Edu-Law Consulting Services Limited

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Student-on-Student sexual harassment claim does not meet test set by U.S. Supreme Court

A recent U.S. Court of Appeal case, *Hawkins v. Sarasota County School Board, No. 02-10990 (11th Cir. 02/28/2003)*, dealt with the first Title IX claim since the U.S. Supreme Court in *Davis v. Monroe County Board*, held that Title IX could be used for private-damages awards with respect to student-on-student sexual harassment.

Title IX permits private-damage awards against school boards for sexual harassment by employees, and the *Davis* case expanded the potential liability to include student-on-student sexual harassment.

A minority judgment in the Supreme Court case of *Davis* had warned that permitting Title IX to be used for student-on-student harassment would open a floodgate. However, if the courts continue to strictly apply the principles in *Davis* regarding when a claim may come before the courts, as they have done in *Hawkins*, the flood may just be a trickle. Unfortunately, school boards will nevertheless be faced with the costs of defending such unmeritorious actions, at least until they are dismissed on summary judgment motions.

In *Hawkins*, three grade-2 girls had suffered sexual harassment from a grade-3 male student with a history of behaviour problems. The sexual harassment occurred over the course of the year and had been apparently reported by two of the three girls from time to time. However, school staff had not had occasion to witness the harassment, and the girls did not usually report the actual statements made, but rather reported that the male student was "being gross".

The third female student who had joined the class during the school year also reported the harassment to her teacher, and did so in more detail. The court found that her teacher did take some actions to remedy the situation. Once the girls' parents complained to the school, the male student was suspended for one week and was given a further one-week in-school suspension on his return to school. He was also escorted at all times by another adult, presumably an Educational Assistant, who ensured that he had no contact with the girls and did not behave in an inappropriate manner.

While the girls' grades did not suffer, they had reported that on occasion they had avoided school by telling their parents that they were sick.

The Supreme Court in *Davis* set out two issues to be established for a Title IX claim to proceed: "(1) was the school board deliberately indifferent to sexual harassment about which it had actual knowledge; and (2) was the sexual harassment so severe, pervasive and objectively offensive that it can be said to have systematically deprived the victims of access to the educational opportunities of the school."

The Court of Appeal found that, with respect to issue 1, the school was not "deliberately indifferent". Once the girls and their parents had reported the harassment, the school had disciplined the male student and ensured that he was very closely monitored. The court went further to analyze issue 2 nevertheless, and found that the girls had not been deprived of access to education since the evidence was that their grades had not suffered.

Although the concern raised by the minority of the Supreme Court was that there might be a flood of Title IX claims, equally disconcerting is the expense facing U.S. school boards in seeking the dismissal of these cases on a summary-judgment basis, such as cases like *Hawkins*, which clearly fail to satisfy the criteria established by the Supreme Court.

Obviously, there is some question as to whether the principles enunciated by the Supreme Court of the United States will be applied in Canada. Nevertheless, school boards in Canada should be concerned about the possibility of liability for student-student harassment claims —

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Court of Appeal confirms exclusion and discipline for special education students

The Ontario Court of Appeal recently had the opportunity to review the issue of stays of special education placements and safety issues in *Bonnah v. Ottawa-Carleton District School Board*, (2003, O.J. No. 1156, Ont. C. A.). In the context of these issues, the Court of Appeal also confirmed the use of exclusions for special education students for safety reasons, as well as the discipline of special education students.

Zachary Bonnah was placed in a regular class placement with support. This placement was in a grade 2 classroom, even though Zachary was much older and larger than the other students in the class. Zachary's age, size and behaviour created safety concerns in the classroom and, therefore, the Principal initiated an IPRC to review his placement. The IPRC recommended that Zachary be placed in a self-contained class, which was located at another school, presumably an intermediate school.

Zachary's parents appealed his placement.

Zachary's behaviour continued to pose safety concerns, and the Principal initiated an administrative transfer into the placement that had been recommended by the IPRC which, in effect, transferred him to another school. Zachary's parent's argued that the administrative transfer was an effort to circumvent the IPRC appeal process. They withdrew Zachary from school and sought judicial review of the transfer.

On judicial review, the lower court confirmed the long-standing principle that there is no right to attend a particular school, and the Court confirmed the right to transfer Zachary for safety reasons. [For a review of this decision, see "Do special education students have a right to attend a particular school?", Education Law Newsletter, September 2002, Vol. 8, No. 4.]

