

Duty to Accommodate

*Guide for School Divisions and
Saskatchewan Teachers' Federation Members*

A Collaborative Project

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Table of Contents

Introduction	iii
1. Guiding Principles to Support Accommodation	1
Preamble	1
Principles	1
2. The Legal Foundation	3
Meaning of Accommodation	3
Meaning of Disability	4
Understanding <i>The Saskatchewan Human Rights Code</i>	5
Obligation to Accommodate	6
Obligation to Provide Medical Information	7
Undue Hardship	8
3. Restrictions	11
Definition	11
Categories	11
4. Roles and Responsibilities	13
The School Division	13
The Teacher Seeking Accommodation	14
The Medical Practitioner	14
The Federation	15
The Typical Process	16
5. Frequently Asked Questions	19
6. Appendices	
Appendix I <i>The Saskatchewan Human Rights Code</i> (applicable sections)	23
Appendix II Expanded Restriction List With Possible Accommodations by Category	25
Appendix III How to Talk to Your Doctor About Accommodation – A Teacher’s Guide	29

Introduction

In the educational community, one of the most important recent developments in human resource relationships is accommodation for disability. For teachers and their employers, efforts in this area were advanced through the inter-organizational (Government of Saskatchewan, Saskatchewan School Boards Association and Saskatchewan Teachers' Federation) commitments expressed in the Memorandum of Agreement to the Provincial Collective Bargaining Agreement signed in 2007.

One of the many important recommendations resulting from this initial work was the recommendation to engage all of the individuals involved in the processes to support the duty to accommodate in an educative process. The complexity of this work will be enhanced by shared knowledge and approaches, a commitment to collaboration and good faith relationships.

To support this work, the Saskatchewan School Boards Association and the Saskatchewan Teachers' Federation have worked collaboratively to prepare this document of shared understandings to better enable teachers, employers and their agents to meet their respective obligations and successfully respond to the unique circumstances of each accommodation relationship.

This document is intended to be used as a guide for information and discussion purposes only. Each particular case and applicable law must be addressed on an individual basis.

The Saskatchewan School Boards Association and the Saskatchewan Teachers' Federation are pleased to provide this resource as a guide for employers and teachers as they engage in the work of accommodation. It is intended to support processes and conversations that reflect the guiding principles to support accommodation and, ultimately, lead to sound accommodation decisions.

1.

Guiding Principles to Support Accommodation

In 2007, parties to the Provincial Collective Bargaining Agreement signed a Memorandum of Agreement committing to study duty to accommodate. In 2009, a report was signed that contained the principles of duty to accommodate.

Preamble

- Accommodation is a fundamental legal obligation that is informed by the applicable human rights law.
- Accommodation is one element of an inter-organizational commitment to a culture of wellness.
- Accommodation is both a right and a duty.

Principles

Responsiveness

- Accommodation is a dynamic, ongoing process that runs throughout the life of an employment relationship.
- A commitment to a culture of wellness assumes an attitude which facilitates the presence at work for a teacher with an illness or disability.
- All parties must be attuned and alert to the needs of the workplace so as to maximize the most productive working relationship possible.

Fairness and Equity

- It is assumed that all parties engage in the accommodation process in good faith.
- Accommodation requires flexibility on the part of all parties involved in the process.
- It is recognized that each accommodation circumstance is unique and the accommodations made must be appropriate to those unique circumstances.

Shared Responsibility

- Successful accommodations result from interdependent, yet distinct responsibilities on the part of the board of education, the teacher, the Saskatchewan Teachers' Federation and the medical practitioner.
- Within that interdependent relationship, the distinct roles and responsibilities must be well understood and respected by all parties.

- Education is a critical component of successful accommodations. Educational opportunities that support accommodation ought to be organized and supported by all of the educational partners and should be constructed to meet the needs of all.

Respectful Communication

- Respectful communication is marked by ethical behaviour, trust, open-mindedness and an acceptance of personal responsibility.
- Access to and provision of medical information should be determined by applicable law, collective agreements and the purpose for which the information was requested.
- The relevance and disclosure of medical information to the accommodation process should be determined within the context of the established legal principles, the applicable collective agreements and good practices.
- While there is recognition that the accommodation process is complex, it is important that there is a timely provision of medical information and that the related accommodation decisions are made in a timely manner.

Duty to Accommodate and Return to Work: The Report of the Joint Committee of the Parties to the Provincial Collective Bargaining Agreement, April 2009.

2.

The Legal Foundation

Meaning of Accommodation

The requirement to accommodate an employee who has a disability comes from the obligations of human rights and labour law. In Saskatchewan that law is set out in *The Saskatchewan Human Rights Code*; Section 16 provides that no employer can discriminate against any individual on the basis of a prohibited ground.

The Saskatchewan Human Rights Code

Discrimination prohibited in employment

16(1) No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term of employment, on the basis of a prohibited ground.

(2) No employee shall discriminate against another employee on the basis of a prohibited ground.

(3) No employment agency shall discriminate against any person or class of persons in receiving, classifying, disposing of or otherwise acting on applications for the agency's service or in referring an applicant or applicants to an employer or anyone acting on an employer's behalf on the basis of a prohibited ground.

(3.1) No employer shall use, in the hiring or recruitment of persons for employment, an employment agency that discriminates against any person or class of persons seeking employment on the basis of a prohibited ground.

One of the prohibited grounds is disability.

In the case of public institutions such as boards of education, Section 15(1) in the *Canadian Charter of Rights and Freedoms* also protects against discrimination on the basis of "physical disability" unless justified under Section 1 of the Charter.

In order to prevent discrimination, the employer has a legal obligation to find a way to accommodate the disability in the workplace.

A limited requirement to accommodate is also spelled out in Section 44.3 of *The Labour Standards Act* which provides that:

44.3(1) Where an employee becomes disabled and the disability would unreasonably interfere with the performance of the employee's duties, the employer shall, where reasonably practicable, modify the employee's duties or assign the employee to another job.

