



Education Law eBulletin

A newsletter for educators.

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May you enjoy a happy and successful 2003!

current issues

Chamberlain: Teaching resources depicting same-sex parented families

A kindergarten-grade one teacher, James Chamberlain, applied to have three books depicting same-sex parented families approved as supplemental learning resources. The school board passed a resolution declining to approve the books. The teacher sought judicial review of the decision to the British Columbia Supreme Court, which quashed the school board's resolution, finding that it breached the *School Act* since board members who made the decision were significantly influenced by religious considerations. On appeal, the Court of Appeal set aside the lower court's decision, finding that the school board's resolution was made within its jurisdiction. That decision, in turn, was appealed to the Supreme Court of Canada. By a 7-2 majority, the Supreme Court overturned the appeal court's decision and the issue was remanded to the school board to be determined in accordance with appropriate principles.

The Supreme Court found that the appropriate standard of review when reviewing the school board's decision was "reasonableness". The school board's decision was unreasonable because it acted in a manner contrary to what was required by legislation. The Supreme Court held that the school board violated the principles of secularism and tolerance in the *School Act*, failing to promote respect for all types of families. The school board acted on the concern of certain parents regarding the morality of same-sex relationships without considering the interest of same-sex parented families to receive equal recognition and respect in the school system.

The Supreme Court also found that the school board had violated its own regulation concerning how decisions on supplementary resources should be made, which required the board to consider the relevance of the material to curriculum objectives and the needs of children of same-sex parented families. In addition, the Court held that the school board applied the wrong criteria when making its decision. The board had applied a criteria of "necessity" and concluded that the curriculum did not require the inclusion of these resources. The board should have instead considered the "relevance" of the materials.

With respect to the school board's position that children should not be exposed to information and ideas with which their parents disagree ("cognitive dissonance"), the Supreme Court held that exposure to some cognitive dissonance is necessary for children to be taught tolerance, and that such a position conflicted with the curriculum's objective of promoting an understanding of all types of families. The Court also rejected the school board's concern regarding age-appropriateness, finding that the curriculum itself required the discussion of all types of families in the community for students in this age group. The Supreme Court commented that "tolerance is always age-appropriate."

The Supreme Court rejected the school board's position that its decision could not be attacked because it was not required to approve any particular supplementary materials. The Court found, instead, that the school board could only reject supplementary materials if it did so on valid grounds.

update

The Bonnah Decision

In last month's eBulletin, we summarized the *Bonnah* decision of the Ontario Superior Court of Justice which upheld the transfer of a special needs student from a regular classroom to a special education setting for safety reasons. At the time, a decision of the Ontario Special Education Tribunal regarding the appeal of the student's placement was pending. That decision was released on December 3, 2002; the appeal was granted in part and the Tribunal ordered the school board to place the student in a grade seven regular classroom for non-academic subjects and in a "Dual Diagnosis" classroom for his academic program. As we also previously indicated, the decision from the Superior Court was appealed to the Ontario Court of Appeal. That appeal was heard on December 6, 2002, however, the Court of Appeal reserved its decision. We will advise of the decision once it is released.

special education

Jimmo: Funding cuts affecting special education overturned

The Ontario Superior Court of Justice recently determined that the Supervisor appointed by the Minister of Education to oversee the Ottawa-Carleton District School Board's financial affairs had no authority to make financial cuts of some \$3.7 million to special education. The cuts eliminated special education learning centres, special education resource teachers, and educational assistants. The Supervisor did not notify or consult the parents of the affected special needs students prior to making his decision. An emergency application for judicial review to quash the Supervisor's decision was made to the court. The Court found that neither the Supervisor nor the school board had the authority to make the cutbacks without following the procedures set out in Regulation 181/98, which provides for a comprehensive procedure governing special needs placements. The Court ordered that the "status quo" regarding the special needs students must be maintained until the procedures in Regulation 181/98 have been followed.

