



Education Law eBulletin

A newsletter for educators.

June 2003

student supervision

School board found not negligent for special needs student's injuries

In *F.C. (Litigation guardian of) v. 511825 Ontario Inc. (c.o.b. C.G.H.)*, the Ontario Court of Appeal upheld a finding that a school board was not negligent for injuries suffered to a 20 year-old special needs student who suffered severe frostbite requiring the amputation of his legs after wandering away from school with another special needs student without supervision.

The Court of Appeal explained that the school board was bound by the standard of a "reasonably careful or prudent parent" in providing for the supervision and protection of its students. The school board had taken certain actions to guard against unsafe incidents and to supervise special needs students at the end of the school day. The Court rejected the argument that the school board was aware of four other instances when the same two special needs pupils had gone "AWOL" from school. The evidence suggested, to the contrary, that the school board was unaware of any pattern of runaway activity. The board did have knowledge of two previous such incidents, but had taken steps in these regards. The Court of Appeal stated that it would only overturn the jury verdict of the lower court if it was plainly unreasonable and unjust such that the Court was satisfied that no jury, reviewing the evidence as a whole and acting judicially, could have reached it. The Court of Appeal noted that although a different conclusion may well have been reached by the jury, given the vulnerability of the special needs student (who functioned at the level of a 5 to 7 year old), there was evidence at trial to support that the school board was not negligent.

The tragic facts of this case serve to remind school boards of the importance of taking all steps reasonably possible to ensure that special needs students are safely transported to and from school. If school boards fail to take such steps, they risk serious harm to their students, as well as possible legal liability.



Special needs teacher denied damages for injuries caused by pupil

The Saskatchewan Court of Queen's Bench, in *Kendall v. St. Paul's Roman Catholic Separate School Division No. 20*, denied a special needs teacher damages caused when a special needs student struck her in the head. The teacher alleged that the school board failed to provide a safe work environment and was therefore negligent and breached an implied condition of the teacher's employment contract.

The Court explained that the school board had an obligation to provide all students, including the special needs student in question, a program of instruction consistent with the pupil's educational needs and abilities. The Court also explained that the school board owed a duty of care to the teacher and indicated that there was no doubt that having the special needs pupil in the school presented a risk. The school board was not liable in negligence unless it breached its duty to avoid conduct that exposes others to unreasonable risk of harm. The school board had an obligation to take reasonable care to provide and maintain as safe a workplace as is reasonably possible in all the circumstances. The school board was obliged not to expose employees to unreasonable risks of harm, but was not required to avoid every possible risk.

The Court explained that the degree of risk that a reasonable person will tolerate varies in direct relation to the worthiness of the undertaking. The Court concluded that the safety risk in this case was acceptable. Given the statutory obligation imposed on the defendant, the social value of the programs offered at the school, the careful planning of the programs, and the steps taken to minimize risks, a reasonable person of ordinary prudence would accept an elevated level of safety risk rather than forego the situation. The Court rejected the teacher's allegation that she was not adequately trained for her job, given that she had done the job successfully for a year before the accident and there was no evidence that the accident was connected to a lack of training. The Court also rejected the argument that the school board's failure to provide a "quiet room" for calming down special needs students contributed to the accident. There was no evidence that the lack of such a room caused or contributed to the teacher's injury.

This decision is one example of the recently increased litigation involving injuries caused to educators by special needs pupils. When special needs pupils cause injuries to staff, a school board is open to potential legal liability. School boards should take special care to try to limit as much as possible the risk of injuries to their staff caused by special needs pupils. This may involve the implementation of appropriate safety plans, including techniques for injury prevention specifically tailored to individual special needs pupils who create a safety risk.

announcements

Welcoming Alan Wolfish, Q.C.

We are very pleased to announce that Alan Wolfish, Q.C. has joined our firm as Counsel practising with the Education and Public Law Group.

Extremely well-respected in the Education field for his wisdom, experience and integrity, Mr. Wolfish brings almost 25 years of experience as a legal director in the Ontario Public Service. He served as Director of the Legal Services Branch serving both the Ministry of Education and the Ministry of Training, Colleges and Universities.

Mr. Wolfish established the Province's first system of legal representation for children in protection proceedings while serving as Director of the Child Representation Program. He was designated Queen's Counsel in 1981 in recognition of this accomplishment. In 1993, Mr. Wolfish was also honoured with the Amethyst Award, an award established to recognize outstanding achievements by people in the Ontario Public Service.

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

Diane M. Abbey
diane.abbey@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

J. Paul Howard
paul.howard@shibleyrighton.com

Thomas McRae
thomas.mcr@shibleyrighton.com

Byrdena M. MacNeil
byrdena.macneil@shibleyrighton.com

Marion Hoffer
marion.hoffer@shibleyrighton.com

Jennifer E. Trépanier
jennifer.trepanier@shibleyrighton.com

case law

Toronto District School Board

Ontario Labour Relations Board

The Ontario Labour Relations Board found that a teacher union's boycott of postings for positions of responsibility constituted an illegal strike.

