

Special Education in Human Rights Litigation: Have We Found a More Reasonable Balance?

J. Paul R. Howard

Shibley Righton LLP

**Canadian School Boards Association
2012 Congress “Community ConneXions”**

July 6, 2012



Try not to have a good time ... this is supposed to be educational.

Charles Schulz



[oh, and Paul, note to self]:

The mind can absorb only what the seat can endure.

Anonymous



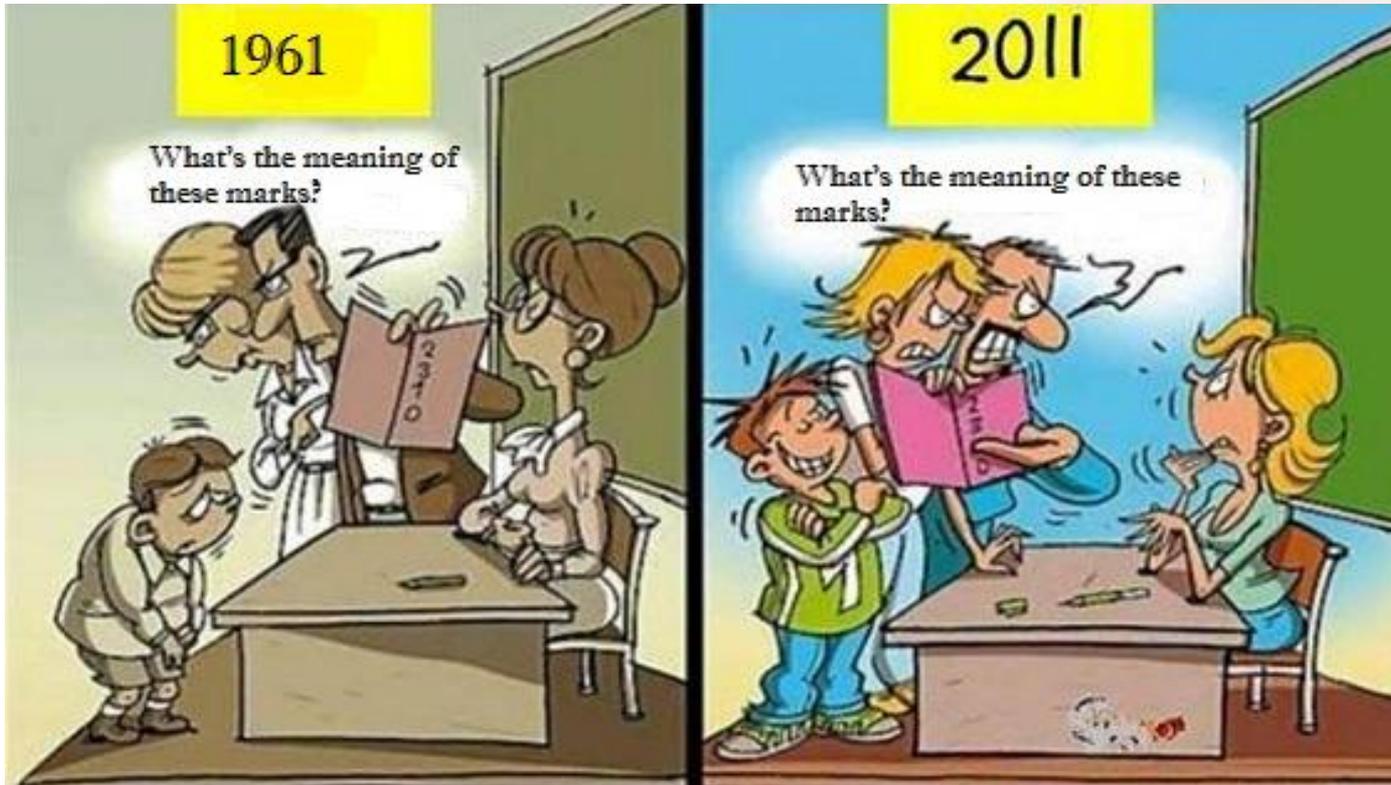
Special Education in Human Rights Litigation: Learning Objectives

1. Introduction
2. Background: Jurisprudential Waves and Momentum
3. Placement Decisions, the “Best Interests of the Child” Test, and Equality Rights Principles
4. Respecting Roles and Community ConneXions: Educators and Doctors



1. Introduction

In 50 years a lot has changed in school ...



