SHIBLEY RIGHTON LLP
Barristers and Solicitors

Education Law eBulletin

A newsletter for educators

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"Reasonable" Supervision Practices and Policies Fend Off Schoolyard Negligence Claim

As we launch into another school year, one in which full-day Junior and Senior Kindergarten continues to be rolled out throughout Ontario, safety – in and out of the classroom - continues to be a primary concern.

Despite the unquestionable need to ensure students' safety, it is trite to say that accidents, and incidents, will happen. A relatively recent decision of the British Columbia Supreme Court may allow school adminstrators to breathe a little easier insofar as the Court held dismissed a negligence claim against a school that had implemented reasonable supervision policies and practices.

The decision in question, styled *Gu (Litigation guardian of) v. Friesen*, 2013 BCSC 607 April 9, 2013, considered the extent of contributory negligence stemming from an accident during recess at Southridge School in Surrey, British Columbia ("Southridge"). In 2008, the 11-year-old plaintiff was giving her friend a "piggyback" ride during recess at which time a classmate (the defendant) ran over and pushed the friend, causing both her and the plaintiff to fall. The plaintiff fractured her elbow. The plaintiff subsequently initiated a claim in negligence against the classmate, his parents and Southridge, specifically alleging that the school was negligent for failing to provide adequate supervision. The defendants had made third party claims against each other and claimed contributory negligence against the plaintiff. At trial, the defendant student testified he did not mean to injure anyone, but he also admitted that he knew that pushing was prohibited on the playground. Southridge had extensive safety policies that were known to students and were enforced by staff. During the recess break, there were approximately 70 grade six and seven students outside, being supervised by one staff member, who walked around the premises. There was some question as to whether piggybacking was a permissible activity and, during the trial, the extent of supervision was a live issue.

Ultimately, the only successful claim was that against the student defendant who, it was held, did not turn his mind to the risk before pushing the plaintiff's friend, which caused the accident. All other claims were dismissed, including the claim against the defendant student's parents on the basis that there was no evidence that the parents failed to supervise or control him. The Court also dismissed the negligence claim against Southridge. Although the Court recognized that standard of care applicable to Southridge was that of a "careful and prudent parent," it also noted that this standard varies according to different factors, including the number and age of the students involved and the activity in which they are participating. The Court concluded that "piggybacking" is an "innocuous activity" and that Southridge was not negligent in allowing the activity to take place. The Court also considered the number and age of the students, the area in which they were playing, and the usual activites. In this case, the Court found that neither the number of sutdents nor the overall size of the area to be kept under supervision was "inordinately large" or that the deployment of a single supervisor was unreasonable. The Court then remarked that, unlike pre-schoolers or primary grade students, 11 and 12-year-old students will require a meaningful level of supervision, but that this did not necessarily equate to a requirement of *constant* supervision. This was further supported by Southridge's school yard policies, enforcement of these policies, and past experience, which created a reasonable expectation that recess would be safe and fairly uneventful. In this case, even though the school yard supervisor had not been in a position to witness the accident, the Court held that the supervision policies and

practices were reasonable in the circumstances.

The *Gu* decision recognizes that schools and school boards will be held to the standard of a careful and prudent parent and that the adequacy of supervision measures runs along a spectrum, increasing or decreasing depending on a variety of factors. In the *Gu* case, based on the age of the students, the size of the playyard, the activities in question and past experience, a single supervisor was deemed to be reasonable and appropriate. However, if any of those factors are modified; for example, if it is well known that students tend to engage in risky and unsanctioned activities despite board policies, it may be reasonable to expect that superivision requrements need to be revisited. In our opinion, school boards should be cautioned that although a single supervision *policy* may set out expectations and requirements, supervision *practices* should be determined on a school-by-school basis.

Accommodation Update: Termination of Teacher with Bipolar II Disorder "Reasonable"

When it comes to employee matters, questions regarding accommodation rank near the top of the list of frequently asked questions. When considering students' safety, the nature of a disability can raise issues as to whether accommodation is practicable or possible, as illustrated by a recent decision of the Nova Scotia Supreme Court titled *A.A. v. Halifax Regional School Board*, 2013 NSSC 228, the Nova Scotia Supreme Court

In *A.A.*, the applicant in question was a high school teacher who had been employed by the Halifax Regional School Board since 1993. The teacher's evaluation reviews described him to be hard-working, dedicated and talented. Prior to 2008, the teacher had no disciplinary record. During the summer of 2008, the teacher engaged in e-mail correspondence with a female student who had just completed grade 10. The teacher's emails included a recommendation that the student kill her parents, made reference to rescuing the student from her parents, compared the teacher's desire to leave his wife with her need to leave her parents, and invited the student for a drive to the ocean. The email correspondence was found on the student's computer by her parents who subsequently turned the communications over to the principal. Following a meeting with the teacher, during which he acknowledged the inappropriate nature of the correspondence, he saw his family physician and was referred to various psychologist and mood disorder specialists. The teacher was subsequently diagnosed with bipolar disorder and has received continuous treatment for the disorder since the diagnosis; however he has not worked since September 15, 2008. In April 2010, the school board terminated the teacher's employment. This decision was appealed by the teacher to the Appeal Board, pursuant to the *Education Act*. Ultimately, the dismissal was upheld on the basis that the teacher had breached his duties under the *Education Act*, and that his conduct had damaged the student's impression of herself and her relationship with her parents and friends. Ultimately the Appeal Board concluded that there was a risk to the safety of students if another hypomanic episode occurred and that such a risk could not be reasonably accommodated and controlled without undue hardship to the school board. The teacher then brought an application for judicial review to the Nova Scotia Supreme Court. The Court dismissed the application for Judicial Review finding that the Appeal Board had applied the proper tests in coming to its conclusions on the issues of the level of risk and the requirements and burden of proof to establish a bona fide occupational requirement. Although the Court did not make any findings as to the termination of the teacher, it held that the Appeal Board's findings that the teacher could not be accommodated were reasonable.

The *A.A.* decision is one that emphasizes the complexity inherent when considering accommodation of disabilities. In this case, the teacher's disability could not be accommodated due to the teacher's position of trust and the "probable recurrences of hypomania" despite the relative optimism of the teacher's doctors. Indeed, the termination was justified, in part, based on problems related to detection of the onset of hypomania, combined with the compelling need to have trust in schools and the potential serious consequences if another student was drawn into a relationship. The school board's decision to terminate was carefully scrutinized by both an Appeal Board and the Nova Scotia Supreme Court; despite the dismissal of the application for judicial review, the Court alluded to the fact that there may remain contentious issues regarding the just cause standard. In short, the *A.A.* decision reflects the difficult nature of accommodation and the need to review all such matters on a case-by-case basis prior to making any final decisions. At Shibley Righton LLP, we regularly review these types of situations and are prepared to answer all of your accommodation or termination questions.