2020, an estimated 94% of learners globally had been impacted by the pandemic,<sup>5</sup> with school closures in 180 countries leaving 1.5 billion children out of school.<sup>6</sup> While the ability of countries to respond was largely impacted by a country’s level of development, a common thread was that children with disabilities were often left out by emergency education plans.<sup>7</sup> COVID-19 further compounded challenges faced by children with disabilities, who were already more likely to be out of school. Enrollment in some countries for children with disabilities is as low as 1%.<sup>8</sup> For children with disabilities, disruptions were particularly pronounced, as schools often serve as places for diagnosis, counselling,<sup>9</sup> physical therapy,<sup>10</sup> and respite care.<sup>11</sup> Some

---

<sup>5</sup> United Nations, “Policy Brief: Education during COVID-19 and beyond” (2020) at 5-8, (online); (pdf): *United Nations* < [un.org](https://www.un.org/) >.

<sup>6</sup> Charlotte McClain-Nhlapo, “An Inclusive Response to COVID-19: Education for Children with Disabilities” (11 May 2020), online: *Global Partnership for Education* < [globalpartnership.org](https://globalpartnership.org/) >

<sup>7</sup> United Nations, *supra* note 5 at 5-8.

<sup>8</sup> UNICEF East Asia and Pacific Region, “Ensuring an inclusive return to school for children with disabilities” (2020), online (pdf): *Relief Web* < [reliefweb.int](https://reliefweb.int/) >.

<sup>9</sup> United Nations *supra* note 5 at 10.

<sup>10</sup> McClain-Nhlapo, *supra* note 6.

<sup>11</sup> Lucyna Lach and Donna Thomson, “Children with disabilities disproportionately affected by pandemic” *iPolitics* (16 October 2020), online: < [ipolitics.ca](https://ipolitics.ca/) >.

students also rely on learning aids or equipment that could not be made available with emergency distance learning.<sup>12</sup>

The experience of school closures and emergency learning was not felt equally by all students, with the most significant impacts felt by marginalized students. Globally, students who rely on schools for food and nutrition, and students with parents who lacked the skills to assist them with emergency learning faced particular challenges.<sup>13</sup> Digital instruction was the most common approach used during emergency learning, used by an estimated 74% of countries for primary education.<sup>14</sup> A report by UNICEF found that when schools across the world shifted to remote learning following school closures, 463 million children were unable to access remote learning due to lack of technology and other tools,<sup>15</sup> accounting for 31% of all schoolchildren worldwide. Globally, 70% of students who could not be reached by online learning lived in rural areas, and 40% were members of the poorest households.<sup>16</sup> This gap has become known as the “digital divide.”<sup>17</sup>

## The Right to Education for Students with Disabilities in Ontario

Students with disabilities (referred to as students with “exceptionalities” in Ontario’s provincial legislation) account for 1/6 of all students within Ontario’s publicly funded schools.<sup>18</sup> This encompasses a range of disabilities including physical disabilities, intellectual disabilities, learning disabilities, and mental-health related disabilities.

Canada is a signatory to the UN Declaration of the Rights of Persons with Disabilities (UN CRDP). The CRPD was the

---

<sup>12</sup> UNICEF, *supra* note 8 at 2.

<sup>13</sup> UNESCO, “Adverse consequences of school closures” (last visited 4 December 2020), online: UNESCO < [unesco.org](https://unesco.org) >.

<sup>14</sup> UNICEF, “COVID-19: Are Children able to Continue Learning During School Closures?” (2020) at 3, online (pdf): UNICEF < [RemoteLearningFactsheet\\_Updated.pdf](#) >.

<sup>15</sup> UNICEF, “COVID-19: At least a third of the world’s schoolchildren unable to access remote learning during school closures, new report says” (26 August 2020), online: UNICEF < [www.unicef.org](https://www.unicef.org) >.

<sup>16</sup> UNESCO, *supra* note 14 at 2.

<sup>17</sup> United Nations *supra* note 5 at 24.

<sup>18</sup> Meagan Gillmore, “Families of kids with disabilities worried they’ll lose a year of learning” *TVOntario* (6 October 2020), online: < [www.tvo.org](https://www.tvo.org) >.



first human rights instrument specifically for persons with disabilities and is legally binding. It does not create new rights, but refines well-known human rights for persons with disabilities.<sup>19</sup> The CRPD was monumental in international human rights law, which had historically viewed disabilities as a “medical issue that reflected personal problems that must be resolved at the individual level.”<sup>20</sup> It is considered the biggest victory for international disability rights activists in decades.<sup>21</sup> The CRPD is representative of a paradigm shift from a medical model that focuses on changing aspects of the person with a disability to adapt to the environment, to the social model recognizing that the marginalization experienced by persons with disabilities is a consequence of physical and attitudinal barriers that must be removed. Following ratification of the CRPD, Canada (and its provinces and territories) were bound internationally to ensure compliance with the CRPD,<sup>22</sup> as domestic law must be interpreted in a manner that is consistent with Canada’s international obligations.<sup>23</sup> Article 24 of the CRPD requires that states develop inclusive education at all levels. In realizing this right, states are required to ensure that students with disabilities are not excluded from free and compulsory elementary education on the basis of a disability, are provided reasonable accommodations, and are provided with effective individualized support measures.<sup>24</sup> The requirement to ensure equal access to education for students with disabilities is also reflected in Canada’s other global commitments. These include the right to education enshrined within the United Nations Convention on the Rights of a Child (UNCRC), as well as under Article 26 of the Universal Declaration of Human Rights (UDHR).<sup>25</sup>

---

<sup>19</sup> Caroline Harnacke, “Disability and Capability: Exploring the Usefulness of Martha Nussbaum’s Capabilities Approach for the UN Disability Rights Convention” (2013) 41:4 *JL Med & Ethics* 768 at 768-775.

<sup>20</sup> Ravi A Malhotra & Robin F Hansen, “The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education” (2011) 29 *Windsor YB Access Just* 73 at 76.

<sup>21</sup> Helen Meekosha & Karen Soldatic, “Human rights and the Global South: the Case of Disability” (2011) 32:8 *Third World Q* 1383 at 1384.

<sup>22</sup> Malhotra & Hansen, *supra* note 20 at 73-89.

<sup>23</sup> “Policy on accessible education for students with disabilities” (2018) at 15, online (pdf): *Ontario Human Rights Commission* < [www.ohrc.on.ca](http://www.ohrc.on.ca) >.

<sup>24</sup> *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTS 3 at art 24 (entered into force 3 May 2008) [*UN CRPD*].

<sup>25</sup> UNICEF, *supra* note 8 at 1.

All school boards in the province are governed under the *Education Act* and accompanying regulations.<sup>26</sup> Under s. 8(3) of the *Education Act*, "The Minister shall ensure that all exceptional children in Ontario have available to them... appropriate special education programs and special education services without payment of fees."<sup>27</sup> The Act defines an exceptional pupil as a "pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee."<sup>28</sup> School boards, schools, and educators all have responsibilities towards students with disabilities. Ontario's 72 school boards operate the publicly funded schools within the province.<sup>29</sup> Under Regulation 306 to the Act, school boards "must provide special education programs and services to exceptional students."<sup>30</sup> To do this, school boards must prepare an Individual Education Plan (IEP) that requires annual review. School boards must also create Identification, Placement and Review Committees and Special Education Appeal Boards.<sup>31</sup> Educators are required to assess and grant accommodations in a timely manner.<sup>32</sup> Supports provided to students with disabilities may include differentiated teaching approaches within regular classrooms, or tailored programs within specialized classes.<sup>33</sup>

As school boards implement government programs and policy, their decisions may also be subject to the *Canadian Charter of Rights and Freedoms (Charter)*. This includes s. 15 of the *Charter* that addresses equality rights.<sup>34</sup> These rights cannot be infringed unless justified under s. 1 of the *Charter*.<sup>35</sup>

---

<sup>26</sup> "Elementary and secondary education", (last visited 6 December 2020), online: Ontario Human Rights Commission < [www.ohrc.on.ca](http://www.ohrc.on.ca) >.

<sup>27</sup> Education Act, R.S.O. 1990, c. E.2.

<sup>28</sup> *Ibid* at s. 1.

<sup>29</sup> "Who's responsible for your child's education?" (last accessed 6 December 2020), online: Government of Ontario < [www.edu.gov.on.ca](http://www.edu.gov.on.ca) >.

