Keel Cottrelle LLP
www.keelcottrelle.com

Toronto — 36 Toronto St. Suite 920 Toronto ON M5C 2C5
416-367-2900 fax: 416-367-2791

Mississauga — 100 Matheson Blvd. E. Suite 104 Mississauga ON L4Z 2G7
905-890-7700 fax: 905-890-8006

Education Law Newsletter

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U.S. Supreme Court issues significant ruling on requirements for special education

In *Endrew F. v. Douglas County School District* (580 US (2017)), the Supreme Court of the United States (SCOTUS) held that, to meet its substantive obligation under the *Individuals with Disabilities Education Act* (IDEA), a school must offer an Individualized Education Plan (IEP) which enables a child to make progress appropriate in light of the child's circumstances. An IEP is a personalized education plan (similar to Ontario) by which special education and related services are tailored to the unique needs of each child. IDEA provides federal funds to states in order to assist in educating children with disabilities (which is not similar to Ontario). To be eligible for the funding, states must comply with a number of statutory conditions. Among the conditions, states must provide a free appropriate public education (FAPE), which includes both special education and related services, to eligible children. The services must be provided in conformity with the child's IEP.

The case was brought on behalf of Endrew F., an autistic child attending school in the Douglas County School District. Autism is a disorder which qualifies under IDEA, and as such, Endrew

was entitled to a FAPE. Endrew had an IEP, but his parents became unhappy with both the plan and his progress in school. His parents believed that the IEP needed to be significantly changed or Endrew's behavioral problems and lack of progress would continue. Before Endrew began the 5th grade, his parents received a prospective IEP, which, in their opinion, would not have provided the necessary support for Endrew to succeed in school.

As a result Endrew was enrolled in a private school, where his performance improved. Endrew's parents met with the school district again after 6 months, but the proposed IEP was essentially the same and did not provide a similar level of accommodation as his private school, which his parents felt was essential to his success.

In February of 2012, Endrew's parents filed a complaint with the Colorado Department of Education seeking reimbursement for Endrew's tuition at his private school. In order to be reimbursed, they were required to show that the school district had not provided Endrew a FAPE in a timely manner prior to his enrollment at the private school. His parents argued that the proposed IEP had not been sufficient to provide Endrew with a FAPE. After a series of court cases and appeals, the Tenth Circuit Court held that "the instruction and services furnished to children with disabilities must be calculated to confer some educational benefit". The Tenth Circuit Court noted that it interpreted this language to mean that a child's IEP is adequate as long as it confers an "educational benefit [that is] merely … more than de minimis". *De minimis* is a latin term, which is used at law to mean trifling or minimal. Applying this standard, the Tenth Circuit Court held that Endrew's IEP enabled him to make some progress and as such he had not been denied a FAPE.

The SCOTUS disagreed, and overruled the Tenth Circuit Court Decision. The SCOTUS held that "to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances". The SCOTUS held that a focus on the particular child is at the core of IDEA. As such, the instruction offered by the school must be specially designed to meet the child's unique needs through their IEP.

The SCOTUS discussed how society generally considers education to mean progress through a system where "regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material", and that access to an education as described is promised by IDEA. As such a FAPE requires a substantive standard of a level of instruction reasonably calculated to permit advancement through the general curriculum. This is a higher standard than the *de minimis* test applied by the Tenth Circuit Court. The SCOTUS held that "it cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot." It held that if that were the case then those children "can hardly be said to have been offered an education at all." However, the SCOTUS made it clear that IDEA demands more. Instead of the *de minimis* standard, it requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

While the SCOTUS did not elaborate on what appropriate progress will mean in each case it held that "the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." Typically, this will mean an educational program designed to allow the child to progress from grade to grade. However, if that is not possible, schools must provide a program that is appropriately ambitious in light of the child's circumstances. The SCOTUS held that while individual IEP goals may differ "every

child should have the chance to meet challenging objectives."

The case provides a landmark victory for students with disabilities. No longer will schools be able to use minimal progress as a justification for an inadequate IEP. While the requirements in each case will vary, the standard has been raised. Although this case is not binding in Canada it may well have an influence on special education in this country. In particular, the principles enunciated resonate with case law in Canada. For example, the L.B. case below includes an analysis similar to the SCOTUS analysis. ■

HRTO upholds Board's refusal to allow service dog in the classroom

In *J.F. v. Waterloo Catholic District School Board,* (2017 HRTO 1121), the Human Rights Tribunal of Ontario (HRTO) confirmed that the respondent school board was not required to allow a disabled student to have his service dog attend in class with him.

