

**University of Windsor  
Senate**

**5.8.1: Review of Special Needs Policy**

Item for: **Discussion**

**Special Needs Policy Review**

*[Review conducted by: Raj Anan, Lawyer specializing in Human Rights]*

“Generally speaking, the policy represents a reasonably fair and accurate statement of the respective rights and obligations of the University and its students. I have some substantive comments on ways in which the policy can be improved:

1. There is no specific reference to the procedural obligation that has been part of the duty of accommodation at least since the *Meiorin* decision of the Supreme Court of Canada. In other words, when it receives a request for accommodation, the University has a procedural duty to take reasonable steps to obtain information, examine alternatives, consult with the student, maintain confidentiality and weigh available accommodations. While a good deal of the content of this procedural duty is covered in the policy, it would be worthwhile in my view to recognize the procedural duty explicitly.
2. Conversely, the student has a duty to disclose sufficient information and cooperate with the University in fashioning an appropriate accommodation. In other words, accommodation is a "two way street". Again, there is some reference to the student's obligations in the accommodation exercise, but it would be helpful to specifically state the complementary nature of the parties' obligations.
3. On the meaning of undue hardship, which is discussed under heading 4 on page 2 of the policy, I would note that the three numbered considerations (cost, outside sources of funding and health and safety requirements) are in fact the only factors to be taken into account in assessing undue hardship under the *Ontario Human Rights Code*. Other factors were in fact included in the original 1986 Bill and were removed before the post-*Charter* amendments to the *Code* were passed. I do not deny that labour arbitration jurisprudence, particularly in other provinces, has allowed consideration of factors such as impact on other employees, which is analogous to the negative impact on other students that is mentioned in Policy S2. But the views of non-disabled students or employees, or the impact on such individuals, have to be approached with some care, because by definition accommodation does not involve identical treatment, and this may not be well understood by those who do not require accommodation. More generally, Ontario is the only province whose human rights legislation provides an exhaustive list of three factors to be considered in assessing undue hardship. The Ontario Human Rights Commission Policy and Guidelines on Disability and the Duty to Accommodate, which I wrote in their original form over 20 years ago, stipulate that undue hardship will intercede where the accommodation threatens the economic viability or essential character of the program or activity in question. The current version is at <http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2/pdf>. While this is not necessarily the legal threshold, the Policy does adopt these Guidelines.
4. Confidentiality is an important aspect of accommodation, and in my view section 1 under Operational Principles could be tightened up. First, generally speaking, the nature and severity of the disability should only be made known to the extent that it is necessary for the University to assess the validity of the accommodation request and the available choices in terms of an appropriate accommodation in the circumstances. This will not always involve disclosing the student's diagnosis, and if it does, the information about the diagnosis should be restricted by the "need to know" principle. The focus should be on the accommodation, rather than the reason it is required, unless there is a basis to question the existence or extent of the disability or the good faith of the request. Second, medical and other health-related information should generally be restricted to Student Disability Services, and should not be disclosed to faculty or staff of the University. This restriction is founded on several grounds, including the importance of confidentiality as a human rights principle of dignity and respect; the usual absence of training in these issues that is available to faculty and staff; and the need to protect them from claims that other decisions that they made were influenced by their knowledge of students' confidential health information.”