<sup>30</sup> OHRC, *supra* note 26.

<sup>31</sup> *Ibid*.

<sup>32</sup> "Accommodating students with disabilities - Roles and responsibilities (fact sheet)" (last accessed 6 December 2020), online: Ontario Human Rights Commission < [www.ohrc.on.ca](http://www.ohrc.on.ca) >.

<sup>33</sup> Jess Whitley, "Coronavirus: Distance learning poses challenges for some families of children with disabilities" (1 June 2020), online: *The Conversation* < [theconversation.com](http://theconversation.com) >.

<sup>34</sup> Blake Murdoch, Eric M Adams & Timothy Caulfield, "The law of food allergy and accommodation in Canadian schools" (2018) *Allergy, Asthma & Clinical Immunology* 14:1 1 at 3.

<sup>35</sup> OHRC, *supra* note 23 at 14.

The Ontario *Human Rights Code* (the Code) guarantees the right to equal treatment without discrimination in accessing services and to treatment free from discrimination on several grounds, including disability. Education is considered a service under s. 1 of the Code.<sup>36</sup> While other legislation like the *Education Act* may apply alongside the Code, and may include overlapping or parallel responsibilities, the Code as human rights legislation defines minimum standards and prevails when in conflict due to its quasi-constitutional status.<sup>37</sup>

The Code guarantees the right to equal treatment in education, including the right to be free from discrimination in educational settings.<sup>38</sup> Educators, schools, school boards, and governments all have responsibilities to ensure the guarantee of this right. While the Code does not define discrimination, an understanding has emerged from case law. To demonstrate *prima facie* discrimination, a student must show that they have a characteristic that is protected from discrimination, that they have experienced an adverse impact in a social area protected by the Code, and that this characteristic was a factor in the adverse impact. Discrimination does not need to be intentional, and may take a variety of forms including direct, indirect, subtle, and/or adverse effect discrimination.<sup>39</sup> This also includes systemic discrimination, that is defined as:

Systemic or institutional discrimination consists of attitudes, patterns of behaviour, policies or practices that are part of the social or administrative structures of an institution or sector, and that create or perpetuate a position of relative disadvantage for students with disabilities. The attitudes, behaviour, policies or practices may appear neutral on the surface but nevertheless

---

<sup>36</sup> Government of Ontario Ministry of Education, "Draft - Special Education in Ontario Kindergarten to Grade 12 Policy and Resource Guide" (2017) at 35, online (pdf): Government of Ontario < [www.edu.gov.on.ca](http://www.edu.gov.on.ca) >.

<sup>37</sup> "2. The Code prevails over other laws" (last visited 6 December 2020), online: Ontario Human Rights Commission < [www.ohrc.on.ca](http://www.ohrc.on.ca) >.

<sup>38</sup> ARCH Disability Law Centre, "Access to Education for Students with Disabilities during the COVID-19 Crisis" ARCH Disability Law Centre (3 July 2020), online: < [archdisabilitylaw.ca](http://archdisabilitylaw.ca) >

<sup>39</sup> OHRC, *supra* note 23 at 29-38.

have an "adverse effect" or exclusionary impact on students with disabilities.<sup>40</sup>

Students are required to receive accommodations to ensure they can enjoy the full benefits of their education, when they "are adversely affected by a requirement, rule or standard."<sup>41</sup> This includes receiving an appropriate curriculum, as well as the support necessary in order to participate in learning and extracurricular activities.<sup>42</sup> The duty to accommodate includes both a procedural element (i.e. the process to assess an accommodation) and a substantive element (i.e. the accommodation provided). As a result, a failure to give any consideration to the issue of accommodation has been determined to be a failure of the procedural element of duty to accommodate. In the context of schools and school boards, educational providers must engage in meaningful interaction with all parties, to consider whether the educational provider can accommodate a student's needs. Even in cases where no substantive accommodation may be provided due to undue hardship, educational providers may still be found in breach of their obligations under the Code if they have not sufficiently fulfilled this procedural component. The duty to accommodate is further guided by the principles of dignity, individualization, integration, and full participation.<sup>43</sup>

Students must be accommodated up to the point of "undue hardship,"<sup>44</sup> that is outlined in s. 17(2) of the Code.<sup>45</sup> Some degree of "hardship" or inconvenience is to be expected in accommodating students with disabilities; the question is whether this hardship reaches the standard of "undue."<sup>46</sup> The Code details only three considerations for assessing undue hardship, and under Ontario law no other considerations may be taken into account.<sup>47</sup> Undue hardship which must be assessed "considering the cost, outside sources of funding, if any, and health and safety requirements."<sup>48</sup> The educational provider bears the onus of proof to demonstrate undue hardship.

---

<sup>40</sup> *Ibid* at 36.

<sup>41</sup> *Ibid* at 41.

<sup>42</sup> ARCH Disability Law Centre, *supra* note 38 at 12.

<sup>43</sup> OHRC, *supra* note 23 at 41-45.

<sup>44</sup> OHRC, *supra* note 26.

<sup>45</sup> *Human Rights Code*, RSO 1990, c H-19, s 17(2).

<sup>46</sup> OHRC, *supra* note 23 at 42-45.

<sup>47</sup> *Ibid* at 84.

<sup>48</sup> *Human Rights Code*, *supra* note 45 at s 11(2).

Evidence must be provided that the undue hardship would be “objective, real, direct and, in the case of cost, quantifiable.”<sup>49</sup>

The cost standard is a high threshold, as the Supreme Court of Canada (SCC) has expressed concern that a lower threshold would make it too easy for educational providers to deny equal treatment by citing cost. Costs must be shown to be quantifiable, related to the accommodation, and “so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability.”<sup>50</sup> In regards to outside sources of funding, educational providers must take the initiative to recover the costs of accommodation, through the pursuit of grants, subsidies, tax deductions, and other sources of funding. Students are also expected to avail themselves of similar programs. In regard to health and safety, the Code recognizes that in some circumstances, a balance must be struck between ensuring that all students are free from discrimination, and other health and safety considerations. Where health and safety requirements create barriers for students with disabilities, educational providers must assess whether these requirements may be waived or modified, while weighing potential risks. When waiving a health or safety risk poses additional risks to others, these must be assessed against other common risks within an educational institution. The question of whether suitable precautions may be taken to address the risk must also be considered.<sup>51</sup>

Beyond the undue hardship standard, courts have identified other narrow situations where the duty to accommodate may be limited, including situations where the duty to accommodate must be balanced with the rights of other people. An example of this may include a student with a disability who requires a guide dog, but whose teacher has a severe allergy that is triggered by the presence of the guide dog in the classroom. In these situations, educational providers have a duty to take steps to resolve the competing rights issues.<sup>52</sup>

The landmark SCC decision of *Moore v. British Columbia* (Moore) in 2012 clarified the legal requirements that education service providers must offer to students with disabilities in

---

<sup>49</sup> OHRC, *supra* note 23 at at 84.

<sup>50</sup> *Ibid* at 85.

<sup>51</sup> OHRC, *supra* note 23 at 86-92.

<sup>52</sup> *Ibid* at 95-98.

relation to human rights legislation, and helps to illustrate some of these concepts.<sup>53</sup> The case involved a student named Jeffrey Moore in British Columbia with a learning disability, who filed a claim after being denied remedial services in the government of British Columbia’s provision of public education.<sup>54</sup> Moore had a severe learning disability, and was identified as eligible for assistance from his school district (hereby referred to as the “the District”)’s “Diagnostic Centre” where he could receive more intensive assistance. Following provincial budgetary changes by the government that created financial pressure on the District, however, the decision was made to close the Diagnostic Centre. This forced Moore’s family to pay for a private school that offered the support he needed.<sup>55</sup>

Writing for the Court, Abella J. wrote that “Adequate special education... is not a dispensable luxury. For those with severe learning disabilities, it is the ramp that provides access to the statutory commitment to education made to *all* children in British Columbia” [emphasis in original].<sup>56</sup> The Court emphasized that the obligations of education service providers is to ensure “meaningful access” so that students with disabilities may fully access the benefits of the education system.<sup>57</sup> The Court agreed with the dissenting opinion from the lower Court of Appeal that special education was not the service at question, but the means to accessing educational services available to all students in British Columbia, analogous to the accommodations made for interpreters in the provision of medical services in the SCC case of *Eldridge v. British Columbia*.<sup>58</sup> Reflecting the high standard adopted when assessing costs and undue hardship as a justification for discrimination within educational institutions, the Court agreed that the conduct of the District was not justified. The Court argued that the District had other options to address its budgetary crisis, highlighting how programs such as the District’s “Outdoor School” continued while the Diagnostic Centre was closed. In discussion of remedies, the Court

---

<sup>53</sup> ARCH Disability Law Centre et al, “If Inclusion Means Everyone, Why Not Me?” (2018) at 9, online (pdf): ARCH Disability Law Centre < [archdisabilitylaw.ca](http://archdisabilitylaw.ca) >.

