

## ARTICLE

## Reasonable Accommodation: Equal Education for Learners with Disabilities

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The concept of reasonable accommodation is integral to realising the Education Act 1989's promise of equal education for persons with disabilities. Currently, that promise is undermined by discriminatory practices in schools. Reasonable accommodation is relevant in determining whether discrimination by State schools is justified pursuant to s 5 of the New Zealand Bill of Rights Act 1990. It considers the effectiveness of accommodation measures and their burden on State schools. This article applies those considerations to the facts of *A v Hutchinson* and concludes that discrimination in the disciplinary decision at issue was not justified. Having assessed that situation, this article turns to broader policy issues of the limited effectiveness of the law in remedying discrimination by State schools and the need to upskill, educate and support educators to realise the promise of equal education.

### I Introduction

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.

—Abella J, Supreme Court of Canada<sup>1</sup>

This article analyses the human rights concept of reasonable accommodation in education for high school students with special learning needs. It demonstrates that the right to equal education for students with intellectual disabilities is not realised in practice, and it

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1 *Moore v British Columbia (Education)* 2012 SCC 61, [2012] 3 SCR 360 at [5] per Abella J.

analyses the obligation of reasonable accommodation: where does it fit in New Zealand law? What role might it play in justifying discrimination? What does the obligation entail? How useful is it in practice?

Reasonable accommodation is defined by the Convention on the Rights of Persons with Disabilities (the Disability Convention) as the “modification and adjustments” that are “necessary and appropriate” to ensure equal enjoyment of all human rights without “imposing a disproportionate and undue burden” on providers.<sup>2</sup> The Human Rights Act 1993 (HRA) prohibits “[d]iscrimination by [the] Government, related persons or bodies, or persons or bodies acting with legal authority”, and imports the analytical framework and legislative tests of the New Zealand Bill of Rights Act 1990 (NZBORA).<sup>3</sup> Failure to provide reasonable accommodation constitutes discrimination.<sup>4</sup> Section 19 of the NZBORA prohibits discrimination on a number of grounds, including disability.<sup>5</sup> Thus, discrimination by State schools on the basis of disability is unlawful unless justified under s 5 of the NZBORA.<sup>6</sup>

The author carried out an empirical study, interviewing specialists and persons with experience in this intersection of disability rights law and education.<sup>7</sup> As this article relies heavily on empirical evidence, it is appropriate that those with experience are first given the opportunity to speak for themselves. Parents described significant barriers to their children’s education relating to lack of support (“with [autism spectrum disorder], often there is no ambulance, just rocks”),<sup>8</sup> informal institutionalised stigma (“I have been through the gamut of schools not wanting my child”)<sup>9</sup> and difficulties accessing funding (“when you need the most help, you have the steepest wall to climb”).<sup>10</sup> Reasonable accommodation asks, in practice and in law: “[w]hat is *different enough treatment* to avoid a finding of discrimination, and how is that different treatment to be funded?”<sup>11</sup> Legal action is considered “out of reach in terms of cost, time and energy”.<sup>12</sup> However, participants believe that the “language of rights ... may be an antidote to a sense of

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2 Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008) [Disability Convention], art 2.

3 Human Rights Act 1993 [HRA], pt 1A.

4 Disability Convention, art 2; and *Eaton v Brant County Board of Education* [1997] 1 SCR 241 at 272 affirmed in *Smith v Air New Zealand Ltd* [2011] NZCA 20, [2011] 2 NZLR 171 at [21].

5 HRA, s 21.

6 A discrimination claim could be brought against State schools under pt 1A of the HRA or under the New Zealand Bill of Rights Act 1990 [NZBORA] itself.

7 Approval for interviews was granted by the Victoria University of Wellington Human Ethics Committee (reference number 0000022798). Eighteen disability and education experts were asked about their views and experiences regarding challenges and discrimination in the learning environment. Interviewees included: the Director of Special Education; the Disability Rights Commissioner; the former chair of the Human Rights Review Tribunal; lawyers (Human Rights Commission, Auckland Disability Law, YouthLaw); human rights advocates (partner at a law firm, QC); a school principal; the deputy principal of a special school; a specialist teacher who manages an outreach service for children with severe disabilities; a mainstream teacher with lived experience of disability; an education academic; and parents of children with disabilities who have served on school Boards of Trustees.

8 Interview with participant 17, parent (the author, 4 August 2016).

9 Interview with participant 15, parent (the author, 24 July 2016).

10 Interview with participant 17, parent, above n 8.

11 Interview with participant 4, former chair of the Human Rights Review Tribunal (the author, 26 May 2016).

12 Interview with participant 5, lawyers at Auckland Disability Law (the author, 20 June 2016).

helplessness”<sup>13</sup> facing parents who fight “daily battles” for their children’s education.<sup>14</sup> The ultimate goal is a systemic one: “an education system that meets *everybody’s* needs”,<sup>15</sup> support that begins by asking “what works best for the child”,<sup>16</sup> and schools that “understand that every student has a gift and their own capacity for development”.<sup>17</sup> These interviews motivated the author to analyse how the concept of reasonable accommodation is integrated in New Zealand law, the content of the obligation to reasonably accommodate, how reasonable accommodation might be applied in a discrimination claim and, ultimately, whether recourse to the law is an appropriate solution in this situation. The empirical study was critical to grounding this legal analysis in real-life experience, which is particularly important when telling the story of discrimination. Disability is incredibly individualised and the author does not seek to generalise these experiences—as one participant said: “[w]hen you’ve met one person with autism, you’ve met one person with autism.”<sup>18</sup> Rather, the author’s intention is to emphasise the voices of those with disabilities.

This article explores disability discrimination in schools in five parts. Part II uses empirical evidence and the case of *A v Hutchinson (Green Bay)* to demonstrate that discrimination exists in the provision of education and that the Education Act 1989’s promise of equal education for persons with disabilities is not realised in practice.<sup>19</sup> Part III sets out the legal framework for a discrimination case under the NZBORA by outlining the right to freedom from discrimination and the role reasonable accommodation plays in justifying discrimination (pursuant to s 5 of the NZBORA). Part IV analyses the content of reasonable accommodation and how it is to be applied when justifying discrimination in the education context, with reference to the Disability Convention, Part 2 of the HRA and case law from comparable jurisdictions. In the context of disability, justification under s 5 of the NZBORA will include considerations of the effectiveness and any potential burdens of accommodation. Part V applies this analysis to the facts in *Green Bay*.

In *Green Bay*, the High Court quashed the Principal’s and Board of Trustees’ decisions to suspend and expel student A, whose learning and behavioural disabilities include autism spectrum disorder (ASD), the mismanagement of which led to an incident posing safety risks to others. When the Principal and Board of Trustees appealed, A’s mother raised an HRA claim of discrimination on the basis of disability. Ultimately, the case became moot and the Court did not hear the substantive appeal.<sup>20</sup> However, as submitted to the Court of Appeal, discrimination in school raises “important practical and every day issues for parents of children with disabilities and schools endeavouring to deal with them”.<sup>21</sup> In Part VI, this article returns to the empirical study to argue that the law is not necessarily the most effective way to address discrimination in education, and proposes some practical solutions regarding teacher training and the funding scheme.

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13 Interview with participant 7, human rights advocate—partner at law firm (the author, 23 June 2016).

14 Interview with participant 4, former chair of the Human Rights Review Tribunal, above n 11.

15 Interview with participant 2, Disability Rights Commissioner (the author, 2 June 2016).

16 Interview with participant 1, Director of Special Education (the author, 18 July 2016).

17 Interview with participant 11, deputy principal of a special school (the author, 25 June 2016).

18 Interview with participant 12, specialist teacher who manages outreach service for Ongoing Resourcing Scheme-funded children (the author, 16 May 2016).

19 *A v Hutchinson* [2014] NZHC 253, [2014] NZAR 387 [*Green Bay*]; and *Hutchinson v A* [2015] NZCA 214, [2015] NZAR 1273. See Education Act 1989, ss 3, 8 and 9.

20 *Hutchinson v A*, above n 19, at [28].

