

**THE UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL**

Report #409 of the Academic Appeals Committee
August 17, 2020

To the Academic Board
University of Toronto

This appeal was conducted electronically, via Zoom.

Academic Appeal Committee Members:

Professor Hamish Stewart, Senior Chair
Professor Douglas McDougall, Faculty Governor
Ms. Olivia Batt, Student Governor

Hearing Secretary:

Mr. Christopher Lang, Director, Office of the Appeals, Discipline and Faculty Grievances
Ms. Krista Kennedy, Administrative Clerk and Hearing Secretary, Office of the Appeals,
Discipline and Faculty Grievances

For the Student Appellant:

Mr. Marcus McCann, Millard and Company LLP, Counsel for the Appellant

For the Faculty of Law:

Mr. Robert Centa, Counsel, Paliare Roland Rosenberg Rothstein LLP

Overview

The Student was enrolled in the first year of the JD program at the Faculty of Law (the Faculty) during the 2017/18 academic year. The Student confronted significant health challenges and received a number of accommodations throughout the year. He successfully completed the preliminary “Legal Methods” course in August 2017 and three courses in the Fall 2017 term, but did not complete three courses in the Winter 2018 term or his year-long small group course in Criminal Law. On April 4, 2019, the Student emailed Assistant Dean Alexis Archbold, requesting to resume his studies on a part-time basis. On April 8, Dean Archbold advised him by email that his registration could not be extended and that the appropriate next step was to reapply for admission to the JD program. The matter proceeded on the basis that this advice was a decision of the Faculty’s Student Accommodations Committee (composed of Dean Archbold and Assistant Dean Sara Faherty). A decision of the Accommodations Committee may be appealed first to the Associate Dean of the Faculty and then by way of petition to the Faculty’s Academic Standing Committee (ASC). The Associate Dean upheld Dean Archbold’s decision. The Student accordingly petitioned the ASC. In a decision dated June 26, 2019, and sent to the Student on July 16, 2019, the ASC dismissed the Student’s petition.

The Student appeals to your Committee from the ASC’s decision. The principal remedy sought by the Student is an order permitting him to complete his remaining work from the first year of the

program and then to resume studies at the Faculty on a part-time basis with appropriate accommodations. The Faculty submits that the appeal should be dismissed.

Your Committee is not unanimous. A majority of your Committee would dismiss the appeal. One member of the Committee would allow the appeal and order the Faculty to permit the Student to resume his studies, as explained in more detail below.

Chronology

2015/16

The Student was admitted to the Faculty of Law and began the first year of the JD program in the Fall 2015 term. He did not complete his courses that term and petitioned the ASC, with supporting medical evidence, for a retroactive leave of absence and for permission to start the first-year program in the Winter 2016 term. Because the first-year program forms an integrated whole, the Faculty does not permit students to begin law school in a winter term. According to the law school's policies, normally at this point the Student would have been considered to have failed first year and would have had to reapply for admission. The ASC decided instead to provide the Student with the following accommodation: his admission to the Faculty was retroactively deferred. As a result, his transcript does not show his attendance in the Fall 2015 term and the tuition fees he paid for the 2015/16 academic year were credited to his account for the 2016/17 academic year.

In May 2016, the Student was involved in a bicycle accident, which caused a number of ongoing medical problems.

2016/17

The Student began the first-year program again in the Fall 2016 term. He registered with Accessibility Services and a counsellor recommended a set of accommodations, which the Faculty accepted. But the Student was unable to complete his work for the Fall 2016 term. He successfully petitioned the Accommodations Committee for a second retroactive deferral. The Accommodations Committee granted his request, but stated that "no additional retroactive deferrals will be available to you". Thus, the Student's transcript does not show his attendance in the Fall 2016 term and the tuition fees he had originally paid for the 2015/16 academic year were now credited to his account for the 2017/18 academic year.

2017/18

The Student began the first-year program for the third time in the Fall 2017 term, once again with a set of accommodations in place that had been recommended by Accessibility Services and accepted by the Faculty. The Student's transcript for 2017/18 currently reads as follows. (The Faculty's grading scale is: HH (high honours), H (honours), P (pass with merit), LP (low pass),

and F (fail). Some courses are taught on a CR (Credit) / NCR (no credit) basis. INC stands for incomplete.)

