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Education Law Newsletter

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HRTO confirms principal acted properly in reporting to CAS

In *AH v. Toronto District School Board* (2016 HRTO 392) the Human Rights Tribunal of Ontario (the tribunal or HRTO) found that a school principal acted with sincerity when he offered winter clothing to a single mother and had reasonable grounds for suspicion of neglect or abuse when he called the Children's Aid Society.

The applicant was a single mother with three children. She was insulted after the principal called her into a meeting to offer her children warm clothes as part of a donation program. The applicant took offence at the implication that her children were not well provided for. After the principal's offer, the applicant went home and sent an email to her school trustee detailing the incident and copied the principal on the email. Sometime later, the principal called the Children's Aid Society and reported that the children came to school without proper winter clothing and sometimes without lunches.

The tribunal examined two issues: whether the offer of winter clothing was discrimination and whether the phone call to the Children's Aid Society was a reprisal for the email to the school trustee.

The tribunal first considered whether the offer for winter clothes was discriminatory, based on the stereotype that single parents cannot provide for their children. School administrators (staff and teachers) testified about the children's winter clothing and their observation that there were several occasions when the children were inadequately prepared. For example, there were times the children did not have socks, scarves, mittens or a proper winter coat and the clothing that the children did have seemed to be small for them and not particularly warm.

The tribunal found, based on the evidence, that the discrimination allegation should be dismissed: "the offer of clothing was made to the applicant because there was a sincere belief by the principal that it was needed and not because of stereotypical assumptions relating to the applicant's ability to provide for her children as a single parent"(para.4).

Next the tribunal considered whether the report to the Children's Aid Society was made as a reprisal. According to section 72 of the *Child and Family Services Act*, R.S.O. 1990, c. C.11 (*CFSA*), people, including teachers and school administrators, who have reasonable grounds to suspect neglect or abuse have a duty to report their suspicion to the Children's Aid Society. Section 72(7) of the *CFSA* also includes a provision to protect individuals against actions for reporting reasonable suspicions of neglect: "no action for making the report shall be instituted against a person who acts in accordance with this section unless the person acts maliciously or without reasonable grounds for the suspicion."

The duty to report cannot be narrowly construed. The tribunal referenced *Young v. Bella* (2006 SCC 3) in which the Supreme Court of Canada found that "information that a child may be in need is sufficient to trigger the obligation to report … there is no duty to investigate the accuracy of the information before reporting to a children's aid society" (para. 47 of *AH* citing para. 49 of *Young*).

The tribunal noted that imposing liability could effectively discourage others from calling the Children's Aid Society when there is a genuine concern about a child being harmed or at risk of harm. In this case, there was documented proof of multiple times when the children had come to school without food and adequate clothing. The tribunal found that, although the timing of the call may have been troubling, the principal had reasonable grounds to suspect neglect and was not acting maliciously when she called the Children's Aid Society. The principal was protected from liability because there were reasonable grounds for suspicion in this case. As such, a determination of whether the call was a reprisal was not made. The reprisal complaint was dismissed. ■

HRTO deals with the use of harnesses on school buses

In *CJ v. Toronto District School Board* (2016 HRTO 345), the HRTO heard a request for an interim remedy and a request to expedite the proceeding, for a student who required assistance securing a safety harness in a school bus.

The applicant, CJ, was a grade seven student who was required to use a safety harness to travel on the school bus. CJ had previously worn a seat belt and a seat belt cover, with which the bus driver occasionally assisted. However, due to her behaviour on the bus, bussing services were suspended until CJ's parents agreed to the use of a safety harness to transport her to school. The Toronto District School Board

(TDSB) had a policy known as the "No Touch Policy," which limited the interactions between students and bus drivers. As a result, CJ's parents had to secure CJ into the harness in the morning and detach the harness when CJ returned from school in the afternoon. CJ's mother was physically unable to assist with the harness, so CJ's father was attaching and detaching it; however, the process was disruptive to his business and resulted in a financial loss. In addition, because CJ's father would be required to drive CJ's sibling to another school farther away starting in September 2016, he would be unable to secure CJ in her harness in the morning. CJ's family thus proposed that the bus driver assist in securing the harness, with the mother present to ensure that her daughter was protected, and agreed to sign a release for any concerns about allegations of inappropriate touching.

The HRTO set out conditions to order an interim remedy, as allowed in Rule 23.2 of the its *Rules of Procedure*. The tribunal noted that interim remedies are extraordinary, because they are made without a finding that the *Human Rights Code* has been breached. As such, the applicant has a significant onus to prove that an interim remedy is necessary.