Zachary's parents appealed the lower Court decision to the Court of Appeal.

In the meantime, the SEAB proceeded and the Board implemented some of its recommendations. Zachary's parents appealed the Board's decision to the Special Education Tribunal, and the Tribunal ordered that Zachary be placed in the self-contained placement with integration into a regular class for activities as specified by the Tribunal. In effect, the Tribunal confirmed the IPRC placement in a self contained class located at a different school.

Although the Tribunal had decided the issue of placement, thereby making the appeal to the Court of Appeal moot, the Court of Appeal determined that the issues were significant and should be dealt with.

The Court of Appeal decision confirmed that the best interests of the child would determine the appropriate placement. However, the decision also placed significant emphasis on the best interests of the school community with respect to safety.

The Court confirmed that section 20 of Regulation 181/98 creates a stay of placement pending the determinations of the SEAB, and the Tribunal, if the matter is appealed further. However, the Court indicated that the provisions in Regulation 181/98 creating a stay of placement could not be applied in isolation.

The Court held that subsection 265(1)(m) of the Act, and subsection 3(1) of Regulation 474/01 authorize a Principal to refuse entrance of persons into a school or permit the Principal to require them to leave. The Court held that "person" should be defined to include not only students but also exceptional students:

"An interpretation of s. 265(1)(m) and s. 3(1) that would place exceptional pupils beyond the reach of a principal's power to exclude persons for safety reasons from the school is not only inconsistent with the language used in the Act and the Regulation, but would seriously imperil the safety of exceptional pupils and other children who interact with that exceptional pupil. Where there are genuine safety concerns, considerations of the best interests of the child must extend to all of the children whose safety is at risk."

The issue of whether ss. 265(1)(m) and ss. 3(1) of Regulation 474/01 could be applied to students has never been adequately answered by the Ministry or previously by the Courts. Although these subsections have been used to exclude students notwithstanding the uncertainty, the decision of the Court of Appeal now clarifies the application of these two very important provisions.

The Court also commented that a principal must be mindful of a placement decision when making a decision regarding exclusion. The court suggested that the Principal must first consider whether another class in the school would be suitable to address safety concerns before deciding to exclude the pupil.

Notwithstanding the affirmation with respect to exclusion, the Court noted:

"If it were shown that a principal used these powers to circumvent an obligation to leave an exceptional pupil in his or her placement pending an appeal, the court could intervene by way of judicial review just as it could if a principal used these powers for any other improper purpose."

The Court did not accept that s. 265(1)(m) provided the authority for the Board to administratively transfer the student to another school. The Court held that, rather than transfer the student, the student should be excluded and another placement should be offered to the parents for their consideration until the special education appeals were completed. If the parents refused the alternative placement, the student would remain excluded.

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Court of Appeal confirms ...

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It should also be noted that the Court did not specifically review the decision of the Judge at first instance that a student does not have a "vested right to attend any particular school within the jurisdiction of the Board". The issue of whether a school board can transfer a student for safety reasons was left to be decided on another occasion, and the Court stated the Board's position in this respect: "... may have merit in the case of pupils who are not exceptional pupils". In essence, the Court of Appeal did not overrule the principle that a student does not have a right to attend a specific school but left the issue of administrative transfer for safety reasons for students who are not exceptional students to be dealt with in another case. As an aside, the Ontario Government's previous statements regarding giving parents and students the right to select a school may change this principle.

The Court also confirmed that the discipline provisions under the Act might be applied to exceptional students, although the discipline would necessarily need to consider the individual circumstances of the student. Certainly, the mitigating factors set out in the Regulations relating to mandatory suspensions and expulsions must be considered.

Interestingly, the Court noted that it was unfortunate that Zachary had remained out of school for all of 2002, and the Court suggested that the Regulation should be amended to provide the IPRC with the authority to consider interim placements where there are safety concerns.

This decision is a significant affirmation of the authority of schools to deal with safety concerns. Where a school is attempting to negotiate the use of appropriate restraint, and the parents are not co-operating or will not consent, and there are safety issues, the school may have no alternative except to exclude the student. —

School closing case consistent with long line of decisions

The Upper Grand District School Board decision to close Arthur District High School was recently upheld by the Ontario Superior Court of Justice in *Dingman v. Upper Grand District School Board* (2003, O.J. No. 1564). The heart of the applicant's argument was that the School Board had undertaken an improper procedure in closing the high school, thereby failing to comply with the statutory requirements imposed on it.

