

REBECCA MCMENAMIN

**REASONABLE ACCOMMODATION: EQUAL
EDUCATION FOR LEARNERS WITH DISABILITIES**

Faculty of Law

Victoria University of Wellington

2016

Abstract

This paper analyses the concept of reasonable accommodation which 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 to determining whether discrimination by State schools is justified pursuant to s 5 of the New Zealand Bill of Rights Act 1990. It raises considerations of the effectiveness of any accommodation and burden of that accommodation on State schools. This paper applies those considerations to the facts of *A v Hutchinson and Green Bay High School* to conclude that discrimination in the disciplinary decision at issue was not justified. Having assessed that situation, this paper 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.

Key words

Reasonable accommodation; disability discrimination; education; section 5 of the New Zealand Bill of Rights Act 1990; Convention on the Rights of Persons with Disabilities; *A v Hutchinson and Green Bay High School*.

Contents

I	Introduction.....	4
II	Equal education is not realised in practice	6
	A THE RIGHT TO EDUCATION	6
	1 The EA89.....	6
	2 International obligations	7
	B EMPIRICAL STUDY: EQUAL EDUCATION IS NOT REALISED IN PRACTICE	7
	C GREEN BAY.....	11
III	Freedom from discrimination and the obligation of reasonable accommodation	13
IV	How is the concept of reasonable accommodation to be applied within the s 5 framework?	14
	A THE CONVENTION	14
	B PART 2 OF THE HRA	16
	C COMPARABLE JURISDICTIONS	18
	1 Relevant to the reasonably necessary test	18
	2 Fiscal justifications	19
	3 Teacher training and resourcing	20
	D CONCLUSIONS REGARDING APPLICATION OF REASONABLE ACCOMMODATION WITHIN S 5.....	20
V	Reasonable accommodation applied to Green Bay facts.....	21
	A BORA APPLIES (S 3)	21
	B PRIMA FACIE DISCRIMINATION (S 19).....	21
	C AN UNJUSTIFIED LIMITATION (S 5)	21
	1 Sufficiently important objective	21
	2 Proportionality	22
	D CONCLUSION ON APPLICATION OF S 5 TO GREEN BAY	25
VI	Reasonable accommodation in practice	25
	A THE LIMITED EFFECTIVENESS OF LEGAL CHALLENGE	25
	1 Impracticalities of a legal claim.....	25
	2 Potential fiscal justifications	26
	B PRACTICAL SOLUTIONS	27
	1 The role of educators.....	27
	2 Rethinking the learning support system.....	29
VII	Conclusion.....	30

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.*¹

The Education Act 1989 (EA89) provides that students with special education needs, including needs stemming from disabilities, have the same right to enrol and receive State-provided education as non-disabled students.² However, discrimination exists in the provision of education, and equal education is not realised. This paper examines the role that reasonable accommodation plays in legal and non-legal responses to discrimination in education.

Reasonable accommodation is defined by the Convention on the Rights of Persons with Disabilities (the Convention) to be the modification and adjustments necessary and appropriate to ensure equal enjoyment of all human rights, without imposing a disproportionate and undue burden on providers.³ Failure to make reasonable accommodation constitutes discrimination.⁴ Discrimination by State schools on the ground of disability is unlawful unless justified under s 5 of the New Zealand Bill of Rights Act 1990 (BORA).⁵ That is because s 19 of BORA prohibits discrimination on a number of grounds, including disability.⁶

To analyse the role that reasonable accommodation might play in justifying discrimination, this paper makes use of the facts in *A v Hutchinson and Green Bay High School*.⁷ *Green Bay* concerned a student, “A”, who had learning and behavioural disabilities, including autism spectrum disorder (ASD). Following an incident at school, A was suspended and excluded. The Principal and Board of Trustees reasoned that A posed safety concerns and

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

² Education Act 1989, ss 3, 8 and 9.

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

⁴ CRPD, art 2; *Brant Country Board of Education and Attorney General for Ontario v Eaton* [1997] 1 RCS 241 (SCC) at 272 [*Eaton*], affirmed in *Smith v Air New Zealand Ltd* [2011] NZCA 20, [2011] 2 NZLR 171 at [21].

⁵ A discrimination claim could be brought against State schools under Part 1A of the Human Rights Act 1993 or under BORA itself.

⁶ Human Rights Act 1993, s 21.

⁷ *A v Hutchinson and Green Bay High School* [2014] NZHC 253 (HC); [2014] NZAR 387 [*Green Bay (HC)*].

that they had inadequate resources to meet his needs. The High Court quashed these decisions, finding that neither decision-maker sufficiently considered the fact that the school had reduced A's learning and behaviour support.⁸ The Principal and Board appealed. Before the Court of Appeal, A's mother submitted that the suspension and exclusion of A was discriminatory contrary to the Human Rights Act 1993 (HRA). Ultimately, the case became moot and the Court did not hear the substantive appeal.⁹ 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, particularly in the disciplinary area."¹⁰

This paper will explore disability discrimination in schools in five Parts. Part II outlines the right to education and draws on an empirical study conducted by the author and the facts of *Green Bay* to illustrate that equal education is not realised because discrimination exists in practice.¹¹ The right to be free from discrimination and the obligation of reasonable accommodation are introduced in Part III. Part IV analyses how reasonable accommodation is to be applied when justifying discrimination in the education context, with reference to the Convention, Part 2 of HRA and case law from comparable jurisdictions. That analysis is applied to the facts of *Green Bay* in Part V. In Part VI, this paper returns to the empirical study to argue that the law is not necessarily the most effective way to address discrimination in education and to propose some practical solutions regarding teacher training and the funding scheme.

Before embarking, it is worth noting that this paper follows the Convention in adopting a social model of disability: people's impairments are only disabling when treated as such

⁸ At at [74], [78] and [82].

⁹ *Hutchinson and Green Bay v A* [2015] NZCA 214, [2015] NZAR 1273 at [28].

¹⁰ At [16].

¹¹ 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, Disability Rights Commissioner, previous chair of the Human Rights Review Tribunal, lawyers (Human Rights Commission, Auckland Disability Law, YouthLaw) and 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 also served on school boards of trustees).

by society.¹² As recognised by the Supreme Court of Canada, the concept of reasonable accommodation is integral to the social model of disability: “It 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”.¹³

II Equal education is not realised in practice

A The right to education

Education provides a gateway for fulfilling potential and is “both a human right in itself and an indispensable means of realising other rights.”¹⁴ Education “is a way of achieving equity, regardless of personal circumstances”, such as disability.¹⁵

1 The EA89

Part 1 of the EA89 provides rights to primary and secondary education. Every child is “entitled to free enrolment and free education at any State school”.¹⁶ This right is provided on an equal basis to all students, including those with “special education needs”.¹⁷ Although there is no right to special education,¹⁸ the Secretary of Education may authorise a child to receive support from, or be enrolled in, a special service or enrolment at a particular State school, special or clinic, with parental agreement.¹⁹ Parents can apply to have such arrangements reconsidered.²⁰

¹² CRPD, preamble; Interview with participant 10, primary school principal (the author, 4 July 2016): “take the view of ‘what problems does the child face’ instead of ‘what problems does the child create?’”; Interview with participant 11, deputy-principal of a special school (the author, 25 June 2016): “we 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 NZJPIL 227 at 283.

¹³ *Eaton*, above n 4, at 272, cited in *Smith*, above n 4, at [21].

¹⁴ Human Rights Commission *Disabled Children’s Right to Education* (2009) at 3; United Nations Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 13: The Right to Education (Art 13 of the Covenant)* XXI E/C.12/1999/10 (1999).

¹⁵ Interview with participant 14, education academic (the author, 28 June 2016).

¹⁶ Section 3.

¹⁷ Section 8.

¹⁸ *Daniels v Attorney-General* [2003] 2 NZLR 742 (CA) at [21]–[25].

¹⁹ Section 9.

²⁰ Section 10.