The core consideration as to whether an interim remedy should be awarded is "whether an interim remedy is necessary to ensure the tribunal will be able to provide a full, effective and appropriate remedy" (para. 22 citing *TA v. Montclair*, 2009 HRTO 39 at para. 23). The tribunal also noted its preference to order an interim remedy when its effect would preserve an existing set of circumstances, as opposed to creating a new state of affairs.

The tribunal found that the applicants had not established that it was just or appropriate to grant the requested remedy at this time. CJ was still receiving bussing services and attending school, and her father was able to attach and detach the harness so that CJ could travel to school for the remainder of the school year. The tribunal stated that any financial losses could be recovered at the end of the hearing, if the applicant was successful. Finally, the tribunal did not think it appropriate to order the remedy, because it was the remedy the applicants were ultimately seeking but there had not been a trial to examine the nuances of the case. Thus, the request for an interim remedy was denied.

The tribunal did, however, decide to expedite the proceeding. Because CJ's parents would be unable to assist with the harness during the next school year, transportation would be denied to CJ and CJ would be unable to go to school. CJ's inability to go to school could not be remedied, and so the tribunal found it was not appropriate to wait until the problem had materialized and CJ was denied transportation. As such, the request to expedite was allowed.

In a related interim proceeding, the applicant sought to add Stock Transportation (Stock) to the proceedings, and the respondent (the board) applied to remove the Toronto Student Transportation Group (TSTG) as a respondent.

The tribunal determined that it was appropriate to add Stock as a respondent. The applicants had alleged discrimination by both of the existing respondents and Stock. The applicants sought a remedial order to require the bus driver to help secure and detach the harness. As such, the tribunal found that Stock should be added as a respondent in this case.

The applicants opposed TSTG's removal, submitting that accountability between the board and TSTG was not clearly delineated. They alleged that TSTG's Operations and Safety

Manager was responsible for many events that had caused CJ's alleged transportation issues and that TSTG would have a role in implementing an accommodation plan (if the applicants were successful).

The board submitted that, as an unincorporated association with "no legal status beyond its members," TSTG was not an appropriate party. The board also submitted that including TSTG would be a roadblock to resolution or that its inclusion was unnecessary because the board was already vicariously liable for its actions. The HRTO rejected all of these claims. The fact that TSTG was an unincorporated association was not a reason to find it should not be a respondent. As well, the tribunal found it difficult to assume that the board would be vicariously liable for TSTG, and also stated that the effect of the absence of TSTG would be the opposite of that argued by the board: resolution would be more difficult. ■

HRTO finds Board did not meet child's needs

B.(L.) (Litigation guardian of) v. Toronto District School Board (2015 HRTO 1622) was an application to the HRTO alleging discrimination with respect to services because of disability. The applicant, L.B., was diagnosed with multiple disabilities, including learning disabilities, attention deficit hyperactivity disorder (ADHD), and mental health disabilities, including anxiety and depression. The applicant was a student in a large collegiate institute operated by the respondent, Toronto District School Board (TDSB or the board).

The applicant alleged discrimination due to the alleged failure of the board to accommodate his disability-related needs to the point of undue hardship. It was argued that, as a result of the alleged lack of appropriate and needed accommodations, his mother had no option but to remove him from the school and enrol him at a private boarding school. The applicant claimed that due to his disabilities, he needed the regular involvement of a school staff member or mentor to motivate him to attend school regularly. The applicant stated that the current private school placement accommodated his needs and allowed him to overcome his anxiety by focusing on a key motivator — hockey.

The respondent claimed that the applicant was accommodated appropriately within the board's mandate under the Ontario *Human Rights Code*, R.S.O. 1990, c. H-19, and the *Education Act*, R.S.O. 1990, c. E-2. The respondent argued that the accommodations sought by the applicant were services that were outside the legislated mandate of a school board in Ontario.

During L.B.'s grade six year, a social worker met with the applicant to provide counselling and support. In addition, one of the teachers voluntarily agreed to go to the applicant's home first thing in the morning on several occasions to encourage him to get up and get to school, resulting in L.B.'s attending somewhat more regularly.

In grade nine, L.B. was missing school due to his depression and anxiety, and he stopped attending school during the winter months. The vice-principal agreed to explore potential supports, such as peer mentoring, peer tutoring and providing L.B. with some sports leadership-related opportunities that might motivate him. There was no evidence that there was any immediate follow up with L.B.'s teachers from the vice principal. In February 2013, S.B., the mother of L.B., met with the school guidance counsellor and special education teacher. S.B. informed them that she was exploring the option of sending L.B. to a private boarding school that focused on hockey. She asked if the

school could complete a recommendation form for L.B.'s admission to the private boarding school, and the guidance counsellor completed the form. The guidance counsellor confirmed that she did not suggest any alternative placements or programming.

