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Education Law Newsletter

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IN THIS ISSUE —

Divisional Court provides guidance to IPRCs and the Special Education Tribunal

In *Kozak (Litigation Guardian (of) v. Toronto District School Board*, [2010] O.J. No. 3438, the Divisional Court unanimously upheld a decision of the Special Education Tribunal (the "Tribunal") with respect to the placement of the applicant, Jared, in a Special Education Class: Intensive Support Program at the Toronto District School Board ("TDSB").

Jared had been diagnosed with autism and was subsequently identified as an exceptional student. In June, 2003, an Identification and Placement Review Committee ("IPRC") was convened and Jared was placed half days in a special education class. However, his mother withdrew him, and he attended a child care centre for his Junior Kindergarten year. In Senior Kindergarten and Grade 1, Jared was placed in a special education class for children with developmental delays. In March, 2005, while in Senior Kindergarten, he began to receive Intensive Behavioural Intervention ("IBI"), a form of Applied Behavioural Analysis ("ABA"), at home from a private company. In Grades 2 and 3, from September 2006 to June 2008, Jared

was enrolled in his home school for half days and continued to receive IBI at home. In Grade 2 he had 50% withdrawal to the Home School Program ("HSP") for one-on-one instruction. In Grade 3, he had 75% withdrawal to the HSP. Throughout this time, staff consulted the Pervasive Developmental Disorder / Autism Spectrum Disorder Team ("PDD/ASD Team") at the TDSB due to concerns about disruptive behaviour.

On May 17, 2007, the Ministry of Education issued PPM 140, "*Incorporating Methods of Applied Behaviour Analysis (ABA) Into Programs for Students with Autism Spectrum Disorders (ASD)*" ("PPM 140"). PPM 140 requires school boards to offer special education programs and services to students with ASD , including using ABA methods where appropriate. It also requires that staff plan for transitions between various activities and settings involving students with ASD.

On June 13, 2007, a second IPRC was established. Jared was identified as "Communication: Autism" and "Intellectual Development Disability" and the IPRC recommended placement in a "Special Education Class: Intensive Support Program".

The applicant appealed the decision of the IPRC to the Special Education Appeal Board, which upheld the decision of the IPRC with respect to placement. The decision was approved by the TDSB. The applicant then appealed to the Special Education Tribunal. He sought continued placement in a regular class with withdrawal to the HSP. The applicant's mother and IBI therapist felt that he had been making strides at home and that placement in a regular class would allow him to practice social skills and have more educational demands placed on him. The evidence suggested that Jared experienced less anxiety and had fewer behavioural issues in his IBI sessions at home than he did in his regular school placement, where instances of aggression were more frequent. According to the expert evidence submitted by the applicant, success in the regular classroom placement was contingent upon upgraded ABA services in the school.

The Tribunal held a 5-day hearing *de novo* in which evidence of twelve witnesses was tendered. The Tribunal made several important findings of fact. The Tribunal found that the applicant's behaviour resulted in concerns for the safety of the applicant, other students and staff, and that the triggers and functions of this behaviour were not well understood by the applicant's mother or the school. The Tribunal also accepted that integration in a regular class for the purpose of socializing was not a compelling reason for designating that placement as "*his social adjustment [would] be inhibited and his academic progress [would] be hampered until his problem behaviours are brought under control*" (para. 23). The Tribunal recommended an educational assessment be administered so that an educational program could be put in place. The applicant's academic functioning was estimated to be 2 to 5 years behind that of his peer group.

The applicant argued that the ABA being implemented in the school was inadequate. The Tribunal found that ABA was being implemented adequately in the school and by the TDSB. The Court held that there were reasonable grounds on which the Tribunal based this decision.

The Tribunal considered the various placement options available to the applicant, namely, a regular class placement, an HSP class placement, and an Intensive Support

Placement (ISP), and found that placement in an ISP class was appropriate and in the best interest of the applicant.

The Court held the Tribunal to the reasonableness standard of review. The Attorney General of Ontario intervened in the application for judicial review with respect to the application of human rights legislation.