2 *International obligations*

New Zealand is party to a number of international instruments affirming the right to equal education: the International Covenant on Economic, Social and Cultural Rights,²¹ the Convention on the Rights of the Child,²² and the Disability Convention.²³

These obligations 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”,²⁴ and 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”.²⁵

B Empirical study: Equal education is not realised in practice

An empirical study conducted by the author has confirmed literature and anecdotal evidence indicating that there is a gap between the right to equal education under EA89 and its practical implementation.²⁶ Examples from that study illustrate that discrimination in education is prevalent.

Discriminatory practices exist at the point of enrolment. Schools face a “higher cost to enrol someone with disabilities and [have] no mechanism to remedy that”.²⁷ In practice, there are “soft ways” for schools to say “take your child somewhere else”.²⁸ One parent

²¹ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (adopted 16 December 1966, entered into force 3 January 1976), art 13.

²² Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 23 (rights of children with disabilities) and art 28 (right to education) [CRC].

²³ CRPD, art 24(1).

²⁴ CRC, arts 23 and 28.

²⁵ CRPD, art 24(1)(a).

²⁶ Independent Monitoring Mechanism of the CRPD (the Human Rights Commission, the Ombudsman and the New Zealand Convention Coalition) [IMM] *Art 24 The Right to an Inclusive Education: Implementation Report* (June 2016); IMM *Making Disability Rights Real: Annual report of the monitoring mechanism 2011-2012* (December 2012) at 64; Interview with participant 14, education academic (the author, 28 June 2016): “the problem is about enforcement and implementation of that right”.

²⁷ Interview with participant 10, primary school principal (the author, 4 July 2016).

²⁸ Interview with participant 17, parent (the author, 4 August 2016); Interview with participant 16, parent (the author, 15 June 2016): “we don’t have the right teachers or resources to manage your child”; Interview with participant 12, specialist teacher who manages outreach service for ORS-funded children (the author, 16 May 2016): “have you tried the school down the road?”

expressed that she has “been through the gamut of schools not wanting my child”.²⁹ These practices exist, despite it being unlawful to refuse enrolment.³⁰

Discrimination is also rife in day-to-day school life.³¹ Interviewees shared a variety of experiences: parents being asked to pay for a teacher aide, children not allowed to go on camp, children sent home at midday when their teacher aide left, and children sent to the library for most of the day, alienated from their peers.³²

It is important to recognise that children with ASD may be treated differently from those with other disabilities, and that differential treatment constitutes discrimination.³³ An interviewee has experienced this form of discrimination first hand: his children were diagnosed with ASD and diabetes respectively as toddlers. When the second child was diagnosed with diabetes, medical staff promptly trained staff at his kindergarten how to manage diabetic crises. This upskilling of teachers regarding management of diabetes is “the opposite of the ambulance at the bottom of the cliff philosophy that dominates thinking about ASD and intellectual disability. With ASD, often there is no ambulance, just rocks”. In the parent’s words, “there is no reason why [children with ASD] shouldn’t also get this”.³⁴ ASD crises may be more complex to manage because the disability manifests in behavioural changes. However, teachers should be taught how to manage ASD crises as they are for other illnesses and disabilities.

Stigmatisation of persons with disabilities is often based on prejudice or fear, as one interviewee observed, “like anything that is different, people are scared of it”.³⁵ This stigma is compounded against learners with ASD because the community has less knowledge about ASD as compared with other disabilities. A school may inaccurately perceive a child

²⁹ Interview with participant 15, parent (the author, 24 July 2016).

³⁰ Education Act, s 3.

³¹ Interview with participant 15, parent (the author, 24 July 2016): “things at primary school were probably not legal, but we put up with it”.

³² Interview with participant 5, lawyers at Auckland Disability Law (the author, 20 June 2016); Interview with participant 15, parent (the author, 24 July 2016); 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).

³³ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.4.1].

³⁴ Interview with participant 17, parent (the author, 4 August 2016).

³⁵ Interview with participant 8, human rights advocate – QC (the author, 23 August 2016).

with ASD as a threat.³⁶ An interviewee has even heard a board member say “they shouldn’t even be at our school.”³⁷

Such discrimination occurs within a “fundamentally flawed”³⁸ funding scheme that is perceived to be based on “political judgment and degree” rather than effectiveness of solutions.³⁹ Problems with the current funding scheme will now be explored.

There is a problem with the amount of funding available and the capping of funding.⁴⁰ High needs funding is capped at a level that does not reflect the number of students with high needs.⁴¹ Outside of specific funding regimes,⁴² the Government provides funding to schools in a bulk amount,⁴³ but this is not tailored to the number of children with special learning needs enrolled at each school.⁴⁴ 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”.⁴⁵

Moreover, the limited available funding is difficult to access and is often withdrawn before substantive equality is achieved for the child. Parents find there are unnecessary administrative barriers in the current funding system, making it difficult to access on a

³⁶ Interview with participant 10, primary school principal (the author, 4 July 2016).

³⁷ Interview with participant 8, human rights advocate – QC (the author, 23 August 2016).

³⁸ Interview with participant 6, lawyer at Youth Law (the author, 20 May 2016).

³⁹ Interview with participant 4, previous chair of the Human Rights Review Tribunal (the author, 26 May 2016).

⁴⁰ The Ministry of Education is currently reviewing and updating the structure of special education, but will not alter the amount of funding (any changes will come into effect March 2017) “Special Education Update” Ministry of Education (11 January 2016) <www.education.govt.nz/ministry-of-education/specific-initiatives/special-education-update/>.

⁴¹ “More funding needed for all schools to become fully inclusive” (2015) *Education Review Series* <www.educationreview.co.nz/subject/policy/priority-learners>.

⁴² Specific funding regimes include Ongoing Resourcing Scheme, Severe Behaviour Service, Intensive Wraparound Service, and Positive Behaviour for Learning, see “Students with special education needs” (22 June 2016) <www.education.govt.nz/school/student-support/special-education/>.

⁴³ “Special education needs – services and support available” (14 November 2014) Education.govt.nz for Parents <parents.education.govt.nz/special-education-needs/primary-school/services-and-support-available/#specialedgrant>.

⁴⁴ 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/national/programmes/insight/audio/201796930/insight-the-special-education-struggle>.

⁴⁵ Interview with participant 10, primary school principal (the author, 4 July 2016).

practical and emotional level.⁴⁶ A parent applying for high needs funding found it to be “humiliating” 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”.⁴⁷ Problematically, funding is reduced when children make progress;⁴⁸ “if 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”.⁴⁹ Rather than “punishing schools for being successful” when children make progress, administrative bodies should “assess whether interventions being used are effective”.⁵⁰ Both parents and lawyers interviewed raised the administration and structure of learning support as a fundamental flaw in the implementation of equal education.

As a consequence of funding problems, schools lack resources and face budget constraints. This may lead them to discriminate. In disciplinary scenarios, 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.⁵¹ Even this best practice fails to recognise the need for preventive support to avoid discrimination, and does not address pressures on schools which lead to discrimination in situations short of exclusion. As articulated by an interviewee, “we need to avoid the situation where a school reaches their last resort and threatens exclusion before the school and child get extra resources”.⁵² 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.”⁵³

The empirical study conducted by the author suggests that discrimination in the implementation of equal education exists in enrolment and day-to-day life, and is exacerbated by prejudiced attitudes in schools and systemic funding issues. Discrimination also exists in disciplinary decision-making. Unfortunately, discrimination in this context is

⁴⁶ Interview with participant 17, parent (the author, 4 August 2016): “when you need the most help, you get the steepest wall to climb”.

⁴⁷ Interview with participant 17, parent (the author, 4 August 2016).

⁴⁸ Interview with participant 15, parent (the author, 24 July 2016): for example, the child’s ability to learn the saxophone was used by the Ministry to justify decreasing funding because he had shown capability to learn. Rather, this showed he could learn a technical skill one-on-one.

⁴⁹ Interview with participant 17, parent (the author, 4 August, 2016).

⁵⁰ Interview with participant 9, lawyer (the author, 24 July 2016).

⁵¹ Interview with participant 1, Director of Special Education (the author, 18 July 2016).

⁵² Interview with participant 2, Disability Rights Commissioner (the author, 2 June 2016).