In April 2013, L.B. transferred to a private boarding school. He continued to receive counselling and treatment as needed. His involvement in sports acted as a motivator for his attendance. Educational accommodations benefited L.B., including smaller class sizes, as well as access to 1:1 resource assistance and tutoring from teachers. The residential setting reduced the need for "getting to school" on a daily basis. However, his attendance issues were not fully resolved.

Quoting its interim decision, the HRTO upheld the following principles in the context of a school board accommodating students with disabilities:

"(a) School boards have an obligation under the *Code* to accommodate their students with disabilities to the point of undue hardship, regardless of whether the students are receiving any medical treatment in the community or not;

(b) School boards cannot order or demand of parents to place their children into residential psychiatric treatment programs and cannot deny or withhold accommodations to the point of undue hardship on the grounds that the student should be in such a program. While I have not evidence to show that this was the case here, that does not alter the principle;

(c) School boards have an obligation under the *Education Act* to provide appropriate special education placements, programs and services to their exceptional students. Parental conduct or lack of parental authority cannot be used as a justification for not meeting an exceptional student's needs; and

(d) …a parent's 'fierce advocacy' for his or her child must not and cannot prevent a school board from accommodating the child's needs to the point of undue hardship" (para. 77).

The HRTO found that L.B. was a person with a disability, as defined by the *Code.* The applicant's position was that the respondent should have provided a residential school placement within its jurisdiction with a hockey focus or that it should have provided a daily staff member escort to get the applicant to school. The HRTO had to determine whether this was a "service" mandated under the *Code* obligations of school boards.

The HRTO agreed with the board that establishing or providing funding for a residential school (with or without a hockey or sports focus) is not within the school board's legislated mandate and is not a "service" for the purposes of the *Code.* Furthermore, section 264(1) of the *Education Act* does not require teachers to go to the homes of pupils to motivate them to attend school. The primary responsibility for ensuring that a child attends school resides with the children and their parents. The HRTO concluded by stating that a school board has no obligation to develop and provide a service that is wholly different from their legislated mandate.

Nevertheless, the HRTO found that L.B. had established a *prima facie* case of discrimination. L.B. did not receive access to educational services offered by the board and his disabilities were a factor in this treatment. The respondent had not accommodated the applicant to the point of undue hardship in accordance with the *Code* and its obligations under the *Education Act.* The HRTO found that the respondent failed to provide services and supports to the applicant

that were or should have been reasonably available, such as attendance counselling, as well as in-school special education programming support. If provided, the applicant could have remained within the public educational system. The HRTO noted that TDSB delayed referring the applicant, for almost a full year, to appropriate support services such as potential alternative placements, including section 23 programs or a provincial demonstration school for students with severe learning disabilities and ADHD. The HRTO held that this omission could be deemed to be discriminatory because substantially delaying access to these services could amount to a substantive breach of the *Code.*

The applicant had requested a monetary remedy of $50,000 in compensation for injury to his dignity, feelings and self-respect. The HRTO awarded $35,000. The HRTO did not award compensation representing tuition and all other costs for L.B.'s attendance at the private elite sports boarding school, because this was not a service provided by school boards. The request for reconsideration was denied. The interim decision of the HRTO in this case was reviewed in the 2015 *Education & Law Journal* Annual Review. ■

Tribunal refuses interim order re service dog in school

In *JF v. Waterloo Catholic District School Board* (2016 HRTO 953), the applicant alleged discrimination with respect to goods, services and facilities because of disability. The applicant was diagnosed as being on the autism spectrum. The applicant alleged that the respondent violated his rights under the *Ontario Human Rights Code* (RSO 1990, c. H.19) (*Code*) because it refused to allow him to attend school with his Autism Service Dog. The respondent denied that it failed to accommodate the applicant's disability-related needs, and stated that the applicant could be accommodated without his Autism Service Dog. In this particular hearing before the Human Rights Tribunal of Ontario (HRTO), the applicant requested an interim remedy of an order requiring the respondent to allow the applicant to attend school with his Autism Service Dog. The applicant's parents were prepared to facilitate the dog's attendance by providing the necessary documentation, equipment and advice regarding the animal's needs. A term of the order that the applicant sought required the respondent to assign an educational assistant to be the handler for the Autism Service Dog with primary responsibility for the dog during school hours. In addition, the respondent would be responsible for training the educational assistant to be a handler.

The applicant filed declarations which identified the applicant as a flight risk and stated that the applicant's Autism Service Dog would significantly mitigate the risk that the applicant would bolt from situations when faced with challenging or frustrating circumstances. The applicant's father stated that without his Autism Service Dog at school, the applicant often returned home in a highly agitated state and experienced meltdowns for extended periods. Other declarations stated that the applicant's Autism Service Dog assists him in dealing with new environments and regulating his emotions.