“What’s the meaning of these marks?!”

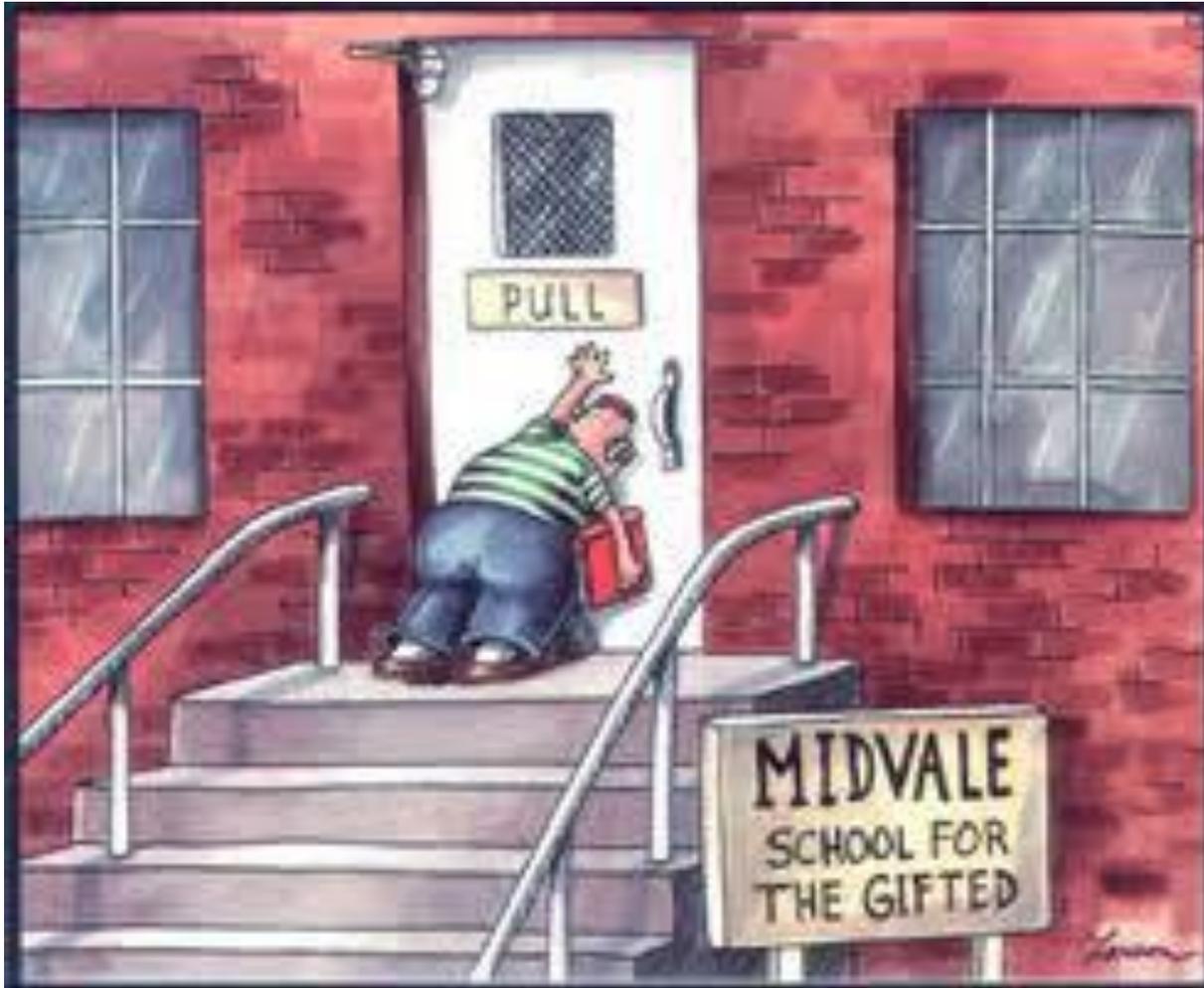


1. Introduction

- 2012 CSBA Congress theme: “Community ConneXions”
- Working within community connections with other professionals must also mean respecting each other’s roles
- Respecting the role of the educator
- Message of empowerment