The applicant in this case, J.F., represented by his father, C.F., was a nine-year-old boy diagnosed with Autism Spectrum Disorder (ASD). In April 2014, the applicant was accepted into the Autism Assistance Guide Dog Program implemented by the Lions Foundation of Canada. During the 2014/2015 school year when the applicant was in grade two at an elementary school within the respondent board, C.F. sent an email to the school's principal and special education teacher requesting that the applicant's guide dog be allowed to attend in class with him.

The principal and special education teacher consulted their policy and replied with their opinion that the applicant would be unlikely to qualify to have his service dog attend in class with him. C.F. later sent a formal request to the respondent's Superintendent of Education, who set up a meeting to discuss the issue. At this meeting, C.F. answered questions about the applicant's disability-related needs and how his service dog helped him. The respondent suggested that they have a behaviour support team attend in class to observe the applicant and provide an individual assessment.

Another meeting was held to present the findings of the behaviour support team's assessment. The respondent expressed that the applicant was doing well in school with the help of an Individual Education Plan that had been put in place for him. The behaviour support team had not found any major issues with the applicant's behaviour in class.

C.F. had the opportunity to give a presentation and answer questions for the respondent's board of trustees, however the respondent maintained its refusal of C.F.'s request. C.F. asked for reasons for this decision. The respondent's Director of Education provided these reasons in an email where she indicated that the behaviour support team and the applicant's teacher had individually assessed the applicant's needs, and reported that he was experiencing academic success and socializing well. The respondent therefore could not identify any need for the service dog. The email further noted that because the applicant was too young to handle the dog without the assistance of an adult, the dog would be considered a comfort dog rather than a service dog under their amended policy.

The applicant, as represented by C.F., alleged that the respondent discriminated against J.F. on the basis of disability.

The tribunal began by establishing the framework for its analysis. It rejected the applicant's argument that he had a right to bring his service dog into the school with him under the *Accessibility for Ontarians with Disabilities Act* (*AODA*), which allows people with disabilities to be accompanied by their guide dogs when accessing services open to the public. The tribunal found that because section

305 of the *Education Act* explicitly restricts the public's access to schools, the respondent was not legally obligated to allow the applicant to enter the school with his service dog.

Instead, the respondent's legal obligation was to deliver educational services to the applicant in a manner that did not breach his rights as protected by the Ontario *Human Rights Code* (the *Code*).

The tribunal laid out the test for proving *prima facie* discrimination set by the Supreme Court of Canada in *Moore v. British Columbia (Education)* (2012 SCC 61). Under this test the applicants must show:

- they have a characteristic protected from discrimination;
- that they have experienced an adverse impact with respect to their education; and
- that the protected characteristic was a factor in the adverse impact.

The tribunal also laid out the procedural and substantive aspects of the respondent's duty to accommodate. The procedural aspect requires the respondent to undertake a reasonable investigation into the applicant's disability and needs. The substantive aspect requires the respondent to explore all legitimate accommodations to the point of undue hardship, including a determination of the adequacy and appropriateness of any modifications, accommodations or programs implemented to support the applicant.

Applying this legal framework to the facts of this case, the tribunal found that the respondent school board satisfied the procedural duty to accommodate by completing a "thorough and timely investigation and assessment of the applicant's disability-related needs in the education context." By conducting multiple meetings with C.F. and school staff who had worked with the applicant, considering the applicant's medical evidence, and engaging the behaviour support team to observe the applicant, the respondent demonstrated that it fully considered the applicant's individual needs before making its decision.

The tribunal also found that the respondent satisfied the substantive duty to accommodate. The tribunal considered evidence given by the applicant's family, medical professionals, and numerous school staff employed with the respondent board, noting a 'disconnect' in their evidence. Those who had not observed the applicant at school said that his safety was at risk due to his tendency to run away and that he had serious behavioural issues that were alleviated by the presence of his service dog. While the tribunal accepted that the service dog was a benefit to the applicant, it placed more weight on the evidence of those who had actually observed the applicant at school. These people indicated that the applicant was generally succeeding academically and socially, and that any behavioural or safety concerns that persisted were not serious and were already being adequately addressed through the use of the student's Individual Education Plan and the work of the applicant's educational assistant and special education teacher.

Considering that the applicant was generally doing well at school without his service dog, the tribunal went on to apply the test for proving *prima facie* discrimination. While no one disputed that the applicant's ASD was a disability protected from discrimination, the tribunal found that the applicant had not experienced an adverse impact on his right to meaningful access to the educational services provided by the respondent. The evidence demonstrated that the respondent had already been providing accommodations in a dignified and inclusive manner, and that these accommodations were sufficient for supporting the applicant's disability-related needs. The application was therefore dismissed because the applicant failed to demonstrate *prima facie* discrimination and the respondent satisfied its

procedural and substantive duties to accommodate.