⁵³ Interview with participant 8, human rights advocate – QC (the author, 23 August 2016).

not rare. 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.⁵⁴ *Green Bay* is a typical example of discrimination in disciplinary decision-making.

C Green Bay

“A” is a fourteen-year-old student who had been diagnosed with learning and behavioural disabilities including dyslexia and ASD. A had been treated by specialists for a number of years.⁵⁵ Prior to A’s attendance at Green Bay, a critical part of A’s support was a Resource Teacher of Learning and Behaviour (RTLb).⁵⁶ Green Bay did not activate that support.⁵⁷

The incident giving 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 A pulled the door shut to prevent his teacher entering, still yelling obscenities. The closing door hit the teacher’s head. The senior leadership team then physically restrained A. When calm, A skated to his next class. A was not disruptive but staff considered his presence inappropriate given the earlier events and removed him. The Dean requested A be taken home.⁵⁸

The Principal was concerned about wider safety at the school and had diminishing confidence in the effectiveness of strategies used to manage A’s complex and challenging behaviour.⁵⁹ She considered A’s “episode of defiance” to be “gross misconduct” that was a “dangerous example to other students” and therefore suspended A.⁶⁰ Notably, the Principal’s decision did not comment on strategies suggested by A’s educational psychologist to address behavioural issues and defiance.⁶¹ Thus that material did not come

⁵⁴ IMM Art 24 *The Right to an Inclusive Education: Implementation Report*, above n 26, Appendix 1.

⁵⁵ *Green Bay (HC)*, above n 7, at [5].

⁵⁶ Ministry of Education “Professional Practice” (May 2016) TKI Resource Teacher Learning & Behaviour Online <rtl.b.tki.org.nz/Professional-practice/Intro-to-professional-practice>. The RTLb service entails specialist teachers working collaboratively with classroom teachers to develop strategies to teach and manage learning and behaviour.

⁵⁷ *Green Bay (HC)*, above n 7, at [12].

⁵⁸ At [18]–[28].

⁵⁹ At [31]–[32].

⁶⁰ At [34]; relying on Education Act, s 14(1)(a).

⁶¹ At [8] and [33].

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.⁶²

A's mother successfully judicially reviewed the school's decisions.⁶³ 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.⁶⁴

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 by, first, suspending and excluding A because of his disabilities and, second, failing to provide reasonable accommodation for A's disabilities.⁶⁵ These arguments were never tested. The Court of Appeal considered the case moot because A had moved cities and had found education outside of the mainstream system.⁶⁶

Issues of discrimination against students with disabilities in education remain unaddressed by the courts. This paper uses *Green Bay* as a case study of how reasonable accommodation may be applied in the education context. This paper proceeds on the basis that the school's decisions were discriminatory,⁶⁷ and focuses, instead, on whether that discrimination can be justified.⁶⁸ To inform that analysis, this paper now introduces freedom from discrimination and the obligation of reasonable accommodation.

⁶² At [45]–[46].

⁶³ At [74], [78] and [82].

⁶⁴ At [75]–[78].

⁶⁵ *Hutchinson and Green Bay v A*, above n 9, at [3].

⁶⁶ At [28].

⁶⁷ Contrary to New Zealand Bill of Rights Act, s 19. See *Ministry of Health v Atkinson* [2012] NZCA 456, [2012] 3 NZLR 456 at [55] and [136]. Regarding the contentious role of the comparator in discrimination analysis, see Asher Emanuel *To whom will you liken me, and make me equal? Reformulating the role of the comparator in the identification of discrimination* (2014) 45 VUWLR 1. Regarding discrimination against ASD in education, see *Purvis v New South Wales* [2003] HCA 62, [2003] CLR 92, majority decision on reasonable accommodation rejected in *Smith*, above n 4, at [32], and *Purvis* minority approach (at [130]) preferred in *Adoption Action Inc v Attorney General* [2016] NZHRRT 9 at [191].

⁶⁸ New Zealand Bill of Rights Act, s 5.

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 to be assessed under BORA or Part 1A of the HRA, and, therefore, according to ss 19 and 5 of BORA.⁶⁹ Section 19 of BORA prohibits discrimination on any of the grounds listed in s 21 of the HRA, one of which is disability, by an actor to whom s 3 of BORA applies. If discrimination “can be demonstrably justified in a free and democratic society” under s 5 of BORA, that discrimination is lawful.⁷⁰

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.⁷¹ 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”.⁷² Therefore, to achieve freedom from discrimination for persons with disabilities, providers must treat those people differently, subject to an element of reasonableness.

The concept of reasonable accommodation is integral to 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 BORA. It will be unlawful for a government service provider to fail to accommodate the needs of persons with disabilities unless it would be disproportionate to make that accommodation in the circumstances (making that accommodation unreasonable).⁷³

This paper focuses on the role that reasonable accommodation plays in the s 5 proportionality analysis when determining whether prima facie discrimination on the basis

⁶⁹ Human Rights Act, s 20L imports the BORA framework to a Part 1A claim.

⁷⁰ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [92]; *Adoption Action*, above n 67, at [56]–[58].

⁷¹ Butler and Butler, above n 33, at [17.4.1].

⁷² *Purvis*, above n 67, at [86] per McHugh and Kirby JJ; cited in *Smith*, above n 4, at [20].

⁷³ Butler and Butler, above n 33, at [17.20.4].

of disability is justified. The Supreme Court in *Hansen v R* set out the relevant methodology when applying s 5:⁷⁴

- a) Is the objective of the limiting measure sufficiently important to justify limiting the right?
- b) Is the limiting measure proportional?
 - i) Is the limiting measure rationally connected to its purpose?
 - ii) Is the limit greater than reasonably necessary?
 - iii) 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.⁷⁵ In the disability context, application of s 5 will be coloured by the concept of reasonable accommodation.

IV How is the concept of reasonable accommodation to be applied within the s 5 Framework?

The following analysis of the relationship between the concept of reasonable accommodation and the s 5 framework is informed by the obligation of reasonable accommodation in the Convention, the way that obligation manifests in Part 2 of the HRA, and case law from comparable jurisdictions.

A The Convention

In the disability context, s 5 will be applied in light of New Zealand's obligations under the Convention. It is well established that Courts strive to apply domestic legislation consistently with New Zealand's international obligations.⁷⁶ Moreover, the HRA is to be interpreted purposively.⁷⁷ The purpose of the HRA is to "provide better protection of human rights in New Zealand in accordance with United Nations Covenants or Conventions on human rights".⁷⁸ Although the HRA predates the Convention, this purpose

⁷⁴ *Hansen*, above n 70, at [103] per Tipping J, [203]–[205] per McGrath J, [269]–[272] per Anderson J, and [64]–[81] per Blanchard J; *R v Oakes* 1986 1 SCR 103 (SCC).

⁷⁵ Butler and Butler, above n 33, at [17.20.1].

⁷⁶ *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); *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA).

⁷⁷ Interpretation Act 1999, s 5(1).

⁷⁸ Human Rights Act, long title.

statement was not intended to crystallise the relevance of international conventions as at 1993. Accordingly, the HRA is to be interpreted consistently with the Convention.⁷⁹

While the Convention does not establish new rights for people with disabilities,⁸⁰ it does require that existing rights be provided on an equal basis. The Convention adopts a substantive (not formal) model of equality, to which the concept reasonable accommodation is central.⁸¹

Under the 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.”⁸² The Convention defines reasonable accommodation to be:⁸³

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.

The Convention explicitly requires reasonable accommodation in education.⁸⁴ To safeguard the right to education without discrimination, States must ensure that children are not excluded from school on the basis of disability, ensure inclusive education and provide reasonable accommodation of individuals’ requirements.⁸⁵

While the Convention does not prescribe how reasonable accommodation is to be implemented in practice, the definition requires that attention be paid to effectiveness and potential burden.⁸⁶ Assessment of whether accommodation is reasonable will include considerations of the effectiveness of any accommodation and the potential burden of making it. Potential burdens may arise from issues of practicality, associated financial or other costs, availability of resources, and potential disruption to other people.⁸⁷ Reasonable

⁷⁹ Bell, McGregor and Wilson, above n 12, at 285.

