



Education Law eBulletin

A newsletter for educators.

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in the courts

Province ordered to provide ABA funding to children with autism

In the recently released decision, *Wynberg et al v. Her Majesty the Queen in Right of Ontario* (April 4, 2005), the Ontario Superior Court of Justice has held that the Province of Ontario is required to fund or provide applied behavioural analysis therapy (ABA/IBI) for thirty-five children diagnosed with autism.

In 1999, the Minister of Community and Social Services announced the Intensive Early Intervention Program (IEIP) which provided or funded Intensive Behavioural Intervention (IBI) for children with autism ages 2 to 5. In their claim, the plaintiffs alleged that the Province breached their rights under sections 15 and 7 of the *Charter of Rights and Freedoms* because the program ceased to be available once the child reached 6 years of age and because IBI was not available in the education system. In addition, the Deskin plaintiffs alleged that the Province was negligent and breached a duty to Michael Deskin and his family created through a special relationship between the Deskins and various elected representatives. The plaintiffs sought a declaration that the defendant's failure and/or refusal to provide the IEIP for the children violated their rights under ss. 15 and 7 of the *Charter* and violated the *Education Act*. The plaintiffs sought damages arising from the *Charter* breaches, general damages, and special damages including past costs of therapy and education, future cost of therapy and education, lost income and career opportunities of the adult plaintiffs for having had to provide therapies, for the permanent impairment of the health and well-being of the minor plaintiffs and for pain and suffering and loss of love, care and companionship. The Deskin plaintiffs sought further damages for negligence.

The Superior Court of Justice held that, *inter alia*, the Province of Ontario had violated the s. 15 (1) *Charter* rights of the infant plaintiffs on the basis of age with respect to the IEIP and on the basis of disability with respect to special education programs and services. The Court held that, with respect to the special education regime, the Province had not violated the s. 7 rights of the infant plaintiffs or their parents. The Court granted declaratory relief and damages for past and future ABA/IBI respecting the violations of the s. 15 rights. Other general and special damages claimed by the plaintiffs were denied.

The Court found that between March 1998, when parents brought to the attention of government the needs of children with autism, and September 2000 (when the first child was served in the IEIP) the government responded appropriately; the chosen 2 - 5 years age range was rational; and the IEIP was constitutionally sound. However the decision-makers had assumed, among other things, that children with autism would be appropriately served in the education system. By June 2001, it had become apparent to the government that the predicted wait lists for the IEIP were growing. The violation of the infant plaintiffs' s. 15 *Charter* rights occurred because the Province knew in October 2002 that more children were aging out of the IEIP than were being served and because the Province knew that school-aged children were not receiving appropriate special education programs and special education services in school. The important assumptions on which the age range had been established had failed to materialize. Despite this knowledge, the government re-committed to the age range of 2 - 5 years.

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upcoming conference

School Principals Summit on July 6, 2005

Paul Howard and Sheila MacKinnon of Shibley Righton LLP will be speaking at the "School Principals Summit" conference presented by LexisNexis on July 6, 2005, at the Holiday Inn on King in Toronto. Paul Howard is chairing the conference, which also includes speakers from the Toronto District School Board and the Ontario Principals' Council. The Summit is an intensive one-day conference that will provide answers to some of the most problematic concerns currently facing principals and other educational officers. Issues to be addressed include:

- different methods of developing a school-wide disciplinary approach
- balancing demands of the Occupational Health and Safety Act, the Education Act and the Ontario Human Rights Code
- establishing appropriate boundaries with parents and the outside community
- dealing with crisis situations
- arbitration/mediation in the school setting
- when to call the Ontario Principals' Council

The conference will involve interactive sessions focussing on "nuts and bolts" answers to difficult questions. For further information about the conference, please review the LexisNexis brochure accompanying this eBulletin issue. Participants can register online at www.lexisnexis.ca or by calling 1-800-668-6481 or (905) 479-2665. An Early Bird Fee is available for registrations received on or before May 16, 2005. If you call LexisNexis Customer Service when registering and tell them you were referred by Paul Howard or Sheila MacKinnon, you will receive 20% off the registration fee.

... in the courts, *continued*

The Court held that the Minister of Education failed to fulfill its statutory duty to “ensure that appropriate special education programs and special education services” were available to all exceptional pupils without payment of fees. In particular, the Minister of Education failed to develop policy and give direction to school boards to ensure that ABA/IBI services were provided to children of compulsory school age. Indeed, the actions and inactions of the Ministry of Education and the Minister created a policy barrier to the availability of ABA/IBI in schools. The absence of ABA/IBI meant that children with autism were excluded from the opportunity to access learning with the consequential deprivation of skills, the likelihood of isolation from society, and the loss of the ability to exercise the rights and freedoms to which all Canadians are entitled.