This decision does not eliminate the possibility that school boards may be required to accommodate students with disabilities by allowing them to attend class with their service dogs. The tribunal specifically noted that these decisions will have to be determined on an individual case-by-case basis.

The decision demonstrates that school boards will have to complete a thorough investigation into a student's disability-related needs before deciding whether to allow a requested form of accommodation such as a service dog. In addition to this procedural element, school boards must accommodate to the point of undue hardship by evaluating the adequacy and appropriateness of any supports given to accommodate students with disabilities. While in this case the fact-specific evidence demonstrated that the respondent's accommodations were sufficient, other cases may require more or less accommodation to ensure that students with disabilities are not impeded in exercising their right to access meaningful education and, in some cases, accommodation may include the use of a service dog. ■

Court confirms damages for failure to accommodate, but reiterates requirement to give school an opportunity to accommodate

In *L.B. v. Toronto District School Board* (2017 ONSC No. 2301), the Divisional Court awarded damages for costs of a private school. The applicant, LB, sought review by the court of a decision of the Human Rights Tribunal of Ontario (HRTO) that was later confirmed in a Reconsideration Decision. In its Decision, the HRTO held that the respondent, the Toronto District School Board (TDSB), discriminated against the applicant, and awarded the applicant general damages as monetary compensation for injury to the applicant's dignity, feelings, and self-respect. However, the HRTO denied the applicant's request for special damages for tuition and other costs associated with the decision of the parents to enroll LB in a private school that accommodated his disabilities. The applicant requested that the Court overturn the HRTO's decision to deny special damages, and that the respondent be required to pay special damages in the amount of $145,000.00.

This particular application has prior background with the HRTO. The first issue is reviewed in the March 2015 KC LLP Education Law Newsletter: "HRTO limits evidence at hearing re parental care for special needs child". The Decision of the HRTO awarding damages is reviewed in the March 2016 KC LLP Education Law Newsletter: "HRTO awards damages to student with multiple disabilities for school board's failure to accommodate".

The events leading up to the initial application included complaints by the applicant's mother that the respondent had not facilitated the applicant's transition from elementary to secondary school, and that the respondent had not accommodated the applicant's learning and mental health disabilities once he had entered secondary school. The applicant had been diagnosed with a number of learning and mental health disabilities, including attention deficit hyperactivity disorder, anxiety, and depression. In preparation for the transition from elementary to secondary school, the applicant's elementary school provided his secondary school with an exit copy of his Individual Education Plan (IEP), which outlined a number of recommendations for facilitating the applicant's transition to secondary school and for accommodating the applicant once he had entered secondary school.

After entering secondary school, not all of the recommendations contained in the applicant's exit IEP were implemented. Consequently, the

applicant began to exhibit attendance problems early in Grade 9, and eventually stopped attending school altogether. As a result, the applicant's mother scheduled a meeting with staff from the secondary school to discuss the applicant's performance issues. In this meeting, the applicant's mother indicated that she was exploring the possibility of sending the applicant to a private boarding school, and requested that the school complete a recommendation form for the applicant's admission to the private school, which the school provided shortly thereafter. Subsequent to the meeting, and approximately seven months into the school year, a number of staff members from the school met to discuss potential steps that could be taken to address the applicant's performance issues, however, before these steps could be implemented, the applicant's mother notified the school that the applicant had been enrolled in private boarding school and that, effective immediately, he would no longer be attending the secondary school.

The HRTO held that the applicant was a person with a disability under the *Human Rights Code* and that the applicant's secondary school had discriminated against him by not accommodating him to the point of undue hardship during the time that he attended the secondary school. The HRTO noted that the respondent's slow response exacerbated the applicant's struggles, and ultimately resulted in the applicant's mother removing him from the school and enrolling him in a private school. As a result of the respondent's failure to accommodate the applicant's disability, the HRTO awarded the applicant $35,000.00 in damages. However, the tribunal rejected the applicant's request for special damages to cover the private school expenses. Specifically, the HRTO held that, although the applicant's performance had noticeably improved while at the private school, a similar outcome could have been achieved at the respondent's secondary school had the applicant's mother not removed him from the school.

The applicant applied for judicial review and asked the Court to overturn the HRTO's decision to deny special damages on the basis that the HRTO failed to consider whether the respondent's secondary school could have accommodated his mental health disabilities. Specifically, the applicant took issue with the HRTO's finding that a similar outcome could have been achieved at the secondary school if the applicant had not been removed. The applicant argued that the school presented no substantive evidence that would lead one to conclude that the respondent could have accommodated him and that there was no evidence that would suggest that the applicant's performance would have been similar had he remained at the respondent secondary school.

