SHIBLEY RIGHTON LLP
Barristers and Solicitors

Education Law eBulletin

A newsletter for educators. November 2003

"We remember" ~ 11/11

special education

Special Education Tribunal rules that IBI therapy for autism is not "education"

In two recent decisions of the Ontario Special Education Tribunal, both released in September 2003, the Tribunal has ruled that the provision of Intensive Behavioural Intervention to children with autism is in the nature of a therapy and, as such, "falls outside education".

In *Clough v. Simcoe County District School Board* (September 15, 2003), the parent appealed the appropriateness of the school board's placement decision which sought to place her son in an "Communications-Autism Pilot Program" class. That appeal came before the Special Education Tribunal under section 57 of the *Education Act*. The parent asked the Tribunal to make an order directing the board to place the student "in a special education class for autistic pupils, which includes Intensive Behavioural Intervention (IBI)".

The school board argued before the Tribunal that what the parent was seeking was an order requiring the board to provide therapeutic services, and that the Tribunal had no authority to direct the Board to provide a medical therapy or therapeutic program, and therefore no jurisdiction to hear the appeal.

The Tribunal denied the board's preliminary objection and held that it did have jurisdiction to hear the appeal but then went on to deny the request of the parents. There was evidence before the Tribunal from a doctor who gave an overview of IBI and stated that it is a medical treatment and a critical learning program. The evidence appeared to the Tribunal to make a clear distinction between therapy and education, and indicated that IBI is a therapy.

The Tribunal concluded that "a special education program is intended to be educational not therapeutic. The therapeutic program sought by [the parent] for her son ... falls outside education". The Tribunal referenced the decision of *Auton v. British Columbia*, where the B.C. Court of Appeal found that IBI therapy was a "medically necessary service" for the purposes of the B.C. *Medicare Protection Act*.

Readers of our Education Law eBulletin will recall that in our review of the *Auton* decision in our November 2002 issue, we observed that in *Auton* the B.C. courts perceived the question of IBI as "primarily an issue of health care, not education", and that the judges went out of their way to restrict their comments to the health context, declining to address the issue of treatment for school-age children, where different considerations may apply. (In May 2003 leave to appeal the *Auton* decision to the Supreme Court of Canada was granted by that Court.)

In *Crarey v. Dufferin-Peel Catholic District School Board* (September 18, 2003), the parents initiated an appeal to the Special Education Tribunal on behalf of their eight-year-old daughter who had been diagnosed with Autism Spectrum Disorder. The parents sought to have their daughter placed in an integrated placement that would provide IBI therapy services to the student in a regular class setting.

As in *Clough*, the school board again requested the Tribunal to decline jurisdiction to hear the appeal on the basis that the Tribunal had already decided in *Clough* that IBI was a therapeutic service, not an educational service. This time the Tribunal accepted the preliminary objection of the board to the Tribunal's jurisdiction, and held that "IBI is a therapy and therefore it is a service that is outside the jurisdiction of the Tribunal".

continued...

SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
250 University Avenue
Suite 700
Toronto, ON M5H 3E5
Tel.: (416) 214-5200
Toll free: 1-877-214-5200

Windsor Office:
2510 Ouellette Avenue
Suite 301
Windsor, ON N8X 1L4
Tel.: (519) 969-9844
Toll free: 1-866-422-7988

Education and Public Law Group:

John P. Bell
john.bell@shibleyrighton.com

Brian P. Nolan
brian.nolan@shibleyrighton.com

Alan Wolfish, Q.C.
alan.wolfish@shibleyrighton.com

Diane M. Abbey
diane.abbey@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

J. Paul Howard
paul.howard@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Byrdena M. MacNeil
byrdena.macneil@shibleyrighton.com

Marion Hoffer
marion.hoffer@shibleyrighton.com

Jennifer E. Trépanier
jennifer.trepanier@shibleyrighton.com

Jason Green
jason.green@shibleyrighton.com

special education, *continued*

In dismissing the appeal in *Crarey*, the Tribunal made some important observations on the nature of IBI in an apparent attempt to remedy any possible confusion between the terms ABA (Applied Behavioural Analysis) and IBI, and defeat the suggestion that teachers are not versed in using behavioural principles in the classroom. The Tribunal described IBI as:

> "... an intensive, one-on-one therapy delivered by a trained therapist, working under the direction of a psychologist. The program is delivered in a separate room for long hours ...
>
> IBI is a program that is not developed by a teacher but rather by a therapist who would have no involvement into the content of [the student's] learning program. This therapist would be supervised by a psychologist from outside the school system and the Board would have no control of the persons planning and delivering the program because they would not be employees of the School Board. ...
>
> Teachers learn behavioural principles and techniques in their teacher education programs. How children learn using behavioural principles is one of the classical learning theories and is not exclusive to ABA ... or IBI. Consistent with *Clough*, IBI is a specific program developed by psychologists. The step-by-step program is delivered by a therapist trained to use 'discrete trials' [specific, uniform processes with a child in a separate room for a significant portion of a child's day]."