The respondent submitted a declaration which stated that:

- the applicant's behaviour is successfully regulated while at school through appropriate special education programs;
- the applicant has never displayed behaviour indicating that he is a flight risk at school;
- the applicant is making progress at school;
- the applicant has never displayed behaviour that was out of control or that put himself or others at significant risk of harm while at school;
- the respondent has implemented strategies which have successfully addressed situations where the applicant demonstrated anxiety; and,

- the respondent must consider the needs of staff and other students (e.g., asthma, allergies, anxiety regarding dogs, and cultural sensitivities) when assessing a request to allow a service dog into school.

The HRTO held that the evidence before it did not support the conclusion that the interim remedy requested was necessary to ensure that the applicant had access to education or to avoid harm to him while at school, as the application progresses. The HRTO noted that the material submitted by the respondent indicated that the applicant does not exhibit the behaviours sometimes observed at home or in the community at school. Furthermore, the HRTO stated that granting an interim remedy would require the respondent to assign an employee to handle the applicant's service dog, which it may not be entitled to do. The HRTO noted that introducing a dog into a classroom setting may have adverse effects on the other students and staff that cannot be assessed at this time. The request for the interim remedy was denied. The HRTO stated that "this conclusion does not mean that the [a]pplication does not have merit, but that the balance of harm or convenience does not favour granting the interim remedy" (para. 10).

Although it is an interim decision, this is an interesting decision on the issue of refusing to permit a service dog into school. The HRTO's final decision could have a significant impact on school boards by setting parameters for service dogs in schools.

The tribunal may have reference to another decision involving competing rights and service animals heard by the British Columbia Human Rights Tribunal, which was reviewed in "BCHRT finds taxi driver had legitimate reasons to refuse to transport guide dog", KC Education Law Newsletter, March 2016. In that case, the taxi driver's allergy to dogs was juxtaposed with the rights of an individual who was legally blind and required a guide dog. A similar balancing will be required if the JF case proceeds to a hearing. ■

Tribunal strikes application due to lack of link to Code

In *AG v. Toronto District School Board* (2016 HRTO 917), the applicant's mother (his litigation guardian) made an application on his behalf when he was in grade one. The litigation guardian alleged that since the applicant started attending the school operated by the respondent school board, his teachers and principals targeted him and treated him unfairly because of their stereotypical view towards black boys and Caribbean ethnicity. The Human Rights Tribunal of Ontario (HRTO) directed that a summary hearing be held to determine whether the application should be dismissed. The HRTO found that the application should be dismissed on the basis that it has no reasonable prospect of success under the *Human Rights Code* (RSO 1990, c. H.19) (*Code*).

The applicant made a number of allegations including, but not limited to the following:

(1) the applicant's suspension after he pushed two students was discriminatory because in a separate incident believed to involve bullying, the children were not suspended because they were not black;

(2) the applicant was the only child not allowed to attend a school trip to Legoland without a parental chaperone and was the only black child in the class;

(3) the school's principal suggested the applicant change schools because he was a child of colour and because of stereotypical views about black boys held by his teachers;

(4) one of the applicant's teachers suggested that the applicant could benefit from a "positive male role model" on the basis of stereotypes of black boys having behavioural problems because they come from fatherless homes;

(5) the teacher's refusal to grade the applicant's unfinished work was discriminatory and hostile; and

(6) the respondent contacted the Children's Aid Society (CAS) out of malice and continued to push for CAS involvement to validate and attribute its own prejudicial and discriminatory views of black boys.

The respondent denied all allegations and submitted that the litigation guardian failed to point to any evidence that would link the allegations to the *Code*. The respondent submitted that the allegations were mis-statements of what had occurred, and noted that the litigation guardian did not witness any of the events she described in the application.

The HRTO recognized that racism, and in particular anti-Black racism, is existent in society and has been recognized by both the HRTO and the courts. However, the HRTO noted that an applicant cannot rely on the existence of racism in the absence of any other evidence, to establish that race was a factor in the respondent's conduct.

The HRTO dismissed the application as the applicant was unable to point to any evidence, beyond suspicions, that could make out a link to the *Code*. The HRTO did affirm that it is often difficult to establish direct evidence of racism because it may be subtle and nuanced. The HRTO noted that in cases of racism, reasonable inferences can be drawn from circumstantial evidence which establishes that race is more likely than not one of the factors associated with the conduct in question. ■

Court finds CFSRB acted with bias

In *Children's Aid Society of the United Counties of Stormont, Dundas and Glengarry v. SVD* (2016 ONSC 350), the Divisional Court conducted a judicial review of two Child and Family Services Review Board (CFSRB) decisions made about the adoption and adoption probation of an infant child (CR). Although this decision is not directly applicable to education, the review of a decision of the CFSRB is.