(2) In any prosecution alleging a contravention of this section, the onus is on the employer to prove that it is not reasonably practicable to modify the employee's duties or reassign the employee to another job.

It is to be noted that the obligation of the employer under the labour standards legislation is to modify duties or reassign the employee where "reasonably practicable." The requirement under human rights legislation is broader.

(*The Labour Standards Act* also provides in Section 44.2 that, subject to certain limitations, an employer cannot dismiss, suspend, lay off, demote or discipline an employee because of absence due to illness.)

At the time of writing, the Government of Saskatchewan has proposed new legislation in the form of *The Saskatchewan Employment Act* which provides protection of employees for illness or injury.

There is no definitive or exhaustive legal definition of accommodation. It is not defined in human rights legislation. The principles applicable to accommodation come in large part from arbitration and court decisions.

In general terms the principle of accommodation requires an employer to tailor, adjust or alter the workplace environment so as to give a person with a disability an equal opportunity for employment.

Meaning of Disability

Under *The Saskatchewan Human Rights Code*, a disability is very broadly defined. The definition in Section 2(1)(d.1) includes "any degree of physical disability ..." or "intellectual disability ..." or "mental disorder" This would encompass a wide variety of medical issues including drug addiction and alcoholism.

Mental disorder is given a specific definition in Section 2(1)(i.1).

The lists of matters set out in the Code definition are not exhaustive; they merely illustrate the types of conditions that will fall within the meaning of disability.

The courts have been very willing to take an expansive view of the notion of disability; they will define the term broadly, inclusively and it will continually evolve. The courts will focus on whether or not there are medically related limitations on opportunities to take part in the life of the workplace community.

Disability does not, however, extend to every physical aspect of the individual. Because the legal emphasis is on obstacles to full participation in the workplace, the immediate condition or state of the individual (having a cold) or physical characteristics (having blue eyes) are not considered disabilities.

The Saskatchewan Human Rights Code

Interpretation

2(1) In this Act:

(d.1) “**disability**” means:

- (i) any degree of physical disability, infirmity, malformation or disfigurement and, without limiting the generality of the foregoing, includes:
 - (A) epilepsy;
 - (B) any degree of paralysis;
 - (C) amputation;
 - (D) lack of physical co-ordination;
 - (E) blindness or visual impediment;
 - (F) deafness or hearing impediment;
 - (G) muteness or speech impediment; or
 - (H) physical reliance on a service animal, wheelchair or other remedial appliance or device; or
- (ii) any of:
 - (A) an intellectual disability or impairment;
 - (B) a learning disability or a dysfunction in one or more of the processes involved in the comprehension or use of symbols or spoken language; or
 - (C) a mental disorder;

(i.1) “**mental disorder**” means a disorder of thought, perception, feelings or behaviour that impairs a person’s:

- (i) judgment;
- (ii) capacity to recognize reality;
- (iii) ability to associate with others; or
- (iv) ability to meet the ordinary demands of life;

Please refer to Appendix I for further information.

Understanding The Saskatchewan Human Rights Code

The Saskatchewan Human Rights Code applies to all employers in Saskatchewan. (There are different, but similar, laws that apply to federal employees such as the *Canadian Human Rights Code* and the *Employment Equity Act*. These statutes do not apply to boards of education.)

The Code is considered to be a “quasi-constitutional” law. This means that if other statutes in Saskatchewan, including *The Education Act, 1995* are in conflict with the Code, then the Code will take precedence.

The Saskatchewan Human Rights Code, Section 44, states:

44 Every law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless it falls within an exemption provided by this Act or unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act.

We can gain a better understanding of the meaning of the Code by studying the jurisprudence that has interpreted its provisions. This can come from:

- The Saskatchewan Human Rights Commission – Their decisions are binding with regards to interpretation of the Code.
- Saskatchewan courts and the Supreme Court of Canada – Their decisions are binding with regard to interpretation of the Code and other relevant law.
- Saskatchewan arbitration decisions – Their decisions are not binding but are highly influential in how the Code should be interpreted.
- Courts and arbitrations from other provinces – Their decisions are not binding but they often interpret legislation which is similar to that in Saskatchewan and their reasoning will often be applied to similar situations in Saskatchewan.

In interpreting a particular fact situation, the courts or arbitrators may also take into account:

- The Provincial Collective Bargaining Agreement and locally negotiated agreements – These agreements cannot contradict the Code but can be used as a guide in determining how the parties understand that the Code should be interpreted.
- Board of education policies and procedures – Policies and procedures must be consistent with the Code and with the Provincial Collective Bargaining Agreement and the locally negotiated agreements (unless the agreements are in conflict with the Code).

Obligation to Accommodate

The Saskatchewan Human Rights Code does not set out details of how the accommodation process must take place. The parties will need to look to arbitration and case law to understand the duties of each of the parties.

The obligation to accommodate exists throughout the employment relationship. The accommodation can be initiated by either the employer or the employee.

Accommodation might occur before, during or after an employee is on sick leave.

Accommodation can be initiated in a variety of ways, including, but not limited to the following:

- The employee advises the employer that the employee has a limitation or restriction caused by a disability that requires accommodation and:
 - The employee continues to work during the period of time the accommodation process is carried out; or
 - The employee is absent from work and requires a return to work process as part of the accommodation.
- The employer observes the employee having difficulty meeting the requirements of employment and has reasonable grounds to believe that the difficulty might be due to a disability that requires accommodation.
 - In cases where safety of the employee or others is in jeopardy, there may be a positive duty on the employer to take action. For example, courts and arbitrators have found such a duty to exist when an employer becomes aware that an employee appears to be suffering from addictions.

The employer has the legal obligation to determine what can be done in the workplace to accommodate the identified medical restrictions of the employee. Consultation with the employee and the Federation is advisable, although the ultimate responsibility to find an appropriate accommodation rests with the employer.

