



## Education Law eBulletin

A newsletter for educators.

October 2003

We are pleased to be back for the  
2003/2004 school year! 😊

### special education

#### Application to appeal order requiring continuation of funding of IBI therapy dismissed

On April 11, 2003, Mr. Justice Gans of the Ontario Superior Court of Justice issued an interim injunction in *Lowrey v. Ontario*, requiring the Government of Ontario to continue to fund Intensive Behavioural Intervention (IBI) therapy to Andrew Lowrey, beyond the standard 5-years-of-age cut-off under the Government's Intensive Early Intervention Program, until the earlier of (1) the completion of the therapy as determined by his therapist and psychologist, (2) the decision of the Court in the *Wynberg* and *Deskin* cases (the two trials involving challenges to the Government's IEI Program, currently being tried before Madam Justice Kiteley), or (3) further order of the court.

Mr. Justice Gans made it clear that his decision to extend the funding for Andrew did not have general application to all children with autism in the Province of Ontario who presently qualify for IBI therapy. Justice Gans specifically held: "In my respectful opinion, this decision, much like the judgment of Epstein J. in *Rogers, supra*, is intended to act only as an exemption to the operation of the Program specific to the Lowreys and in relation to the evidence they have adduced. It is not intended to send the Ministry down the 'slippery slope' to a suspension of the operation of the Program guidelines until such time as another court passes on their constitutionality or otherwise."

The Government tried to appeal the decision of Justice Gans, however, its leave to appeal application was dismissed. In the course of dismissing the leave application, Mr. Justice Lane reviewed Justice Gan's decision to see whether there were any errors made, whether the wrong legal principles were applied to the facts, or whether there were some other grounds that would justify leave to appeal. During his review, Justice Lane, naturally enough, gave a brief description of the case before Justice Gans, the critical evidence, and the respective position of the parties. In describing the position that was taken by the Government before Justice Gans, Justice Lane remarked in passing that: "The Crown's position is that ongoing treatment beyond six years of age is the responsibility of the local School Board, here the Simcoe Board, which has funding for its special needs pupils."

Although innocently made, Justice Lane's choice of the word "treatment" to describe the Government's position in the lawsuit is inaccurate because, in fact, it was not and is not the position of the Government that IBI treatment must be provided in the classroom or that the provision of ongoing IBI treatment for students beyond six years of age is the responsibility of local school boards. This mischaracterization would have been avoided if, for example, Justice Lane had used the word "program" instead of "treatment" in describing the Government's position. School boards are responsible under the *Education Act* for the provision of appropriate special education programs to their exceptional pupils, but currently there is no legal requirement that they provide IBI therapy to students in the classroom.

In any event, the decision of Justice Lane is not authoritative or binding precedent for the proposition that school boards must provide IBI therapy in schools. That issue was never before Justice Lane for consideration. The only issue Justice Lane was deciding was whether the Government had demonstrated sufficient grounds for leave to appeal.

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### announcements

We are pleased to announce that our own Jennifer E. Trépanier has just released a book, *Student Discipline: A Guide to the Safe Schools Act*, published by LexisNexis/Butterworths. The text is a hands-on guide to help educators understand the legal and practical implications of the Act.

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## safe schools

### Schoolyard fight held not consensual

In *R. v. J. W.*, a student was charged with assault causing bodily harm after a schoolyard incident that began with a snowball fight. The confrontation escalated into taunting, followed by both students throwing punches. One student then dropped to the ground, at which point the other kicked him a number of times, causing serious injuries to his eye, before other students intervened. The student who caused the injury was charged with assault but argued that the fight had been consensual, as both boys had contributed to the taunting and the violence.

The Youth Court Judge held that the accused could not rely on the defences of consent and self-defence because the accused had continued kicking the other student even after he had dropped to the ground. The Judge acknowledged that, while some fistfights between adolescents are consensual and should not result in assault charges, this defence does not extend to a student causing bodily harm with the intent to hurt another. This distinction is an attempt to differentiate between the type of schoolyard fight that might occur between two students both of whom are equally responsible participants in the dispute, and the type of incident where one person takes advantage of the other to cause significant harm.

## facilities

### Community approval not required to lease an unused property

In *Humber Heights of Etobicoke Ratepayers Inc. v. Toronto District School Board*, ratepayers objected to a decision by the School Board to lease an unused school property without community approval. In the past, the facility had been used for community education and events. The ratepayers argued that a Board policy regarding leasing of properties created a duty of fairness. The Court disagreed finding that the policy did not create an enforceable right of participation but simply the right to be notified of the new lease. In fact, the Board had acted properly as it had a duty to make the most cost efficient use of the facilities.

## professional bodies

### Court awards costs of appeal before teachers association

The Alberta Court of Appeal recently awarded costs to the teacher who contested the conflict between her rights as a parent and her obligations as a teacher in *Eggertson v. Alberta Teacher's Association*. Normally, a court cannot order costs for appeals before the Alberta Teachers Association. In this case, however, the Court considered the complexity and duration of the issue, and recognized the importance of being able to protect one's professional reputation. The issue was important to both the plaintiff individually and to all teachers who are also parents. The Court awarded a lump sum payment of \$15,000 plus disbursements to provide partial compensation for the lengthy appeal process.

## school property

### Parents ordered to pay for damage caused by vandalism

The Labrador School Board in Newfoundland recently succeeded in winning \$7000 in damages in a lawsuit brought against the parents of a student who had maliciously damaged school property. In the Spring of 2000, the student trespassed on school property, broke sixteen windows and flooded the building by running the water faucets. The student was subsequently charged and convicted for vandalism under the *Young Offenders Act*.

Section 21 of the Newfoundland *Schools Act*, S.N. 1997, c.S-12.2, states that where property of a board or employee is damaged by an intentional or negligent act of a student, both the student and his/her parents are individually and collectively liable. The Newfoundland and Labrador Supreme Court found that the Legislature had, in the clearest language, intended a straightforward focus of liability and, therefore, awarded damages against the parents for the costs of repairing the vandalism.

Although the *Education Act* does not include a similar provision, Ontario does have the *Parental Responsibility Act, 2000*, S.O. 2000, c.4, which permits the victims of intentional youth vandalism to sue the parents in small claims court for the damages. The *Parental Responsibility Act, 2000* can be used by any owner of property, including a school board, and provides that proof that a child has been found guilty under the *Young Offenders Act* of an offence is proof for the purposes of the small claims court action (in the absence of evidence to the contrary) that the offence was committed by the child.

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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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