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Edu-Law Newsletter —

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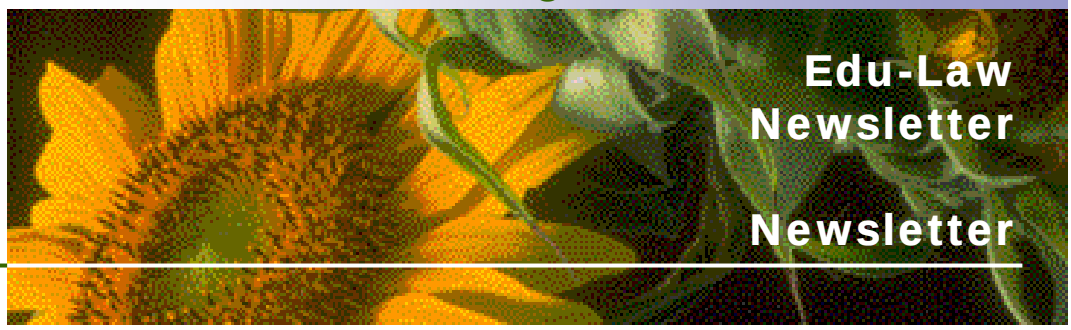

French-language majority not entitled to English-language education

In *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 15, a group of parents, most of whom being members of the French-language majority in Quebec and receiving their educational instruction in French when they were students in Quebec, sought and were refused admission for their children into English-language schools. The parents argued before the Supreme Court of Canada that the *Charter of the French Language*, which provides access to English-language schools only to children who have received or are receiving English-language instruction in Canada or whose parents studied in English in Canada at the primary level, discriminates against the majority of French-speaking Quebec students. The parents claimed that their children's right to equality guaranteed under sections 10 and 12 of the Quebec *Charter of Human Rights and Freedoms* requires that all children in Quebec be given access to publicly-funded English-language education.

In dismissing the appeal by the appellant parents, the Supreme Court of Canada noted that if the argument put forward by the appellants was adopted, the practical effect would be to read out of the Canadian Constitution the carefully crafted compromise contained in section 23 of the *Canadian Charter of Rights and Freedoms*, the purpose of which is the protection and promotion of the minority-language community of each province. The Court affirmed that there is no hierarchy between constitutional provisions; all parts of the Constitution of Canada must be read together and equality guarantees cannot be used to invalidate other rights expressly conferred.

The Supreme Court explained that the purpose of section 73 of the *Charter of the French Language* is not the exclusion of categories of children from accessing a public service but, rather the implementation of a positive constitutional responsibility requiring all provinces to offer minority-language instruction to their minority-language community, and that any analysis of minority-language instruction must begin with the guarantees provided in section 23 of the *Canadian Charter*, which provides a comprehensive code for minority-language education rights. The Court found that the appellants in this case were attempting to use the equality guarantees to modify the categories of rights-holders outlined in section 23.

The Supreme Court explained that while equality rights are of "*immense importance, they constitute just part of Canada's constitutional fabric. The protection of minorities was also identified as a key principle, manifested in part in minority language education rights, denominational school rights and aboriginal and treaty rights*". The Court held that section 23 achieved its purpose by ensuring that the English community in Quebec and the French communities in other provinces can flourish by granting minority-language educational rights to minority-language parents throughout Canada.

As members of the French-language majority in Quebec, the parents' objective of having their children educated in English did not fall within the purpose of section 23 of the Constitution. The Court commented that, in rejecting "free access" as the governing principle, the framers of the *Canadian Charter of Rights and Freedoms* were concerned about the consequences of permitting members of a majority-language community to send their children to minority-language schools. Their concern was that the minority-language schools would themselves become centres of assimilation if members of the majority-language community could access, and thereby dominate, minority-language education rights. The Court's suggestion that, if a majority is allowed to access an ameliorative service to the same extent as the disadvantaged minority, such access will in itself cause further disadvantage, is a concept that might apply to the open-access provisions and Catholic education in Ontario. —

IBI therapy to be funded by Government

The Ontario Superior Court, in *Wynberg et. al v. Ontario (Minister of the Attorney General)*, [2005] O.J. No. 1228 (Ont. S.C.), recently found that the Government of Ontario's Intensive Early Intervention Program for Children with Autism (the "IEIP") discriminated against the minor plaintiffs in this case on the basis of age, contrary to section 15 of the Charter. Further, the Court found that the Government's failure to provide or fund Intensive Behavioural Intervention therapy ("IBI Therapy") based on the individual needs of the plaintiffs, as well as speech therapy, occupational therapy and "appropriate educational services" for minor plaintiffs, was a violation of the minor plaintiffs' rights on the basis of disability contrary to section 15 of the *Canadian Charter of Rights and Freedoms* and in violation of the *Education Act*. Damages were ordered to be paid to the minor plaintiffs and their families as a result of the failure of the Government to provide "IBI/ABA" while the children were school-aged.

