



Assessment Report

PROTECTED

Complaint Information

Complainant: Mississaugas of the New Credit First Nation

Respondent: Indian and Northern Affairs Canada (now Aboriginal Affairs and Northern Development Canada)

File Number: 20091016

Section of the Act: 5

Date Accepted: September 28, 2009

Relevant Grounds: National or Ethnic Origin, Race, Disability

Purpose

The purpose of this report is to help members of the Canadian Human Rights Commission (the Commission) decide whether or not the complaint should be sent to the Canadian Human Rights Tribunal (the Tribunal) at this time. An investigation into the complaint has not taken place.

This report is not a decision of the Commission. The Commission can decide:

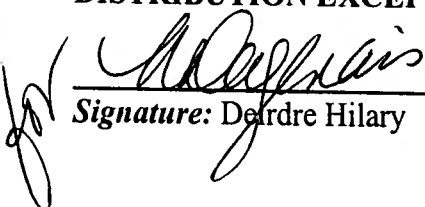
- a) to send the complaint to the Tribunal at any stage after the filing of the complaint under section 49(1) of the *Canadian Human Rights Act* (the Act), or
- b) to appoint a conciliator under section 47 of the Act to attempt to bring about a settlement of the complaint, or
- c) to send the complaint back for investigation.


The Commission is separate from the Tribunal. The Tribunal is like a court because it hears evidence from the parties in person and can decide questions of law and fact including whether or not there has been discrimination under the Act. If the Tribunal agrees that discrimination has happened, it can make orders to stop the discrimination, to prevent the discrimination from taking place again and to remedy the effects of the discrimination.

When the Commission decides whether or not to send the complaint to the Tribunal without an investigation, the Commission members take into consideration all the circumstances of the complaint including:

- a) What is the nature of the dispute between the parties? Is it a purely private dispute or are there allegations of systemic discrimination?
- b) Is there information to support the allegations in the complaint?
- c) Was the information in support of the allegations contradicted by the respondent?
- d) Has the respondent already addressed the complainant's allegations? Have substantial and comprehensive remedies already been provided by the respondent?
- e) Would further investigation assist the Commission in making a final determination in the complaint?
- f) How is the public interest engaged by this complaint?

N.B.: THIS REPORT IS NOT A PUBLIC DOCUMENT AND IS NOT FOR DISTRIBUTION EXCEPT TO THE PARTIES TO THE COMPLAINT.


Signature: Deirdre Hilary


Date: December 28, 2011

The Complaint

1. The complainant, the Mississaugas of the New Credit First Nation (MNCFN), alleges that children from their community are being discriminated against on the basis of national or ethnic origin, race and disability. The complainant alleges that the failure of Indian and Northern Affairs Canada (now Aboriginal Affairs and Northern Development Canada) to provide funding and support to special education on reserve constitutes denial of service to Aboriginal children.
2. The respondent denies the allegation and states that it provides funding for a broad range of programs and services, and it is the complainant that determines how much is spent on education. The respondent maintains that the real provider of education services in this case is the Council itself. The respondent maintains that any differential treatment is in part a result of the choices made by the complainant in its allocation of special education funding.

