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Education Law eBulletin

A newsletter for educators. December 2002

❄ We wish you all a wonderful holiday season! ❄

current issues

Safety and Special Needs: The *Bonnah* Decision

School boards are often faced with a difficult dilemma when a special needs pupil creates a safety risk to other pupils or staff. The recent decision of the Ontario Superior Court of Justice in the *Bonnah (Litigation Guardian of) v. Ottawa-Carleton District School Board* (as referenced in the October 2002 eBulletin) addresses some of the issues arising in this context.

In the *Bonnah* decision, the father of a special needs pupil sought judicial review of the school board's decision to transfer his son from the program he was attending (an integrated placement in a regular class with special needs supports) to a special needs class at a different school, due to safety concerns. The 11-year old pupil was functioning at approximately kindergarten level. The parents refused to consent to the new placement and appealed the decision pursuant to Regulation 181/98 of the *Education Act.*

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 toward others including his teacher. The pupil also instigated four unprovoked physical attacks against other students.

The school board called the transfer an "administrative transfer" involving safety issues, and informed the parents that the decision was not an "expulsion" and was not appealable. The pupil's parents felt that the decision was an "end-run" around Regulation 181/98. The Court upheld the school board's decision to transfer the pupil, and made it clear that the duty of a school board to maintain a safe school environment prevails over the rights of a pupil and his family under special education legislation regarding placement decisions.

The Court concluded that the school board, under the safe schools provisions of the *Education Act*, had statutory authority to effect the administrative transfer notwithstanding Regulation 181/98, based upon the following: (i) a principal has a duty under s. 265(1)(m) of the *Education Act* to exercise his or her judgment as to whether a person's presence is detrimental to the physical or mental well-being of the pupils; (ii) if so, under Regulation 474/00, such a person is not permitted to remain on school premises; and (iii) there is nothing in the safe schools provisions which prohibits their implementation in respect of an exceptional pupil.

The Court held that the administrative transfer decision was made fairly. The pupil's father had been made aware that there were safety concerns regarding his son, but he refused to discuss them believing that the board was to blame for the safety issues.

Unfortunately, it is unclear from the *Bonnah* decision whether the Court has classified the school board's actions as an "exclusion", a "denial of access", or an "administrative transfer" supported by an obligation to maintain a safe school. This results in some confusion as it appears that the Court is blending three distinct methods for removing a pupil from a school.

In our opinion, the preferable way for a school board to transfer a special needs pupil where serious safety concerns exist, as in *Bonnah,* is by the "denial of access" provisions under s. 305 and Regulation 474/00. While these provisions provide no right of appeal to the pupil, they are subject to judicial review by a court. Given that the decision to remove a pupil from a placement affects the pupil's education, it is necessary to take reasonable steps to advise the pupil's parents of a pending decision to deny access and to give them an opportunity to respond, prior to finalizing such a decision. Of course, the opportunity for parental input will necessarily depend on the circumstances of the case. One could envisage a situation where such input would not be possible, for instance when the matter is of great urgency or when a parent simply refuses to discuss the issue of safety (as in the *Bonnah* case).

Where incidents occur involving issues of "discipline" for special needs pupils, school administrators must be cognizant that the *Safe Schools Act* provisions regarding "mandatory" suspensions and expulsions become "discretionary" if the pupil is not able to control his or her behaviour, or if the pupil is not able to understand the foreseeable consequences of his or her behaviour. A further exemption from "mandatory" discipline exists in cases where the pupil's continuing presence in the school does not create an unacceptable risk to the safety of any person. The existence of the mitigating factors supports the fact that the legislation was intended to apply to all pupils, including special needs pupils.

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***Bonnah*, continued**

Although it would have been preferable if the Court in *Bonnah* had accurately characterized its basis for upholding the school board's decision to transfer the student, one thing is abundantly clear from the decision: the Court placed the safety concerns of the remaining pupil population and staff ahead of the parental wishes in respect of the placement of a special needs pupil.

upcoming conference presentation

Brian Nolan of our Windsor office and Jennifer Trépanier of our Toronto office will be presenting a paper which further addresses the issues raised in the *Bonnah* decision (and other related issues) at the upcoming CAPSLE (Canadian Association for the Practical Study of Law in Education) Conference in Jasper, Alberta in April 2003.