The *Wynberg* case was consolidated with the *Deskin* action, as well as several other similar claims made by other families with children with Autism. The trial lasted approximately 130 days and was heard between April 28, 2003 and September 2, 2004, with further submissions being made by counsel in December 2005 and February 2005. The decision of the Court was some 220 pages in length with many findings of fact and will only be briefly summarized in this article.

The minor plaintiffs in this action were all diagnosed with Autism and sought to participate in the Government of Ontario's IEIP. Some of the minor plaintiffs participated in the Program and were "aged-out" on their sixth birthday. Others were placed on a waiting list for services, but did not receive services prior to turning 6, at that time becoming ineligible. All of the plaintiffs sought to continue their IBI Therapy past the age of 6 years as their educational program or as a method to access their educational program (these concepts were not clearly delineated in the decision).

Although the program provided by the IEIP was described by the Court as "IBI Therapy", it should be noted that the Court found that the difference between Intensive Behavioural Intervention Therapy and Applied Behavioural Analysis ("ABA") was a "red herring". The Court commented that, many of the psychologists who provided evidence used the terms interchangeably.

One of the most significant suggestions from the decision of the Court is that IBI/ABA is the only effective educational program for children with Autism. The Court found that the failure of the Government to require the provision of IBI/ABA in schools equated to a failure to provide "appropriate education programs and services" for students with Autism.

Important findings of the Court include:

"the expectation that the education system would respond to the special needs of these children. However, it was apparent to Cabinet that the education system was not appropriately responding to the special needs of children with autism based on the following:

(i) MCFCS [Ministry of Community, Family and Children's' Services] had made significant efforts to train instructor therapists, supervising therapists, and identify supervising psychologists. Notwithstanding those efforts, MCFCS was unable to deal with the children on the wait list. Consequently, there were more children on the IEIP waiting list than were being served and hundreds of un-served children were reaching schools without having had IBI;

(ii) serious consequences would befall those children and their families who did not have service;

(iii) while laudable on paper, the "Transition to School" provisions in the September 2000 IEIP Guidelines had failed to ensure a transition to school which responded to the needs of the children. Indeed they appeared to have had little impact. According to MCSS, the Ministry of Education was responsible for ensuring that the jointly developed transition to school guidelines had been distributed to boards and schools. There was no evidence to indicate that the government was informed that that had been done or that officials of the Ministry of Education had taken any steps to prepare for children with autism;

(iv) the Minister of Education had not ensured that school boards had special education plans to deal with the children who had aged out without IEIP;

(v) the Minister of Education had not ensured that school boards had special education plans to deal with the children who had received IBI and were transitioning to school;

(vi) the Premier had directed MCFCS and the Ministry of Education and the Ministry of the Attorney General to collaborate on solutions, from which I infer that it was obvious to the government that collaboration between the key Ministries was essential to address the issues;

(viii) complaints and concerns were reaching MCSS from the Office of the Ombudsman about the age limit and aging out, and reaching the Ministry of Education from MACSE and the Provincial Auditor about children with autism in particular and special needs students in general;

(ix) although most of the references to these proceedings had been redacted, Cabinet was aware that lawsuits had been launched on behalf of children alleging discrimination on the basis of age;

(d) notwithstanding the efforts by officials in MCSS and

MCFCS to collaborate, officials in the Ministry of Education were operating in a silo, without seeking the input of those involved in the IEIP;

(e) without any analysis, Cabinet took a policy position that IBI was "therapy" or "treatment" not education and would not be available to children in school."

With respect to the issue of IBI/ABA and its characterization, the Judge commented that:

". . . there appears to be a stereotype about ABA/IBI. The message communicated by the Ministry to the educators is that ABA/IBI is a therapy or treatment which consists of 40 hours per week, 52 weeks a year, supervised by psychologists, delivered in a 1:1 setting with extensive data."