<sup>54</sup> Jennifer Koshan, “Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the *Charter*” (2014) 3:1 Can J Hum Rts 115 at 128.

<sup>55</sup> *Moore v British Columbia (Education)*, 2012 SCR 360 at paras 1-16.

<sup>56</sup> *Ibid* at para 5.

<sup>57</sup> ARCH Disability Law Centre et al, *supra* note 53 at 9.

<sup>58</sup> *Moore*, *supra* note 55 at para 28.

emphasized that systemic discrimination can be found to have occurred even if the effects were solely experienced by one student.<sup>59</sup>

Despite these assurances, advocacy groups have highlighted numerous instances where these obligations have not been met.<sup>60</sup> A consultation report completed by the Ontario Human Rights Commission (OHRC) in 2002 determined that “based on the Commission’s findings, it is apparent that many students with disabilities do not have equal access to educational opportunities in Ontario.”<sup>61</sup> The extensive report cited numerous barriers, including inadequate funding, lack of timely accommodations, and a lack of understanding from all parties regarding their responsibilities, including under the Code.<sup>62</sup> An interdisciplinary study of elementary schools in Ontario in 2015 concluded that Ontario schools are often not physically accessible, highlighting common accessibility issues with the physical environments of schools. These included inaccessible pathways leading up to schools (often due to inadequate snow removal), lack of sufficient space within classrooms to move around with mobility devices, and inaccessible playground equipment.<sup>63</sup> Students with disabilities have reported being excluded from schools at an alarming rate, accounting for close to 50% of formal expulsions and suspensions. This does not include instances of more informal exclusion, with 25% of parents of students with disabilities reporting additional instances where they were simply told not to bring their child to school. More recently, in a 2018 survey, 53% of parents of children with intellectual disabilities reported that their child was not receiving their required accommodations at school.<sup>64</sup>

Education is an important right, as it is an enabling right that permits individuals to realize a plethora of other rights.<sup>65</sup> A rights-based approach to education works to “assure every child

---

<sup>59</sup> *Ibid* at paras 52-53.

<sup>60</sup> ARCH Disability Law Centre et al, *supra* note 53 at 9.

<sup>61</sup> “The Opportunity to Succeed: Achieving Barrier-Free Education for Students with Disabilities in Ontario” (2002) at 5, online (pdf): *Ontario Human Rights Commission* < [www3.ohrc.on.ca](http://www3.ohrc.on.ca) >.

<sup>62</sup> *Ibid* at 5-6.

<sup>63</sup> Lindsay Stephens et al, “The Accessibility of Elementary Schools in Ontario, Canada: Not Making the Grade” (2015) 25:2 *Children, Youth and Environments* 153 at 153-166.

<sup>64</sup> ARCH Disability Law Centre et al, *supra* note 53 at 11-14.

<sup>65</sup> United Nations, *supra* note 5 at 3.

a quality education that respects and promotes her or his right to dignity and optimum development.”<sup>66</sup> Turning to the experience of children with disabilities during the Learn at Home period, this paper will assess the response of the Ontario government, school boards, and educators through these human rights instruments.

## The Experience of Students with Disabilities in Ontario during “Learn at Home”

In March 2020, schools across Ontario closed to limit the spread of COVID-19, eventually shifting to a reliance on remote learning for the remainder of the 2019-20 school year, through its “Learn at Home” initiative. The Government of Ontario outlined minimum expectations of weekly work time for students, with materials provided by educators. Early primary students, for example, were expected to work for five hours per day, with an emphasis on math and literacy.<sup>67</sup> The province also increased the number of educational resources available for free online, and increased the volume of educational programming provided by the province’s public broadcaster TVOntario (TVO) on cable and online.<sup>68</sup> Recognizing the challenges faced by families during this period, work provided by educators was not considered mandatory, and students were assessed on final report cards based on assessments up to the start of the March Break.<sup>69</sup>

In order to understand the specific challenges and successes faced by students with disabilities in Ontario during the Learn at Home period, this paper relies upon a collection of surveys and media interviews with families, students, advocates, and educators, in addition to a small number of studies (including about the Learn at Home period more broadly). It does not claim to capture the full breadth of experiences felt by students with disabilities during this period, but rather identifies some broad, recurring themes as identified by these stakeholders. A brief note that the language and terminology

<sup>66</sup> UNICEF, “A Human Rights-Based Approach for Education for All” (2007), online (pdf): UNESCO < [unesdoc.unesco.org](https://unesdoc.unesco.org/) >.

<sup>67</sup> Timmons et al, *supra* note 2 at 2.

<sup>68</sup> Kristin Rushowy & Isabel Teotonio, “Ontario launches ‘learn at home’ online program for students during school shutdown” *Toronto Star* (20 March 2020), online < [www.thestar.com](https://www.thestar.com) >.

<sup>69</sup> Timmons et al, *supra* note 2 at 2-16.



used in this essay reflects the language chosen by students and families to describe themselves. Emphasis added is mine, unless otherwise stated.

## Challenges

### Scheduling & Consistency

For students with disabilities who thrive on a consistent schedule, the educational disruptions of COVID-19 posed particular challenges. One parent in Toronto described how their daughter, who has Down syndrome and a mild intellectual disability and thrives with a consistent schedule, struggled with the lack of daily, in-person classes, sharing: *"She needs a daily schedule. That's what she thrives in: routine, regularity, and people who will allow her to move at her own pace."*<sup>70</sup>

### Lack of Accommodations & Failure to Adjust to Online Learning

Many parents of children with disabilities criticized a lack of compliance by some schools and educators to accommodate students with disabilities during the Learn at Home period.<sup>71</sup> In a study by the Faculty of Education at Queen's University of the experiences of junior kindergarten to second grade educators in Ontario during the Learn at Home period, some teachers admitted to being confused at how to provide accommodations for students with disabilities during remote learning.<sup>72</sup> Parents expressed frustration that the willingness to adapt and accommodate often differed from educator to educator, creating varied experiences for students. One educational assistant (EA) to students with disabilities, for example, adapted to the Learn at Home period by creating homemade playdough and recording herself reading stories for her students: *"I understand what they need to learn, and I knew that what was being taught online wasn't going to work for them."*<sup>73</sup> This was done, however, on her own initiative before receiving guidance from the school board, and was not standard among her colleagues.<sup>74</sup> Another

---

<sup>70</sup> Sarah Trick, "The government's school-reopening plan ignores kids with disabilities, say critics" (2 September 2020), online: TVOntario < [www.tvo.org](http://www.tvo.org) >.

<sup>71</sup> *Ibid.*

<sup>72</sup> Timmons et al, *supra* note 2 at 8.

<sup>73</sup> Trick, *supra* note 70.

<sup>74</sup> *Ibid.*

parent in Ajax, whose two children are autistic and enrolled in an alternative learning program that emphasizes life skills, expressed frustration that their children’s school struggled to adapt lessons like doing laundry to a virtual format.<sup>75</sup> Another parent of a child who has Down syndrome and is in remission from leukemia commented on their family’s experience, indicating that their daughter’s school “*basically [was not] going to do anything for kids with IEPs.*”<sup>76</sup>

Moreover, online learning was simply not appropriate for some students. A survey of families with students with autism spectrum disorder (ASD) found that 60% of parents believed their child was insufficiently engaged during the Learn at Home period.<sup>77</sup> For students who learned best through physical interaction and hands-on learning, this was difficult to replicate on screen. Without the additional support available in school, some students could not learn effectively.<sup>78</sup> One parent in Toronto of a student with a disability commented that her child “*struggles in a typical classroom... To be expected to do things independently at home with no support, it’s just not going to happen really.*”<sup>79</sup>

### Accessibility Issues

Online learning tools also posed issues in regard to accessibility. At a virtual town hall led by the Accessibility for Ontarians with Disabilities Act Alliance (AODA Alliance), the group voiced concerns about the use of inaccessible video conferencing platforms and other technologies by schools. Advocates also raised concerns that the online Learn at Home resources created by the province’s public broadcaster TVO in Spring 2020 were not fully accessible, highlighting issues with colour contrast, incompatibility with screen readers, and a lack

---

<sup>75</sup> Gillmore, *supra* note 18.

