

# Inclusive Education: a Model of Equality

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*By looking at different models of equality and the means by which they can be achieved, this article examines decisions in Education Law and arguments for and against inclusive schooling. Equal education means different things to different individuals and groups. The source of our right to education in Canada provides helpful context for the current debates. Addressing the arguments for segregated schooling for both deaf students and students of African descent, the article suggests that all sides of the argument are in favour of equal education, but are working within different paradigms of equality.*

*En examinant divers modèles d'égalité et les moyens de parvenir à cet idéal, cet article examine des décisions provenant du domaine du droit de l'éducation ainsi que des arguments, tant favorables que défavorables, à l'instruction universelle. L'égalité en matière d'éducation peut avoir plusieurs significations différentes, selon les groupes et les individus. La source du droit à l'éducation au Canada nous fournit un contexte utile pour les débats qui ont cours actuellement. En prenant comme exemple les débats entourant les propositions d'écoles séparées pour les malentendants ou pour les personnes de race noire, l'auteur suggère que ceux qui sont en faveur de ces propositions, tout comme ceux qui sont contre, travaillent tous à l'intérieur d'un même paradigme qui vise l'égalité.*

## 1. INTRODUCTION

In a 1999 lecture later published in the Manitoba Law Journal, then Supreme Court Justice Claire L'Heureux-Dubé recognized that inequality often stems from innocently motivated actions.<sup>1</sup> She stated that "the analysis requires that we understand equality, and make it part of our thinking, rather than treading heavily on it with the well-worn shoes of unquestioned, and often stereotypical assumptions."<sup>2</sup> Justice L'Heureux-Dubé recognized that there are different types of inequality, and different means of understanding equality.

Scholarship on the *Charter's* section 15<sup>3</sup> suggests that different models of equality underlie the court decisions in *Charter* cases. In an examination of the challenges faced by immigrants and foreign workers in Canada<sup>4</sup>, Donald Galloway identifies three models of equality in Supreme Court of Canada decisions. First, the

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<sup>1</sup> Claire L'Heureux-Dubé, "Lecture: Conversations on Equality" (1999) Man. L.J. 273-298. [Lecture] at para 17.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>4</sup> J. Donald C. Galloway, "Three Models of (In)Equality." (1993) 38 McGill L.J. 64.

eradication of discrimination tied to membership in society, or “differentiation that disadvantages people who belong to an already disadvantaged group” as an attack on a person’s equal status.<sup>5</sup> Second, that the purpose of s. 15 of the *Charter* is an eradication of systemic forms of disadvantage.<sup>6</sup>

The third model is an understanding of equality that is based on human dignity. He writes that “according to the human dignity model, it is the individual self which is the object of protection against discrimination, rather than the individual in society. Personhood rather than membership is the salient concept.”<sup>7</sup> He identifies this model as problematic for its deference to “dominant conceptions of what counts as an interest which is integral to one’s dignity and which consequently requires judicial protection.”<sup>8</sup> I would add that a further problem with this human dignity model is its sole emphasis on individual rights.

In “Disability Advocacy in the *Charter* Era” Sarah Armstrong aligns with Galloway’s first model that bases equality on membership in society, arguing that the “ultimate goal of the equality guarantee for people with disabilities is to assure them full participation in society with respect to all of its rights, benefits, burdens, and obligations.”<sup>9</sup> David Lepofsky aligns with Galloway’s second model that sees equality as an eradication of systemic disadvantage, contending that the correct interpretation of equality for people with disabilities is “equality as a right to full inclusion and participation in a barrier-free society . . . a right of all persons with disabilities to full participation and inclusion, free of barriers, in all rights, benefits, opportunities, burdens and obligations that are extended by or under law.”<sup>10</sup>

The model of equality with which different individuals, organizations or groups align themselves shapes the practical goals they seek. In the context of education law, the different models respond to problems of equality differently. For example, if equality is based on an elimination of barriers, then equal education for students with disabilities can be achieved with appropriate accessibility and accommodation. If equality is about human dignity, education might mean more focus on incorporating the differences among the student population in a way that recognizes and celebrates those differences. Accommodation may still be required, but the human dignity model requires that students with disabilities not be “corrected” to fit the mainstream, and not be treated as a mere list of deficiencies or special needs.

In its Guidelines for Accessible Education, the Ontario Human Rights Commission writes that “differential treatment may sometimes be required to provide students with an equal opportunity to achieve full benefit from the education ser-

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<sup>5</sup> *Ibid.* at p. 72.

<sup>6</sup> *Ibid.* at p. 80.

<sup>7</sup> *Ibid.* at p. 83.

<sup>8</sup> *Ibid.* at p. 89.

<sup>9</sup> Sarah Armstrong, “Disability Advocacy in the Charter Era.” *University of Toronto Journal of Law & Equality* (2003) 2 J.L. & Equality 33. [Disability Advocacy] at 55.

<sup>10</sup> David M Lepofsky, “Discussion: The Charter’s Guarantee of Equality to People with Disabilities- How Well is it Working?” (1998) 16 *Windsor Y.B. Access Just.* [Guarantee of Equality] at 155.

vice.”<sup>11</sup> This focus, like each of Galloway’s three models of equality, is highly individualistic. While acknowledging that differential treatment can be a path to equality, it only conceives of such treatment on an individual basis.

In “The Equality Provisions of the *Charter*” Wayne MacKay identifies three different models of equality: non-discrimination, equal opportunity, and equal outcomes, the most desirable and broadest of which is equal outcomes.<sup>12</sup> He suggests that an equal outcomes model of equality would see Judges “involved in mandating positive programs to promote equal outcomes” and would fulfill the purposive interpretation of the *Charter*.<sup>13</sup> This article will examine current debates in education between proponents of inclusive education and advocates for separate education for certain groups of students, specifically deaf students and African-Canadian students. By looking at these debates through an understanding of the various models of equality, the arguments on each side become clearer.

Indeed, when examining the very important role of education in Canadian society, both as a government service and as an indispensable part of growing into a contributing member of Canadian society, different models of equality yield different results. By looking at some of the arguments for inclusion, and two case-specific arguments against it, it is clear that a particular sense of equality of individuals in Canadian society, plays a very significant role in what some commentators suggest is the best solution to the problem of inequality in education.

## 2. THE RIGHT TO EDUCATION IN CANADA

### (a) International Legislation

The right to education in Canada is not explicitly granted in the text of our Constitution or our laws, though implicit rights have been found by the courts. There are many legal texts that form the basis of our conception of equality in education. Canada has signed numerous international documents that guarantee this right explicitly. These include the United Nations Declaration of Human Rights,<sup>14</sup> the United Nations Convention on the Rights of the Child,<sup>15</sup> and the United Nations Convention on the Rights of Persons with Disabilities.<sup>16</sup>

Art. 26(2) of the UN Declaration of Human Rights guarantees education for

<sup>11</sup> Ontario Human Rights Commission, *Guidelines on Accessible Education* (Toronto: Ontario Human Rights Commission, 2004 [am. 2009]) [*Guidelines*] at 12.

