



Education Law eBulletin

A newsletter for educators

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Special Education Tribunal rejects claim to have therapist work with autistic child in classroom

In a very recent decision of the Ontario Special Education Tribunal, released March 12, 2009, the Tribunal declined the request of a parent of a child with autism to have the Tribunal issue a recommendation that the school board should permit the child's Intensive Behaviour Intervention (IBI) therapist in the classroom to support the child and consult with school staff during an extended "transition period" lasting until the end of the school year.

In *J.K. v. Toronto District School Board*, the parent of a 9-year-old boy, who had been previously identified as having autism and a developmental disability, appealed the pupil's placement to the Special Education Tribunal. The parent wanted her son placed in a regular classroom in the neighbourhood school with resource withdrawal. For the first two years of his schooling, the child attended a developmental disability class at a different school. Starting in September 2006, the student was moved, at his mother's request, to an integrated placement in the regular classroom in the neighbourhood school, where he attended in the morning, spending half of his time in a regular classroom and the remainder in an Home School Program (HSP) class, which is a small class setting typically used for resource withdrawal. In the afternoon, the student received IBI therapy in the home setting from his instructor therapist from Leaps & Bounds, an agency that provides IBI services.

However, the child demonstrated significant disruptive behaviours in the integrated placement. As the Tribunal noted, the student's "aggression and his spontaneous hitting of people made the classroom and the school an unsafe environment." There were also episodes of aggression in the home setting, although the number of episodes reported at home was less than that observed in school. School staff were also concerned that his academic, social and emotional goals were not being met in the integrated setting; the student was working on alternative curriculum expectations with very little focus on academics, but was not making credible gains. As the Tribunal found, the student's "behaviours were so disruptive that little or no academic achievement occurred and his anxiety levels were high."

The school staff shared their concerns with the Identification, Placement and Review Committee (IPRC) when the student's annual review was conducted in June 2007. The IPRC determined that the pupil should be placed in an Intensive Support Program (ISP), which is a self-contained special education class. The parent then appealed the placement to the Tribunal, which held a hearing in December 2008.

Paul Howard and his colleague Megan Marrie, both of Shibley Righton's Education & Public Law Group, successfully represented the School Board before the Tribunal. Board counsel argued that the appeal should be dismissed and the IPRC's determination of placement in an ISP should be upheld. The Tribunal agreed; in a well-crafted decision that considered the student's academic, behaviour and social needs, and to what extent these needs could be met in each of the regular class, HSP or ISP settings, the Tribunal held that the most appropriate placement was the ISP class, and it therefore upheld the IPRC decision of June 2007 and dismissed the parent's appeal.

At the outset of the appeal, the parent had requested placement in the regular classroom "with qualified support and accommodations." When Board counsel requested particulars of what was meant by "qualified support and accommodations," they were told that the parent is seeking "the educational supports [that the student] requires, namely the use of his ABA therapist in the

classroom.” In final argument before the Tribunal, the parent indicated she was seeking a regular class placement with resource withdrawal assistance in the HSP in the neighbourhood school, i.e., basically a continuation of the same placement that was in place during the 2006/2007 school year, which the IPRC had found was not meeting the child’s needs.

The parent also took the position in final argument that the child was entitled to inclusion in a regular class “and the only way to effectively achieve this is to provide appropriate ABA accommodations and supports by qualified personnel in the classroom.” The parent argued that “provision of ABA as an accommodation in the classroom is integral to the placement of [the student] and is well within the jurisdiction of the Tribunal’s powers.” To that end, the parent urged the Tribunal to make a recommendation that the School Board engage Leaps & Bounds, the child’s IBI provider, to permit that agency’s staff to “work with the school in order to support [the student] for a limited ‘transition period’ that could last until the end of the school year.”