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That is, that the resources previously established for the students were to be maintained, and any reduction in those resources made only in accordance with the provisions set out in the Regulation. In light of the decision in *Jimmo*, school boards must pay special attention when considering making any changes which could affect special needs placements otherwise regulated by Regulation 181/98.

surveillance videotapes

Request for disclosure of surveillance videotapes

Last month in our *Safe Schools* feature, we discussed how surveillance videotapes can be helpful to an administrator when dealing with safe schools issues. On a related note, an Adjudicator with the Ontario Information and Privacy Commission recently ordered a school board to provide a portion of a surveillance videotape to a student pursuing possible legal action in respect of an assault inflicted upon him which was caught on tape (Order MO-1570). The school board had denied the student's access request on the basis that the disclosure would constitute an invasion of the personal privacy of the other individuals shown on the video. The Adjudicator rejected the school board's position and ordered the disclosure of a portion of the videotape.

The Adjudicator found that, while the cameras were in "quasi-public" areas, the affected individuals nonetheless had a reasonable expectation that the tape recordings would only be used for the limited purpose for which the surveillance cameras were installed - school safety and security. The privacy expectation of the affected individuals was a significant factor weighing against disclosure. In this instance, however, the reasonable expectation of privacy of the affected individuals was outweighed by the fact that the student requesting access was seeking to enforce a legal right and the videotape could assist him in determining whether or not to proceed with a legal action, and by the fact that the videotape ultimately could become significant evidence in potential litigation. Accordingly, the Adjudicator granted access to a one-hour portion of the videotape surrounding the assault, finding that this shorter time period would lessen the infringement of the personal privacy of the other individuals. The Adjudicator also found that the student's purpose for seeking access to the videotape was closely related to the health and safety purpose for which the cameras had been installed.

What is clear from this decision is that students have a reasonable expectation that school surveillance videotape recordings will only be used for purposes of school safety and security. School boards should refrain from disclosing videotape evidence in circumstances unrelated to these purposes. In our view, if there is a risk of a breach of any student's privacy expectations, school boards should exercise caution and not disclose the requested information unless ordered to do so. In any event, legal advice should be sought when dealing with this type of information request.

freedom of information

MFIPPA and privacy

When reference is made to the *Municipal Freedom of Information and Privacy Act*, we often think of "freedom of information requests". While MFIPPA establishes the statutory regime for obtaining information from a public institution, it also requires public institutions to protect personal information in their possession.

Whereas "personal information" is defined for the purposes of the *release of information* as "recorded information about an identifiable individual", personal information for the purposes of *protecting the privacy* of an individual also includes information that is *not* recorded (s. 28(1)). This prevents an institutional employee from verbally disclosing information that the institution holds in its records or which is simply known to the employee, though not formally recorded.

Additionally, you will be familiar with a note in small print at the bottom of many forms, to the effect that "the information provided is collected in accordance with MFIPPA". Section 29(2) of MFIPPA requires generally that the individual from whom personal information is being collected be informed of the "legal authority" for the collection, the purpose(s) for its use, and who to contact with respect to any questions.

There is a positive injunction against disclosing personal information once collected, except in specified circumstances. For example, s. 32(d) allows an institution to disclose the information if an officer or employee of the institution needs the information "in the performance of his or her duties and if the disclosure is necessary and proper in the discharge of the institution's functions". A child's medical condition could properly be disclosed in order that a teacher-supervisor is prepared in the event of an emergency.

Next time: What happens when there is a "breach" of privacy?

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

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caselaw

Johnson v. Webb

Manitoba Court of Appeal

The Court dismissed the appeal of a school teacher who sought damages from his school board and a student regarding an injury he suffered in a recreational hockey game affiliated with the school.

Mr. D. v. Lucent

Alberta Court of Queen's Bench

The Court struck out a statement of claim against the Minister of Learning of Alberta issued by a student who was expelled for sexually assaulting another student.

R. v. D.H.

British Columbia Provincial Court

The Court found a student, who had threatened another student that she would "beat her up" and "kick her ass", guilty of threatening death or bodily harm.

Summaries of these cases and others can be found in the Shibley Righton Education Law NetLetter published by Quicklaw. Visit www.quicklaw.com.