<sup>12</sup> A Wayne MacKay, “The Equality Provisions of the Charter and Education: A Structural Analysis.” *Canadian Journal of Education*, Vol. 11, No. 3, “Education in Canada and the “Charter of Rights and Freedoms”” (Summer, 1986), pp. 293–312. [Equality Provisions] p. 294–296.

<sup>13</sup> *Ibid.* at 296.

<sup>14</sup> *United Nations Declaration of Human Rights*, United Nations, 10 December 1948. [UN Human Rights] See article 26, which explicitly guarantees free, compulsory education in the elementary stages.

<sup>15</sup> *United Nations Convention on the Rights of the Child*, United Nations, 2 September 1990.

<sup>16</sup> *United Nations Convention on the Rights of Persons with Disabilities*, United Nations, 13 December 2006.

the “full development of the human personality.” Education that promotes tolerance, understanding, and friendship. This language suggests an educational system focused on inclusion despite difference, particularly when the provision is coupled with art. 2, which guarantees the rights set forth to all persons without regard to several enumerated differences. Though disability is not enumerated the list is open. Art. 23 of the UN Convention on the Rights of the Child also extends an explicit right to education to all children with disabilities.

Art. 26(3) of the UN Declaration of Human Rights provides that “parents have a prior right to choose the kind of education that shall be given to their children.” The potential scope or application of this provision in Canada is unclear. International documents such as these are not legally binding in Canada, but can be used in argument.

The UN Convention on the Rights of the Child extends an explicit right to free elementary education in Art. 28. This provision refers to human dignity and accessibility for all children. Art. 29(1)(c) identifies a need for respect of children’s cultural identity and values, as well as respect for other civilizations. Focus on respect for cultural difference is an affirmation of the value of cultural ties and students’ feelings of belonging to a particular group. This is not an explicit guarantee to be educated according to one’s own cultural background, but it is an arguable starting point for such claims.

The UN Convention on the Rights of Persons with Disabilities includes an explicit right to education at art. 6. This provision cites “social integration or reintegration” as a primary goal for people with disabilities. Underlying this is a model of equality based on membership in society that sees the path to equality in the removal of clear and harmful barriers to basic services so that individuals with disabilities have an equal chance at success in mainstream life.

Again, these international documents are not binding in Canada. However, in “Canada’s Implementation of the Right to Education for Students with Disabilities” Seema Shah argues that the courts have shown an increasing willingness to rely on them.<sup>17</sup> If Canada makes representations to the international community, the suggestion is that the courts are becoming more receptive to holding Canadian legislation to the image we project abroad, making these international documents an important tool in arguing about how a Canadian education should look.

Despite the increasing availability of arguing international documents in Canadian courts, Shah is not suggesting that the international guarantees are perfect. On the UN Convention on the Rights of the Child, she writes that “what is not clear is what constitutes discrimination in education on the basis of disability. In other words, to what extent will barriers to education . . . be tolerated?”<sup>18</sup> Despite this and other potential shortcomings, international legislation provides an explicit guarantee to education. A domestic search for similar guarantees only proves fruitful in case law.

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<sup>17</sup> Seema Shah, “Canada’s Implementation of the Right to Education for Students with Disabilities.” *International Journal of Disability, Development and Education*. Mar 2010, Vol. 57 Issue 1, p. 5–20. [Canada’s Implementation] at 10.

<sup>18</sup> *Ibid.* at 11.

### 3. CANADIAN LEGISLATION AND CASE LAW

The primary sources of rights to education in domestic law are the various Education Acts of each province<sup>19</sup> and the *Canadian Charter of Rights and Freedoms*.<sup>20</sup> Shah contends that the *Charter's* purpose is to restrain government action, and not to require that positive steps be taken to accommodate students with disabilities.<sup>21</sup> According to the plain language of the *Charter*, this is accurate, though case law demonstrates that the court is willing to find a positive obligation of accommodation on the government in the provision of services.<sup>22</sup>

In “The Equality Provisions of the Charter” Wayne MacKay predicted that equality provisions “may have more impact on education than all the other provisions of the *Charter* combined.”<sup>23</sup> He recognized the open-ended language of s. 15, and saw the impact of the American decision in *Brown v. Board of Education of Topeka*<sup>24</sup> as opening “a window whereby lawyers and judges will enter the world of educational policy making.”<sup>25</sup> This prediction has particular resonance in the context of arguments for inclusive education.

Proponents of inclusion, including Mackay, argue for equality in education. So do those who argue for separate Africentric schools, and separate schools for the deaf. The government is providing a service in education, and the provision of that service must be done in a non-discriminatory manner. This makes s. 15 essential to an understanding of the debates surrounding inclusive education. MacKay writes that “assuming for a moment that there is a right to education, s. 15 makes it clear that it must be provided without discrimination based upon either physical or mental disabilities.”<sup>26</sup> The same is true of race, an enumerated ground in s. 15. Furthermore, section 15(2) allows the government to act positively to ameliorate the disadvantages faced by enumerated groups without facing claims of reverse discrimination.

MacKay also acknowledges the practical limits of the *Charter*. When courts are determining the reasonable limits of accommodation, cost and administrative inconvenience are both relevant factors.<sup>27</sup> Section 1 of the *Charter* allows the government a defense of reasonable limits. This also sets Canadian Constitutional litigation apart from that in the United States, which lacks an equivalent provision. Comparing rights in the two countries can be challenging for this reason, among others. When I refer to similar educational challenges in the United States, it will be for the sake of comparing similar societies rather than specific law for this

<sup>19</sup> I will be discussing Ontario’s legislation specifically: *Education Act*, R.S.O. 1990, c. E.2.

<sup>20</sup> *Charter*, above note 3.

<sup>21</sup> Canada’s Implementation, above note 17 at 13.

<sup>22</sup> *Eldridge v. British Columbia (Attorney General)*, 1997 CarswellBC 1939, 1997 CarswellBC 1940, [1997] 3 S.C.R. 624 (S.C.C.). [*Eldridge*] Discussed at page 10.

<sup>23</sup> Equality Provisions, above note 12 at 293.

<sup>24</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (U.S. Sup. Ct., 1954) [*Brown*].

<sup>25</sup> Equality provisions, above note 12.

<sup>26</sup> *Ibid.* at 302.

<sup>27</sup> *Ibid.* at 295.

reason.

Lepofsky agrees with MacKay on the importance of the *Charter*'s equality provisions. He sees s. 15 as a presumption that "a person with a disability is entitled to fully participate in the mainstream wherever possible,"<sup>28</sup> almost a requirement for the government to remove barriers to equality. Canadian case law suggests that our courts do not share this presumption.