<sup>76</sup> Trick, *supra* note 70.

<sup>77</sup> Autism Ontario, “Readiness for the Safe and Successful Return to School” (2020) at 5, online (pdf): < [www.autismontario.com](http://www.autismontario.com) >.

<sup>78</sup> Leila El Shennawy, “‘It’s labour intense. It’s emotional’: In Ontario, parents of children with developmental disabilities face back-to-school challenges”, *The Pigeon* (16 September 2020), online: < [the-pigeon.ca](http://the-pigeon.ca) >.

<sup>79</sup> Shawn Jeffords, “Online learning begins for students across Ontario as COVID-19 closures continue”, *Global News* (6 April 2020), online: < [globalnews.ca](http://globalnews.ca) >.

of accessible on-screen controls.<sup>80</sup> An advocate described her experience testing the resources, saying “I did go to the ‘Homework Zone’, and *unsuccessfully found any homework to do.*”<sup>81</sup>

### Fears of Regression or Falling Behind

Educators expressed increased concern for the long term academic impacts of remote learning on their students with disabilities.<sup>82</sup> During the Learn at Home period, a national study by Statistics Canada also found that 58% of parents of children with disabilities expressed that they were “very” or “extremely” stressed about the school year and their child’s academic success, compared to just 36% of parents of children without disabilities.<sup>83</sup> Many parents feared that their children could lose months of progress.<sup>84</sup> This was particularly true for students with disabilities who benefited from therapies or other supports received in school. One parent of a kindergarten student with ASD shared their family’s frustrations: “With school and the therapy he was having... he’s made such amazing progress and *without those in place those behaviours start to come back.*”<sup>85</sup>

### Equity Concerns

Families of children with disabilities are more likely to face socioeconomic disadvantages, including reduced access to the internet and the devices necessary for emergency learning, posing challenges during the Learn at Home period.<sup>86</sup> Speaking more broadly of all students, educators during this period experienced varied participation by students, often correlating with a student’s access to devices within the home. One teacher shared an experience of a child in her classroom, indicating that

---

<sup>80</sup> Ontario Autism Coalition, “Virtual Townhall on Students With Disabilities During COVID” (4 May 2020) at 00h43m50s, online: (video): YouTube < [www.youtube.com](https://www.youtube.com) >.

<sup>81</sup> *Ibid* at 00h44m34s.

<sup>82</sup> Timmons et al, *supra* note 2 at 7.

<sup>83</sup> Rubab Arim, Leanne Findlay & Dafna Kohen, “The impact of the COVID-19 pandemic on Canadian families of children with disabilities” (2020), online: Statistics Canada < [www150.statcan.gc.ca](https://www150.statcan.gc.ca) >.

<sup>84</sup> Lach & Thomson, *supra* note 11.

<sup>85</sup> Caryn Lieberman, “Coronavirus: Accessibility advocate calls on Ford government to provide support for special needs students” *Global News* (20 May 2020), online: < [globalnews.ca](https://globalnews.ca) >.

<sup>86</sup> Michelle Phoenix, “Children with disabilities face health risks, disruption and marginalization under coronavirus” (11 May 2020), online: *The Conversation* < [theconversation.com](https://theconversation.com) >.

"one of my kids has 5 siblings and two of them are in high school, so my little guy is in grade 2 and his sister is in grade 1 and they never get on... like *they just say like 'my brother he's using the Chromebook.'*"<sup>87</sup> Although many school boards made the effort to distribute devices to students, there were frequent delays in getting devices into the hands of those who needed them.<sup>88</sup> The Toronto District School Board, the largest school board in the province, predicted that it would take until early May 2020 to distribute devices to waiting students.<sup>89</sup>

Beyond economic barriers, geographic discrepancies in regard to technology were seen as well. A survey by Autism Ontario of families with students on the autism spectrum during the Learn at Home period found that parents in Northern Ontario, where many communities still have limited options for high-speed internet, were eight times more likely than parents in the Greater Toronto Area (GTA) to identify internet bandwidth as a technological barrier to emergency learning.<sup>90</sup>

Much of the burden to accommodate and teach students with disabilities was shifted onto the shoulders of parents and families, creating varied experiences that were frequently dependent on the amount of time parents could set aside to assist with distance learning.<sup>91</sup> This disadvantaged children who came from single-parent households or whose parents held jobs that did not provide parents with sufficient time to assist their children with school work. This was particularly salient for parents of children with disabilities, who in some cases were forced to assume the roles of parent, teacher, support staff, and more virtually overnight.<sup>92</sup> One mother described the experience saying, "As a parent, I suddenly felt like I had to take on... all of her therapy, all of her learning, *plus just being her mom at home.*"<sup>93</sup> An essential worker and single parent of two in Toronto, including a child with a disability, described their

---

<sup>87</sup> Timmons et al, *supra* note 2 at 10.

<sup>88</sup> *Ibid.*

<sup>89</sup> Alastair Sharp, "Pandemic-forced home-schooling widens the digital divide", *Canada's National* (24 April 2020), online: < [www.nationalobserver.com](http://www.nationalobserver.com) >.

<sup>90</sup> Autism Ontario, *supra* note 77 at 4.

<sup>91</sup> Jessica Wong, "Pandemic leaves students with disabilities disconnected from peers and short on support" (4 December 2020), online: CBC News < [www.cbc.ca](http://www.cbc.ca) >.

<sup>92</sup> Brittney Rosen, "Durham families fear COVID-19 effect on autistic children's education", *Global News* (26 August 2020), online < [globalnews.ca](http://globalnews.ca) >.

<sup>93</sup> Trick, *supra* note 70.

experience during the Learn at Home period saying, “For me, I’ve just had to say to the school, *this isn’t working for my family.*”<sup>94</sup>

### Social Isolation and Loneliness

The loss of peer connections during the Learn at Home period was particularly felt by students with disabilities, who may have a greater reliance on school-based networks for establishing friendships.<sup>95</sup> In a national study by Statistics Canada, approximately 6 in 10 parents of children with disabilities were “very” or “extremely concerned” that their children would experience loneliness or isolation, compared to approximately 5 in 10 parents of children without disabilities.<sup>96</sup>

### Frustration with Short-term Responses to the Crisis

Parents and advocates also expressed frustration with the decentralized and short-term response to the crisis from both the Ministry of Education and school boards, particularly the failure to plan for a long-term crisis. In March 2020, the Ontario government announced a three-week closure to combat the virus.<sup>97</sup> On April 26th 2020, the government announced that it was extending school closures to at least May 31st, 2020.<sup>98</sup> This was followed finally by an announcement on May 19th 2020 that schools would remain closed for the remainder of the 2019-20 school year.<sup>99</sup>

During the Learn at Home period, parents of many students expressed frustration with the lack of a clear, long-term plan. Speaking again of students more generally, one parent of an early primary student expressed frustration that, “our Director of Education adores calling this “Emergency Remote Learning,” however, we are going to hit a point where I’m going to *stop thinking it’s reasonable to call it an emergency.*”<sup>100</sup>

---

<sup>94</sup> Jeffords *supra* note 79.

<sup>95</sup> Whitley, *supra* note 33.

<sup>96</sup> Arim, Findlay & Kohen, *supra* note 83.

<sup>97</sup> Laura Stone, Jeff Gray, & Caroline Alphonso, “Ontario to close all public schools for two weeks after March break” *The Globe and Mail* (last modified 13 March 2020), online < [www.theglobeandmail.com](http://www.theglobeandmail.com) >.

<sup>98</sup> “School Closures Extended to Keep Students, Staff and Families Safe” (26 April 2020), online: Government of Ontario < [news.ontario.ca](http://news.ontario.ca) >.