Fall 2017	Legal Methods	CR
	Legal Research and Writing	P
	Contracts	P
	Torts	HH
Winter 2018	Legal Process	INC
	Property	INC
	Constitutional Law	INC
Full-year 2017/18 (small group)	Criminal Law	INC

By April 30, 2018, students would normally have completed all of their written work and exams. The Student had not. There were two papers outstanding for his Criminal Law small group, referred to in the materials as paper #2 and paper #3. Paper #2 would originally have been due towards the end of the Fall 2017 term and paper #3 towards the end of the Winter 2018 term. The Student had already been granted extensions on these papers. The Student did not write his three exams at the scheduled time. On April 30, the Student met with Dean Archbold to discuss the completion of his work and later that day sent an email proposing a schedule. He proposed to submit paper #2 on May 7 and paper #3 on May 14, and he also proposed a schedule for his final examinations. Dean Archbold was “supportive” of the plan (Tab 24). Dean Faherty responded to the Student, stating “We will schedule your exams after you hand in your term work”, *i.e.*, the two papers for Criminal Law. On May 7, the Student wrote to Dean Archbold, stating “Continuing to work on Paper #2. Have been unable to complete.” Dean Archbold replied the next day, stating that the Student was required to complete all of his outstanding work by June 30, and that “It is important that you submit all of your written work before the end of May so that we can schedule your exams in June. If you are unable to complete all of your course work ... by the end of June, you risk losing your academic standing in the program, and may not be able to continue.” On May 16 and 18, the Student wrote to Dean Archbold, stating that he was continuing to make progress on the outstanding papers.

On July 3, 2018, the Student emailed Dean Archbold, stating that he was experiencing “a re-deterioration of my health status” and asking for more time to complete his work. On July 9, Dean Faherty replied to the Student’s email, stating:

Your note does not indicate that you are now in a position to do academic work. As you know, you have outstanding course work in your *Criminal Law* class. You will not write exams until that term work is submitted.

There was no further communication between the Student and the Faculty until April 2019.

The Student states that he “became debilitatingly sick in the winter of 2018” and that he was “too sick to complete the course work by the extended deadline [June 30] . . . , and too sick to respond to the Faculty’s email [of May 7].” (Notice of Appeal, para. 4). In his petition to the ASC, the Student stated that in the Winter 2018 term, “my mental health deteriorated to such a point that it left me unable to attend to even the most basic daily responsibilities. I was paralyzed with severe anxiety and depression that left me unable to do much.”

The Student’s appeal materials include a letter dated May 1, 2020, from Dr. David Tsai, MD, summarizing the Student’s medical history from March 24, 2014, to May 1, 2020. This letter was obviously not available to the ASC. With respect to the year 2018, Dr. Tsai states:

In 2018, [the Student] was seen for 5 office visits regarding injuries sustained from the May 2016 accident During this time, he suffered from severe anxiety and depression which incapacitated him, including activities of . . . daily living. This compounded on top of his physical ailments rendered him significantly disabled.

The Student’s appeal materials also include a letter dated May 1, 2019, from Dr. Tony Hoff, C.Psych. The ASC had this letter before it. Dr. Hoff states that the Student has been his patient since 2007. With respect to the period April 2018 to April 2019, Dr. Hoff states:

During the past year especially, [the Student] has experienced significant mental health challenges, including severe and debilitating anxiety and depression. During this period of severe debilitation, he was incapable of performing many basic activities of daily living. In many ways, he withdrew from the community at large, as well as from family and friends. He was certainly incapable of performing higher cognitive tasks relating to his academic responsibilities.

The Faculty does not contest the opinions of Dr. Tsai or Dr. Hoff concerning the Student’s health during 2018.

July 9, 2018 to April 4, 2019

There was no communication between the Faculty and the Student during this period. There were suggestions in the submissions of each party that there was some onus on the other party to make contact during this time.