⁸⁰ Office for Disability Issues *Convention on the Rights of Persons with Disabilities National Interest Analysis* (24 June 2008) at [23].

⁸¹ Preamble.

⁸² Article 5(3).

⁸³ Article 2.

⁸⁴ Article 24.

⁸⁵ Article 24(2)(a)–(c).

⁸⁶ Noted in *Smith*, above n 4, at [55].

⁸⁷ IMM *Reasonable accommodation of persons with disabilities in New Zealand* (November 2015) at 4.

accommodation is a fact-specific exercise, and must be determined in light of the circumstances of each case.⁸⁸

Turning to s 5, matters relating to effectiveness and potential of any accommodation will arise when considering whether the discrimination is reasonably necessary in order to achieve its purpose (the reasonably necessary test). In order to achieve consistency with Convention obligations, it is likely that the reasonably necessary test would be applied by a court so that a discriminatory measure would only be found to fall within a range of *reasonable* options where it would be unreasonable to accommodate the disability because any accommodating measures would be (a) ineffective or (b) unduly burdensome.

B Part 2 of the HRA

Claims against State schools may be made under Part 1A of the HRA. Part 2 of the HRA prohibits discriminatory conduct by private providers (as opposed to public providers) in various contexts, one of which is education. In these contexts, discrimination is unlawful, unless it falls within the relevant tailored statutory exception.

In respect of education, ss 57 and 60 prohibit and excuse discrimination by private education providers. Section 57 specifies that it shall be unlawful to discriminate in the areas of enrolment, access to benefits or services, exclusion decisions (or other decisions which cause detriment) on one of the prohibited grounds.⁸⁹ Under s 60, nothing in s 57 will apply where:

- special services or facilities required to enable the disabled learner's participation or benefit cannot reasonably be made available in the circumstances;⁹⁰ or
- the disabled person's admittance to the school would create unreasonable risk of harm to that person or others (unless reasonable measures could reduce that risk to a normal level without causing unreasonable disruption).⁹¹

The prohibitions, and excuses for, discrimination in the other contexts covered by Part 2 are substantially similar in their structure and content. While the HRA does not contain an

⁸⁸ Interview with participant 8, human rights advocate – QC (the author, 23 August 2016); Anna Lawson "Reasonable Accommodation and Accessibility Options: Towards a More Unified European Approach?" (2010) 11 EADLR 11, at 12–14.

⁸⁹ Section 21(1).

⁹⁰ Section 60(1).

⁹¹ Sections 60(1) and (2).

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.⁹²

Smith concerned discrimination on the basis of disability within the context of the provision of services. The claimant argued that Air New Zealand failed to reasonably accommodate her need for supplementary oxygen when flying because it charged extra money for the supply of that oxygen. Air New Zealand responded that charging extra money was reasonable and that, therefore, its discrimination was lawful. The Court of Appeal agreed: Air New Zealand had discriminated contrary to s 44(1)(b), but the s 52 exception applied, rendering that discrimination lawful.⁹³

For present purposes, *Smith* is relevant to the application of reasonable accommodation in the context of s 5 of BORA. The Court confirmed that providers have an obligation under s 44 to accommodate disability where that is reasonable, by providing services in a special manner. The Court reached this conclusion by analysing the structure of the provisions: because discrimination is excused when accommodation is too onerous, there is “an inherent requirement” to accommodate where that accommodation is *not* too onerous.⁹⁴

The structure of ss 44 and 52 mirrors the structure of the prohibitions and excuse provisions found across the HRA, including ss 57 and 60. 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.”⁹⁵ As the structure of the education provisions mirrors that of ss 44 and 52, and s 60 uses the language of reasonableness in justifying discrimination, an ‘inherent requirement’ to accommodate can be read into s 57.

The above analysis, in respect of disability discrimination by private education providers, is relevant also to disability discrimination by public education providers. Discrimination by State school is assessed in accordance with ss 19 and 5 of BORA. The structure of ss 19 and 5 parallels the structures of discrimination prohibition and justification in Part 2 of the HRA. In addition, just as the justificatory provisions in Part 2 use the language of “reasonable”, so does s 5. Therefore, applying the principles behind the Court of Appeal’s

⁹²*Smith*, above n 4, at [17] and [33]–[34].

⁹³ At [97].

⁹⁴ At [33].

⁹⁵ At [57].

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).

The exceptions expressly set out in s 60 to discrimination on the basis of disability in the private education context can be taken to indicate what Parliament intended to amount to a justified limit on rights and, therefore, will inform the application of s 5 of BORA in the context of a discrimination claim against non-private education providers.⁹⁶ Drawing on the s 60 exceptions, discrimination may be justified under s 5 if it is not reasonable to provide special services in the circumstances (s 60(1)) or if it is reasonably necessary to avoid an unreasonable risk of harm (s 60(2)-(3)). In relation to the former, a provider's refusal to accommodate may be justified if accommodation would incur excessive costs. However, courts should not rely on "impressionistic evidence" and must be wary of placing a low value on accommodation of persons with disabilities.⁹⁷

C Comparable jurisdictions

Anti-discrimination law and the principle of reasonable accommodation have been a powerful antidote to failed implementation of the right to education for learners with disabilities in other jurisdictions.⁹⁸ The following principles have emerged: reasonable accommodation is relevant to the reasonably necessary test, fiscal restraints will not justify discrimination where the government failed to consider alternatives or to take steps not involving excessive cost, and inadequate teacher training may be a form of discrimination.

1 Relevant to the reasonably necessary test

The case of *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) (Grismer)*⁹⁹ supports the proposition that reasonable accommodation fits under the reasonably necessary test in the s 5 framework. *Grismer* was a decision of the Canadian Supreme Court concerning disability discrimination in testing for driver licenses. When determining whether that discrimination was lawful, the Supreme

⁹⁶ See also Butler and Butler, above n 33, at [17.20.4].

⁹⁷ *Smith*, above n 4, at [60]; cites *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868 (SCC) [*Grismer*] at [41].

⁹⁸ Further jurisdictions have upheld a substantive right to education independent without recourse to anti-discrimination law: see *Sinnott v Minister for Education* [2001] IESC 63, [2001] 2 IR 505 (SC); *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198, [2016] 1 All SCA 369 (SCA) (2 Dec 2015).

⁹⁹ *Grismer*, above n 97.

Court applied a test similar to that applied by the New Zealand Supreme Court in respect of s 5 of BORA. The defendant was to establish:¹⁰⁰

- (a) a rational connection between the alleged discriminatory standard and its purpose;
- (b) that the standard was adopted on a good faith belief that it is necessary to fulfil the purpose; and
- (c) that the standard is reasonably necessary to accomplish the purpose.

Grismer confirmed that when assessing whether discrimination is reasonably necessary to achieve its purpose, the courts will assess whether the defendant has complied with the obligation to reasonably accommodate. While the s 5 test does not require the assessment of good faith, it does ask whether the discrimination is no more than reasonably necessary to achieve its purpose.¹⁰¹ As in *Grismer*, this is the stage of the inquiry where reasonable accommodation bites.

2 *Fiscal justifications*

In *Moore v British Columbia (Education)*,¹⁰² the Supreme Court of Canada held that a public education provider cannot justify discrimination in the provision of special education services unless they demonstrate that they considered alternative options to accommodate disabilities. That obligation exists even where the provider is facing resource constraints.¹⁰³ In New Zealand, it is clear 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.”¹⁰⁴

Additionally, *MDAC v Bulgaria*¹⁰⁵ emphasises that financial constraints will not justify failure to implement the right to education where the government could have taken specific

¹⁰⁰ At [20]; derived from *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees’ Union* [1999] 3 SCR 3 (SCC) [*Meiorin*] at [54].

¹⁰¹ *Hansen*, above n 70, at [103] per Tipping J.

¹⁰² *Moore*, above n 1.

¹⁰³ At [49] and [52].

¹⁰⁴ *Attorney-General v IDEA Services Ltd (In Stat Management)* [2012] NZHC 3229, [2013] 2 NZLR 512 at [205].