21 At [16].

It is worth noting that this article follows the Disability Convention in adopting a social model of disability: people's impairments are only disabling when treated as such by society.<sup>22</sup> As recognised by the Supreme Court of Canada, the concept of reasonable accommodation is integral to the social model of disability: “[i]t is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not prevent the disabled from participation, which results in discrimination”.<sup>23</sup>

## II Equal Education is Not Realised in Practice

### A *The right to education*

Education is a gateway for children to fulfil their potential; it is “both a human right in itself and an indispensable means of realising other rights”.<sup>24</sup> Further, education “is a way of achieving equity, regardless of personal circumstances” such as an individual's disability.<sup>25</sup>

#### (1) The Education Act 1989

Every child is “entitled to free enrolment and free education at any State school”.<sup>26</sup> This right is provided on an equal basis to all students, including those with “special educational needs”.<sup>27</sup> Although there is no right to special education,<sup>28</sup> the Secretary of Education may authorise a child to be enrolled in, or receive support from, a special service, or to enrol at a particular State school, special school or clinic, with parental agreement.<sup>29</sup> Parents can apply to have such arrangements reconsidered.<sup>30</sup>

#### (2) International obligations

New Zealand is party to a number of international instruments that affirm the right to equal education, including the International Covenant on Economic, Social and Cultural

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22 Disability Convention, preamble; Interview with participant 10, primary school principal (the author, 4 July 2016): “[t]ake the view of ‘what problems does the child face?’ instead of ‘what problems does the child create?’”; and Interview with participant 11, deputy principal of a special school, above n 17: “[w]e cannot view children with disabilities as a diagnosis. We must view children by their strengths, and adjust the environment according to the need.” See also Hilary Stace “The Long Unfinished Journey Towards Human Rights for Disabled People in Aotearoa New Zealand” (2007) 5 Human Rights Research 1 at 3; and Sylvia Bell, Judy McGregor and Margaret Wilson “The Convention on the Rights of Disabled Persons: A Remaining Dilemma for New Zealand?” (2015) 13 NZJPL 277 at 283.

23 *Eaton*, above n 4, at 272 as cited in *Smith*, above n 4, at [21].

24 Human Rights Commission *Disabled Children's Right to Education* (2009) at 3; and United Nations Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 13: The right to education (article 13 of the Covenant)* E/C 12/1999/10 (1999).

25 Interview with participant 14, education academic (the author, 28 June 2016).

26 Section 3.

27 Section 8.

28 *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA) at [21]–[25].

29 Education Act, s 9.

30 Section 10.

Rights;<sup>31</sup> the Convention on the Rights of the Child;<sup>32</sup> and the Disability Convention.<sup>33</sup> These instruments recognise the importance of education in upholding human dignity. For children with disabilities, effective inclusive education “promote[s] self-reliance” and enables “active participation in the community”.<sup>34</sup> Moreover, it leads to “the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity”.<sup>35</sup>

### B *Empirical study: equal education is not realised in practice*

The author’s empirical study confirms literature and anecdotal evidence that exposes a gap between the right to equal education under the Education Act and its practical application.<sup>36</sup> The results of this study illustrate that discrimination in education exists in enrolment and day-to-day life, and is exacerbated by systemic funding issues and prejudicial attitudes in schools.<sup>37</sup>

#### (1) Parent experience

Discriminatory practices exist from the point of enrolment. Schools face a “higher cost to enrol someone with disabilities and [have] no mechanism to remedy that”.<sup>38</sup> In practice, there are “soft ways” for schools to say, “take your child somewhere else”.<sup>39</sup> One parent expressed that she has “been through the gamut of schools not wanting my child”.<sup>40</sup> These practices exist, despite it being unlawful to refuse enrolment.<sup>41</sup>

Discrimination is also rife in day-to-day school life.<sup>42</sup> Interviewees shared a variety of experiences: parents were asked to pay for a teacher aide, children were not allowed to

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31 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 13.

32 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [CRC], arts 23 and 28.

33 Disability Convention, art 24(1).

34 CRC, art 23.

35 Disability Convention, art 24(1)(a).

36 Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities [IMM] *Making disability rights real: Annual report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities 1 July 2011 – 30 June 2012* (December 2012) at 64; IMM *Article 24: The Right to an Inclusive Education - Implementation Report* (June 2016); and Interview with participant 14, education academic, above n 25: “[t]he problem is about enforcement and implementation of that right.”

37 This finding is supported by in-depth research in Jennifer Walsh *Barriers to Education in New Zealand: The Rise of Informal Removals of Students in New Zealand* (Youth Law Aotearoa, October 2016) at 5, 19 and 30.

38 Interview with participant 10, primary school principal, above n 22.

39 Interview with participant 17, parent, above n 8; Interview with participant 16, parent (the author, 15 June 2016): “[w]e don’t have the right teachers or resources to manage your child”; and Interview with participant 12, specialist teacher who manages outreach service for Ongoing Resourcing Scheme-funded children, above n 18: “[h]ave you tried the school down the road?”

40 Interview with participant 15, parent, above n 9.

41 Education Act, s 3.

42 Interview with participant 15, parent, above n 9: “[t]hings at primary school were probably not legal, but we put up with it”.

go on camp, and children were sent home at midday when their teacher aide left, or sent to the library for most of the day, alienated from their peers.<sup>43</sup>

A school may inaccurately perceive a child with ASD as a threat.<sup>44</sup> This is particularly so when teachers are not equipped to manage ASD crises, which may result in risks to the safety of other students and staff, such as occurred in *Green Bay*. One interviewee even heard a board member say: “[t]hey shouldn’t even be at our school.”<sup>45</sup>

Stigmatisation of persons with disabilities is often based on prejudice or fear. As one interviewee observed: “[l]ike anything that is different, people are scared of it.”<sup>46</sup> For learners with ASD, this stigma is compounded because the community has less knowledge about ASD compared to other disabilities.

## (2) Funding regime

Both parents and lawyers who were interviewed argued that the administration and structure of learning support poses a fundamental flaw in the implementation of equal education. Some participants suggested that discrimination occurs within a “fundamentally flawed” funding scheme,<sup>47</sup> which they perceived to be based on “political judgment and degree” rather than the effectiveness of solutions.<sup>48</sup> High-needs funding is capped at a level that does not reflect the number of students with high needs.<sup>49</sup> Outside of specific funding regimes,<sup>50</sup> the Government provides funding to schools in a bulk amount.<sup>51</sup> This amount is based on the school’s decile rating and total enrolments, but does not consider the number of students with special learning needs.<sup>52</sup> One interviewee criticised this, drawing an analogy to lifeboats on the Titanic: it is good to improve the quality of the lifeboats, “but we still need enough lifeboats”.<sup>53</sup>

Moreover, the limited funding is difficult to access and is often exhausted before the child achieves substantive equality. Parents find that there are unnecessary administrative barriers in the current funding system, which make it difficult to access on both a practical

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43 Interview with participant 5, lawyers at Auckland Disability Law, above n 12; Interview with participant 15, parent, above n 9; Interview with participant 3, human rights specialist at the Human Rights Commission (the author, 2 June 2016); and Interview with participant 8, human rights advocate—QC (the author, 23 August 2016).

44 Interview with participant 10, primary school principal, above n 22.

45 Interview with participant 8, human rights advocate—QC, above n 43.

46 Interview with participant 8, human rights advocate—QC, above n 43.

47 Interview with participant 6, lawyer at Youth Law (the author, 20 May 2016).

48 Interview with participant 4, former chair of the Human Rights Review Tribunal, above n 11.

49 “More Funding Needed for All Schools to Become Fully Inclusive” *Education Review* (New Zealand, 15 September 2015) <[www.educationreview.co.nz](http://www.educationreview.co.nz)>. The Ministry of Education has been reviewing and updating the structure of special education in recent years, but has focused on modernising the system rather than altering the amount of funding “Learning Support Update information release” (05 March 2018) Ministry of Education <[www.education.govt.nz](http://www.education.govt.nz)>.

50 Specific funding regimes include Ongoing Resourcing Scheme; Behaviour Services; Intensive Wraparound Service; and Positive Behaviour for Learning. See “Students with learning support needs” (29 September 2017) Ministry of Education <[www.education.govt.nz](http://www.education.govt.nz)>.

51 “Services and support available” (19 February 2018) Education.govt.nz for Parents <<https://parents.education.govt.nz>>.

