

Confidential Attachment to OM2.2a - made public on May 2, 2019

CONFIDENTIAL ATTACHMENT #1

CONFIDENTIAL INFORMATION OR ADVICE

ISSUE

Toronto Public Health has requested a legal opinion on whether the City's current policy of funding student nutrition programs is consistent with the Ontario *Human Rights Code*.

SHORT ANSWER:

Currently, the City extends municipal funding to student nutrition programs ("SNPs") in publically funded schools but not to programs in independent schools.

The City funding policy presents a risk of liability through a successful challenge. Faith-based independent schools may be able to establish that the current funding policy results in adverse impact discrimination against students of those faith-based schools, based on religion.

FACTS

The following facts are taken from the public report and information provided to the City Solicitor by Toronto Public Health.

Since 2009, City funding to expand Toronto's student nutrition programs has been directed to publically funded schools to align with provincial policy. Provincial policy identified "designated school communities" which were eligible for new program implementation due to their socio-economic situations. All of the designated communities were publically funded schools.¹

In October 2016, the Board of Health approved a strategy to apply a needs based health equity lens to develop an objective and consistent means of assessing the level of need in independent private schools that aligns with the means used to assess the level of need in publically funded schools.

In September 25, 2017, the Board of Health recognized that all schools in Toronto should be eligible for consideration for municipal funding for student nutrition programs based on need. Accordingly, the Board of Health approved a methodology which uses socio-demographic data to assess need in independent schools interested in student nutrition

¹ However, the Ministry grandfathered in all prior student nutrition programs, including those that were in operation in independent (privately funded) schools. As a result, only this handful of four independent schools is currently eligible for municipal student nutrition funds.

programs. The methodology is comparable to the one used to assess need in public schools. The City Solicitor commented in a companion report that this proposed methodology was reasonable form a Human Rights Code analysis. The Board of Health endorsed a 2018 municipal budget enhancement for student nutrition program funding for eligible independent schools. In its final 2018 City budget, City Council did not approve this enhancement for SNPs.

Since that time, the provincial policy has been updated. In 2018, Ontario's Ministry of Children and Youth Services updated its program funding guidelines for student nutrition programs. The new program guidelines allow independent schools to be reviewed for provincial funding eligibility on a case by case basis, based on the level of aggregate student need at the school level.

ANALYSIS

The Ontario *Human Rights Code* provides that every person has a right to equal treatment with respect to services, goods and facilities without discrimination because of 15 enumerated grounds, including religion. The *Code* applies to municipal government services, goods and facilities.

Potential Claim – Adverse Impact Discrimination

The City's current policy of funding student nutrition programs raises the potential for a claim of indirect discrimination based on religion. Indirect discrimination, commonly referred to as "adverse impact" discrimination, arises where policies, programs or rules that are neutral on their face, result in a disproportionate and adverse impact on a group identified by one of the personal characteristics identified in the *Code* grounds.

The City's funding policy is neutral on its face; it does not draw distinctions based on Code protected grounds. However, the funding policy may have unintended consequences that result in an adverse impact on students of faith-based independent schools. These students are excluded from the program and denied the potential benefit of the program because they attend a faith based independent school. In this way, the funding policy may be considered discriminatory as against those students.

If the Claim is Made Out, City will be called on to Justify its Funding Policy

Where a student attending a faith based independent school succeeds in meeting the threshold burden of proving a *prima facie* case of discrimination, the City will be called upon to justify the funding policy/decision as reasonable and *bona fide*, in the circumstances. A policy requirement that is found to be reasonable and *bona fide* is a full defence to a claim of discrimination.

To justify a requirement as "reasonable and *bona fide*," the City must first prove that the requirement is reasonably necessary to accomplish its purpose and then prove that the requirement cannot be altered to remove the potential discrimination, without presenting undue hardship on the City. Put another way, where a policy creates an adverse impact on a *Code*-protected group, the City has a duty to accommodate to the point of undue hardship by modifying the policy to remove the rights-infringing impact.

The purpose or rationale behind the City's current funding policy is to align municipal funding with the provincial mandate. Now that the provincial mandate allows for independent schools to be reviewed for provincial funding eligibility, this purpose/rationale would no longer be available to the City.

Establishing an undue hardship defence is difficult. Courts have stated that the Code's use of the term "undue" signifies that accommodation need not be provided if it causes undue or excessive hardship. However, some degree of hardship is acceptable. The Code prescribes only three considerations that are relevant to an undue hardship assessment: cost; outside sources of funding, if any; and, health and safety requirements, if any. No other considerations can be properly considered.

With respect to the current funding policy, cost would be the potentially applicable consideration. If the City were to determine that the cost of extending funding for student nutrition programs in independent schools serving higher needs communities was excessive to the point that it could not extend the funding without experiencing undue hardship, the City would have to make the financial/budget case.

The nature of the evidence required to prove a costs-related undue hardship defence must be objective, real, direct and quantifiable. A mere statement without supporting evidence that the cost is too high based on impressionistic evidence will not be sufficient.

Once Government Decides to Confer a Benefit, it must be Conferred in a Non-Discriminatory Manner

The Code does not create a positive legal obligation on government to provide benefits to meet pressing social needs. However, once the decision has been made to confer a benefit, it cannot be conferred in a discriminatory manner. In other words, once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner. In many instances, this will require governments to take positive action, for example, by extending the scope of a benefit to a previously excluded class of persons. In this case, the City has long-funded student nutrition programs and so is obliged to fund in a non-discriminatory manner.

Conclusion

It would not be difficult for a student attending a faith based independent school to meet the threshold burden of establishing adverse impact discrimination contrary to the Code. Assuming that the threshold burden is met, the City may have a difficult time establishing that the current policy is reasonable and *bona fide* in the circumstances. We had previously advised that using a needs assessment to assess the need in independent schools was acceptable from a Human Rights Code analysis if Council decides to support the request from TPH to provide funding to expand the program into independent schools serving higher need committees.