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Education Law Newsletter

— September 2012 —

IN THIS ISSUE —

SCC confirms right of teachers to copy copyright materials for teaching

In *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, the Supreme Court of Canada ("SCC") held that teachers photocopying textbooks on their own initiative and instructing students to read the materials qualified as "fair dealing" under the *Copyright Act*.

Fair dealing allows users to engage in some activities which might otherwise amount to copyright infringement. Access Copyright, an organization representing authors and publishers of literary and artistic works, argued the photocopying did not constitute fair dealing. The appellant coalition of school boards and provincial ministries ("Coalition") argued the copying constituted fair dealing.

Both the Copyright Board ("Board") and the Federal Court of Appeal held the photocopies were made for the allowable purpose of "research or private study" under the *Copyright*

Act, but that the copying did not constitute fair dealing and was therefore subject to a royalty. The Coalition appealed to the SCC.

In explaining the concept of fair dealing, the majority of the SCC affirmed its previous two-part test for fair dealing set out in *CCH Canadian Ltd. v. Law Society of Upper Canada*, (2004). The first part of the test requires a determination of whether the dealing was for the allowable purpose of "research or private study", "criticism or review", or "news reporting". The second step involves assessing whether the dealing was "fair" according to the following factors: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.

In this case, the five justice majority of the SCC held the Board misapplied many of the fairness factors under the second stage of the above test. The majority therefore allowed the Coalition's appeal, and held the photocopying by teachers constituted fair dealing under the *Copyright Act*.

The majority opinion stated the Board erred in its approach to the "purpose of the dealing" factor under the second step of the test by focusing on the teacher's / copier's perspective. The Board concluded the photocopying was unfair because students did not request the photocopies, and teachers did not use the photocopied materials for their own research or private-study but instead distributed the copies to students for instructional purposes. Therefore, the Board held the photocopies were made predominately for the teachers' purpose of instructing students, and not for the purpose of students' private study. However, the majority held the purpose of the dealing factor should have been assessed from the students'/ ultimate users' perspective. The SCC held the copier's purpose will be relevant to the fairness analysis if the copier hides behind the shield of the user's allowable purpose in order to engage in a separate unfair purpose. However, in this case, the teachers did not have a separate ulterior or commercial motive when providing copies to students. Teachers were there to facilitate students' research and private study and to enable them to have the material they needed for the purpose of studying. The fact that students did not request the photocopied materials required for their own research and private study did not matter. The students instead relied on the guidance of their teachers.

The majority also held the Board misinterpreted the "amount of the dealing" factor by focusing on the aggregate number of pages which were photocopied. The focus of this factor should instead be on the question of what proportion of the text was photocopied. The fact that teachers photocopied a small portion of a text numerous times was irrelevant under this factor.

Under the "alternatives to the dealing" factor, a dealing may be found to be less fair if there is a non-copyrighted equivalent of the work that could have been used, or if the dealing was not reasonably necessary to achieve the ultimate purpose. In this case, the Board concluded the schools could have simply bought more original textbooks for students; however, in overturning the Board's decision, the majority held that buying books for every student was not a realistic alternative to teachers copying short excerpts to supplement student textbooks.

The final error of the Board was its approach to the "effect of the dealing on the work" factor, which assesses whether the dealing adversely affects or competes with the original copyrighted work. In this case, the majority held there was no evidence of a link between photocopying short excerpts and a decline in textbook sales. Moreover, it was difficult to see how such copying competed with the market for textbooks when the Board found that teachers' copying was limited to short excerpts of complementary texts.

In dissent, four justices of the SCC held that the Board made no reviewable error in principle when applying the fairness factors, except for its

application of the "effect of the dealing on the work" factor. While there was insufficient evidence to support the Board's conclusion that the teachers' photocopying competed with the original work to an extent that made the dealing unfair, the dissent held that no single fairness factor is determinative, and was therefore willing to uphold the Board's decision as reasonable.

While the decision favours teachers, the 5-4 split of the SCC is not an overwhelming endorsement.

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School Board ordered to adapt busing policies to accommodate students in joint custody arrangements

In *J.O v. London District Catholic School Board*, 2012 HRTO 732, the Ontario Human Rights Tribunal ("Tribunal") examined the relationship between school bus transportation services and the needs of a student whose parents were separated and shared custody. The Tribunal found that the London District Catholic School Board ("Board") had discriminated against the student on the basis of family status by refusing to allow him to take different school buses on different weeks.