Yet, the Judge also stated in the decision:

"Based on the research and the evidence, I agree with the conclusions reached by Dr. Laredo-Marcovitz that the body of research, as a whole, safely supports the conclusion that ABA is the only scientifically supported effective intervention for children with autism and that:

(a) therapy must be intensive (ideally 30 – 40 hours per week) and based on the circumstances of the individual child;

(b) therapy must be consistent, planned, and documented (to assess efficacy and to use in ongoing planning and modification);

(c) therapy must be modified on an ongoing basis to respond to the child's progress;

(d) therapy should be started at the earliest possible age;

(e) therapy should be continued consistently through the calendar year;

(f) therapy should be continued until the child is (i) able to learn independently from the environment or (ii) the child ceases to receive benefit from the treatment;

(g) there is no literature to support the withdrawal of ABA at one specific age; and

(h) there is no literature supporting withdrawal of ABA at age six."[emphasis added]

The Court held that, *"the education system was not responding to the needs of exceptional students with autism who had had IBI or who had not had the intervention."* However, it should be noted that the Court identified that only two individuals who were part of the teaching profession gave evidence. Moreover, there was very little evidence outlined in the decision regarding the programs and services provided by school boards for students with Autism and no evidence in the decision regarding the programs provided to the minor plaintiffs, many of whom, it would appear from the decision, never attended a publicly-funded school.

The Court in *Wynberg* has differed from the Supreme Court of Canada in *Auton* in its characterization of IBI Therapy. Moreover, the Court has found that, with respect to the minor plaintiffs, IBI/ABA is the only appropriate intervention for them and that, by not providing IBI/ABA in schools, the Government discriminated against these plaintiffs by failing to provide appropriate educational programs or services. Moreover, the Court held that the Ontario Government's age six cut-off for the IEIP program was discriminatory on the basis of age.

The impact of the *Wynberg* decision is not yet known, and it should be noted that it has been appealed by the Attorney General. Moreover, the Divisional Court, in *Clough v. Simcoe County District School Board*, [2005] O.J. No. 2124, recently commented that the decision in *Wynberg* only has application to those minor plaintiffs who were plaintiffs in the action. —

Not necessary to be homosexual to suffer from discrimination on the basis of sexual orientation

The British Columbia Court of Appeal in *North Vancouver School District No. 44 v. Jubran* [2005] B.C.J. No. 733, recently reviewed the decision of the lower Court, which had overturned the decision of the B.C. Human Rights Tribunal finding that Jubran was discriminated against on the basis of sexual orientation while attending secondary school.

Although Jubran does not identify himself as homosexual, he brought a Complaint before the Human Rights Tribunal as a result of repeated insults and harassment of a homophobic nature suffered by him during his attendance at secondary school. The Human Rights Tribunal found that the school board had failed to provide him with an education free from discrimination. This decision of the Tribunal was overturned on appeal to the Court on the basis that Jubran was not homosexual and therefore, could not rely on the Code for protection. The Court of Appeal disagreed.

The Court of Appeal confirmed that the purpose of human rights legislation is to *"promote and foster human dignity and equality, to prevent discrimination prohibited by the Code and to identify and eliminate persistent patters of inequality associated with discrimination prohibited by the Code."* Moreover, it noted that it is common ground that a person who is perceived to have the characteristics of a person who falls under one of the enumerated grounds of the Code does not need to actually have those characteristics to be the object of discrimination.

The Court found that the legislation should be interpreted broadly that the lower Court applied too narrow an

interpretation when it denied Jubran standing to bring a Human Rights Complaint. Further, the Court of Appeal reviewed the findings of the Tribunal and held that they were reasonable. In reviewing the Tribunal's decision to hold the school board responsible for the discriminatory acts of the students who attended the school, the Court of Appeal stated:

"*In my opinion, the legal reasoning of the Tribunal on this question is sound. Contrary to the position taken by the School Board, she did not impose a standard of strict liability. The Tribunal relied on Ross for the Supreme Court of Canada's articulation of the importance of a discrimination-free school environment and the duty of the School Board to provide it.*"

The Court of Appeal noted that the Tribunal:

"*...found that the school staff was pursuing a disciplinary approach that was not effective, and lacked resources to adopt a broader, educative approach to deal with the difficult issues of harassment, homophobia and discrimination*".