The issues before the Court were, firstly, whether the Tribunal had failed to apply section 17(1) of Regulation 181/98, *Identification and Placement of Exceptional Pupils* (the "Regulation"). Section 17(1) of the Regulation provides: "*When making a placement decision on a referral under section 14, the committee shall, before considering the option of placement in a special education class, consider whether placement in a regular class, with appropriate special education services, (a) would meet the pupil's needs; and (b) is consistent with parental preferences.*" The second issue before the Court was whether the Tribunal had failed to satisfy the statutory requirement to assign a placement because it failed to specifically define the programs and services to be provided in the placement.

With respect to the first issue, the applicant submitted that, correctly applied, s. 17(1) of the Regulation would presumptively have resulted in the applicant's placement in regular class with appropriate special education services. The applicant argued that the Tribunal should first have identified appropriate special education services for the applicant and then addressed whether regular class placement with those services would meet the child's needs. The applicant submitted that the Tribunal failed to consider the first issue.

The Court held that the Tribunal had not erred in its application of section 17(1) of the Regulation for four reasons. Firstly, the Court held that the section did not create a presumption in favour of a regular class placement. The Court noted that there was nothing in the legislation to indicate that the legislature intended to displace the best interest of the child test set out by the Supreme Court of Canada in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 ("*Eaton*"). In that decision, the Supreme Court held that the test for best interest of the child does not include a presumption in favour of integration. The Court held that section 17(1) was intended to provide a roadmap for the Tribunal to use in its decision making and was intended to be in furtherance of the approach provided by the Supreme Court in *Eaton*. The Court outlined the application of section 17(1) at paragraph 58:

Under section 17(1), in accordance with Eaton, supra, the Tribunal must first identify the actual characteristics of the exceptional student and the appropriate special educational needs required by the student. Based on that determination, the Tribunal must then address whether integration in regular class is in the best interests of the student in that it will "enable " [the exceptional student to] access to the learning environment [the student] need[s] in order to have an equal opportunity in education" (see para. 69 in Eaton, supra). If the Tribunal determines that integration will not have this effect, then the Tribunal must address the other placement options that will best satisfy this standard. Such an approach may provide a "decision-tree", but it does not create a presumption at law in favour of integration in a regular class.

Secondly, the Court found that the Tribunal had reached its decision in accordance with

the principle of the best interest of the child and the approach mandated by s. 17(1). Specifically, the Tribunal had first identified the "*relevant characteristics of the applicant for purposes of the placement decision*" (para. 60), including problem behaviours and associated safety concerns and level of academic achievement. The Tribunal found that social and academic learning would be hindered until the applicant's behaviours were under control. The Tribunal then identified ABA as the appropriate special education services for the applicant. The Tribunal next considered the various placement alternatives, addressing regular, HSP and ISP placement options. The Tribunal then applied the best interests of the child test.

Thirdly, the Court held that although the applicant had not expressed the argument clearly, the implicit position was that "*the programs and services provided to him by the TDSB did not satisfy the requirement of PPM 140 as ABA programs and services and that any consideration of placement in a regular class with access only to such services as are currently provided, rather than services that can be properly characterized as ABA programs and services, is inherently flawed*" (para. 64). The applicant argued that, with additional ABA services and programs at the school, the applicant could be placed in a regular class setting. The Tribunal found that ABA was being adequately implemented in the school and that the staff members were well versed in ABA methods, continued to receive assistance from the PDD / ASD Team at the TDSB, and continued to have educational opportunities to further their familiarity with ABA methods. The Tribunal was entitled to take into consideration in applying s. 17(1) the ABA services and programs offered at the school, and was not required to assume that additional services were being provided. Further, the Tribunal had no authority to order the TDSB to provide special education services and programs unless the order was to the extent that the requirements of PPM 140 were not being met.

Finally, the Court held that section 1 of the *Human Rights Code*, R.S.O. 1990, c. H-19 (the "*Code*"), does not require the Tribunal to take additional or enhanced programs or services into account in applying section 17(1). Section 1 of the *Code* does not create a presumption in favour of integration to satisfy the duty to accommodate to the point of undue hardship. The Court found that the provision of ABA satisfied the duty to accommodate and the applicant had not identified any further services or programs that could be provided in furtherance of the duty to accommodate to the point of undue hardship. The applicant's expert had acknowledged that IBI services are not appropriately delivered by the school in a regular class setting.