The student, J.O., alternated between living with his mother and his father on a weekly basis in accordance with a shared custody agreement. Both parents' residences were located within the school's normal busing zone. The transportation consortium's policies only allowed for two possible arrangements: either students could be picked up and dropped off at the same address, or they could be picked up at a primary address and dropped off at an alternate address. If the latter arrangement was requested, however, the alternate address had to be used consistently every day of the school year regardless of the reason for the accommodation request.

In January of 2007, the parents requested that the Board allow J.O. to alternate between school bus routes on a weekly basis. The Board refused the request. Nevertheless, J.O. began taking different buses on alternate weeks without the Board's knowledge. The Board eventually discovered this practice and made several requests to J.O.'s parents that he stop alternating routes. J.O.'s parents ultimately made a formal request for accommodation regarding school bus services. The Board denied the request, citing safety, labour relations and operational concerns.

The Tribunal considered four questions:

(1) whether the Board's policy regarding bus routes was discriminatory;

(2) whether the policy was justified;

(3) whether the Board could have accommodated J.O. without undue hardship; and

(4) whether the Board met its procedural duty of accommodation, — i.e., its duty to make a good-faith effort to accommodate all students.

With respect to the first issue, the Tribunal found that the consortium's policy of refusing to allow a student to ride on alternating routes amounted to constructive discrimination because it imposed a substantial disadvantage on J.O. by reason of his family status.

With respect to the second and third issues, the Board's primary justification for maintaining their policy was that personalizing the school bus transportation system to provide services according to parents' needs would create an unacceptable level of risk and complication with respect to the already complicated task of transporting nearly 50,000 students to and from school on a daily basis. The Tribunal rejected this argument, noting that the Board had never performed a detailed evaluation of the risks

involved in accommodation. In the absence of concrete evidence, the Tribunal held that the Board's safety concerns were hypothetical and the policy was therefore not justified. In addition, the reality that J.O. had, in fact, taken alternate bus routes for over two years without incident supported the inference that the Board could have accommodated him without undue hardship.

In its analysis, the Tribunal gave considerable attention to the issue of age-appropriateness in relation to safety concerns. The Tribunal did not dispute that an alternating route arrangement may not be appropriate for a younger child as opposed to a high-school student. However, because J.O. was old enough to make decisions regarding his transportation, the issue of age-appropriateness was not determinative of the outcome in this case.

Regarding the fourth issue, the Tribunal found that Board had never properly considered the different potential strategies for accommodation or consulted with other transportation consortia with respect to their practices regarding joint-custody arrangements. Accordingly, the Tribunal held that the Board had breached its procedural duty of accommodation.

The Applicants did not request a monetary award and the Tribunal accordingly did not order the Board to pay any damages. The Tribunal ordered the Board to perform the following:

(i) amend their policies and procedures regarding school bus transportation so as to directly address the accommodation of individuals subject to custody arrangements that conflict with their Primary Address Policy;

(ii) retain the services of a consultant or lawyer with expertise in human rights and accommodation to advise with respect to the necessary policy amendments;

(iii) articulate the process that they would follow in addressing such individuals' accommodation needs; and

(iv) amend any information provided to students and parents regarding the availability of alternative busing arrangements to reflect the amended policy.

The Tribunal noted that the Board would be obliged to consider and investigate all requests for accommodation and to make and implement reasonable proposals to meet each individual's needs. However, the Tribunal acknowledged that the Board may not be able to accommodate every student without undue hardship and so some requests may be denied.

This case was the first in Ontario to consider the question of whether school boards and transportation consortia have a duty to accommodate children living in joint-custody arrangements who require flexible transportation. This case also underscores the importance of the procedural aspect of accommodation. In other words, this case serves as a reminder that the issue of **how** a school board responds to an accommodation request — i.e., what steps the school board takes to investigate the request and consider possible measures of accommodation — is a substantive requirement distinct from the issue of whether the school board ultimately grants the request.

School Board fulfilled duty to accommodate students with learning disabilities

In *D.S. v. London District Catholic School Board*, 2012 HRTO 786, the Ontario Human Rights Tribunal ("Tribunal") found that the London District Catholic School Board ("Board") had fulfilled its duty to accommodate D.S. and A.C., two students with ADHD and learning disabilities

enrolled in Our Lady of Lourdes Catholic School ("School").