Background to Complaint

3. This complaint is about service levels for special education for Aboriginal children living on reserve. The complainant states that, unlike special education in the provinces, there is no clear legislative and policy framework for special education on reserve, that funding authorities for special education are limited by a formula-based approach that results in funds being exhausted annually before needs are met, that additional funding must be sought through the "exceptional circumstances" category, and that bands that go into deficit to pay for special education may be placed under third party management by the respondent. The complainant says that it cannot make decisions that meet the special education needs of children on reserve because it only administers the money it receives through the respondent's funding formulas.
4. The MNCFN received \$171,123 for special education from INAC for the 07/08 school year; \$125,143 of which was used in the community's elementary school to pay the Special Education Teacher and four Education Assistants on behalf of 49 students. The balance of \$45,980 was targeted for students in the secondary school system (off reserve). The MNCFN has stated that the money received was insufficient to meet the special education needs of Aboriginal children on reserve.
5. In the Spring of 2008 issues regarding the education of two special needs twins with Downs Syndrome arose. The complainant contacted the respondent regarding additional funding for the 'exceptional circumstance' as per clause 5.1 and 5.2 of the Multi year Funding Agreement.
6. The complainant received \$164,949 in funding for special education in 08-09. The complainant requested an additional one time amount of \$238,482 for miscellaneous education expenses. The breakdown of this request for additional funding was as follows:
 - \$93,700 for a one time bus purchase;
 - \$40,000 for one year of operation and maintenance of the bus;
 - \$81,260 for special education needs;
 - \$16,022 for tuition; and
 - \$7,500 for specialized equipment.
7. Following discussions regarding the request, the respondent provided the following additional funding:
 - \$93,659 for the actual cost of a one time bus purchase;
 - \$39,000 for bus operation and maintenance;
 - \$16,400 for tuition; and
 - \$5,000 for one time specialized equipment.

In total, the respondent provided additional funding to the complainant in the amount of \$154,059. The additional funding requested for special education was not granted.

8. The complainant maintains that the respondent told them that only a portion of the funding request was approved for the exceptional circumstance because:

The majority of your request fell under funding authorities related to Special Education funding. Currently the Chiefs of Ontario allocate all special education funding as per a formula based approach. As such all funds in this area are exhausted annually. INAC cannot provide any additional funds under this authority.

The complainant maintains that while the Chiefs approved a formula for distributing special education funds, they have not conceded that funding is adequate to meet needs or to provide provincially equivalent services.

9. When the complaint was first filed, the respondent made an objection, pursuant to section 41(1)(c) of the *CHRA*, stating that the complainant had not provided reasonable grounds for believing that the alleged discrimination is based on a prohibited ground, and that the facts alleged in the complaint did not constitute a discriminatory practice. The respondent also argued that, pursuant to section 41(1)(d) of the Act, the respondent was not the real provider of education services, and the complainant made the choices that resulted in any differential treatment. On August 11, 2010, the Commission decided to deal with the complaint, reasoning it is not plain and obvious that members of the complainant First Nations are not being discriminated against on grounds of their national or ethnic origin.
10. The respondent continues to maintain that the complaint is beyond the jurisdiction of the Commission, pursuant to sections 41(1)(c) and (d) of the *CHRA*.

Jurisdiction

Respondent's position

11. The respondent maintains that its role is as a funder to the complainant, and that it has no control over the provision of services. The respondent maintains it is not involved in the day to day operations of education for the complainant.
12. The respondent says that the complaint is about the cost of provincial special education, and not about discrimination on the grounds of race and disability. The respondent argues that any differential treatment as between the federal and provincial governments is based on their constitutional jurisdictions. The respondent maintains that there cannot be a cross-jurisdictional comparison between two separate and distinct entities. The respondent cites the Tribunal decision in *First Nations Child and Family Caring Society of Canada et al. vs. Attorney General of Canada* 2011 CHRT 4 wherein the Tribunal concluded that even if INAC is a service provider, it cannot be compared to a provincial service provider.

Complainant's position

13. The complainant says that while it may be difficult to compare two service providers in the typical human resources cases, the situation of First Nations people is particular. The complainant argues that the federal government generally provides services on reserve (mainly to First Nations) whereas the provincial governments provide mostly off-reserve services (mainly to non-First Nations people). Therefore, if First Nations people are not entitled to compare the level of service they receive with another service provider, they are not entitled to the same government services as non-First Nations people, and would be excluded from the protections of the *CHRA*.

14. The complainant also alleges discrimination on the basis of disability, in that disabled children on reserve are treated in an adverse differential manner compared to non-disabled children on reserve. The complainant relies on the Supreme Court of Canada decision, *Withler v. Canada (Attorney General)* 2011 SCC 12 at pps. 59 and 60, that finding an appropriate comparator group may be impossible, and a mirror comparator may fail to capture substantive equality.

