

WHEN SPECIAL NEEDS EDUCATION AND SAFETY COLLIDE :

HOW SCHOOL BOARDS CAN BALANCE THE COMPETING INTERESTS OF SPECIAL NEEDS STUDENTS AND MAINTAINING A SAFE SCHOOL ENVIRONMENT

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INTRODUCTION

On occasion, the education of special needs pupils can create a safety risk to other individuals in a school; for example, a pupil may kick or hit others. This may be related to the pupil's exceptionality (i.e. the pupil is unable to control his or her behaviour) or may be completely unrelated to the exceptionality. In any event, an administrator faced with this issue must address a number of significant practical and legal issues.

This situation raises a conflict between two competing interests. First, the special needs pupil or parent has interests in the furtherance of the pupil's education. Second, the other individuals at the school have interests in being in a safe school environment. As is always the case where interests collide, there must be a balancing of these interests, and this balancing must be done within the applicable legal context. In this situation, there are two overlapping legal "schemes" which arise.¹

THE LEGAL SCHEMES

(1) SAFETY VS. SPECIAL NEEDS EDUCATION

The primary legal scheme to be considered reflects the following two competing interests: (A) the interest of ensuring the safety of the school environment; and (B) the interest of the education of the special needs pupil.

(A) *School Safety*

Safety Requirements

¹ In this situation, the law can act both as a help and a hindrance: on the one hand, helping to guide educators in the balancing of these conflicting interests; on the other hand, hindering the process by imposing conflicting legal requirements onto the situation.

School boards are required to provide a safe school environment. In Ontario, this is required both by legislation (by a number of provisions of Ontario *Education Act* and regulations)², and by the common law.³

Tools to Ensure a Safe Environment

In Ontario, the *Education Act* provides a number of “tools” to educators, which empower them to take steps to ensure a safe school environment. The tools currently in place in Ontario were enacted by the “*Safe Schools Act, 2000*” which amended the *Education Act*. These tools include provisions for imposing pupil discipline (suspensions and expulsions), as well as ‘denial of access’ provisions which empower administrators to deny access to school premises to any individual (including a pupil).

(B) *Education of Special Needs Pupils*

Special Education Regime

² See section 265(1)(j), *Education Act*, s. 11(3)(e) and (f), Regulation 298 to the *Education Act*

³ Similar requirements can be found across Canada, due to the importance of ensuring a safe school environment.

The *Education Act* requires the Minister to ensure that all exceptional children in Ontario have access to free appropriate special education programs and special education services.⁴

Regulation 181/98 to the *Education Act* sets out detailed procedure to be followed regarding the education of special needs pupils. The Regulation entitles parents of special needs pupils to provide input into the special education program of their child. The Regulation requires either parental consent to changes to a pupil's special education placement, or alternatively, requires that certain procedures must be followed prior to the implementation of placement changes.

Human Rights Legislation

The Ontario *Human Rights Code* (the "Code") prohibits discrimination on the basis of handicap. A school board is required under the Code to "accommodate" a special needs pupil to the point of "undue hardship".⁵

Conflict Between Competing Interests

School boards are required to follow both of the above legislative schemes. If no conflict arises between the two schemes this raises no problems; however, if a conflict arises, a school board must determine how it should be resolved.

Caselaw

Recently, the Ontario Superior Court of Justice considered the conflict between a special needs pupil's education and the duty to ensure a safe school environment. In the decision of *Bonnah (Litigation guardian of) v. Ottawa-Carleton District School Board*⁶ ("Bonnah"), the Ontario Superior Court considered a school board's transfer of a special needs pupil from an integrated placement in a regular class to a special needs class at a different school, as a result of safety concerns. The safety concerns stemmed from the pupil's continuous disruptions of class (yelling and "bolting from his desk"), his kicking and hitting the educational assistant, and his growing physical aggression towards others including his teacher. The pupil also instigated four unprovoked physical attacks against other students.

The parents challenged the transfer in court because they had not consented to this placement change, and argued that the transfer violated their rights under Regulation 181/98.