In *R. v. Kind* the court found a right to education in s. 7 of the *Charter*.<sup>29</sup> It did not find a presumption of inclusion in mainstream education. Indeed the court there ruled that home schooling is allowed and provides parents an alternate means of educating their children.<sup>30</sup> This is consistent with the choices art. 26(3) of the UN Declaration of Human Rights gives parents, as discussed. It also clearly stands for the fact that Canada will tolerate, to use the language of *Charter* reasoning, a range of reasonable alternatives when it comes to education. There may be standardized tests or common curricula, but there is no requirement that a child actually attend a government funded school if a reasonable alternative is offered.

In *R. v. Jones*<sup>31</sup> Justices Laforest and Dickson accepted the reasoning of the seminal American case of *Brown v. Board of Education of Topeka*<sup>32</sup> and state that "education is today a matter of prime concern to government everywhere."<sup>33</sup> Justice Laforest quotes *Brown* at length:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."<sup>34</sup>

The Ontario Human Rights Commission guidelines on accessibility in education explain the legal history as well as the social and practical realities facing many students with disabilities. These guidelines describe barriers to education as including "inadequate funding, physical inaccessibility, cumbersome and time-consuming accommodation processes, [and] negative attitudes and stereotypes."<sup>35</sup>

Human Rights legislation also applies to education. Shah writes that "human rights legislation consists of quasi-constitutional statutes" with a status of

<sup>28</sup> Guarantee of Equality, above note 10 at 208.

<sup>29</sup> *R. v. Kind*, 1984 CarswellNfld 259, [1984] N.J. No. 243, 50 Nfld. & P.E.I.R. 332, 149 A.P.R. 332, ¶20 (Nfld. Dist. Ct.).

<sup>30</sup> *Ibid.* para 42.

<sup>31</sup> *R. v. Jones*, 1986 CarswellAlta 181, 1986 CarswellAlta 716, [1986] 2 S.C.R. 284 (S.C.C.) [*Jones*]

<sup>32</sup> *Brown*, above note 24.

<sup>33</sup> *Jones*, above note 31 at para 22.

<sup>34</sup> *Brown*, above note 24 at 493.

<sup>35</sup> Guidelines, above note 11 at 4.

supremacy over other Canadian statutes that “is rarely challenged.”<sup>36</sup> A seminal case finding a right to be accommodated in order to equally access to education was the *Moore* case, in which the British Columbia Human Rights Tribunal ruled that Jeffrey Moore had not been properly accommodated.<sup>37</sup> As a student facing dyslexia, Jeffrey was entitled to accommodation. In failing to accommodate, the School Board was liable for discrimination. This decision was reversed by the British Columbia Supreme Court, and has been appealed to the British Columbia Court of Appeal.

#### 4. EDUCATION AS A GOVERNMENT SERVICE

Section 15 of the *Charter* impacts Canadian case law with regard to the fair provision of government services. Given the colossally important role education has in Canadian society, it is clear that meaningful access to education is essential for students to fully benefit. Meaningful access to government services has come up in *Charter* case law, most notably *Eldridge v. BC*<sup>38</sup> in which health care was found to be a government service that must be provided without discrimination.

The facts in *Eldridge* provide a prime example of institutional or systemic discrimination. As Justice L’Heureux-Dubé outlined, these facts “show how treating everyone the same may in fact contribute to inequality.”<sup>39</sup> Where actual abilities differ, they cannot be ignored, and part of equality is responding to these actual differences and accommodating them.

In *Eldridge*, health care facilities are classified as private, but the services they provide are on behalf of the government. In the provision of those services, the facilities are subject to the *Charter*. Similarly, the case law dealing with primary and secondary education under the *Charter* indicates that education is seen by the courts as a government services, and the facilities that provide that service are therefore subject to the *Charter*.

In *Eldridge* Justice Laforest acknowledges that “the history of disabled persons in Canada is largely one of exclusion and marginalization” including exclusion from many of the benefits that education helps to provide.<sup>40</sup> Though deaf Canadians face many barriers in accessing health care, in their general lives Justice Laforest accepts that many deaf Canadians “identify themselves as members of a distinct community with its own language and culture.”<sup>41</sup> Laforest also finds it unfortunate that ignorance and exclusion from mainstream Canadian society comes along with this cultural identity.<sup>42</sup>

Laforest characterizes communication as so fundamental to medical services

<sup>36</sup> Canada’s Implementation, above note 17 at 14.

<sup>37</sup> *Moore v. British Columbia (Ministry of Education)*, 2005 BCHRT 580, 2005 CarswellBC 3573 (B.C. Human Rights Trib.)

<sup>38</sup> *Eldridge*, above note 22.

<sup>39</sup> Lecture, above note 1 at para 14.

<sup>40</sup> *Eldridge*, above note 22 at para 56.

<sup>41</sup> *Ibid.* at para 57.

<sup>42</sup> *Ibid.*

that the Court could take judicial notice of it.<sup>43</sup> Communication barriers for deaf Canadians are only more significant in the educational context. “Sign language interpretation,” writes Laforest “should not therefore be viewed as an ‘ancillary’ service. On the contrary, it is the means by which deaf persons may receive the same quality of medical care as the hearing population.”<sup>44</sup> Benefits, once provided, must be provided without discrimination.<sup>45</sup>

Given that Justice Laforest both recognizes the importance of delivering services in a way that is free from discrimination, and acknowledges the massive importance of education to society at large, it is clear that education must be provided on an equal basis. The delivery of educational services must adhere to section 15 of the *Charter*.

Sarah Armstrong addresses the submissions of the interveners in *Eldridge* who “reiterated the importance of ‘fine tuning’ society so that people with disabilities do not face ‘structures and assumptions’ that preclude their participation and discriminate against them.”<sup>46</sup> The interveners focused on alteration of the mainstream, not just accommodation. Armstrong suggests that the *Eldridge* decision was seen as a success by disability advocates in part because it put a positive obligation on the government, even “forcing the government to spend money” to prevent inequality.<sup>47</sup> The decision is not all positive, however. Armstrong criticizes Laforest’s analysis for finding cost a valid factor when justifying limits on *Charter* rights.<sup>48</sup>

Requiring the government to pay to remedy inequity it creates through the provision of services is a very important step in determining what the government’s obligations are under s. 15. There is limited assurance from a court decision that government money will be spent in the manner directed, and certainly no guarantee that sign language interpretation is currently provided in BC hospitals. As a legal principle, however, it is an important step.

## 5. MEANINGFUL ACCESS TO EDUCATION

As with health care, meaningful access to education requires effective communication. The “foundation of citizenship” outlined in *Brown v. Board of Education* is more than times tables. Canadians generally expect that schools will teach children basic societal values. There are essential elements of an education that are not generally tested: social skills, working with others, negotiation and problem solving. Meaningful access to education means not only the ability to be tested in any given subject, but participation in this full experience. It is a way for Canadian culture to ensure its continued existence. The range of reasonable educational alternatives identified in *R. v. Kind* fits into this context. A reasonable alternative should include the full complement of education. Society as well as the sciences.