D.S. attended the school for the first and second grades, after which he was withdrawn and homeschooled. He returned to the school three years later in September of 2005. Upon his return, D.S. initially attended school for half-days with the plan being that he would transition gradually to full-day attendance. His re-integration went extremely well. In early October of 2005, the Principal consulted with a number of individuals, including the Board's Special Education liaison, D.S.'s teachers, his parents, and his pediatrician. The Principal concluded that D.S. would benefit from full-day schooling and issued a formal requirement that D.S. either begin attending school on a full-time basis or recommence homeschooling. D.S.'s parents objected to the requirement.

The Tribunal held that the Board had not breached its duty to accommodate D.S. by requiring him to return to full-day schooling because neither the pediatrician nor any of the detailed reports regarding D.S.'s disabilities indicated that he was incapable of attending school on a full-day basis. **The Tribunal noted that a parent's belief regarding their child's needs, however well-intentioned, is not the same as the evidence of a medical or health practitioner.**

The Tribunal also disagreed with the assertion that the School failed to accommodate D.S. in 2005 when it refrained from seeking a formal designation for D.S. under the *Education Act*. The Tribunal noted that the School was not provided with a diagnosis of a significant learning disability until early 2006. **Moreover, the Tribunal stated that accommodation of a disability does not necessarily require a child to be designated as an "exceptional student" under the *Education Act*. The appropriate question is simply whether the student's needs were accommodated. The Applicant failed to meet the onus of providing adequate evidence as to D.S.'s needs and the specific manner in which those needs were not met**.

Unlike D.S., A.C. was identified by the School as an exceptional learner in 2003. In their Application, A.C.'s parents alleged that his teachers failed to consistently accommodate his needs and that the Board failed to provide A.C. with adaptive technology in a timely manner.

The Tribunal found that A.C.'s disability-related needs had been properly accommodated. The Tribunal refused to infer a lack of accommodation from the mere fact that A.C. had fallen two years behind grade level and continued to struggle with school work, stating that *"to draw such a conclusion would, in my view, conflate a child's results or achievement levels with the process of accommodating the child's needs in the classroom".*

The Tribunal held that a six-month delay in providing A.C. with trial access to transcription software did not constitute a failure to accommodate because A.C. had access to other software during the delay and the trial software was ultimately found to be inappropriate for his needs. In addition, the Tribunal held that a delay in providing A.C. with organizational software did not constitute a failure to accommodate. The software in question allows students to brainstorm, put their ideas on the screen, organize them and expand upon them in a piece of writing. During the delay, the teacher fulfilled those same functions when she helped A.C. brainstorm and organize his ideas using "mind maps" and "spoke and wheel" visualizations.

Finally, the Tribunal held that the act of switching to a leaner form of IEP did not, in itself, constitute a breach of the school's duty to accommodate A.C. Because there was no evidence that the change in the form of IEP resulted in a denial of accommodations to A.C., there could be no finding of discrimination.

This case clarifies that the question in disputes regarding accommodation under the *Human*

Rights Code is not whether more could have been done to assist the student with the disability, but whether there is evidence of (1) a specific need for accommodation arising out of the student's disability and (2) a denial of that accommodation by the School Board.

The case also confirms that formal identification under the *Education Act* is not required. The duty to accommodate exists without such identification.

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Tribunal dismisses student's allegation of discrimination related to re-entry after suspension

In *Ebrahimi v. Durham District School Board*, 2011 HRTO 2319, the Human Rights Tribunal of Ontario ("Tribunal") dismissed the Applicant's allegations of discrimination on the basis of family status and reprisal under the *Human Rights Code* ("*Code*") against Durham District School Board and J. Clark Richardson High School (collectively referred to as the "Respondents").

The Applicant, a grade twelve student during the period at issue, was arrested and charged with "possession of a controlled substance", "possession of a weapon dangerous to public peace" and "carrying a concealed weapon". The vice-principal discovered the Applicant had marijuana and drug paraphernalia in his pocket, as well as a BB gun tucked under his clothing when he and two friends arrived to school late after lunch. The school called the police, who laid charges against the Applicant. The Applicant was released from police custody on several conditions, including remaining 200 metres away from the school unless otherwise permitted in writing by the Principal, and refraining from having "communication or association" with the two friends with whom he had arrived late to school that day.