Analysis

15. This complaint raises allegations under section 5 that arguably could be analysed under ss. 5(a) and (b).¹ The ss. 5(a) allegation relates to whether Aboriginal children on reserve are denied access to the benefit of INAC's policy of providing special education services on reserve that are reasonably comparable to those of the provinces. The ss. 5(b) allegation is whether Aboriginal children on reserve who require special education services are treated differently and in a negative way compared to children who live off reserve.
16. In *First Nations Child and Family Caring Society of Canada et al. vs Attorney General of Canada*, the Tribunal held that section 5(b) of the CHRA, requires a comparison, that the choice of an appropriate comparator is "a pure question of law" (at para. 107), and that the comparison must be within the same service provider. The Tribunal went on to find that comparisons between two service providers are not permitted and, even if they were, "the CHRA does not allow INAC as a service provider to be compared to the provinces and service providers" (at paras. 4 and 128 to 131). However, the Tribunal held that comparisons are not required under ss. 5(a) (at para. 125).
17. It would appear that the allegations could be considered under ss. 5(a) and/or (b). Based on this, the *Child and Family Caring Society* decision is mixed in its support for the respondent's position that the complaint should not be dealt with because it requires comparisons with provincial special education services. If the complaint is considered under (a), comparisons are not required. Under (b), comparisons may be required.
18. Furthermore, the *Child and Family Caring Society* decision is currently being judicially reviewed by the Federal Court of Canada. One of the issues that the Federal Court will consider is the impact of the decision of the Supreme Court of Canada in the *Withler* case. The requirement of a strict comparator group in the analysis of allegations of discrimination was rejected by the Supreme Court. In its decision, the Supreme Court stated the following:
- A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator group.*
19. The respondent says that the complaint should not be dealt with pursuant to s.41(1)(d) as its role is as a funder to the complainant, and that it has no control over the provision of service. It should be noted that the issue of whether funding can be considered a service, pursuant to s. 5 of the CHRA, is not settled as a decision is yet to be made by the Federal Court on the matter. In the meantime, the Commission continues to deal with complaints where the allegation pertains to an alleged discriminatory level of funding on the basis of a prohibited ground of discrimination.
20. Based on the foregoing, it appears that the complaint raises serious and unsettled issues of law, and mixed fact and law that warrant further inquiry. The Tribunal is a quasi-judicial body and under s. 50(2) of the CHRA, has jurisdiction to decide "... all questions of law or fact necessary to determining the matter".

¹In another case the Tribunal decided that both subsections were infringed: *Hughes v. Elections Canada*, [2010] C.H.R.D. No. 4.

Is there information to support the allegations in the complaint?

21. The information provided by the parties has been analysed using the following framework that is based on section 5 of the CHRA.

Step 1:

Does the available information tend to support the Complainant's allegation of a denial of special education services or adverse differential treatment in special education services, to children living on reserve, specifically:

- i. Are special education services for children on reserves "services... customarily available to the general public"?
- ii. Does the respondent deny or differentiate adversely with respect to the provision of special education services to children on reserve?
- iii. Is the denial of special education services and/or the adverse differential treatment with respect to special education services, linked to national or ethnic origin, race and/or disability?

Step 2:

Depending upon the findings in Step 1, the Commission may also consider:

- i. Has the respondent provided a reasonable explanation for its actions that is not a pretext for discrimination on the basis of national or ethnic origin, race and/or disability?

Step 1:

- i. **Are special education services for children on reserve "services... customarily available to the general public"?**
22. This issue was addressed in the "Jurisdiction" section above. As noted, the respondent asserts that the complaint is about funding and INAC funding is not a service under section 5. The complainant says that the complaint is about more than funding and that in any event, funding is a service. By determining how much funding is available, the complainant says that INAC effectively controls the level and quality of education and schooling services provided.
23. By way of decision dated July 14, 2010, the Commission decided under s. 41(1)(c) of the CHRA to deal with the complaint because, amongst other reasons, INAC's "... role and responsibilities in funding education in the context of the allegations raised in the complaint are unclear".
24. INAC's website provides the following information regarding its Special Education Program which it lists as a program activity:

The Special Education Program (SEP) provides investments in programs and services for students ordinarily resident on reserve with identified special education needs. Program funds are targeted to improve the quality of education and levels of support services for eligible students with special needs classified as moderate to profound. The objective is to allow students to achieve their fullest potential and be contributing members of society, as well as increase the numbers of high cost special needs students acquiring a regular high school diploma.