The employer must accommodate to the point of undue hardship.

How each individual employee will be accommodated will depend upon the unique facts of each situation.

Employees are also prohibited from discriminating against other employees. This will require employees to co-operate with the employer in any changes or adaptations required in the workplace to accommodate the person with a disability.

There are some limited exceptions when discrimination on the basis of ability is allowed and those are set out in the Code. The most likely exception in relation to disability would be a situation where the employer can show that ability is a reasonable occupational qualification and requirement for the position or employment.

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- The employer must be flexible and creative in determining what accommodations might be possible.
 - The employee must be flexible, co-operative and willing to consider diverse options for accommodation.
 - The Federation must also co-operate in a reasonable way with the accommodation.
-

Obligation to Provide Medical Information

To determine whether or not an employer has the obligation to accommodate, the employee must provide sufficient appropriate medical information to the employer so that:

- The medical issue clearly fits the definition of a disability under *The Saskatchewan Human Rights Code* and related jurisprudence (in most cases this is not an issue).
- The medical restrictions that will require accommodation are clearly identified.

The Provincial Collective Bargaining Agreement provides that the board of education can require that the medical information must be provided by a medical practitioner.

The employer may consider information from other duly qualified, registered medical professionals. These other medical professionals may include chiropractors, physiotherapists, occupational therapists, nurse practitioners, psychologists and others who have specialized training in identifying medical limitations and restrictions.

In some cases the parties will agree to use a functional assessment service. The service will provide an assessment by a team of medical professionals chosen according to the particular needs of the teacher. The school division will generally be responsible for the costs of such assessments.

Provision of medical information usually does not require a disclosure of the diagnosis of the condition. In a case where a medical practitioner provides more information than is required, the school division should not take such information into account and should dispose of the information in a secure manner.

The role of the medical practitioner is to provide information concerning the medical restrictions or limitations of the employee. The medical practitioner should not be asked to recommend what types of accommodations might be required.

The information is provided through the teacher. The school division does not have direct contact with the medical practitioner unless there are exceptional circumstances and all parties agree.

Once the employer has medical information, the employer must determine what adaptations will be required in the workplace to meet the restrictions or limitations.

All medical information supplied by the teacher must be treated in confidence by all parties and in accordance with *The Local Authority Freedom of Information and Protection of Privacy Act* and with the terms of the Provincial Collective Bargaining Agreement. The Provincial Collective Bargaining Agreement provides in Article 7.5.4 that personal medical information collected by the school division will not be retained in the personnel file. It will be retained in a teacher specific file available only to the teacher and to the official designated by the school division. The information must be retained only as long as it is required for the purpose for which it was collected.

If the teacher refuses to provide the required medical information, the school division's duty to accommodate the employee ends or is suspended until such time as the teacher provides the required medical information.

Undue Hardship

The law recognizes that accommodation requires a balancing act between the right of an employee to equal treatment and the right of the employer to a productive workplace. An employer is required to accommodate an employee to the point of undue hardship.

The onus will be on the employer to show undue hardship and it is often difficult for an employer to be able to show that it has reached the point of intolerable cost or disruption of business (as per Section 2(1)(q) of *The Saskatchewan Human Rights Code*).

Undue hardship exists when the steps required to accommodate the employee are so extreme, onerous or difficult that it is clear that it is unreasonable to expect the employer to implement them.

There are, however, many other aspects to undue hardship other than financial. Factors that can be considered in determining whether or not the point of undue hardship has been reached may include:

- Financial cost to the employer.
 - Financial cost alone is not usually sufficient to show undue hardship.
 - The size and financial resources of the employer will be significant.
 - External sources of funding may limit the financial ability of the employer.
 - The availability of other jobs.
 - Disruption to other employees.
 - Impact on students.
 - It is not merely sufficient for the employer to simply allege that a possible accommodation is not "in the best interest of students."
 - The onus will be on the employer to show that, from a pedagogical perspective based on objective information, the accommodation will result in a negative impact on students.
 - The impact on students must be balanced with the accommodation obligation taking into account the employee's obligation to co-operate.
 - The employee's return to work poses a real and immediate risk of relapse or aggravation.
 - The nature of the work.
 - The number of employees and their interchangeability.
 - The impact of accommodation on the collective agreement.
 - The need to replace someone with special skills.
 - A significantly increased workload for other employees.
 - The need for a major reorganization of the work unit.
-

In the case of employment, undue hardship will generally be reached when the employer is able to show:

- That there is no reasonable chance that the employee will be able to return to work within the reasonably foreseeable future.
- That all reasonable efforts at accommodation have been tried and found unsuccessful.

This conclusion must be based on appropriate and up-to-date medical information. The information should be relevant, reliable, significant and provable.

If the employer can show undue hardship, the employer does not have to provide accommodation.

The employer can, in the appropriate circumstances, terminate the contract of employment for “frustration of contract”; a legal term meaning that, through no fault of the employee, the employee is not able to perform the essential tasks of teaching and the contract is therefore “frustrated.”

There are implications for all parties to contemplate before a contract of employment is terminated for frustration. It is generally a step to be considered only after all other options have been exhausted.

3.

Restrictions

Definition

Restrictions are the limitations of skills and abilities due to a disability preventing the person from performing essential duties of their job. Restrictions can be broadly characterized into motor or physical limitations, cognitive limitations and socio-emotional or psychosocial limitations. An individual can have restrictions in one or more categories.

Categories

Motor or Physical Restrictions

A motor or physical restriction is a broad term that reflects activity limitations due to impairment in body function or structure. Motor or physical restrictions **may include but are not exclusive to:**

- Motor or mobility impairments.
 - Limited ability in standing and sitting.
 - Limited ability in bending to assist students or obtain materials.
 - Limited ability in moving around room, building or grounds.
 - Limited ability in writing on chalkboard, paper or keyboard.
- Sensory impairments.
 - Difficulty viewing due to low vision or no vision.
 - Difficulty communicating with others due to hearing loss or no hearing.
 - Difficulty speaking loudly enough for others to hear.
- Allergies or multiple chemical sensitivities.
 - Allergies to teaching tools such as chalk, markers, glue, etc.
 - Sensitivities to cleaning agents, smoke, pesticides, perfumes, paint, carpet and other building furnishings.