The court system had a moment to define the goals of education in *Eaton v.*

<sup>43</sup> *Ibid.* at para 69.

<sup>44</sup> *Ibid.* at para 71.

<sup>45</sup> *Ibid.* at para 73.

<sup>46</sup> Disability Advocacy, above note 9 at 62-63.

<sup>47</sup> *Ibid.* at 65.

<sup>48</sup> *Ibid.*

*Brant County Board of Education*.<sup>49</sup> Here, a presumption for integrated schooling for children with disabilities was rejected by Justice Sopinka.<sup>50</sup> Justice Sopinka writes that presumptions “render proceedings more technical and adversarial” and there is a concern that a standing presumption will lead to decision by default.<sup>51</sup> Justice Sopinka also expresses concern that students who are placed in mainstream classrooms on parallel curricula could be isolated if there was a large enough gap between the specialized curriculum and the mainstream one.<sup>52</sup> This reasoning acknowledges the academic goals of education. Sopinka’s comments do not address the socialization aspect of what students are meant to learn.

Another seminal case dealing with educational rights for the disabled was *Auton*.<sup>53</sup> In “The Lighthouse of Equality” MacKay writes that:

Three critical questions arise from this case with regard to special needs programming in schools. First, how do schools and ministries of education deal with and implement new research, methodology and technology both with regard to individual accommodation and systemic barriers? Second, how does this compare with the implementation of new research, methodologies, and technologies in other areas? Finally, who should bear the costs of certain programs to advance inclusion of disabled students?”<sup>54</sup>

The court in *Auton* seems to answer that as long as treatments are new or experimental, government is under no obligation to pay for them. This is likely to be particularly true where treatments are expensive, given that finances are a valid part of the analysis from *Eldridge*. For some students with some disabilities then, novel treatments are not something the government is willing to provide. This seems to be the case even when the path to meaningful educational access there lies.

Galloway’s criticism of the third model of equality he identified resonates here. Dominant conceptions of need form the basis of court findings of equality. Where finances are an issue, as they are likely to be, dominant conceptions of need will dictate what schools and courts are willing to spend money on. Like Justice Sopinka’s reasoning in *Eaton*, *Auton* also demonstrates the court’s particular focus on the curricular aspects of education, rather than the socialization component.

## 6. THE ARGUMENT FOR INCLUSION

Critical scholarship of *Eaton* by disability advocates generally responded to the Supreme Court decision as a blow to students with disabilities. Lepofsky wrote that “the Eatons should never have had to prove that their child belongs in the

<sup>49</sup> *Eaton v. Brant (County) Board of Education*, 1996 CarswellOnt 5035, 1996 CarswellOnt 5036, [1997] 1 S.C.R. 241 (S.C.C.).

<sup>50</sup> *Ibid.* at para 79.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* at para 17.

<sup>53</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, 2004 CarswellBC 2675, 2004 CarswellBC 2676, [2004] 3 S.C.R. 657 (S.C.C.).

<sup>54</sup> A Wayne MacKay, “The Lighthouse of Equality: A Guide to “Inclusive Schooling.””(2008) in: M. Manley-Casimire (ed.) *The Courts, the Charter, and the Schools* (Toronto: Univ. of Toronto Press, 2008). [*Lighthouse*]

mainstream of society. Section 15 presumes that a person with a disability is entitled to fully participate in the mainstream wherever possible.<sup>55</sup> *Eaton* puts the onus on the parties with disabilities to prove their presumptive right to be in the mainstream. As Lepofsky demands, “women need not so prove. Ethnic minorities may not so prove. Why should equality treat people with disabilities any worse than these others[?]”<sup>56</sup>

Lepofsky is strongly in favour of a presumption of integration for students with disabilities. He states that the accommodation and participation of a person with a disability in the mainstream is equality achieved.<sup>57</sup> Lepofsky’s concern with the reasoning of the Supreme Court in *Eaton* rests with the onus of proving one’s right to a place in the mainstream. His aim is “to have people fairly and accurately judged on their individual ability, based on what they can do in a barrier-free context, and not on what they cannot do or on what others think they cannot do.”<sup>58</sup> For Lepofsky, the starting point for this individualized look at students must be that all are entitled to education in mainstream schools.

MacKay is also a proponent of inclusion, citing a right to access mainstream education with accommodation.<sup>59</sup> Indeed he suggests that “equality, properly understood and applied with adequate resources, can be the lighthouse that guides us to more inclusive, effective and even safer public schools.”<sup>60</sup> Armstrong writes that disability advocates hope that the “norm of general application” of integration established in *Eaton* “will, in the long run, become a presumption that is applied in all cases concerning the education of children with disabilities.”<sup>61</sup>

Most arguments in favour of inclusion appear to be based on Galloway’s second and third models of equality. MacKay’s equal outcomes also focus on eliminating barriers to education, and respecting the dignity of individual students. Achieving equal access to education by eradicating stereotype-based barriers makes sense in this context. Choice in education should at least include the option of education in the mainstream.

Accommodation can fit into these models of equality as well. Accommodation is the conscious removal of barriers to education that are related to actual characteristics of students. As Shah writes: “while some people have . . . variations that may sometimes cause individual impairments, these do not necessarily lead to disability, unless society fails to take account of and include these individuals, thus creating disability.”<sup>62</sup> Failure to accommodate these actual needs is failure to remove barriers to education. A failure to accommodate is a lack of recognition of the affect of actual characteristics, which is a decision, whether conscious or unconscious, to let barriers to education remain. It is a failure to recognize the dignity inherent in each

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55 Guarantee of Equality, above note 10 at 208.

56 *Ibid.*

57 *Ibid.* at 213.

58 *Ibid.*

59 Lighthouse, above note 54.

60 *Ibid.*

61 Disability Advocacy, above note 9 at 62.

62 Disability Advocacy, above note 9 at 7.

individual student.

With so much critical scholarship on the side of inclusion and a presumption of integration, where do the arguments against inclusion come from? After all, the push towards inclusion is at least in part a reaction against discriminatory separate education: schools into which students might have been pushed based on perceived characteristics or disabilities.

In her article “The Disability Integration Presumption: Thirty Years Later” Ruth Colker discusses the integration presumption under the *Individuals with Disabilities Education Act* (IDEA) in the United States.<sup>63</sup> Colker discusses integration for students with disabilities by looking at the history and lessons of racial integration in the American context. She writes: “my goal is straightforward- I hope to learn from the dialogue in the racial civil rights area in order to suggest principles that might guide the development of programs in the disability context.”<sup>64</sup> Colker’s article includes a thorough examination of many aspects of racial integration, from effects on performance and self-esteem, to the kind of social changes desegregation in a public school system truly requires.