The Applicant's brother had spoken with both of the Applicant's friends that day and had secretly videotaped their discussion, in which one of the Applicant's friends appeared to admit he had given the Applicant the BB gun, while the other friend appeared to admit he had given the Applicant the marijuana and drug paraphernalia. After the principal issued a 20 school day suspension to the student, the Applicant's father and one of his brothers met with the vice-principals and showed them the videotape. The school notified the police and issued a 20 school day suspension to the friend who had given the Applicant the BB gun. The police did not lay any charges against the Applicant's friend and did not impose a condition on his friend to remain away from the school.

The Applicant was not allowed to return to school following his suspension and was home-schooled instead, due to the release condition which required him to stay within 200 metres of the school. The Crown Attorney's office and the Applicant's family asked for this condition to be removed, but the Respondents did not support the removal of such conditions.

The Applicant's brother had an argument with the Administrative Officer for the Board's Ajax/Pickering schools, whereby the Administrative Officer informed him that the Applicant could attend another high school within the Board. The Applicant began attending another school but attempted to attend the prom of his former school. The vice-principal of the school saw the Applicant and did not allow him to attend the prom. The Applicant then filed his Application stating that the Respondents had discriminated against him and *"subjected him to reprisal ".*

The Applicant noted in his Application that another student had been *"in the exact same situation"* as him but allowed back into his former school. The Applicant further stated that the vice-principal had taken advantage of the Applicant's father, as his father was not able to speak English fluently. In alleging that the Respondents had *"subjected him to a threat of reprisal",* the Applicant referred to the telephone conversation with the Administrative Officer and his brother. The Applicant alleged that the Administrative Officer stated to his brother *"that the word discrimination should not be thrown around"* and that he could also *"prevent the applicant from ever returning to school".*

The Respondents stated the Application did not establish *"a prima facie breach of the Code"* and that the fact that the Applicant's friend was not charged with a weapons-related offence was not in their control. The Respondents stated that they did not support the removal of the Applicant's release conditions as it was their "consistent practice" not to intervene with *"criminal proceedings involving a student".* Additionally, the Respondents pointed out that the Applicant and his friend were of the same race, colour and ethnic background and as such, there could not have been a discriminatory basis for differential treatment under the *Code*. The Respondents also reiterated that they made reasonable efforts to assist the Applicant with finding suitable alternative education but that the Applicant failed to cooperate; the release conditions made the situation more difficult; and teachers of the school did not want to provide home instruction to the Applicant *"who had brought a gun to school".* The Respondents further stated that the Administrative Officer "merely denied" the Applicant's brother's many requests to allow the Applicant to return to his former school.

The Applicant filed a reply to the Response stating that he had taken a drug test demonstrating he had no drugs in his system; the BB gun had not been functional; that the release conditions allowed him to return with the Principal's written approval; and that the Respondents *"set him up to fail"* by not transferring him to a different high school immediately once they were aware teachers were unwilling to provide the Applicant with one-on-one home instruction. The Applicant further denied that he and his friend were of the same race, as he identified himself to be of Afghani origin and his friend to be of Pakistani origin. The Applicant argued the Respondents' conclusions were based on stereotypes.

The Tribunal stated that the Application did not have a reasonable prospect of success on the grounds of discrimination. The Tribunal noted that the Applicant's allegations centred on demonstrating that the Respondents had allegedly punished the Applicant "disproportionately" and that his alleged offences were less serious than the Respondents submitted. Furthermore the Tribunal stated that there was little *"reference to supporting evidence"* which would have linked the prohibited grounds of the *Code* to the Respondents' actions. For example, the Applicant alleged that the Respondents treated his friend better than him because his friend had darker skin. The Tribunal noted *"this is not the way racism usually works in Canada"* and the Applicant did not explain how discrimination had truly occurred in this situation. The Tribunal noted that while the Applicant may have demonstrated that he was able to prove some of the Respondents actions were disproportionate, *"the Code is not a catch-all"* and merely identifying a ground under the *Code* will not necessarily lead to an Application having a reasonable

prospect of success, as *"everyone identifies with one or more Code grounds"*.

