



Education Law eBulletin

A newsletter for educators

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Appeal Denied in Case Involving Employer's Request for Independent Medical Examination (IME)

A superintendent with the Ottawa Catholic School Board brought an application to the Ontario Human Rights Tribunal (HRTO) alleging that the school board failed to accommodate his return to work¹. He was employed with the school board for 35 years. Shortly after commencing his medical leave, he was diagnosed with unipolar depressive disorder and his doctor provided a medical opinion that he should remain off work as he faced a long road to recovery.

However, a few months following receipt of this medical opinion, the school board received a supplementary opinion from the same doctor indicating that the superintendent should return to work on modified duties, which included only eight hours of work per week for the next 6-12 months, and no indication of when he might return to work full time. The school board then requested to have the superintendent attend an IME, which he at first agreed to attend. In the HRTO application, he alleged that the school board provided the medical examiner with misleading information and maintained that the school board improperly required him to attend an IME, which left him with no choice but to resign.

The HRTO found that there was no discrimination on the part of the school board in fulfilling its duty to accommodate and in the circumstances, the employer was reasonable in its request for an IME as it formed part of its procedural duty to accommodate. The superintendent judicially reviewed the HRTO's decision to the Ontario Divisional Court². The Court concluded that the Tribunal's findings were reasonable. The superintendent appealed this decision to the Ontario Court of Appeal and leave to appeal was denied.

The Ontario Divisional Court decision serves as a reminder to employers that it is reasonable to request an IME from an employee in certain circumstances. In this case, the school board had legitimate concerns regarding the superintendent's medical evidence supporting his sudden request to return to work. First, the doctor's accommodation plan was onerous given the superintendent's essential duties. Second, the doctor's opinion regarding the superintendent's ability to work changed significantly and unexpectedly. Third, the superintendent's proposed return to work coincided with the end of his paid sick leave. Given the totality of these concerns, the school board's decision to request an IME was reasonable. However, this does not create a freestanding and unrestricted right for an employer to request an IME, nor does it translate to it automatically becoming a part of the accommodation process. Further, the Tribunal concluded that it was

Bottiglia v. Ottawa Catholic District School Board 2015 HRTO 1178
Bottiglia v. Ottawa Catholic District School Board 2017 ONSC 2517

reasonable for the school board to request an IME instead of requesting further information from the employee's doctor.

Regarding the IME process, the HRTO found that it was not unreasonable for the school board to provide the medical examiner with background information and a series of questions prior to the IME. This was also consistent with the parties' agreement for the IME process. However, the school board's counsel also provided the medical examiner with an opinion as to the reason why the superintendent went on medical leave in the first place, the view that the proposed accommodation was nearly impossible, the proposed return to work was premature and that it coincided with the expiry of his paid sick leave. The Tribunal found this to be reasonable.

Given this was a judicial review of the HRTO decision, the Divisional Court concluded that the Tribunal's finding on this issue still fell within the range of acceptable and defensible outcomes. However, the Court provided a warning that while an employer is entitled to provide a medical examiner with relevant information prior to an IME, it must be careful and not impair the examiner's objectivity. In situations where this may occur, the employee may be justified in refusing to attend the IME.

New Individualized Medical Plans for Ontario Students

The Ontario Ministry of Education has released a draft PPM 161: *Supporting Children and Students with Prevalent Medical Conditions (Anaphylaxis, Asthma, Diabetes, and/or Epilepsy) in Schools*. It will require all schools to have policies in place to improve the safety of students with any of the four identified medical conditions (anaphylaxis, asthma, diabetes and epilepsy). This will include a requirement to have individualized care plans for students with these specific medical conditions to outline individual contacts and procedures relating to the student in case of an outbreak or medical emergency.

School boards must already comply with the requirement to have policies to support students who have asthma or who are at risk for anaphylaxis as a result of Ryan's Law, 2005 and Sabrina's Law, 2015.

Some of the key elements of PPM 161 include a requirement for schools to encourage parents to co-create the plan of care; encourage students to also participate in this process and play an active role in self-monitoring and in the self-management of their medical condition (depending on their cognitive abilities); communicate to all relevant staff any relevant information from each plan of care; and to provide training relating to the specified medical conditions to all relevant staff.

Ontario school boards are expected to have the new policies in place by the start of the 2018-2019 school year.

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

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