The Court dismissed the negligence claim brought by the Deskin plaintiffs as it was not satisfied that there was a “special relationship” between the plaintiffs and the Province. In this context, any duty owed by the government was owed to the public as a whole, not to any specific individual.

Although this decision is currently being appealed by the provincial government, it could result in dramatic changes to the education of autistic children in schools should it be upheld by the higher courts.

human rights

School Board vicariously liable for damages for discrimination and harassment of student by bullies

In its decision, *School District No. 44 (North Vancouver) v. Jubran*, released April 6, 2005, the British Columbia Court of Appeal upheld a human rights tribunal decision that a school board may be held vicariously liable for damages related to discrimination and harassment. Azmi Jubran attended a British Columbia high school for five years, during which time he was repeatedly subjected to homophobic harassment. Jubran’s high-school was made aware of the harassment during his grade 9 year. During his five years at the school, many incidents were recorded, including 11 incidents of harassment during Jubran’s grade 11 year, and 5 incidents of harassment during his grade 12 year. School response to these incidents included discussing the inappropriateness of the behaviour with the offending students; one detention and two suspensions were handed out due to behaviour directed toward Jubran. Jubran, who did not identify himself as a homosexual, complained of the harassment to the B.C. Human Rights Commission. The Human Rights Tribunal, in concluding that Jubran was discriminated against on the basis of sexual orientation, found that it was irrelevant whether or not he was homosexual or his harassers believed that he was homosexual. The Tribunal found Jubran was subjected to a course of conduct that constituted harassment on a prohibited ground of discrimination, sexual orientation; and that the Board of School Trustees, School District No. 44 (North Vancouver) was responsible for the discrimination as it had failed to provide an educational environment free from discriminatory harassment. On review, the British Columbia Supreme Court held that because Jubran was not homosexual, and the students who harassed him did not believe him to be homosexual, Jubran could not bring himself within s. 8 of the B.C. Human Rights Code. Consequently, the Court did not consider the school board’s liability.

On appeal, the British Columbia Court of Appeal applied a contextual interpretation to the Human Rights Code and held that the purpose of the Code, consistent with human rights legislation generally, is to promote and foster human dignity and equality, to prevent discrimination prohibited by the Code, and to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by the Code. One of its purposes is also to provide a means of redress for those persons who are discriminated against contrary to the Code. In finding that the Code did apply to Jubran, the Court cited Madam Justice L’Heureux-Dube’s judgment in *Commission des droits de la personne du Québec v. Ville de Laval*, [1983] C.S. 961 at 966 (Q.S.C.), wherein she stated that there is a “subjective component” of discrimination, and that the emphasis of the analysis should be on “the effects of the distinction, exclusion or preference rather than the precise nature” of the person’s condition. The Court held that the chambers judge’s interpretation of s. 8 would “impose an unwarranted burden on a person such as Jubran to either declare himself as a homosexual or prove that his harassers believed him to be homosexual”. Accordingly, the emphasis was placed not on the intentions and beliefs of the harassers, which were to insult Jubran based on the myths, prejudices and stereotypes which the Code was enacted to address. The Court of Appeal upheld the Tribunal’s decision in finding the school board vicariously liable. The Court of Appeal cited the Tribunal’s examination of the measures the high-school had taken and measures the high-school should have taken in Jubran’s case. The Tribunal indicated that a written and identifiable Code of Conduct established by the school was sufficient and, hence, all students knew what behaviour was acceptable and what behaviour was not. The Tribunal noted that, although the school staff had participated in anti-harassment training and that the school carried out campaigns targeting peer harassment, the school did not seek any outside assistance with respect to discrimination until Jubran’s human rights complaint. In addition, the Court of Appeal found that, while the school authorities did turn their minds to Jubran’s situation, they neither attempted to address the issue of homophobia or homophobic harassment with the student population generally nor did the school implement a program designed to address that issue. Consequently, the Court of Appeal upheld the Tribunal’s decision that the goal of a discrimination-free school environment is the ideal against which the school board’s response to the harassment of Jubran may be measured, and the school board fell far short of this goal.

This case indicates that, to avoid being held vicariously liable for bullying, school boards and schools must carefully outline and implement codes of conduct, and ensure that students and parents are aware of and abide by the codes. Further, if there are specific problems, school authorities must not only respond to those problems but also must examine them in the wider context of the entire school. If the problem persists or involves a number of students, the school may wish to consider implementing continuing education programs to deal with harassment issues on a school-wide basis.

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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