With respect to the threat of reprisal allegation, the Tribunal stated that the Applicant *"did not establish on a balance of probabilities"* that the Administrative Officer had subjected the Applicant to a threat of reprisal. The Tribunal stated that it was unable to determine whose evidence was more credible: the Administrative Officer or the Applicant's brother; and that the Applicant failed to establish that his brother was claiming the Applicant's rights under the *Code*. The Applicant's brother admitted that he could not remember linking the allegation of discrimination to a prohibited ground under the *Code*.

Tribunal dismisses Application related to exclusion of student

In *D.M. v. Halton District School Board*, 2012 HRTO 689, the Human Rights Tribunal of Ontario ("Tribunal") dismissed an Application for discrimination contrary to the *Human Rights Code* ("*Code*") in providing services, goods or facilities on the basis of race, ethnic origin, and place of origin against Halton District School Board ("Board").

The parties agreed the Applicant's behaviour stemming from an incident which occurred on May 12, 2011 was uncharacteristic, and that he had to be removed from the school that day. The Board stated the Applicant had become aggressive, exhibited strange behaviour, spoke incoherently, and was emotionally unstable on the day in question. The Applicant's next friend argued the Applicant had been "high-strung" and had acted out. The Applicant's next friend agreed that while it was appropriate for the Applicant to leave the school at that time, it was inappropriate for the Board to not permit him to return to the school for 17 days. The Application stated the Board's alleged actions were discriminatory as the Board: had required the Applicant to produce a doctor's note *"attesting to his fitness to return to school"*; had not the Applicant allowed to return immediately; had sought to have communication with the doctor; the Board had conducted its own investigation with a risk assessment before allowing the Applicant to return to the school; and, had not fully informed the Applicant *"of its decision-making process in a timely manner"*. The Applicant's next friend denied the Applicant had any disability and argued that had the Applicant been Caucasian, he would have experienced different treatment by the Board. The Applicant's next friend pointed out the Applicant was part of a small group of racialized students in the school. While she did not have "overt evidence" to demonstrate the alleged discrimination, she believed the Applicant would have received information in a timely way and would not have been excluded from school had he been caucasian.

The Board denied any allegations of discrimination and argued it had substantive reason to believe the Applicant was a potential threat to others as well as to himself. This was based on complaints and information received from the Applicant's sister and other students. The Board was also concerned the Applicant's physician *"had not been given sufficient information"* about the incident at the school in order to make an adequate diagnosis. The Board also stated it had made several attempts to reach the physician but had not been successful, and that it had *"a duty to ensure security in schools"*.

The Tribunal stated there was no reasonable prospect of success in this Application. The Tribunal noted that while it agreed with the

Applicant's next friend that discrimination could be subtle and difficult to prove, the Board had provided a detailed response with a "non-discriminatory basis" for any decisions it had made. The Tribunal stated the allegations in the Application appeared to be "speculative" and that in light of the complaints and information the Board received, it was "not unreasonable" for the Board to have taken all of this information into consideration in making its decisions, including the two-week exclusion. The Tribunal noted it was acceptable for the school to have considered the safety of all students at the school. While the Applicant may have felt it was an overreaction, it was reasonable for the Board to have considered and taken all necessary steps to ensure the safety of the staff and students. The Tribunal also noted the Applicant did not prove that the Board's alleged failure to provide information in a more timely manner, despite the number of communications that took place between the parties, amounted to discrimination.

The Tribunal was able to balance the issue of safety in schools with the requirements under the *Code*.

Tribunal dismisses Application by father against Board seeking information in custody situation

In *Doxtador v. Hamilton-Wentworth District School Board*, 2012 HRTO 933, the Human Rights Tribunal of Ontario ("Tribunal") dismissed an Application of an Aboriginal man at a summary hearing who alleged that the Hamilton-Wentworth District School Board ("Board") discriminated against him contrary to the *Human Rights Code* ("*Code*") in providing goods, services or facilities because of race, ancestry, ethnic origin, sex, family status, marital status and reprisal.