The court held that it was not unreasonable for the tribunal to find that accommodation is a two-way street, and that the applicant's removal from the secondary school prevented the respondent from accommodating his mental health disabilities. However, the court found that the respondent did not take the appropriate steps to accommodate the applicant during the first seven months of his Grade 9 year and, as a result, the applicant's mother was left with little choice but to enroll him in the private school in April of his Grade 9 year. Accordingly, the court held that there was no rational basis to deny the applicant compensation for the expenses incurred during the Grade 9 year, and ordered the respondent to pay expenses incurred for that year. However, the court held that the HRTO was justified in rejecting the applicant's claim for special damages beyond the Grade 9 year, as the applicant did not give the respondent the opportunity to accommodate his disability. The matter was remitted to the tribunal to determine the quantity of costs payable.

This decision should serve notice to those seeking accommodation that there is a positive obligation to give the other party the opportunity to accommodate. ■

Court upholds Board's decision denying student's eligibility to play on high school basketball team

In *Capelli v. Hamilton Wentworth (Catholic School Board)* (2017 ONSC 5442), the Divisional Court dismissed a high school student's application for judicial review of the Board's decision to deny her eligibility to play on her school's basketball team.

The applicant in this case, Lauren Capelli, was a 16-year-old grade 11 student who transferred from Bishop Tonnos High School (BT) to another school within the respondent Board. The Board maintained a policy of precluding students from participating in team sports for one year following a transfer to a new school. The purpose of this policy was to prevent recruitment of student athletes from one school to another, as this could create an imbalance in each school's competitiveness in team sports while discouraging or preventing students from participating. The policy allowed for exemptions in situations where a student transferred schools due to bullying.

The applicant and her father applied to the board for an exemption on the basis that the applicant had been bullied by another student at BT and by that student's father, who was a teacher and basketball coach at BT. The students and their parents had a strained relationship with each other going back several years, and the applicant had avoided playing on teams with the other student or teams being coached by the other student's father since Grade 9. The applicant alleged that, at an out-of-school basketball tournament, the other student hit her during a game and later bragged about it to other students at BT. In a separate out-of-school tournament, the students and their fathers had gotten into a verbal altercation.

In order to qualify for the bullying exemption, the board's policy required documented evidence of the bullying, and a letter from the previous school supporting the student's decision to transfer to a new school. When the applicant's father requested a letter of support from BT, the school refused. The school's principal explained in a letter that because the conflict had been coming from both sides, it did not qualify as bullying. The school had held a mediation meeting with the students and their parents, and no further incidents or conflict had arisen in the school's follow ups.

Following receipt of the application and the information from BT's principal, the board's superintendent found that there was insufficient evidence to support the allegations of bullying. The superintendent therefore denied the request for an exemption. This decision was upheld by the Golden Horseshoe Athletic Committee (GHAC). The applicant's father provided further documentation about the incidents at the basketball tournaments, however the superintendent and GHAC both reaffirmed their decisions. The applicant had an opportunity to appeal these decisions to the Ontario Federation of School Athletic Associations (OFSAA), but the hearing would not occur until well into the school year's basketball season. The applicant and her father therefore brought an application for judicial review to the divisional court on an urgent basis under s. 6(2) of the *Judicial Review Procedures Act* (the *Act*), seeking *certiorari* to quash the previous decisions and a declaration that she could play on the school's basketball team. In the alternative, they sought a requirement that OFSAA hear and decide the applicant's case before the first game in the basketball season.

The court held that the matter could be heard on an urgent basis under s. 6(2) of the *Act* because, even though the application could have been brought earlier, much of the delay was outside of the applicant's control. The court also acknowledged that the loss of an opportunity to participate in school sports is significant and may give rise to the types of issues that warrant urgent relief.

Next, the court determined that it had jurisdiction to hear the matter. The type of relief requested in this case could only be subject to judicial review when the decision under review has a "public law character."

The court held that the decision in this case had a sufficient public law character for several reasons, including that the board was a public body created by statute, its power to promote school athletics came from the *Education Act*, the decisions of the superintendent and GHAC were compulsory unless overturned on appeal, and courts in past cases have recognized the broader importance of school athletics for the general public.

After determining that it could hear the matter, the court considered the substance of the applicant's arguments. She argued that she should be permitted to play on her new school's team because the decisions to deny her eligibility raised a reasonable apprehension of bias, and the manner in which these decisions were made breached her right to procedural fairness.