Analysis

25. The evidence appears to indicate that the respondent may do more vis-à-vis special education on reserve than simply provide funding. As explained on its website, INAC has a program regarding special education.
- ii. **Does the respondent deny or differentiate adversely with respect to the provision of special education services to children on reserve?**

Complainant's position

26. The complainant says that, in addition to inadequate funding to meet the needs of children on reserve requiring special education, INAC's involvement with special education on reserve goes beyond funding. Specially, they claim that the funding formula which is established by INAC has limits and restrictions which result in First Nations children with special needs being denied educational opportunities. The lack of special education services on reserve means that First Nations children with special needs must then go off-reserve, and communities pay the municipal school board for services. The result is either a denial of educational services to children in need, or if the money is paid by the band, a potential deficit situation which could result in a First Nation being placed under third party management.

Respondent's position

27. The respondent does not specifically deny that children on reserve are discriminated against in the provision of special education services. However, it says that it is the complainant who "... must ensure that the educational programs and services are comparable to the programs and services in the province."
28. The respondent further states that it has no control over the provision of services as required by section 5 of the CHRA. "INAC is not involved in the day to day operations of education nor does it dictate or control how the Council spends the funds that it receives. INAC is not responsible for the educational standards, nor does it employ teachers or otherwise provide educational services."

Analysis

29. It appears that INAC's policy is to support the provision of special education services on reserve that are reasonably comparable to those of the provinces and territories. The available information shows that, generally speaking, the range and quality of special education services on reserve appear to fall short of this policy. INAC does not expressly deny this although it says that it is not responsible, as it is the result of policy choices made by the complainant.
30. The objectives and services of the Special Education Program are described as follows:

The objective of the Special Education Program is to improve the educational achievement levels of First Nations students on reserve by providing access to special education programs and services that are culturally sensitive and meet the provincial standards in the locality of the First Nations.

Programs and services available to students generally include, but are not limited to, providing support such as hiring special-education teaching staff and assistants, professional services such as speech language pathologists and counsellors, and specialized programs and assistive technology to meet the students' special needs and enhance their quality of education.

Reference:

http://www.hrsdc.gc.ca/eng/disability_issues/reports/fdr/2008/page09.shtml

31. The complainant and the respondent disagree about whether the respondent has any responsibility for the shortcomings in special education services on reserve. There is evidence, including evidence from government websites, that the respondent's role may go beyond providing funding.

iii. Is the denial of special education services and/or the adverse differential treatment with respect to special education services, linked to national or ethnic origin, race and/or disability?

Complainant's position

32. The complainant states that while provinces and territories provide programs, services, policies and legislation for special education, the needs of First Nations special education students are largely ignored or forgotten. Thus, they say that non-Aboriginal children with special needs receive better services than First Nations children.
33. In support of their position, the complainants provided "First Nations Education Policy in Canada: Progress or Gridlock" by Jerry Paquette. On page 231, Dr. Paquette concludes that INAC's funding for special education "is reflective of service levels well below current provincial norms when the very high incidence rates in First Nations student populations is taken into consideration, and is well below any reasonable estimate of overall assessment and service need in First Nations communities."
34. The assessor reviewed a number of additional reports and documents provided by the complainant, which support its position, including the following:
- Auditor General of Canada, Status Report of the Auditor General of Canada to the House of Commons, Chapter 4 Programs for First Nations on Reserves, 2011
 - Harvey McCue Consulting, First Nations 2nd & 3rd Level Education Services, A Discussion Paper of The Joint Working Group, April 2006
 - Paquette, Jerry and Smith, William J., "Equal Educational Opportunity for Native Students: Funding the Dream," Canadian Journal of Native Education vol. 25, no. 2, 2001, 129
 - Phillips, Ron, "Forgotten and Ignored: Special Education in First Nations Schools in Canada," Canadian Journal of Educational Administration and Policy, Issue 106, June 7, 2010
 - Phillips, Ron, "Special Education in First Nations Schools in Canada: Policies of Cost Containment" Alberta Journal of Educational Research, Vol. 56, No. 1, Spring 2010, 72