The Applicant was divorced and had supervised access to his children. The Children's Aid Society ("CAS") had been involved during his divorce and conducted seven separate investigations during this time. The Applicant submitted that he had several difficulties dealing with principals and teachers of the two schools his children attended in the Board. The Applicant stated that despite a Court Order which entitled him to receive information about his children, he had difficulty getting information from the schools such as the children's progress, difficulties they experienced, report cards, etc. The Applicant stated he made many "persistent requests" to teachers and the principals, as well as to the superintendent of the Board. He also became upset when he learned from his son's teacher that his son was going to undergo a psychological assessment and believed the assessor should have considered his son's First Nations heritage and background. The Applicant felt the Board failed to confirm this consideration had occurred and submitted that he heard nothing more of the assessment. The Applicant also stated the Board did not coordinate the Court Orders appropriately and prevented him from attending school events because the Board was allegedly accepting his ex-wife's interpretation of the Court Orders, which he felt amounted to gender discrimination.

The Board submitted the Applicant did not establish the necessary *"reasonable prospect of success"* for his Application and did not demonstrate anything which linked the Board's *"alleged actions to a prohibited ground of discrimination"*. The Board further submitted the Application did not meet the high burden of proof of intentional or threat of intentional action against the Applicant

under section 8 of the *Code*. The Board confirmed it did not make any submissions with respect to the alleged *"retaliatory action or threat"* against the Applicant which related to his Application to the Tribunal.

The Board made further submissions regarding the factual submissions of the Applicant, stating it had *"gone a long way to meet the applicant's requests for information about his children"*. Additionally, no formal assessment of the Applicant's son was done and the Board also made attempts to help the parents reach a compromise such that the Applicant could attend school events. The Board further mentioned that the most recent Court Order had given the Applicant supervised access to his children for three hours on Saturdays and the CAS would not give permission to the Applicant to visit the children's school.

The Tribunal found the Application did not have a reasonable prospect of success, as the Applicant could not provide any evidence establishing a connection between the alleged ground of discrimination and the Board's alleged actions. The Tribunal found the Applicant did not provide evidence proving the Board failed provide him with information regarding his children or that the Board had even assessed his son. The Tribunal stated the Board appeared *"to have been thrust in the midst of the dispute"* regarding the Applicant's family issues, divorce and Court Orders which affected his rights to visit his children's schools. The Tribunal noted that while it was a possibility that the Board may have incorrectly interpreted the extent of the Applicant's rights with respect to access to his children or its own role in relation to such issues, the Applicant did not establish that discrimination was a factor in the Board's decisions and/or actions. Furthermore, the Tribunal stated that while the ex-wife may have supported the Board's decision to deny the Applicant to attend his children's school, this did not mean the Board's decision to disallow him to attend his children's school amounted to gender discrimination.

The Tribunal also went through an analysis of section 8 of the *Code* and stated the Applicant did not indicate in his Application that he had tried to enforce his rights as per section 8 of *Code*. The Tribunal noted that while the Applicant made submissions on his continuous attempts to what he viewed as an enforcement of his rights to receive information about his children and also attend their school, this did not fall *"within the ambit of the Code"*. The Applicant, in the Tribunal's view, did not point to any evidence which would have established that Board's actions were a retaliation against him and consequentially a reprisal under section 8 of the *Code*. As such, the Tribunal dismissed the Application.

This decision sheds light on the difficulties many school boards face in handling custodial issues, including the interpretation of Court Orders. The Tribunal notably made reference to this difficulty in its decision, in addition to discussing the Applicant's failure to establish a causal link between the alleged discrimination and the Board's actions.

IPC Orders disclosure of fundraising by schools

In *Durham District School Board (Re)*, 2012 CanLII 29934 (ON IPC), the Ontario Information and Privacy Commissioner ("Commissioner") ordered the Durham District School Board ("Board") to disclose its financial records to the Appellant showing how much each of the Board's individual schools derived

from fees and fundraising from September 1, 2008, to August 31, 2009.

The Applicant filed a request for this information under the *Municipal Freedom of Information and Protection of Privacy Act* ("*MFIPPA*"). The Board replied to this request by disclosing financial records showing the total combined revenue all schools generated together during 2008 and 2009; however, the Board refused to grant access to financial records showing the breakdown of revenues for each individual school, relying on a statutory exception to disclosure under section 11(c) of *MFIPPA*. The section 11(c) exemption states *"A head may refuse to disclose a record that contains information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution".*

In this case, the Board argued that the Appellant had previously requested and received similar information from eight other school boards in the Greater Toronto Area ("GTA") which the Appellant used to publish a newspaper article portraying a "great divide" between schools in the GTA in terms of school and community generated funding. According to the Board, the article was damaging and misleading because the Appellant published the information without qualifying the data. Therefore, the Board claimed it was exempt from disclosing the requested information because full disclosure would negatively impact the financial situation of the schools in the Board's district, and would serve to identify schools as being either "have" or "have not" schools.