The Court of Appeal held that the Tribunal's findings of fact and interferences were reasonable and that its decision should stand.

The Court of Appeal supported not only the broad interpretation of the Code applied by the Tribunal, but also the responsibility of school boards to provide all students with a non-discriminatory environment.

To address the discrimination, the school had applied a disciplinary approach, which included speaking to students about their inappropriate comments or behaviour, restricting privileges and suspension. The school reported that very few students re-offended; however, the discriminatory acts did not stop. The Tribunal found that the school's actions were insufficient and should have included the implementation of programs to educate the students in the school about diversity and discrimination.

For further information about the steps taken by the school and the decision of the Tribunal, please see "Student Taunting: Criminal Harassment & Contrary to the Human Rights Code", Vol.8, No.3 – June, 2002 of the Education Law Newsletter. Please also note that the lower Court's decision was covered in "BC Court re-affirms responsibility of Boards for sexual harassment or bullying", Vol. 1, Issue I , March, 2003 of the Edu-Law Newsletter. —

Custody order not necessary for residency

The *Chou v. Chou*, unreported decision of the Ontario Superior Court, Newmarket File No. 19746/04, case involved a custody application with respect to a 13-year old Canadian student whose parents sent her to live with her aunt. The Board took the position that the student, Valerie, was not a resident under the *Education Act* because both her parents resided in Hong Kong. Her parents had signed an agreement giving joint custody of Valerie to the Applicant, which the Board did not accept as conferring resident-pupil status on the student. To avoid the tuition fee imposed by the Board for non-resident students, the student's aunt applied for a custody order. The Board did not take a position with respect to whether the custody order should be granted.

The Court found the Custody Agreement signed by the parents was ineffective under the law to confer joint custodial rights over the student to her aunt. The Court held that the only instruments recognized in law as transferring custodial rights over a child were marriage contracts, cohabitation agreements, separation agreements and temporary care and special-needs agreements with a Children's Aid Society. However, the Court found that the Agreement signed operated as consent to a joint custody order "if such court order is necessary for education or other purposes" and constituted evidence of the intentions of the parties.

The Court found that the true intention of the agreement was to permit Valerie to live with the Applicant, to permit the Applicant to manage the day-to-day decisions in Valerie's life, and to permit the Applicant to have day-to-day physical care and control arising from residence. The Court found that the agreement provided the Applicant with legitimate authority for the day-to-day care and control of Valerie. The Court noted that the Applicant was an agent for the parents in Ontario.

The Court found that, given modern technology which permits signatures to be obtained within minutes, there is no real need for the Applicant to have a custody order. Furthermore, the real reason behind the custody application was to enable the Applicant to register the student at the Board without paying the non-resident tuition fee. In refusing the custody application, the Court concluded that such a motive and purpose did not serve Valerie's best interests and that the intent was not to make the Applicant a true joint custodian of Valerie.

In addition to the custody order, the Applicant also applied for a mandatory order, which the Board opposed, requiring the Board to admit Valerie to school without charging a non-resident fee. At issue was the interpretation of the school attendance provisions in the *Education Act* and whether the student was a non-resident pupil for whom tuition must be paid. As this was a matter of law, the Court found that the standard of review was correctness.

In assessing the school attendance provisions, the Court noted that the provisions do not require that the pupil and the parent or guardian reside together in order for the pupil to qualify as resident. Both the student and the parent or guardian must live in the same school section, but could be in separate residences. In Valerie's case, there was no parent who was resident in the school section. The only way she could qualify as a resident pupil was to have a "guardian" residing in the same school section. The Court found "guardian" to mean a person, other than the parent, who has lawful custody of a child.

Noting that custodial parents can transfer some incidents of custody without transferring all incidents of custody, such as physical care and control, residence and daily discipline and authority, without a court order or agreement in writing, the Court concluded that a child could live in the "lawful custody" of a person who does not have authority to exercise all of the incidents of "custody". The transfer of day-to-day residence, care and control were found to be sufficient to make the situation one of a child living in "lawful custody" of a non-parent.

In the present case, the parents had authorized the student to reside in the care and control of her aunt. The Court concluded that such authorization was "lawful custody", and that the Applicant was a "guardian" who had "lawful custody" over the student for the purpose of attending school without the payment of a fee.