Cognitive Restrictions

A cognitive restriction is a restriction that affects the ability to think logically, concentrate, formulate ideas, reason, remain focused and remember. Cognitive restrictions may include a learning disability or may have been acquired later in life as a result of an accident or illness. Cognitive restrictions **may include but are not exclusive to:**

- Difficulty with concentration.
- Memory deficits.

Socio-Emotional or Psychosocial Restrictions

Socio-emotional or psychosocial restriction is a broad statement that reflects an individual's ability to respond appropriately to everyday situations. An individual may have altered moods and/or behaviours. Socio-emotional or psychosocial restrictions **may include but are not exclusive to:**

- Difficulty handling stress, emotions or change.
- Difficulty with organization, staying on task or managing time.

Please refer to Appendix II for further information.

4.

Roles and Responsibilities

The school division, teacher, medical practitioner and Federation share in the responsibility of managing a successful accommodation. Below are summaries of the main roles and responsibilities that each party has in the process.

The School Division

Obligations of the School Division

Section 16 of *The Saskatchewan Human Rights Code* requires the accommodation of an employee who suffers from a disability. Section 44.3(1) of *The Labour Standards Act* requires the employer, where reasonably practicable, to modify duties or reassign if the employee becomes disabled and cannot perform job duties. The school division:

- Has the inherent management right to propose the accommodation and determine the teaching assignment.
- Has the obligation to investigate and/or initiate where evidence suggests the need for an accommodation.
- Is required to make every reasonable effort, short of undue hardship, to accommodate an employee who comes under a protected ground of discrimination under the *Canadian Human Rights Act*.

Supportive Role

School divisions are encouraged to:

- Be supportive of the teacher. This includes providing a positive workplace, viable return-to-work processes and assistance in meeting appropriate performance standards.
- Discuss proposed accommodations with the teacher and the Federation.
- Educate employees in the duty to accommodate process.
- Be aware of and apply the principles of accommodation.

Information Gathering

School divisions are required to:

- Gather appropriate information to make informed decisions around accommodation. This will include medical information, information regarding the workplace and options available for accommodation.
- Document the accommodation process and keep appropriate documents.

Incur Some Hardship

It is the role of the school division to incur some hardship as part of accommodation obligations. While the school division is not expected to provide accommodation when it causes undue hardship, it is expected to tolerate some difficulties and challenges.

Make the Final Decision

- It is the role of the school division to decide the accommodation that it will offer the employee.
- While the school division may consult with the teacher and consider the teacher's preferences, the school division is not required to grant such preferences.

Followup

- It is the school division's role to implement and monitor the accommodation including medical followup as necessary.
- Accommodation is to be based on identified restrictions.

The Teacher Seeking Accommodation

Obligation of the Teacher

- The teacher has a duty to co-operate in the process with all concerned parties in a timely fashion.
- It is critical that the teacher identify the need for an accommodation, which will trigger the employer's duty to accommodate. The teacher has an obligation to set the process in motion.

Provide the Appropriate Medical Information

The teacher is required to:

- Comply with reasonable requests for medical information.
- Demonstrate there is a disability verified by a medical practitioner.
- Provide regular medical information as requested throughout the accommodation process.

Seek Rehabilitation

The teacher is required to take the medically recommended steps towards rehabilitation and self-improvement.

Try the Accommodation

The teacher is required to:

- Try a reasonable accommodation before it is refused.
- Try the proposed reasonable accommodation even on a trial basis.
- Participate in finding an appropriate workplace accommodation.

The Medical Practitioner

According to the Saskatchewan College of Physicians and Surgeons, "the responsibility of the physician is to do an objective evaluation and to report the impact of an injury/illness and the limitations that the patient/worker's injury/illness places on their ability to perform certain functions." **Their role is not to provide specific recommendations regarding accommodations.**

The Federation

School Based Administrator

School based administrators are encouraged to:

- Exercise leadership to ensure confidentiality of any medical information that may be disclosed by the teacher with sickness or disability.
- Exercise, through leadership and support of the school division and the Federation, flexibility in assignments and duties in respect to the teacher seeking an accommodation.

Collegial Relations

Colleagues are encouraged to be:

