



## Education Law eBulletin

A newsletter for educators.

November 2004

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 R. Howard  
paul.howard@shibleyrighton.com

Thomas McRae  
thomas.mcrae@shibleyrighton.com

Byrdena M. MacNeil  
byrdena.macneil@shibleyrighton.com

Jennifer E. Trépanier  
jennifer.trepanier@shibleyrighton.com

Bryce Chandler  
bryce.chandler@shibleyrighton.com

Sarah McCoubrey  
sarah.mccoubrey@shibleyrighton.com

### employment matters



#### Cryptic doctor's notes and an employer's right to further information

Sometimes, a doctor's note requiring an employee's absence from work may state only that. When, if ever, can an employer ask for particulars regarding an alleged ailment?

First, the employer must determine what is reasonable in the circumstances. If the employee will be absent for a short period of time only, additional information may not be necessary. If the employee is likely to be absent for an extended period of time or is asking for accommodation, further particulars may be required to meet these requests.

Second, the employer must have regard to the collective agreement (if any). If the collective agreement speaks to the issue of medical notes, only that information allowed by the collective agreement may be collected by the employer. However, if the collective agreement is silent on the issue, employers may wish to implement a policy requiring employees applying for partial or extended leave to obtain a prescribed medical certificate from their doctors. Any such policy will be judged on a standard of reasonableness; an employer must gather only the minimum of information required for the identified purpose.

If it is decided that further information is required, the employer should not attempt to contact the employee's doctor directly. Instead, the employer should give a list of questions to the employee to give to his or her doctor to answer. The questions should only ask for information such that the doctor is able to support the leave of absence or a return to work. Note that questions regarding diagnosis, treatment, and when the employee first saw the doctor have been deemed by arbitrators to be unnecessary, and may raise privacy concerns.

In some instances, it will be appropriate for the employer to request that an independent doctor perform a medical examination of the employee. However, this measure should only be taken if there is some reasonable ground for the employer to believe that the employee's doctor is not acting in good faith. Examples of such grounds include: the employer's past dealings with that doctor which indicated bad faith or fraud; or where the doctor has recommended activities for the employee without explanation and it is arguable that the doctor has exceeded his or her area of knowledge.

### case law

#### R. v. Galliani

*Ontario Superior Court of Justice*

The Court overturned an acquittal of a special education teacher of assault charges involving a developmentally-delayed student. Although there was not conclusive evidence that the teacher "punched" the boy, to find there was no contact would be unreasonable and could only be reached by ignoring overwhelming evidence on the issue. The Court refrained from deciding whether s. 43 of the Criminal Code applied, since to do so would have required the Court to make findings of fact from the transcript. A new trial was ordered to allow a full rehearing of the matter.

#### MacDonald v. University of British Columbia

*British Columbia Superior Court*

The Court dismissed a claim for damages arising after the University raised tuition for its MBA program from \$7000 to \$28,000.

#### Baier v. Alberta

*Alberta Court of Queen's Bench*

Alberta teachers and their union successfully challenged a proposed prohibition on teachers acting as trustees while employed as teachers as a breach of their freedom of expression.

#### Lefebvre c. Collège St-Alexandre de la Gatineau

*Quebec Superior Court*

The Court dismissed a motion brought by parents for an interlocutory injunction requiring a private secondary school to readmit their son who was suspended for the upcoming school year.

Summaries of these cases and others can be found in the Shibley Righton Education Law NetLetter published by Quicklaw. Visit [www.quicklaw.com](http://www.quicklaw.com).

## in the courts

### Ontario government ordered to continue funding IBI therapy for autistic child

In August 2004, in the case *Naccarato (Litigation guardian of) v. Ontario*, the Ontario Superior Court of Justice granted an interlocutory mandatory injunction to a 7 year-old autistic child requiring the Ontario government to continue to fund the child's Intensive Behavioural Intervention (IBI) therapy under the government's Intensive Early Intervention Program (IEIP). The child's funding had been cut off when he reached the program's 6 year-old age limit. The plaintiff (through his litigation guardian) brought a legal action against the government which is pending. In the interim, the child sought the interlocutory injunction to reinstate his funding for IBI therapy in order that he could maintain his treatment pending the outcome of his legal proceedings.