The residents of Arthur alleged that the School Board had conducted itself in such a reckless manner that it stripped the residents of their right to participate in the decision-making process.

The residents argued that the School Board's failure to produce the required information, reports and analysis meant that the residents could not effectively participate in the decision-making process.

In arriving at a decision, the Court made it clear that the only jurisdiction it had was to decide if the school closing was authorized by law, whether there was adequate public consultation, and finally, whether the School Board acted with procedural fairness. The Court was insistent that it was not to consider whether the decision of the Board to close the high school was right or wrong, wise or foolish. The central consideration was whether the applicants were treated fairly in the decision-making process.

The Court ascertained that it was the closure policies established by the School Board and not the procedures that it followed that were of paramount importance. The Board's decision to close any particular school is based solely on the policies it creates because it is through these policies that the statutory power to close schools is derived. Arguably, had the Board created a policy consistent with Ministry Guidelines, but failed to follow the policy, the issue before the Court would have been the Board's conduct.

The Court was of the view that the residents' right to voice their opinions included the right to reasonable disclosure of information in order to enable them to fully develop and present their viewpoints. The Court affirmed that there must be a real opportunity for residents to try to influence the decision.

The Court believed it was necessary for the Board to give the applicants the context and financial data required to fully develop and present their position.

The Court also quoted the decision in *Bezaire v. Windsor Roman Catholic Separate School Board* (1992), 9 O.R. (3d) 737, which stated that, no matter how ambiguous the guidelines are, they are premised on the principle that the closing of a school is the business of the community, and the community must be consulted.

In arriving at a decision, the Court identified substantial material documenting and detailing the positions of both sides to the application. However, when the final decision was given, it was clear that the conduct of the School Board on the facts of the case did not come anywhere near the kind of detrimental conduct that had been seen in prior cases. In addition, the Court could not find any convincing evidence that the School Board approached the public consultation process leading up to its decision with a demonstrated bias or "closed mind" so as to render futile the representations in favour of keeping the School open.

The case was concluded by once again quoting from the *Bezaire* case, which expressed the right of meaningful participation by persons and groups affected by the decision. The consultation and the decision-making process need not be perfect so long as it is basically fair.

This case is consistent with the long line of school-closing decisions that have held that the applicants must show not only that there was some procedural defect, but also that the defect was so fundamental that it affected the very basis of the decision.

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Interlocutory Injunction: Stage 1 in the IBI Constitutional Litigation

In April 2003, the Ontario Superior Court in *Lowrey (Litigation guardian of) v. Ontario*, [2003] O.J. No. 1197, issued an order granting a mandatory interlocutory injunction requiring the Ministry of Community, Family and Children's Services (the "Ministry") to continue funding Intensive Behavioural Intervention treatment ("IBI") for the complainant's son, Andrew, who is diagnosed with Autism Spectrum Disorder ("ASD"), pending the outcome of the litigation against the Government. While this case does not directly involve the Ministry of Education, the outcome of the litigation will undoubtedly have an impact on education programs and/or funding. In addition, as noted below, the treatment is inter-related with school services and programming.

At the age of four, Andrew Lowrey was diagnosed with ASD and, as a result of this diagnosis, he was enrolled in an IBI program partially funded by the Ministry. However, due to the age-eligibility requirements set by the Ministry for the program, this partial funding was cut for Andrew when he attained the age of six.

Andrew's parents launched a court challenge of the age-eligibility requirements for the IBI program based on sections 15 and 17 of the *Charter* . Pending final determination of the *Charter* challenge, they sought an injunction requiring the Ministry to continue funding their son's IBI treatment.

The Lowreys argued that Andrew is entering a critical phase of the program meant to integrate him into the regular school curriculum. They argued that, if his treatment were suspended now, he would regress, losing the progress that he has made and closing the "window of opportunity" to develop and learn. The Attorney General argued that the age-eligibility cut-off of six years was reasonable and based on scientific and clinical research that indicates that children between the ages of two and five benefit most from IBI treatment.

Mr. Justice Gans set out the requirements for obtaining a stay of, or in other words, an exemption from the operation of the legislation pending the determination of a constitutional challenge. The court indicated that the moving party must establish that: (a) there is a serious legal issue to be tried; (b) the moving party will suffer irreparable harm prior to trial if the interlocutory relief is not granted; and (c) the balance of convenience, taking into account the public interest, favours a departure from the status quo. He noted that injunctive relief in respect of the operation of legislation for which there is a public benefit is very rarely granted.