¹⁰⁵ *MDAC v Bulgaria* Complaint No 41/2007 (Decision on the merits, 3 June 2008, European Committee of Social Rights). See also the similar case of *Autism Europe v France* Complaint No 13/2002 (Decision on the merits, 4 November 2003, European Committee of Social Rights).

steps, such as training educators on the legislative action plans, without incurring excessive cost.¹⁰⁶

3 Teacher training and resourcing

MDAC also illustrates that inadequate teacher training will be discriminatory. The European Committee on Social Rights used the framework of availability, accessibility, acceptability and adaptability of education to assess implementation of education for intellectually disabled children.¹⁰⁷ The Committee held that the government failed to meet adaptability criteria because teachers were not sufficiently trained to meet these learning needs and teaching materials in mainstream schools were inadequate.¹⁰⁸ This breached the rights to education and equality.¹⁰⁹ A similar argument has been raised in the forthcoming case of *IHC v Ministry of Education*, and if successful, may trigger better teacher education and provision of adequate resources.¹¹⁰

D Conclusions regarding application of reasonable accommodation within s 5.

Drawing on the Convention, Part 2 of the HRA and case law from comparable jurisdictions, it is concluded that reasonable accommodation is relevant at the reasonably necessary test of the s 5 analysis. Assessment of reasonable accommodation will involve considerations of effectiveness, and burdens arising from impracticality, excessive financial cost, unavailability of resources, and 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 paper now applies those conclusions to the discrimination claim in *Green Bay*.

¹⁰⁶ At [47].

¹⁰⁷ CESCR, above n 14; see also Katarina Tomaševski “Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable” Right to Education Primers No 3 (Novum Grafiska AB, Gothenbur, 2001) <www.right-to-education.org> at 12.

¹⁰⁸ At [44]. See Janet 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 Rioux, Lee Ann Bassler and Melinda Jones (eds) *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff, Leiden, 2011) 273 at 290–291.

¹⁰⁹ At [55]; European Social Charter (revised) ETS 163 (entered into force January 7, 1999), art 17(2).

¹¹⁰ Similar issues regarding teacher training and lack of resources are at issue in the class action *IHC v Ministry of Education* (forthcoming).

V Reasonable accommodation applied to Green Bay facts

Whether “A” was unlawfully discriminated against by Green Bay High School is to be determined with reference to ss 3, 5 and 19 of BORA.¹¹¹

A BORA applies (s 3)

BORA 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.”¹¹² The school performs the public function of providing education pursuant to EA89. Accordingly, BORA applies to the school.

B Prima facie discrimination (s 19)

This paper proceeds on the basis that the school’s decisions to suspend and exclude A were discriminatory.¹¹³

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. That test assesses whether there is a sufficiently important objective for the limitation and whether the limit is proportional to the harm to the right.

1 Sufficiently important objective

The sufficiently important objective test is an easily met threshold test.¹¹⁴ 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 served by excluding A is the protection of safety of staff and other children. Safety in a classroom is essential for effective teaching and learning. Additionally, 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.

¹¹¹ An action may be brought as a HRA claim (and go to the Human Rights Review Tribunal) or as a BORA claim (and go straight to the High Court).

¹¹² New Zealand Bill of Rights Act, s 3.

¹¹³ See *Atkinson*, above n 67, at [55] and [136].

¹¹⁴ *Hansen*, above n 70, at [121] per Tipping J.

2 Proportionality

(a) Rational connection

Whether there is a rational connection between the exclusion and the safety of staff and other children is also a threshold issue, satisfied by a mere logical relationship.¹¹⁵

If A's verbal threats and uncontrolled physical actions had escalated, they could have caused serious harm. Exclusion of A removed those threats and behaviours. Thus removal of A 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."¹¹⁶ 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 limb of s 5 of BORA if it falls within a range of reasonable alternatives.¹¹⁷

As concluded above, reasonable accommodation bites at the reasonably necessary test. In the disability context, considerations of effectiveness and burden are relevant to whether the discrimination fell 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) Risk of harm to others and mitigation options

Suspension on the ground of risk of serious harm is a last resort; such action is only lawful where safety concerns cannot be managed in other ways.¹¹⁸ Even if A posed an unreasonable risk of harm, there were alternative measures the school could have taken

¹¹⁵ *Hansen*, above n 70, at [122]-[125] per Tipping J.

¹¹⁶ *Hansen*, above n 70, at [126] per Tipping J.

¹¹⁷ *Atkinson*, above n 67, at [154]; *IDEA Services Ltd*, above n 104, at [222].

¹¹⁸ 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) <www.education.govt.nz/assets/Documents/School/Managing-and-supporting-students/Stand-downs-suspensions-exclusions-and-expulsions-guidelines/SuspensionLegalGuideWEB.pdf> at [33]-[34].

which would have likely reduced the risk to a “normal level” without causing unreasonable disruption to others.¹¹⁹ For example, the teacher could have been trained to communicate with A without being confrontational, or simply could have allowed A to keep his skateboard by his desk.¹²⁰ The school could have re-activated RTLB support,¹²¹ or implemented the educational psychologist’s suggested behaviour management strategies.¹²² Evidence from A’s previous schooling showed that when he received support, his ability to manage behavioural difficulties significantly improved.¹²³ These measures would likely have reduced the safety risk to a normal level without causing unreasonable disruption to others.

(ii) Mitigation options were reasonable

There were alternative measures that would not have imposed an excessive financial burden on the school. Determination of whether a cost is excessive depends on the circumstances. The Board submitted that exclusion was “the only option available in the circumstances”, stating that one-on-one support was beyond the school’s capabilities.¹²⁴ To determine whether provision of support to A would entail excessive costs, the court would need to analyse the school’s resource allocation decisions.¹²⁵ It is unlikely a court would defer to the school unless it had considered where the “balance ... between fiscal objectives and human rights ... was to be struck”.¹²⁶ 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

¹¹⁹ Human Rights Act, s 60(2). See also *Moore*, above n 1.

¹²⁰ See Ministry of Health *New Zealand Autism Spectrum Disorder Guidelines* (April 2008) at [3.4] ‘education sector organisation and management’; Emma Goodall “Simple strategies for effective engagement of autistic spectrum students to facilitate school success” (2015) *Altogether Autism* <www.altogetherautism.org.nz/wp-content/uploads/2015/07/Dr-Emma-Goodall-Simple-strategies-for-effective-engagement-of-autistic.pdf>.

¹²¹ *Green Bay (HC)*, above n 7, at [12].

¹²² *Green Bay (HC)*, above n 7, at [15]–[17].

¹²³ At [7], [10] and [11].

¹²⁴ *Green Bay (HC)*, above n 7, at [46].

¹²⁵ “Special education needs – services and support available” (14 November 2014) Education.govt.nz for Parents <parents.education.govt.nz/special-education-needs/primary-school/services-and-support-available/#specialedgrant>.

¹²⁶ *IDEA Services Ltd*, above n 104, at [205]; *Atkinson*, above n 67, at [172]–[173] deference does not displace Court’s s 5 responsibility.

resources.¹²⁷ There was no evidence before the High Court that Green Bay sought extra resources from the Ministry before excluding A.

Even if the court found one-on-one support, such as an RTLB, to be excessive in the circumstances, the school should have considered alternative options.¹²⁸ Alternative options would not have been excessive in the circumstances. For example, the teacher using non-confrontational management strategies would not involve any financial costs.¹²⁹ Additionally, implementation of the educational psychologist's defiance management advice was not excessive because incurring that cost is part of meeting the expectation that teachers will meet learners' needs with the support available to them.¹³⁰

Moreover, it was practical to implement any of those options. Although teachers may be challenged to meet the diverse sets of learning needs in each class, it is expected that the teacher will do so.¹³¹ It would also be practical to implement behaviour and defiance management advice because it had already been provided to the school.

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.¹³² Therefore, because exclusion did not accommodate A and there were effective and not burdensome alternatives to accommodate A, the school failed to reasonably accommodate A. Failure to reasonably accommodate A infringed his right to freedom from discrimination more than 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 balancing of 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.