The pupil's family has appealed the *Bonnah* decision and the appeal is scheduled to be heard by the Ontario Court of Appeal on December 6, 2002. We are further advised that, since the trial court decision, the appeal of the placement decision has been heard by the Special Education Tribunal and a decision is expected shortly. If the appeal tribunal upholds the placement decision made by the school board, the board will be raising the issue of mootness before the Court of Appeal. In our opinion, however, it would certainly be helpful to receive some guidance from the Ontario Court of Appeal regarding the issues raised in *Bonnah*.

safe schools - lessons learned

Expulsion hearings - can I settle?

During the early stages of the implementation of the discipline process required by the *Safe Schools Act*, educators believed or were advised that once a matter had been referred to the board's discipline committee, no opportunity existed to try and resolve the discipline issue by negotiation and agreement. Nothing could be further from the truth. The *Statutory Powers Procedures Act* (SPPA), which governs the conduct of these proceedings, permits the issue of discipline to be resolved without a hearing and without the usual legalistic formalities. In fact, given the stress that a discipline hearing imposes on the participants, settlement efforts should be a requirement of every discipline policy.

If a settlement is reached between the principal and the parents or student, as the case may be, it is not always legally necessary that it be approved by the board's discipline committee. For instance, where the discipline issues have been resolved in a case where the parent has appealed a limited expulsion, the settlement can be implemented by the parties entering into a written document wherein the resolved issues are described and the parent expressly withdraws his or her appeal. In fact, as a matter of law, the only type of discipline that cannot be resolved without the approval of the board's discipline committee is a full expulsion. And even then, the law permits the parties to enter into an agreement wherein they agree to a full expulsion and request that the discipline committee issue a decision accordingly.

Where an agreement in the case of a full expulsion expressly contains: a waiver of the minimum rules of procedure required by the SPPA; an agreement that the matter be disposed of without a formal hearing; an acknowledgment by the parents and student that the settlement is understood and that they have been encouraged to consult with independent legal counsel; a statement of relevant facts concerning the alleged infraction upon which the discipline committee can decide whether to issue the order of a full expulsion; and, if applicable, a stipulation by the family and the student that to preserve an opportunity for a fair trial in any criminal proceedings that facts listed are not admitted, a discipline committee of a board should accept the settlement and issue a decision imposing a full expulsion.

In resolving a discipline issue by settlement you will avoid the stress and trauma of a legal proceeding; avoid further alienation of the family and deterioration of the relationship between family and school; make the parents and student participants in the discipline solution; and save legal and other related costs associated with a formal disciplinary hearing.

Not all discipline matters can be settled, however. Sometimes a formal hearing will be the only means to identify and achieve the appropriate disciplinary result. But the majority of situations can and should be resolved by settlement. Certainly a disciplinary result reached this way can only be more effective and respected.

Security videotapes - your good friends

There has been much debate over the effectiveness of security video cameras in schools. Some argue that they are an affront to the traditional model of a school environment. That notwithstanding, one thing is certain, they can be a very effective tool for a principal in conducting the required "inquiry" under section 309 of the *Education Act* to determine whether an expellable infraction has occurred. Remarkably, the longer video-cameras are a part of a school's "landscape", the more they are taken for granted by the student population. Over time, students will act as if the cameras do not exist or more importantly, that no one looks at the tapes.

Where the occurrence of an infraction is suspected in any part of the school premises where cameras are in the vicinity, the relevant tapes should be closely examined. An important test of a witness's credibility is to analyze and compare the content of the videotapes to statements given to school authorities.

The videotapes may have to be reformatted before they can be viewed on a conventional VCR. The tapes can also be digitalized onto a CD-ROM for highly detailed computer examination, frame by frame, from which still photos can be produced. Your board's information technology specialists should be able to assist you with the necessary conversions. In many cases, the detailed evidence revealed by this process is the determining factor that allows a principal to make the appropriate and correct decision on discipline.

Where the police are conducting their own investigation of the alleged infraction, they will require you to give them the original copies of all relevant videotapes. Make sure before doing so that you have taken duplicate copies. Without these copies you will not have access to this important piece of evidence.

CD-ROMs and photographs produced from security videotapes have frequently been used as effective demonstrative evidence in discipline hearings. More importantly, they have been used effectively during cross-examinations of witnesses to establish the grounds upon which discipline hearings have been initiated. That perhaps is their greatest value in the scheme of this discipline process.

special education

On *Auton* and Applying Precedent

In our November 2002 issue of the eBulletin, we reviewed the recent B.C. Court of Appeal decision in *Auton v. British Columbia (Attorney General)*, which held that the failure of the B.C. government to fund early intensive behavioural intervention therapy for autistic children violated their equality rights under s. 15 of the *Charter*.