<sup>99</sup> “Ontario schools will not re-open for remainder of school year”, *City News* (19 May 2020), online: < [toronto.citynews.ca](http://toronto.citynews.ca) >.

<sup>100</sup> Timmons et al, *supra* note 2 at 24.

Moving into the Fall, reopening plans for the 2020-21 school year caused further frustration, particularly for parents of children with disabilities deciding whether or not their child could safely return to in-person learning. Parents experienced frustration that details regarding the return to school remained unfinalized up to a week before the start of classes.<sup>101</sup>

## Benefits & Successes

Despite the challenges faced by many learners during emergency learning, it is important to note that the shift presented a positive experience for some learners, providing important lessons that can help to improve learning beyond the crisis, as well as in future instances of emergency learning.

### Increased Flexibility for Learners

Distance learning did not prove to be an issue for all students. Some students in Ontario who have struggled with a more structured school day have benefitted from the ability to work at a more relaxed, self-directed pace.<sup>102</sup> While detailed sources were difficult to locate in the Ontario context at the time of this paper, documented experiences of students in the other jurisdictions has demonstrated that some students with disabilities have thrived in an online learning environment due to reduced distractions, fewer social challenges, and increased flexibility to manage their own time and work environment. A seventh-grade student in Boston, Massachusetts who has attention deficit hyperactivity disorder (ADHD) and a language disorder found that his concentration improved significantly when he began to play music at home while working on his schoolwork. He wished his school would be more accommodating regarding this strategy, telling his parents “*I wish I could do this in school; I bet I could do so much better, and I could concentrate better.*”<sup>103</sup>

<sup>101</sup> Bobby Hristova, “Schools set to open: Students, parents, teachers on edge, with ‘Herculean tasks at the 11th hour’” CBC News (7 September 2020), online: < [www.cbc.ca](http://www.cbc.ca) >.

<sup>102</sup> Whitley, *supra* note 33.

<sup>103</sup> Azure Gilman, “Remote learning has been a disaster for many students. But some kids have thrived”, *The Washington Post* (3 October 2020), online: < [www.washingtonpost.com](http://www.washingtonpost.com) >.

### **New Technologies Facilitating Accessibility**

While technology has created many inequities for some students with disabilities, other students have benefitted from the technology incorporated into emergency learning. Likewise, detailed sources on this topic in the Ontario context were difficult to locate at the time of this paper, however, some experiences may be extrapolated from other jurisdictions. A 12-year-old student in the United States with low vision and bilateral cochlear implants (an electronic device that improves a person's ability to hear), for example, found that video conferencing platforms improved his experience in school. It was easier for him to see his teacher on screen rather than from across a classroom, and small group discussions were easier to hear in "breakout rooms" without the background chatter of other students typical of a regular classroom.<sup>104</sup>

### **Increased Parental Involvement in (Some) Children's Education**

For some parents privileged enough to spend more time one-on-one with their child during the Learn at Home period, remote learning offered many a new window into their child's education, revealing their children's strengths and areas where their children may be struggling. One Ontario parent, for example, discussed how their child's teachers had previously recommended they be tested for ADHD and ASD. While the parent admitted they had struggled to understand why before the Learn at Home period, they told researchers: "having her home has really sort of made me go 'oh wow, how did I miss these things'... we're now on the path to getting some assessments done."<sup>105</sup>

### **Analyzing the Experience of Students with Disabilities during the Learn at Home through a Rights-based Approach**

The experiences of students with disabilities during the Learn at Home period were diverse, including both negative and positive experiences. This paper does not assume a singular experience of students with disabilities or pretend to capture the

---

<sup>104</sup> *Ibid.*

<sup>105</sup> Timmons et al, *supra* note 2 at 30.

totality of experiences felt by students with disabilities during this period. Students have diverse needs that must be addressed individually. The CRPD requires that states provide “effective individualized support measures” under Article 24(2)(e),<sup>106</sup> and a guiding principle for the duty to accommodate is individualization under the Code.<sup>107</sup> Instead, this paper uses the common themes and responses identified above to identify broader patterns of failure of the Government of Ontario, school boards, schools, and educators to respect the rights of students with disabilities during the Learn at Home period. Analyzing the responses during this period will help to better identify lessons that may be learned from the crisis.

An analysis of the above themes shows that some students with disabilities experienced instances of discrimination during this period on the basis of their disability. Many students failed to receive required accommodations. While some failures to accommodate may have been justified under undue hardship as a consequence of health and safety requirements, many schools and educators failed to sufficiently engage with families regarding how a student’s needs could be accommodated, often failing the procedural requirement of duty to accommodate.

### Discrimination

Under Article 24(1) of the CRPD, students with disabilities have a right to an education at all levels “without discrimination and on the basis of equal opportunity.”<sup>108</sup> In order to identify whether discrimination towards some students with disabilities may have been present during the Learn at Home period, this essay will refer back to the test discussed earlier under the Code. To begin, a student must show that they are have a characteristic protected from discrimination. For students with disabilities, this is easily satisfied, as disability is a protected ground. Second, a student must show that they have experienced an adverse impact in a social area protected by the Code. For students who experience discrimination in schools, this is also easily satisfied as education is considered a service under the Code.<sup>109</sup>

---

<sup>106</sup> CRPD, *supra* note 24 at article 24.

<sup>107</sup> OHRC, *supra* note 23 at 42-45.

<sup>108</sup> CRPD, *supra* note 24 at article 24(1).

<sup>109</sup> OHRC, *supra* note 23 at 29-38.



Thirdly, students must demonstrate that this characteristic was a factor in the adverse impacts they experienced.<sup>110</sup> This prong of the test could be difficult for some students to satisfy when looking at the common themes we have identified. It is a truism to assert that the events of this period were unprecedented. Wide segments of society were impacted by COVID-19, including students both with and without disabilities. As the SCC details in *Moore*, the comparator group to determine discrimination is not other students with disabilities, but rather whether students with disabilities have the same genuine access as all students.<sup>111</sup> Article 24(2)(b) of the CRPD also requires students to provide “inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live” [emphasis mine].<sup>112</sup> Some challenges experienced by students with disabilities during this period may raise other rights claims, such as students with disabilities in rural areas who could not access remote learning, however, if they were also shared by students without disabilities, they may not rise to discrimination *on the basis of a disability*. Other challenges, such as the TVO online resources being inaccessible, would however, satisfy this prong of the test. While students without disabilities may have enjoyed genuine access to these resources, students with disabilities could not as they were inaccessible. The finding of discrimination would occur irrespective of intent, even if efforts were made in good faith to create engaging online resources for all learners.<sup>113</sup>

Discrimination may take a variety of forms, including systemic discrimination. Systemic discrimination in education occurs when attitudes, behaviors, or practices appear neutral on the surface, yet have an “adverse effect or exclusionary impact on students with disabilities.”<sup>114</sup> From a review of the themes identified, possible instances of systemic discrimination were apparent. For example, while the shift to online learning occurred for all students, particular adverse impacts were felt by students with disabilities who struggled to learn through a screen.

---

<sup>110</sup> *Ibid.*

<sup>111</sup> *Moore*, *supra* note at paras 28-31.

<sup>112</sup> CRPD, *supra* note 24 at article 24(3)(b).

<sup>113</sup> OHRC, *supra* note 23 at 29-38.

<sup>114</sup> OHRC, *supra* note 23 at 36.

## Accommodations

Under article 24(2)(c) of the CRPD, states are required to grant “reasonable accommodations” to persons with disabilities in educational contexts,<sup>115</sup> and under article 24(2)(d) of the CRPD states are required to ensure that “Persons with disabilities receive the support required, within the general education system, to facilitate their effective education.”<sup>116</sup> Schools are required to grant timely accommodations under the *Education Act*,<sup>117</sup> and under the Code students are required to receive accommodations to ensure they can enjoy the full benefits of their education, when they “are adversely affected by a requirement, rule or standard.”<sup>118</sup> In the context of the Learn at Home period, the requirements of emergency education created many adverse impacts on students with disabilities, including struggles with a lack of a consistent schedule,<sup>119</sup> difficulty with following along with online learning,<sup>120</sup> inaccessible resources,<sup>121</sup> and separation from therapies and other supports received in school.<sup>122</sup>

Related to the substantive element of the duty to accommodate, many families felt that they did not receive the accommodations necessary for their child to learn during this period. Returning, for example, to the EA who described making homemade play dough and videotaping herself reading stories to accommodate students this period, this EA admitted that other EAs she worked with did not adjust their teaching for students in the same manner.<sup>123</sup>

Arguably, however, a more significant issue during this period related to the procedural element of a duty to accommodate, and the requirement for educational providers to engage in a meaningful interaction with all parties to determine whether a student’s needs may be accommodated. As identified during the discussion of themes, parents frequently expressed frustration at the lack of willingness from some schools and

<sup>115</sup> CRPD, *supra* note 24 at article 24(3)(c).