35. The complainant provided the following chart comparing special education services on and off reserve:

Some Differences Between Special Education Services On and Off Reserves

Special Education On Reserves	Ontario's Special Education System
There is no legal right to free and appropriate special education in the <i>Indian Act</i> (see Education Act, R.S.O. 1990, c. E.2, s. 8(3))	All children have a legal right to free education and appropriate special education under provincial laws
Guaranteed funding insufficient to meet provincial standards regarding identification, assessment and programming	Provincial standards require all school boards to identify and assess special needs children and to purchase special education programs and services for all school age children regardless of exceptionality.
There are no specialized legal procedures or rights for First Nations parents to ensure their children get appropriate services	Parents can use provincial laws to ensure their children get appropriate services (e.g. parents can appeal decisions made about their children ²)
Some children may not get services unless the family or First Nation can pay	Children are guaranteed special education services paid for by school boards
Specialists (e.g. speech therapists) often unavailable or very expensive	Specialists (e.g. speech therapists) available from school board
Little or no funding for high-level curriculum creation and policy setting	Provincial ministry provides high-level curriculum planning and creation and policy setting and compliance
Smaller education departments have small budgets that cannot absorb costs of certain students with high needs	Larger school boards have large budgets that can afford high cost services, benefit from economies of scale, and can balance out high cost cases

Analysis

Special Education in Canada

36. All provinces and territories have a legal regime for providing special education services for those children for whom it is necessary. In Ontario, the special education needs of non-First Nations children are addressed in s.8(3) of the *Education Act* which requires school boards to:
- implement procedures for the early and ongoing identification of the learning abilities and needs of students;
 - define exceptionalities of pupils and to prescribe classes, groups or categories of exceptional pupils and to require the use of these definitions by school boards;
 - provide an appeal process for parents concerning special education identification and/or placement decisions;
 - ensure that special education programs and services are provided without payment of fees by school boards to their exceptional pupils.

Special Education for First Nations

37. While the *Constitution Act, 1867* gives responsibility for education to the provinces and territories generally, responsibility for "Indians and Lands reserved for Indians" is given to the federal government. Education of First Nations students on reserves is provided

²See, for example, *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.

for in various treaties and under ss.114 and following of the *Indian Act*. Various INAC documents affirm the federal government's responsibility to provide for the education of First Nations children. In addition, the recent *Status Report of the Auditor General*, June 2011, includes a section (p.12) on the federal government's "unsatisfactory progress" in improving First Nations education.