Certainly one would be hard-pressed to find a more sympathetic case before the courts than that of the petitioners in *Auton*. All of the judges were quite obviously, and properly, struck by the myriad of circumstances confronted by those who live with autism, both the afflicted children and their care-givers. The judges specifically noted that without effective treatment, this lifelong affliction "almost always results in a life of physical, emotional, social and intellectual isolation and eventual institutionalization". And underscoring the court's ruling was the cardinal finding of fact that there was a practically-complete absence of any treatment for the condition of autism itself under the B.C. medicare system. Tellingly, the Court of Appeal obliquely spoke of the B.C. Government's inaction as a "refusal to treat a heath care problem". In such cases, judges feel – as any human being would – impelled to act.

However, the *Auton* decision is destined to be surrounded in controversy. For some, the focal point will be, as the chambers judge herself recognized, the "significant public policy issues as to the respective roles of the judiciary and the legislature". That is, *Auton* dives head-first into the heated debate of whether the *Charter* was intended to impose a positive duty on the state to provide state-funded programs and benefits in order to remedy pre-existing conditions of disadvantage that were not caused by the state. This concern is reflected in the headline of an article appearing in *The Globe and Mail* soon after the release of the Court of Appeal's decision, which quoted Mr. David Stratas, an experienced constitutional lawyer in Ontario, commenting on the anticipated reaction to *Auton* by "critics of judicial activism": "This sort of thing is a red flag to those who feel that in an era of increasing demands and competing priorities over scarce financial resources, our elected representatives alone should decide how those resources should be distributed".

But *Auton* will just as inevitably be held out to be binding precedent in other jurisdictions and in other contexts, and for present purposes it is the attempts, which will surely now follow, to apply *Auton* to the education sector that are of concern. The issue then becomes one of the proper application of "precedent" and the need to be sensitive to materially different contexts. There were troubles in this regard with the application of the Supreme Court of Canada's 1997 decision in *Eldridge v. British Columbia (Attorney General)*. In *Eldridge*, the Court found that the equality rights of three individuals who were born deaf, and who preferred to communicate by sign language, were violated by the failure of both the B.C. Government to fund under its medicare system, and certain hospitals to provide, sign language interpreters where it was necessary for the effective communication in the delivery of medical services to those deaf patients.

Thereafter, in practice and in commentary, *Eldridge* was transported into the education sector, and utilized to support claims that educators were required by law to provide, not only one-on-one sign-language interpreters for deaf and hard-of-hearing students integrated into regular classrooms, but also a wide variety of other special education support services and programs for a wide variety of special needs students. Frequently, there was little attention paid to whether the application of *Eldridge* was always appropriate in the education sector. *Auton* has the potential to resurrect the spectre of the *Eldridge* phenomenon.

However, there is clear evidence in *Auton* that the judges themselves specifically intended that their ruling should not apply to the education context. The chambers judge, who generally perceived the question as "primarily an issue of health, not education or social services", found that the expert medical evidence indicated that, age-wise, autistic children had a "narrow window of opportunity" to benefit from early IBI, and that the material "period of time extends from the time they are first diagnosed with autism (usually at age two or three) until the age of six, approximately". No opinion was expressed on the appropriate treatment for school-age children, and the Court of Appeal explicitly held the chambers judge was correct to refrain from so opining.

update

Special Education - *Auton*

The British Columbia government has indicated that it will be seeking leave to appeal to the Supreme Court of Canada the ruling of the B.C. Court of Appeal in *Auton* which requires the government to fund early intensive behavioural intervention treatment for children with autism. The issue for the government is not in respect of the funding of the treatment itself, but with what it considers to be the court's intrusion into government policy-making. That is, it should be for the government alone to decide which services it will fund.

Furthermore, both courts went out of their way to disavow expressly the education context from their consideration. The chambers judge clearly stated it was not "appropriate to determine here whether or not the Government will breach its obligations to autistic children by failing to accommodate their disabilities after they reach school age". The Court of Appeal agreed, and observed that "issues of funding programs for children of school age may involve additional considerations not before the Court, either in evidence or submissions".

But then again, we have the same *Globe* article ascribing a statement to Mr. Stratas, who is certainly no novice in public law matters, that "since the therapy is really a form of education, the ruling [in *Auton*] also suggests that the court has recognized a right to state-provided special education for the mentally disabled". Quite apart from the fact that such a right already exists, with great respect (and giving Mr. Stratas the benefit of the doubt that his actual statement may have been misreported or misunderstood), the Court in *Auton* said nothing like that. In fact, it went out of its way to say it was *not* saying any such thing. But that's exactly the point.

