

[June 10, 2009]

INSTRUCTIONS TO ADJUDICATORS
REGARDING STUDENT ON STUDENT RE-OPENERS

A. BACKGROUND

A settled DR claimant may apply to have their claim re-opened and assessed against the standards of the Independent Assessment Process (IAP). The requirements to have a hearing re-opened in relation to student on student abuse are referred to in **Section XIII 2(c) of The Agreement In Principle**. This Transition Section allows a hearing to be re-opened to consider an allegation of sexual abuse by another student in the following circumstances:

- i. A decision has to have been rendered by an adjudicator under the DR process;
- ii. A release must have been signed in relation to that decision after May 30, 2005;
- iii. The allegations of sexual abuse must be at the SL 4 or SL 5 level; and
- iv. Such abuse must be the most serious proven abuse in their case.

In addition to the above, **Schedule “D”** of the IAP applies to these hearings in all respects. In particular, the following should be noted:

- i. The Application filed to re-open a claim of sexual abuse by another student may contain a claim for actual income loss. Therefore, depending upon whether this request is made or not, this type of claim may either be a standard track or a complex track case;
- ii. Expert evidence is required to establish the harms leading to the losses at Levels 4 or 5 unless the parties have agreed to dispense with it; and
- iii. There must be a plausible link between the abuse proven to have occurred at the IRS, and the proven subsequent experience unless it is a complex track case, in which event, the civil standard for causation applies.

B. POSSIBLE SCENARIOS THAT MIGHT GIVE RISE TO A STUDENT ON STUDENT RE-OPENER

There are potentially four different scenarios that might have occurred that could result in the issue of student on student abuse being revisited after the DR process:

- i. During the course of a DR hearing it might have become apparent that the evidence was not sufficient to meet the test for student on student abuse and counsel might have withdrawn their Application at that point and not asked for a decision. This scenario would not result in a Re-Opener Application as counsel or the claimant would be free to commence with a new application under the IAP.
- ii. The adjudicator might have heard all of the evidence in a DR case and rendered a decision denying any form of compensation because the acts were not proven according to the requirements of the test for student on student abuse. No award would have been made in this scenario for harms, loss of opportunity or future care and it is possible that the adjudicator would not have even questioned on these issues knowing that the Acts had not been proven. This scenario would require a new Re-Opener Application and a decision would have to be made by the adjudicator as to how much evidence would have to be revisited and what new evidence is required and in what form.
- iii. The adjudicator might have heard all of the evidence and rendered a decision determining that the more serious forms of abuse were not proven according to the SOS test but that lesser abuse was proven. In this scenario, other forms of compensation available in the DR Model might be awarded at lower levels by virtue of the fact that the plausible link was not proven in relation to the higher levels of harm because the acts proven were not as serious. Aggravating factors, loss of opportunity and future care might also have been awarded at lower levels as a result. This scenario would require a Re-Opener Application and a determination by the adjudicator as to how much new evidence is required and in what form.
- iv. A claimant might have been advised by counsel not to pursue a SOS claim as their evidence would not be sufficient to meet the test. In this scenario the claimant might have proceeded to a hearing with other allegations but

may never have mentioned issues relating to SOS abuse. This situation would require a Re-Opener Application and the adjudicator would have to set up a hearing to hear the claimant's evidence on SOS abuse and any other related issues

C. INITIAL PROCESS

The process for re-opening settled DR claims for SOS abuse has been designed to give claimant's who are eligible an opportunity to re-open their claims while minimizing the trauma and effort they have to undergo to have their claim revisited. Although claimants must apply by filing a specific SOS Re-Opener Application to have their claim re-opened, they are not required to re-write information already contained in DR records. Claimants and Canada may submit additional information or documents in support of or opposition to the claim. A Re-Opener hearing package will be sent to the Adjudication Secretariat when the matter is ready to be adjudicated. This package will typically include:

- Re-Opener Application;
- ADR decision;
- ADR hearing transcript;
- ADR final release;
- The ADR hearing package including copies of all of the mandatory documents, research, Person of Interest Statements and any subsequent expert assessments;
- Any additional supporting materials submitted by the claimant or Canada;
- Any additional and/or updated claimant attendance and alleged abuser research; and
- Any additional alleged abuser statements that may be submitted as a result of the SOS re-opener allegations.

The Chief Adjudicator has determined that these files will proceed on the following principles:

- i. If possible, the original adjudicator who made the DR decision that is being re-opened will be assigned to re-open and hear the case. If this is not possible, another DR adjudicator will be assigned to hear the case.

