



Education Law eBulletin

A newsletter for educators

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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 R. Howard
paul.howard@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Jennifer E. Trépanier
jennifer.trepanier@shibleyrighton.com

Gaynor J. Roger
gaynor.roger@shibleyrighton.com

Bryce Chandler
bryce.chandler@shibleyrighton.com

Special Education Tribunal has no authority to review School Board process

In a very recent decision of the Ontario Special Education Tribunal, released May 3, 2008, the Tribunal has ruled that it has no jurisdiction under the *Education Act* to determine whether a school board is in breach of the *Act*, the regulations, or the board's common law duty of procedural fairness in dealing with special education placement appeals of exceptional pupils.

In *W. v. Toronto District School Board*, the parent appealed to the Special Education Tribunal in respect of the placement of her son, who had been identified as a student with autism. The student was placed in a Regular Class and was receiving resource withdrawal support. At an IPRC review in May 2007, the IPRC recommended that the student would be better served if the placement were changed to a Special Education Class. The parent appealed to the Special Education Appeal Board, and in September 2007 the SEAB overruled the IPRC and upheld the parent's wish to have the student remain in the Regular Class with necessary supports. The SEAB indicated that the IPRC's recommendation was not supported with sufficiently current information to justify the proposed placement, and the SEAB recommended that updated assessments, including a language assessment and educational assessment, be obtained before the next annual IPRC review. The School Board accepted and upheld the SEAB's decision and recommendations, the effect of which was to confirm that the student would remain in the Regular Class with appropriate supports, as the parent had requested. However, despite the Board's agreement with the parent's position on the Regular Class placement, the parent then commenced an appeal to the Special Education Tribunal, under section 57(3) of the *Education Act*.

Paul Howard of Shibley Righton's Education & Public Law Group represented the School Board before the Tribunal. The Board brought a preliminary motion challenging the jurisdiction of the Tribunal to hear the appeal. Mr. Howard argued that the Tribunal had no authority under the statute to hear the appeal because the parent had not demonstrated that she was, on an objective basis, "dissatisfied" with the Board's Regular Class placement decision, as required by the *Act*. The written statements and arguments put forth by the parent's advocate all focussed on the parent's alleged dissatisfaction with the Board's procedures and the process whereby it considered the student's needs and placement. Mr. Howard argued that the Tribunal has no authority to review or evaluate the procedures of the School Board.

The Tribunal upheld the Board's motion and found that it has no jurisdiction to hear the merits of the proposed appeal because the parent had not met the statutory requirements of section 57(3) of the *Act* that she prove she is dissatisfied with the placement. The Tribunal took note of the parent advocate's argument that the parent "would not have appealed if she had not been dissatisfied" and said that this was "not enough to give the Tribunal the requisite jurisdiction to hear the merits of the appeal of placement. The Tribunal heard that [the parent] wants the school board to comply with the *Education Act* and the *Regulation*. Addressing that concern is not within the Tribunal's jurisdiction."

In a useful passage that defines the limits of the Tribunal's authority under the statute, the Tribunal explained that:

The Tribunal receives its authority under the *Education Act*. This authority is limited to the identification and placement of exceptional pupils.

Placement, which is not defined in the *Education Act*, is often intertwined with programs and services. Therefore, when parents are in disagreement with either identification or placement, it is important that they state the grounds of disagreement clearly and specify the remedy that they are seeking. In *K. v. Simcoe County Board of Education* (cited by Mr. Howard), the Tribunal stated: "No evidence will be heard in regards to the conduct of the school board during the hearing of the appeal because the due process issue has no relevance to the identification or placement of the child. The hearing will deal solely with the issues of identification and placement."

The appellant stated that the grounds of her appeal relate to what she believes are breaches to the *Education Act* and the *Regulations* by the TDSB. She stated that the remedies that she is seeking are an order from the Tribunal to the school board to change its special education policies and procedures and to direct the Ministry of Education to monitor the school board's compliance with the legislation. The Tribunal cannot do that given its legislated mandate.

If you wish to receive a copy of the full text of the Tribunal's decision, please contact Paul Howard at paul.howard@shibleyrighton.com.

Student Privacy in the Classroom

On the heels of the Supreme Court Decision in *R. v. A.M.*, discussed in last month's Shibley Righton e-Bulletin, an Alberta Information and Privacy Commissioner has made a ruling that parents cannot blindly attempt to enforce their children's privacy rights. In *Re: Edmonton Public School Board District No. 7*, [2008] A.I.P.C.D. No. 26, parents of a student attending an Edmonton high school complained to the Office of the Information and Privacy Commissioner that their son's high school administrators violated his privacy by confiscating his cell phone. The parents also complained that the high school administrators had circumvented the cell phone's lock code and reviewed photographs on the phone, deleting some of them. The parents complained that an invasion of privacy had occurred not only to their son, but also to all the individuals in the photographs stored on the camera, including themselves, when the cell phone was confiscated.