Your Committee does not criticize either the Faculty or the Student for the lack of contact during these nine months. From the Faculty’s point of view, the Student had failed to complete his work within the (accommodated) deadlines and it was quite reasonable for the Faculty to wait to hear from him as to any proposed next steps. As for the Student, given that he had not completed the first-year program and was therefore not in a position to continue to the second year, it cannot have come as a surprise to him that he was not a registered student in the Faculty for the 2018/19 academic year. Nevertheless, your Committee finds that he was so seriously disabled that, during this period of time, it was unrealistic to expect him to contact the Faculty, much less to attempt to resume his studies.

April 4 to July 16, 2019

On April 4, 2019, the Student emailed Dean Archbold. He requested “to resume my studies on a part-time basis.” Dean Archbold responded on April 8, stating that “the appropriate next step for you is to reapply to the [JD] program” and that he would not be registered for the 2019/20 academic year. The Student responded on April 11, asking “what specific policy was applied in coming to the decision you sent me.” Dean Faherty later explained to the Student that the Faculty had “treated your email as a request for accommodation”, that the Accommodation Committee had decided not to grant the request, and that the Associate Dean had confirmed that decision (email of May 31, 2019).

The Student petitioned the ASC, which (among many other functions) considers petitions from the Accommodation Committee. In his petition, he once again requested the opportunity to complete his outstanding work and then resume his studies part-time. In accordance with its usual procedures and practices, the ASC received the Student’s written petition and supporting materials, received written materials from the Faculty, and heard from both the current and former Associate Deans as well as Dean Faherty. In accordance with the Faculty’s grading policy, the materials before the ASC were anonymized; the Student is identified only by his first-year pseudonym “Oak.” The ASC met on June 5 and eventually released a carefully reasoned decision dismissing the Student’s petition.

The ASC’s decision is dated June 26, 2019, but it was not sent to the Student until some time later. On July 4, Reshma Dhrodia, an advisor from Accessibility Services, emailed Dean Archbold stating that the Student “now has a reduced course load/half time accommodation in place.” Ms. Dhrodia appears to have been unaware that the Student was currently engaged in an appeal about precisely this issue. Dean Archbold was understandably surprised to receive this message, since the Student was not currently registered at the Faculty; moreover, though the Faculty normally defers to the accommodations proposed by Accessibility Services, they must, at least in principle, be approved by the Faculty before being implemented. On July 5, she wrote to Ms. Dhrodia seeking clarification. Ms. Dhrodia replied the same day, indicating that she had recently learned of the Student’s appeal and that “there is a disability-related rationale for a half-time accommodation should [the Student] be allowed to return.”

On July 16, Dean Faherty emailed the ASC’s decision to the Student.

Preliminary Procedural and Legal Issues

The issues in this section of the report were determined by the Chair alone.

Jurisdiction: When dealing with the matter in the spring of 2019, Dean Archbold and the ASC were both rightly concerned about whether the Faculty’s Accommodations Committee or ASC had any jurisdiction over the Student’s request. As the ASC put it, “did the Accommodations Committee have jurisdiction to make any accommodation decision in respect of Oak given that he was no longer a registered student?” (ASC decision, p. 1). The ASC chose to proceed on the assumption that it had jurisdiction (ASC decision, p. 6). The appeal to your Committee proceeded

on the same assumption. The Student submitted that “the question of the jurisdiction of the ASC is now moot [because] there is no question that *this* committee (the AAC of Governing Council) has jurisdiction to review and overturn a decision of ... the ASC” (Notice of Appeal, para. 29, original emphasis). The Faculty conceded that the AAC has jurisdiction (Submissions, para. 57).