Board counsel argued that the parent was trying to do indirectly what she cannot do directly. Counsel argued that it is well established in the Tribunal’s jurisprudence that the Special Education Tribunal has no jurisdiction or legal authority to order a school board to provide IBI therapy or treatment under the guise of “placement or program,” and that this same rationale applies to the parent’s request that the Tribunal should determine that the student should be accompanied by his IBI therapist in the integrated classroom setting.

Without expressly giving reasons on point, the Tribunal declined to issue any such recommendation as requested by the parent. The Tribunal focused its analysis on the child’s individualized needs and best interests and which placement could best meet those needs.

If you wish to receive a copy of the full text of the Tribunal’s decision, please contact Paul Howard at paul.howard@shibleyrighton.com.

Parent and advocate held liable for defamation of educators for internet posting

It is an unfortunate truism that in some cases the home-school relationship is a difficult one. In some instances, and one sometimes sees this in the special education context, disagreements between the parents and the school can give rise to heated disputes. In some cases, the parents, seeking to advocate strongly for their child, send numerous letters and e-mail correspondence to the school principal and other board staff, to the point where the educators feels themselves bombarded and harassed. Sometimes the language used is accusatory. And sometimes it is defamatory.

Unfortunately, that was the situation involved in the case of *Ottawa-Carleton District School Board, J.W. and M.N. v. Scharf and L.P.*, [2007] O.J. No. 3030, aff’d [2008] O.J. No. 775 (C.A.), leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 285. In that case, there had been a continuing and long standing dispute between the school board and the parent L.P. as to the appropriate placement and supports for her daughter, N.P., who was born with Down’s Syndrome. Scharf was an advocate and had been assisting L.P. throughout. At an IPRC convened in December 2004, the IPRC determined that the child’s needs could best be met through placement in an age-appropriate (grade 6) English-only program, rather than in the grade 1 French Immersion class where N.P. was then currently placed. The parent did not accept the IPRC decision. By reason of the family’s subsequent conduct, the school officials assumed the parents were appealing the IPRC decision and, accordingly, the IPRC’s placement decision was stayed and the child remained in the grade 1 French Immersion class.

The home-school relationship continued to deteriorate, and in January 2005, the parent L.P. and her advocate Scharf posted a “News Release” and other supporting documents on a website, which remained available for viewing on the internet for more than two-and-a-half years until the subsequent trial was held in this matter. The Court found that the “News Release” was posted on the internet for the purpose of intimidating the school officials into complying with the demand of the parent and advocate that N.P. should remain in the French Immersion program. The document was also circulated by e-mail to school board trustees, school principals, Members of Parliament, and Members of Provincial Parliament.

The school principal J.W. and the superintendent M.N. took the position that the News Release publication contained four statements that were defamatory of them, and they then commenced an action in the Ontario Superior Court of Justice seeking damages against the parent and the advocate. The action proceeded to trial before Mr. Justice Morin, who found the parent and her advocate jointly and severally liable for defamation in respect of the four statements.

In the first statement, the News Release posting alleged that the principal and superintendent had violated a court order requiring placement of the child in the French Immersion program, and that an order for their incarceration for contempt of the court order was being sought. In fact, there was no such court order for placement, and a motion to find the educators in contempt for breach of the non-existent court order had been dismissed.

In the second statement, the internet posting said that the school placement had become unsafe for the child, and at trial the defendants tried to argue that on a certain date the principal used excessive force with the child and effectively assaulted her. The evidence at trial indicated that N.P. had been acting out in class, as a result of which she was told that she could not go out for recess. The child became agitated, insisted on going out to recess, and the principal and classroom teacher guided her back to class, in the course of which the child allegedly injured her finger. However, the trial judge was not satisfied that the child actually sustained any injury, and there was no basis to say that the principal's actions made the school unsafe.

In the third statement, the internet publication said that the principal was under investigation by the Ottawa Police for criminal conduct. In stark contrast, the evidence at trial, including the testimony of a sergeant from the Police Force, established that there had never been a police investigation of the principal at all.