Two of the applicants requested an order to quash the decision or, in the alternative, to undertake a new hearing with a newly constituted panel. The applicants claimed that the chair had compromised the appearance of fairness in the proceedings through uneven treatment of the parties and by taking an over-involved role as a quasi-advocate instead of a neutral arbiter. As such, the judicial review applications were based on the CFSRB's conduct giving rise to a reasonable apprehension of bias which rendered the decisions unreasonable.

Three separate parties were involved in the dispute: the Children's Aid Society (the CAS), Mr. and Ms. VD and Mr. and Ms. C. Mr. and Ms VD were initially approved to have a foster home with the possibility to adopt, should a child be available to adopt, and CR was placed in their care. CR had a complex medical and health history, including having been diagnosed with slow-growth velocity and having difficulty feeding. The CAS later received a report from a nurse at the hospital that expressed serious concerns about CR's health, feeding and medication. The CAS removed the baby from the VDs' care and placed him in Mr. and Ms. C's foster home.

Mr. and Ms. VD asked the CAS to review its decision, which it did. The CAS received other medical information and agreed to return CR to the VDs' foster home, placing conditions on the return related to working with the CAS and following medical recommendations. The return did not ultimately occur because the VDs insisted that CR first see a medical professional before returning to their home. The CAS would not agree that the child needed to see a doctor because he had been seen recently and was to be seen again soon. The CAS returned CR to Mr. and Ms. C's foster home where the child stayed until the CFSRB decision.

CR was subsequently found to be a child in need of protection and was made a Crown ward. There was no appeal, and when the appeal period expired, CR was legally available for adoption. The child was placed on adoption probation with Mr. and Ms. C, based on a signed agreement. The VDs also applied to adopt CR. The CAS completed a new home study of Mr. and Ms. VD's home and recommended that their application to adopt be denied.

The VDs applied for a review of the decision to deny their application. As a result, the CAS informed the Cs that it was terminating their adoption placement as a result of the VDs' application. The Cs then applied to the board for a review of that decision.

The court first summarized the legal test for a reasonable apprehension of bias, set out in *Committee for Justice & Liberty v. Canada (National Energy Board)* ([1978] 1 SCR 369). The test is based on what "an informed person, viewing the matter realistically and practically — and having thought the matter through — would conclude. Would he think that it is more likely than not that the decision maker whether consciously or unconsciously would not decide fairly" (para. 20, citing *Committee for Justice & Liberty*, p. 394).

The court clarified that the threshold for finding a reasonable apprehension of bias is high because there is a strong presumption that the trier of fact is impartial. The test requires a highly fact-specific inquiry whereby the impugned hearing would be assessed in its totality (instead of examining specific and isolated incidents).

The CAS, along with Mr. and Ms. C, claimed that the chair compromised the appearance of fairness and demonstrated a reasonable apprehension of bias. The CAS cited multiple examples of the chair's questioning of society witnesses in a cross-examination; refusing to call a witness or examine another witness; and the board's calling and manner of questioning of its own witnesses. Mr. and Ms. C also alleged that the chair's questioning of Mr. C was adversarial and not a neutral intervention to clarify or expand gaps or discrepancies.

The CFSRB responded that the interventions were not demonstrative of bias. The CFSRB argued that the best interests of the child are paramount during the proceedings, and the CFSRB claimed that the primary duty of fairness is owed to the child and not to the parents. The VDs also submitted that because they were self-represented, the CFSRB had to participate to discover all of the pertinent information, and to avoid prolonging the hearing.

The court then reviewed the case law for other considerations to determine whether there was a reasonable apprehension of bias. It considered the recent case of *Clayson-Martin v. Martin* (2015 ONCA 596), which was a high-conflict custody trial in which one party was self-represented. The Court of Appeal in *Clayson* looked to several factors that demonstrated reasonable apprehension of bias, including that the trial judge treated the parties' evidence unevenly; failed to take into account important evidence supporting one side, although generously overlooking inconsistencies in the other side; stepped out of the role as an arbiter to become an advocate for one party; made negative findings of credibility through cross-examining witnesses or questioning witnesses to fill in one party's testimony; and generally appeared to favour one version of events over the other party's when questioning witnesses. The court found that the conduct identified in *Clayson* had occurred in the case at hand.