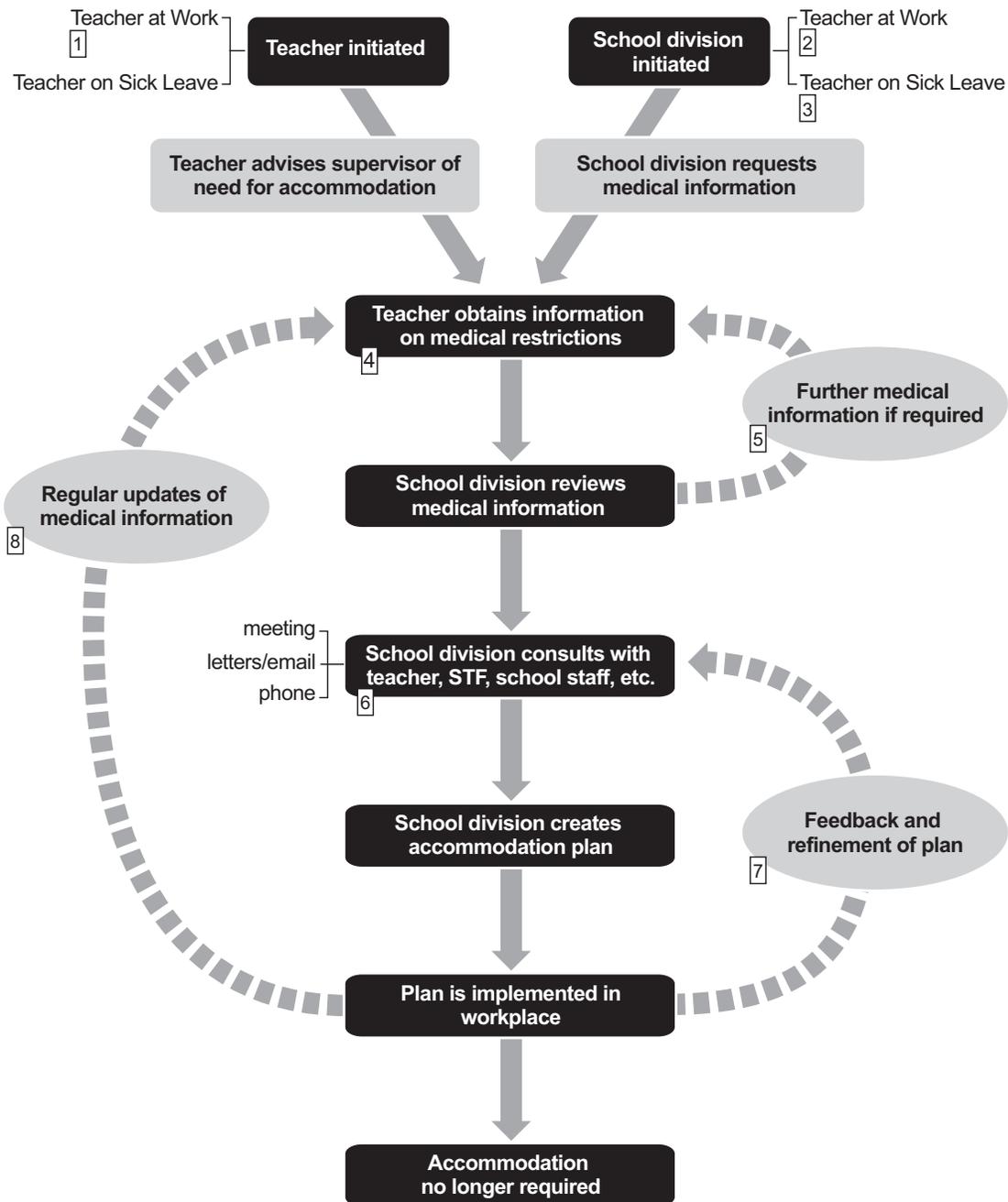
- Aware that there may be some sacrifice, such as additional duties, that teacher colleagues may have to undertake as part of the overall duty to accommodate.
- Cognizant of the confidential nature of medical information and respect the legitimacy of the confidential medical needs of a colleague.
- Aware that a colleague may not always be cognizant of the existence or impact of his or her disability and should provide professional support to their colleague as needed.

Federation Senior Administrative Staff

Senior Administrative Staff:

- Facilitate and support the accommodation process.
- Propose alternatives as part of the search for an accommodation.
- Provide educational supports to members of the profession in the accommodation process.

The Typical Process



The usual practice is for the school division to advise the teacher to contact the Federation for support and advice in the process. In some cases where there is concern that the teacher may not be well enough to understand the seriousness of the situation, the school division will contact the Federation to let them know that their member might need assistance. The school division will share only minimal information at this stage.

Once the teacher has brought the Federation into the discussion, school division personnel will speak freely with the Federation representative about all aspects of the case unless and until the teacher specifically directs otherwise.

Footnotes to the Typical Process Chart

1. A teacher may initiate a request for an accommodation either while on sick leave, or while at work, in cases where the teacher can continue to work but has a disability that requires some form of accommodation.

The teacher can make the request to his or her principal, superintendent or to the human resources superintendent depending on the processes used in the school division.

2. The school division may be able to initiate an accommodation process while a teacher is at work if it has objective information from persons who have observed behaviours that indicate the teacher is not able to complete all the tasks of a teacher and there is evidence to indicate that this inability may be linked to a disability.

In some cases, usually where the nature of the disability is such that the teacher may have no awareness of the issue or is denying its existence, the school division will have a positive duty to initiate action. Examples might be some types of mental disorders including alcoholism and other addictions.

The school division may decide to temporarily assign the teacher to home, with pay, in order to allow the teacher to seek medical information in situations where the evidence indicates that:

- The teacher is not performing the essential duties of teaching and that it may be related to a disability.
 - The safety of the teacher or others is in question and the teacher needs time to consult with a medical practitioner.
3. When a teacher is on sick leave, usually for an extended period of time of more than just a few weeks, the school division may ask for information about medical restrictions in order to determine if there is any way in which it can accommodate the teacher and assist the teacher to return to work.
 4. After initiating the process, the next step is for the teacher to provide information to the school division about any medical restrictions which might be affecting the ability of the teacher to perform all the essential duties of a teacher.
 5. It is vital that the medical report clearly sets out the medical restrictions that require accommodation. If the medical information is not clear, relevant or sufficient, the school division will ask for further medical information.
 - The school division will usually ask the teacher to go back to the teacher's own medical practitioner or to a specialist consulted by the teacher for further information.
 - In some cases the school division can ask for a second opinion from another medical practitioner agreeable to both parties.
 - In some cases the school division will offer to pay to send the teacher to an agency or organization that specializes in functional and/or cognitive assessments. A variety of professionals such as medical doctors, physiotherapists, occupational therapists, etc., will provide a comprehensive assessment and confirmation of the medical restrictions that need to be accommodated, as well as recommendations on how a return to work program might be achieved.
 6. After reviewing the medical information, the school division will look at possible options for accommodation.
 - The school division will look at the workplace and what might be required for the accommodation in terms of equipment, schedules, classroom adaptations, etc.
 - The school division will consult with the teacher and the Federation in order to ensure the creation of a relevant and achievable accommodation and return to work program.
 - This may involve one or more meetings with the teacher and other parties, and may include communication by email or phone.
 - All parties are encouraged to make suggestions for possible accommodations, **but it is the responsibility of the school division to create an appropriate accommodation and return to work plan.**
 7. The accommodation plan should include arrangements for communication and feedback on a regular basis between the teacher and his or her supervisors.

