Education Law Newsletter

Fall 2019

Elementary Teachers' Union Asks for Conciliation in Bargaining

On October 16, 2019, the Elementary Teachers' Federation of Ontario ("ETFO") asked the Minister of Labour to appoint a conciliation officer "to help the parties at its two central tables reach fair agreements".

ETFO represents permanent and occasional teachers, as well as education workers and early childhood educators. The union has over 83,000 members.

ETFO is continuing to negotiate at the central table and is holding strike votes across the province until the end of October, 2019.

"ETFO's goal is to reach fair agreements for our members that also embrace learning conditions for Ontario's elementary students", said Sam Hammond, ETFO President. "These are achievable goals, and ETFO will do everything it can to reach them. That includes participating in the legal steps of the collective bargaining process, like conciliation and taking strike votes."

Mr. Hammond said that during negotiations, the government told ETFO that it is seeking cuts of up to 2.5 per cent in overall education sector spending. Mr. Hammond indicated that as part of achieving that reduction, the government expects ETFO teacher and occasional teacher members to agree to up to $150 million in cutbacks.

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ETFO collective agreements expired on August 31, 2019. Discussions have taken place at two central tables since June 2019: the ETFO Teacher/Occasional Teacher Central Table and the ETFO Education Worker Central Table.

On October 15, 2019, the Ontario Secondary School Teachers' Federation ("OSSTF") announced that it would be holding strike votes in November. A memorandum sent to the union's 60,000 teachers and support staff on October 15 stated that negotiations will continue but there has been "no indication that meaningful discussion will take place (so) the Ontario Secondary Teachers' Federation feels it now has no choice but to begin the process of continuing strike votes among members across the province in the coming weeks".

The votes will conclude by November 15, 2019.

Harvey Bishop, the President of OSSTF, said that the move to hold strike votes should put pressure on the government as it did with the CUPE, which represents custodians, office staff, educational assistants and early childhood educators.

"Unfortunately, Mr. Bishop stated, that seems to be the only thing they respond to." We have taken a very measured approach, and we saw how they responded at the other (CUPE) bargaining table and certainly there is a lesson in that," stated Mr. Bishop.

Prior to October 15, there had been five days of bargaining between OSSTF, the trustees associations and the Crown at the central table.

Education Minister Stephen Lecce urged the unions not to resort to job action. He said, "As families across our province know, strike action disproportionately hurts our kids, especially the most vulnerable in our classrooms... Our message to our labour partners is always to put kids first, and continue to work with us in good faith to make sure kids remain in class each and every day."

On October 20, 2019, the Ontario English Catholic Teachers' Association ("OECTA") stated that its members would vote on a province-wide strike in early November. OECTA indicated that negotiations can continue while the strike vote, which is scheduled to end on November 13, is being conducted.

The province has already announced that it wants to increase high school class sizes from an average of 22 to 28 over the next four years. In addition, the government is introducing four mandatory online courses at an average of 35 students per teacher. The result of these proposed changes would be a significant reduction of secondary school teachers and classes and course options for students.

These are the latest developments in the education sector, following a work-to-rule campaign by the 55,000 member school support staff unit of the Canadian Union of Public Employees ("CUPE"). That job action lasted three weeks before a three-year agreement was reached on the eve of a potential strike.

Among other terms, the CUPE deal included:

- A one per cent increase in salary per year over three years
- *Status quo* on sick leave at 11 sick days at 100 per cent and 120 short-term leave days at 90 per cent pay
- School boards have the ability to request a doctor's note for short-term leave
- The government will spend up to $20 million each year on 300 full-time equivalent CUPE jobs across the province
- Allocation of $58.3 million per year for three years to a local priorities fund for special education supports
- The CUPE contract will expire on August 31, 2022

The CUPE agreement will inform the strategy used by the other unions at the central table negotiations. The ETFO, OSSTF and OECTA union leaders appear to be borrowing steps from the CUPE playbook in terms of attempting to gain advantage at the bargaining table. The possibility of ETFO, OSSTF and OECTA being in a legal strike position at similar times could put considerable pressure on the government. The Minister of Education has indicated that he is willing to listen to "innovative" proposals from the unions on how to offset larger class sizes that fall within the government's "fiscal realities".

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Tribunal Ruled that School Board did not Discriminate Against Student with ASD

A recent decision by the Human Rights Tribunal of Ontario ("HRTO" or "Tribunal") confirms that while educators have a duty to accommodate special-needs students for the provision of meaningful access to education, guardians must also co-operate with schools in the accommodation process, an obligation particularly relevant where violent behaviour has been present in the classroom.

Educators have long been working towards a model of inclusive education, striving to create classrooms that integrate rather than segregate students with special needs. Faced with a rise in the number of children diagnosed with disabilities linked to behavioural problems, however, schools and their staff are finding it increasingly difficult to discern the limits of the accommodation process – a process often punctuated with violent incidents inside the classroom and strained relations outside it.