With respect to the second issue, the failure to comply with requirements of a placement by not designating a specific special education class at a specific school. The Court noted that the term placement is not defined in the *Education Act*, R.S.O. 1990, c. E-2, nor does it indicate how specific the special education placement must be. The Tribunal had reasonably relied on a Ministry of Education policy that outlined five special education placement options in making its decision with respect to the applicant's placement. The Court also held that the Tribunal did not have legislative authority and was not required to order the applicant to attend a specific school or class. In addition, it was not necessary for the Tribunal to compare a specific special education class with a regular placement in order to determine that the former was more

appropriate for the applicant. Further, the TDSB was required to accommodate the student by providing ABA services in accordance with the requirements of PPM 140 whether he was placed in a regular classroom or in a special education classroom.

This decision provides guidance to IPRCs with respect to the application of section 17(1) of the Regulation as well as clarifying the powers of the Special Education Tribunal in making orders with respect to special education programs and services.

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Moore unsuccessful in appeal to B.C. Court of Appeal

In *British Columbia (Ministry of Education) v. Moore*, [2010] B.C.J. No. 2097 (B.C.C.A.), the British Columbia Court of Appeal dismissed an appeal from a lower court decision quashing the British Columbia Human Rights Tribunal's decision that the School District and Ministry of Education (Ministry) had discriminated against a student, Moore, with special needs and other severe learning disabled students by failing to accommodate their learning disabilities in the provision of educational services contrary to s. 8 of the *Human Rights Code* (British Columbia), R.S.B.C. 1996, c. 210 ("*Code*").

Moore, filed two human rights complaints on behalf of his son, Jeffrey, a student with above average intelligence and dyslexia, alleging discrimination on the basis of mental disability. The first complaint, filed in May 1997, was against the School District and the second, filed in August 1999, was filed against the Ministry. Both complaints alleged individual and systemic discrimination by the School District, acting on behalf of the Ministry, for failing to identify Jeffrey's special needs early enough and failing to provide supports that Jeffrey, as well as all children with severe learning disabilities, needed to access their educational services.

The Tribunal's decision, released in 2005, concluded that there was evidence to support discrimination as alleged by Moore and that the School District and the Ministry had failed to justify that discrimination. The Tribunal found that Jeffrey was not provided with the level of support that he needed at an early stage and that he should have been provided with an intensive program as soon as his needs were identified. For a detailed review of the British Columbia Human Rights Tribunal decision in 2005, please see "B.C. Human Rights Tribunal finds liability against both school board and province in special education case", KC Edu-Law Newsletter, June 2006, Volume 4, Issue 2.

The School District and the Ministry were successful in their appeal to the B.C. Supreme Court of the Human Rights Tribunal's decision. The Court found that the Tribunal erred in finding discrimination in the absence of evidence of disparate treatment. For a detailed review of the lower court's decision, please see "Discrimination Case Quashed by B.C. Court" in KC Education Law Newsletter, Fall 2008.

Moore appealed the Court's decision to the B.C. Court of Appeal. The Court of Appeal held that the District, by closing the DC1 program, did not deny Jeffrey, nor other students with severe learning disabilities, an accommodation or educational service or did the District discriminate against him or any other student in that regard. The Court of Appeal agreed with the lower court on a number of its findings with respect to its

discrimination analysis, including that the service at issue, was special education services provided to special needs students; and that the appropriate comparator group, was special needs students other than those with severe learning disabilities. Also affirmed by the Court of Appeal was that the benefit provided by law was general education. The Court of Appeal found that Jeffrey and other severe learning disabled students were given the same opportunity to receive a general education as was given to all other students. It was not proven, as alleged by the appellants, that severe learning disabled students, including Jeffrey, received less intensive or effective remediation after the closure of DC1. The Court of Appeal agreed with the District that following the closing of DC1, the District took reasonable steps toward remediation in accordance with the treatment theories available at the time.

The Court of Appeal reaffirmed that the standard of accommodation required of the District was reasonableness; and that the provision of services for students with special needs could not be measured against a standard of perfection, but rather a conscientious and reasonable attempt to identify the condition and address the special needs. Finding the District's actions reasonable in the circumstances, the Court of Appeal held that there was no denial of service or discrimination with respect to its delivery.

