



## Education Law eBulletin

A newsletter for educators

Issue No. 10 Sept 2018

SHIBLEY RIGHTON LLP  
Barristers & Solicitors  
www.shibleyrighton.com

Toronto Office:  
2510 Ouellette 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

Brian P. Nolan  
brian.nolan@shibleyrighton.com

Sheila M. MacKinnon  
sheila.mackinnon@shibleyrighton.com

Thomas McRae  
thomas.mcrae@shibleyrighton.com

Jessica Koper  
jessica.koper@shibleyrighton.com

Gaynor J. Roger  
gaynor.roger@shibleyrighton.com

John De Vellis  
john.devellis@shibleyrighton.com

Megan Marrie  
megan.marrie@shibleyrighton.com

### Court upholds Board decision to transfer student to a different school

A recent decision of the Ontario Divisional Court, commenced by way of an application for judicial review, challenged a decision of the Toronto Catholic District School Board (the "Board") to transfer a student to a new school pursuant to its *Fresh Start Policy*.<sup>1</sup> The Applicants argued that the transfer was a disciplinary transfer and beyond the Board's authority.

Following an incident of assault involving students at a school of the Board, an investigation completed by the school principal found that K.W. committed assault on a fellow student, M.V. In fact, K.W. admitted to having committed the assault and was given a five-day suspension. The principal then decided that K.W.'s continued attendance at the school would pose a risk to the physical and/or mental well-being of M.V. Pursuant to the Board's *Fresh Start Policy*, the principal transferred K.W. to another school. The *Fresh Start Policy* permits a non-voluntary transfer of a student either at the end of or during a school year in response to the Board's *Victim's Rights Policy*, court conditions or other special circumstances. This type of transfer does not appear on a student's Ontario Student Record and is not considered disciplinary by the Board.

At the beginning of the new school year, K.W. appealed the decision to transfer him to a different school. Pursuant to the *Fresh Start Policy*, an appeal of such a decision is heard before a superintendent of the Board. The submissions made by K.W., and its legal counsel at the appeal, mainly revolved around allegations of procedural unfairness and racial profiling. The impact of the transfer on K.W. was also significant in his view as he was no longer permitted to take part in school sports teams pursuant to the Ontario Federation of Secondary School Athletic Associations' policy on transfer students. As a result, K.W. was not permitted to play on any school sports team for the entire school year. However, at the appeal hearing, K.W. did not discuss the actual assault incident and did not appear to express any remorse for same.

The superintendent upheld the transfer decision and relied on both the *Fresh Start Policy* as well as the Board's *Victims' Rights Policy*. The superintendent found that there was no evidence to demonstrate that the transfer decision was made because K.W. was Black. The *Victim's Rights Policy* requires a principal to separate a victim from the perpetrator after a serious incident occurs that causes harm, and permits the separation of the individuals for a longer period, which may result in a student being transferred from the school. It refers to the *Fresh Start Policy* in that it recommends for the student who caused the harm, as opposed to the victim, to be transferred.

<sup>1</sup> *K.W. v. Toronto Catholic District School Board*, 2018 ONSC 2794

At the judicial review hearing, the Court brought attention to section 265(1)(m) of the *Education Act*, which states that it is the principal's duty to refuse to admit a person whose presence, in the principal's mind, would be "detrimental to the physical or mental well-being" of the students. The Court also noted that Policy/Program Memorandum No. 145 confirms that s. 265(1)(m) is not to be used as a form of discipline and contemplates non-disciplinary transfers for students to preserve school safety. The Applicant's primary argument before the Court was that further to K.W.'s imposed discipline pursuant to the discipline provisions in the *Act*, the Board was not permitted to include a transfer of K.W. to another school as part of that discipline.

The Court rejected this argument and recognized that the Board had the proper authority to develop the *Fresh Start Policy* for the purposes of promoting safety and the well-being of students, which is not a punitive purpose. Further, the Court confirmed that the principal had the authority to impose the non-voluntary transfer of K.W., which was not disciplinary or punitive, pursuant to the Policy and a principal's duty found in s. 265(1)(m) of the *Act*.

With respect to the challenge that there was no procedural fairness provided to K.W., the Court found that K.W. was given an opportunity to be heard at the appeal and individuals who wished to speak on K.W.'s behalf were also given an opportunity to speak. In addition, K.W. had legal counsel. In terms of the reasonableness of the decision, the Court found that the Board's decision was reasonable as the Applicants failed to establish that the transfer was really disguised discipline and both notice and written reasons were also provided to the Applicant.

The Court recognized that the superintendent who heard the appeal had every right to consider not only the impact of the transfer on K.W., but also consider the physical and mental well-being of M.V. if K.W. remained at the school.

This decision confirms a previous decision of the Divisional Court, *K.B. v. Toronto District School Board*,<sup>2</sup> where the Court similarly found that a student does not have a right to attend a particular school and upheld a principal's decision to transfer students to a different school in consideration of other students' safety following a physical altercation. Similarly, the transfer was in addition to and separate from the discipline that the students received for the incident.

This case serves as an important reminder that a non-voluntary administrative transfer of a student may be made whether or not the school board has a policy on transferring students, as long as the decision is reasonable and appropriate in the circumstances.

**Shibley Righton LLP** partner **Sheila MacKinnon** and associate **Jessica Koper** will be speaking at two upcoming programs hosted by Osgoode Professional Development in Toronto: Advanced Issues in Special Education Law (October 11, 2018) and Cannabis in Schools – An Educator's Guide to the Law and Best Practices (October 12, 2018).

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

Legal Disclaimer: The information contained in this publication is not intended to be legal advice. It is general information only. You should take appropriate professional advice on your particular circumstances. Shibley Righton LLP disclaims all responsibility for all consequences of any person acting on, or refraining from acting in reliance on, information contained herein.

<sup>2</sup> 2008 CanLII 6875 (Div Court).