The court found that bias could not be demonstrated by the mere fact that the other student's father was a teacher at BT. There was no evidence to suggest he influenced the decision. The court also found no bias in the fact that the superintendent who ultimately made the decision for the board had participated in the mediation meeting with the students and their parents. There was no evidence to suggest that he had any personal interest or that there was anything improper about the manner in which he participated in his role as superintendent. Finally, the evidence suggested that the decisions were made only after accepting submissions from all parties and considering their perspectives. The court concluded that an informed person viewing the matter realistically and practically would not think that the decision makers in this case would act unfairly, whether consciously or unconsciously.

The court also rejected the argument that the manner in which the decisions were made breached the applicant's right to procedural fairness. The court noted that both the Superintendent and GHAC reviewed their decisions and allowed the applicant and her father to submit additional evidence of the alleged bullying. The court found that there was nothing unreasonable about the superintendent's position that the additional documentary evidence offered nothing new, as it generally described the same incidents that had already been considered.

The court dismissed the application for judicial review, finding that there was no evidence of a reasonable apprehension of bias or procedural unfairness in the board's decision. The court confirmed however that the applicant was free to pursue an appeal with OFSAA and to present her evidence and arguments afresh. ■

Court dismisses motion for interim injunction on allegedly defamatory articles

In *Upper Canada District School Board v. Gilcig (c.o.b. Seaway Media)* (2017 ONSC 2904), the plaintiff school board and school principal brought a motion for an interim injunction compelling the defendant to remove two allegedly defamatory articles posted on the internet. The articles concerned a series of events that took place in October 2013. A Cornwall resident had noticed two swastikas scribbled onto a bathroom wall in a local secondary school. The resident notified the school's principal. Over the next 15 days, the resident returned to the school three times and saw that the swastikas were still there each time. The resident repeatedly reported this to the principal after every visit. On the fourth and final visit, the resident attended the school with the defendant and met in person with the vice principal, who had the swastikas promptly covered over.

The defendant began publishing a series of online articles in October 2013 that the plaintiffs alleged were defamatory. The plaintiffs commenced an action against the defendant in April 2014, and the defendant eventually removed the publications as part of a settlement in July 2015. About two years later in early 2017, however, the defendant resumed publishing articles about the incident. In these articles, the defendant characterized the school's principal as an incompetent racist who took no steps to remove the swastikas. The articles also alleged that the board engaged in a cover-up of these events.

The articles made no mention of the plaintiffs' side of the story. The plaintiffs claimed that the principal had the swastikas painted over each time they were reported to her, but that the images were repeatedly re-drawn. The principal stated that she conducted an investigation, found and disciplined the student responsible, and organized a school-wide event to educate the student body about the Holocaust and the importance of combatting racism, discrimination and hate.

At the time of this motion, two of the impugned articles remained online. The defendant denied that they were defamatory and refused to take them down, relying on the defences of truth, fair comment, and responsible communication on matters of public interest.

The Ontario Superior Court of Justice began by describing the stringent test to obtain an interim injunction for defamation. Interim injunctions to restrain behaviour before a matter has been heard at trial are normally difficult to obtain, but because of the significant public interest in the free circulation of information, the test in defamation cases is even stricter. An injunction to restrain defamation prior to trial cannot succeed unless the plaintiff can demonstrate "that the words are clearly defamatory and impossible to justify." It must be clear at the time of the motion that the plaintiff's case at trial will be "close to ironclad."

In applying this stringent test, the court considered the strength of the three defences that the defendant relied upon.

The court found that the defendant would be unable to rely on the defence of responsible communication on matters of public interest. When the defendant resumed publishing the articles in 2017, he failed to mention that the events described actually took place in 2013. The passage of time casts doubt on whether the events are really in the public interest. The articles would also fail to meet the "responsibility" element of this defence, as the defendant was fully aware of the plaintiffs' side of the story but "steadfastly neglected" to report it.

Similarly, the defence of fair comment was unavailable because the reading public would be unable to distinguish between the facts and the defendant's opinion without knowing the plaintiffs' side of the story.

Finally, the court considered the defence of truth or justification. If a defendant can prove on the balance of probabilities that an allegedly defamatory statement is true, then the defence will be made out.

The court found that the viability of this defence was uncertain. On the one hand, the defendant embellished the facts by claiming that the swastikas had been left on the walls for a month when really it had been 15 days. On the other hand however, the plaintiffs provided no evidence to support their assertion that the swastikas had been removed each time they were reported to the principal. Without the sworn testimony of the custodians who allegedly painted over the graffiti only to see it reappear each time, the court could not be satisfied that a reasonable jury would be unable to deliver a verdict in the defendant's favour at trial.