Similarly, with respect to the Ministry, the Court of Appeal held that there was no basis for finding discrimination against the Province in the absence of such a finding against the School District.

Interestingly, although at this point this case has been before the courts for over 14 years since the filing of the first human rights complaint, it remains outstanding, as an application for leave to appeal to the Supreme Court of Canada was filed by Moore on January 11, 2011.

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Niagara school closing upheld

In *Friends of Niagara District Secondary School v. Niagara District School Board*, [2010] O.J. No. 3932, a group of students brought a motion for an injunction pending the hearing of their application for judicial review of the decision of the respondent District School Board of Niagara to close the students' school, Niagara District Secondary School. The Board had decided on June 17, 2008 to close the School, effective August 31, 2010, if enrolment did not reach 350 students.

The students' motion was dismissed due to delay. The Court noted that it is "*well settled law that delay may defeat an application for Judicial Review. Here, the decision to close the school occurred in June 2008. Only two years later in June 2010 was the application launched and notice of this motion given.*" (paras. 6, 7) The evidence indicated that, instead of commencing potentially expensive legal proceedings, the students had sought several other means to have the matter reconsidered. However, every attempt was defeated by the Board of Trustees. The students had attempted to have the Minister of Education intervene, but the Minister declined. The Court held that the reluctance of the students to incur the expense of commencing legal proceedings was not a sufficient explanation for the two-year delay.

There was no issue of procedural fairness in the process undertaken by the Board. The Board had established the Niagara-on-Lake Accommodation Review Committee to deal with the question of the future of the school, and numerous public meetings and consultation meetings had taken place.

The Court noted that all of the students had been accommodated by being provided an opportunity to attend a school of their individual choice, selected from a group of four choices. In addition, bus routes had been modified and all former school administrative and professional staff had been reassigned.

The Court concluded that *"the decision was an administrative one taken in an atmosphere of complete procedural fairness by officials elected to do exactly what they did – make a difficult decision."* (para. 60)

While the students should be commended for their efforts, the decision to close a school is one that effects all students of a school board, not only those who attend the school to be closed, and consideration must be given to the greater good.

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A caring response might have avoided action

Allegations of negligence were brought by a student against a school board in *Gemelus (Litigation guardian of) v. Ecole Secondaire Catholique Renaissance* [2010] O.J. No. 3830. The student alleged that the injuries she suffered while participating in a basketball drill at her secondary school were caused by the negligence of the school board or by those for whom the school board was vicariously liable. The student had fallen while participating in the drill, fractured a bone in her leg and partially tore her anterior cruciate ligament. With limited assistance, the student crawled to a nearby bench and remained there for the remainder of the class. The defendant school board brought a motion for summary judgment.

The Court granted the school board's motion for summary judgment. The school board's evidence indicated that the gymnasium floor was fairly new and was swept daily. The evidence also indicated that the basketball drill was safe and the students were properly instructed. Based on this evidence, the Court held that the school board had discharged its evidentiary onus, and therefore, the burden shifted to the student to demonstrate that there was a chance her claim could succeed. The Court found that there was no evidence to suggest that the school board or those for whom it was legally responsible caused or contributed to the student's injuries. The student was unable to recall anything unusual about the gymnasium floor, and she had no explanation for her fall.

The Court concluded that the student simply lost her balance and was unable to recover. However, the Court also noted distain at the school's response to the fall, stating: *"could have shown greater sensitivity to the student. She was left largely to fend for herself despite being in obvious pain…It seems clear the response was justifiably perceived by Ms. Gemelus and her mother to be uncaring. I cannot help but think a more appropriate and timely reaction to Ms. Gemelus' plight may have avoided this action."*

Often parents report that they proceeded with legal action because they feel that "no one cared". In the present case, it would appear that the Court agreed. Coming to a student's assistance and showing regret that

an accident took place, is always appropriate and should not be avoided for fear of litigation.

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Action resulting from expulsion partially struck

In *Thompson v. James Fowler Senior High School*, [2011] A.J. No. 27, a student appealed the chambers judge's decision to strike out portions of her Statement of Claim and to summarily dismiss other aspects of her action against her school and the Minister of Education that arose from her suspension and expulsion from her high school.