Permitting the Student to appeal to the ASC and then to the AAC is a practical and effective way to obtain a formal and reasoned resolution, one way or the other, of the way the Faculty handled the issue he raised in his email of April 4, 2019. Moreover, your Chair, like the ASC, is reluctant to determine the question of jurisdiction without full submissions on the point. But, with respect, your Chair is concerned about jurisdiction and is not entirely persuaded by the position taken by either party on the appeal. The Student’s submission that the issue of jurisdiction is moot cannot be correct. It is hard to see how a question of jurisdiction could ever be moot, in that there is nothing a tribunal can decide, including the issue of mootness, if it does not have jurisdiction over a dispute. More concretely, if the Faculty’s Accommodations Committee had no jurisdiction to respond to the Student’s request, then on an appeal from its decision, the ASC would have no jurisdiction to decide anything other than the jurisdictional issue itself and any decision it made on the merits would be a nullity; an appeal from that decision to the AAC would then, presumably, also be limited to the jurisdictional question. On the other hand, the Faculty’s concession is not determinative because jurisdiction cannot be created by consent (*Phillips and Phillips v. The Queen*, [1983] 2 S.C.R. 161 at p. 164; *Canada (Attorney General) v. Haberman*, 2000 CanLII 15802 (Fed. C.A.) at para. 20); otherwise, any legal dispute could be decided by anyone on consent of the parties, regardless of any statutory grant of jurisdiction.

In the Chair’s view, jurisdiction in this matter depends on the proper characterization of the Student’s request and Dean Archbold and Dean Faherty’s response to it. There are (at least) three possible ways to characterize this matter. On the first view, the Student inquired into his status at the Faculty and, in response, Dean Archbold provided him information about his status. On that view, there was no application of any of the Faculty’s policies to the Student and there is no decision to appeal from; if so, your Committee would lack jurisdiction over this matter.

On the second view, the Student requested an accommodation, and the Accommodations Committee had jurisdiction over that request even though the Student was no longer registered. On that view, the jurisdiction of the ASC and the AAC is unproblematic. On the third view, the Student requested an accommodation, but the Accommodations Committee did not have jurisdiction over that request because the Student was no longer registered. The Chair’s view is that the AAC does have jurisdiction over this appeal on either of the second or third view, because on either view the Faculty was applying its accommodation policy to the Student (<https://handbook.law.utoronto.ca/guidelines-and-procedures/academic-accommodations>). The AAC’s jurisdiction does not depend on whether the Student appellant is currently registered at the University or not. One of the functions of the AAC is to “hear and consider appeals made by students against decisions of faculty, college or school councils (or committees thereof) in the application of academic regulations and requirements ...” (*Terms of Reference*, 2.1). This function does not depend on the student appellant being currently registered; indeed, it is not uncommon for the AAC to hear appeals from former students (see, for example, Report # 405, decided in 2019, concerning an appeal by a former student from a decision made in 1991; or Report # 398, decided in 2018, concerning an appeal by a former student who had recently graduated).

Put another way, if the Student was requesting an accommodation then the Accommodations Committee either had jurisdiction over that request (the second view) or it did not (the third view). If it did, then the jurisdiction of the ASC and the AAC is clear. If it did not, then the ASC also lacked jurisdiction and your Committee would have no jurisdiction to hear an appeal from the ASC's decision. But in that case, the Chair's view is that the AAC would have jurisdiction to hear the Student's appeal directly from Dean Archbold's decision of April 8, 2019, refusing the Student's request to resume his studies, because that decision was an application of academic regulations and requirements to the Student. In that event, although your Committee would not be hearing an appeal from the ASC, the ASC's decision would nevertheless be very helpful to your Committee in that it provides reasoned support for Dean Archbold's decision. Thus, regardless of whether the Accommodations Committee had jurisdiction to deal with the Student's request, your Committee has jurisdiction over the Faculty's response to that request.

The appeal therefore proceeded on the basis that your Committee had jurisdiction over it.

Standard of review. The Student submitted that your Committee should conduct a *de novo* review of the Faculty's response to the Student's request and determine whether that response was correct. The Faculty submitted that your Committee should limit itself to reviewing the reasonableness of the ASC's decision.

In support of his submission that the proceeding before your Committee was a hearing *de novo*, Mr. McCann made essentially three points, First, he relied on your Committee's Report # 322, dated January 29, 2009. This Report was written by Professor Emeritus Ralph Scane of the Faculty of Law, who was then Senior Chair of your Committee. On p. 3 of the decision, Professor Scane wrote:

Your Committee normally proceeds by a *de novo* hearing, that is, it hears evidence and cross-examination thereon, including evidence that may have been before lower tribunals, and reaches its own conclusions on that evidence. It does not restrict itself ... to a review of the record of the material before the lower tribunals, and a consideration, based upon that review, of the reasonableness of the conclusions drawn by the tribunals below.