2. Jurisprudential Waves and Momentum



2. Jurisprudential Waves and Momentum

- in the early decade of 2000, there was a great deal of special education litigation in Canada, and most of it was based on disability discrimination contrary to human rights legislation and/or the *Canadian Charter of Rights and Freedoms*
- in Ontario, the period of 2002-2004 saw a flood of litigation commenced on behalf of students with autism, both in the courts and before the Ontario Human Rights Commission
- e.g., the *Arzem* proceedings involved approximately 245 discrimination complaints filed with the OHRC on behalf of approximately 94 children with autism against the Ontario Government and 29 school boards



2. Jurisprudential Waves and Momentum

- the common issue involved in the Ontario litigation was the claim that the failure of the Government to adequately fund and/or provide Applied Behaviour Analysis (ABA)/Intensive Behavioural Intervention (IBI) to children with autism constituted discrimination on the basis of age and disability
- the claim was similar to that in *Auton v. British Columbia*, 2002 BCCA 538, where the B.C. Court of Appeal upheld the finding that failure to fund ABA/IBI violated equality rights
- similarly, in March 2005, Justice Kiteley of the Ontario Superior Court of Justice found for the plaintiffs in *Wynberg v. Ontario*, 2005 CanLII 8749



2. Jurisprudential Waves and Momentum

- in April 2005, in *Sagharian v. Ontario (Education)*, a court action was commenced under the *Class Proceedings Act, 1992*, by a group of families of children with autism against the Ontario government and seven Ontario school boards
- in December 2005, in *Moore v. British Columbia, 2005 BCHRT 580*, the B.C. Human Rights Tribunal found that the School District failed to provide Moore, who suffers from dyslexia, with appropriate accommodation, failed to provide “sufficiently early or appropriately intensive and effective remediation,” and found that the Ministry of Education failed under-funded the District resulting in significant cuts to services to severely learning disabled students



2. Jurisprudential Waves and Momentum

- but then, in July 2006, the Ontario Court of Appeal released its decision in *Wynberg v. Ontario*, 2006 Can LII 60343, and overturned Justice Kiteley's findings of discrimination:

In particular, it was not demonstrated that such a program could be delivered within the public school system because of the time and intensity it involves. There was no evidence about how effective the existing programs for autistic children are, preventing the conclusion that an IEIP program is the only one that is effective. Nor was there sufficient evidence about the programs provided to students with other disabilities to permit the conclusion that they all receive proper special education programming and that autistic students were therefore differently treated because of their disability.



2. Jurisprudential Waves and Momentum

- the Court of Appeal’s decision in *Wynberg* took direction from the Supreme Court of Canada’s earlier decision, released on November 19, 2004, in *Auton v. British Columbia*, [2004] 3 S.C.R. 657, where the Supreme Court allowed the appeals based on the appropriate “comparator group” analysis, and reversed the findings of discrimination upheld by the B.C. Court of Appeal
- as the Court of Appeal in *Wynberg* observed of the Supreme Court’s reversal in *Auton*: “This significantly altered the landscape relied on by the claimants.”



2. Jurisprudential Waves and Momentum

- in March 2007, Justice Cullity in *Sagharian v. Ontario (Education)*, 2007 CanLII 6933, followed the principles in *Wynberg* and struck out the plaintiffs' statement of claim, with leave to amend
- in April 2007, the Supreme Court of Canada denied leave to appeal the Ontario Court of Appeal's decision in *Wynberg*
- in February 2008, Justice Dillon of the B.C. Supreme Court set aside on judicial review the findings of discrimination in *British Columbia (Ministry of Education) v. Moore*, 2008 BCSC 264, applying *Auton* and *Wynberg*



2. Jurisprudential Waves and Momentum

- in May 2008, the Ontario Court of Appeal in *Sagharian v. Ontario (Education)*, 2008 ONCA 411, affirmed the decision of Justice Cullity striking out the plaintiffs' statement of claim
- in December 2008, the Supreme Court of Canada denied leave to appeal the Court of Appeal decision in *Sagharian*
- in October 2010, the British Columbia Court of Appeal dismissed an appeal from the decision of the B.C. Supreme Court in *British Columbia (Ministry of Education) v. Moore*, 2010 BCCA 478



