

Asking for a Diagnosis

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Earlier this month York University settled a human rights complaint about the way it handled accommodation requests from students. At issue was the practice of the school of asking for the diagnosis of the student when assessing a request for accommodation for the student's disability. The school said that having this information helped it to better accommodate the disability.

The accommodation request could relate to assignments (e.g., extra time to submit a paper) or to tests and examinations (e.g., a separate room without the distraction of scores of other students writing at the same time). The student argued that all the school needed in order to accommodate her was a medical report specifying how her learning could be achieved through accommodation.

The Ontario Human Rights Commission intervened in the case in support of the student. The Commission relied on a policy it published regarding the prevention of discrimination based on mental health disabilities and addictions stating:

[T]he person seeking accommodation is generally required to advise the accommodation provider that they have a disability, and the accommodation provider is required to take requests for accommodation in good faith...

There may be rare instances where there is a reasonable basis to question the legitimacy of

a person's request for accommodation or the adequacy of the information provided. In such cases, the accommodation provider may request confirmation or additional information from a qualified health care professional to get the needed information...

In the rare case where an accommodation provider can show that it legitimately needs more information about the person's disability (as opposed to just the needs related to the disability) to make the accommodation, it could ask for the nature of the person's illness, condition, or disability (for example, is it a mental disability, a learning disability or an addiction?), as opposed to a medical diagnosis...

In rare situations where a person's accommodation needs are complex, challenging or unclear, the person may be asked to co-operate by providing more information, up to and including a diagnosis. In such situations, the accommodation provider must be able to clearly justify why the information is needed...

This policy has a number of rationales, including:

- *Relevance*: Knowing the diagnosis is usually not relevant to providing the accommodation. The organization is only entitled to relevant information.
- *Privacy*: Access to the information intrudes on the privacy interests of the individual. If the information is known by others in the organization it may affect how they are treated

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by their colleagues and could even result in harassing behaviour.

- *Stereotypical Thinking*: The organization can make assumptions about the individual based on the diagnosis. For example, not everyone who suffers from depression responds the same way.

According to the Commission, when it will take a long time for the individual to obtain the medical report, the organization should consider providing interim accommodation based on the information it already has (e.g., the individual's self-report).

Regulators may bristle at the notion that it should accept the determination of the health practitioner as to the nature and extent of the practitioner's condition. This is particularly the case when the health practitioner would generally be relying primarily (or even solely) on the individual practitioner for information. In almost anything else that it does (e.g., complaints and discipline), the usual approach of regulators is to gather all of the evidence and assess the facts of the case. Most regulators are also used to dealing with conflicting expert opinions and appreciate how even well-intentioned and competent experts may not always get it right.

It should be noted that the Commission's policy does not require the organization to accept the medical opinion in every case. Where there is information to suggest that the medical opinion may not be accurate (e.g., attempts to implement the accommodation reveal that there must be another issue), the organization can ask follow up questions. In some cases it can even insist on a second assessment by the organization's own expert.

Further, the application of the Commission's policy may depend on the issue and the circumstances. For example, it may be appropriate to follow the policy for some requests made for accommodation at entry-to-practise examinations.

However, if the issue is the capacity of a practitioner, the legislative scheme may support an assessment of the practitioner by the regulator's own expert (see, for example: *Iacovelli v. College of Nurses of Ontario*, 2014 ONSC 7267, (Div.Ct.)). In incapacity cases the issue is usually not whether the practitioner has a disability, but whether the disability interferes with practitioner's professional judgment. That context may raise a genuine issue of whether the practitioner's medical expert has all of the relevant information and a sufficient understanding of how the condition may affect the practitioner's professional practice.

The York University case was resolved without a hearing and does not, therefore, constitute formal ruling.

A media report about the case may be found at: <http://www.thestar.com/news/gta/2016/01/12/york-university-student-wins-mental-health-fight.html>. The Commission's policy referenced above can be found at: http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions/13-duty-accommodate#_edn219. Another Commission policy on disability-related accommodation in the employment context can be found at: <http://www.ohrc.on.ca/en/iv-human-rights-issues-all-stages-employment/9-more-about-disability-related-accommodation>.