The court found the CFSRB demonstrated a reasonable apprehension of bias through its

conduct and participation in the proceedings. It found the CFSRB had ignored relevant evidence and inconsistencies in evidence. The court went through a detailed analysis of the entire transcript and found direct references to the uneven treatment in the questioning of the CAS witnesses and Mr. and Ms. C. For example, Mr. and Ms. C were repeatedly questioned about their history and experiences of violence and the current implications for their childcare abilities. Although Ms. VD had experienced similar abuse, her history was ignored and there was no assumption that her experiences would impact her ability to parent.

The CFSRB's treatment of the CAS witnesses was also called into question. The court specifically examined part of the transcript where the board forced a witness to answer with "yes," "no" or "I don't know," and where it cross-examined on the witness's testimony. The court noted this was especially inappropriate because the "[q]uestions put to her were not simple questions. Often they were compound, in that they included more than one question or premise that underlay the actual question. A witness should not be limited to answer this type of question by a yes, no or I don't know answer" (para.88).

The CFSRB submitted that the CAS and the Cs waived any entitlement to allege reasonable apprehension of bias, because the objections were not made during the hearing. However, the CAS had brought a motion during the trial seeking recusal based on reasonable apprehension of bias during the trial, which the CFSRB dismissed. The court noted that although it may have been more appropriate for counsel to object during inappropriate questioning at the time, it appears that the objections would not have improved the record. When the objections were raised before the CFSRB, the CFSRB had not changed its conduct in response.

The court found that the extremely high threshold was met, and there was a reasonable apprehension of bias: "an informed person would more likely than not conclude that the decision maker would, and here the submission is unconsciously, not decide the case fairly" (para. 128). As such, the court ordered the remedy of a new hearing before a newly constituted panel. Relying on the finding in *Clayson*, the court found that a new hearing may resolve the matter more quickly and efficiently.

In *Clayson*, the Court of Appeal had ordered a new trial, but directed that there be no focus on events that had been the focus of the first trial. In this case, the court found that approach to be appropriate. The court ordered that a newly constituted panel would decide the matter by looking at the current circumstances of the child, the current best interests of the child and the current ability of the prospective parents. The court explicitly stated that the new panel would not re-try events leading to the removal of the child from the VDs' home and to the placement with the Cs.

Finally, the court found that the CFSRB's decision was unreasonable. The decision should have encompassed the child's current circumstances, but most of the inquiry had focused on the care provided up to that date or the CAS's decisions that were made earlier in the year. The CFSRB relied on *Family, Youth and Child Services of Muskoka v. DM*, (2010 ONSC 6018 (Div. Ct.)) (*Muskoka*) to explain its approach. However, by focusing so significantly on whether it had been in the child's best interest to remove him from the VDs' home, the board may have gone beyond *Muskoka*. The court referred to *Muskoka* and stated that, "the authority of the [b]oard to determine what action is in the child's best interests is confined by the decision under review; the [b]oard does not have *parens patriae jurisdiction* to

determine a child's best interests in relation to any or every action taken by a [s]ociety" (para. 138).

The CFSRB did not focus on the child's current best interests and needs nor was the focus on the current ability of each adoptive parent, which should have been the primary focus in reviewing the decisions. ■

CFSRB makes reference to UNCRC

In *Appellant v. Thames Valley DSB* (2015 CFSRB 20), the Child and Family Services Review Board (CFSRB) claimed jurisdiction to review a decision of a discipline committee to uphold a suspension. The pupil had been suspended for 20 school days, and the principal recommended that the trustees' discipline committee consider an expulsion. The trustees held an expulsion hearing and chose not to expel the student, but instead upheld the suspension and offered two options: to remain at the same school and have access to other programs, or to enrol in another school in the school board. The student's family attempted to appeal this decision, but were told that there was no right of appeal for a suspension. The CFSRB heard the appeal, however, and decided that the trustees had in effect expelled the pupil from his school.

The CFSRB considered the *Education Act* and found that the behaviour, discipline and safety provisions of the Act mandate that the trustees can choose between two options. Under section 311.4, if the pupil is not expelled, the trustees can confirm, quash or shorten the duration of the suspension. Alternately, if the pupil is expelled, then the "school board must assign the pupil to another school, provide a notice of the expulsion that give reasons for the expulsion and the right to appeal including the steps to be taken for the appeal" (para. 11).

The school board submitted that it had the authority to create the remedy under section 311.3 of the *Education Act*. This section instructs that an expulsion hearing "shall be conducted in accordance with the requirements established by board policy." The provision was interpreted by the trustees in conjunction with their policy which allowed the discipline committee to "make such orders as the [d]iscipline [c]ommittee considers appropriate."

The CFSRB did not accept this interpretation of the Act, given that it expanded the school board's existing powers. The CFSRB found that the trustees' role was limited to deciding whether or not to expel the pupil. The CFSRB found that the legislation placed clear limits on the trustees' authority during the expulsion hearings and the school board could not redefine those limits: "The legislators and not school boards are the only ones with authority to add to the dispositions available to the trustees at an expulsion hearing" (para.22).