2. Jurisprudential Waves and Momentum

- on March 22, 2012, the Supreme Court of Canada heard oral argument in the *Moore* case, and reserved its decision
- on April 25, 2012, in the *Sagharian* case, the Ontario Superior Court of Justice granted leave to discontinue the claim on behalf of all members of potential class, under the *Class Proceedings Act, 1992*, effective October 31, 2012



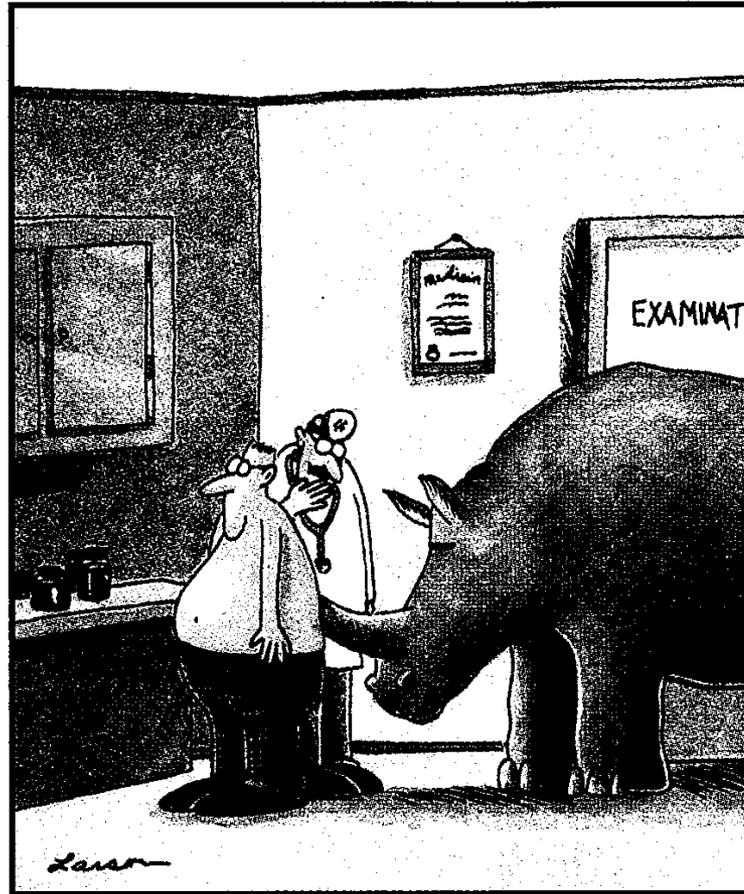
2. Jurisprudential Waves and Momentum

- the principles underlying *Auton*, *Wynberg* and *Sagharian* were applied by the Human Rights Tribunal of Ontario to similar complaints under the *Human Rights Code*. In *Zavadsky v. Ontario (Education)*, 2009 HRTO 756, the Tribunal held that:

In my view, the Court of Appeal decisions in *Wynberg* and *Sagharian* effectively held that the Ministry of Education did not discriminate against children with autism by failing to ensure the delivery of IBI consistent with IEIP guidelines in the school boards and that a party cannot avoid the effect of *Wynberg* by claiming that a non-specific form of intervention could be delivered through the school boards.



3. Placement Decisions, the “Best Interests of the Child” Test, and Equality Rights Principles



“Wait a second here, Mr. Crumbley. ... Maybe it isn’t kidney stones after all.”



3. Placement Decisions, the “Best Interests of the Child” Test, and Equality Rights Principles

- given the nature of disability discrimination, and the fundamental notion that in the disability context the essence of equality is accommodation, many human rights complaints involving students with special needs turn on the duty to accommodate
- in the words of the Human Rights Tribunal of Ontario, “special education is all about finding the appropriate accommodation for students with disabilities.” See *Campbell v. Toronto District School Board*, 2008 HRTO 62 at para. 42



3. Placement Decisions, the “Best Interests of the Child” Test, and Equality Rights Principles

- the “best interests of the child” test is a familiar legal standard
- in its seminal decision in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, the Supreme Court of Canada recognized that test for determining the placement of students with special needs
- it was argued that educators and/or the Special Education Tribunal is required to decide in favour of an integrated placement because of the equality rights guarantees found in s. 15 of the *Canadian Charter of Rights and Freedoms* and s. 1 of the *Ontario Human Rights Code*