<sup>116</sup> CRPD, *supra* note 24 at Article 24(3)(d).

<sup>117</sup> OHRC, *supra* note 32.

<sup>118</sup> OHRC, *supra* note 23 at 41.

<sup>119</sup> Trick, *supra* note 70.

<sup>120</sup> Jeffords, *supra* note 79.

<sup>121</sup> Ontario Autism Coalition, *supra* note 80 at 00h44m34s.

<sup>122</sup> Lieberman, *supra* note 85.

<sup>123</sup> Trick, *supra* note 70.

educators to engage with them to accommodate or make adjustments for their child. This was embodied in the frustration of the one parent who had indicated that their daughter's school "basically [was not] going to do anything for kids with IEPs."<sup>124</sup> Even if failures to accommodate could be justified on the basis of undue hardship, educational providers may have still breached their failure to accommodate on account of failing to fulfill this procedural element.

### Undue Hardship

Turning now to assess whether potential accommodations would pose undue hardship, it must be assessed whether accommodations would cause undue hardship "considering the cost, outside sources of funding, if any, and health and safety requirements."<sup>125</sup> In relation to cost, this is difficult to assess broadly given the varied accommodations that could be provided to address students' diverse needs. However, given the high threshold that has been articulated, that accommodations must be "so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability"<sup>126</sup> to constitute undue hardship, educational providers would likely not have succeeded on this point for students who required more moderate accommodations. The question of whether outside sources of funding were available would also be a very fact-based inquiry that is difficult to address in this broad analysis.

A more interesting analysis is related to health and safety requirements. During the Learn at Home period, school closures were required to ensure the safety of all students and staff, as well as to limit the spread of the virus in the broader community. To prevent the spread of COVID-19, most students had little, if any, in-person interaction with their schools or educators during this time, with the exception of things like receiving distributed technology,<sup>127</sup> and retrieving items left at school. These few interactions were done with precautions including masks and social distancing.<sup>128</sup>

---

<sup>124</sup> *Ibid.*

<sup>125</sup> *Human Rights Code*, *supra* note 45 at s 11(2).

<sup>126</sup> OHRC, *supra* note 23 at 85.

<sup>127</sup> "Frequently Asked Questions - OCSB At Home" (last visited 6 December 2020), online: Ottawa Catholic District School Board < [www.ocsb.ca](http://www.ocsb.ca) >.

<sup>128</sup> "Collecting & Returning Items from School" (4 June 2020), online: Ottawa Catholic School Board < [www.ocsb.ca](http://www.ocsb.ca) >.

While these health and safety measures often created barriers, an assessment of risk would have likely concluded that they could not be waived or modified. If waiving a health or safety measure poses risks to a student, education providers have the responsibility to explain this risk to parents, allowing them to assess the risk. However, this applies only when the risk is to a student themselves. When waiving a health or safety measure poses risks to others, this must be balanced with the rights of others, with consideration of suitable precautions. In regard to COVID-19, during this period there were many unknowns about how the virus could spread in a school environment. The virus posed significant risks to students and staff alike. In some instances, this could bring the rights of students with disabilities into conflict with the rights of other people within schools.<sup>129</sup> For example, in regards to the theme of students struggling without in-person therapies received at school, the provision of in-person services during this period would have to be balanced with the safety and rights of therapists and other support workers. Educational providers would be required to take steps to balance these rights. In some instances, the denial of accommodations may have been justified due to undue hardship as a consequence of health and safety requirements, in order to keep students and staff safe.

## Lessons Learned

COVID-19 exposed many inequities in society, and a consistent message in regard to the challenges posed by pandemic has been a call to “build back better.” Speaking of her experience during the COVID-19 pandemic, a parent of a student with a disability commented, “Even before COVID, the resources in the schools were lacking... COVID has really exposed those holes in our system and the things that we’re lacking for kids with disabilities to be able to succeed.”<sup>130</sup> In regards to students with disabilities, there have been calls to “build back resilient” to “ensure that education systems are more flexible, equitable, and inclusive.”<sup>131</sup>

---

<sup>129</sup> OHRC, *supra* note 23 at 87-98.

<sup>130</sup> Gillmore, *supra* note 18.

<sup>131</sup> United Nations, *supra* note 5 at 23.

Moreover, as the world faces the growing crisis of climate change, many have reflected on the lessons learned during COVID-19 educational disruptions to better prepare for the possibility of emergency learning that is likely to occur in the coming years as a consequence of climate change-related disasters.<sup>132</sup>

### Developing Long-term Responses to Educational Disruptions

A significant lesson learned as a consequence of the response to the pandemic was the lack of preparedness by schools to deal with educational disruptions. Experts in the humanitarian and global development sectors expressed frustration during school closures, arguing that authorities failed to take into account lessons learned from previous work in education in emergencies. One of the central lessons that many governments failed to heed was to “plan for school closures that last months, not weeks.”<sup>133</sup> In the future, by accepting that disruptions will continue for an extended period of time, governments, school boards, and educators can develop effective long-term plans, including sufficient consideration for the needs of students with disabilities.

Furthermore, long-term plans enable governments and institutions to build back better. A 1999 UNICEF report argued that emergency education should not just exist as “short-term stopgap measures but rather as rapid response activities with longer-term development goals.”<sup>134</sup> In the Canadian context, long-term planning for emergency education for students with disabilities could lead to the development of tools and strategies, such as more accessible online tools or improved access to technology, that continue to improve education for students with disabilities even after a crisis has ended.

---

<sup>132</sup> Justin Worland, “The Debate About Reopening Schools Is a Preview of Climate-Related Disruption to Come”, *TIME* (18 August 2020), online: < [time.com](https://www.time.com) >.

<sup>133</sup> Rebecca Winthrop, “COVID-19 and school closures: What can countries learn from past emergencies?” (31 March 2020), online: *Brookings* < [brookings.edu](https://www.brookings.edu) >.

<sup>134</sup> *Ibid.*

## Adopting the Universal Design for Learning Approach

In response to the COVID-19 pandemic, many families of children with disabilities felt that government responses once again demonstrated that educational systems are designed with children without disabilities in mind, and that children with disabilities are often treated as an “afterthought.”<sup>135</sup>

Advocates have called for a shift to a “universal design for learning” (UDL) approach to the design of educational policies.<sup>136</sup> The concept builds off the approach of “universal design” in physical environments, that seeks to structure environments so that they are as universally accessible as possible. UDL expands this concept of removing barriers to the design of barrier-free learning environments and educational lessons, with the needs of all students kept in mind.<sup>137</sup> The concept centers around three principles: “give learners different ways to acquire information through multiple means of representation; give learners different ways to demonstrate learning through multiple means of expression; and tap into learners’ motivation and interests through multiple means of engagement.”<sup>138</sup> In practice in elementary school classrooms, UDL has been applied through strategies such as providing students multiple options to complete an assignment, providing flexible work spaces, and offering print and audio reading materials.<sup>139</sup> The approach has been identified by the OHRC as the “preferred approach to removing barriers or making “one-off” accommodations,”<sup>140</sup> and the OHRC has encouraged educational providers to incorporate these principles in the creation of any new systems, or the revision of old ones. The United Nations’ Committee on the Rights of Persons with Disabilities has also encouraged state parties of the CRDP to adopt the approach.<sup>141</sup>

---

<sup>135</sup> Waberi, *supra* note 3.

<sup>136</sup> Ardavan Elizadirad & Steve Sider, “Schools after coronavirus: Seize ‘teachable moments’ about racism and inequities”, online: *The Conversation* < [theconversation.com](http://theconversation.com) >.

<sup>137</sup> Loui Lord Nelson, *Design and Deliver : Planning and Teaching Using Universal Design for Learning* (Baltimore: Brookes Publishing, 2013) at 1-6.

