



Education Law eBulletin

A newsletter for educators

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SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
2510 Ouellette Avenue
Suite 700
Toronto, ON M5H 3E5
Tel.: (416) 214-5200
Toll free: 1-877-214-5200

Windsor Office:
2510 Ouellette Avenue
Suite 301
Windsor, ON N8X 1L4
Tel.: (519) 969-9844
Toll free: 1-866-422-7988

Education and Public Law Group

Brian P. Nolan
brian.nolan@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Jessica Koper
jessica.koper@shibleyrighton.com

Deborah Howden
deborah.howden@shibleyrighton.com

Gaynor J. Roger
gaynor.roger@shibleyrighton.com

John De Vellis
john.devellis@shibleyrighton.com

Megan Marrie
megan.marrie@shibleyrighton.com

Human Rights Tribunal looks at whether school boards are required to provide ABA/IBI therapy as part of its duty to accommodate

The meaningful access to education test arising from the Supreme Court of Canada decision *Moore v. British Columbia*¹, was recently applied in a decision of the Human Rights Tribunal of Ontario² that addressed allegations of discrimination of a 7-year-old pupil diagnosed with Autism Spectrum Disorder. The pupil's mother filed an application against the school board alleging that JS required Applied Behavioral Analysis (ABA) and Intensive Behavioral Intervention (IBI) therapy delivered in the classroom in order to access a meaningful education and that the school board discriminated against JS by failing to provide these services.

There was a wide range of witnesses called by both parties who provided testimony regarding whether or not JS required ABA/IBI therapy in order to meaningfully access educational services. All witnesses testified that the Applicant was assessed as having above average intelligence and would have been able to access the school curriculum without ABA/IBI therapy. While there was no dispute that JS did require access to special education services, the school board had ASD-related programs in place and trained professional staff to support the pupil. The Applicant's witnesses did feel that he required or at least would benefit from focused ABA therapy. However, the witnesses agreed that the ABA therapy was not required to access the school curriculum; rather, the ABA therapy was beneficial in remediating the Applicant's ASD symptoms.

Application of the *Moore* Test

When the Tribunal applied the test from *Moore* and whether discrimination occurred in the context of the provision of educational services, there was no dispute that the Applicant had a disability. However, the key question was whether the Applicant experienced an adverse impact resulting in a denial of access to a meaningful education. The Applicant claimed that the school board's refusal to provide ABA/IBI therapy in the classroom amounted to adverse treatment because of his disability. The Tribunal was clear that the service to be provided by the school board was meaningful access to education as opposed to ABA/IBI therapy, which is the core of the legal analysis.

The court differentiated the facts of this case from *Moore* by pointing out that in *Moore*, there was no dispute that the Applicant required intensive services to access the school curriculum. In this case, there was no such consensus among the witnesses and the evidence demonstrated that the Applicant did not require

¹ 2012 SCC 61 ("*Moore*").

² *J.S. v. Dufferin-Peel Catholic District School Board*, 2018 HRTO 1284

this therapy to access the curriculum. In fact, the evidence showed that the Applicant was doing very well in school.

Meaningful Access to Education

The Tribunal turned next to the concept of meaningful access to education. It stated that the Tribunal has to make an overall assessment by looking at the successes and challenges of the student in the context of the overall curriculum. The Tribunal also pointed out that it needed to be mindful of the comments made in *Moore* that just because a student does not succeed at school does not mean that the school board has failed to provide meaningful access to education. Based on evidence before the Tribunal regarding the Applicant's performance in junior kindergarten, senior kindergarten, and grade 1, it was clear he was performing above his peers in many areas and mastering skills related to overcoming ADS symptoms.

The Tribunal concluded that a school board is not required to provide therapeutic services which, while beneficial, are not necessary for the student to access education. The school board was already providing a variety of programs, including those specifically designed to address the needs of students with ASD. The Tribunal dismissed the application against the school board because the Applicant had not made out a case of prima facie discrimination.

What Does this Mean for Educators?

The Tribunal makes it very clear that although it found that ABA/IBI therapy is not required for the Applicant to access meaningful education, the finding was specific to the facts of this application and it does not mean that the Tribunal will never find that ABA/IBI therapy is required. School boards need to continue to assess the needs of students on a case-by-case basis to ensure that each pupil can meaningfully access the curriculum and the pupil is accommodated to the point of undue hardship.

Legalization of Cannabis in Schools

The Ministry of Education has updated and issued the following Policy/Program Memoranda as a result of the legalization of cannabis on October 17, 2018:

- PPM 128 – Provincial Code of Conduct and School Board Codes of Conduct
- PPM 144 – Bullying Prevention and Intervention
- PPM 145 – Progressive Discipline and Promoting Positive Student Behaviour

As a result of the changes to the legislation, a student may be suspended pursuant to s. 306 of the *Education Act* if they are found in possession of cannabis, with the exception of medical cannabis, and a student must be suspended pursuant to s. 310 of the *Act* if they have given cannabis to a minor.

The Ministry's resource on cannabis for school boards may be found at:
<http://www.edu.gov.on.ca/eng/healthyschools/cannabis-fact-sheet-en.pdf>

We welcome your comments and questions. Send them, and any updated contact information, to jessica.koper@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to christen.broadbent@shibleyrighton.com

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