The student's claim arose from a fight that involved her and another student. A male student, accompanied by his mother and sister, reportedly threatened to "get her" as he walked by the student in school. When the male student subsequently walked by again, the student impulsively struck him after he reportedly threatened to "beat her up". Following the brief fracas that ensued, the student was suspended and later expelled from the school.

A hearing was convened by the Calgary Board of Education to review the suspension/expulsion. At the hearing, the student and her mother were unable to persuade the Board to overturn the expulsion, and as a result, the suspension and expulsion were confirmed. Arrangements were made for the student to attend another local high school, but the student's mother refused these arrangements due to an alleged concern for safety. The student missed several months of school while her mother attempted to register her at another school.

In the student's Statement of Claim, she sought monetary damages, and an order to make her academically whole, but not an order overturning the expulsion. The student alleged defamation, false imprisonment, assault, battery, malicious prosecution, negligence, fraud and breach of trust. The student alleged that the Board failed in its duty to provide her with a safe environment and to protect her while she was at school. With respect to the defamation allegation, the student alleged that the principal defamed her by making false statements to others that the she had been criminally charged.

The chambers judge struck the entirety of the Statement of Claim as against the Minister of Education, and struck the majority of the claims against other defendants. The only portions of the Statement of Claim that remained were the defamation allegation and the allegation that the school board failed to provide a safe environment. The chambers judge went on to summarily dismiss the defamation allegation, as a result of the appellant not providing sufficient particulars by way of affidavit evidence. The appellant appealed these orders.

The appeal was allowed in part. Several of the paragraphs from the appellant's Statement of Claim, that the chambers judge had struck, were reinstated. These paragraphs provided context to the allegation that the school board failed to provide a safe environment for the appellant. However, the Court found no fault in the remainder of the chambers judge's order, and therefore, the other claims, including defamation, fraud, false imprisonment, assault, battery and malicious prosecution, were found to have been properly struck. Similarly, the Court found the defamation claim was properly dismissed.

As a minor, the student, if charged criminally, would likely have been charged pursuant to the *Youth Criminal Justice Act* ("*YCJA*"), which protects a youth's right to confidentiality.

Administrators must be careful not to discuss criminal charges that have been laid or that might be laid in a youth matter.

Had the student been able to provide the Court sufficient evidence regarding the principal's alleged communications, the principal might also have breached the protections afforded to youth pursuant to the *YCJA*.

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IPC comments on standard applying in search for records

The issue of reasonable searches by an organization in response to an access to information request was the focus of an interim order of the Information and Privacy Commission (IPC) in IPC Interim Order MO-2581-I/December 15, 2010.

The request was made under the *Municipal Freedom of Information and Protection of Privacy Act* ("*MFIPPA*") for access to all personal information of the requester contained in any and all Toronto District School Board (the Board) records. This all encompassing request was filed by the requester who attended various Board schools between 1994 and 2008 and had concerns relating to the accuracy of her student records.

Following a decision letter from the Board to the requester outlining its response to the access request with the located records attached, the requester appealed the Board's decision advising that she believed additional records should exist, and that the Board failed to do a reasonable search.

In reviewing this issue, the Information and Privacy Commissioner noted that "*the Act does not require the institution to prove with absolute certainty that the records do not exist. However, in order to properly discharge its obligations under the Act, the institution must provide me* [the IPC] *with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request. A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request*" (p. 4).

Following an unsuccessful mediation of the issues and a review of written submissions from the parties, the IPC concluded that the Board had not conducted a reasonable search for records responsive to the appellant's requests. The Board's evidence with respect to the steps taken in the search was found to have insufficient detail and certain records provided in response to the request had a substantial number of pages missing without adequate explanation. The Board was ordered to conduct further focused searches and to provide a reasonable amount of detail regarding the results. The IPC also cautioned the appellant regarding the detailed but broadly framed request, and recommended that the appellant assist the Board in identifying the possible location of the records sought.

Searches pursuant to *MFIPPA* are costly both with respect to time and effort; however, consistent document retention strategies and expectations can significantly reduce the effort of staff.

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