The Court also commented on the broader implications of this case. In particular, the Court expressed a concern about the good faith and honesty of Applicants in "school custody applications" and the potential abuse of the court process to achieve an improper purpose, such as avoiding payment of non-resident tuition fees. In appropriate circumstances, a Board might reject the validity of any "guardian" arrangement and/or oppose a court application. The Court acknowledged this was an issue to be dealt with by the government and that, until the government took action, the courts could only continue to do their best in deciding similar cases on a case-by-case basis. —

Privacy right applies to communication with Guidance Counsellor

Recently, in *Children's Aid Society of Ottawa v. N.S.*, [2005] O.J. No. 1070, the Ontario Superior Court ruled that a student is entitled to enjoy an expectation of privacy concerning communications made to a school guidance counsellor. The communications between a student and a guidance counsellor and the notes relating to those communications are properly the subject of confidentiality.

The judgment was rendered after a mother brought a motion in a child protection case seeking an Order from the Court directing the Ottawa-Carleton District School Board to produce her daughter's entire school record, including notes, reports and records of any and all meetings involving her daughter, M.M., and the school's guidance counsellor.

In analyzing the issues, the Court reiterated the general expectation of privacy in communications made by a student to a guidance counsellor. The Court made reference to subsections 266(1) and (2) of the *Education Act*, which govern the issue of "pupil records", but concluded that any notes made and kept by the guidance counsellor cannot be considered to form part of a "pupil record" as per subsection 266(2) and, therefore, could not come within the statutory protected privilege contained in subsection 266(2) of the *Education Act*.

The Court, however, continued to maintain the view that a student has an "expectation of privacy" in communications made to a guidance counsellor insofar as such communications should be protected by a form of common law privilege.

The Court determined that communications made by students to their guidance counsellors are made in confidence and with the expectation that such communications will not be disclosed. Students disclose information to guidance counsellors in an atmosphere of confidentiality. The Court rationalized that, if students cannot rely on this confidentiality, then it will effectively destroy the utility of the guidance counsellor's role, given the centrality of the element of confidentiality in helping students overcome their fears or worries in disclosing problems in their life, whether at school or at home.

The Court reiterated the fact that the onus in any application for disclosure of school records that have elements of confidentiality and privilege falls on the Applicant and, while the "benefit" to be gained from disclosure of the counsellor's notes was high in the context of a child protection hearing, the injury to the student-counsellor relationship was equally high and was found to tip the balance in favour of non-disclosure.

The Court agreed with the School Board that an order for disclosure of the counsellor's notes would have a ripple effect on other student's communications with guidance counsellors. If the Court was to grant such order for disclosure it would cause irreparable and far-reaching harm as it would effectively destroy the role of guidance counsellors by removing the assurance of confidentiality. Disclosure might, therefore, have a very serious detrimental effect on the child's best interest, sufficient to override any potential benefit gained by the parent for preparing and mounting an effective defence of the child protection hearing.

Therefore, the Court decide that communications between a student and a guidance counsellor may properly be the subject of a privileged confidentiality, depending upon the circumstances. —

OCT cannot discipline retrospectively

In *Cressman v. Ontario College of Teachers* [2005] O.J. No. 565, Ken Cressman filed an application with the Divisional Court seeking an order to restrain the Ontario College of Teachers from proceeding with a disciplinary hearing against him. The issue before the Divisional Court was whether the College of Teachers had jurisdiction to determine whether there was any misconduct by Cressman with respect to incidents that occurred prior to the creation of the College of Teachers and despite the fact that Cressman had retired and subsequently resigned his membership in the College of Teachers. Therefore, the Divisional Court had to determine if misconduct provisions enacted following the incident and Cressman's resignation from the College could be applied retroactively and used for the purpose of discipline before the College of Teachers.

Cressman had been the principal at Forest Glen Public School, a school where convicted sex offender Ronald Wayne Archer had been a teacher on staff. The Ontario College of Teachers Investigative Committee began an investigation following Archer's criminal conviction and, based on its investigation, alleged that Cressman was guilty of professional misconduct or incompetence as defined in section 30(2) and (3) of the *Education Act*. The Investigation Committee believed Cressman, through his inaction, had set the stage for Archer to commit the sexual assaults because Cressman failed to maintain appropriate records with respect to Archer's relationships with minors, and Cressman did not follow up on a complaint he received that related to Archer's conduct.