52 See John Gerritsen “Why is it such a battle to get special needs children the right help in school?” (17 April 2016) Radio New Zealand <[www.radionz.co.nz](http://www.radionz.co.nz)>.

53 Interview with participant 10, primary school principal, above n 22.

and an emotional level.<sup>54</sup> One parent applying for high-needs funding found it a “humiliating” experience because the “institutionalised thinking makes you feel like you’re petitioning for something that’s not your right ... your demands are made to feel unreasonable”.<sup>55</sup> Problematically, funding is reduced when students make progress:<sup>56</sup> “[i]f our child makes any progress in learning, she will get less money ... they take away the thing that works ... lest she be able to catch up with the other kids.”<sup>57</sup> Rather than “punishing schools for being successful” when students make progress, administrative bodies should “assess whether the interventions being used are effective”.<sup>58</sup>

As a consequence of these funding problems, schools lack resources and face budget constraints. This may lead them to discriminate against students with special learning needs. In disciplinary situations, best practice requires the Ministry of Education to assess the effectiveness and availability of resources before the school makes any decision. The Ministry may provide more resources to accommodate the child’s needs.<sup>59</sup> But even this best practice fails both to recognise the need for preventive support to avoid discrimination, and to address pressures on schools that lead to discrimination in situations short of exclusion. As one interviewee said: “[w]e need to avoid the situation where a school reaches their last resort and threatens exclusion before the school and child get extra resources.”<sup>60</sup> It is a failure of the system that “only after a huge drama will [the Ministry] throw money at the problem. But there is no responsibility for schools, no education for schools.”<sup>61</sup> Schools are left able to avoid responsibility by relying on the specific accommodation being sufficiently onerous under the law, and are also left without resources to better build capacity to accommodate students with disabilities.

When a student with special learning needs faces disciplinary action, the types of resources available to the school often influence the decision as to the kind of action taken. Often, schools lack sufficient resources to manage students’ needs, and this can lead to discrimination, which halts students’ education. Unfortunately, discrimination in this context is relatively common. Allegations of discrimination in school disciplinary decisions have constituted over 30 per cent of the total number of disability discrimination complaints received by the Human Rights Commission in the past five years.<sup>62</sup> *Green Bay* is a typical example of discrimination in disciplinary decision-making.

### C Green Bay

A was a 14-year-old student who had been diagnosed with learning and behavioural disabilities, including dyslexia and ASD. A had received specialist treatment for a number of years.<sup>63</sup> Prior to A attending Green Bay High School, a critical part of A’s support system

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54 Interview with participant 17, parent, above n 8: “[w]hen you need the most help, you get the steepest wall to climb”.

55 Interview with participant 17, parent, above n 8.

56 Interview with participant 15, parent, above n 9. For example, the Ministry used the child’s ability to learn the saxophone to justify a decrease in funding because he had shown capability to learn. In fact, this merely showed he could learn technical skills in a one-on-one setting.

57 Interview with participant 17, parent, above n 8.

58 Interview with participant 9, lawyer (the author, 24 July 2016).

59 Interview with participant 1, Director of Special Education, above n 16.

60 Interview with participant 2, Disability Rights Commissioner, above n 15.

61 Interview with participant 8, human rights advocate—QC, above n 43.

62 IMM *Implementation Report*, above n 36, Appendix 1.

63 *Green Bay*, above n 19, at [5].

was a Resource Teacher of Learning and Behaviour (RTLb).<sup>64</sup> Green Bay High School did not engage the wraparound services available at A's previous school, which included an RTLb to provide the classroom teacher with specialised teaching strategies. Green Bay High School only developed an individual education plan for A after the first term.<sup>65</sup>

The incident that gave rise to *Green Bay* began when A took his skateboard from behind the teacher's desk without permission and left class. A refused to hand the skateboard over, and yelled obscenities at the teacher. The teacher sent A to Student Services where, still yelling obscenities, A pulled the door shut to prevent his teacher entering. The closing door hit the teacher's head. A member of the senior leadership team then physically restrained A. Once calm, A skated to his next class. A was not disruptive in this class, but staff considered his presence inappropriate given the earlier events and removed him. The Dean then requested that A be taken home.<sup>66</sup>

The Principal was concerned about wider safety at the school and was not confident that the strategies used to manage A's difficult behaviour would be effective.<sup>67</sup> She considered A's "episode of defiance" to be "gross misconduct" that was a "dangerous example to other students", and she suspended A accordingly.<sup>68</sup> Notably, in her decision, the Principal did not comment on the behavioural management strategies suggested by A's educational psychologist.<sup>69</sup> Thus, that material information did not come before the Board of Trustees, who excluded A for two reasons: inadequate resourcing to meet A's educational needs, and the need to ensure the safety of staff and other students.<sup>70</sup>

A's mother successfully pursued a judicial review of the school's decisions.<sup>71</sup> The High Court held that the Principal and Board did not sufficiently investigate whether A's individual education plan reduced support contrary to his needs.<sup>72</sup>

The school appealed. Before the Court of Appeal, A's mother pleaded discrimination by the school contrary to the HRA, arguing that the school discriminated against A, first, by suspending and excluding him because of his disabilities and, secondly, by failing to provide reasonable accommodation for A's disabilities.<sup>73</sup> These arguments were never tested. However, if they were tested, a court would inquire into whether the school did take, or could have taken, reasonable alternatives to reduce the risk of harm and support A's inclusion.<sup>74</sup> Ultimately, the Court of Appeal considered the case moot because A had moved cities and had found education outside the mainstream system.<sup>75</sup>

Issues of discrimination against students with disabilities therefore remain unaddressed by the courts. This article uses *Green Bay* as a case study of how a court might apply reasonable accommodation to a discrimination claim in the education context. For that analysis, this article assumes that the school's decisions were

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64 Ministry of Education "Introduction to professional practice" (May 2016) TKI Resource Teacher Learning & Behaviour Online <<http://rtlb.tki.org.nz>>. The Resource Teacher of Learning and Behaviour service entails specialist teachers working collaboratively with classroom teachers to develop strategies to teach and manage learning and behaviour.

65 *Green Bay*, above n 19, at [12].

66 At [18]–[28].

67 At [31]–[32].

68 At [34], relying on Education Act, s 14(1)(a).

69 At [8] and [33].

70 At [45]–[46].

71 At [74], [78] and [82].

72 At [75]–[78].

73 *Hutchinson v A*, above n 19, at [3].

74 See Part V(C).

75 *Hutchinson v A*, above n 19, at [28].



discriminatory;<sup>76</sup> first, that A was treated differently because of his disability (a prohibited ground of discrimination);<sup>77</sup> and, secondly, that the differential treatment materially disadvantaged A compared with a comparator group (that is, students without ASD).

This article focusses on reasonable accommodation and the justification of discrimination (under s 5 of the NZBORA) rather than discrimination itself (under s 19 of the NZBORA). This is because the legal position of justifying discrimination on the basis of disability is not well tested, and reasonable accommodation may be a meaningful mechanism, in law and in practice, to enforce the right to education.

### III Freedom from Discrimination and the Obligation of Reasonable Accommodation

Freedom from discrimination protects the equal enjoyment of rights by persons with disabilities. Discrimination by public education providers is assessed under ss 3, 5 and 19 of the NZBORA, which are also imported into the HRA by pt 1A of the HRA.<sup>78</sup> Under s 19 of the NZBORA, a public actor under s 3 is prohibited from discriminating on any ground listed in s 21 of the HRA, one of which is disability. However, discrimination is lawful if it “can be demonstrably justified in a free and democratic society” under s 5 of the NZBORA.<sup>79</sup>

The principle of freedom from discrimination has two dimensions: it is discriminatory to “[treat] like people differently” and, conversely, to “[fail] to treat unlike people differently”.<sup>80</sup> Discrimination on the ground of disability falls into the latter dimension; “the elimination of discrimination against people with disabilities is not furthered by ‘equal’ treatment that ignores their disabilities”.<sup>81</sup> Therefore, to achieve freedom from discrimination for persons with disabilities, providers must treat those persons differently, subject to an element of reasonableness.