Second, Mr. McCann pointed out that your Committee operates under the *Statutory Powers and Procedures Act*, R.S.O. 1990, c. S.22, and is therefore empowered to receive relevant evidence of all kinds (ss. 10.1, 16). Finally, he reminded your Committee that this case is ultimately about the University's obligations under the *Human Rights Code*, R.S.O. 1990, c.H.9 (the *Code*) to accommodate a person with a disability, which in his submission meant that your Committee should not limit itself to reviewing the reasonableness of the ASC's decision but should consider directly whether the accommodation requested by the Student was appropriate.

Your Chair did not understand Mr. Centa to be taking issue with the first two points. While he did urge your Committee to apply a standard of reasonableness, his principal submission was that regardless of the applicable standard of review, the Faculty had done more than enough to discharge its obligations under the *Code*.

Your Committee's *Terms of Reference* do not explicitly define the standard of review; on the other hand, Governing Council's *Policy on Academic Appeals within Divisions (2005)*, s. 2.ii, states that "The standard of review of an academic appeal is reasonableness". Moreover, in the experience of your Chair (who began serving as Senior Chair in 2012), your Committee normally proceeds not by asking whether a division's decision was correct but by asking whether that division's application of its policies was fair and reasonable in the circumstances.

Your Chair's view is that, in most cases, the issue before it is the reasonableness of the decision being challenged by the student appellant, whether or not it exercises its powers to receive additional evidence. Your Chair would be extremely reluctant to hold that a decision like the one made by the ASC in this case should be reviewed for correctness rather than for reasonableness. However, given the jurisdictional uncertainty about whether the AAC's task in this case is in fact to review the ASC's decision, and given that the party's submissions focussed largely on the adequacy of the accommodations that the Student had received, and had requested but not received, rather than the reasonableness of the ASC's decision, your Chair is of the view that the AAC should not review the ASC's decision as such. On the other hand, even if your Committee were to adopt a standard of review of correctness for the purposes of this case, there would nevertheless be a strong element of reasonableness embedded in that standard, because the duty to accommodate is a duty of reasonable accommodation. For these reasons, your Chair is of the view that the issue before the AAC is simply whether the Faculty's overall response to the Student's request of April 4, 2019, was a reasonable application of the Faculty's duty to accommodate (in accordance with its accommodation policy).

The duty to accommodate. The University is obligated to reasonably accommodate a person with a disability to the point of undue hardship to the University. Sections 17(1) and (2) of the *Code* provide:

- (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
- (2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Here, having been admitted to the Faculty, the Student had a right to proceed through the program. "[T]he essential duties or requirements attending the exercise of the right" are that he should successfully complete the academic requirements of the program. He is disabled by reason of his health challenges. Section 17(1) of the *Code* indicates that the Student's rights are not violated if he is "incapable" of meeting those requirements, but s. 17(2) directs your Committee not to find him "incapable" unless his disability "cannot be accommodated without undue hardship".

The parties disagree about what factors should be taken into account in determining whether the point of undue hardship to the University has been reached. The parties' submissions on this issue were pointed but not extensive. Mr. McCann submitted that only the three factors explicitly

mentioned in s. 17(2) – cost, outside funding, and health and safety requirements – may be considered. Mr. Centa frankly conceded that this was not a case where these three factors weighted heavily, if at all, in determining the point of undue hardship; but it appeared to be implicit in his submissions that while these three factors must be considered, other factors are also relevant. Your Chair understood him to be arguing that damage to the academic integrity of the Faculty’s program could be considered under s. 17(2). In his submission, and in the view of the ASC, the first-year JD program is an integrated unit in which students learn how to learn law, not only through the specific subject-matter that is taught in each class but through the interaction of different parts of the curriculum (for example, the many intersections between the three main bodies of private law, or the influence of constitutional law on criminal law). Moreover, the first general principle of the Faculty’s accommodations policy specifically references academic integrity: “In the interest of fairness and equity among students and to protect academic integrity, accommodations will be designed within the framework of the Faculty of Law academic policy.”