<sup>138</sup> Alberta Government, “Making Sense of Universal Design for Learning” (last visited 6 December 2020) online (pdf): *Alberta Government* < [education.alberta.ca](http://education.alberta.ca) >.

<sup>139</sup> CAST, “5 Examples of Universal Design for Learning in the Classroom” (last visited 6 December 2020), online: *Understood* < [www.understood.org](http://www.understood.org) >.

<sup>140</sup> OHRC, *supra* note 23 at 46.

<sup>141</sup> *Ibid* at 48-49.

In another crisis, the principles of UDL could be extended to the planning of education in emergencies, with the needs of all students kept in mind. This could include planning for diverse methods of instruction and assessment, such as the distribution of printed materials rather than a heavy reliance on internet-based platforms. In contrast to the province's materials made available through TVO, ensuring that online lessons are accessible, with closed-captioning, appropriate contrast, and text-to-speech compatibility, from the time they are first made available would assist all students. Other examples that have been given in a remote learning context include use of asynchronous lessons (or recording synchronous lessons) that provide flexibility to students and provide students the opportunity to review content as many times as needed. Effective use of closed-captioning features and audio descriptions are also strongly encouraged.<sup>142</sup> The use of these strategies would benefit all students, not just students with disabilities. As highlighted by the OHRC, a proactive approach that ensures inclusion from the start is preferable to barrier removal.<sup>143</sup>

In regards to building back better, many educators have already expressed a desire to incorporate the lessons learned from the positive experiences of students with disabilities into the post-crisis educational environment, including the use of new technologies and flexible learning environments that reflect principles of UDL. For example, this can include providing students with greater flexibility to determine their work environment, such as allowing students to listen to music when working. These changes could improve learning outcomes for students with disabilities and students without disabilities alike.<sup>144</sup>

### Ensuring Access to Technology

Just months prior to the start of the COVID-19 pandemic, Ontario's four teachers unions engaged in strike action after contract negotiations with the Government of Ontario reached a deadlock. One of the central sticking points at the time was the government's plans to adopt mandatory online courses for high school students (the government initially proposed a mandatory

---

<sup>142</sup> Terri Eichholz, "Applying Universal Design for Learning in remote classrooms" (14 July 2020), online: NEO Blog < [blog.neolms.com](http://blog.neolms.com) >.

<sup>143</sup> OHRC, *supra* note 23 at 47.

<sup>144</sup> Gillmore, *supra* note 18.

requirement of four courses over a student’s high school career, that was later lowered to two). Teachers unions had raised significant objections to this proposal, arguing that many students did not have access to the required technology to complete these courses, that students with disabilities would struggle without adequate support, and that online courses have been shown to have very low pass rates.<sup>145</sup>

While no one could anticipate that in a few short months all learners in Ontario would be attempting online learning, COVID-19 re-affirmed many of these fears. As detailed in the themes section, many students struggled with access to needed technology and lack of in-person support during this period. In response to the issues posed by the digital divide during the pandemic, some have called for expanding the definition of the right to education to include a connectivity entitlement.<sup>146</sup> In their guidance for remote learning following the pandemic, UNICEF has offered the guidance that, “Remote learning programs need to be designed around modalities that are accessible to all children and adapted for households that do not have access to broadcast or digital media.”<sup>147</sup> As governments and school boards work to create policies in the future, in both the context of emergency learning and in the everyday context, they can no longer engage in the fallacy that all students have adequate access to technology at home for remote learning without increased investment.

### Proactive Approaches to Accommodation

As Abella J. wrote that in Moore, “Adequate special education... is not a dispensable luxury.”<sup>148</sup> Educational providers hold obligations to provide timely accommodations under the CRPD,<sup>149</sup> the *Education Act*,<sup>150</sup> and the Code.<sup>151</sup> In the Learn at Home period, families often felt forgotten by educators, and that their concerns were not being heard. Many of these challenges reflect frustrations that pre-existed the Learn at Home

---

<sup>145</sup> Jamie Mauracher, “What is e-learning and why does it have some Ontario teachers concerned?” *Global News* (21 January 2020), online: < [globalnews.ca](https://globalnews.ca) >.

<sup>146</sup> United Nations, *supra* note 5 at 24.

<sup>147</sup> UNESCO, *supra* note 14 at 1.

<sup>148</sup> Moore, *supra* note 55 at para 5

<sup>149</sup> CRPD, *supra* note 24 at art 24.

<sup>150</sup> OHRC, *supra* note 32.

<sup>151</sup> OHRC, *supra* note 23 at 41.



period, with years of families reporting that schools often failed to meet their obligations to provide required accommodations.

Schools and educators must meet their obligations to provide accommodations, including both procedural and substantive aspects to duty. A renewed emphasis on engaging with families would help to address barriers felt by students with disabilities, and ensure students receive the accommodations they are entitled to. In future instances of emergency learning, greater communication between students, families, and educational providers would help to fulfill the duty to accommodate.

## Conclusion

A United Nations report on the impact of COVID-19 on the education of students with disabilities emphasized the need to prevent a “learning crisis” from becoming a “generational catastrophe.”<sup>152</sup> The Government of Ontario’s Learn from Home initiative for the remainder of the 2019-20 school year sought to address this crisis, yet ultimately fell short.<sup>153</sup> These shortfalls reflected long-standing barriers faced by students with disabilities in accessing equal educational opportunities in Ontario. Viewing the experience of children with disabilities through the lens of rights-based approach to education, some students with disabilities faced instances of discrimination during this period, as well a lack of accommodations. While some instances of a failure to accommodate may have been justified by undue hardship, educational providers often failed to sufficiently engage with families, failing the procedural requirement of duty to accommodate. The lessons that can be extrapolated from this period may, however, assist in “building back better” and help governments better prepare for future emergencies. These lessons would help to ensure that students with disabilities only have to worry about doing their very best.

---

<sup>152</sup> United Nations, *supra* note at 3.

<sup>153</sup> Kristy Timmons et al, *supra* note 2 at 2.

## Bibliography

### LEGISLATION

*Human Rights Code*, RSO 1990, c H-19.

### JURISPRUDENCE

*Moore v British Columbia (Education)*, 2012 SCR 360

### INTERNATIONAL MATERIALS

*Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTS 3 at art 24 (entered into force 3 May 2008) [UN CRPD].

UNESCO, "Adverse consequences of school closures" (last visited 4 December 2020), online: UNESCO < [unesco.org](https://unesco.org) >.

UNICEF, "A Human Rights-Based Approach for Education for All" (2007), online (pdf): UNESCO < [unesdoc.unesco.org](https://unesdoc.unesco.org) >.

UNICEF, "COVID-19: At least a third of the world's schoolchildren unable to access remote learning during school closures, new report says" (26 August 2020), online: UNICEF < [www.unicef.org](https://www.unicef.org) >.

UNICEF East Asia and Pacific Region, "Ensuring an inclusive return to school for children with disabilities" (2020), online (pdf): Relief Web < [reliefweb.int](https://reliefweb.int) >.

United Nations, "Policy Brief: Education during COVID-19 and beyond" (2020), online (pdf): United Nations < [un.org](https://un.org) >.

## SECONDARY MATERIAL: MONOGRAPHS

Nelson, Loui Lord, *Design and Deliver : Planning and Teaching Using Universal Design for Learning* (Baltimore: Brookes Publishing, 2013).

## GOVERNMENT DOCUMENTS

"Accommodating students with disabilities - Roles and responsibilities (fact sheet)" (last visited 6 December 2020), online: Ontario Human Rights Commission < [www.ohrc.on.ca](http://www.ohrc.on.ca) >.

Alberta Government, "Making Sense of Universal Design for Learning" (last visited 6 December 2020) online (pdf): Alberta Government < [education.alberta.ca](http://education.alberta.ca) >.

"Elementary and secondary education", (last visited 6 December 2020), online: Ontario Human Rights Commission < [www.ohrc.on.ca](http://www.ohrc.on.ca) >.

Government of Ontario Ministry of Education, "Draft - Special Education in Ontario Kindergarten to Grade 12 Policy and Resource Guide" (2017), online (pdf): Government of Ontario < [www.edu.gov.on.ca](http://www.edu.gov.on.ca) >.

"Policy on accessible education for students with disabilities" (2018), online (pdf): Ontario Human Rights Commission < [www.ohrc.on.ca](http://www.ohrc.on.ca) >.