The Special Education Tribunal's decisions in *Clough* and *Crarey* are significant in their attempt to re-assert some definitional and conceptual boundaries on the services provided by different agencies or institutions involved with children. They recognize that not every service provided to a school-age child necessarily falls within the concept of education. And for the several Ontario school boards who are currently facing complaints of discrimination under the *Human Rights Code* by parents of children with autism who seek to have IBI therapy provided to them in the classroom, these two Tribunal decisions provide an important reminder that although school boards may be a "service" provider for the purposes of section 1 of the *Code*, IBI is not part of the service of education that they provide.

---

human rights

Ontario Human Rights Commission releases consultation report on disability issues

On Monday, October 27, 2003, the Ontario Human Rights Commission released its consultation report on disability issues in Ontario's education system. The report is called "The Opportunity to Succeed: Achieving Barrier-free Education for Students with Disabilities" and is available on-line at the OHRC website linked below.

Last summer, the Commission initiated a province-wide consultation on education issues affecting students with disabilities. In July 2002, the Commission issued a consultation paper on these issues, and invited interested parties to respond with written submissions. Paul Howard of our firm was retained by the Ontario Public School Boards' Association, and filed an extensive brief with the Commission as part of that consultation. The Commission then held six days of public hearings in November 2002 to receive oral submissions from selected delegations. (OPSBA was one of the very few organizations representing school board interests selected by the Commission to appear before it.)

The report released Monday is the Commission's summary of and report on the consultation process it held last fall. Eventually, the Commission intends to issue guidelines on these issues, which will set out the Commission's policy views on the duty to accommodate under the *Human Rights Code* as it relates to students with special needs, provide suggestions to school boards for accommodation planning, and set out specific guidelines to clarify the application of its policies and principles in the education sector. Although the Commission's guidelines do not have the force of law, in practice they are often used by the Commission's investigation officers and staff who rely upon them for interpretation when dealing with complaints under the *Code* and other enforcement issues.

On review of the Report, we note that the Commission accepted OPSBA's primary submission that inadequate funding for special education is "the foremost barrier to equal access to educational opportunities confronting students with disabilities." The Report also accepted our arguments that the Commission must consider naming the Ministry of Education as a separate party respondent in appropriate cases where the complaint alleges inadequate provision of special education services, and that students with disabilities (and their parents) also share in the duty to accommodate and must cooperate with school boards (in terms of sharing information, etc.) in the accommodation process.

However, other aspects of the Report are problematic. For example, parts of the Report that address discipline issues under the *Safe Schools Act* appear to be based on anecdotal evidence, and seem to suggest that students with special needs are being singled out for discipline. These and other aspects of the Report require further dialogue with the Commission.

You can access the Commission's Report and background material at: http://www.ohrc.on.ca/english/index.shtml

---

in the courts

IBI funding for autism continued on "interim interim" basis

On October 20, 2003, Madam Justice Constance Backhouse of the Ontario Superior Court of Justice issued an "interim interim" injunction in *Burrows et al. v. Ontario*, requiring the Government of Ontario to continue funding of IBI therapy for 12 minor plaintiffs under its Intensive Early Intervention Program (IEIP) until at least January 2004.

The 12 plaintiffs, each of whom was diagnosed with autism, commenced an action in the Superior Court seeking the reinstatement of government funding for their IBI treatment, which was terminated under the IEIP when they attained six years of age, which they allege is a breach of their rights to equality under the *Canadian Charter of Rights and Freedoms*. As such, the claim is quite similar to the *Wynberg* and *Deskin* actions currently at trial before Madam Justice Kitely. After commencing their action, the plaintiffs in *Burrows* then brought a motion before the Court for a pre-trial order to have their IBI funding continued on an interim basis until such time as their case comes to trial. The government sought to adjourn the hearing of that motion in order to be given an opportunity to challenge the plaintiffs' evidence and cross-examine on the affidavits that were filed on behalf of the plaintiffs in support of the interim claim. The hearing of the motion was adjourned to the week of January 5, 2004, and there was then a discussion of terms of the adjournment, out of which arose the plaintiffs' claim for an "interim interim" order that would at least continue the funding for the period from now until January 2004 when the motion for the interim injunction could be heard.

Justice Backhouse granted the "interim interim" relief and ordered the funding for these 12 plaintiffs continued pending the hearing of the interim injunction in January. In doing so, she relied upon the decision of Mr. Justice Gans in *Lowrey v. Ontario*, the reasons for which were reviewed in the October 2003 issue of the Shibley Righton LLP Education Law eBulletin. To be sure, this new decision of Justice Backhouse provides no authority or support for the proposition that school boards must provide IBI therapy in the classroom. As in the *Lowrey* decision, that issue was never before the judge when she made her decision to extend funding on an "interim interim" basis.