¹²⁷ Interview with participant 1, Director of Special Education (the author, 18 July 2016); Interview with participant 15, parent (the author, 24 July 2016): "it helps to be an ally with the school against the Ministry".

¹²⁸ *Moore*, above n 1, at [47]; *IMM Reasonable accommodation of persons with disabilities in New Zealand*, above n 87, at 7.

¹²⁹ See *MDAC*, above n 105.

¹³⁰ Ministry of Education *The New Zealand Curriculum for English-medium teaching and learning in years 1-13* (2007) at 9: inclusion is one of eight principles of curriculum decision making.

¹³¹ Interview with participant 1, Director of Special Education (the author, 18 July 2016).

¹³² See *MDAC*, above n 105.

Exclusion of A was disproportionate. Freedom from discrimination is fundamentally important in a free and democratic society because it upholds human dignity, which “is the foundation of human rights theory and practice”,¹³³ by ensuring substantive equality. In particular, freedom from discrimination in education is critical for children with disabilities because it achieves substantive equality for this traditionally marginalised group. Although 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”,¹³⁴ the importance of safety does not outweigh the importance of affirming, promoting and protecting A’s freedom from discrimination.

D Conclusion on application of s 5 to Green Bay

This paper concludes that the school’s discrimination was not justified according to s 5 of BORA because it limited A’s right to freedom from discrimination more than reasonably necessary and was disproportionate. Accordingly, Green Bay’s discrimination is inconsistent with BORA and therefore unlawful.

VI Reasonable accommodation in practice

Having considered the application of the concept of reasonable accommodation to *Green Bay*, this paper returns to the empirical study conducted by the author to analyse possible solutions to achieve non-discriminatory education in practice. It recognises that the law may not be the best solution because of the limited effectiveness of legal challenge in this context.

A The limited effectiveness of legal challenge

The effectiveness of the law to realise the right to equal education is limited because of the impracticalities of bringing a legal claim in this situation and because schools may be able to justify discrimination by pointing to inadequate funding.

1 Impracticalities of a legal claim

Parents are unlikely to go to court to enforce their child’s right to equal education: “who has the time? Who has the money? Who is going to force themselves into a school where they’re not wanted?”¹³⁵ It can be extremely draining for parents to take a legal claim when

¹³³ *Seales v Attorney-General* [2015] NZHC 1239; [2015] 3 NZLR 556 at [66].

¹³⁴ Interview with participant 15, parent (the author, 24 July 2016).

¹³⁵ Interview with participant 15, parent (the author, 24 July 2016).

they are already fighting daily battles for their children’s education.¹³⁶ The effects of taking a legal challenge are exacerbated for parents who are “culturally alienated from asking for help and negotiating a western-based bureaucracy”.¹³⁷

Lawyers interviewed saw that “the only real option is judicial review, but it is out of reach in terms of cost, time and energy”.¹³⁸ Moreover, litigation does not guarantee that the student’s needs are addressed in the best way.¹³⁹ 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. Alternative dispute resolution may resolve the dispute in a more timely manner, making it “very effective if people want to engage with it”.¹⁴⁰ Despite the benefits of alternative dispute resolution, all “legal options are the last resort” and pit the parent, with few resources, against the school or state, as the case may be.¹⁴¹

Where legal avenues are pursued, good advocacy is “mission critical”.¹⁴² The author endorses the idea of an education advocacy service similar to that under the Health and Disability Commission or the Child, Young Persons and Families advocacy service, available for any dispute.¹⁴³ This would hold Boards to account and make it easier for parents to have their children’s rights upheld.

2 *Potential fiscal justifications*

Even if a legal claim is pursued, it may be ineffective because the principle of reasonable accommodation excuses discrimination where accommodation poses an excessive cost to

¹³⁶ Interview with participant 4, previous chair of the Human Rights Review Tribunal (the author, 26 May 2016).

¹³⁷ Interview with participant 13, mainstream teacher with lived experience of disability (the author, 14 July 2016).

¹³⁸ Interview with participant 5, lawyers at Auckland Disability Law (the author, 20 June 2016).

¹³⁹ Interview with participant 1, Director of Special Education (the author, 18 July 2016); Interview with participant 4, previous chair of the Human Rights Review Tribunal (the author, 26 May 2016); Interview with participant 5, lawyers at Auckland Disability Law (the author, 20 June 2016).

¹⁴⁰ Interview with participant 6, lawyer at Youth Law (the author, 20 May 2016). Compare with Interview with participant 4, previous chair of the Human Rights Review Tribunal (the author, 26 May 2016): it is better for parents to seek agreement with the school and the Ministry rather than attempt litigation, but even then, “agreement can be deeply ineffective, with parties having a David and Goliath-like bargaining disparity”.

¹⁴¹ Interview with participant 5, lawyers at Auckland Disability Law (the author, 20 June 2016).

¹⁴² Interview with participant 4, previous chair of the Human Rights Review Tribunal (the author, 26 May 2016).

¹⁴³ Interview with participant 5, lawyers at Auckland Disability Law (the author, 20 June 2016).

the provider. While schools must consider the balance to be struck between human rights and fiscal burdens, the court may find that funding constraints on schools, discussed in Part 1 of this paper, justify discrimination. On a practical level, the risk of such a finding may act as a disincentive for parents taking legal claims against schools, as one parent said, “reasonable accommodation seems to be a ... giant out”.¹⁴⁴ For these reasons, it is by no means certain that any legal challenge would succeed in upholding the promise of equal education for the affected individual.

Although limited, the law still plays an important role: the “language of rights”¹⁴⁵ “may be an antidote to a sense of helplessness” facing parents,¹⁴⁶ and strongly influences community attitudes. The law is only one tool of many to solve problems. Perhaps the principles of reasonable accommodation are best used as part of “a practical solution, not a dispute resolution tool”.¹⁴⁷

B Practical solutions

Two important components of “an education system that meets *everybody’s* needs”¹⁴⁸ are the educators, and structural support given to educators and learners. These two components complement each other in achieving reasonable accommodation in practice. Educators accommodate the child, and that accommodation is to be funded by the learning support system.

1 The role of educators

The education system itself may pose barriers to the implementation of the promise of equal education. Equally, it might be a vehicle of cultural change, complementing any role the law has 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.¹⁴⁹

According to education and human rights specialists interviewed, the education provided to teachers does not equip them to deliver the law’s promise of equal education. Interviewees suggest that one root of the problem is inadequate teacher training: “teachers

¹⁴⁴ Interview with participant 15, parent (the author, 24 July 2016).

¹⁴⁵ Interview with participant 14, education academic (the author, 28 June 2016).

¹⁴⁶ Interview with participant 7, human rights advocate – partner at law firm (the author, 23 June 2016).

¹⁴⁷ Interview with participant 5, lawyers at Auckland Disability Law (the author, 20 June 2016).

¹⁴⁸ Interview with participant 2, Disability Rights Commissioner (the author, 2 June 2016).

¹⁴⁹ Interview with participant 7, human rights advocate – partner at law firm (the author, 23 June 2016).

are trained to teach ‘ordinary’ – excuse that language – kids... kids with disabilities are seen as an add-on.”¹⁵⁰ Teachers have echoed this: “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.”¹⁵¹ The structure of secondary teaching qualifications also poses a problem; “one year isn’t long enough to teach them how to teach”.¹⁵² The content and structure of teacher education should empower teachers to be “competent and confident” to teach in a collaborative way and to take responsibility for all learners.¹⁵³

To champion inclusive education, schools must “understand that every student has a gift and their own capacity for development”,¹⁵⁴ the “school leadership team needs to buy into inclusive culture and create it” and teachers must be “upskilled to meet the needs to the children in [their] class”.¹⁵⁵ The author came across one such school in carrying out interviews. That school charter provides that, in words verbatim from a student, “We help people no matter what”.¹⁵⁶ As reported by a parent, that Principal is “committed to the philosophy to the point of making it into a daily fight”.¹⁵⁷ At this school, “teachers deliberately teach the whole school about everybody” by having a special lesson where the teacher asks: “what does autism mean?” “what does A mean when he says ...” and “how can we connect with him?”¹⁵⁸ This school demonstrates the power of inclusive education in achieving the promise of equal education. Cultivating an inclusive school environment has flow-on benefits: stigma is reduced and children are taught to question the marginalisation of people with disabilities and to seek change in the world around them.¹⁵⁹

If the law’s promise of equal education is to be realised, educators must be educated about their legal non-discrimination obligations and what the principle of reasonable

¹⁵⁰ Interview with participant 7, human rights advocate – partner at law firm (the author, 23 June 2016).

