SHIBLEY RIGHTON LLP
Barristers and Solicitors

Education Law eBulletin

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School Records - When and How to Disclose

Principals and school administrators are often required to attend to matters that involve students and the legal system. In this respect, it can be somewhat disconcerting when one receives an unexpected subpoena requiring one to attend court with a student's Ontario Student Record (OSR). This may occur in many different contexts, including family law or other civil law proceedings. When a subpoena is received, the question regularly arises as to the course of action a principal should take, and what materials form part of the record in question.

This issue was recently reviewed by the Ontario Superior Court in *Leer v. Toronto District School Board*. In Toronto, a student was allegedly assaulted by another student in the schoolyard during school hours. The plaintiff student and his family subsequently sued the school board, principal, teachers and the child's guardian, alleging that they knew of the child's history of violent behaviour and failed to take appropriate steps, including, among other things, to properly supervise the child. At the time of the assault, the two children involved were 7 years of age and in grade two. The plaintiff brought a motion for the production of school and police records relating to the student defendant; the plaintiff alleged that the records substantiated its claims that the school knew about the defendant's violent tendencies.

Ultimately, the motions judge ordered that all records, including the records held by both the school board and the police, be produced. With respect to the school records, the motions judge held that where a person's school record is relevant and producible, and a party is either the student or the parent or guardian of the student, then the court should order the student (if an adult) or the parent or guardian to sign a consent and take all reasonable steps to have the record holder produce the record for the purpose of the litigation.

This is but one example of where the OSR may be compelled by a court. In any event, this case serves as a reminder that any school records, including materials forming part of a student's OSR, may be compellable in a variety of circumstances and that such records must be produced where there is a court order requiring disclosure. It is important to ensure that the subpoena is read thoroughly, as it will usually set out the records with which the principal will be required to attend, and will usually expressly include the OSR. As set out in the Ministry of Education's OSR Guidelines, where a school administrator is subpoenaed to attend court with the OSR, the principal should attend court with both the original OSR and a complete and exact photocopy of it, and should propose to the judge that the photocopy be submitted instead of the original. The principal should inform the judge that the subpoena is inconsistent with subsection 266(2) of the *Education Act.* However, the principal must relinquish the documents if ordered to do so by the judge.

Disciplining Special Needs Students

Teachers and principals often experience difficulties determining how to react to inappropriate behaviour when exhibited by an exceptional student. This difficulty may arise, in part, because there exists an inherent conflict where schools maintain "zero-tolerance policies" but are also required to consider mitigating factors when administering discipline in appropriate circumstances. In this respect, through Bill 212, the *Education Amendment Act*, the Ministry of Education has moved away from zero-tolerance policies, and has placed a strong emphasis on progressive discipline and the consideration of mitigating factors. This does not, however, mean that a teacher or principal must account for a student's exceptional condition if that condition is unrelated to the inappropriate behaviour.

To illustrate, in May 2000, a student attending school in Prince Albert, Saskatchewan, was suspended from school for using profane language. The suspended student had "Williams Syndrome", a genetic disorder which affects cognitive development. Some of the student's prominent Williams Syndrome characteristics included anxiety, acute hearing and limited speech. The student's age equivalent performance on development of mental activities ranged from under 2.5 years of age to just under 4 years of age at the time the complaint was made; the student's cognitive abilities would have been similar to an early pre-school child. Prior to this suspension, the student had previously been suspended on two other occasions, for one day on February 4, 2000, for hitting a teacher and from one-half day on February 18, 2000, for using profanity. In addition, the student had been taken home early on almost every day in February and March 2000 because he was having trouble coping in the classroom. The School Division had accommodated the student and had held meetings with the student's parents, but upon receiving notice of the third suspension, the parents complained that this suspension was discriminatory, as it was for behaviour related to his disability. Supported by the Saskatchewan Human Rights Commission (the "Commission"), the parents brought the complaint to the Human Rights Tribunal, where it was held that the complainant's disciplinary suspension from school for profanity did not constitute discriminatory conduct. Pursuant to the Saskatchewan Human Rights Code, the Commission appealed the Tribunal's decision to the Saskatchewan Queen's Bench: *Saskatchewan (Human Rights Commission v. Prince Albert Roman Catholic School Division No. 6*.

Contrary to the Commission's arguments that the suspension was related to the complainant's disability, the Court held that no evidence had been presented to the Tribunal demonstrating that profanity was a characteristic common to persons with Williams Syndrome. Further, although the Commission argued that the suspension was discriminatory because it limited the student's access to educational programming, the Court found that this argument commented on the broader issue as to whether the practice of suspensions should be outlawed as the effect of the suspension was the same for any student and therefore not discriminatory towards this student in particular.

Therefore, when dealing with exceptional students, teachers and school administration must be mindful of individual student's particular needs. The existence of an exceptional condition should not be used to justify inappropriate behaviour where this behaviour is not symptomatic or otherwise causally related to the underlying condition. However, teacher and school administrators should always be mindful of student's needs prior to imposing discipline.

Case Law

An Ontario Labour Arbitrator took jurisdiction over a grievance that alleged that a principal, by sending a note to parents that a teacher was undergoing treatment for breast cancer, had violated the teacher's privacy and therefore the collective agreement. The arbitrator held that the *Education Act* and *Municipal Freedom of Information and Protection of Privacy Act* were employment-related "prevailing statutes" that were incorporate into the collective agreement by reference. *Re Kawartha Pine Ridge District School Board and Elementary Teachers' Federation of Ontario*, [2008] O.L.A.A. No. 106.

The New Brunswick Court of Queen's Bench allowed an application for judicial review of a Minister's decision to phase out an Early French Immersion, finding that the Minister did not allow time for a full debate on the issue as promised, resulting in a breach of parents' procedural rights. *Small v. New Brunswick (Minister of Education)*, [2008] N.B.J. No. 208.

The Alberta Labour Relations Board held that persons performing research at the University of Calgary, paid out of trust moneys including government research grants and private research grants, were in fact employees of the University, with some exceptions such as where an employer was employed exclusively by the grant holder and not in any way otherwise connected with the University. *Re University of Calgary*, [2008] A.L.R.B.D. No. 30.

The Ontario Court of Appeal upheld the Superior Court's decision that there is no constitutional obligation on the province to ensure that every school-aged child had access to specific educational services. *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, [2008] O.J. No. 2009. An application for leave to appeal to the Supreme Court of Canada was filed by the parent in August 2008.

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

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