The concept of reasonable accommodation is integral in determining whether a provider’s differential treatment is reasonable, and therefore lawful. Providers must make reasonable efforts to make the necessary modifications to ensure substantive equality for persons with disabilities. Any failure to do so must be justified in accordance with s 5 of the NZBORA. It will be unlawful for a government service provider to fail to accommodate the needs of persons with disabilities unless, in the circumstances, it would be

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76 See *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [136]. Regarding the contentious role of the comparator in discrimination analysis, see Asher Gabriel Emanuel “To whom will ye liken Me, and make Me equal? Reformulating the Role of the Comparator in the Identification of Discrimination” (2014) 45 VUWLR 1. Regarding discrimination against autism spectrum disorder in education, see *Purvis v New South Wales* [2003] HCA 62, [2003] 217 CLR 92. The majority decision on reasonable accommodation was rejected in *Smith*, above n 4, at [32], and the minority approach (at [130]) was preferred in *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, [2016] NZFLR 113 at [191]. See further discussion in Part V(B).

77 HRA, s 21(h)(iv).

78 HRA, s 20L imports the NZBORA framework to a pt 1A claim.

79 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [92]; and *Adoption Action*, above n 76, at [56]–[58].

80 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.4.1].

81 *Purvis*, above n 76, at [86] per McHugh and Kirby JJ as cited in *Smith*, above n 4, at [20].

disproportionate to make that accommodation, suggesting that the requested accommodation is unreasonable.<sup>82</sup>

This article focusses on the role of reasonable accommodation in the s 5 proportionality analysis when determining whether, prima facie, discrimination on the basis of disability is justified. The Supreme Court in *Hansen v R* set out the relevant methodology when applying s 5:<sup>83</sup>

- (1) Is the objective of the limiting measure sufficiently important to justify limiting the right?
- (2) Is the limiting measure proportional?
  - (a) Is the limiting measure rationally connected to its purpose?
  - (b) Is the limit greater than reasonably necessary?
  - (c) Is the limit in due proportion to the importance of the objective?

The analysis of reasonableness in each case will depend on the context of the prohibited ground of discrimination.<sup>84</sup> In the context of disability, the application of s 5 will be coloured by the concept of reasonable accommodation.

#### IV Application of Reasonable Accommodation within the s 5 Framework

The following analysis is informed by the obligation of reasonable accommodation in the Disability Convention, the way that obligation manifests in pt 2 of the HRA, and case law from comparable jurisdictions.

##### A *The Disability Convention*

In the context of disability, s 5 will be applied in light of New Zealand's obligations under the Disability Convention. It is well established that courts strive to apply domestic legislation consistently with New Zealand's international obligations.<sup>85</sup> Moreover, the HRA must be interpreted purposively.<sup>86</sup> The purpose of the HRA is to "provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights".<sup>87</sup> Although the HRA predates the Disability Convention, this statement of purpose was not intended to refer only to international conventions as at 1993. Accordingly, the HRA is to be interpreted consistently with the Disability Convention.<sup>88</sup>

Under the Disability Convention, New Zealand has committed to "take all appropriate steps to ensure that reasonable accommodation is provided" in order to "promote equality and eliminate discrimination".<sup>89</sup> The Convention defines reasonable accommodation as:<sup>90</sup>

82 Butler and Butler, above n 80, at [17.20.4].

83 *Hansen*, above n 79, at [103] per Tipping J, [203]–[205] per McGrath J, [269]–[272] per Anderson J, and [64]–[81] per Blanchard J; and *R v Oakes* [1986] 1 SCR 103.

84 Butler and Butler, above n 80, at [17.20.2].

85 *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [133]–[134] per McGrath J; *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); *R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA); and *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA).

86 Interpretation Act 1999, s 5(1).

87 HRA, long title.

88 Bell, McGregor and Wilson, above n 22, at 285.

89 Article 5(3).

90 Article 2.

The necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

While the Disability Convention does *not* establish new rights for persons with disabilities,<sup>91</sup> it *does* require that existing rights be provided on an equal basis. It explicitly requires reasonable accommodation in education to safeguard the right to education without discrimination. States must ensure inclusive education in that children are not excluded from school on the basis of disability, and provide reasonable accommodation of individuals' needs.<sup>92</sup>

The Disability Convention does not prescribe how reasonable accommodation is to be implemented in practice. The New Zealand Court of Appeal has held that, with regard to the provision of services by private providers, an assessment of the reasonableness of accommodation will weigh its effectiveness against the potential burden of making that accommodation.<sup>93</sup> Potential burdens may arise from issues of practicality associated financial or other costs, availability of resources, and disruption to other people.<sup>94</sup> Reasonable accommodation is a fact-specific exercise and must be determined in light of the circumstances in each case.<sup>95</sup>

Turning to s 5 of the NZBORA, matters relating to the effectiveness of, and any potential burden caused by, accommodation will become relevant when considering whether the discrimination is reasonably necessary in order to achieve its purpose (the *reasonably necessary* test).<sup>96</sup> A court is likely to assess compliance with Convention obligations by using the *reasonably necessary* test to ask: would the accommodation be ineffective or unduly burdensome? If so, then it would be unreasonable to accommodate for the disability in that way, and the resultant discrimination would be justified.

## B Part 2 of the HRA

Claims of unlawful discrimination against State schools may be made under pt 1A of the HRA, which imports relevant sections of the NZBORA (freedom from discrimination in s 19, and justification in s 5) and applies to the same *public* actors to whom the NZBORA applies. Discriminatory conduct by *private* providers is covered under pt 2 of the HRA in various contexts, one of which is education. In these contexts, discrimination is unlawful unless it falls within the relevant tailored statutory exception.

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91 Office for Disability Issues "Convention on the Rights of Persons with Disabilities: National Interest Analysis" in Justice and Electoral Committee *Disability (United Nations Convention on the Rights of Persons with Disabilities) Bill (232-1) and international treaty examination of the Convention on the Rights of Persons with Disabilities* (7 August 2008) 6 at [23].

92 Articles 24(2)(a)–24(2)(c).

93 Noted in *Smith*, above n 4, at [55].

94 IMM *Reasonable accommodation of persons with disabilities in New Zealand* (25 November 2015) at 4.

95 Interview with participant 8, human rights advocate—QC, above n 43; and Anna Lawson "Reasonable Accommodation and Accessibility Obligations: Towards a More Unified European Approach?" (2010) 11 EADLR 11 at 12–14.

96 See Butler and Butler, above n 80, at [17.20.4].

With regard to education, ss 57 and 60 respectively prohibit and justify discrimination by private education providers. Section 57 makes it unlawful to discriminate in the areas of enrolment, access to benefits or services, and exclusion decisions (or other decisions that cause detriment) on one of the prohibited grounds of s 21(1). Under s 60, s 57 does not apply where:

- (1) the special services or facilities required to enable the disabled learner's participation or benefit "in the circumstances cannot reasonably be made available"; or
- (2) the disabled person's admission to the school would create an unreasonable "risk of harm to that person or others" (unless reasonable measures could "reduce the risk to a normal level" without causing "unreasonable disruption").

The prohibitions against, and justifications for, discrimination in the other contexts covered by pt 2 are substantially similar in their structure and content. While the HRA does not contain an explicit obligation of reasonable accommodation, the Court of Appeal held in *Smith v Air New Zealand Ltd* that an obligation to reasonably accommodate arises implicitly from the structure of the provisions.<sup>97</sup>

*Smith* is relevant for present purposes as the Court of Appeal found that the prohibition-justification structure of the provisions means there is "an inherent requirement" in the prohibition provision (here, s 44 of the HRA) to accommodate where that accommodation is *not* too onerous.<sup>98</sup> This structure is mirrored across the HRA, including in ss 57 and 60, which prohibit and justify discrimination by private education providers. The Court recognised this parallel structure and stated that when the term "reasonable" appears "in the context of exceptions to what is otherwise unlawful conduct, some consistency in approach in the Act may be expected".<sup>99</sup> As the structure of the education provisions mirrors that of the service provisions, and as s 60 uses the language of reasonableness in justifying discrimination, an inherent requirement to accommodate can be read into s 57.

The above analysis regarding disability discrimination by private education providers is also relevant to disability discrimination by public education providers. Discrimination by state schools is assessed in accordance with ss 19 and 5 of the NZBORA. The structure of ss 19 and 5 parallels the structures of discrimination prohibition and justification in pt 2 of the HRA. Additionally, just as the justificatory provisions in pt 2 use the term "reasonable", so too does s 5. Therefore, applying the principles behind the Court of Appeal's analysis in *Smith*, s 19 should be read to contain an inherent requirement to accommodate disability, subject to a standard of reasonableness (the s 5 test).