According to Colker, IDEA presumes “that the regular classroom environment is superior to the other configurations that are often available to children with disabilities . . . because it offers a more integrated education environment.”<sup>65</sup> She recognizes the historical importance of this presumption in both the race and disability contexts. Colker promotes the “original purpose” of an integration presumption, “to encourage school districts to create more than disability-only options for children” but argues in favour of a continuum of educational services.<sup>66</sup> She disagrees with a presumption of integration, despite its acceptance among many scholars. Colker accuses such a presumption of being too broad, and expresses concern for potential side effects of this “structural remedy.”<sup>67</sup>

In examining integration in the disability context Colker argues that a presumption in favour of inclusion “makes little sense” as each student presents highly individualized needs that can be met through a variety of techniques.<sup>68</sup> Her comments focus mostly around learning disabilities, but her logic can be extended to include other disabilities or needs in the classroom. Her conclusion is that the integration presumption “should not be understood to dictate that a fully inclusive education is necessarily the best educational option when a school district offers a continuum of educational alternatives.”<sup>69</sup> She recommends instead an individual assessment for each student. The government can have “checklists or criteria that will help guide school districts and parents in deciding what combination of educa-

<sup>63</sup> Colker, Ruth. “The Disability Integration Presumption: Thirty Years Later.” University of Pennsylvania L.R. Vol. 154, No. 4 (Apr. 2006) pp. 789–862. [Integration Presumption]

<sup>64</sup> *Ibid.* at 835.

<sup>65</sup> *Ibid.* at 797.

<sup>66</sup> *Ibid.* at 823-824.

<sup>67</sup> *Ibid.* at 799.

<sup>68</sup> *Ibid.* at 825.

<sup>69</sup> *Ibid.* at 857.

tional resources are most likely to be effective for an individual child.”<sup>70</sup>

The differences between Colker’s take on an integration presumption in America and the Canadian scholars discussed in this section are obvious. What helps explain them? Though the United States has a more complex history of racial desegregation in schools, one would expect the logic to be similar. According to Colker, a presumption of integration, despite the urgings of MacKay, Lepofsky, Armstrong and others, is not the best option.

The OHRC Guidelines also focus on an individual assessment.<sup>71</sup> They acknowledge that education is a service, and so must be provided without discrimination.<sup>72</sup> Even the name of these guidelines: for Accessible Education (not inclusive) is an important indicator of the OHRC’s position. The official statement is that “there is no set formula for accommodation. Each student’s needs are unique . . . Blanket approaches to accommodation that rely solely on categories, labels and generalizations are not acceptable.”<sup>73</sup> I do not mean to suggest that the proponents of a presumption of inclusion want to forgo any individual assessments of need, or promote the use of blanket approaches to accommodation. I only point out that the arguments against a presumption of inclusion focus strongly on the individual, and his or her specific needs.

## 7. MEANINGFUL ACCESS FOR STUDENTS WITH DISABILITIES

### (a) The Source Of The Need

As in the case of *Eldridge*, some needs associated with disability are very clear. Assistance with communication is an example of this kind of clear need. For some students with disabilities, equal access to education absolutely requires accommodation. There are some examples though, in which the argument from a particular community is against mainstream education. This is true for the Canadian Association of the Deaf (CAD). The CAD argues that the types of needs deaf students have are such that segregated schooling for deaf children is actually preferable to mainstream accommodation.

The CAD addresses education as a key issue facing the deaf community. Their web site states that the successes of the disability rights movement in eliminating the institutions of the past “has unfortunately led educators, government policy advisors, and the medical professions to assume integration is the best option for all disabilities. In the case of deaf children, this is not true.”<sup>74</sup> The CAD identifies communication is a key reason for this failure. Support services in mainstream schools are identified as being “very weak”, with no tutoring in ASL,<sup>75</sup> lack of availability of full time ASL interpreters, and interpreters that have only limited

<sup>70</sup> *Ibid.* at 856.

<sup>71</sup> Guidelines, above note 11 at 5.

<sup>72</sup> *Ibid.* at 5.

<sup>73</sup> *Ibid.* at 8.

<sup>74</sup> Canadian Association of the Deaf “Education” online: Canadian Association of the Deaf <<http://www.cad.ca/en/issues/education.asp>> [CAD site]

<sup>75</sup> American Sign Language, the first language of many deaf students.

signing skills.<sup>76</sup>

Louise Brown writes in her article “School Plan for the Deaf Sparks Outcry” for the *Toronto Star* that the increasing use of surgical implants for deaf children has resulted in dropping enrollment at sign language public schools.<sup>77</sup> She notes that “Toronto’s only full sign language elementary school . . . has just nine students enrolled for September, down from more than 100 a decade ago.”<sup>78</sup> According to Brown, 2,400 deaf and hard-of-hearing students in Ontario are currently in mainstream schools with accommodation.<sup>79</sup> Given the choice, Brown’s article suggests that many students (or their parents) are in favour of integration.

Brown quotes Norah-Lynn McIntyre, executive director of VOICE for Hearing Impaired Children, who is supportive of the “right to go to mainstream universities” even where sign language colleges are available.<sup>80</sup> Jim Roots, the executive director of the CAD, is also quoted criticizing the lack of availability of sign language campuses in Canada.<sup>81</sup> The CAD uses ASL as its official language, and is not in favour of inclusive education unless all communication needs are met through sufficient accommodation.

Shah recognizes that the challenges faced by students with disabilities arise from more than their actual need for accommodation. Her article focuses on epilepsy, which when poorly accommodated can result in multiple types of barriers to education. For many, the social construction of disability can create unrecognized barriers to education that are not accommodated. In the case of students with epilepsy for example, the ability of accommodative measures “to protect students from epilepsy from barriers arising from sources other than neurological deviation is limited.”<sup>82</sup> Shah sees this failure as a failure of Canadian legislation to protect all students with disabilities.<sup>83</sup>

### **(b) A Model of Equality**

Focusing accommodation strictly on the medical needs of students with disabilities is a focus on removing certain barriers to education. These barriers are identifiable by a common standard. Lepofsky suggests that accommodation of disability goes further than accommodation of race or gender. The court in *Eaton* ruled that accommodation of race or gender “seeks to eradicate false stereotypes based on person attributes, while disability equality goes further, by also seeking the accommodation of actual attributes.”<sup>84</sup>

Lepofsky discusses cost, which can be used to justify limits on accommoda-

<sup>76</sup> CAD site, above note 74.

<sup>77</sup> Louise Brown, “School Plan for the Deaf Sparks Outcry” *The Toronto Star* (August 9, 2007) online: <[http:// www.thestar.com/article/244580](http://www.thestar.com/article/244580)>

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> Canada’s Implementation, above note 17 at 18.

<sup>83</sup> *Ibid.*

<sup>84</sup> Guarantee of Equality, above note 10 at 211.

tion in some circumstances. The fear of the price tag of accommodation, he argues, “derives from an underestimation of the abilities of persons with disabilities and a failure to take into account the much greater costs society must pay when excluding these people from the mainstream.”<sup>85</sup> The cost of not accommodating students with disabilities is particularly notable in the case of education, which is designed at least in part to turn students into contributing adults. Lepofsky points to the cost of social assistance weighed against the cost of workplace accommodation.<sup>86</sup> The cost in dignity is also substantial when accommodations are not made, particularly in education where part of the goal is reaching one’s potential.

