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Human Rights Tribunal applies best interests of the child concept to accommodations provided by school board

A recent Human Rights Tribunal of Ontario decision provides some insight for school boards in the area of special education and the accommodation of students with special needs.[1] Two applications were brought by the father of two students with Autism Spectrum Disorder alleging that the school board failed to accommodate them. The Tribunal described the father as a "very involved parent" who relied "on his own opinions about his children's general and specific needs and schooling" and rejected "psycho-educational and medical assessment data available for his children."[2]

There were several allegations made against the school board, which can generally be summed up as an alleged failure to meet the students' educational needs. Some allegations related to placements that were contrary to the students' IPRC statements of decisions and the father's wishes as well as alleged inaccuracies with the content of the students' IEPs. The Tribunal applied the test for discrimination from the Supreme Court of Canada's ("SCC") *Moore* decision[3] and questioned whether the children were denied a meaningful access to education. In *Moore*, the SCC found that special education is not the service that is protected under the *Code*, rather it is the means by which students obtain meaningful access to general education services.

The Tribunal also relied on an earlier decision from the SCC, which was initially brought to the Divisional Court as an application for judicial review of a decision of the Ontario Special Education Tribunal ("OSET").[4] The SCC found that in determining placements of children who are receiving special education services, OSET should look at the "best interests of the child," which is a legal concept that is most commonly used by the courts in cases involving children and custody disputes. The Tribunal applied the SCC case and found that the same concept should be applied by the Tribunal when determining discrimination.[5] While the allegations before the Tribunal did not form a general inquiry as to whether the education provided to the applicants were in their best interests, the Tribunal did apply the "best interests of the child" concept in finding that the respondent school board had that in mind when it placed the children in placements contrary to those identified in their IPRC statements of decision.[6]

The Tribunal first proceeded with an analysis of whether the applicants established a *prima facie* case of discrimination. The respondent school board presented plenty of evidence demonstrating consistent cooperation between school board staff and the

[1] *U.M. v. York Region District School Board*, 2017 HRTO 1718.
[2] at para. 13.
[3] *Moore v. British Columbia (Education)*, 2012 SCC 61 ["*Moore*"].
[4] *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241.
[5] at para. 83.
[6] at paras. 9-94

father's wishes, including several changes to the students' placement that were contrary to the IPRC statements of decision but in accordance with the father's requests. The school board also provided EA support for a summer camp despite the existence of another summer camp program offered by the school board specifically for children with disabilities. The Tribunal recognized that the school board allowed the father to have a significant level of involvement and control "beyond what the relevant legislation normally calls for and which most parents expect and receive."[7] After 16 days of hearing, the Tribunal found that the evidence presented by the applicants did not support a *prima facie* case of discrimination and specific facts surrounding alleged acts of discrimination were simply not borne out by the applicants. The applications were dismissed.

Bill 164 might result in four new protected grounds of discrimination to *Human Rights Code*

Supported by the Ontario Human Rights Commission, Bill 164, *Human Rights Code Amendment Act, 2017*, seeks to amend the Ontario *Human Rights Code* by adding four new grounds of discrimination:

1) Immigration status;

2) Police records;

3) Genetic characteristics; and

4) Social condition.

The proposed definition for immigration status is "the status according to Canadian immigration." We note that citizenship is already a protected ground under the *Code*.

The proposed definition for police records is "charges and convictions, with or without a record suspension, and any police records, including records of a person's contact with police." The *Code* currently prohibits discrimination on the basis of "record of offences" in the area of employment, which currently only applies to convictions where pardons have been granted and for convictions under provincial laws.

Genetic characteristics is already a prohibited ground of discrimination under the Federal *Canadian Human Rights Act*.

The proposed definition for social condition includes: (a) employment status; (b) source or level of income; (c) housing status, including homelessness; (d) level of education; or (e) any other circumstance similar to those mentioned in clauses (a), (b), (c) and (d).

Alberta, Manitoba and Newfoundland and Labrador already have the ground of source of income in their respective human rights legislations. Manitoba and New Brunswick's legislations both also contain the grounds social disadvantage and social condition, respectively.

In 2015, an attempt to add genetic characteristics to the *Code* as a prohibited ground was unsuccessful. However, Bill 164 has passed Second Reading and has been referred to the Standing Committee on Regulations and Private Bills.

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[7] at para. 109.