The motion for an interim injunction was ultimately dismissed because the plaintiffs failed to meet the onerous test of presenting a

nearly "ironclad" case that would "almost certainly succeed" at trial. The articles could remain online for the time being, however, the court offered some final advice for the plaintiffs. If they returned to court with the sworn evidence of the custodians who they claimed had repeatedly removed the graffiti, then this might be enough to obtain the interim injunction they were looking for. With that evidence, there may be no viable defences left for the defendant, and the plaintiffs' case could potentially meet the high burden for an interim injunction to restrain defamation before trial. ■

School closings and consolidations continue to be fraught with challenges

In *Town of Bridgewater v South Shore Regional School Board* (2017 NSSC 73), the applicant town applied to the court seeking a review of the decision by the respondent school board, to move students from Bridgewater Junior/Senior High School (Bridgewater HS) to Park View Education Centre (Park View). The applicant submitted that the school board breached the principles of procedural fairness in its decision to move the students from Bridgewater HS to Park View.

In its decision to move the students, the school board followed the School Review Policy prescribed in the *Education Act* of Nova Scotia. In keeping with the School Review Policy, the school board convened a School Operations Committee (SOC) of 20 representatives composed of members from Bridgewater HS and from Park View, from local businesses, and from the Town. The SOC was charged with both conducting a review of the decision to move the students and with submitting a report to the school board that was to inform the board's final decision.

The SOC ultimately voted in favour of making a recommendation to move the students from Bridgewater HS to Park View, and submitted the reasons for the recommendation to the school board. After receiving the SOC's recommendations, a number of concerns were raised by members of the SOC regarding the process followed by the SOC and, as a result, the school board decided to pause the school review process in order to obtain an independent review of the process adopted by the SOC. The independent review culminated in the MacNeil Report, which indicated that the process adopted by the SOC adhered to the principles of administrative fairness. The report did, however, make recommendations directed at the Minister of Education for improvements regarding the school review process on a go-forward basis.

After the release of the MacNeil Report, the school board held a number of meetings with members of the SOC to consider the Report's recommendations. The school board requested additional material from members of the SOC, received correspondence from members, and allowed members to make presentations. After considering the additional materials, the school board ultimately passed a motion – the motion at issue in this application – approving the decision to move students from Bridgewater HS to Park View Education Centre. The applicant submitted that the decision process, discussed above, breached the principles of procedural fairness.

In examining the town's claim that the school board breached the principles of procedural fairness, the court first established the standard of review for such allegations. Relying on a number of prior decisions, including *Dunsmuir v. New Brunswick*, the court held that reasonableness was the correct standard when reviewing an administrative body's decision-making process and outcome.

The Court then made a determination with respect to whether the school board owed the town a duty of fairness. The school board argued that the decision to move the students from Bridgewater HS to Park View did not involve a school closure per se – the school was to remain open, but would no longer be serving

students – and that, as a consequence, it did not owe a duty of procedural fairness to the town. In putting forth this argument, the school board relied on a number of cases in which courts held that, unless the board had decided to close a school, no duty of fairness is owed. The town responded to this submission on two fronts: one that the decision to move the students was a de facto school closure; and that in any event, the school board owed a duty of fairness to the citizens of the Town.

The court found that it was unnecessary to determine whether the school closure was considered a closure for the purposes of the *Education Act*. In relying on the *Potter v. Halifax Regional School Board* decision, the court held that a determination with respect to whether there exists a general duty to act fairly can be made by examining the relationship between the administrative body making the decision and the impact of that decision on the affected individuals' rights. In considering the impact of the school board's decision on the town, the court held that the interests of both the parents and the students would be negatively impacted. The court specifically noted that the decision to live close to a school, the school's program offerings, and the quality of the school's facilities were all factors that parents consider in determining where to send their children to school, and that the school board's decision to move the school would have a clear impact on these considerations. Accordingly, the court found that the respondent did owe a common-law duty to the town to act fairly in making the decision to move the school.

The court then turned to the primary issue raised by the town, which was whether the school board had breached its duty of procedural fairness in making its decision to move the students from Bridgewater HS to Park View. As alluded to above, the standard of review that the court adopted in reviewing the school board's decision to move the students was whether the decision was reasonable in the circumstances. The town submitted that the school board had breached the duty of fairness and acted unreasonably by, among other reasons, not fully considering the concerns raised by some of the members of the SOC.

The court found that the SOC mandate was simply to make recommendations to the school board, and that the school board had the option of accepting, rejecting or modifying the recommendations made by the SOC.