Turning to s 5 of the NZBORA, and drawing on pt 2 of the HRA, discrimination may be justified under s 5 if it is not reasonable to provide special services in the circumstances (s 60(1) of the HRA) or if discrimination is reasonably necessary to avoid an unreasonable risk of harm (ss 60(2)–60(3) of the HRA). In relation to the former, a provider's refusal to accommodate may be justified if accommodation would incur excessive costs. However,

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97 *Smith*, above n 4, at [17] and [33]–[34]. *Smith* concerned discrimination on the basis of disability within the context of the provision of services. The Court of Appeal upheld the claimant's argument that Air New Zealand failed to reasonably accommodate her need for supplementary oxygen when flying by charging extra money for supplying that oxygen. But the Court found that charging extra money was reasonable and, therefore, Air New Zealand's discrimination was lawful. At [97].

98 At [33].

99 At [57].

courts should not rely on “impressionistic evidence” and must be wary of placing a low value on accommodation of persons with disabilities.<sup>100</sup>

### C *Comparable jurisdictions*

Anti-discrimination law and the principle of reasonable accommodation have been powerful antidotes to the failed observance of the right to education for learners with disabilities in other jurisdictions.<sup>101</sup> Several principles have emerged:

- (1) Reasonable accommodation is relevant to the *reasonably necessary* test;
- (2) Reasonable accommodation seeks no more than to enable participation;
- (3) Fiscal restraints will not justify discrimination where Government failed to consider alternatives or take steps that do not involve excessive cost; and
- (4) Inadequate teacher training may be a form of discrimination.

These principles are discussed in the following sections.

#### (1) Relevance to the *reasonably necessary* test

The case of *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) (Grismer)* supports the proposition that reasonable accommodation fits under the *reasonably necessary* test in the s 5 framework.<sup>102</sup> When determining whether disability discrimination in driver licence testing was lawful, the Supreme Court of Canada applied a test similar to that applied by the New Zealand Supreme Court in respect of s 5 of the NZBORA. The defendant was to establish:<sup>103</sup>

- (1) a rational connection between the alleged discriminatory standard and its purpose;
- (2) that the standard was adopted on a “good faith belief that it was necessary” to fulfil its purpose; and
- (3) that the standard was “reasonably necessary” to accomplish the purpose.

*Grismer* confirmed that, when assessing whether discrimination is reasonably necessary to achieve its purpose, the courts will look to whether the defendant has complied with the obligation to reasonably accommodate. While the s 5 test does not require an assessment of good faith, it does ask whether the discrimination is *more* than is reasonably necessary to achieve its purpose.<sup>104</sup> As in *Grismer*, this is the stage of the inquiry where reasonable accommodation bites.

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100 *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868 [*Grismer*] at [41] as cited in *Smith*, above n 4, at [60].

101 Further jurisdictions have upheld a substantive right to education independently—that is, without recourse to anti-discrimination law. See *Sinnott v Minister for Education* [2001] IESC 63, [2001] 2 IR 545 (SC); and *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198, [2016] 1 All SCA 369.

102 *Grismer*, above n 100.

103 *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union* [1999] 3 SCR 3 (SCC) [*Meiorin*] at [54] as summarised in *Grismer*, above n 100, at [20].

104 *Hansen*, above n 79, at [103] per Tipping J.

## (2) The purpose of reasonable accommodation: enhancing participation

The purpose of reasonable accommodation is to enhance the ability of persons with disabilities to participate. However, reasonable accommodation may be objectionable in a competitive setting if it modifies the *rules of play*.

For example, Professor Bruce Pardy argues that no accommodation can be made for students with intellectual or mental disabilities in tests at law school; to allow such students extra time in exams would result in their exam results being a “fiction” and not comparable to other students’ exam results.<sup>105</sup> However, his position can be distinguished in the non-competitive context of secondary schooling. Unlike universities, high schools are not generally competitive academic environments. Grades are not set to a bell curve and the *rules of play* do not establish a competitive structure. Rather, the *rules of play* at high school are the New Zealand curriculum, where inclusion is one of the eight principles.<sup>106</sup>

Pardy further objects to such accommodation because it compensates for a lack of ability that is relevant to the test; the time-pressured law exams at university assess problem-solving, time management and information processing skills.<sup>107</sup> He states that accommodation to counter “functional limitations” leaves little to assess because executive functioning is central to tertiary education.<sup>108</sup> Again, secondary and tertiary education can be distinguished. While these skills may be central to success at university, they are still being developed at high school. Failing to make accommodation for “functional limitations” at high school ignores the role of education as a gateway to achieving potential. Moreover, discrimination in high school (such as informal or formal exclusion) would undermine the student’s chances of developing these functional skills that are essential for participating in society.

Finally, Pardy’s position can be criticised on a more fundamental level as prioritising formal equality over substantive equality. A participant in the author’s empirical study described substantive equality by using the analogy of children of different heights looking over a tall fence. Formal equality would involve giving the children blocks of the same height to stand on, such that they can all see over the fence. Conversely, substantive equality would give the children blocks that different in height relative to each child’s height—relative to each child’s need.<sup>109</sup> Pardy, in focussing on formal equality—that is, giving the students the same amount of time in tests—fails wholeheartedly to adopt the social model of disability, which is central to the Disability Convention.

## (3) Fiscal justifications

In *Moore v British Columbia (Education)*, the Supreme Court of Canada held that a public education provider cannot justify discrimination in the provision of special education

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105 Bruce Pardy “Head Starts and Extra Time: Academic Accommodation on Post-secondary Exams and Assignments for Students with Cognitive and Mental Disabilities” (2016) 25 ELJ 191 at 201–202.

106 Ministry of Education *The New Zealand Curriculum for English-medium teaching and learning in years 1–13* (Learning Media Ltd, 2007) at 9.

107 At 203–204.

108 See M Condra and EM Condra *Academic Accommodations: Recommendations for Documentation Standards and Guidelines for Post-Secondary Students with Mental Health Disabilities* (Queen’s University and St Lawrence College Partnership Project, Kingston (ON), 2015) at 4 as cited in Pardy, above n 105, at 203.

109 Interview with participant 10, primary school principal, above n 22.

services unless it demonstrates that it considered alternative options to accommodate disabilities.<sup>110</sup> In New Zealand, the degree of deference given by a court to the decision-maker will depend on whether the decision-maker “understood that there was a balance to be struck between fiscal objectives and human rights and ... made a considered assessment of where that balance was to be struck”.<sup>111</sup>

Further, that obligation exists even where the provider is facing resource constraints.<sup>112</sup> *Mental Disability Advisory Centre v Bulgaria (Decision on the Merits) (MDAC)* emphasises that financial constraints will not justify a failure to vindicate the right to education where the government could have taken specific steps, such as training educators on the legislative action plans, without incurring excessive cost.<sup>113</sup>

#### (4) Teacher training and resourcing

*MDAC* also demonstrates how inadequate teacher training will be discriminatory. The European Committee on Social Rights held that the fact that teachers were not sufficiently trained to meet the learning needs of intellectually disabled students, and had inadequate teaching materials to do so, meant that the government had breached the students’ rights to education and equality.<sup>114</sup> A similar argument has been raised in the forthcoming substantive case of *IHC New Zealand v Ministry of Education*; if successful, it may trigger effective teacher education and resourcing.<sup>115</sup>

#### D Conclusion

Drawing on the Disability Convention, pt 2 of the HRA and case law from comparable jurisdictions, reasonable accommodation can be said to be relevant as part of the *reasonably necessary* test under the s 5 analysis. Assessment of reasonable accommodation will involve considerations of effectiveness, burdens arising from impracticality, excessive financial cost, lack of resources and any potential disruption or unreasonable risk of harm to other people. Accordingly, state education providers must consider alternatives and implement measures that do not impose an unreasonable burden.

This article will now apply these conclusions to the discrimination claim in the *Green Bay* case.

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110 *Moore*, above n 1.

111 *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 at [205].

112 *Moore*, above n 1, at [49] and [50].