Given this difference of opinion, the Chair invited the parties to provide additional written submissions on the issue of whether your Committee could consider “the effect of a proposed accommodation on the integrity of an academic program” in determining undue hardship. The parties provided extremely helpful submissions on this point. The primary submission of each party was that it was not necessary to determine the point, though understandably their reasons for taking that position differed. In the alternative, each party offered arguments and authorities in support of the positions they took at the hearing. The Chair notes particularly that, despite the arguably exhaustive working of s. 17(2), there are some Tribunal and judicial decisions from Ontario that have taken academic integrity into account in determining whether an academic institution has reached the point of undue hardship (*Cohen v. Law School Admission Council*, 2014 HRTO 537 at para. 130, commenting that a proposed accommodation would “undermine the integrity of the testing process [so] that it would result in undue hardship to the respondent”; *Longuepée v. University of Waterloo*, 2019 ONSC 5465 at para. 62, commenting that the accommodation in issue would not affect academic integrity).

Nevertheless, having read and considered the parties’ submissions, your Chair has concluded that the question he posed at the hearing may not have been properly framed. In the Chair’s view, whether or not academic integrity can be considered in determining undue hardship under s. 17(2), academic integrity is better considered in relation to “the essential duties or requirements attending the exercise of the right” under s. 17(1). Students are evaluated on the basis of the quality of their work in completing course and program requirements. Their success in completing these requirements should be a function of academically relevant factors, notably ability and effort, not of extraneous and academically irrelevant factors. Academic integrity, in this context, refers to the University’s efforts to ensure that the results reported on a student’s transcript, including the awarding or withholding of degrees and other qualifications, is a function only of academically relevant factors and effort and not of extraneous factors. Academic accommodations contribute to academic integrity by attempting to ensure that the extraneous factor of disability does not affect a student’s reported results; they are not, and could not be, designed to guarantee that the student succeeds. The university should not provide an accommodation that compromises academic integrity, whether or not doing so would amount to undue hardship, because it would not be possible to fairly assess a student’s performance under such an accommodation. Put another way, an accommodation inconsistent with academic integrity is of no value in determining whether a

student is capable “performing or fulfilling the essential duties or requirements” of their academic program. It is not contrary to the *Code* to refuse an accommodation that would compromise academic integrity because, if a student is unable to succeed without such an accommodation, that student “is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.”

The Human Rights Tribunal’s decision in *Fisher v. York University*, 2011 HRTO 1229, provides a good example of this point. A student was granted a number of accommodations in relation to a number of courses. The subject matter of one of those courses was French literature for young persons. A fairly high level of proficiency in the French language was a prerequisite. The course materials were in French; the course was taught in French; and all class discussions were conducted in French. The course instructor rejected the student’s request to give a required oral presentation in English “because it would compromise the academic standards of the course” (para. 49). Granting this accommodation would not have amounted to undue hardship in terms of the three factors specifically mentioned in s. 11(2) or s. 17(2), but it would have provided no basis for assessing the student’s performance in the course; refusing to grant it was therefore not contrary to the *Code*. The Tribunal found that the university had made “all reasonable efforts” to accommodate the student (para. 56).

The Student’s Appeal

The Student raises two issues on appeal. First, he contends that the ASC denied him procedural fairness. Second, he argues, with the support of new evidence, that permitting him to continue the program on a part-time basis would be an appropriate accommodation.

The Faculty argues that the ASC’s process was fair and that “The Faculty has fulfilled its duty to provide the Student with reasonable accommodation.”

First issue: Procedural Fairness

Your Committee is unanimously of the view that the Faculty did not deny the Student procedural fairness.

The Student’s allegation of procedural unfairness ultimately turns on the following feature of the ASC’s process. The Student submitted a written petition to the ASC; but the ASC received written material and heard directly from Deans Archbold and Faherty as well as from the Associate Dean. So, as the Student put it in his Notice of Appeal, since he had not been provided with the Faculty’s submissions, “he could not respond to them”; and only one party—the Faculty—was permitted to appear in person and make oral submissions at the ASC’s meeting. In its response, the Faculty notes that the ASC proceeded in accordance with its own rules and that it provided the Student with reasons that are “comprehensive and clearly explain to the student how the [ASC] arrived at its decision” (Submissions, para. 62).