And while the decision to continue funding for 2½ months is perhaps not surprising considering the sympathy expressed for the plaintiffs by the Court, what is surprising is some of the "factual" findings that Justice Backhouse made in the course of her ruling. The judge began her discussion by stating that: "It is accepted that if children with autism receive [IBI therapy] along the lines of the methodology developed by Dr. Ivan Lovaas, of the University of California, their ability to learn and develop improves markedly and they stand a greater chance of keeping pace with their non-developmentally disabled peers." Certainly the plaintiffs in *Burrows* (and in *Wynberg, Deskin* and *Lowrey* for that matter) would "accept" that broad statement. But it is certainly not accepted by the government (at least not in such unqualified terms) – and that is precisely the dispute presently before Madam Justice Kitely in the *Wynberg* and *Deskin* trial.

The other aspect of the factual findings made by Justice Backhouse that some would find surprising concerns the evidence that was led on behalf of the parents which spoke of the "immediate regression in gains of the children where there is even a short break in [IBI] treatment". That evidence was led in support of the parents' argument that the "balance of convenience" favours the granting of the interim interim relief because, as they argued, the children would suffer more if the funding were discontinued than would the government if the funding were maintained. Thus, the evidence filed on behalf of the parents, which was accepted by Justice Backhouse, referred repeatedly to the "inevitable" or "immediate regression" that would result if IBI therapy were discontinued; indeed, Justice Backhouse concluded that "[a] 2½ month interruption in their therapy could prove disastrous".

What is surprising is that evidence which demonstrates – at least from a teacher's perspective – that a given therapy or methodology is ineffective should be used to justify the continuance of that very same therapy. For the parents involved in this litigation, the potential for "immediate regression" argues for continued IBI therapy. But for the educator, it tends to show that IBI may not be an effective treatment in the first place. That is, the student teacher at a faculty of education is taught that where a particular teaching method is used with a student for some time and that teaching method is then discontinued, if the student

continued ...

new *safe schools* text

Congratulations to our own Jennifer E. Trépanier, whose new book, *Student Discipline: A Guide to the Safe Schools Act*, has just been published by LexisNexis/Butterworths. This important new work includes detailed commentary on the Act and regulations; practical, "hands-on" advice to educators dealing with student discipline; the text of the relevant provisions; a guide to the conduct of an appeal hearing before the Child and Family Services Review Board; and various sample precedents for use by educators. Copies of the text may be obtained by contacting Barbara Brumwell, Customer Service at LexisNexis, toll-free 1-800-668-6481, ext. 826, or direct 905-415-5826.

shows signs of "immediate regression", such that there has been no generalization, then that technique is probably a weak method of instruction at best. Thus, for the teacher, "immediate regression" suggests that one should be employing a different method – not that one should be continuing to provide, and fund at significant cost, a method that is evidently ineffective.

At present, the government is seeking instructions on whether to seek leave to appeal the decision of Justice Backhouse in *Burrows*.

felicitations

Congratulations to the CEA on its 112th year!

At its AGM on October 17, 2003, the Canadian Education Association celebrated its 112th year of operations! The CEA has transformed itself, following an intense 3-year review, with fundamental changes to both its strategic direction and its governance arrangements, and a "realignment" of its activities that reflects "the important interactions among practice, research and policy that underlie the concept of knowledge mobilization". The CEA has also unveiled a new visual identity, with a new logo and an impressive redesigned Web site, which provides an "online resource to build stronger links among research, policy and practice for better education in Canada". Check out CEA's new site at www.cea-ace.ca

November 20 - Universal Children's Day

Universal Children's Day is observed as a day of worldwide fraternity and understanding between children and of activity promoting the welfare of the world's children. The United Nations Convention on the Rights of the Child was adopted on November 20, 1989. The Government of Canada designated November 20 as "National Child Day" in 1993.

case law

K.L.B. v. British Columbia
Supreme Court of Canada
The Supreme Court of Canada upheld the B.C. Court of Appeal's determination that various claims arising out of the physical and sexual abuse of four siblings while in foster care were statute barred. Otherwise, the Province of British Columbia would have been found liable for negligence, but not for vicarious liability or for breach of fiduciary duty; further, the claim for breach of a non-delegable duty would have failed as no such duty existed in this case.

E.D.G. v. Hammer
Supreme Court of Canada
The defendant school board was found not liable for the sexual abuse of a student by a janitor. The Supreme Court of Canada determined that the B.C. *School Act* does not impose a non-delegable duty on school boards to ensure that children are kept safe while on school premises. The Supreme Court further held that the school board did not breach any fiduciary duty owed to the student.

M.B. v. British Columbia
Supreme Court of Canada
The Supreme Court of Canada determined that the Province of British Columbia was neither vicariously liable nor in breach of a non-delegable duty for the sexual abuse of a child by her foster father, based on the principles already set out in *K.L.B. v. British Columbia*.

Doe v. O'Dell
Ontario Superior Court of Justice
The Court found the Diocese of Sault Ste. Marie was not vicariously liable for $1.4 million in damages arising out of the sexual abuse by a priest/teacher of a non-Catholic child who sought the advice of the priest at the rectory.

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

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

Legal Disclaimer: The information contained in this publication is not intended to be legal advice. It is general information only. You should take appropriate professional advice on your particular circumstances. Shibley Righton LLP disclaims all responsibility for all consequences of any person acting on, or refraining from acting in reliance on, information contained herein.

© Copyright 2003. Shibley Righton LLP. All rights reserved.