113 *Mental Disability Advisory Center v Bulgaria (Decision on the Merits)* European Committee of Social Rights Complaint No 41/2007, 3 June 2008 [*MDAC*] at [47]. See also the similar case of *International Association Autism-Europe v France (Decision on the Merits)* European Committee of Social Rights Complaint No 13/2002, 4 November 2003.

114 *MDAC*, above n 113, at [44] and [55]; and European Social Charter (revised) ETS 163 (adopted 3 May 1996, entered into force 1 July 1999), art 17(2). See also CESCR, above n 24; and Janet E Lord and Rebecca Brown “The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: the UN Convention on the Rights of Persons with Disabilities” in Marcia H Rioux, Lee Ann Bassler and Melinda Jones (eds) *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff, Leiden, 2011) 273 at 290–291.

115 *IHC New Zealand v Ministry of Education* (HRRT) (forthcoming) is a class action that discusses issues regarding teacher training and lack of resources.

## V Reasonable Accommodation Applied to *Green Bay* Facts

Whether A was unlawfully discriminated against by Green Bay High School must be determined with reference to ss 3, 5 and 19 of the NZBORA.<sup>116</sup>

### A *Whether the NZBORA applies pursuant to s 3*

The NZBORA applies to acts or omissions by branches of government, or by persons or bodies “in the performance of any public function, power or duty conferred on that person or body by or pursuant to law”.<sup>117</sup> Schools performs the public function of providing education pursuant to the Education Act. Accordingly, the obligations under NZBORA apply to the school.

### B *Prima facie discrimination (s 19)*

This article assumes that the school’s decisions to suspend and exclude A constituted differential treatment based on A’s disability, and that this differential treatment materially disadvantaged him. It is beyond the scope of this article to comprehensively analyse whether there was discrimination. However, there is at least an arguable case for prima facie discrimination:<sup>118</sup>

- (1) Discrimination on the basis of A’s ASD is prohibited under s 21(1)(h)(iv) of the HRA;
- (2) A was treated differently because of his disability (lack of resources and support; suspension and exclusion) compared with his peers without ASD (a possible comparator group); and
- (3) The differential treatment materially disadvantaged A, as he was formally excluded.

This prima facie discrimination will be unlawful unless justified pursuant to s 5 of the NZBORA.

### C *An unjustified limitation (s 5)*

The s 5 test determines whether the limit on A’s right to be free from discrimination on the basis of disability is justified in this instance. The test asks whether there is a sufficiently important objective to justify the limitation and whether the limitation is proportionate to the harm done by curtailing the right.

#### (1) Sufficiently important objective

The *sufficiently important objective* test is a threshold that is easily met.<sup>119</sup> The question is whether the decision to remove A from the school serves a purpose sufficiently important to justify curtailing A’s right to freedom from discrimination.

The main purpose that A’s exclusion serves is protecting the safety of staff and other students. Safety in a classroom is essential for effective teaching and learning. Additionally,

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116 An action may be brought as a HRA claim (and go to the Human Rights Review Tribunal) or as a NZBORA claim (and go directly to the High Court).

117 NZBORA, s 3.

118 Applying *Atkinson*, above n 76, at [55] and [135]–[136]. See also *Smith*, above n 4, at [28]–[29]; *Emanuel*, above n 76; *Purvis*, above n 76; and *Adoption Action*, above n 76.

119 *Hansen*, above n 79, at [121] per Tipping J.



parents would not want to send their children to an unsafe school, nor would teachers want to be employed in an unsafe environment. For that reason, safety is a sufficiently important objective.

(2) Proportionality

(a) Rational connection

Whether there is a rational connection between the exclusion and the safety of staff and other students is also a threshold issue that is satisfied by a mere logical relationship.<sup>120</sup>

If A's verbal threats and uncontrolled physical actions had escalated, they could have caused serious harm. Excluding A removed those threats of harm. Thus, A's removal from the school was logically connected to the objective of safety at school.

(b) Reasonably necessary

Discrimination can only be justified if the limiting measure impairs the right no more than is "reasonably necessary to achieve the purpose".<sup>121</sup> The court acts as a review body and thus does not substitute its decision for that of the decision-maker. Accordingly, the school's decision will satisfy this element if it falls within a range of reasonable options.<sup>122</sup>

As concluded above, reasonable accommodation bites at the *reasonably necessary* test. In the disability context, considerations of effectiveness and burden are relevant in assessing whether the discrimination falls within a range of reasonable alternatives. Burden may arise from practicality, excessive financial cost, availability of resources and potential disruption or unreasonable risk of harm to other people.

(i) Reasonable to mitigate risks of harm to others

Suspension on the basis of risk of serious harm is a last resort; such action is only lawful where safety concerns cannot be managed in other ways.<sup>123</sup> Even if A posed an unreasonable risk of harm, there were alternative measures the school could have taken that would have likely reduced the risk to a "normal level" without causing unreasonable disruption to others.<sup>124</sup> For example, the teacher could have been given additional training to facilitate non-confrontational communication with A, or he simply could have allowed A to keep his skateboard by his desk.<sup>125</sup> The school could have reactivated RTLB support or implemented the educational psychologist's suggested behaviour management strategies.<sup>126</sup> Evidence from A's previous schooling showed that when he received support,

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120 At [122]–[125] per Tipping J.

121 At [126] per Tipping J.

122 *Atkinson*, above n 76, at [154]; and *IDEA Services*, above n 111, at [222].

123 Ministry of Education *Guidelines for principals and boards of trustees on stand-downs, suspensions, exclusions and expulsions: Part I - Legal options and duties* (December 2009) at [33]–[34].

124 HRA, s 60(2); and see also *Moore*, above n 1.

125 See "Education sector organisation and management" in Ministry of Health and Ministry of Education *New Zealand Autism Spectrum Disorder Guideline* (2nd ed, Ministry of Health, Wellington, 2016) 127; and Emma Goodall "Simple strategies for effective engagement of autistic spectrum students to facilitate school success" (2015) Healthy Possibilities <<http://healthypossibilities.net>>.

126 *Green Bay*, above n 19, at [12] and [15]–[17].

his ability to manage behavioural difficulties significantly improved.<sup>127</sup> These measures would likely have reduced the safety risk to a normal level without causing unreasonable disruption to others.

(ii) Reasonable alternatives to discrimination to mitigate financial costs

There were alternative measures that would not have imposed an excessive financial burden on the school. Whether a cost is excessive depends on the circumstances. The Board submitted that exclusion was “the only option available in the circumstances” because one-on-one support was beyond the school’s capabilities.<sup>128</sup> This is a resource allocation decision for the courts to analyse.<sup>129</sup> A court is unlikely to defer to the school unless it had considered where the “balance ... between fiscal objectives and human rights ... was to be struck”.<sup>130</sup> In any event, it is not reasonable for a school to exclude a student on the basis of excessive cost unless they have followed best practice, which is to seek assistance from the Ministry of Education. That may involve an assessment of the effectiveness of resources already provided and the provision of further resources.<sup>131</sup> Here, there was no evidence that Green Bay High School sought extra resources from the Ministry before excluding A.

(iii) Conclusion

Even if RTLB support was not reasonable because it involved excessive costs, the other options discussed would have been both effective and not unduly burdensome.<sup>132</sup> The school should have considered alternative options.<sup>133</sup>

Alternative options would not have been excessive in the circumstances. For example, the teacher could have used non-confrontational management strategies without incurring any financial costs.<sup>134</sup> Additionally, implementing the educational psychologist’s defiance management advice would not have been excessive as there is an expectation that teachers will meet learners’ needs with the support available to them.<sup>135</sup> In fact, it would have been practical to implement any of those options. For example, the behaviour and defiance management advice had already been provided to the school. Although teachers may find it a challenge to meet the diverse learning needs in each class, we as a society expect that teachers will do so to the best of their ability.<sup>136</sup>

Thus, because there were effective and not unduly burdensome alternatives to excluding A, the school failed to reasonably accommodate A. This infringed his right to

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127 At [7], [10] and [11].

128 At [46].

129 “Services and support available” (19 February 2018) Education.govt.nz for Parents <<https://parents.education.govt.nz>>.

130 *IDEA Services*, above n 111, at [205]; and *Atkinson*, above n 76, at [172]–[173]. Deference does not displace the Court’s s 5 responsibility.