Justice L’Heureux-Dubé asks whether our institutions “enable all people to enjoy full membership in society, and an equal sense of self-worth?”<sup>87</sup> The removal of barriers in order for individuals to have full access to society, or membership within it, is equality focused on equal opportunity, or equal access. As in *Eldridge*, this model of equality focuses on the right to, as Armstrong says, “be provided with the means necessary to communicate.”<sup>88</sup> Accommodation so that deaf students can fully access, participate in, and communicate with the mainstream. The equality envisioned by the CAD, instead of focusing on individual accommodation, addresses the need for a group identity in which deaf students can feel comfortable and proud. This does not fit precisely into any of Galloway’s models. Instead it appears that in order to achieve MacKay’s ideal equality (equal outcomes) the scope of equality must broaden considerably to consider distinct social groups.

### (c) The Cultural Component

The CAD addresses isolation and social problems that can result from being the only deaf child in a mainstream school. They also identify another important aspect of deaf education: deaf culture. Deaf culture is described as a “healthy sociological community of Deaf people”<sup>89</sup> a group who are not compatible with the medicalized treatment of deafness as a defect to be fixed “at any cost.”<sup>90</sup> Deaf culture is outlined as including deaf education all the way up to the university level, deaf entertainment, and a distinct social and political structure. The hearing mainstream culture is described as being “in deep conflict” with Deaf culture.<sup>91</sup>

Deaf culture adds new complexity to determining the best form of education for deaf children. This is not only a matter of equality of access to a service provided by the government for the mainstream, but access to a service in a way that accommodates a different method of communication and a different cultural identity.

Lepofsky addresses the issue of deaf versus mainstream schooling in the

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85 *Ibid.*

86 *Ibid.*

87 Lecture, above note 1 at para 27.

88 Disability Advocacy, above note 9 at 85.

89 CAD site, above note 74.

90 *Ibid.*

91 *Ibid.*

*Trofimenkoff*<sup>92</sup> case, in which applicants claiming that the closing of a school for deaf children violated s. 15 lost their case. Lepofsky sees this result as “consistent with the Ontario Court of Appeal’s ruling in *Eaton*, in that there was no proof the needs of deaf children would not be met in the mainstream or local setting.”<sup>93</sup> If the case were pleaded not only on the grounds of disability, but claimed a distinct culture apart from the mainstream, perhaps the results would look less consistent. Extending s. 15 of the *Charter* to cover a cultural group that finds a common identity in a disability might seem a stretch. However, if a central component of deafness is belonging to deaf culture, the argument might find traction.

Lepofsky acknowledges that “there will be situations where segregation is warranted”<sup>94</sup> as with separate schools for the blind or the deaf, but maintains that a presumption in favour of integration supports s. 15 equality for students with disabilities. He writes: “the continued existence of these [segregated] schools does not displace the risk that school boards will resort to segregating blind or deaf children too readily.”<sup>95</sup> What Lepofsky does not acknowledge here is the claim to a distinct deaf culture put forward by the CAD. The CAD’s position is that there is a valid claim to segregated schooling on the basis of cultural identity.

Since Laforest’s acknowledgment in *Eldridge* of a distinct deaf culture<sup>96</sup> the legal result of such a cultural argument might extend to mean that being deaf requires protection, not just accommodation in the mainstream. Shah writes that segregation is less dignified unless undue hardship on the part of the mainstream can be shown.<sup>97</sup> The CAD would suggest that mainstream integration is the less dignified option, in its failure to recognize the distinct cultural needs of the deaf community. Shah defines accommodation as the “adjustment of a rule, practice, condition, or requirement to take into account the specific needs of an individual or group.”<sup>98</sup> She does not go as far as stating that accommodating a specific group can include providing a segregated option for them on a cultural basis, but this is what the concept of a group right would suggest.

#### (d) The American Experience

Colker finds principles for educating students with disabilities in studies of racial desegregation in the United States. She suggests that it might be better for students’ self-esteem to have the choice of a more segregated or more inclusive option.<sup>99</sup> This claim might be stronger if based on cultural identity. A precondition for the self-esteem benefit is that “children are taught by teachers who have high

<sup>92</sup> *Trofimenkoff v. Saskatchewan (Minister of Education)*, 1991 CarswellSask 212, [1991] S.J. No. 350, [1991] 6 W.W.R. 97, 97 Sask. R. 161, 12 W.A.C. 161 (Sask. C.A.)

<sup>93</sup> Guarantee of Equality, above note 10.

<sup>94</sup> *Ibid.* at 206.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Eldridge*, above note 22 at para 57.

<sup>97</sup> Canada’s Implementation, above note 17 at 11.

<sup>98</sup> *Ibid.* at 15.

<sup>99</sup> Integration Presumption, above note 63 at 843.

expectations for the children's achievement."<sup>100</sup>

Colker also addresses the need to avoid tokenism in mainstream classrooms. She does recommend that students with disabilities "might benefit from having teachers with visible disabilities to serve as role models to help raise students' expectations for their own performance."<sup>101</sup> This view is shared by the CAD. Both Colker and the CAD are anxious to avoid tokenism in educational settings, in both teachers and students.

## 8. MEANINGFUL ACCESS FOR AFRICAN CANADIAN STUDENTS

### (a) The Source of the Need

The push for an Africentric school in Toronto has many sources of strength. George Sefa Dei focuses a great deal of attention on the need for a different set of cultural values underlying education. Current statistics show that African-Canadian students are facing particular challenges, and these must be addressed.

Scott Anderson interviewed Dei in 2009, shortly before Toronto's Africentric school opened its doors. Dei cited a 1993 TDSB report recording a dropout rate among the black population as 51%, compared to 31% among the white population. Graduation rates were similarly different: the black graduation rate was 31%, and 44% among the white population.<sup>102</sup> Dei acknowledges that black students are not the only ones facing extraordinary challenges in accessing education. The dropout rate reveals an acute problem for black youth and Aboriginal students "even when family socio-economic status is held constant."<sup>103</sup>

Another issue that makes the situation facing black youth challenging is low self esteem. Colker reports that the court in *Brown* "predicted positive outcomes from desegregation with respect to both" self-esteem and academic achievement.<sup>104</sup> However, she acknowledges the view of some black activists in the United States that closing a local school that serves a predominantly black population and busing those children to predominantly white schools teaches black children "that there is nothing of value in the black community."<sup>105</sup>

In "Black-Focused Schools: A Call for Re-Visioning" Dei frames this problem as a problem of lack of encouragement, and sufficient role models, for black students. He describes the "deep frustration many members of the Black/African-Ca-

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.* at 844.