The court found that the school board had in fact accepted the recommendations of the SOC, and had allowed those members of the SOC that had concerns regarding the process to express those concerns in an open forum. The court stated that the process was transparent "at each step along the way" and, accordingly, held that the decision to move the students from Bridgewater HS to Park View was reasonable in the circumstances, and dismissed the Town's claim. ■

Further challenges to school closings

In *Young v Newfoundland and Labrador English School District* (2017 NLCA 39), the Newfoundland and Labrador Supreme Court found that trustees, who were appointed rather than elected, lacked the authority to order a school closure.

The case concerned the authority of a school board, comprised of appointed rather than elected trustees, to order the closure of an elementary school. In 2013, four school boards with defined jurisdictional areas were reorganized and replaced with the respondent school board, who then closed a school. Four parents of children at the school sought judicial review. The reviewing judge found that the appointed board trustees had the authority to vote on the school closure, but that the board's decision to close the school could not be given effect since the parents were denied the opportunity to make reasonable representations. The parents then appealed

the judge's first finding regarding the board's authority to close the school.

One issue concerned the lack of election of the trustees that had decided on the school closure. The legislative intent of the *Schools Act* and the *School Board Election Regulations* collectively was that the board was to be comprised of trustees elected by zone. However, the date specified in the regulations for the first election passed without any election of trustees, and there was no outlined procedure for elections thereafter. This also formed part of the basis for the parents' appeal.

The court allowed the appeal, finding that the judge erred in determining that the appointed Board had the authority to order the school closure.

The requirement for trustee elections was considered consistent with underlying democratic principles and expectations that those affected by government decisions will have a voice in choosing decision makers. While the legislature had allowed for the appointment of trustees in specific situations, such as the creation of a new school district, it could be inferred that an election should be held within a reasonable time. Where the *Schools Act* and its regulations authorize the government and a board to proceed in the absence of an election, compliance with those provisions is essential in order to override the premise that parents will be represented by elected trustees.

It was ruled that, if the elected Board wished to close the school, it was necessary to provide the parents with the opportunity to make representations. This was consistent with section 76 of the *Schools Act*, which outlined the requirement that a board may close a school only after the parents of the affected students have been given an opportunity to make representations to the board.

The potential closure of a school was confirmed as a matter of special concern to parents for which there is a right to make representations to a properly constituted board. This ruling will likely influence future decisions on school closures, and the prior discussions required. ■

Divisional Court establishes minimum level of assistance Tribunal must provide to unrepresented party

In *Challans v Timms-Fryer*, 2017 ONSC 1300, an application was brought by a police officer with the Amherstburg Police Service, seeking judicial review of a decision by the Ontario Civilian Police Commission (OCPC) to order a new disciplinary hearing pursuant to the *Police Services Act*.

The case reviews the minimum procedural requirement for tribunals dealing with unrepresented parties, which is relevant for education cases.

The respondent had made a complaint to the Office of the Independent Policy Review Director (OIPRD) regarding the conduct of the police officer during a confrontation. The respondent had been pulled over, and eventually charged with assaulting a police officer and resisting arrest, but was later acquitted of these charges. He alleged that the applicant had exercised an unlawful arrest, used unnecessary force, acted in a manner prejudicial to discipline, and used profane, abusive and insulting language.

The Hearing Officer found the police officer not guilty of all charges, but the OCPC overturned this decision on appeal, noting a failure by the Hearing Officer to provide a minimum level of assistance to the unrepresented respondent, who, pursuant to the *Police Services Act*, was a party to the discipline proceeding before the Hearing Officer. This failure of the Hearing Officer was considered a breach of natural

justice and procedural fairness which required a new hearing.

The OCPC outlined reasons why the Hearing Officer failed to provide the minimum level of assistance, including:

- the Hearing Officer did not confirm that the respondent was aware he was entitled to representation by legal counsel;
- the Hearing Officer did not explain the roles of the parties or the process that would be followed;
- the Hearing Officer did not explain his role in the proceedings or explain the process that he intended to follow;
- the Hearing Officer did not confirm that the respondent understood the process and his role in the process;
- the Hearing Officer did not invite the respondent to cross-examine any of the witnesses called at the hearing, save for when the police officer gave evidence, although he was still not given sufficient time to prepare questions;
- the Hearing Officer did not ask the respondent whether he wished to call any witnesses or adduce evidence; and
- the Hearing Officer failed to give the respondent a meaningful opportunity to make submissions at the conclusion of the evidence.

The police officer sought judicial review of the OCPC's decision arguing that the above failings of the Hearing Officer, while acknowledged, ought not to have justified ordering a new hearing, unless the respondent could establish actual prejudice arising from these failings. The divisional court rejected this argument and upheld the OCPC's decision to order a new hearing.