The Privacy Commissioner held, as a preliminary issue, that a complainant has an initial evidentiary burden to adduce some evidence that personal information has been collected, used or disclosed in order to raise the issue of whether the collection, use or disclosure is in compliance with the Act. Moreover, the Commissioner held that the person initiating the complaint has the onus of establishing that he or she has standing to bring the complaint insofar as there must be evidence to suggest that the complainant's personal information has been collected, used or disclosed under the Act. In this case, the Privacy Commissioner held that the parents did not have standing to bring the complaint because they were unable to substantiate their claims that the school administrators had collected their personal information, namely, that they were in any of the pictures that had been deleted. Further, the Privacy Commissioner held that there was no evidence demonstrating that the school administrators had collected, used or disclosed their son's personal information. To establish a claim, evidence explaining what and who the photographs were of and why they were taken would be necessary to determine whether the photographs contained the son's personal information or that of his parents. Moreover, the evidence before the Commission indicated that the pictures were of persons other than the complainants' son; only those individuals in the pictures would have standing to bring a complaint. Accordingly, the complaint was dismissed.

This decision is significant as it reiterates the idea that privacy complaints must fall within the ambit of privacy legislation, and parents will not be able to use said legislation or the threats of complaints as leverage over school boards to resolve frivolous disputes.

Ontario Family Day Update

On Monday, February 18, 2008, many employees across Ontario took the day off, as a result of a newly legislated public holiday, "Family Day". However, not all employees found themselves entitled to this public holiday. Specifically, employee entitlement to the new holiday depends on the holiday benefits provided in their collective agreements.

Section 5(2) of the Ontario *Employment Standards Act, 2000* (ESA) essentially provides that if an employment contract or collective agreement confers a greater benefit to an employee than an employment standard under the Act, the provision or provisions in the Act will not apply. Thus, where an employment contract or collective agreement provides more than the enumerated statutory holidays pursuant to the Act, an employer will not be obliged to honour every holiday listed therein. School-related employees are often conferred such a greater entitlement insofar as employees such as teachers, secretarial staff, IT staff, and custodians may receive, through their collective agreements, time off during the Holiday season or during the "winter break". In these cases, the employees' benefit is arguably greater than the nine statutory holidays provided in the Act, and the employer need not honour the Family Day entitlement.

We welcome your comments and questions. Send them, and any updated contact information, to bryce.chandler@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to unsubscribe@shibleyrighton.com

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Two Ontario arbitrators have since specifically considered union claims that their members are entitled to Family Day notwithstanding that the collective agreements, in both cases, conferred a benefit greater than nine paid holidays.

In both *Sun Parlour Emergency Services v. S.E.I.U., Local 1* and *U.S. Steel Canada v. U.S.W., Local 8782*, the unions attempted to argue that the term “employment standard” in s. 5(2) of the Act should be interpreted as referring to Family Day itself – not to the number of public holidays provided in the Act. As neither collective agreement provided for a mid-winter public holiday, the unions attempted to show that their members were entitled to the paid holiday as the collective agreements in question did not address the mid-winter benefit provided by the Act. In this position, the unions relied on differences between the Act and its predecessor statute, the Employment Standards Act. The unions argued that changes in language between the two pieces of legislation meant that instead of evaluating entitlement to the new holiday by adding up all the paid holidays under a collective agreement and determining whether there were more or less as compared to the entitlement pursuant to the Act comparison should be made by having regard to the specific employment standard in question, being a mid-winter holiday.

The arbitrators in both cases rejected this argument, finding that there was no basis for departing from the previous test which held that the scope of the balancing test is not limited to examination of a particular public holiday, regardless of its purpose. Instead, the appropriate balancing exercise must compare public holiday entitlement pursuant to the Act and the provisions of the collective agreement that directly relate to the same subject matter as that employment standard.

School boards have several issues to consider with respect to Family Day and these findings. Although the Ontario provincial government amended R.R.O. 1990, Regulation 304 to include Family Day as a “school holiday”, school boards should review the collective agreements pertaining to all applicable bargaining units, including, for example, custodial employees and/or secretarial staff to determine whether the language contained therein provides that such employees are automatically entitled to Family Day as a paid holiday. Although it may not be practical to require secretarial staff to attend when teachers are on holiday, if a particular collective agreement does not entitle bargaining unit employees to Family Day, based on the above-mentioned decisions, Family Day could become valuable during the next round of collective bargaining.

CASELAW

The Nova Scotia Supreme Court held that it did not have jurisdiction to hear an action for mental suffering and mental distress initiated in respect of alleged bullying of a guidance counsellor by her principal and vice-principal. The Court held that the essential character of the dispute arose out of the collective agreement and it set the statement of claim aside. *Frayn v. Quinlan*, [2008] N.S.J. No. 84.

The Alberta Information and Privacy Commissioner held that the parents of a student whose cell phone had been confiscated and accessed for photographs it contained did not have standing to bring a complaint under the Freedom of Information and Protection of Privacy Act. *Re: Edmonton Public School Board District No. 7*, [2008] A.I.P.C.D. No. 26.

The Supreme Court of British Columbia held that verbal and written communications between a school board administrator did not alter the purchase price of land for which a school board had issued a request for tenders. *Turnbull Holdings Ltd. v. Board of School Trustees of School District No. 61 (Greater Victoria)*, [2008] B.C.J. No. 760.

Two school district trustee boards appealed judgment dismissing their claims for negligence against certain architects after summary trials, alleging that design defects in the architects’ plans led to water leakage problems in two schools that were not discovered until more than six years after the schools were occupied. *Howe Sound School District No. 48 v. Killick Metz Bowen Rose Architects and Planners Inc.*, [2008] B.C.J. No. 821.

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