<sup>102</sup> Scott Anderson, "Afrocentric Schools" *U of T Magazine* (Autumn 2009) online: U of T Magazine <<http://www.magazine.utoronto.ca/leading-edge/afrocentric-schools/>>

<sup>103</sup> George Sefa Dei, "Beware of False Dichotomies: Revisiting the Idea of 'Black-Focused' Schools in Canadian Contexts." *Journal of Canadian Studies*. Winter 96/97, Vol. 31 Issue 4, p.58. [Beware of False Dichotomies]. For more current statistics on dropout and graduation rates, see the TDSB Report: Secondary Student Success Indicators at <[http://www.tdsb.on.ca/wwwdocuments/about\\_us/external\\_research\\_application/docs/atssi17-18yearoldoutcomes0506.pdf](http://www.tdsb.on.ca/wwwdocuments/about_us/external_research_application/docs/atssi17-18yearoldoutcomes0506.pdf)>

<sup>104</sup> Integration Presumption, above note 63 at 838.

<sup>105</sup> *Ibid.* at 840.

nadian community in Ontario feel about the inability of the current public school system to effectively educate students from diverse backgrounds.”<sup>106</sup> He argues that part of the answer to this frustration is schools that affirm the identities and experiences of students. “Schools in which both the curriculum . . . and classroom teaching emphasize, value and nurture the contributions of every member of our society.”<sup>107</sup> Dei identifies a specific need for more positive role models for black youth in the teaching staff, and also a reflection of black culture in the curriculum itself.<sup>108</sup>

In May of 1992 Dei completed a three year study examining African-Canadian students’ disengagement and high dropout rates. He interviewed many current students and students who had dropped out and found common criticisms among the latter were that the curriculum and schools themselves are exclusive, and that there are far too few black teachers.<sup>109</sup> With this lack of encouragement and curricular exclusion, the statistics cited above are not surprising. It is a challenging context that demands a complex, well-informed solution.

Proponents of Africentric schooling options also argue that inclusion, or an integration presumption is not enough. Schools are built on value systems, and changing the foundation to reflect the values of students of African descent may indeed be more of a challenge than inclusion in mainstream schools. In “The Role of Afrocentricity” Dei writes that “‘inclusion’ may not be enough. Current definitions and practices of inclusion still leave students on the margins, even when these students are ‘included.’”<sup>110</sup>

Equal access to education might require something more for black youth, according to Dei. Because of the way in which race, identity and the majority white western culture interact, Dei suggests that “the contributions of Black people are largely excluded or framed in simplistic, non-specific terms.”<sup>111</sup> Dei is addressing a modern problem with models of equality: do we accommodate and increase representation in the mainstream, or do we rebuild the structure of the educational system from its very foundations? The Africentric school proposal does not consist of more lessons about black contributions, but a fundamental shift in the way that students are educated.

A necessary question: can Africentric schools fare any better? There is no single definition of Black culture.<sup>112</sup> How will sufficient adjustments be made to an educational system to recognize and affirm the identities of all students of all black

<sup>106</sup> George J Sefa Dei, “Black-Focused Schools: A Call for Re-Visioning.” *Education Canada*, Vol. 46 No. 3 p.27–31, Summer 2006 [Black-Focused Schools]

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> Beware of False Dichotomies, above note 103.

<sup>110</sup> George J. Sefa Dei, “The Role of Africentricity in the Inclusive Curriculum in Canadian Schools.” *Canadian Journal of Education* Vol. 21, No. 2 (Spring 1996) pp. 170–186. [Role of Africentricity] at 177.

<sup>111</sup> Beware of False Dichotomies, above note 103.

<sup>112</sup> Even when definitions are provided, as in the case of Deaf culture as defined by the CAD, these are only one version, and cannot be taken as the definition each member of that group would themselves use.

histories and experiences? Tom Flanagan writes in support of Africentric schools in an article for the *Globe and Mail*. He argues in favour of rigorous evaluations for student progress, but points out that “it should be possible to beat what the public schools are doing with black youth, because by all reports it’s not working very well.”<sup>113</sup>

In their TDSB Research Report: “The Effectiveness of Africentric (Black-Focused) Schools In Closing Student Success and Achievement Gaps: A Review of the Literature” Carmen Dragnea and Sally Erling look to established Africentric schools or programs to help predict the success of the TDSB school.<sup>114</sup> Their review of literature on Africentric schools suggests that factors outside the classroom such as socio-economic position, whether a student’s first language is English, and educational aspirations can have an impact on academic performance.<sup>115</sup> The in-school factors found to have the greatest impact on achievement were students’ opportunity to learn, the adequacy of instruction, and the expectations from schools and teachers.<sup>116</sup> The report concludes that the three main influences on academic achievement for black students are “societal and cultural, school-based, and extra-curricular and community support.”<sup>117</sup>

### (b) A Model of Equality

In what model of equality is the push for Africentric education based? The goals of Africentric education are not based on changing the current norm or eradicating barriers to the equal access of that norm, but creating a separate option entirely. Like segregated schooling for the deaf supported by the CAD, an Africentric school is meant to respond to something deeper than accommodation in mainstream society seems capable of. The goal after all is a separate option.

Dei is keen to distinguish this separate option from segregated schooling of the past. He points to a “meaningful qualitative difference between ‘forced segregation’ and ‘separation by choice.’”<sup>118</sup> Instead of focusing on the intentional exclusion of an entire racial group, Dei says that the focus of an Africentric school will be an “environment free from bias.”<sup>119</sup>

The purpose is not to separate in order to diminish, but in order to focus on the minority group in a positive manner. Encouraging self-esteem through belief in student abilities, the employment of successful role models among the school’s staff and fundamental alterations to the curriculum and the way that African history and

<sup>113</sup> Tom Flanagan, “Give All Parents Educational Choice” Commentary *The Globe and Mail* (4 February 2008), online: <<http://www.parentseducchoice.org/newsRoom/index.html>>

<sup>114</sup> Carmen Dragnea and Sally Erling, Toronto District School Board, “The Effectiveness of Africentric (Black-Focused) Schools In Closing Student Success and Achievement Gaps: A Review of the Literature” (Toronto: Toronto District School Board). [Effectiveness Report]

<sup>115</sup> *Ibid.* at 2.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.* at 12.

<sup>118</sup> Beware of False Dichotomies, above note 103.

<sup>119</sup> *Ibid.*

contributions are taught. Dei writes that “minority students . . . should be moved from the margins to the centre; they should not just be grafted onto the existing order.”<sup>120</sup> The dignity of an entire cultural history should be affirmed in the Africentric educational context.

This concept of equality is different from many of the arguments that have been made in Canadian case law. Emily Eaton’s parents were not arguing that the school system should be fundamentally altered to reflect the dignity of their daughter’s cultural identity. They were arguing for inclusive access to the mainstream, for accommodation. Similarly, the Eldridges argued for equal access to a government service, and the interpretive services they required to achieve that equality.