¹⁵¹ Interview with participant 13, mainstream teacher with lived experience of disability (the author, 14 July 2016).

¹⁵² Interview with participant 14, education academic (the author, 28 June 2016).

¹⁵³ Interview with participant 14, education academic (the author, 28 June 2016); echoed by participant 7, human rights advocate – partner at law firm (the author, 23 June 2016) and participant 8, human rights advocate – QC (the author, 23 August 2016).

¹⁵⁴ Interview with participant 11, deputy-principal of a special school (the author, 25 June 2016).

¹⁵⁵ Interview with participant 11, deputy-principal of a special school (the author, 25 June 2016).

¹⁵⁶ Interview with participant 10, primary school principal (the author, 4 July 2016).

¹⁵⁷ Interview with participant 17, parent (the author, 4 August, 2016).

¹⁵⁸ Interview with participant 10, primary school principal (the author, 4 July 2016).

¹⁵⁹ Interview with participant 17, parent (the author, 4 August, 2016).

accommodation requires of them in practice. Although, as one interviewee said, it is “very hard to capture the very delicate judgment to be made in the black and white of legislation”,¹⁶⁰ some education to inform teachers’ practice may be necessary. The author submits that the Ministry of Education could usefully publish guidelines exploring 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 (the IMM).¹⁶¹ The proposed guidance could be introduced to schools in professional development trainings. Guidelines would make reasonable accommodation obligations clear and accessible. 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”.¹⁶²

However, even if educators upskill and lead 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 learners and educators.

2 *Rethinking the learning support system*

The author welcomes the purpose of the special education update currently being undertaken by Government, which is to:¹⁶³

- Improve support for teachers and parents as the primary providers of additional learning support;
- Deliver child centred, easy to access, prompt, early and uninterrupted additional learning support, for as long as it’s needed;
- Strengthen collaboration between specialists, educators, students, parents and whānau; and
- Provide quality information about additional learning support to inform sound, timely decisions.

¹⁶⁰ Interview with participant 1, Director of Special Education (the author, 18 July 2016).

¹⁶¹ IMM *Reasonable accommodation of persons with disabilities in New Zealand*, above n 87. For inclusive education generally, see IMM Art 24 *The Right to an Inclusive Education: Implementation Report*, above n 26.

¹⁶² Interview with participant 8, human rights advocate – QC (the author, 23 August 2016).

¹⁶³ Ministry of Education *Special Education Update: Update action plan* (November 2015).

Specific policies as to how these purposes will be achieved are not yet published. Interviewees emphasised that support must begin with “what works best for the child.”¹⁶⁴ One suggested that upon enrolment, parents, teachers and the principal should determine together whether there are “any obstacles between the child and the curriculum” then ask “how do we remove those barriers?” and take a proposed resource plan to achieve effective education to the Ministry. The interviewee thought that the Ministry should provide that proposed support unless they can prove it is unreasonable to do so.¹⁶⁵ The author supports this idea, as it closely aligns with the justificatory structure of New Zealand human rights law: the provider must justify that any breach of the “inherent” obligation to accommodate was reasonable and proportionate.

Any new special education policy should recognise the role that reasonable accommodation and the social model of disability play in achieving substantive equality. The Convention contains positive obligations to provide reasonable accommodation to “promote equality and eliminate discrimination”¹⁶⁶ based on the understanding that societal barriers, rather than individual’s impairments, are what leads to disability. The removal of barriers will be most successful if it is systemic. “Once 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”.¹⁶⁷ The concept of universal design will be important because it “normalises different needs” and “plans with all learners in mind”.¹⁶⁸ Achieving universal design of schools spaces, structures and the curriculum may include some large upfront costs, but is the most effective commitment to the Convention and a social model of disability.

VII Conclusion

Reasonable accommodation of disabilities by schools is essential to uphold the dignity of children with disabilities and to achieve equal education. The EA89 provides a formal right to inclusive education in law. However, discrimination on the basis of disability means that such a right does not exist in practice for children with disabilities, in particular, students

¹⁶⁴ Interview with participant 1, Director of Special Education (the author, 18 July 2016).

¹⁶⁵ Interview with participant 17, parent (the author, 4 August, 2016); Interview with participant 13, mainstream teacher with lived experience of disability (the author, 14 July 2016) phrased this as “support without having to jump through hoops... putting students and their families in charge of what they need, with that being delivered”.

¹⁶⁶ CRPD, art 5(3).

¹⁶⁷ Interview with participant 11, deputy-principal of a special school (the author, 25 June 2016).

¹⁶⁸ Interview with participant 11, deputy-principal of a special school (the author, 25 June 2016),

with ASD. Empirical evidence has shown that discrimination exists within the provision of education and is aggravated by a funding system in need of repair.

Discriminatory practices by State schools can be challenged under the HRA and BORA for their consistency with the right to be free from discrimination, which can only be subject to reasonable limits that are demonstrably justified in a free and democratic society. Discrimination will not be justified unless reasonable accommodation has been provided. The concept of reasonable accommodation is relevant when assessing whether discrimination is reasonably necessary for the purposes of s 5 of BORA. In the disability and education context, the application of s 5 will involve considerations of effectiveness and burden, which have been imported from the Convention, Part 2 of the HRA and overseas case law on equal education for learners with disabilities.

This paper has taken the case of *Green Bay* as an example of discrimination in disciplinary decisions. Application of s 5 of BORA, coloured by the principle of reasonable accommodation, found that the Principal's and Board's discriminatory decisions were not reasonably necessary and were disproportionate. Therefore, the exclusion of A could not be justified pursuant to s 5 of BORA and constitutes unlawful discrimination.

There are limits on the effectiveness of law as a dispute resolution tool in this context. It can be inaccessible and may be ineffective. Nevertheless, reasonable accommodation is an important principle in the implementation of equal education. Drawing on an empirical study conducted by the author, this paper finds that significant barriers to equal education are an inadequate system of learning support and inadequate training and support of educators to meet the needs of all learners. Further guidance and training from the Ministry of Education as to the practical consequences of the principle of reasonable accommodation could be useful for Boards, educators and parents. 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 EA89's promise of equal education. It is essential that equal education for students with disabilities is realised because it upholds human dignity, enables the full development of human potential and achieves substantive equality for traditionally marginalised children.

Word Count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7,910 words.

Bibliography

A Cases

1 New Zealand

A v Hutchinson and Green Bay High School [2014] NZHC 253 (HC); [2014] NZAR 387 [Green Bay (HC)].

Adoption Action Inc v Attorney General [2016] NZHRRT 9.

Attorney-General v Idea Services Ltd (In Stat Management) [2012] NZHC 3229, [2013] 2 NZLR 512.

Child Poverty Action Group Inc v Attorney-General [2013] NZCA 402, [2013] 3 NZLR 729.

Daniels v Attorney-General [2003] 2 NZLR 742 (CA).

Helu v Immigration and Protection Tribunal [2015] NZSC 28, [2016] 1 NZLR 298.

Hutchinson and Green Bay v A [2015] NZCA 214, [2015] NZAR 1273.

IHC v Ministry of Education (forthcoming).

Investigation of decision to expel a high school student with Aspergers (the Ombudsman, Ref no 178591 (W60658), December 2014).

Ministry of Health v Atkinson [2012] NZCA 456, [2012] 3 NZLR 456.

R v Goodwin (No 2) [1993] 2 NZLR 390 (CA).

Seales v Attorney-General [2015] NZHC 1239; [2015] 3 NZLR 556.

Simpson v Attorney-General [1994] 3 NZLR 667 (CA).

Smith v Air New Zealand Ltd [2011] NZCA 20, [2011] 2 NZLR 171.