131 Interview with participant 1, Director of Special Education, above n 16; and Interview with participant 15, parent, above n 9: “[i]t helps to be an ally with the school against the Ministry”.

132 See *MDAC*, above n 113.

133 *Moore*, above n 1, at [47]; and *IMM Reasonable accommodation*, above n 94, at 7.

134 See *MDAC*, above n 113.

135 Inclusion is one of eight principles of curriculum decision-making. See Ministry of Education *The New Zealand Curriculum for English-medium teaching and learning in years 1-13* (2007) at 9.

136 Interview with participant 1, Director of Special Education, above n 16.

freedom from discrimination more than was reasonably necessary to meet the school's safety objectives.

(c) Due proportion

The final assessment under s 5 is whether the limiting measure is, overall, proportionate to the objective. This requires the court to balance the importance of A's freedom from discrimination, and the extent of the limitation on that right, against the importance of the safety objectives pursued by excluding A.

A's exclusion was disproportionate. Freedom from discrimination is fundamental in a free and democratic society because it upholds human dignity, which "is the foundation of human rights theory and practice",<sup>137</sup> by ensuring substantive equality. Freedom from discrimination in education is particularly critical for children with disabilities because it achieves substantive equality for this traditionally marginalised group. Notwithstanding that safety objectives should not be underplayed and Boards must consider "the right of others to be safe" and "not just [the disabled child's] right to be at school", the importance of safety does not outweigh the importance of affirming, promoting and protecting A's freedom from discrimination.<sup>138</sup>

D *Conclusion*

This article concludes that Green Bay High School's discrimination was not justified pursuant to s 5 of the NZBORA as it limited A's right to freedom from discrimination more than was reasonably necessary. Accordingly, the school's discrimination against A was inconsistent with the NZBORA and therefore unlawful.

## VI Reasonable Accommodation in Practice

Having considered the ways in which the concept of reasonable accommodation applied to *Green Bay*, this article returns to the author's empirical study to analyse possible legal and non-legal solutions to achieve non-discriminatory education in practice.

A *Legal solutions may not provide the best answer*

In theory, the Education Act provides an enforceable substantive right to education. As one parent said: "[i]t is pretty clear. It's your local school. You get to go to it, regardless of disability."<sup>139</sup> However, the law has limited effectiveness because it is often impractical to bring a legal claim in these situations, and schools may be able to justify discrimination by pointing to inadequate funding.

(1) Impracticality of using legal mechanisms

Participants interviewed seemed to conclude that "legal options are the last resort" because they pit the parent, having few resources, against the school or State.<sup>140</sup> It can be

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137 *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556 at [66].

138 Interview with participant 15, parent, above n 9.

139 Interview with participant 17, parent, above n 8.

140 Interview with participant 5, lawyers at Auckland Disability Law, above n 12.

extremely draining for parents to bring a legal claim when they are already fighting daily battles for their children's education.<sup>141</sup> Parents considered legal claims impractical and ineffective in achieving the goal of having their child in school: "[w]ho has the time? Who has the money? Who is going to force themselves into a school where they're not wanted?"<sup>142</sup> Lawyers who were interviewed echoed these sentiments: "[j]udicial review ... is out of reach in terms of cost, time and energy".<sup>143</sup> These barriers against taking legal action are exacerbated for parents who are "culturally alienated from asking for help and negotiating a Western-based bureaucracy".<sup>144</sup>

Moreover, litigation does not guarantee that the student's needs will be addressed in the best way.<sup>145</sup> For example, in *Green Bay*, A moved to be educated elsewhere before the Court of Appeal determined the discrimination claim, thus rendering the case moot. Indeed, one lawyer interviewed thought it better for parents to seek agreement with schools and the Ministry than to attempt litigation—but even then, "agreement can be deeply ineffective, with parties having a David and Goliath-like bargaining disparity".<sup>146</sup> Other lawyers considered that alternative dispute resolution would provide greater benefits in reaching a timely solution, making it "very effective if people want to engage with it".<sup>147</sup>

Where legal avenues are pursued, good advocacy is "mission critical".<sup>148</sup> The author endorses the idea of an education advocacy service similar to the Nationwide Health and Disability Advocacy Service or VOYCE—Whakarongo Mai (an advocacy service for youth in State care), which would be available for any dispute.<sup>149</sup> This would hold Boards of Trustees to account and make it easier for parents to ensure that their children's rights are upheld.

Other systemic options to enhance claimants' ability to pursue a legal claim against the school or State include the creation of: a litigation fund, an Education Commissioner, an independent tribunal or a Council to oversee and support Boards of Trustees in their decision-making.<sup>150</sup>

Legislative change—to make explicit either the justiciability of the right to education, or the implicit "inherent" obligation of reasonable accommodation in human rights law—would also enhance claimants' abilities to pursue legal claims.<sup>151</sup> If reasonable accommodation were to be included in legislation, it should not be overregulated. By nature, reasonable accommodation is extremely individualised. It would be "very hard to capture the very delicate judgment to be made in the black and white of legislation".<sup>152</sup> However, as the above analysis shows, such a claim could be pursued under the HRA or the NZBORA as they currently stand. Legislative amendment is not necessary but may be worthwhile in order to empower parents and hold schools or the State accountable.

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141 Interview with participant 4, former chair of the Human Rights Review Tribunal, above n 11.

142 Interview with participant 15, parent, above n 9.

143 Interview with participant 5, lawyers at Auckland Disability Law, above n 12.

144 Interview with participant 13, mainstream teacher with lived experience of disability (the author, 14 July 2016).

145 Interview with participant 1, Director of Special Education, above n 16; Interview with participant 4, former chair of the Human Rights Review Tribunal, above n 11; and Interview with participant 5, lawyers at Auckland Disability Law, above n 12.

146 Interview with participant 4, former chair of the Human Rights Review Tribunal, above n 11.

147 Interview with participant 6, lawyer at Youth Law, above n 47.

148 Interview with participant 4, former chair of the Human Rights Review Tribunal, above n 11.

149 Interview with participant 5, lawyers at Auckland Disability Law, above n 12.

150 Walsh, above n 37, at 39–51.

151 *Smith*, above n 4, at [33].

152 Interview with participant 1, Director of Special Education, above n 16.

## (2) Potential fiscal justifications

Even if parents pursue a legal claim, it may be ineffective because the principle of reasonable accommodation allows for discrimination where accommodation would incur excessive cost to the provider. While schools must consider the balance to be struck between human rights and fiscal burdens, the court may find that funding constraints justify discrimination. On a practical level, the risk of such a finding may discourage parents from taking legal action against schools. As one parent said: “[r]easonable accommodation seems to be a ... giant out.”<sup>153</sup> For these reasons, it is by no means certain that any legal claim would succeed in upholding the promise of equal education for the affected individual.

## (3) Value of the law

Although limited, the law still plays an important role: the “language of rights” may be “an antidote to a sense of helplessness” facing parents, and it strongly influences community attitudes.<sup>154</sup> But the law is only one tool of many that can be used to solve problems. Perhaps the principle of reasonable accommodation is best used as part of “a practical solution, not a dispute resolution tool”.<sup>155</sup>

*B Practical solutions may be better*

There are two important components of “an education system that meets *everybody’s* needs”: the educators, and the structural support given to educators and learners.<sup>156</sup> These two components complement each other in achieving reasonable accommodation in practice. Educators accommodate the learner, and that accommodation is funded by the learning support system.

## (1) The role of educators

The education system itself may pose barriers to upholding the promise of equal education. However, equally, it may be a vehicle for cultural change, complementing the role of the law in addressing the failed implementation of equal education. Whether the education of children with disabilities is seen as a “problem or a professional challenge” depends on the tools available to teachers for “teaching all kinds of people” and the mindset of the teaching profession.<sup>157</sup>

According to education and human rights specialists who were interviewed, the training provided to teachers does not equip them to deliver the law’s promise of equal education. Interviewees suggested that one root of the problem is inadequate teacher training: “[t]eachers are trained to teach ‘ordinary’—excuse that language—kids ... kids with disabilities are seen as an add-on.”<sup>158</sup> Teachers have echoed this:<sup>159</sup>

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153 Interview with participant 15, parent, above n 9.

154 Interview with participant 14, education academic, above n 25; and Interview with participant 7, human rights advocate—partner at law firm, above n 13.