38. The complainant says that the federal government does not have an education act for First Nations students, and for students with special needs there are only policies and guidelines. It maintains that the respondent's special education for First Nations is flawed and under-funded, stating that the terms and conditions do not ensure that First Nations children living on reserve will receive appropriate special education services – as do neighbouring non-First Nations children.
39. The respondent states that First Nation communities themselves govern education, including special education. The respondent maintains that its role in special education is limited to providing funds for general and special education programs and services. In terms of general education, INAC provides funding for elementary and secondary education of students living on reserve and reimbursement for students attending provincial schools off reserve. In the latter case, the MNCFN negotiates its own tuition agreements with the school board. The respondent states that it is not a party to these agreements.
40. The complainant notes that these agreements arise when First Nations communities lack any capacity to provide for some special needs children. As a result, they are required to leave their communities to attend off-reserve public schools. The complainant maintains that the respondent does not provide sufficient funding for First Nations communities to receive special education in the provincially funded schools, when necessary.
41. In support of this position, the complainant provided a letter from the President of the Ontario Public School Boards' Association to INAC, published in their newsletter at http://www.opsba.org/index.php?q=advocacy_and_action/aboriginal_issues/aboriginal_students_and_special_education. The letter (attached as Appendix A) expresses concern about the respondent's funding decisions on the special education services provided to First Nations children by the public boards, and states:
 - The per pupil amount approach to funding for special education adopted by INAC does not reflect the incidence of high needs or the costs of particular supports, including educational assistants, that some students need.
 - education funding for First Nations students with special needs should be restructured to recognize the real costs of providing First Nations students with the support to which they are entitled, and ensuring that First Nations receive services comparable to those available to other Canadian residents.
42. The respondent maintains that funding for special education is calculated by a formula proposed by the Ontario First Nation Special Education Working Group. The complainant notes that this funding formula simply divides and allocates an overall, set amount of funding, which is insufficient to begin with. The formula does not determine the overall amount available; that decision is made unilaterally by the respondent. The complainant also maintains that the funding formula does not in any way limit or prevent the respondent from providing additional funding to First Nations when required to meet provincial standards.
43. The complainant provided documentation indicating that the Chiefs of Ontario have clearly indicated that, by approving the funding formula, they do not concede that funding is adequate to meet needs or to provide provincially equivalent services.

Special Education for MNCFN Children

44. The complainant maintains that the respondent has justified its refusal to pay for the two special needs twins' education by saying that it already provides yearly special education funding to MNCFN, and that the twins' education should be paid for using those funds. The respondent also notes that it has provided additional funding to the complainant to pay for the special costs for the twins. The information provided to the Commission suggests that MNCFN's existing special education funding allocation may be insufficient to pay for the special needs twins' education, since they attend an off-reserve provincial school because of their high special needs.
45. The evidence gathered indicates that the provincial school board charges the Band over \$80,000 per year to provide the required special education services. The complainant provided a spread sheet indicating that since 2008, MNCFN's special education allocation has equalled between \$160,000 and \$190,000. Thus, the cost of these two high needs children would take up roughly half of the MNCFN's budget. An examination of the overall special education funding vs. the costs for the special needs twins indicates the following:

	2008-2009	2009-2010	2010-2011
Total special education allocation from INAC to MNCFN	\$164,949.00	\$171,903.00	\$166,990.00
Special education for the twins (charged by provincial school board)	\$116,983.03	\$ 81,342.03	\$84,160.00
Special education budget for remaining special needs children on reserve	\$ 47,966.00 for 28 children*	\$ 90,561.00 for 23 children*	\$ 82,830.00 for 23 children*

* these numbers only include special education needs as identified in the nominal roll at the beginning of the school year and do not include students with high cost special needs who have not yet been formally identified, but who are on an Individualized Education Program; students who are awaiting assessment of high cost special needs; and students who may have undiagnosed special needs (e.g. learning disabilities, behaviour issues, ADD, ADHD, etc.)

It appears that the provincial school boards recognize that the cost per child for special education can range from \$40,000 to \$58,000, depending on the needs, existing services and infrastructure. The current funding regime leaves the complainant in a situation whereby they have to provide special education funding for the remaining special education children on as very limited budget.

Step 2:

Depending upon the findings in Step 1, the Commission may also consider:

- i. **Has the respondent provided a reasonable explanation for its actions that is not a pretext for discrimination on the basis of national or ethnic origin, race and/or disability?**

Respondent's position

46. The respondent maintains that pursuant to the Funding Agreement, it is the Band Council that controls the funds in question and requires only limited reporting to INAC as to how these funds are allocated for educational services. Furthermore, the MNCFN has the ability to shift the funds between programs and services as needed.