The Ontario College of Teachers argued that a plain reading of the legislative framework made it clear that the legislation intended the College to have jurisdiction over misconduct occurring prior to the creation of the College of Teachers in 1997. The College also argued that the transition matters in the Statute expressly provided the College of Teachers' with jurisdiction over conduct that had come to the attention of the Minister of Education.

In rendering its decision, the Divisional Court said that there is a strong legal presumption against the retroactive or retrospective application of statutes. A statute can only have retroactive or retrospective application if it there is express language in the statute or by necessary implication. Furthermore, the Court commented that there was a history of jurisprudence annunciating the principle that penal statutes should be strictly interpreted in favour of the subject, in this case Cressman.

The Court found that the disciplinary Code that the College of Teachers attempted to apply to Cressman was not in effect prior to his resignation from the College. Therefore, the Court held that to apply the new standard to Cressman would be asking the Court to apply the Act retrospectively. This, as the Court previously noted, would only occur in the rarest of circumstances, the present case not raising such a circumstance; thus, the College was prohibited from proceeding with any Disciplinary hearing or action —

New legislation for anaphylactic students - Sabrina's Law

The Ontario government recently passed legislation establishing a set of minimum standards for school boards, which will allow school personnel to recognize and react to anaphylactic shock. The law strives to create preventative measures and to require school staff to recognize symptoms of anaphylaxis and address allergic reactions.

The legislation rationalizes School Board policies concerning allergic management and creates a single set of rules for the province's elementary and secondary schools.

The Bill, better known as *Sabrina's Law, 2005*, is named in honour of a 13-year-old girl who died after suffering an allergic reaction from digesting French fries in her high school cafeteria. Sabrina had been allergic to milk, peanut and soy products, and had been cautious prior to purchasing the food. In fact the young girl only purchased the fries after being reassured by cafeteria staff that the fries had not come into contact with any diary products. Unfortunately, unbeknownst to Sabrina, the fries had earlier come into contact with a diary product, which triggered Sabrina's allergic reaction and untimely led to her death.

The legislation mandates school boards to inform and train school staff about emergency situations that may arise following a student's allergic reaction to foods or other allergic reactions, such as bee stings. One specific training technique required is the proper administration of an EpiPen in the event a student goes into anaphylactic shock. If an employee has reason to believe that a pupil is experiencing an anaphylactic reaction, the employee may administer an epinephrine auto-injector or other prescribed medication.

Many school boards, across Ontario, already have allergy management policies in place. What *Sabrina's Law* attempts to do; however, is include strategies to reduce the risk of exposure to anaphylactic causative agents, such as peanut oil, bee stings and other common causative agents.

The Bill creates a communication plan for the distribution of information on life-threatening allergies, while also introducing regular training to deal with life-threatening allergies. There is also a requirement that every school principal develop an individual plan for each pupil who has an anaphylactic allergy and a requirement that every school principal maintain a file for each anaphylactic pupil. —

Accessibility for Ontarians with Disabilities Act, 2004

The *Accessibility for Ontarians with Disabilities Act* recently received Royal Assent. The new Act will require government to work with the disability community as well as the private and public sector to establish accessibility standards. The Act requires the Ontario Government to establish a process for the development of accessibility standards, which shall include the establishment of several committees. Each committee is responsible for developing proposed accessibility standards for a specified industry, sector of the economy, or class of persons or organizations. Representatives of industry, organizations, persons with disabilities and affected ministries are to be invited to sit on each committee, which will submit proposed standards to the Government for adoption as regulations. The standards will include timelines for compliance, and the legislation provides for tough penalties for violators. The New Act repeals the *Ontarians with Disabilities Act, 2001*. Implementation of the various anticipated standards is expected by the year 2025. —

Professional Development Corner

Edu-Law continues to provide "In-House" Negotiation & Mediation Training Programs. Anyone interested in such In-House Programs, or a Program together with a coterminous Board, should contact Edu-Law.

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October 28, 2005

hosted by: Keel Cottrelle LLP

Complimentary session on

"Special Education & Student Discipline Issues"

Capitol Banquet Centre, Mississauga, Ontario

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For any information with respect to Edu-Law or the services provided by KEEL COTTRELLE LLP, please contact **Bob Keel** at **905-501-4444**, or at **rkeel@keelcottrelle.on.ca**.

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