155 Interview with participant 5, lawyers at Auckland Disability Law, above n 12.

156 Interview with participant 2, Disability Rights Commissioner, above n 15.

157 Interview with participant 7, human rights advocate—partner at law firm, above n 13.

158 Interview with participant 7, human rights advocate—partner at law firm, above n 13.

159 Interview with participant 13, mainstream teacher with lived experience of disability, above n 144.

We are given so little information on how to support those students ... I feel I'm not doing a good job. The reality is that you have 30 kids and one hour. The numbers don't add up ... you end up feeling guilty.

The structure of secondary teaching qualifications also poses a problem: “[o]ne year isn’t long enough to teach them how to teach.”<sup>160</sup> The content and structure of teacher training should empower teachers to be “competent and confident” to teach in a collaborative way and take responsibility for all learners.<sup>161</sup>

In order to champion inclusive education, schools must “understand that every student has a gift and their own capacity for development”.<sup>162</sup> The “school leadership team needs to buy into inclusive culture and create it” and teachers must be “upskilled to meet the needs of the children in [their] class”.<sup>163</sup> The author came across one school with these qualities in carrying out interviews, where the school charter provides: “[w]e help people no matter what.”<sup>164</sup> As one parent reported, the Principal of this school is “committed to this philosophy to the point of making it into a daily fight”.<sup>165</sup> At this school, “teachers deliberately teach the whole school about everybody” by having a special lesson where the teacher asks: “[w]hat does autism mean?”, “[w]hat does [X] mean when he says [Y]?”, and “[h]ow can we connect with him?”<sup>166</sup> This school demonstrates the power of inclusive education in achieving the promise of equal education. Cultivating an inclusive school environment has flow-on benefits: it reduces stigma and teaches children to question the marginalisation of persons with disabilities and seek change in the world around them.<sup>167</sup>

If we as a society are to realise the law’s promise of equal education, educators at all levels must be educated about both their legal obligations not to discriminate and what the principle of reasonable accommodation requires of them in practice. This article acknowledges that, as one interviewee said, it is “very hard to capture the very delicate judgment to be made in the black and white of legislation”.<sup>168</sup> However, *some* training is undoubtedly necessary. This article argues for the Ministry of Education to publish specific guidelines on the application of reasonable accommodation principles in the education context. The closest guidance currently available is published by the Human Rights Commission, the Ombudsman and the New Zealand Coalition (collectively, the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities).<sup>169</sup> These guidelines could be introduced in schools for professional development purposes, and would make reasonable accommodation obligations clear and accessible to educators at all levels. As one interviewee said: “I understand as a lawyer that Acts must be interpreted consistently with the Convention, but Principals need to see that in black and white.”<sup>170</sup>

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160 Interview with participant 14, education academic, above n 25.

161 Interview with participant 14, education academic, above n 25. This was echoed in Interview with participant 7, human rights advocate—partner at law firm, above n 13; and Interview with participant 8, human rights advocate—QC, above n 43.

162 Interview with participant 11, deputy principal of a special school, above n 17.

163 Interview with participant 11, deputy principal of a special school, above n 17.

164 Interview with participant 10, primary school principal, above n 22.

165 Interview with participant 17, parent, above n 8.

166 Interview with participant 10, primary school principal, above n 22.

167 Interview with participant 17, parent, above n 8.

168 Interview with participant 1, Director of Special Education, above n 16.

169 IMM *Reasonable accommodation*, above n 94. For inclusive education generally, see IMM *Implementation Report*, above n 36.

170 Interview with participant 8, human rights advocate—QC, above n 43.

However, even if educators upskill and facilitate cultural change, their ability to realise the promise of equal education will be hampered if the funding system does not support them or their students. Effective resource allocation is necessary to support both learners and educators.

## (2) Rethinking the learning support system

The author welcomes the Special Education Update that the government is currently undertaking, which aims to:<sup>171</sup>

- improve support for teachers and parents as the primary providers of additional learning support;
- deliver child-centred, easy-to-access, prompt and uninterrupted additional learning support for as long as it is needed;
- strengthen collaboration between specialists, educators, students, and parents and whānau; and
- provide quality information about additional learning support to inform sound and timely decisions.

However, the government has yet to publish specific policies outlining how these purposes are to be achieved.

Interviewees emphasised that support must begin with “what works best for the child”.<sup>172</sup> Some interviewees suggested that, upon enrolment, parents, teachers and the Principal should collectively determine whether there are “any obstacles between the child and the curriculum”, and then ask: “[h]ow do we remove those barriers?”<sup>173</sup> Following this, they should propose to the Ministry a resource plan to support that student. The interviewees believe, and the author agrees, that the Ministry should provide the proposed support unless it can establish that it is unreasonable to do so.<sup>174</sup> This would align closely with the justificatory structure of New Zealand’s human rights framework: the provider must justify any breach of the “inherent” obligation to accommodate as reasonable and proportionate.<sup>175</sup>

Any new special education policy should recognise the roles that reasonable accommodation and the social model of disability play in achieving substantive equality. The Disability Convention contains positive obligations to provide reasonable accommodation in order to “promote equality and eliminate discrimination”.<sup>176</sup> This is based on the understanding that it is societal barriers rather than individual impairments that create disability. Barriers will be most successfully removed through a systemic effort: “[o]nce we start thinking that A is different and we need to fit A in, then all sorts of practical challenges arise—it is very hard and very specific”.<sup>177</sup> The concept of universal design will be important because it “normalises different needs” and “plans with all learners in

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171 Ministry of Education *Special Education Update: Update action plan* (November 2015).

172 Interview with participant 1, Director of Special Education, above n 16.

173 Interview with participant 17, parent, above n 8; and Interview with participant 13, mainstream teacher with experience of disability, above n 144.

174 Interview with participant 17, parent, above n 8; and Interview with participant 13, mainstream teacher with experience of disability, above n 144. The interviewee described this as “support without having to jump through hoops ... putting students and their families in charge of what they need, with that being delivered”.

175 *Smith*, above n 4, at [33].

176 Disability Convention, art 5(3).

177 Interview with participant 11, deputy principal of a special school, above n 17.

mind”.<sup>178</sup> Achieving universal design of school spaces, structures and curricula may involve some large upfront costs, but it is the most effective way to comply with the principles in the Disability Convention and uphold the social model of disability.

## VII Conclusion

Reasonable accommodation in schools is essential in upholding the dignity of children with disabilities and in achieving equal education. The Education Act provides a formal legal right to inclusive education. However, in practice, discrimination on the basis of disability means that such a right does not exist for students with disabilities. Empirical evidence has shown that discrimination exists in the provision of education and is aggravated by a funding system in dire need of repair.

Part 1A of the HRA can be used to challenge discriminatory practices by State schools in light of the right to be free from discrimination. This right is only subject to reasonable limits that are demonstrably justified in a free and democratic society. The concept of reasonable accommodation is relevant in assessing whether the discrimination is reasonably necessary for the purposes of s 5 of the NZBORA. In the context of disability and education, this assessment will involve considerations of effectiveness and burden, which have been imported from the Disability Convention, pt 2 of the HRA and relevant overseas case law.

This article has used the case of *Green Bay* as an example of discrimination in school disciplinary decisions. Applying s 5 of the NZBORA, coloured by the principle of reasonable accommodation, this article concludes that the Principal’s and Board of Trustee’s decisions were discriminatory, disproportionate and not reasonably necessary. Therefore, A’s exclusion could not be justified pursuant to s 5 of the NZBORA, and thus constitutes unlawful discrimination.

There are limits to the effectiveness of the law, which can often be inaccessible as a dispute resolution tool in this context. Nevertheless, reasonable accommodation is an important principle in the implementation of equal education. Drawing on the author’s empirical study, this article finds that the current system of learning support and teacher training are not simply inadequate—they are barriers to equal education. Parents and educators will all benefit from further guidance and training from the Ministry of Education regarding the practical requirements of reasonable accommodation. Teachers must be trained and supported to meet the needs of all learners in their class, and the Government should provide more effective resources to schools to help them realise the Education Act’s promise of equal education. Equal education for students with disabilities must be realised because it upholds human dignity, enables the full development of human potential and achieves substantive equality for traditionally marginalised children.

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178 Interview with participant 11, deputy principal of a special school, above n 17.