Arguments in favour of an Africentric school can be read as a much broader concept of inclusion. The language of the service, education, can stay the same. But nearly every other aspect of it must be tweaked if this model of equality is to be achieved. Dei writes that “students are cognizant of the paradox of asking for a ‘Black school’ in the contemporary context of Canadian multiculturalism and the struggle for educational equity and social justice.”<sup>121</sup> Is it a paradox? Or is it simply based on a different notion of equality? Is a separate educational option necessary for some black students to have an equal access to the goals of education? The UN Declaration of Human Rights calls for education for the “full development of the human personality.”<sup>122</sup> Must it be acknowledged that the needs of some human personalities are best met when allowed to thrive in a culturally distinct environment?

### (c) The Cultural Component

There is an obvious cultural aspect to the push for an Africentric school. Dei says early on in his work that he uses the descriptor Black “in the cultural sense, to include the diverse ethnicities that make up peoples of African descent.”<sup>123</sup> Without a unanimous cultural voice, one might conclude that the appropriate response is more along the lines of “correcting” mainstream schools to be more inclusive. Indeed it might involve altering the concept of inclusion itself to be more thorough, and perhaps ultimately more respectful.

Dragnea and Erling’s report cites a cultural mismatch between black students and mainstream schools that could be partially responsible for the lower levels of achievement among black students. They canvass examples of implemented Africentric schools or programs and report that although the central reason behind many such schools in the United States and Canada was closing the gap in achievement, the “rationale . . . also included creating culturally relevant and enabling learning environments.”<sup>124</sup> They do report some success in standardized test scores, and a decreased dropout rate in many of the implemented Africentric

<sup>120</sup> Role of Africentricity, above note 110.

<sup>121</sup> Beware of False Dichotomies, above note 103.

<sup>122</sup> UN Human Rights, above note 14. art. 26(2)

<sup>123</sup> Black-Focused Schools, above note 106.

<sup>124</sup> Effectiveness Report, above note 114 at 7.

schools, though often the improvement took some time to become clear.<sup>125</sup> The empirical evidence that Africentric schools work to close the achievement gap is described as not being extensive enough to offer a complete picture of the potential of Africentric schools.<sup>126</sup>

Dei's conception of the curriculum of an Africentric school appears broadly inclusive, designed to question educational norms of many stripes. He suggests that similar arguments could be made for Aboriginal or Asia-centric education.<sup>127</sup> The challenges faced by different racial or cultural groups are different. Dropout and graduation rates vary, as do problems with self-esteem and teacher expectations. The basis for this promotion of educational diversity therefore must not exclusively be need, or the failings of the current educational system to graduate students, but on the system's failure to promote the individual dignity of students and their respective cultural backgrounds.

What is also interesting is that Dei does not confine his concept of the Africentric school to a school exclusively for students of African descent. He writes that the "school would be defined more by a set of guiding principles than by the racial or cultural background of its students or teachers."<sup>128</sup> Dei describes diversity within the school as a powerful tool for improving the outcomes of all students. This is not just about meeting the needs of one discrete culture, but recognizing diversity as a beneficial and useful tool. Promoting the idea of a collective or common good, Dei contends that the ideas of Africentrism have relevance to Canadian society generally in the concepts of "community membership and social responsibility."<sup>129</sup> A sense of belonging to a community is something one might anticipate coming out of inclusive education. Dei's reasoning suggests that separate education, at least in the context of students of African descent, can accomplish that same goal.

## 9. RECONCILIATION AND CONCLUSION

Dei urges that mainstream schools should continue to push towards a more inclusive design, and expresses particular concern that "the existence of an African-centred school [not be used to] justify the exclusivity of the mainstream schools."<sup>130</sup> There are some signs suggesting that inclusion will continue to be a priority alongside the Africentric school, as increased academic support for inclusion, as well as new litigation pushes changes at the legal level. The Dragnea and Erling report states that the Ontario Human Rights Commission has recommended that data be gathered on race and disability "in order to monitor, prevent and ameliorate alleged systemic and adverse discrimination."<sup>131</sup>

Sarah Armstrong predicts that the necessary changes will come not only from

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<sup>125</sup> *Ibid.* at 9–11.

<sup>126</sup> *Ibid.* at 11.

<sup>127</sup> The Role of Africentricity, above note 110 at 177.

<sup>128</sup> Black-Focused Schools, above note 103.

<sup>129</sup> The Role of Africentricity, above note 110 at 182.

<sup>130</sup> Beware of False Dichotomies, above note 103.

<sup>131</sup> Effectiveness Report, above note 114 at 13.

litigation, but disability advocates, including the Ontarians with *Disabilities Act* Committee who have already succeeded in pushing that act into law through then Ontario premier Mike Harris.<sup>132</sup> She writes that “litigation is a strategy for change that must be accompanied by a clearly articulated vision, political lobbying, and advocacy at the personal and community levels.”<sup>133</sup>

MacKay writes that there are two broad spheres of accommodation: the first and more focused-on is individual accommodation, while “the second sphere and the one which is the least developed and least precise in its implications, is systemic or institutional accommodation.”<sup>134</sup> Focusing on both, he points out, will “require a dual focus.”<sup>135</sup> Perhaps, as Dei suggests, more inclusive mainstream schools and more segregated school options can form the basis of this dual focus.

The OHRC Guidelines on Inclusive Schooling state that “the most appropriate accommodation is one that most respects the dignity of the students with a disability, meets individual needs, best promotes inclusion and full participation, and maximizes confidentiality.”<sup>136</sup> This touches on many different models of equality, but focuses largely on equality as an individual concept. According to the logic of the CAD and proponents of the Africentric school such as Dei, equality of cultural groups can be just as important. This is the type of broad systemic change promoted by some of those who are against a presumption of inclusion in education. Inclusion, to be helpful, should in some cases be inclusion into a distinct culture that is the student’s own. This type of fundamental change is not exactly in line with the arguments for inclusion, but may be what is necessary to attain equal outcomes. Given that Canada accepts a range of educational options, it is conceivable that expanding that range will result in the most equal outcomes.

Justice L’Heureux-Dubé writes: “In our country, where we believe every individual is a full member of society, it is antithetical to our conception of justice to suggest that people can be treated as less worthy, less deserving, or less equal.”<sup>137</sup> The arguments for separate schools for deaf students and African-Canadian students align with this reasoning, but might broaden the logic slightly: in our country, where we believe that every culture is an equally important part of our society, it is antithetical to our conception of justice to suggest that those cultures can be treated as less worthy, less deserving, or less equal because of the characteristics that set them apart, and the place they occupy in relation to the dominant mainstream. The vision of equality into which Canada should grow remains much debated, and undecided.

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<sup>132</sup> Disability Advocacy, above note 9 at 81.

<sup>133</sup> *Ibid.* at 91.

<sup>134</sup> Lighthouse, above note 54.

<sup>135</sup> *Ibid.*

<sup>136</sup> Guidelines, above note 11 at 20-21.

<sup>137</sup> Lecture, above note 1 at para 2.

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