Complainant's position

47. The complainant says that INAC's own policy is to provide First Nations special education that is not inferior in quality to mainstream provincial special education or, at the very least, to put First Nations in a position where they can do so themselves. They claim that this is not happening. The complainant says that the special educational services should be culturally appropriate, and the respondent should:
- (1) Ensure that First Nations children with special needs are adequately identified and assessed;
 - (2) Ensure that specialized services are available for First Nations children;
 - (3) Ensure that First Nations children benefit from second and third level services (e.g. curriculum development, policy setting and compliance, specialized services, strategic planning, etc.), which are typically provided in non-First Nations communities by school boards and the provincial education ministry;
 - (4) Guarantee First Nations children the same right to special education held by children in the mainstream provincial system (see Education Act, R.S.O. 1990, c. E.2, s. 8(3));
 - (5) Guarantee First Nations parents the same right to have input into their children's education and to ensure their children receive appropriate special education services; and
 - (6) Provide the funding required for equivalency in services.

Analysis

48. Both parties agree that funding is provided to the MNCFN pursuant to a multi-year Funding Agreement. The Funding Agreement allows the Council to control the funds in question and requires only limited reporting to INAC as to how these funds are allocated for educational services. The MNCFN has the ability to shift the funds between programs and services as needed.
49. However, the complainant provided evidence indicating that the current arrangement, including the funding formula, does not appear to fulfil the objectives of the respondent's Special Education Program. The complainant cites a letter from the Ontario Public School Boards' Association which states that the current funding decisions do not reflect the incidence of high needs or the costs of particular supports, that some students need. The letter states that the current situation does not ensure that First Nations students receive services comparable to other Canadian children.
50. The funding arrangements mean that INAC controls how the Council can ask for money (e.g., through "exceptional circumstances" funding or otherwise) and limits how much money is available. INAC sets the standard for services (reasonably comparable level to the provinces) although the Council appears hampered in meeting that standard because INAC does not define the range or quality of services that will be funded nor does it provide an adequate framework or funding for the management and delivery of those services.

Is the information provided by the parties contradictory?

51. On the jurisdictional issue, the parties have opposing views as to whether the respondent is providing a service. As to the merits, the respondent states that any issues relating to the provision of special education services are a result of policy choices made by the complainant.
52. The available information suggests that the parties see the allegations of discrimination very differently. While the respondent does not contradict the complainant's allegation that Aboriginal children are disadvantaged in special education services on reserve, it sees

its role as limited to providing funding. It does not consider whether there are practices (e.g., lack of defined service levels, lack of legislative and policy framework, etc.) for which it has responsibility that contribute to Aboriginal children not receiving the special education services they need. In contrast, while the complainant focusses on the fact that the amount of money received is inadequate, it highlights broader issues such as the lack of a policy and legislative framework and guaranteed levels of service.

53. A tribunal hearing would afford both parties the opportunity to provide evidence and explain their point of view. A decision from a tribunal following a full hearing appears necessary in order to clarify complex factual issues including whether the role of the respondent is limited to funding or whether it is broader. Further, the complaint raises serious and unsettled legal issues some of which require complex factual determinations including whether funding is a service and what constitutional and treaty obligations the federal government may have in relation to special education services on reserve. A quasi-judicial hearing is well-suited to addressing and deciding on such issues.

Has the respondent already addressed the complainant's allegations? Have substantial and comprehensive remedies already been provided by the respondent?

54. From the evidence gathered, it does not appear that the respondent has provided a remedy to the complainant's allegations, particularly with regard to the broader systemic implications of this issue.

Would further investigation assist the Commission in making a final determination in the complaints?

55. There are several studies which appear to point to potential inequalities in all aspects of education and service for First Nation children with special needs. Furthermore, the evidence gathered indicates that the complaint raises legal and factual questions which are best addressed by a Tribunal, with the power to hear evidence from the parties in person, and witnesses including experts.

How is the public interest engaged by this complaint?