The teacher should provide feedback to supervisor as soon as possible whenever there is a significant change, whether positive or negative, to the teacher's medical condition or ability to work.

Adjustments will often have to be made as the plan is implemented and as time passes.
 8. The school division will ask at periodic intervals for updates to the information on medical restrictions.

The accommodation plan will be adjusted as medical restrictions change.

5.

Frequently Asked Questions

I am a teacher and my school division sent me a letter when I was on sick leave asking me to provide information about accommodation. How should I provide this information?

First of all, be reassured that your employer is likely requesting this information to ensure that it is meeting its obligation to accommodate for an employee. In other words, the school division is requesting information that will allow it to assist you to return to work, despite limitations related to your medical condition.

You will need to meet with your medical practitioner to respond appropriately to the request. Please see “How to Talk to Your Doctor About Accommodation” found in Appendix III. You may wish to contact the Federation for further guidance in providing this information.

What is the difference between a “restriction” and a “recommendation?”

The teacher’s medical practitioner is required to provide information about restrictions or limitations. Essentially, a restriction describes the limitation of skills and abilities due to a disability; those things that prevent a person from performing essential duties of their job. Restrictions can be broadly characterized into physical limitations, cognitive limitations, and socio-emotional or psychosocial limitations.

Recommendations, on the other hand, are possible ideas for consideration which are not binding on the employer.

The information in Appendix III entitled “How to Talk to Your Doctor About Accommodation” should be helpful in sorting out this difference.

As a teacher, my school division has asked me to provide medical restrictions related to my health issues. What is the best way to do this?

The medical information from the medical practitioner should be provided to you by your medical practitioner. You should then provide this medical information to the appropriate official at the school division. Direct contact between the employer and the medical practitioner can only occur when the teacher has provided explicit consent for that communication. It is very unusual for direct communication to occur and typically unnecessary.

What role do I as a principal play when a teacher needs an accommodation?

Principals are often called on to support accommodations. Many accommodations are simple and do not require extensive supports in place. The complexity of an accommodation circumstance will influence the decision-making. A principal will need to assess the complexity of the situation and if it seems to require decision-making that extends beyond your duties as a principal, you will want to ensure that you are consulting with your senior administration and the Federation for advice regarding your role in the accommodation process.

In addition, in your role you may find that you are made aware of medical information related to a staff member. It is critical for all teachers to keep the medical information confidential and disclose it to another person only with explicit permission.

As a professional I am very concerned about the well-being of a colleague. I have observed significant behavioural changes and I am worried about what might happen. What should I do?

You will need to make some determination about the severity of the situation and an appropriate response. It may be that a disclosure of your observations is appropriate and necessary. It is critical to seek advice from the Federation about how to proceed in that event. If it is not possible to have a conversation with your colleague, it may still be necessary to disclose your concerns to your supervisor.

If in fact there is a medical issue that is contributing to these behavioural changes (e.g., an addiction or another mental health issue), the employer may need to initiate the accommodation process if the teacher's decision-making and judgment is affected by the disability.

How might drug or alcohol dependency be accommodated?

Drug or alcohol dependency is regarded as a disability and employers must accommodate this disability. Because denial is often a symptom of the condition, an employer who has reason to believe an employee is suffering from a dependency must offer the employee a chance to deal with the issue.

The accommodation required is often time off to enter a rehabilitation program and obtain medical support. This may include sick leave or unpaid medical leave, or a combination of both. The existence of the disability and eligibility for sick leave will have to be confirmed by medical evidence in the same way as any other disability.

Since the relapse rate after treatment is high, an employer will sometimes have to allow the employee a second or, in some exceptional cases, a third course of treatment.

How might mental disorders be accommodated?

A number of mental disorders such as depression or chronic anxiety are considered to be disabilities. In many cases the disability itself makes it difficult for an employee to clearly assess the situation. In these cases the employer will have a duty to determine whether accommodation might be required before disciplining or dismissing the employee. Medical evidence will be required as with any other case and should be used as the basis for determining the accommodation required.

How can I as an employer be proactive in addressing accommodation issues?

Employers are encouraged to monitor and manage absences of employees on a consistent basis. This is important so that issues concerning medical absences can be identified early. This will enable a return to work program to be utilized or accommodation to be considered.

What if the teacher doesn't like the accommodation and fails to co-operate?

If the teacher does not wish to accept a particular accommodation proposed by the employer, the teacher must provide a reasonable explanation for the refusal. If the proposed accommodation is reasonable and does not impose an excessive burden on the teacher, the teacher must accept it. If not, the teacher will lose the possibility of accommodation. As an example, if no permanent position is available that meets the teacher's needs, he or she must be prepared to accept training or an offer of temporary work.

What is undue hardship?

Undue hardship exists when the steps required to accommodate the employee are so extreme, onerous or difficult that it is clear that it is unreasonable to expect the employer to implement them. The onus will be on the employer to show that there was an intolerable cost or disruption of business.

