



Education Law eBulletin

A newsletter for educators

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Students' basic information, if required to be in the OSR, is privileged

In past editions of the Shibley Righton Education eBulletin, we have emphasized that the Ontario Student Record ("OSR") is a privileged document which, according to the *Education Act*, may not be relied upon in any hearing without the consent of the student, or the student's parent or guardian if the student is a minor.

In certain circumstances, courts and tribunals will make exceptions to the rule regarding disclosure of the OSR. For example, in *Prieur v. Ottawa Catholic District School Board*, 2009 HRTO 1702, the Ontario Human Rights Tribunal held that the applicant parent's reliance on part of the OSR allowed the respondent School Board to rely on the entirety of certain documents contained within the OSR.

The Ontario Superior Court also ordered disclosure a student's OSR in *Lee v. Toronto District School Board*, 2008 CanLII 20984, a case in which a student was allegedly assaulted by another student in the schoolyard. In that case, the plaintiff student and his family sued the Toronto District School Board, principal, teachers and the assaulting child's guardian, alleging that the parties knew of the child's history of violent behaviour and failed to take appropriate steps, including proper supervision. The motions judge held that where a person's school record is relevant and producible, and a party is either the student or the parent or guardian of the student, the Court should order that the OSR be produced for litigation.

In *Robinson v. Northmount School for Boys, L.L. and J.L.*, 2013 ONSC 1028 (CanLII), released two weeks ago on February 14, 2013, the Ontario Superior Court was again required to comment on the production of information contained in OSRs. Unlike the above-mentioned decisions however, in *Robinson* the Court was asked to determine whether basic information, such as name and contact information, is privileged simply by virtue of being in the OSR.

In *Robinson*, the plaintiff had been a teacher at Northmount. During the 2006-2007 school year, a dispute arose between Robinson and L.L. and J.L., whose son was a pupil in Robinson's class. In 2007, the pupil made allegations of misconduct against Robinson, including allegations of physical abuse. Subsequent investigations by Northmount, the police, and the Children's Aid Society found no misconduct.

Robinson's employment with Northmount ended on June 1, 2007. On June 7, 2007, Northmount held an open meeting with parents and students at the school. Following this meeting, Robinson brought an action seeking damages for breach of employment contract against Northmount, and seeking damages for defamation, malicious prosecution and breach of contract against L.L. and J.L. In her statement of claim, Robinson alleged that the defendants L.L. and J.L. made defamatory statements about her during the June 7, 2007, meeting.

During the discovery process, a representative for Northmount refused to identify persons who were in attendance at the June 7, 2007, meeting and whether Northmount had any information that Robinson had bullied any other students. Although the information was arguably relevant to Robinson's claim, Northmount refused to disclose the requested names on the basis that the answers

would reveal information about non-party students. In short, Northmount took the position that the information itself was privileged and protected by s. 266 of the *Education Act* because it could also be found in the non-party students' OSRs.

As a result of the refusals, Robinson brought a motion before the Ontario Superior Court to compel Northmount to produce the information requested. The motion was heard by a Master, a judicial officer authorized to hear and decide pre-trial motions. At the motion, Robinson argued that the privilege contemplated by s. 266 of the *Education Act* protects the actual documentary contents of the OSR, but not necessarily all the information contained in those documents. Robinson argued that she was not seeking the actual documents; her requests were limited to the names and contact information of non-party students and their parents who may have information relevant to the matters in the action.

In his analysis, the Master reviewed a 1998 decision by Justice Rivard of the Ontario Superior Court in *Pandremenos v. Riverdale Collegiate Institute*. In *Pandremenos*, Justice Rivard held that s. 266 of the *Education Act* clearly provides that the OSR is privileged and that the record, which must include the name and address of the student, is privileged and cannot be disclosed without the written consent of the student or the parent, if the student is a minor.

In the Master's opinion, the *Education Act* served to make the record privileged, and not necessarily basic information contained therein. Despite the Master's disagreement with the previous decision, he followed *Pandremenos* and held that basic student information, including name and contact information, is specifically required to form part of the OSR and is therefore privileged and could not be disclosed by Northmount without the appropriate consent.

In our view, Rivard's decision in *Pandremenos* and the ultimate conclusion reached by the Master in *Northmount* that necessary OSR information is privileged and not ordinarily subject to disclosure is the interpretation which most closely follows legislative requirements and the Guidelines. Notably, the circumstances in which production of the OSR has been compelled by a court or other administrative tribunal include situations in which the records belong to the students and/or parents who are actual parties to the litigation. In this case, the plaintiff was attempting to gain access to non-party information; the Master's ultimate refusal to order Northmount to disclose this information preserves the confidential nature of OSRs and the requirement that appropriate consent be obtained prior to disclosure.

School boards and school administrators should be mindful of the confidential nature of OSRs when responding to any requests that could result in disclosure of this information. As set out in the OSR Guidelines, where a school administrator is subpoenaed to attend court with the OSR, the principal should attend court with both the original OSR and a complete and exact photocopy of it, and should propose to the judge that the photocopy be submitted instead of the original. The principal should inform the judge that any subpoena is inconsistent with subsection 266(2) of the *Education Act*, however, the principal must relinquish the documents if ordered to do so by the judge.

Legal Issues for Independent and Private Schools Conference

Please find attached a brochure for the upcoming conference on *Legal Issues For Independent and Private Schools* jointly hosted by the Ontario Federation of Independent Schools and York University, Faculty of Education. The Conference will be held at the Mississauga Grand Conference Centre on Wednesday, April 17, and Thursday, April 18, 2013.

Bryce Chandler and Deborah Howden, both experienced counsel with Shibley Righton LLP, will be delivering workshops regarding workplace and human rights issues on Wednesday afternoon and Thursday morning.