Re Toronto Catholic District School Board

Ontario Information and Privacy Commission

The Commission found that the school board contravened the Municipal Freedom of Information and Protection of Privacy Act by disclosing information about the claimant's father without her permission.

Smart v. College of the Rockies (a.k.a. East Kootenay Community College)

British Columbia Supreme Court

The Court denied the College's application for an order dismissing the plaintiff-students' claim, which the College had argued was based solely on the tort of educational malpractice.

Dingman v. Upper Grand District School Board

Ontario Divisional Court

The Court denied an application for judicial review to quash the decision of the school board with respect to closing a school.

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

freedom of information

School's administration of questionnaire breaches privacy act

In *Re Edmonton Public Schools* (Alberta Information and Privacy Commission), the Complainant alleged that the school board had breached the privacy of grade six students by failing to obtain consent from a parent/guardian prior to asking the students to complete a questionnaire. The questionnaire was part of a study intended to identify factors affecting student and school performance. The parents, including the Complainant, only became aware of the study when they received a related questionnaire sent home with their children, which the parents were asked to complete and return to the organization conducting the study. The parents were told that their results would be matched with the results of their children.

The study was sponsored by Human Resources Development Canada and administered by a division of the University of Alberta. The school board facilitated the study because further research was needed in the area of student achievement scores, which had not been correlated with factors other than socio-economic factors. The Board acknowledged, however, that it had not considered whether the questionnaire might violate provincial privacy legislation prior to administering it. The questionnaire was clearly designed to elicit the students' personal information. Section 32 of the Alberta Act permits a school board to collect personal information if the purpose of collection relates directly to and is necessary for an operating program or activity. The Commissioner held that the purpose of the study met the requirements for collection. The pressing issue before the Commissioner was whether the school board had violated the Alberta Act by failing to notify parents prior to collecting the information and disclosing it to a third party. The Commissioner found that the board had violated the legislation in both circumstances and that its conduct was not justified by the intended use of the information. Although the Alberta Act does not contain a specific requirement to obtain written consent prior to gathering personal information, the Commissioner explained that public bodies have a duty to ensure individuals are properly informed. Further, it was noted that elementary school children could not be expected to fully comprehend the purposes for which their personal information would be used, nor would they be able to raise questions or make informed decisions about providing the information. In fact, students who failed to complete the questionnaire had been told they would be reported to the Principal.

There is nothing inherently wrong with surveys and research studies being conducted in public schools. School boards are frequently approached in this regard by well-respected

institutions which enjoy government funding. However, school boards must independently ensure that students' and parents' privacy rights have been protected prior to participating in such studies.

legislation

The Personal Information Protection and Electronic Documents Act

The federal government's *Personal Information Protection and Electronic Documents Act* ("PIPEDA") already applies to certain federal organizations and sectors, such as banking. However, on January 1, 2004, PIPEDA will apply to all commercial activity in all provinces unless a province has enacted comparable legislation of its own. While the Ontario Ministry of Consumer and Business Services proposed the draft *Privacy of Personal Information Act, 2002* in February 2002, it appears there are no plans to pass such legislation prior to the end of the year. Subject to new developments, PIPEDA will apply to Ontario in 2004.

School boards are already governed by provincial privacy legislation, being the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA"). MFIPPA only applies to those institutions specified by regulation, including school boards. PIPEDA, on the other hand, applies to any entity carrying on commercial activity. Unfortunately, though organizations subject to the federal *Privacy Act* are exempted from the application of PIPEDA, PIPEDA makes no provision to exempt institutions already subject to provincial privacy legislation. In other words, insofar as school boards engage in commercial activity, they will be subject to MFIPPA and PIPEDA. Organizations governed by PIPEDA must obtain an individual's consent when they collect, use or disclose the individual's personal information, except in specific limited circumstances. Individuals have the right of access to their personal information and may also challenge the accuracy of such information. Furthermore, personal information must be protected by safeguards. In practice, school boards in compliance with MFIPPA's privacy requirements will likely also be in compliance with PIPEDA. However, some adjustments may be required. For example, the standard notice that information is being collected pursuant to MFIPPA might be modified to include PIPEDA. As well, PIPEDA may also raise some new issues for school boards. PIPEDA is directed at school boards' conduct of commercial activities, so school boards' foundations may be caught by the Act. In this context, it will be prudent for school boards to review their commercial activities to ensure compliance with PIPEDA.

news from the ministry

Strict discipline programs to continue

Sources from the Ministry of Education advise that the pilot Strict Discipline Programs currently in place to educate pupils who have been fully expelled, and which were scheduled to end on June 30, 2003, have been extended for another year, until June 30, 2004.

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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