3. Placement Decisions, the “Best Interests of the Child” Test, and Equality Rights Principles

- in *Eaton*, the Supreme Court confirmed that the duty of educators is to consider all of the various needs of a student and make a determination as to the student’s appropriate placement. Where the Tribunal considers the student’s needs and makes such a determination as to placement that the Tribunal believes is appropriate for the child, then the Tribunal is complying with the *Charter* and the *Human Rights Code*



3. Placement Decisions, the “Best Interests of the Child” Test, and Equality Rights Principles

- that equality rights presumption argument was advanced again by the appellant parent in *J.K. v. Toronto District School Board* (March 12, 2009), (Ont. Spec. Ed. (Eng.) Tribunal) and was rejected by the Tribunal
- the parent applied to the Ontario Divisional Court for judicial review of the Tribunal’s decision, and on July 27, 2010, the Divisional Court dismissed the parent’s application
- see *Kozak (Litigation guardian of) v. Toronto District School Board*, [2010] O.J. No. 3438 (Div. Ct.), leave to appeal to Ont. C.A. refused, M39123 (January 11, 2011)



3. Placement Decisions, the “Best Interests of the Child” Test, and Equality Rights Principles

- *IPRC Regulations, O. Reg. 181/98:*

17. (1) When making a placement decision on a referral under section 14, the committee shall, before considering the option of placement in a special education class, consider whether placement in a regular class, with appropriate special education services,

(a) would meet the pupil’s needs; and

(b) is consistent with parental preferences.



3. Placement Decisions, the “Best Interests of the Child” Test, and Equality Rights Principles

(2) If, after considering all of the information obtained by it or submitted to it under section 15 that it considers relevant, the committee is satisfied that placement in a regular class would meet the pupil’s needs and is consistent with parental preferences, the committee shall decide in favour of placement in a regular class.



3. Placement Decisions, the “Best Interests of the Child” Test, and Equality Rights Principles

- in *Kozak v. Toronto District School Board*, the Divisional Court rejected the parent’s argument that s. 17(1) of Reg. 181/98 creates a presumption in favour of a regular class placement
- the Court stated: “we are satisfied that no such presumption exists at law under section 17(1)”
- the Court then provided a good explanation of the proper interpretation of s. 17(1)



3. Placement Decisions, the “Best Interests of the Child” Test, and Equality Rights Principles

- the Court held:

57. Section 17(1) was enacted after the decision in *Eaton*, supra. There is, however, no indication that the Legislature intended to displace the "best interests of the child" test in *Eaton*, supra, in enacting section 17(1). To do so, one would have expected an amendment to the Act rather than enactment of a regulation under that statute. Moreover, the plain and ordinary meaning of the language of section 17(1) does not establish a presumption in favour of a regular class placement. Instead, we think section 17(1) was intended to further the approach contemplated in *Eaton*, supra, by providing a road map for the Tribunal in its decision-making.



3. Placement Decisions, the “Best Interests of the Child” Test, and Equality Rights Principles

58. Under section 17(1), in accordance with *Eaton, supra*, the Tribunal must first identify the actual characteristics of the exceptional student and the appropriate special educational needs required by the student. Based on that determination, the Tribunal must then address whether integration in regular class is in the best interests of the student in that it will "enable [the exceptional student] access to the learning environment [the student] need[s] in order to have an equal opportunity in education" (see para. 69 in *Eaton, supra*). If the Tribunal determines that integration will not have this effect, then the Tribunal must address the other placement options that will best satisfy this standard. Such an approach may provide a "decision-tree" but it does not create a presumption at law in favour of integration in a regular class.