Your Committee had before it the written material that the ASC received from the Faculty. Mr. Centa correctly noted that there was no information in this written material that was unknown to

the Student. The only document in this material that the Student would not have seen is an item marked “Oak Timeline”, prepared by Dean Faherty on June 3, 2019. This document is mainly a summary of the Student’s history at the Faculty. However, Mr. McCann noted that the Oak Timeline directs the ASC’s attention to a copy of the Student’s undergraduate transcript from the University of Toronto and that on that copy someone has circled all occurrences of “WDR” or “LWD”. Mr. McCann urged your Committee to infer from this feature of the Oak Timeline that the ASC drew negative inferences about the Student’s academic history and used those improper and irrelevant inferences in reaching its conclusions. Your Committee declines to draw this inference. As Mr. McCann says, the Student’s undergraduate record was irrelevant to the issue before the AAC. But there is no indication the ASC’s reasons that it considered the Student’s undergraduate transcript at all, much less drew any inferences from it. The ASC appropriately focussed entirely on the Student’s history at the Faculty.

Thus, the allegation of procedural unfairness rests essentially on the asymmetry in the ASC’s procedure: the Student commenced the appeal by way of a written petition but was not permitted to see or respond to the Faculty’s written materials; moreover, the Student was not permitted to make oral submissions to the ASC, while the Faculty was. Yet this procedure was in accordance with the ASC’s rules. Hearing appeals from the Accessibility Committee is a small part of the ASC’s function. Its primary function is to “approve the academic progress of all students in the J.D. program”; in carrying out that function, it “decides on the granting of supplemental examinations, significant deferrals of examinations and extensions on written work and petitions for *Aegrotat*” (<https://handbook.law.utoronto.ca/guidelines-and-procedures/grading-and-honoursdistinction-standing>). As noted above, all of these decisions are made on an anonymous basis. This is not a process that lends itself to an adversarial format or that requires a hearing.

More fundamentally, it is well-established that your Committee’s function does not extend to invalidating the policies of a division, even if a panel of your Committee is of the view that those policies are flawed or unfair in some respect. To allow an appeal on the basis that a university division had acted unfairly even though it followed its own procedures would be tantamount to invalidating that policy and, as a remedy, would require the creation of *ad hoc* procedures on a case-by-case basis.

Mr. McCann was, however, able to identify a case where your Committee had done just that. In Report # 265, decided April 1, 2002, a student appealed a grade within his division. The division followed its own grade appeal procedure and dismissed his appeal. The student appealed to the AAC. Your Committee found no flaws in the way the division had applied its own appeal policy; however, it determined that the appeal process itself was not fair and reasonable, and ordered a reassessment of the student’s grade on the basis of a different process, which it created itself. Your Chair’s view is that Report # 265 is anomalous and should not be followed.

Mr. McCann also relies on *Khan v. University of Ottawa* (1997), 148 D.L.R. (4th) 577 (Ont. C.A.), in support of the proposition that the ASC should have granted the Student an oral hearing. The facts of *Khan* are very different from the Student’s case. Ms. Khan unsuccessfully appealed a failing grade to her Faculty’s Examinations Committee and then to her University’s senate. Her appeal depended crucially on an issue of credibility: she claimed that one of her examination booklets had gone missing, a claim that her Faculty had rejected. Yet neither appeal body allowed her to make oral submissions. Her appeals were dismissed and her application for judicial review

was initially also dismissed. But the Court of Appeal allowed her appeal, granted her application for judicial review, and ordered a new hearing at her Faculty's appeal committee. The Court was concerned about a number of procedural issues, but particularly about the lack of an oral hearing in a case where credibility was in issue. As Laskin J.A. said at para. 23:

Because Ms. Khan's appeal turned on her credibility and because of the serious consequences to her of an adverse finding, fairness required an oral hearing. The Committee disbelieved Ms. Khan's explanation for the [missing] booklet without hearing from her. This amounted to a denial of procedural fairness, which by itself fatally flawed the proceedings before the Committee.