Tavita v Minister of Immigration [1994] 2 NZLR 257 (CA).

2 *Australia*

Purvis v New South Wales [2003] HCA 62, [2003] CLR 92.

3 *Canada*

Attorney-General v Auton [2004] SCC 78; [2004] 3 SCR 657.

Brant Country Board of Education and Attorney General for Ontario v Eaton [1997] 1 RCS 241 (SCC).

British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union [1999] 3 SCR 3 (SCC) [*Meiorin*].

British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) [1999] 3 SCR 868 (SCC) [*Grismer*].

Moore v British Columbia (Education) 2012 SCC 61, [2012] 3 SCR 360.

R v Oakes 1986 1 SCR 103 (SCC).

4 *European Committee on Social Rights*

Autism Europe v France Complaint No 13/2002 (Decision on the merits, 4 November 2003, European Committee of Social Rights).

MDAC v Bulgaria Complaint No 41/2007 (Decision on the merits, 3 June 2008, European Committee of Social Rights).

5 *European Court of Human Rights*

Affaire Çam c. Turquie CEDH 068.

6 *Ireland*

Sinnott v Minister for Education [2001] IESC 63, [2001] 2 IR 505 (SC).

7 *South Africa*

Minister of Basic Education v Basic Education for All [2015] ZASCA 198, [2016] 1 All SCA 369 (SCA).

B Legislation

Education Act 1989.

Human Rights Act 1993.

New Zealand Bill of Rights Act 1990.

Education Bill 2015 (100-2).

C Treaties

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

Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

European Social Charter (revised) ETS 163 (entered into force January 7, 1999).

International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (adopted 16 December 1966, entered into force 3 January 1976).

D Books

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

Arlene Kanter *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge, London, 2015).

Janet 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 Rioux, Lee Ann Bassler and Melinda Jones (eds) *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff, Leiden, 2011) 273.

E Journals

Anna Lawson “Reasonable Accommodation and Accessibility Options: Towards a More Unified European Approach?” (2010) 11 EADLR 11.

Asher Emanuel “To whom will you liken me, and make me equal? Reformulating the role of the comparator in the identification of discrimination” (2014) 45 VUWLR 1.

E J Ryan “Failing the System? Enforcing the Right to Education in New Zealand” (2004) 35 VUWLR 735.

Hilary Stace “The Long Unfinished Journey Towards Human Rights for Disabled People in Aotearoa New Zealand” (2007) 5 Human Rights Research 1.

Jennifer Puah “*A v Green Bay: Through the Looking Glass*” (March 2015) *NewLaw* 6.

Philippa Moran “No Learner Left Behind: Is New Zealand Meeting its Obligations Under Art 24 of the United Nations Convention on the Rights of Persons with Disabilities?” (2014) NZ Pub Int Law Journal 1.

Sylvia Bell, Judy McGregor and Margaret Wilson “The Convention on the Rights of Disabled Persons: A Remaining Dilemma for New Zealand?” (2015) 13 NZJPIL 227.

F Parliamentary and Government Materials

Education Review Office “Inclusive practices for students with special education needs in schools” (March 2015).

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) <www.education.govt.nz/assets/Documents/School/Managing-and-supporting-students/Stand-downs-suspensions-exclusions-and-expulsions-guidelines/SuspensionLegalGuideWEB.pdf>.

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

Ministry of Education *Supports and Services for Learners with Special Education Needs/Disabilities* (April 2012).

Ministry of Education *The New Zealand Curriculum for English-medium teaching and learning in years 1-13* (2007).

Ministry of Health *New Zealand Autism Spectrum Disorder Guidelines* (April 2008).

Office for Disability Issues *Convention on the Rights of Persons with Disabilities National Interest Analysis* (24 June 2008).

Office for Disability Issues *Disability Action Plan 2014-2018: Update 2015* (December 2015).

Office for Disability Issues *Government response to the Independent Monitoring Mechanism reports 2012 & 2014* (June 2015).

Office for Disability Issues *Government response to the United Nations Committee on the Rights of Persons with Disabilities' Concluding Observations on New Zealand* (June 2015).

Office for Disability Issues *New Zealand Disability Strategy* (April 2016), being revised 2016.

G Reports

G Brodsky, S Day and Y Peters “Accommodation in the 21st Century” (2012) Canadian Human Rights Commission <http://www.chrc-ccdp.gc.ca/proactive_initiatives/default-eng.aspx>.

Human Rights Commission *Disabled Children's Right to Education* (2009).

IMM Art 24 *The Right to an Inclusive Education: Implementation Report* (June 2016).

IMM *Making Disability Rights Real: Annual report of the monitoring mechanism 2011-2012* (December 2012).

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

United Nations Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 13: The Right to Education (Art 13 of the Covenant)* XXI E/C.12/1999/10 (1999).

United Nations Committee on the Rights of Persons with Disabilities *Concluding Observations on the initial report of New Zealand* XII CRPD/C/NZL/CO/1 (2014).

H Internet Sources

“Disabled children law change needed – Human Rights Commission” (18 April 2016)
Radio New Zealand

<www.radionz.co.nz/national/programmes/morningreport/audio/201797419/disabled-children-law-change-needed-human-rights-commission>.

“More funding needed for all schools to become fully inclusive” (2015) *Education Review Series* <www.educationreview.co.nz/subject/policy/priority-learners>.

Emma Goodall “Simple strategies for effective engagement of autistic spectrum students to facilitate school success” (2015) *Altogether Autism* <www.altogetherautism.org.nz/wp-content/uploads/2015/07/Dr-Emma-Goodall-Simple-strategies-for-effective-engagement-of-autistic.pdf>.

John Gerritsen “Children with disabilities missing out as education funding falls short” (15 April 2016) *Radio New Zealand* <www.radionz.co.nz/news/national/301537/kids-with-disabilities-'falling-through-the-gaps'>.

John Gerritsen “Schools ‘demonising’ difficult children – IHC” (13 April 2016) *Radio New Zealand* <www.radionz.co.nz/news/national/301415/schools-'demonising'-difficult-children-ihc>.

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/national/programmes/insight/audio/201796930/insight-the-special-education-struggle>.

Katarina Tomaševski “Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable” *Right to Education Primers No 3* (Novum Grafiska AB, Gothenbur, 2001) <www.right-to-education.org>

Ministry of Education “Ongoing Resource Scheme (ORS)” (30 June 2016) *Education.govt.nz* <www.education.govt.nz/school/student-support/special-education/ors/>.

Ministry of Education “Professional Practice” (May 2016) *TKI Resource Teacher Learning & Behaviour Online* <rtlb.tki.org.nz/Professional-practice/Intro-to-professional-practice>.

Ministry of Education “Special education needs – services and support available” (14 November 2014) *Education.govt.nz for Parents* <parents.education.govt.nz/special-education-needs/primary-school/services-and-support-available/#specialedgrant>.

Ministry of Education “Special Education Policy Principles” Education.govt.nz (16 October 2015) <www.education.govt.nz/ministry-of-education/overall-strategies-and-policies/special-education-policy-principles/>.

Ministry of Education “Special Education Update” Education.govt.nz (11 January 2016) <www.education.govt.nz/ministry-of-education/specific-initiatives/special-education-update/>.

Ministry of Education “Students with special education needs” Education.govt.nz (22 June 2016) <www.education.govt.nz/school/student-support/special-education/>.

Ministry of Education “The National Administration Guidelines” Education.govt.nz (24 October 2013) <www.education.govt.nz/ministry-of-education/legislation/nags/>.

Ministry of Education “The National Education Guidelines” Education.govt.nz (15 September 2015) <www.education.govt.nz/ministry-of-education/legislation/the-national-education-guidelines/>.

I Interviews

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

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

Interview with participant 3, human rights specialist at the Human Rights Commission (the author, 2 June 2016).

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

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

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

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

Interview with participant 8, human rights advocate – QC (the author, 23 August 2016).

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

Interview with participant 10, primary school principal (the author, 4 July 2016).

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

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

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

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

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

Interview with participant 16, parent (the author, 15 June 2016).

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