The Superior Court upheld the transfer decision based on statutory authority in the *Safe Schools Act* provisions and found that the board's decision was made fairly. Unfortunately, it is not clear

⁴ s. 8(3), *Education Act*

⁵ For a detailed analysis of the obligations of school boards to accommodate special needs pupils to the point of undue hardship, please see the submissions prepared on behalf of the Ontario Public School Boards' Association by J. Paul Howard and Jennifer E. Trépanier to the Ontario Human Rights Commission in its consultation regarding Disability and Education dated September of 2002 (see www.shibleyrighton.com)

⁶ [2002] O.J. No. 1253

from the decision as to the exact basis of the school board's authority to effect the transfer; the Court used language which blurred three distinct means to remove a pupil from a school.⁷

In any event, the Superior Court determined that safety took precedence over the procedures to be followed regarding the education of the special need's pupil. In our opinion, the Superior Court was correct in this conclusion, despite the uncertainty of its reasoning. The decision has been appealed to the Ontario Court of Appeal, and it is hoped that the Court of Appeal will clarify this lower court ruling.

It is suggested that an administrator/ school board, when balancing these competing interests should give precedence to the maintenance of a safe school environment, as in the *Bonnah* decision. If an administrator or school board determines that the pupil should be removed from the situation, the school board must determine how to implement this decision.

In our opinion, the preferable way for a school board to transfer a special needs pupil where serious safety concerns exist is by the "denial of access" provisions under s. 305 of the *Education Act* and Regulation 474/00 to the *Act*.⁸ This provisions empower a principal to deny access to an individual whose "presence is detrimental to the safety or well-being of a person on the premises."⁹

Since this decision affects the pupil's education, the principal should take steps to advise the pupil's parents of the pending decision and give them an opportunity to respond prior to finalizing a decision to deny access. An administrator should also consult the appropriate school board personnel and review the applicable school board policies and procedures before implementing a denial of access.

Additional complications may arise when a school board does not offer a range of programs which may provide the pupil with an alternative placement option. For example, some school boards offer only integrated programs to special needs pupils. This means that the special needs pupils are fully integrated into 'regular' classrooms, and no special needs classes *per se* exist within the board. This may create further difficulty when attempting to resolve safety concerns. For example, a transfer to a different classroom (but with the same type of placement) may simply lead to the same safety issues arising in a different school environment. Such school boards must carefully determine the most appropriate solution for the pupil.

Possible alternatives may include home instruction or home schooling. Some counsel for the

⁷ The court blends the following three distinct means of transferring a pupil: an 'administrative transfer', a denial of access under s. 305 and Reg. 474/00, and an exclusion under s. 265(1)(m).

⁸ The other tools in the *Education Act* involve pupil "discipline". The *Education Act* mandates 'mandatory' suspensions and expulsions for certain listed infractions. The Act contains exemptions from this mandatory discipline where a pupil does not have the ability to control the behaviour or cannot understand the foreseeable consequences of the behaviour (these exemptions may be applicable to special needs pupils). Mandatory discipline will not be mandatory for special needs pupils who fall under these exemptions. Discretionary suspensions and expulsions may be warranted in any event.

⁹ s. 3(1) of Regulation 474/00 to the *Education Act*

disabled have requested this as appropriate accommodation for students difficult to serve in the school environment. Others say such accommodation isolates the student from peers and is itself discriminatory. Home schooling involves the parent taking over the instruction of the pupil independent from the school board, under the control of the Minister of Education. Home instruction may involve a school board sending materials to a pupil at home, as well as assistance by school board staff with home instruction of the pupil. Legal implications of this type of instruction include potential increased liability regarding sending a board employee to a pupil's home. This type of instruction may also raise union concerns.

In addition, there are programs which may be offered to students with significant needs through the co-operation of school boards and government approved facilities. These programs are addressed in the Minister of Education Policy/Program Memorandum No. 85 entitled: Educational Programs for Pupils in Government-Approved Care and/or Treatment Facilities.

The school board and family may also wish to consider other resources offered within the community which may be more appropriately tailored to the pupil's needs.

(1) **SECONDARY LEGAL SCHEME - STAFF ACTION TO SAFETY CONCERNS**

Another secondary legal scheme may be superimposed upon the first legal scheme in this context. This involves action taken by educational staff based on concerns about their own safety relating to the conduct of special needs pupils. Increasingly in Ontario, "special needs assistants" ("SNA") or "educational assistants" ("EA") (who provide support to special needs pupils) are taking steps such as refusing to work with special needs pupils due to concerns regarding their safety, by invoking their rights under occupational health and safety legislation, or protective clauses in their collective agreement or school board policies.