The Student's case is different in several respects. Although, like Ms. Khan, he was unable to make oral submissions at the ASC, in contrast to Ms. Khan's experience, he was afforded a full hearing at your Committee; in particular, he could have testified had he chosen to do so. The proceedings before your Committee cured the unfairness (if there was any) at the ASC. More significantly, the Student's appeal does not involve a credibility determination in the same way as Ms. Khan's did. The Faculty has never seriously challenged the Student's descriptions of the way his disability has affected him or the medical evidence that he has filed in support of those descriptions. This is not a case where the ASC's failure to hold an oral hearing caused any unfairness.

Second issue: The Duty to Accommodate

Your Committee is in no way critical of the efforts that the Faculty made to accommodate the Student through the end of the 2017/18 academic year. The question now, though, is whether the Faculty's refusal to offer the additional accommodations that the Student requested in April 2019 was in accordance with its duty to reasonably accommodate his disability. Those two requested accommodations were: (i) providing him another opportunity in the near future to complete his outstanding work from the 2017/18 academic year and, if he successfully completes that work, (ii) to permitting him to continue through the second and third years of the JD program on a part-time basis. Your Committee is divided as to whether the Faculty's decision not to grant these accommodations was a reasonable exercise of its duty to accommodate.

A majority of your Committee would dismiss the appeal. The Faculty has, over the past several years, provided the Student with extensive accommodations. Despite these accommodations, in three attempts, the Student has not completed the first year of the JD program. The first element of the accommodation now sought by the Student would amount to a two-to-three-year extension on his uncompleted work from the Winter 2018 term. The second element of the proposed accommodation---part-time study---was twice proposed to, and rejected by, the Student. The medical evidence filed by the Student, though hopeful, must be weighed against the history of the Student's failure to succeed in the Faculty. As the ASC put it (p. 9),

The fact remains that [the Student] has had three unsuccessful, heavily supported attempts at completing the first year program. Indeed, the fact is that [the Student] has failed three times to even complete a single semester of the program. There is no realistic basis which we can have confidence that [the Student] is likely to succeed in the program even if undertaken on a part-time basis.

The majority of your Committee agrees with this statement.

One member of your committee would allow the appeal for the following reasons. Considering the second element of the proposed accommodation first, allowing the Student to continue part-time is clearly a reasonable accommodation of his disability. The Faculty already has a part-time program which students are permitted to enroll in for a variety of reasons. The Faculty previously suggested part-time studies as an accommodation for the Student, and he declined that suggestion. Your Committee does not see that this history has any bearing either way on the question whether part-time studies would now be an appropriate accommodation for the Student. Medical and other evidence (some of it post-dating the ASC's decision) suggests that the Student's disability has moderated to the point where the prospects for his success as a part-time student are good.

As to the first element of the proposed accommodation, permitting the Student to complete the first-year program at this late date undoubtedly has some impact on academic integrity. In 2017/18, the Student was extensively accommodated and was largely successful in the Fall 2017 term; but despite the accommodations he failed to complete the year's work by the final accommodated date of June 30, 2018. Nevertheless, the evidence presented by the Student suggests that, towards the end of the Winter 2018 term, his disability had become so severe that the accommodations previously put in place were no longer adequate; but that his disability has now abated to the point where he is now capable of resuming academic work. Some, though not all, of this evidence was available to the Faculty in the spring of 2019; but, in any event, the Faculty does not now challenge it. Allowing the Student to complete the work over the next several months is effectively a lengthy extension of time. The dissenting member of your Committee accepts the Faculty's description of the first-year program as an integrated unit, but also notes that, in the 2017/18 academic year, the Student largely had the benefit of experiencing that integrated unit.

The dissenting member would therefore make the following order. The Student cannot progress until he has completed the first year of the program. The Student must therefore complete his remaining work from the 2017/18 academic year before entering the second year, presumably on a part-time basis. Although the details need to be worked out by the Faculty, with advice from Accessibility Services, it appears to the dissenting member that a reasonable solution would be for the Student to complete the outstanding work at some point during the 2020/21 academic year and, assuming he is successful, to commence part-time studies in the Fall 2021 term.

Accordingly, the appeal is dismissed.

Your Committee is grateful to Mr. McCann and Mr. Centa for their clear and helpful submissions.