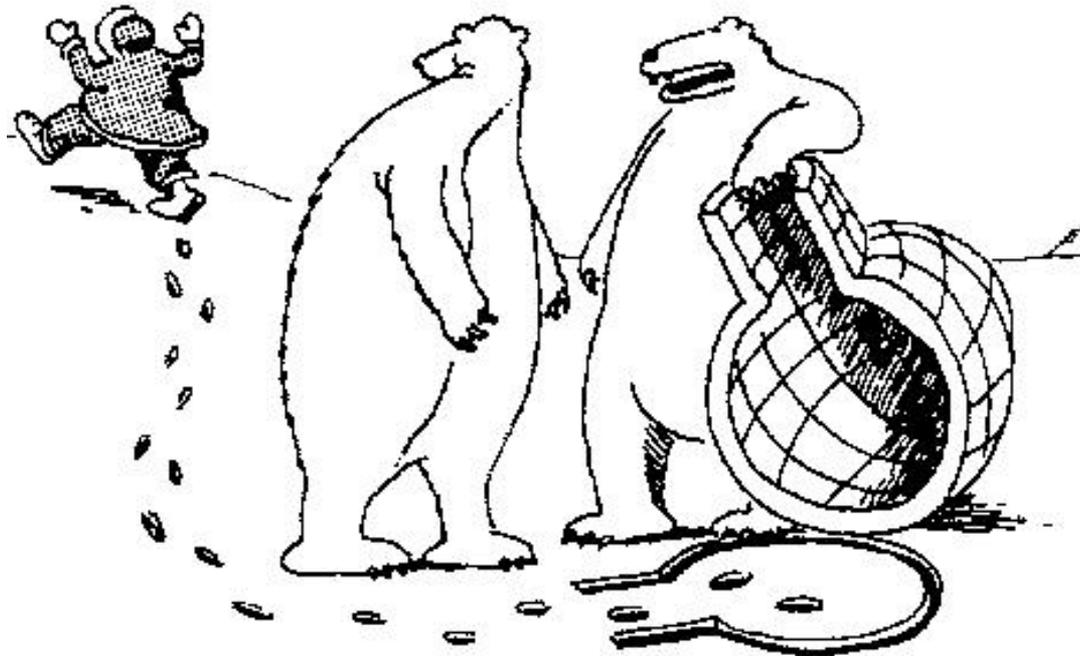


3. Placement Decisions, the “Best Interests of the Child” Test, and Equality Rights Principles

- the unsuccessful parent then sought leave to appeal the Divisional Court’s decision in *Kozak v. Toronto District School Board* to the Ontario Court of Appeal
- the Court of Appeal refused leave to appeal, with no reasons given, on January 11, 2011



4. Respecting Roles and Community Connections: Educators and Doctors



“I lift, you grab. ... Was that concept just a little too complex, Carl?”



4. Respecting Roles and Community Connections: Educators and Doctors

- requests for accommodations for students with special needs, supported by “doctor’s notes”
- similar to the one-liner doctor’s notes in employment context where disabled employee off on sick on sick or LTD leave
- in *Baber v. York Region District School Board*, 2011 HRTO 213, the Human Rights Tribunal of Ontario dealt with the sufficiency of medical information



4. Respecting Roles and Community Connections: Educators and Doctors

- the Tribunal held:

[130] At the hearing of this matter, the applicant adduced no medical evidence either that she was incapable of performing her regular teaching assignment or that she required accommodation in a teacher-librarian/ESL position because of her disabilities.

[131] The applicant did produce several medical notes variously requesting and “recommending” that the applicant be placed in a teacher-librarian or a teacher-librarian/ESL position. The applicant also produced one note which stated that teaching three computer courses had proved “too stressful” for the applicant.



4. Respecting Roles and Community Connections: Educators and Doctors

[132] However, in accordance with an earlier Interim Decision in this case, I give no weight to these medical notes, insofar as they relate to the applicant's need for accommodation on the basis of disability. Because the contents of the medical notes submitted by the applicant were very much in dispute and related to a central issue in the Application, in the interest of natural justice, I ruled that I would give no weight to those portions of the medical reports regarding accommodation of the applicant unless the doctors who wrote the reports were made available for cross-examination: 2010 HRTO 538 (CanLII), 2010 HRTO 538 (CanLII). I also ruled that the applicant's doctors would be permitted to testify by telephone if the applicant wished.



4. Respecting Roles and Community Connections: Educators and Doctors

[135] More importantly, the applicant's medical reports did not identify the applicant's physical or mental restrictions or the specific disability-related accommodations she required. It is not sufficient for a medical certificate to merely state that an employee would benefit from placement in a particular job. **The medical practitioner's role in the accommodation process is not to identify the specific job in which an employee is to be accommodated but rather to identify the employee's disability-related needs and restrictions.** It is then up to the employer, who has the ultimate responsibility for accommodation in the workplace, to take that basic information and to determine whether and how the applicant's disability-related needs might be accommodated up to the point of undue hardship.