In ordering the Board to disclose the financial records of each of its individual schools, the Commissioner held that the statutory exemption to disclosure did not apply in this case because the evidence adduced by the Board merely amounted to a speculation of possible harm. According to the Commissioner, the Board failed to demonstrate that a *"disclosure of the record 'could reasonably be expected' to lead to a corresponding decline in enrolment of students in its schools because parents would choose to enroll their children in a different school board simply on the basis of knowing each school's revenues".*

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IPC deals with information access issues involving special-needs student

In *Ottawa-Carleton District School Board (Re)*, 2012 CanLII 24099 (ON IPC), the Information and Privacy Commissioner ("Commissioner") ordered the Ottawa-Carleton District School Board ("Board") to conduct a more thorough search for records related to the Appellant's son's schooling, and to attach an unmarked copy of the Appellant's letter of disagreement to her son's Individual Education Plan ("IEP").

The Appellant submitted a request to the Board under the *Municipal Freedom of Information and Protection of Privacy Act* ("*MFIPPA*") for access to information related to her son's schooling. In particular, the request was for access to her son's Ontario Student Record ("OSR"), his psychological and speech-language files, any information pertaining to Special Incidence Portion funding for her son and information pertaining to the Board's use of Emergency Educational Assistants for her son. In addition, the Appellant also requested that three letters of disagreement be added to her son's IEP in order to correct certain personal information.

In response to the request, the Board located responsive records and provided them to the

Appellant, and also attached the letters provided by the Appellant. However, the Board made handwritten comments on one of the Appellant's letters before attaching it to her son's IEP. Furthermore, a subsequent search by the Board revealed additional responsive records which were not originally disclosed to the Appellant. These additional records were subsequently provided to the Appellant.

In appealing to the Commissioner, the Appellant argued the Board did not fully disclose all records and that she believed additional undisclosed records still existed. The Appellant also claimed the Board should not have made handwritten comments on her letter of disagreement before adding it to her son's IEP.

In addressing the issue of whether the Board conducted a reasonable search for the requested records, the Commissioner noted that *"[MFIPPA] does not require [an institution] to prove with absolute certainty that further records do not exist".* However, an "*institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records",* with a responsive record being any record "reasonably related" to the request. In conclusion, the Commissioner held *"a reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request".*

In this case, the Commissioner held that, with one exception, the Board's search for responsive records was reasonable. The search was conducted by the Board's Freedom of Information Co-ordinator ("FOIC") who repeatedly met with the Board's doctor, speech-language pathologist and consultant, and personally reviewed their records. The FOIC also instructed the principal of the Appellant's son's school to provide the Appellant with all documents contained in her son's OSR. However, the Commissioner concluded the Board failed to search its payroll records for possible time sheets of Emergency Educational Assistants. The Commissioner held these time sheets would be reasonably related to the Appellant's request and ordered the Board to conduct a search for them.

In regards to the second aspect of the Appellant's claim, the Commissioner held the Board erred in altering one of the Appellant's statements of disagreement before attaching it to her son's IEP. Once the Board refused the Appellant's request for the Board to correct personal information in her son's IEP which she believed to be incorrect, the Appellant was entitled to have her unaltered statement of disagreement attached to the IEP under *MFIPPA*. The Board claimed the handwritten note was necessary in order to ensure that anyone reading the IEP would understand that the statement of disagreement did not reflect the Board's observations. However, the Commissioner held the Board was incorrect in altering the Appellant's actual letter and should have attached a cover document to the letter in order to clearly identify it as a statement of disagreement made by the Appellant. Therefore, the Board was ordered to attach an unmarked copy of the Appellant's letter to her son's IEP.

This decision confirms that the IPC can have a significant role in enabling access to records and requiring appropriate record inquiries.

— KC —

Professional Development Corner

Friday, November 9, 2012

KC LLP Professional Development Session

Special Education / School Operations / Student Discipline Session
at Peel District School Board

Keel Cottrelle LLP provides Negotiation and
Conflict Resolution Training for Administrators as well as Mediation Training.

Modules include a one-day Session or a four-day Mediation Training Program.

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