

**WHEN SPECIAL NEEDS EDUCATION AND SAFETY COLLIDE:  
HOW SCHOOL BOARDS CAN BALANCE THE COMPETING INTERESTS OF SPECIAL NEEDS STUDENTS  
AND A SAFE SCHOOL ENVIRONMENT - ADDENDUM**

**Jennifer E. Trépanier and Brian P. Nolan  
Shibley Righton LLP**

***Update from the Ontario Court of Appeal***

In our paper we cited the Ontario Superior Court of Justice decision of *Bonnah (Litigation guardian of) v. Ottawa-Carleton District School Board* [2002] O.J. No. 1253 ("*Bonnah*"), which was under appeal to the Ontario Court of Appeal at the time of writing the paper. In April of 2003, the Ontario Court of Appeal rendered its decision, which has significant implications regarding the conflict between safety and the education of special needs pupils.

In the *Bonnah* case, the father of a special needs pupil sought judicial review of a school board's decision to transfer his son from the program he was attending (an integrated placement in a regular class with special needs supports) to a special needs class at a different school, due to safety concerns. The Ontario Superior Court of Justice upheld the school board's transfer despite the fact that the parents refused to consent to the placement, and had appealed the placement decision, which appeal was outstanding.

Prior to the appeal being heard by the Ontario Court of Appeal, the placement appeal was determined, which rendered the issues under appeal "moot". Rather than declining to hear the appeal, however, the Court of Appeal exercised its discretion to determine the issue of whether the school board had authority to transfer the pupil to a different school for safety reasons while an appeal from the placement decision was outstanding, finding the matter to be of general importance and likely to arise in the future.

In its decision, the Court of Appeal stressed the importance of maintaining a safe school environment, explaining:

"Everyone agrees that schools must strive to create an environment in which all students, including those with exceptional needs, can thrive and achieve their full potential. It is equally clear, however, that if schools are not safe, students cannot achieve that potential."

The Court of Appeal also stressed the "special significance" of the placement decision as it relates to exceptional pupils, which is provided for in a comprehensive scheme in the *Education Act* and its regulations.

The Court of Appeal found that a principal, and ultimately a board, has the power to exclude an exceptional pupil from school or class for legitimate safety reasons, stating that any other interpretation would "seriously imperil the safety of exceptional pupils and other children". The Court of Appeal stressed, however, that a principal "must bear in mind the special significance of the placement decision as it relates to exceptional pupils and strive to minimize any interference with

that placement". The Court of Appeal explained for example that "if safety concerns can be properly addressed by removal from the classroom rather than the school, then the more limited removal must be preferred".

The Court of Appeal found, however, that the school board could not alter the pupil's placement by purporting to transfer the pupil to a different school. The pupil maintained the right to "retain" the current placement pending the placement appeal. At the same time, the Court made it clear that if the pupil was excluded from the school, he or she could not attend in that placement, despite that the placement itself would be "retained".

The Court of Appeal explained that after a pupil is excluded, a school board could offer the parents an alternative placement option which did not create safety concerns. If the parents did not consent, the pupil would simply remain out of school.

The Court of Appeal further suggested that the legislation should be amended to give the appropriate body<sup>1</sup> the authority, where necessary, to address safety concerns by interim placement orders which would have effect pending the resolution of a placement appeal.

In the lower court decision, the Superior Court unfortunately failed to clearly explain the basis for upholding the school board's transfer of the pupil. The Court had blended the three distinct concepts of "administrative transfer", "exclusion" and "denial of access". Upon appeal, the Court of Appeal blended the two concepts of "exclusion"<sup>2</sup> and "denial of access"<sup>3</sup>. Therefore, it still remains unclear as to the Court's determination of the appropriate means to remove a special needs pupil from school for safety reasons.

As we indicated in our paper, in our opinion, the preferable way for a school board to remove a special needs pupil from a school for safety reasons is by the "denial of access" provisions under s. 305 of the *Education Act* and Regulation 474/00. The pupil/parents should be afforded certain procedural entitlements in respect of this decision, which will vary depending on the particular fact situation. In light of the recent Court of Appeal decision, a principal / school board must carefully assess the circumstances to ensure that the decision it makes regarding a special needs pupil has the least impact possible on the pupil's placement (i.e. if the safety concerns may be addressed by removing the pupil from the classroom rather than the school, this more limited removal should be preferred). Transfers of exceptional pupils to different placements should not be done unilaterally, but may be offered as an option to the parents. If the parents refuse the transfer, the pupil will simply remain out of school; however, the pupil's "official" placement will remain intact.

---

<sup>1</sup> i.e., in this case, the Identification and Placement Review Committee

<sup>2</sup> pursuant to s. 265(1)(m) of the *Education Act*

<sup>3</sup> pursuant to s. 305 of the *Education Act* and Regulation 474/00 to the *Act*