Some educators are also taking steps under internal school board policies regarding assault after being hit or kicked by a special needs pupil.¹⁰ This type of policy will vary across school boards and will not be discussed further here; however, school boards should be mindful of such policies and their implication in these circumstances. School board which have these policies may wish to consider tailoring them to better address the circumstances which arise in the case of special needs pupils.

In theory, this secondary legal scheme need not arise if the first legal scheme is appropriately handled by a school board. That is to say, if the above legal scheme is appropriately balanced such that when an unacceptable safety risk arises, the school board takes action to eliminate the safety risk, in theory, there would be no need for teaching staff to take any independent action. Of course, when the school board and educators have a difference of opinion regarding what constitutes an unacceptable safety risk this legal conflict may well arise.

¹⁰ These policies may stipulate (for example) that the school board will support employees and protect them against assault, and may provided that an employee injured by an assault at work will not be required to use sick days to recover.

In any event, it is increasingly more common for educators to refuse to work where the educator believes that a special needs pupil poses an unacceptable safety risk.

STAFF WORK REFUSALS

Legal Scheme under Occupational Health and Safety Act

The legislation relied upon by an educator as a basis for the work refusal is found in the Ontario *Occupational Health and Safety Act* (“OHS Act”). Work Refusal provisions are found in all of the provinces and territories across Canada (see Appendix “A” for a chart highlighting the work refusal legislation across Canada).

Section 43(3) of the OHS Act entitles employees to refuse to work if he or she has reason to believe that:

- (a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;
- (b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself; or
- (c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker.”

You will note that this section focusses on the physical aspects of the workplace, such as machinery and equipment, rather than individuals with whom the employee is required to interact. In our view, it is more appropriate to restrict the application of this section to the physical surroundings of the workplace, and the application of this section to these circumstances is inappropriate. Notwithstanding this, in Ontario at least, Minister of Labour investigative officers are making broad orders against school boards under these and similar provisions of the OHS Act.

Exemptions

It is arguable that the work refusal rights under the OHS Act were not intended to apply to this circumstance given the scheme of the OHS Act and given certain exemptions to the applicable provisions.

Teachers as defined in the *Education Act* are exempt from the OHS Act (unless otherwise provided).¹¹ Frequently, unions will attempt to negotiate into collective agreements provisions which offer protections to teachers which are similar to those found in the OHS Act. School boards should take care before agreeing to such provisions. By agreeing to even a provision which simply requires the school board to adhere to the OHS Act, the school board may be inadvertently binding itself to follow all of the OHS Act provisions in respect of teachers, despite the fact that teachers are exempt from the OHS Act.

¹¹ s. 3(3)(a), OHS Act

Teaching assistants of the academic staff of a university or a related institution are also exempt from the OHSA unless otherwise stated.¹² Interestingly, although teaching assistants at the university level are exempt from the OHSA, their counterparts at a primary and secondary level are not so exempt. Arguably, the same exemption should apply to teaching assistants at the more junior level.

Further, the work refusal provisions do not apply to certain listed workers if the circumstances raising the safety concern are “inherent in the worker’s work” or “a normal condition of the worker’s employment” or “when the worker’s refusal to work would directly endanger the life, health, safety of another”.¹³

The listed workers include persons employed in the operation of a “hospital, sanatorium, nursing home, home for the aged, psychiatric institution, mental health centre or rehabilitation facility”¹⁴ or a “residential group home or other facility for persons with behavioural or emotional problems or a physical, mental or developmental disability.”¹⁵ These circumstances give rise to similar safety concerns as those raised in the situation at hand.

Although the SNAs and EAs do not fall literally within the exemptions of the OHSA, they function in a role which is analogous to others who are exempt from these provisions. In addition, given that the work refusal provisions focus on the physical state of the workplace, it is arguable that the OHSA was never intended to apply to this situation.¹⁶

Caselaw re: Non-physical Safety Concerns

There has been some case law which supports that the work refusal provisions in the OHSA can apply to the non-physical circumstances of the workplace. For example, one case upheld the work refusal of an employee based on a safety concern toward a customer. In *Moore v. Barmaid’s Arms*¹⁷, the Ontario Labour Relations Board (“OLRB”) considered a female employee’s refusal to work based on fear of a customer who she understood had had an altercation with another female employee. The issue before the OLRB was whether the employee was subsequently terminated as a reprisal for seeking enforcement of the OHSA. The OLRB found that to refuse work the employee need only have “reason to believe” that the workplace or part thereof is a danger to herself or another worker.” The OLRB concluded that the employee had reason to believe that “serving the customer in question was a danger to herself