In addition, the CFSRB found that the discipline committee's decision was a suspension in name, but an expulsion in effect. A suspension did not guarantee a right of appeal if upheld by a board of trustees, unlike an expulsion. The CFSRB found that issuing a suspension in name only had a greater legal implication. The *de facto* expulsion would violate a child's rights guaranteed by the United Nations Convention on the Rights of the Child (*UNCRC*). The convention demands that every child "be provided the opportunity to be heard in any judicial and administrative proceedings …in a manner consistent with the procedural rules of national law" (para. 24 citing Article 28.2). The suspension was a *de facto* expulsion that did not allow for an appeal. Suspensions that are upheld by trustees may not be appealed; only expulsions may be appealed to the CFSRB. As such, imposing the "suspension" would forego a

right to appeal and contravene the pupil's right to be heard, as stated in the *UNCRC*. The CFSRB determined that such a result would be inconsistent with children's rights.

The CFSRB took jurisdiction to hear the appeal, but the parties later resolved the matter through a settlement facilitation process. ■

IPC allows school boards to rely on information from OSR without consent from student or parent for Tribunal Hearing

In two recent decisions, the Information and Privacy Commissioner of Ontario (IPC) ruled that parts of a student's Ontario Student Record (OSR) can be used in Human Rights Tribunal of Ontario (HRTO) proceedings without a student's or parent's consent, despite confidentiality provisions in the *Education Act*.

In *York Region District School Board*, (2016 OIPC No. 111) and *Hamilton-Wentworth Catholic District School Board*, (2016 OIPC No. 112), two different parents (complainants) filed similar privacy complaints with the IPC after the school boards disclosed information from a student's OSR. The complainants both claimed the information should not have been disclosed, based on sections 266(2) and 266(10) of the *Education Act*. The boards responded that the *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M-56 (*MFIPPA*) allowed relevant information from the OSR to be used in HRTO proceedings.

There were slight differences between the background facts giving rise to each complaint. In *Hamilton-Wentworth Catholic District School Board,* the complainant stated he was never asked to release his son's OSR, nor was he asked to sign a consent form for the OSR's release. The complainant eventually consented to use parts of the OSR, but maintained that the initial disclosure was inappropriate as it occurred without his consent.

In *York Region District School Board*, the complainant alleged that the board disclosed personal information from her son's OSR to its legal counsel. However, the complainant used a Brief of Documents for the hearing which included records from her son's OSR, when she filed the HRTO complaint. The board had also asked for the complainant's consent at multiple times during the proceeding, but the complainant repeatedly denied these requests.

In both cases, the HRTO issued orders indicating that the OSR records were material and that the complainants would need to consent to the information being used. If the party refused to consent, then the applications would be dismissed due to an abuse of process.

The IPC first looked at the relevant legislation, beginning with sections 266(2) and 266(10) of the *Education Act*. Section 266(2) of the *Education Act* states:

"A record is privileged for the information and use of supervisory officers and the principal and teachers of the school for the improvement of instruction of the pupil, and such record…

(b) … is not admissible in evidence for any purpose in any trial, inquest, inquiry, examination, hearing or other proceeding, except to prove the establishment, maintenance, retention or transfer of the record, without the written permission of the parent or guardian of the pupil or, where the pupil is an adult, the written permission of the pupil."

The complainants also relied on ss. 266(10) of the *Education Act*, which states:

"Except as permitted under this section, every person shall preserve secrecy in respect of the content of a record that comes to the person's knowledge in the course of his or her duties or employment, and no such person shall communicate any such knowledge to any other person except, … (b) with the written consent of

the parent or guardian of the pupil where the pupil is a minor; or(c) with the written consent of the pupil where the pupil is an adult."

The IPC considered these provisions in light of section 53 of *MFIPPA*, which addresses the relationship between *MFIPPA* and confidentiality provisions in other legislation:

"(1) This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

(2) The following confidentiality provisions prevail over this Act:

1. Subsection 88(6) of the *Municipal Elections Act*, 1996

2. Subsection 53(1) of the *Assessment Act*."

The IPC stated *MFIPPA* or the other legislation must explicitly state that the confidentiality provision will override *MFIPPA*. In this case, there is no mention in either piece of legislation that the confidentiality provisions in the *Education Act* prevail. As such, the IPC was not bound to consider those provisions when considering the validity of the OSR disclosure.

The IPC next considered section 51 of *MFIPPA*, which states:

"(1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

(2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document."