56. The CHRA's purpose is to extend the laws in Canada "to give effect ... to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have ... without being hindered in or prevented from doing so by discriminatory practices." Under Article 28 of the United Nations Convention on the Rights of the Child, children have the right to education on the basis of equal opportunity. In addition, under Article 8, States parties undertake to respect the right of the child to preserve their "ethnic identity" and Article 30 provides that an indigenous child shall not be denied the right to enjoy his or her own culture.
57. The Auditor General's Status Report 2011 notes the inequality in education generally for First Nations children, and states that the gap is widening. The report notes concerns regarding structural impediments, a lack of clarity about service levels, and inadequacies with respect to legislative frameworks, appropriate funding mechanisms and organizational support.
58. It appears that the situation of the particular special needs children represented in this complaint may be indicative of a broader systemic issue affecting First Nations communities across Canada. While a recent National Panel on First Nation Elementary and Secondary Education is engaged in developing options, including legislation, to improve elementary and secondary education for First Nation children who live on reserve, there is nothing in its mandate to indicate it is addressing the needs of special education children. <http://firstnationeducation.ca/home/panel-mandate>.

59. For all of the reasons above, there is a compelling public interest in examining further the human rights implications of the differences in the special education regimes that may be a part of the long-standing divergence of educational outcomes for First Nation children in communities across Canada.

Conclusion

60. Many reports and studies suggest that the current funding levels, legal and policy frameworks and community supports for First Nation special education may not be sufficient to provide substantive equality in education outcomes for First Nation children. Despite efforts to make progress, it appears that a less comprehensive legal and policy framework for First Nations, an overall lower level of on-reserve infrastructure and community supports, and inadequate services available to schools on reserves all appear to contribute to persistently lower outcomes for First Nation as compared to the rest of Canada. This may indicate a possible discriminatory impact under the CHRA, and as such, further inquiry may be warranted.
61. The information gathered during this assessment suggests that special needs children living in the complainant's community are disadvantaged as compared to other, non-First Nations children in regard to the educational services they receive. Given the current evidence of disparity in educational outcomes considered in this case, combined with the complexity of the systemic issues and the fundamental, compelling, and long standing public interests engaged by this complaint, it is recommended this issue be referred for further inquiry.

Recommendation

62. It is recommended, pursuant to section 49(1) of the *Canadian Human Rights Act*, that the Commission request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint because:
- the issues of whether the respondent is a service provider and whether funding is a service within the meaning of section 5 of the *Canadian Human Rights Act*, warrant further inquiry;
 - the available evidence appears to indicate that children living on reserve are denied special education services and/or differentiated against adversely in the provision of special education services;
 - given the conflicting evidence, the positions of the parties and the need to determine complex issues of fact and law, further investigation will not assist in resolving the complaint; and
 - in all the circumstances of the complaint, further inquiry is warranted.

Encl. Appendix A

Rick Johnson
President



GAIL ANDERSON
Executive Director

ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION

439 UNIVERSITY AVENUE, 18th FLOOR, TORONTO, ONTARIO M5G 1Y8
TELEPHONE: (416) 340-2540 ! FAX: (416) 340-7571

November 27, 2006

The Honourable Jim Prentice
Minister for Indian and Northern Affairs Canada

Dear Minister Prentice

The Ontario Public School Boards' Association (OPSBA) represents public district school boards and public school authorities across Ontario, which together serve more than 1.3 million public elementary and secondary students. Our members include First Nations trustees who have responsibility for the agreements under which First Nations students receive education in provincially funded schools.

It is a matter of grave concern to First Nation trustees and to the entire Board of Directors of the Ontario Public School Boards' Association that the Department of Indian and Northern Affairs Canada took a decision at the end of the last school year to reduce the funding for First Nations special needs students. Funding reductions experienced by individual First Nations ran as high as \$325,000 and the impact for students is severe. The per pupil amount approach to funding for special education adopted by INAC does not reflect the incidence of high needs or the costs of particular supports, including educational assistants, that some students need.

We believe that every student in our provincial schools deserves the level of assistance and support that will help them achieve their full potential. INAC's funding decision shortchanges First Nations students and runs counter to equity of opportunity.

We respectfully request that the matter of education funding for First Nations students with special needs be re-opened and that funding be restructured to recognize the real costs of providing First Nations students with the support to which they are entitled. Your Department's mandate includes ensuring that First Nations receive services comparable to those available to other Canadian residents. Equitable treatment for students with special needs is one of these services.

We look forward to hearing from you on this matter.

Sincerely

Rick Johnson
President