"School Closures Extended to Keep Students, Staff and Families Safe" (26 April 2020), online: Government of Ontario < [news.ontario.ca](http://news.ontario.ca) >.

"The Opportunity to Succeed: Achieving Barrier-Free Education for Students with Disabilities in Ontario" (2002), online (pdf): Ontario Human Rights Commission < [www3.ohrc.on.ca](http://www3.ohrc.on.ca) >.

"Who's responsible for your child's education?" (last accessed 6 December 2020), online: Government of Ontario < [www.edu.gov.on.ca](http://www.edu.gov.on.ca) >.

"2. The Code prevails over other laws" (last visited 6 December 2020), online: Ontario Human Rights Commission < [www.ohrc.on.ca](http://www.ohrc.on.ca) >.

## SECONDARY MATERIAL: ARTICLES

Harnacke, Caroline, "Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention" (2013) 41:4 JL Med & Ethics 768.

Koshan, Jennifer, "Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the Charter" (2014) 3:1 Can J Hum Rts 115.

Meekosha, Helen, & Karen Soldatic, "Human rights and the Global South: the Case of Disability" (2011) 32:8 Third World Q 1383.

Murdoch, Blake, Eric M Adams & Timothy Caulfield, "The law of food allergy and accommodation in Canadian schools" (2018) Allergy, Asthma & Clinical Immunology 14:1 1.

Stephens, Lindsay, et al, "The Accessibility of Elementary Schools in Ontario, Canada: Not Making the Grade" (2015) 25:2 Children, Youth and Environments 153.

## SECONDARY MATERIAL: ELECTRONIC SOURCES

CAST, "5 Examples of Universal Design for Learning in the Classroom" (last visited 6 December 2020), online: Understood < [www.understood.org](http://www.understood.org) >.

“Collecting & Returning Items from School” (4 June 2020),  
online: *Ottawa Catholic School Board* < [www.ocsb.ca](http://www.ocsb.ca) >.

El Shennawy, Leila, “‘It’s labour intense. It’s emotional’: In Ontario, parents of children with developmental disabilities face back-to-school challenges”, *The Pigeon* (16 September 2020), online: < [the-pigeon.ca](http://the-pigeon.ca) >.

Elizadirad, Ardavan, & Steve Sider, “Schools after coronavirus: Seize ‘teachable moments’ about racism and inequities”,  
online: *The Conversation* < [theconversation.com](http://theconversation.com) >.

“Frequently Asked Questions - OCSB At Home” (last visited 6 December 2020), online: *Ottawa Catholic District School Board* < [www.ocsb.ca](http://www.ocsb.ca) >.

Gillmore, Meagan, “Families of kids with disabilities worried they’ll lose a year of learning”, *TVOntario* (6 October 2020), online: < [www.tvo.org](http://www.tvo.org) >.

Gilman, Azure, “Remote learning has been a disaster for many students. But some kids have thrived”, *The Washington Post* (3 October 2020), online: < [www.washingtonpost.com](http://www.washingtonpost.com) >.

Hristova, Bobby, “Schools set to open: Students, parents, teachers on edge, with ‘Herculean tasks at the 11th hour’” *CBC News* (7 September 2020), online: < [www.cbc.ca](http://www.cbc.ca) >.

“I Will Teach You Now on ZOOM... Poem for Kids” (31 March 2020), online: *TeachersMag* < [teachersmag.com](http://teachersmag.com) >.

Jeffords, Shawn, “Online learning begins for students across Ontario as COVID-19 closures continue”, *Global News* (6 April 2020), online: < [globalnews.ca](http://globalnews.ca) >.

Lach, Lucyna, and Donna Thomson, "Children with disabilities disproportionately affected by pandemic" *iPolitics* (16 October 2020), online: < [ipolitics.ca](http://ipolitics.ca) >.

Lieberman, Caryn, "Coronavirus: Accessibility advocate calls on Ford government to provide support for special needs students" *Global News* (20 May 2020), online: < [globalnews.ca](http://globalnews.ca) >.

Mauracher, Jamie, "What is e-learning and why does it have some Ontario teachers concerned?" *Global News* (21 January 2020), online: < [globalnews.ca](http://globalnews.ca) >.

McClain-Nhlapo, Charlotte, "An Inclusive Response to COVID-19: Education for Children with Disabilities" (11 May 2020), online: *Global Partnership for Education* <[globalpartnership.org](http://globalpartnership.org)>.

"Ontario schools will not re-open for remainder of school year", *City News* (19 May 2020), online: < [toronto.citynews.ca](http://toronto.citynews.ca) >

Ontario Autism Coalition, "Virtual Townhall on Students With Disabilities During COVID" (4 May 2020) at 00h44m34s, online: (video): YouTube < [www.youtube.com](http://www.youtube.com) >.

Phoenix, Michelle, "Children with disabilities face health risks, disruption and marginalization under coronavirus" (11 May 2020), online: *The Conversation* < [theconversation.com](http://theconversation.com) >.

Porter, Catherine, "In Canada, a Push to Keep Schools Open in Second Lockdown", *The New York Times* (23 November 2020), online: < [www.nytimes.com](http://www.nytimes.com) >.

Rosen, Brittney, "Durham families fear COVID-19 effect on autistic children's education", *Global News* (26 August 2020), online < [globalnews.ca](https://globalnews.ca) >.

Rushowy, Kristin, & Isabel Teotonio, "Ontario launches 'learn at home' online program for students during school shutdown", *Toronto Star* (20 March 2020), online < [www.thestar.com](https://www.thestar.com) >.

Sharp, Alastair, "Pandemic-forced home-schooling widens the digital divide", *Canada's National* (24 April 2020), online: < [www.nationalobserver.com](https://www.nationalobserver.com) >.

Stone, Laura, Jeff Gray, & Caroline Alphonso, "Ontario to close all public schools for two weeks after March break" *The Globe and Mail* (last modified 13 March 2020), online < [www.theglobeandmail.com](https://www.theglobeandmail.com) >.

Trick, Sarah, "The government's school-reopening plan ignores kids with disabilities, say critics", *TVOntario* (2 September 2020), online: < [www.tvo.org](https://www.tvo.org) >.

Waberi, Osobe, "Students with disability face more obstacles amid coronavirus: advocates" *Global News* (22 August 2020), online: < [globalnews.ca](https://globalnews.ca) >.

Whitley, Jess, "Coronavirus: Distance learning poses challenges for some families of children with disabilities" (1 June 2020), online: *The Conversation* < [theconversation.com](https://theconversation.com) >.

Worland, Justin, "The Debate About Reopening Schools Is a Preview of Climate-Related Disruption to Come", *TIME* (18 August 2020), online: < [time.com](https://time.com) >.

Winthrop, Rebecca, "COVID-19 and school closures: What can countries learn from past emergencies?" (31 March 2020), online: *Brookings* < [brookings.edu](https://brookings.edu) >.

Wong, Jessica, "Pandemic leaves students with disabilities disconnected from peers and short on support" (4 December 2020), online: CBC News < [www.cbc.ca](http://www.cbc.ca) >.

## SECONDARY MATERIAL: REPORTS

ARCH Disability Law Centre, "Access to Education for Students with Disabilities during the COVID-19 Crisis" (3 July 2020), online: ARCH Disability Law Centre < [archdisabilitylaw.ca](http://archdisabilitylaw.ca) >.

ARCH Disability Law Centre et al, "If Inclusion Means Everyone, Why Not Me?" (2018), online (pdf): ARCH Disability Law Centre < [archdisabilitylaw.ca](http://archdisabilitylaw.ca) >.

Arim, Rubab, Leanne Findlay & Dafna Kohen, "The impact of the COVID-19 pandemic on Canadian families of children with disabilities" (2020), online: Statistics Canada < [/www150.statcan.gc.ca](http://www150.statcan.gc.ca) >.

Autism Ontario, "READINESS FOR THE SAFE AND SUCCESSFUL RETURN TO SCHOOL" (2020), online (pdf): < [www.autismontario.com](http://www.autismontario.com) >.

Timmons, Kristy, et al, "Examining the implementation and impact of the COVID-19 remote teaching initiative in Ontario early primary education contexts" (2020), online (pdf): Queen's University Faculty of Education < [static1.squarespace.com](http://static1.squarespace.com) >.