The Court found that the plaintiff satisfied the following test for an interlocutory (interim) injunction: (1) there was a serious legal issue to be determined being the constitutional validity of the age 6 cut off for admissibility and funding under the government program (this was uncontested); (2) the moving party would suffer irreparable harm prior to trial if the interlocutory relief was not granted; and (3) the balance of convenience, considering the public interest, favoured a departure from the status quo. The Court accepted the uncontested evidence of the plaintiff's psychologist that there was a risk of the plaintiff regressing if he were to now discontinue his IBI program and, thus, suffer irreparable harm. The Court also concluded that the balance of convenience favoured granting the injunction and noted that if the injunction was not granted, this would have a serious negative impact on the plaintiff's well-being and on his family. The Court held that the public interest was better served by helping the plaintiff gain independence thereby lessening the burden on his family and the public.

The Court also accepted the plaintiff's psychologist's evidence that the plaintiff's attempted part-time integration at school was detrimental to his IBI treatment. The Court noted that while the school board's program was "no doubt excellent", and tailored to educating autistic children, it simply did not deliver IBI therapy which the plaintiff's doctor found was required. The plaintiff's parents and psychologist agreed, however, that the plaintiff's IBI therapy should only continue for a limited time and that the student must, at some point, make the transition from a full-time IBI program to a program in the school system where no IBI therapy exists. Consequently, and given the insufficiency of evidence as to how much longer the plaintiff required continued IBI therapy, the Court ordered that the plaintiff's treatment be funded by the government until the earlier of: (a) the release of the pending decision in the related *Wynberg* case (involving a determination of relevant issues); (b) the trial of the plaintiff's legal action; (c) January 31, 2005; or (d) a further order of the court. It was noted that if the plaintiff were to seek a further extension of the funding, he would have to provide evidence as to how much additional treatment he anticipated requiring and provide plans and recommendations respecting his transition into the school system. The Court found that it was inappropriate to grant retroactive application of the injunction (to the date when the funding ended) in the circumstances.

In October 2004, yet another decision was released requiring the Ontario government to continue funding for an autistic child. In *Kohn v. Ontario (Attorney General)*, the Superior Court of Justice held that an interlocutory injunction would issue for continued IEIP funding for a 6 year-old boy until the earlier of (a) the trial of the action; (b) the release of the *Wynberg* trial judgment; or (c) June 1, 2005.

## upcoming conference

### Safe Schools & Special Education: Managing the Dilemmas

December 8, 2004

Holiday Inn on King, Toronto, ON

Jennifer Trépanier of Shibley Righton LLP is chairing a conference on "Safe Schools and Special Education" to be held December 8, 2004 in Toronto. Increasingly, educators are confronted with the need to balance the interests of special needs pupils with a school board's obligation to maintain a safe school environment for pupils and staff. This seminar will provide educators with the tools necessary to handle the challenging situations presented in educating special needs pupils who raise safety concerns. Various specialists in the field are among the panelists, including Shibley Righton's Paul Howard and Byrdena MacNeil.

The conference's topics will include: the impact of the Safe Schools legislation on the rights of students with disabilities; the flexible and effective use of the Safe Schools legislation; how the Ontario Human Rights Commission's recent consultation report will affect the school system; solutions to the problems that arise when there is dispute among parents, school boards, the OHRC and the Ministry of Labour; strategies for resolving conflict between parents and school boards over the education of their exceptional children; and guidance from those on the front-line in the schools about ways to build a partnership with parents in the education of their special needs children.

Registration information is available by calling 1-800-668-6481 or by visiting [www.lexisnexis.ca](http://www.lexisnexis.ca) and clicking on "LexisNexis Seminar Series" at the bottom of the page.

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

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