¹² s. 3(3)(b), OHSA

¹³ s. 43(1), OHSA

¹⁴ s. 43(2)(i)

¹⁵ s. 43(2)(ii), OHSA

¹⁶ Given the uncertainty of the legislation, it would be of great assistance if the Legislature addressed the issue by explicitly including or excluding the educational workers from application of the provision.

¹⁷ [1995] O.L.R.B. Rep. 229

and her co-workers.”¹⁸

Application of Work Refusal Provisions by Educational Staff

As indicated above, increasingly educational staff have refused work based on safety concerns relating to special needs pupils. In some situations, Minister of Labour inspectors have upheld these work refusals on the basis of section 25(2)(f) of the OHSA, which requires employers to “take every precaution reasonable in the circumstances for the protection of a worker.”

Although at least one challenge has been raised regarding a Minister of Labour inspector’s finding under s. 25(2)(f)¹⁹, the matter was resolved prior to being heard by the OLRB. The writers are unaware of any such challenges having been resolved at the OLRB or the courts in Ontario.

Perhaps the best way for the uncertainty in the application of the legislation to be resolved is if the Minister of Labour and the Minister of Education were to amend the legislation to confirm whether educational assistants and those in similar roles are, in fact, exempt from the application of the OHSA work refusal provisions.

Other Legal Implications of Work Refusals:

When educational personnel refuse work, this may have other indirect legal implications. For example, if an individual refuses work, and the school board is unable to provide adequate educational services to a special needs pupil, the pupil (through his or her parent) may initiate a human rights complaint claiming that the school board failed to accommodate the pupil’s disability.²⁰ This is not to say that these complaints would be found to have merit; however, the possibility of such complaints being initiated in these circumstances certainly exists.

In some cases, union representatives for educational staff refusing work have requested personal information about the pupil and his or her condition through the OHSA work refusal process. The disclosure of personal information (including detailed medical information concerning the pupil) may constitute a breach of the pupil’s privacy rights. Further, the OHSA only requires the provision of generic information regarding the safety of a situation, rather than particular detailed information. No documentation should be disclosed in this process without the consultation of legal counsel.

Suggested practical solutions for dealing with situation when SNA / EA has concerns re: safety

¹⁸ *Moore v. Barmaid’s Arms, supra, at par. 9*

¹⁹ A challenge was also initiated regarding the jurisdiction of the inspector’s order which required additional educational personnel be assigned to the special needs pupil.

²⁰ There have been circumstances when special needs services have been reduced or withdrawn due to a strike by SNAs and EAs and this precipitated the filing of a number of human rights complaints.

In our opinion, the preferable means to deal with an educator's concern for safety in these circumstances is for the educator to raise the issue with school administration. The school can then address the safety issue, perhaps initially using practical means, or if necessary, may decide to transfer the pupil to a more appropriate setting. School boards should encourage open lines of communication in this regard.

PREVENTATIVE PRACTICAL SOLUTIONS

Some possible practical suggestions are as follows:

- school boards drafting policies regarding how to deal with the safety issues raised above;
- school boards preparing emergency measures to handling these situations if they do arise;
- intense training for staff including:
 - general and child specific training with respect to special education pupils;
 - non-violent crisis intervention training (particularly with special needs pupils);
- the provision of protective equipment for staff which is mandatory for them to wear.

CONCLUSION

The situation where a special needs pupil raises safety concerns to others raises a number of difficult practical and legal implications. An educator faced with these issues must balance the interests of the special needs pupil and parent against the interests of maintaining a safe school environment. In our opinion, the interest of maintaining a safe school environment must prevail where a serious safety risk exists.

School board may also be faced with educational staff taking independent steps based on concerns for their own safety (i.e. by refusing work). In our opinion, the health and safety legislation was not intended to be used to this end and it remains to be seen whether this application will be upheld by tribunals and courts. In the meantime, school boards should take all practical steps possible to reduce safety concerns in these circumstances, in efforts to avoid the difficult conflicts which may arise.