The IPC reviewed past decisions and found that if section 51 of *MFIPPA* applied, then the disclosure would not be affected by the provisions that govern the collection, use and disclosure of personal information.

In both cases, the IPC found that section 51 applied, because *MFIPPA* should not interfere with the use of documents in HRTO proceedings. Subsections 51(1) and (2) work together to make sure that disclosure is not prohibited in a way that prevents evidence from being used in a legal proceeding, where that information would otherwise be available.

The IPC also found that the boards had followed the HRTO's *Rules of Procedure*, and the HRTO performed the function assigned to it under its enabling statute. The HRTO already ruled that the OSR was properly admitted into evidence, and section 51(1) is clear that the IPC should not second-guess the HRTO's decision. As section 51(1) applied in the circumstances of these cases, *MFIPPA* "does not impose any limitation" on the Boards disclosing portions of the OSR (para. 25 of *Hamilton*, para. 32 of *York*).

The IPC also addressed potential solutions to avoid a similar situation in the future, by adding that the board should implement practices that would not depend on confirmation, after the fact, of its entitlement to rely on that material. For example, in the circumstances of the complaints, the boards could have sought an order from the HRTO regarding its use of information from the OSR prior to disclosing it to the HRTO. The IPC held that "such a course of action would have acknowledged the sensitivity of and statutory protection given to the information while simultaneously protecting the Board's right to rely on the information in order to respond to the Complainant's allegations" (para. 36 of *Hamilton*, para. 43 of *York*).

This case allows for exceptions under certain circumstances where a school board may disclose relevant parts of a student's OSR without consent, so long as the information is material evidence. The IPC recommended that school boards be pre-emptive by attempting to obtain the parent's consent or, failing that, seeking an order from the HRTO before using the OSR. ■

School boards can be held liable for negligence involving bullying

In 2014, Winston and Vania Karam (Plaintiffs) were successful in bringing a Small

Claims Court action for negligence against the Ottawa Carleton District School Board (board) and were awarded $5,000 in damages (*Karam v. Ottawa-Carleton District School Board*, [2014] O.J. No. 2966). The plaintiffs claimed the board failed to exercise the required standard of care towards the student, Winston, which is that of a careful or prudent parent, in relation to allegations of bullying. The board appealed and the matter was sent back to be retried.

The second trial took place on May 24, 2016 (unreported, May 24, 2016, Bansie, J.). The plaintiffs once again took the position that despite being aware of the bullying, the board failed to take action to protect the student and as a result of their failure to act they breached the standard of care owed to Winston.

The student transferred to the board from another district for the 2011-2012 school year. After starting school, the student formed a relationship with two male students which, over the course of the school year, allegedly became characterized by a pattern of alienation, physical abuse, verbal abuse, name calling and ridicule. The alleged bullying took place over an extended period of time and culminated in what was diagnosed as a panic or anxiety attack. The plaintiffs argued that the board, failed to provide the requisite standard of care required to be exercised by school authorities when providing for the supervision and protection of students for whom they are responsible, which is that of the careful or prudent parent. In order to be successful, the plaintiffs were required to prove on a balance of probabilities that the board breached the standard of care and that but for its actions or in this case inaction the harm in question would not have occurred.

The board took the position that there were isolated incidents between the plaintiff student and the other boys who were alleged to have bullied him, but that the board had not breached the requisite standard of care. Both the superintendent of the board and the school's guidance counsellor testified that they did not become aware of the situation until April of 2012. However, the court preferred the testimony of the plaintiff student and other witnesses, including school staff members, who testified that the bullying began much earlier and that school staff, including the guidance counsellor, were aware of the issues. Further, the court went so far as to call the evidence of Mr. D, the school's principal, and a witness for the board as "obtuse, rote and inconsistent." Considering the entirety of the evidence, the court held that there was enough evidence to meet the requisite elements of foreseeability and causation.

Regarding damages, the court held that there was no evidence presented that the student had suffered a physical or psychological injury despite the anxiety attack he experienced at school. Based on this lack of evidence, no damages were awarded for psychological or physical injury. However, damages were allowed for other expenses, including home schooling and self defense classes. The amount awarded was $3,086.00. We are not aware of any further appeal by the board.

This case stands for the principle that school boards can be held liable as negligent if they fail to uphold the requisite standard of care, which is that of a careful or prudent parent, when they are entrusted with the protection of student safety. Merely having a bullying policy will not be enough to avoid liability if school boards cannot ensure that staff members act prudently and promptly when dealing with matters of student safety. A school board will be vicariously liable for its staff if they fail to meet the standard of a careful or prudent parent.

The Small Claims Court decision in *Karam* was reviewed in the September 2014 KC LLP Education Law Newsletter: "Court awards damages for bullying". ■

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