- ii. A CD-ROM containing the above noted documents will be forwarded to the assigned adjudicator and it will form part of the record; and
- iii. In all cases, the adjudicator will bear in mind that the intention of the parties who agreed on this re-opener process is to have as expeditious a hearing as possible in a manner that is the least intrusive for the claimant who has already gone through the hearing process once. In many instances this may be achieved by conducting a paper review of the file only or by way of a negotiated settlement.

D. PROCEDURE TO BE USED BY THE ADJUDICATOR

- 1. Upon receipt of the file, the Adjudicator will review all of the documentation to identify the following:
 - i. Is the case eligible to be re-opened according to the criteria set out in the **Agreement In Principle** set out above;
 - ii. Has all of the previous file documentation been provided and, if not, determine if it is necessary for the making of a decision and, if so, request same;
 - iii. Is an assessment already on the file and, if not, is one required from the adjudicator's perspective; and
 - iv. Can a paper review be completed on the file without the necessity of a hearing?
- 2. Convene a pre-hearing telephone conference call with all of the parties and ensure that all of the parties have the right to comment on the following:
 - i. How the parties wish to proceed (either paper review, in person hearing or negotiated settlement). If the parties wish to proceed by way of a negotiated settlement, the role of the adjudicator will cease unless the parties request adjudicator assistance. The parties are free to vary the initial decision by consent although this may not always be appropriate where the claimant is self represented;
 - ii. Is more evidence required and how should that evidence be presented (either through documentation or viva voce evidence);

- iii. Is an expert report required, what kind of expert is required and can the parties agree on a specific expert (either from the approved list of psychologists or psychiatrists or another kind of expert depending upon the circumstances);
- iv. Are there any other issues that the parties or the adjudicator wish to raise regarding procedure for the hearing; and
- v. Is Health Support required for the claimant.

The intention of the pre-hearing telephone conference call is that all parties will have the opportunity to canvass process issues at this initial stage but that the adjudicator will have the final say as to how the matter will proceed with the exception of where there has been or will be a negotiated settlement.

- 3. Proceed with one or more of the following depending on the outcome of the conference call:
 - i. Complete a paper review;
 - ii. Ask the Adjudication Secretariat to set up a viva voce hearing to enable the adjudicator to obtain more evidence (bear in mind that the evidence from the first hearing need not necessarily be revisited); and
 - iii. Seek more evidence such as an expert report.
- 4. Prepare a written decision using a modified format of the existing decision template for IAP decisions.

E. GUIDING PRINCIPLES

- 1. The **Agreement In Principle** allows the claimant to have their hearing re-opened as stated in the relevant **Transition Provisions** set out above **and pursuant to the standards of the IAP**. No other information is provided in the **Settlement Agreement** or elsewhere as to any further requirements for a hearing to be re-opened. Accordingly, it is clear that once the initial requirements of the **Transition Provisions** are met, the criteria that guides the decision making process is to be found in the IAP model itself. All procedural rules and due process requirements that would apply in an IAP hearing, apply equally to a re-opener hearing regardless of the form that it takes. This would include the following:
 - i. The right of the parties to make submissions;

- ii. The right of the parties to examine an expert on their report; and
- iii. The right of the parties to seek a review of the re-opener decision.

F. REVIEW OF LEGAL FEES

The Chief Adjudicator's Office has determined that the provisions of the Court Orders with respect to adjudicator's responsibilities regarding legal fees, also apply to Student on Student Re-openers. In other words, while adjudicators have no jurisdiction with respect to legal fees payable on the balance of the ADR award, those responsibilities do apply to any additional amount awarded as a result of a re-opener request. At a minimum, adjudicators are required to ensure that the fees on such additional amount awarded do not exceed the 30% cap imposed by the courts. Further, claimants are entitled to be notified that they are entitled to ask the adjudicator to review those additional fees for fairness and reasonableness. A special notice to claimants has been developed for this purpose. Finally, adjudicators may review such fees for fairness and reasonableness on their own motion. The principles and schedules set out in Guidance Paper 1 (as revised from time to time) apply in such cases, with such modifications as may be necessary.

G. FINAL COMMENTS AND BILLING

1. Adjudicators are encouraged to conclude re-openers without the necessity of recalling the claimant. There will be cases where this is not possible and to some degree, the cooperation of the parties will be required. Please use your persuasive skills wherever possible to keep this process to its simplest.
2. You will notice the re-opener file has a new number. It is the old file number with a "9" in front. For example, file D-0123 would now be file D-90123.
3. Decisions should follow the format of ordinary IAP decisions.
4. We expect billing of one half day for a re-opener case that involves review of the file, conference call and a decision. If the work requires more time because a hearing is needed, you should bill actual time.
5. If you require any assistance, please contact Kaye Dunlop or Rodger Linka.