Appendix I

The Saskatchewan Human Rights Code (applicable sections)

Interpretation

2(1) In this Act:

(d.1) **“disability”** means:

(i) any degree of physical disability, infirmity, malformation or disfigurement and, without limiting the generality of the foregoing, includes:

- (A) epilepsy;
- (B) any degree of paralysis;
- (C) amputation;
- (D) lack of physical co-ordination;
- (E) blindness or visual impediment;
- (F) deafness or hearing impediment;
- (G) muteness or speech impediment; or
- (H) physical reliance on a service animal, wheelchair or other remedial appliance or device; or

(ii) any of:

- (A) an intellectual disability or impairment;
- (B) a learning disability or a dysfunction in one or more of the processes involved in the comprehension or use of symbols or spoken language; or
- (C) a mental disorder;

(i.1) **“mental disorder”** means a disorder of thought, perception, feelings or behaviour that impairs a person’s:

- (i) judgment;
- (ii) capacity to recognize reality;
- (iii) ability to associate with others; or
- (iv) ability to meet the ordinary demands of life;

(q) **“undue hardship”** means, for the purposes of sections 31.2 and 31.3, intolerable financial cost or disruption to business having regard to the effect on:

- (i) the financial stability and profitability of the business undertaking;
- (ii) the value of existing amenities, structures and premises as compared to the cost of providing proper amenities or physical access;
- (iii) the essence or purpose of the business undertaking; and
- (iv) the employees, customers or clients of the business undertaking, disregarding personal preferences;

but does not include the cost or business inconvenience of providing washroom facilities, living quarters or other facilities for persons with physical disabilities where those facilities must be provided by law for persons of both sexes.

Discrimination prohibited in employment

16(1) No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term of employment, on the basis of a prohibited ground.

(2) No employee shall discriminate against another employee on the basis of a prohibited ground.

(3) No employment agency shall discriminate against any person or class of persons in receiving, classifying, disposing of or otherwise acting on applications for the agency's service or in referring an applicant or applicants to an employer or anyone acting on an employer's behalf on the basis of a prohibited ground.

(3.1) No employer shall use, in the hiring or recruitment of persons for employment, an employment agency that discriminates against any person or class of persons seeking employment on the basis of a prohibited ground.

Act takes precedence unless expressly excluded

44 Every law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless it falls within an exemption provided by this Act or unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act.

Appendix II

Expanded Restriction List With Possible Accommodations by Category *(this is not an exhaustive list)*

Motor or Physical Restrictions

Motor or Mobility Impairments

- Limited ability to stand in front of class.
 - Use a sit or stand stool
 - Use an anti-fatigue mat or carpet
 - Alternate between sitting and standing
 - Rearrange student seating (semi-circle)
 - Adjust chalkboard height
 - Allow supported footwear
- Limited ability to bend to assist students.
 - Have the student come to the teacher when needed
 - Provide teacher assistant
 - Ask students to help others
 - Allow portable desk so the teacher can sit next to students
- Limited ability to bend to obtain materials or access files.
 - Use automated shelves and file systems that are brought to appropriate height with the push of a button
 - Place most commonly used material on easy access shelves or drawers
 - Use service animal
- Limited ability to sit for long periods of time at a desk.
 - Use an ergonomic chair
 - Use adjustable height desk
 - Take frequent breaks and alternate between sitting and standing
- Limited ability to move around room, building or grounds.
 - Ensure appropriate mobility aids are being used
 - Accessible path cleared at all times
 - Ensure floor surfaces are appropriate (non-slip; if carpeted, firm and thin)
- Limited ability to write on chalkboard.
 - Use a writing aid
 - Use a PC projector
 - Use an overhead projector
 - Use a flip chart
 - Use a pocket chart
- Limited ability to write on papers.
 - Provide a writing aid
 - Allow frequent breaks or alternate between tasks
 - Use a computer
 - Convert forms to digital format
 - Use stamps for comments and signatures
 - Provide an ergonomic workstation

- Limited ability to work at a keyboard.
 - Use key guards
 - Provide voice recognition software
 - Use an ergonomic keyboard
 - Provide an alternative input device: head stick, scanning system
 - Provide an ergonomic chair with elbow supports
 - Allow for frequent rests between tasks

Sensory Impairments

- Difficulty viewing computer screen due to low vision or no vision.
 - Provide a larger monitor
 - Provide an external screen magnifier
 - Use screen magnification software
 - Reduce glare, flicker-free features
 - Provide monitor with high resolution, higher contrast
 - Allow frequent rest breaks
 - Change the font size
 - Provide a keyboard with large print keys
- Difficulty viewing papers due to low vision or no vision.
 - Provide an optical magnifier
 - Provide a closed-circuit television system
 - Provide an electronic magnifier
 - Enlarge information on a photocopier
 - Provide task lighting
 - Reduce glare in the area via overhead lights, windows, etc.
 - Install adjustable light switches or alternative lighting
 - Change font size
 - Allow frequent rest breaks
 - Use a document camera and computer projector to display images onto a wall or screen
- Difficulty communicating with others due to hearing loss or no hearing.
 - Provide screen reading software
 - Provide Telewriter device
 - Provide access to additional staff
- Difficulty speaking loudly enough for others to hear.
 - Provide FM, infrared power, power loop
 - Provide real-time captioning
 - Provide hearing aids in the classroom
 - Implement appropriate positioning and lighting to assist with lip-reading
 - Reduce background noise
 - Allow written communication
 - Consider sign language interpreter
 - Allow the use of electronic mail
 - Provide text-reading phones, video phones, captioned telephone services
 - Provide visual alarms
 - Provide vibrating pagers

Allergies or Multiple Chemical Sensitivities

- Allergies to teaching tools such as chalk, markers, glue, etc.
 - Use an overhead projector
 - Use a PC projector
 - Use a dry-erase board
 - Use a large table or easel
 - Provide good ventilation and air purification devices

- Sensitivities to cleaning agents, smoke, pesticides, perfumes, paint, carpet and other building furnishings.
 - Use an air purification system
 - Avoid the irritant
 - Use non-toxic paint and products
 - Remove carpet
 - Improve ventilation
 - Notify in advance of painting or use of pesticides
 - Educate others of concerns such as fragrances
 - Move work space away from such areas as shop class, chemistry lab, cafeteria or parking lot
 - Provide dehumidifier to prevent build-up of mould