There was little argument that the challenge of the age-eligibility requirements under sections 15 and 17 of the *Charter* was not a serious issue to be tried, particularly in light of the successful section 15 *Charter* challenge of the B.C. government's absence of funding for IBI treatment in *Auton v. British Columbia*, [2002] B.C.J. No. 2258, which is now seeking leave to appeal before the Supreme Court of Canada. (For a discussion of the *Auton* decision at the B.C. Court of Appeal, see "British Columbia Court of Appeal reviews the claim for IBI therapy", Education Law Newsletter, December 2002.) Further, a 15-week trial with respect to the provision of IBI therapy in Ontario and the 6-year-old age limit, in which 30 Plaintiffs are involved, commenced in April of this year and will likely continue into the Fall of 2003. Finally, Gans J. rejected the Attorney General's argument that, given that the Lowreys seek a mandatory injunction, they should meet the higher threshold of showing a prima facie case.

On the issue of irreparable harm, there was again little argument put forth to question the Lowrey's claim. Gans J. accepted that Andrew's progress would be seriously affected by cutting off access to IBI treatment. He also noted that the sale of the family farm and home, which the Lowreys would be forced to do to continue funding Andrew's treatment, was a loss that could not be compensated in damages should the Lowrey's constitutional challenge prove successful.

Finally, on the issue of the balance of convenience, the Attorney General argued that the public would suffer harm if the injunction were granted, since those already in queue for IBI therapy and those waiting to be assessed will have even longer waits. Gans J. rejected this argument, noting that suspending funding for Andrew's treatment would not prevent the Lowreys from continuing to fund this treatment themselves, and thus continuing to use an instructor/therapist who would not necessarily be available for others waiting to be treated. Gans J. cited the test set out in *RJR-MacDonald v. Canada*, [1994] 1 S.C.R. 311 at 349, which states that the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit. He concluded that there was a public benefit in ensuring that Andrew continues with the prescribed treatment for the time period specified by his instructor/therapist, noting that the alternative would involve a greater strain on the public purse in the long term. Gans J. further rejected the argument that granting the mandatory injunction would open the floodgates in respect of those who presently qualify for IBI therapy, stating that the injunction is specific to the Lowreys and in relation to the evidence they have adduced.

Having found that the Lowreys met each of the requirements, Gans J. issued the order granting the mandatory interlocutory injunction requiring the Ministry to continue to fund Andrew's IBI therapy. The Attorney General sought leave to appeal, but this application was dismissed on May 27, 2003.

As noted above, the claim of the 30 Plaintiffs is now proceeding. Whatever happens, this litigation will inevitably have an effect on education programming and funding. In particular, in the current litigation, the Attorney General will attempt to defend the age limit of six based on the proposition that once a child reaches the age of six, the child is entitled to special education services within the context of school services and programming. The Attorney General will not take the position that IBI is appropriate in a school but, rather, that schools are able to provide appropriate services and programming for autistic children. It is interesting to note that the Plaintiffs in this particular litigation are not interested in IBI treatment in schools. Rather, they contend that the Government should provide funding for the IBI treatment outside of the school setting and after the age of six. Consequently, this current litigation does have some potential implications for special education services and programming. —

Voting for balanced school board budget not a breach of the Charter

Three Toronto District School Board trustees recently had their application to the Ontario Superior Court regarding the constitutionality of provisions of the *Education Act* requiring trustees of school boards to vote for balanced budgets, dismissed (*Ward et al. v. Ontario (Attorney General)*, [2003] O.J. No. 935, Ont. Sup. Ct.).

The funding formula changes brought about by Bill 160 were also accompanied by provisions compelling trustees of school boards to approve only balanced budgets or suffer the consequences of a possible investigation by the Ministry and/or a take-over by the Ministry of Education.