Appendix “A”

EMPLOYERS’ DUTIES TO PROVIDE SAFETY TO EMPLOYEES AND WORKERS’ RIGHT TO REFUSE WORK				
PROVINCE	ACT	EMPLOYER DUTY	WORKERS’ REFUSAL TO WORK	TEST FOR WORK REFUSAL
Alberta	Occupational Health and Safety Act R.S.A. 2000, c.O-2	Section 2	Section 35	-no worker shall carry out work if on reasonable probable grounds worker believes there exists imminent danger to health and safety of worker -“imminent danger” = danger that is not normal or not normally carried out in occupation
British Columbia	Workers Compensation Act R.S.B.C. 1996, c. 492, as amended to date	Section 115	Section 141 (not yet proclaimed)	-worker may refuse to carry out work if reasonable grounds for believing work unsafe -unsafe = significant risk worker or another person may be killed, seriously injured or serious illness -not applicable if refusal directly endanger health or safety of another person
Manitoba	Workplace Safety and Health Act R.S.M. 1987, c. W210, as amended to date	Section 4	Section 43(1)	-worker may refuse work if reasonable grounds danger to safety or health of worker or another person.

New Brunswick	Occupational Health and Safety Act S.N.B. 1983, c.O-0.2, as amended to date	Section 9	Section 19	-can refuse work if reasonable grounds believe act is likely to endanger health or safety of worker or other employee
Newfoundland	Occupational Health and Safety Act R.S.Nfld. 1990, c. O-3, as amended to date	Section 4	Section 45(1)	-worker may refuse to do work if reasonable grounds believe dangerous to health or safety of worker or another person... (a) until remedial action taken... (b) until committee or worker health, safety representative investigated; or (c)...an officer has investigated and advised to return to work
Nova Scotia	Occupational Health and Safety Act R.S.N.S. 1996, c,7, as amended to date	Section 13(1)	Section 43(1)(a), (b) and (c)	employee may refuse work if reasonable grounds believe that the act is likely to endanger health or safety or the health of employee or other person until... (a)..remedial action... (b)..committee investigated... (c)...an officer investigated and advised return to work
Ontario	Occupational Health and Safety Act R.S.O. 1990, c.O.1, as amended to date	Section 25 (2)(h)	Section 43	-worker may refuse work if reason to believe: (a) equipment, machine, device or thing likely to endanger worker or other; (b) physical condition of workplace likely to endanger worker; (c) equipment, machine, device, thing use or operates or physical condition of workplace contravenes act and likely to endanger worker or other.
Prince Edward Island	Occupational Health and Safety Act R.S.P.E.I., 1988, Cap. O-1, as amended to date	Section 13	Section 20(1)	-employee may refuse to do any act if reasonable grounds for believing act is likely to endanger health or safety of employer or other employee.
Quebec	Occupational Health and Safety Act R.S.Q. c.S-2.1, as amended to date	Section 51	Section 12 and 13	-worker right to refuse particular work if reasonable grounds to believe would expose worker or other to danger to his health, safety or physical well-being -can't exercise right if puts life, health, safety or physical well-being of another person in immediate danger or if the conditions under which the work is to be performed are ordinary conditions

Saskatchewan	Occupational Health and Safety Act S.S. 1993, c.O-1.1, as amended to date	Section 3	Section 23	-worker may refuse to perform particular act or series of actions at employment if reasonable grounds to believe unusually dangerous to health or safety of worker or other person until: (a) sufficient steps taken to satisfy the worker otherwise; or (b) the occupational health committee investigated and advised worker otherwise
Northwest Territories (also Nunavut)	Safety Act R.S.N.W.T. 1998, c. S-1, as amended to date	Section 4	Section 13(2)	worker may refuse work if reason to believe (a)...unusual danger to health or safety of the workers; (b) carrying out work likely to cause to exist unusual danger to the health or safety of the worker or another; or (c) operation of tool, appliance, machine, device or thing likely to cause to exist unusual danger to health or safety of worker or another
Yukon	Occupational Health and Safety Act R.S.Y.T. 1986, c. 123, as amended to date	Section 3	Section 14(1)	-worker may refuse work or particular work if reason to believe: (a) use or operation of machine, device, or thing constitutes undue hazard (b) condition exists in workplace that constitutes undue ha