Excerpted from J. Paul R. Howard's article, "Auton, Autism and Applying Precedents", to be published in the Winter 2002 issue of Education Canada*, the quarterly journal of the Canadian Education Association. Visit www.acea.ca.*

freedom of information

MFIPPA and "Personal Information"

The *Municipal Freedom of Information and Privacy Act* ("MFIPPA") has two broad purposes: first, to provide a general right of access to information in the custody and control of institutions subject to MFIPPA, which includes school boards; and, second, to protect the privacy of individuals with respect to "personal information".

What constitutes personal information is defined in s. 2 of MFIPPA. Not surprisingly, personal information includes information relating to a person's race, religion, age, sex and marital status. Addresses, telephone numbers and "identifying numbers" - a student or employee number - also constitute personal information. Further, information relating to an individual's medical, criminal or employment history and to an individual's education is personal information in accordance with MFIPPA.

What you might not know or expect is that personal information is limited to "recorded information". MFIPPA does not apply to information a school board employee knows, if it is not written down or "recorded" in some other way. Nor does MFIPPA require a school board to create a record - for example, if the school board does not keep a list of how many brown schools it has, it will generally not be required to create one.

On the other hand, the Information and Privacy Commissioner/Ontario has found that there is a "personal/professional distinction" which applies to what otherwise might be personal information where that information is provided in the course of a professional's duties. In some contexts, a report which includes the professional's name, telephone number and address would not be considered by the Commissioner to constitute the personal information of the professional.

Then there is s. 2(g) of MFIPPA, which states that personal information includes "the views or opinions of another individual about the individual". More about this next time.

pending

The Education Equality Task Force

The Education Equality Task Force, headed by Dr. Mordechai Rozanski, is expected to release its report on December 10, 2002. The Task Force is reviewing the provincial funding formula. Key areas to be reviewed include: the effectiveness of the model for distributing funding between different types of boards (urban vs. rural; small vs. large); the structure of the cost benchmarks; the degree of financial control school boards should have on a local level; the funding of special education; and the funding of student transportation. The Task Force has been mandated to provide recommendations on ways to improve fairness, certainty and stability for Ontario's schools.

caselaw

Titcher (Litigation Guardian of) v. Toronto District School Board
Ontario Superior Court of Justice
The Court dismissed a student's application for a declaration that she be allowed to attend a particular school despite residing in a condominium complex which had originally been within the school's attendance area but was subsequently excluded by school board policy.

***B. v. Ontario (Human Rights Commission*)**
Supreme Court of Canada
The Court found that an employer (Mr. B) discriminated against an employee (Mr. A) under the *Human Rights Code* on the basis of family status by dismissing him after his wife and daughter alleged that Mr. B had sexually molested the daughter.

R.* v. *Whattcott
Saskatchewan Court of Queen's Bench
The Court set aside a student's conviction for littering contrary to a University of Regina by-law finding that the by-law, enacted to prohibit distribution of advertising matter, was *ultra vires* the University's authority.

Neal v. Kozens
Alberta Court of Queen's Bench
The Court held that a sexual assault claim made by a former student respecting the acts of a teacher who eventually married the student was not statute-barred by the *Limitations Act*. Although the sexual misconduct allegedly occurred between 1980 and 1987, the plaintiff only properly understood that the blame was to be laid on the teacher shortly before the action was commenced in 2001.

Summaries of these cases and others can be found in the Shibley Righton Education Law NetLetter published by Quicklaw. Visit www.quicklaw.com.

# of further interest

OHRC's Consultation Paper on Education and Disability

Paul Howard and Jennifer Trépanier of Shibley Righton LLP's Education and Public Law Group were retained by the Ontario Public School Boards' Association to prepare submissions in response to the Ontario Human Rights Commission's Consultation Paper on "Education and Disability: Human Rights Issues in Ontario's Education System". The Commission held six days of public hearings in November to receive oral submissions from selected delegations. Significantly, OPSBA was one of the very few organizations (if not the only) representing school board interests selected by the Commission to appear before it. On November 22, 2002, Paul Howard and OPSBA President Gerri Gershon appeared before the Commission's Consultation Panel to address these important issues. The full text of our written submissions is available on OPSBA's website at www.opsba.org.

We welcome your comments and questions. Send them, and any updated contact information, to byrdena.macneil@shibleyrighton.com.
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