Sheila Ward and two other TDSB trustees, Kathleen Wynne and Bruce Davis, applied to the Superior Court for a declaration that subsection 230.12(2) [liability for non-compliance with orders, directions and decisions of the Minister made under Part VIII - Compliance with Board Obligations] and subsection 230.12(3) [personal liability and disqualification for applying funds in breach of a Minister's order in Part VIII] and subsection 257.45(2) [liability for non-compliance with orders, directions and decisions of the Minister under Division D - Supervision of Boards' Financial Affairs] and subsection 257.45(3) [personal liability and disqualification for applying funds otherwise than in accordance with a Minister's order under this Division] of the *Education Act* infringed their right to freedom of expression, and their right to life, liberty and security of the person as guaranteed by sections 2 and 7 of the *Charter of Rights and Freedoms.*

Provisions of the *Education Act* require that school boards approve balanced budgets and retain their ability to meet their financial obligations, or be subject to consequences including not only provincial take-over, but also potential personal liability. It should be emphasized that throughout this proceeding, the Toronto District School Board was under supervision as ordered by the Ministry pursuant to Part IX - Finance, Division D - Supervision of Boards' Financial Affairs.

The Court first reviewed the application with respect to the trustees' right to freedom of expression. The trustees argued that the Act compels them to vote for a balanced budget even in circumstances where they are of the view that such a budget is not in the best educational interests of their students. The Judge described their argument as follows:

The pith and substance of the applicants' position, simply put, is that the restriction on their right to vote for a deficit budget, under penalty for so doing, represents an unreasonable infringement on their freedom of expression guaranteed under section 2(b) of the Charter; an infringement that is not saved by the virtue of s. 1 of the Charter.

Section 2(b) of the Charter guarantees the freedom of thought, belief, opinion and expression.

The respondent Government's position, and one that the Judge indicated was supported by the evidence, was that the purpose of the provisions in the Act were to bring "fiscal sanity" to the funding of public education in Ontario, and to bring "soundness to the management" of education funds. The respondents argued that trustees are administrators of public funds, which they are obliged to administer in accordance with the *Education Act*.

Mr. Justice Hoilett, somewhat tongue-in-cheek, described the relationship between the applicants and respondent as being analogous to that of a parent and child with an allowance. While the child can complain to his/her parents, friends and neighbours about the allowance being inadequate, he or she cannot blithely spend beyond the limits of his or her allowance free of consequence. Like the child, a Trustee is free to express as vehemently as he or she wishes his or her disagreement with the government's funding formula. However, the Trustee cannot ignore the law which compels balancing a board's budget. The Judge found that it is difficult to distinguish the Trustees' position from that of any other governing body charged with the statutory responsibility of operating within a fixed budget.

The court found that the provisions at issue do not restrict commentary or the ability to campaign with respect to education policy or a proposed budget. The Act simply restricts the trustees' ability to "substitute their views for those of the government so far as education funding is concerned".

Quoting the Supreme Court of Canada decision in *Lavigne v. SEFCO*, [1991] 2 S.C.R. 211, the Judge stated:

If a law does not really deprive one of the ability to speak one's mind or does not effectively associate one with a message with which one disagrees, it is difficult to see how one's right to pursue truth, participate in the community, or fulfil oneself is denied.

The Judge proceeded to characterize the right that the trustees were asserting had been infringed by reviewing the nature of their obligations as elected officials. The Judge found that they are responsible as managers of public funds and that it is "***difficult if not possible, to distinguish their position from that of any other governing body charged with the statutory responsibility of operating within a fixed budget***".

The Judge held that:

... the trustee is free to express as vehemently as he or she wishes his or her disagreement with the government's funding formula. What the trustee is not entitled to do, based on the authorities, is to ignore the law which compels balancing the board's budget. That exercise in the budgetary process and financial management, is not, in my opinion, an 'expressive' action within the meaning of s. 2(B) of the Charter.

The Judge concluded that there was no infringement of their constitutionally-protected rights.

Although it was not necessary for the purpose of disposing of the application, the Court proceeded to review the potential penalties against trustees should they not comply with the legislation, and whether the provisions were in violation of the right to life, liberty and security of the person, as guaranteed by section 7 of the *Charter*. These rights were also found not to be breached because there is no right to run for municipal office. With respect to the potential penalty of $5,000 under the *Education Act*, as there is no automatic jail term under the *Provincial Offences Act* for failure to pay a fine, the trustees section-7 rights were not violated.

This case confirms the constitutionality of the provisions of the *Education Act* requiring school boards to pass balanced budgets. It also affirms the role of school trustees as managers of public funds and their requirement to comply with the *Education Act*. While debate and commentary about the provisions of the Act and the policies of the Ministry of Education may benefit not only students but also the public, non-compliance with the provisions of the legislation clearly does not.

It has been reported that this case may be appealed to the Court of Appeal, even if the next provincial and municipal elections do not see the same people and parties in power, and we will report on the result. —

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