In doing so, the divisional court held that a party, in the position of the respondent, did not need to show actual prejudice arising from his denial of natural justice and procedural fairness and that requiring actual prejudice to be demonstrated was an impossible burden, requiring speculation about what evidence might have been revealed if the respondent had been able to ask questions of the witness. To the contrary, this breach of natural justice and procedural fairness was seen by the court to be inherently prejudicial, as a party was denied a meaningful role in the proceeding, which is the very purpose behind procedural fairness.

As a result of this decision, the divisional court appears to have established minimum standards of assistance which a tribunal must provide an unrepresented party. ■

IPC partially upholds Board's decision to withhold personal information relating to student threat assessment

In a recent interim decision, the Information and Privacy Commissioner of Ontario (IPC) in MO-3463, Toronto Catholic District School Board, addressed when a school board may rely on personal privacy and safety concerns to refuse a student's request for access to sensitive information (2017 CanLII 45048).

The appellant was a student at a school operated by the Toronto Catholic District School Board (board). Together with his mother, the student made a request to the board under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA) for access to records relating to an incident in which he allegedly claimed to be involved in a gang, and made a serious threat against another student. The board granted the student and his mother partial access to the requested information, but withheld its threat assessment documents and the principal's handwritten investigation notes

under sections 38(a) and (b) (discretionary personal privacy exemption) and section 13 (health and safety exemption) of MFIPPA. The student appealed the board's decision to the IPC in order to obtain access to the withheld records.

The IPC began by considering whether the records contained "personal information" as defined in section 2(1) of MFIPPA. The IPC concluded that the records contained the personal information of not only the appellant and his mother, but also of other students and staff members who witnessed the incident and/or provided statements to the school's principal. Due to the context described in the documents, the identities of these individuals could not be protected by simply redacting their names.

The IPC then considered whether the personal information contained in the documents was exempt from disclosure under MFIPPA. Section 36(1) gave the appellant a general right to the records at issue because they contained his own personal information. Section 38(b) however states that records are exempt from disclosure if they also contain the personal information of another individual, and disclosure of that information would constitute "unjustified invasion" of the other individual's privacy.

The IPC held that disclosure of the personal information would constitute unjustified invasion of the other students' privacy because, even though the appellant was no longer at the school in question, the other students would still experience significant personal distress if their personal information was disclosed to the appellant. The IPC rejected the appellant's argument that he needed the records in order to receive a fair determination of his rights, because there was no specific proceeding against him in existence or contemplation. The IPC considered fairness to the appellant as a factor favouring disclosure, but found that the highly sensitive nature of the other students' personal information tipped the balance of interests in favour of non-disclosure. The personal information about the other students was therefore exempt under section 38(b) of MFIPPA because disclosure would constitute an unjustified invasion of their personal privacy.

The IPC then considered whether the remainder of the information contained in the records could be exempt under sections 38(a) and 13 of MFIPPA, which allow documents to be withheld when disclosure could reasonably be expected to seriously threaten the safety or health of an individual. The IPC held that the board satisfied the test of demonstrating a risk of harm "well beyond the merely possible or speculative." This test did not require the board to prove that disclosure would in fact result in such harm. The IPC found that statements about the appellant made by members of the board's threat assessment team had the potential to be inflammatory. Even though the appellant had not specifically threatened members of the threat assessment team, the IPC concluded that disclosure of the information would create a risk of harm well beyond the merely possible or speculative.

The IPC held that certain limited information contained in the records, namely the appellant's own statements and information about the appellant's mother, was not covered under these exemptions and, therefore, needed to be disclosed.

For the remainder, however, the IPC found that the board appropriately exercised its discretion to withhold the information under the personal privacy and health and safety exemptions of MFIPPA. ■

Professional Development Corner

October 16, 2017

Osgoode Law School Professional Development

Advanced Issues in Special Education Law

October 20, 2017

KC LLP Professional Development Session

Special Education / Student Discipline Session
at Dufferin-Peel Catholic District School Board

November 10, 2017

Osgoode Law School Professional Development

Educator's Guide to Family Law Issues

For information on the above, contact Bob Keel: rkeel@keelcottrelle.on.ca

KEEL COTTRELLE LLP

104 - 100 Matheson Blvd. East
Mississauga ON L4Z 2G7
Phone: 905-890-7700
Fax: 905-890-8006

920 - 36 Toronto Street
Toronto ON M5C 2C5
Phone: 416-367-2900
Fax: 416-367-2791

Keel Cottrelle LLP
www.keelcottrelle.com

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Education Law Newsletter

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Nicola Simmons - Contributing Editor
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Contributors —
The articles in this Newsletter were prepared by Christopher Wirth, Daniel Hastie, Stephen Skorbinski and Alex Smith, who are associated with
KEEL COTTRELLE LLP.