In the final statement, the publication stated that the school board had agreed to resume the supports and services for N.P. in the French Immersion program only because of the contempt of court motion that had been brought against the educators. The implication was that the superintendent had acknowledged wrong-doing and contravention of an existing court order by himself and the principal, when, again, there was no such order. Justice Morin found that there was no evidence to support such allegation, and that the reason why the school continued the child in French Immersion was because of the stay of placement that the school observed when they thought the parents were appealing the IPRC decision.

In finding both the parent and advocate liable for defamation, the Court held:

The plaintiffs are professionals and have exemplary reputations in the profession of teaching. Their professional reputations have been attacked and the attacks have gone to the core of their professional reputations. The defendants used the internet to launch those attacks and it is acknowledged that there is an increased potential for harm when the publication is by way of internet. There has been no retraction or apology on the part of the defendants and the offending materials continue to be posted on a website. M.N. was severely hurt by the defamation and his first thoughts were of his family. J.W. required psychological counselling and was forced to work only part-time. She was severely affected by the defamation.

The Court awarded each of the principal and the superintendent \$15,000 in damages against the parent and the advocate.

The parent appealed the judgment to the Ontario Court of Appeal, which dismissed the appeal in January 2008. The parent argued several grounds of appeal, but the Court of Appeal found it necessary to address only one issue in its decision, namely, the parent's allegation that the trial judge erred by finding that the parent and advocate had jointly prepared the online publication. In this regard, the Court of Appeal upheld the trial judge's findings that the parent provided the advocate with the information that was contained in the News Release, that the parent was aware of the News Release prior to it being posted and emailed out, that she agreed with the drafting and release of the publication, and that, therefore, the parent was fully and jointly responsible for the publication of the defamatory information.

The parent's application for leave to appeal to the Supreme Court of Canada was dismissed with costs on December 4, 2008.

Given the web of anonymity that blankets internet postings, online defamation is becoming increasingly common. Information posted on the internet can be seen by anyone, anywhere in the world, and since some search engines (including the ubiquitous Google) use cached versions of websites to conduct searches, defamatory information may be available even after a website has been removed. For these reasons, online defamation has the potential for being particularly harmful to the professional reputation of educators.

Thus, the Courts' decisions in this case provide a useful, and welcome, cautionary signal to parents and their advocates that, while they are entitled to advocate strongly for their children and clients, they need to exercise restraint in their communications and dealings with educators so as to avoid use of inappropriate, inflammatory language, lest they be held liable by the Courts.

At the same time, it goes without saying that educators must always remain professional in their communications with parents and their support persons. Moreover, the commencement of litigation against a parent should generally be regarded as an avenue of last resort, reserved for exceptional circumstances only. In the *Scharf* case, those exceptional circumstances were clearly evident in, for example, the parent concocting stories that the principal was under police investigation and that the educators had breached a court order. Those will not be the only sort of circumstances where resort to litigation is justified, but obviously very careful consideration must be given to the considerable and deleterious impact that the commencement of court proceedings will have on the home-school relationship.

CASES

The Tax Court of Canada held that Ontario did not, by controlling the administration and affairs of a school board for an 18 month period, become the owner of school board property and, as such, the school board was not entitled to a GST rebate pursuant to s. 125 of the *Constitution Act* and s. 122 of the *Excise Tax Act*. *Toronto District School Board v. Canada*, [2009] T.C.J. NO. 25.

The British Columbia Court of Appeal upheld a trial judge's decision to dismiss the Plaintiff's action against the Defendant for damages as the school board had not breached the terms of an employment contract. *Albert v. Conseil Scolaire Francophone de la Colombie-Britannique*, [2009] B.C.J. No. 61.

The court allowed an action by a private art school, finding that the defendants, a student who had applied to the school in order to gain entry into Canada, and her extended family, were jointly and severally liable for the unpaid balance (\$14,000 plus GST) of the non-refundable tuition. *Sabouhi Academy of Art and Design v. Pakdel*, [2009] O.J. No. 3.