Cognitive Restrictions

- Difficulty with concentration.
 - Increase natural lighting or provide full spectrum lighting
 - Reduce classroom clutter
 - Plan for uninterrupted work time
 - Divide large assignments into smaller tasks or steps
 - Restructure job to include only essential functions
- Memory deficits.
 - Allow individual to record meetings
 - Provide minutes of each meeting
 - Provide written as well as verbal instructions
 - Provide reminders of important deadlines via emails, memos and weekly supervision
 - Provide a mentor for daily guidance
 - Use notebooks, sticky notes to record information for easy retrieval
 - Provide cues to assist location of items by using labels, colour-coding or bulletin boards

Socio-Emotional or Psychosocial Restrictions

- Difficulty handling stress, emotions or change.
 - Have a mentor to assist when stress builds up
 - Provide administrative and co-worker support
 - Allow time off for counselling
 - Limit number of subjects taught
 - Have a planning period each day
 - Provide individual with his or her own classroom
 - Use stress management techniques
 - Use soothing music or environmental sounds
 - Schedule meeting with the supervisor to discuss workplace issues
 - Allow additional time and training to learn new responsibilities
 - Allow telephone calls to emotional supports
 - Develop strategies to deal with situations before they arise
 - Obtain clear expectations of responsibilities and the consequences of not meeting them
 - Provide sensitivity training to co-workers
 - Provide to-do lists and written instructions
 - Consider providing in-service training on stress management

- Difficulty with organization, staying on task or managing time.
 - Provide organizational tools such as electronic schedulers, pace setters, memo recorders, software organizers, calendars and grade books
 - Assign a permanent classroom rather than changing rooms
 - Use colour-coded files, papers and books
 - Create detailed lesson plans and outlines
 - Use specialized lesson plan books
 - Limit the number of subjects taught
 - Divide large assignments into smaller tasks and steps
 - Assign a mentor to assist in determining goals, providing daily guidelines and reminding of important deadlines
 - Consider providing in-service training on time management

Adapted from United States Department of Labour's Office of Disability Employment Policy. Job Accommodation Network (JAN). *Accommodating Educators with Disabilities*. March 2010. Morgantown WV.

Appendix III

How to Talk to Your Doctor About Accommodation – A Teacher’s Guide

I am affected by a disability and it is impacting my work. What do I need to know?

Sometimes injury or illness can result in a change in how we function. For instance, someone experiencing a mental health challenge may have a reduced ability to concentrate or someone whose back is injured may not be able to stand for prolonged periods of time.

Changes in function can be temporary, fluctuating (cyclical) or permanent.

If, due to disability, you are experiencing a change in function, it may be necessary to consider doing your work in different ways.

Duty to accommodate describes the employer’s legal obligation to make modifications to the work environment so as to give a person with a disability an equal opportunity for employment. This means that the employer, working with information related to the medical restrictions of the employee, will implement appropriate measures necessary to allow the employee to continue to teach.

What are restrictions and why do I need to know about them?

Restrictions describe those limitations of skills and abilities that result from disability and prevent some employees from carrying out some aspects of their work. The employer’s efforts to accommodate you are based on those specific restrictions that have been identified by your medical practitioner.

You will need to discuss your restrictions with your medical practitioner and your medical practitioner will need to confirm in writing the nature and extent of your restrictions along with the expected duration of each.

To help identify the limitations to your work skills, consider your role as a teacher and the tasks which you believe will be challenging for you. Now, consider the functions necessary to carry out those tasks (i.e., concentration is required for planning and assessment, being able to prioritize tasks and organize activities are required for instruction and classroom management, mobility may be required for responding to some student needs, etc.).

Restrictions can often be thought of as falling into one or more of three broad categories:

- motor or physical
- cognitive
- psychosocial or social-emotional

Examples of specific restrictions within these categories can be found in Appendix II.

What is the difference between my symptoms and my restrictions?

Restrictions and symptoms are different concepts. While symptoms describe the manifestation of a particular disease, injury or disability, a restriction describes the impact of a symptom on a function.

For example, fatigue and pain are both symptoms that an employee is experiencing. The restrictions associated with those symptoms may be reduced concentration or maintaining stamina. It is critical that your medical practitioner describe the restrictions, not the symptoms, that you are experiencing.

You may want to work with your medical practitioner to answer the question, “Is what is being described a reflection of how I feel or a reflection of what I need to do in the workplace?” If it answers the question, “How and what am I feeling?”, then it is a symptom. If it describes how it impacts your capacity to function at work, then it is likely to be a restriction. Put another way, symptoms describe the illness or the disability; restrictions describe the implications for work.

My medical practitioner and I discussed what we think is best for me at work. How do I make sure that my medical practitioner’s recommendations are followed?

Restrictions and recommendations are different concepts. The employer has a legal obligation to make modifications in the workplace based on the identified restrictions.

While your medical practitioner might have ideas or recommendations about those workplace modifications, the medical practitioner’s recommendations are only that, possible ideas for consideration which are not binding on the employer. If your medical practitioner provides a list of recommendations without restrictions, you will be asked to return to your medical practitioner to have the restrictions identified.

I have met with my medical practitioner and I have a letter describing my restrictions. What should I do next?

Communication of medical information between a medical practitioner and a patient is confidential. As a patient you should ensure that the medical practitioner has reported on restrictions and any recommendations are identified as such. You will also want to ensure that the letter does not contain any unnecessary information. In almost all cases, a list of the restrictions and the expected duration of those limitations is all that is required. You may want to consider having any unnecessary disclosure removed from the correspondence (e.g., a description of the specific disability, your symptoms or the therapies being used to treat you).

Once you are confident that the information is appropriately set out, you should deliver your medical information to the school division. Specifically, there will be a designated official in the school division who safeguards medical information. You can direct your information to that person.

How does a teacher manage information from multiple medical practitioners?

It is not unusual for a teacher to be receiving treatment from multiple medical practitioners. The teacher may want to consult with the treatment team to determine which medical practitioner is best positioned to address the need for accommodation information. While this is often the teacher’s family physician, the team may determine otherwise.



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