In *Kahn v. Upper Grand District School Board*, released on August 8, 2019, the HRTO held that the Upper Grand District School Board (the "UGDSB" or "Board") had fulfilled their duty under the Human Rights Code ("Code") to accommodate a child diagnosed with autistic spectrum disorder ("ASD") and a learning disability. The decision reminds educators and guardians alike of the reciprocal obligations of both schools and parents throughout the accommodation process, helping to delineate the boundaries of the reasonable accommodation of students who behave violently in the classroom.

Background

The *Khan* decision revolves around Grayson Khan, then a grade two student diagnosed with autistic spectrum disorder, who was suspended and ultimately expelled following a violent episode that resulted in one teacher's concussion and the injury of several of his classmates.

Observing the timeline leading up to the case, Grayson's educational history seems to have been marked with problematic behaviour from the outset. Running away from school, acting out in disruptive "melt-downs", and having difficulty maintaining attention throughout junior and senior kindergarten, Grayson was assessed by an occupational therapist in November 2016 and by two psychologists in August 2017, eventually being diagnosed with autistic spectrum disorder and a learning disability just before the commencement of his grade one year.

Both prior to and following this diagnosis, Grayson's school was actively engaged in supporting the student's special needs. Implementing every recommendation suggested in the occupational therapist's and psychologists' assessment reports, the school modified the curriculum to create an Individual Education Plan ("IEP") for Grayson, purchased an MP3 player for his personal use, made a computer and iPad available in the classroom, and collaborated with other private and community organizations who were also involved in the student's development. The school also ensured that educational assistants ("EAs") worked one-on-one with Grayson on a daily basis. While Grayson continued to exhibit "serious behavioural issues" throughout his grade one year, these supportive measures helped the Board to effectively manage Grayson's behaviour, contributing to his successful completion of grade one.

Despite this early success, however, there were some challenges in Grayson's second-grade year. In summer 2018, Grayson's mother observed an increase in her son's aggressive behaviour, reporting to the school's principal that Grayson had begun to hit other children "randomly". Although Grayson's first week of school went well, his violent behaviour drastically increased thereafter. Incidents of hitting, swearing and threatening his teachers and fellow classmates became a regular occurrence. On one occasion, Grayson stood on a table and threw markers at an EA. On another, he cut off the head of the class mascot toy, yelling that he would kill it "like he [was] going to kill everyone else." Twice, he threw his metal water bottle at staff, soaking them with water as they stepped in to protect other students.

Grayson frequently threatened to hurt or kill his classmates and school staff, and engaged in physical behaviours, including: throwing a grapefruit-sized rock at his teacher; hitting an EA with a large stick;, punching his teacher in the groin before punching another student; and attempting to push his EA and another student down a set of stairs. The school held meetings with Grayson's parents and community support providers. An Applied Behaviour Analysis ("ABA") Facilitator Support Plan was developed and implemented, and additional EAs were assigned to Grayson such that he had two EAs working with him simultaneously each day. Despite these additional supports, Grayson's behaviour did not improve.

The breaking point occurred on October 22, 2018. That day, after stabbing and hitting an EA and several classmates with a stick as well as smashing a mug in class, Grayson hit another of his EAs in the chin, causing what was later found to be a concussion. Grayson's class was evacuated for safety reasons, and the EA took a medical leave.

While Grayson was sent home with his parents after the concussion incident on October 22, notably, he was not immediately suspended nor expelled. Instead, the next day the school organized a group meeting to develop a Student Centered Intervention Plan that would become known as the "Loop of School Plan." Under this plan, Grayson would initially work one-on-one with an EA in a quiet space, and would gradually be reintroduced into the classroom in short intervals that would increase in length as his behaviour improved. Another of the school's recommendations was that Grayson be taught in English, as it was thought that his behaviour could have been triggered in part by his inability to understand his French-language instruction within the French immersion program.

Grayson's mother rejected both the Loop of School Plan and the instruction in English. Ms. Khan requested that the school either admit Grayson to his normal classroom, or issue a written exclusion or notice of suspension. During discussions concerning the possibility that Grayson be admitted back to class, Ms. Khan refused to agree to pick Grayson up should he become severely dysregulated again. Unable to allow Grayson back to his normal class in light of the severity of his last episode and Ms. Kahn's refusal to assist the school should he act out again, on November 1, 2018 the school issued a notice of suspension retroactive to October 23, 2018.

Demonstrating a continued effort to find a resolution, the Board offered three options to ensure Grayson's access to education during the suspension. One of these options was a home instruction plan paid for by the Board, which the Khans accepted for a time. Communications broke down, however, when Ms. Khan refused to attend a Collaborative Case Conference organized by the Board in mid-November.

Following this refusal, on November 20, 2018 the Board's Student Discipline Committee recommended Grayson's expulsion from the French immersion school. Grayson had the option to attend his English-instruction home school during this time. Grayson's mother did not enrol Grayson at his home school, and she refused to consider any accommodation option that did not provide tier three ABA therapy.

The communication from Grayson's mother eventually came through her counsel, and she filed an application alleging discrimination at the HRTO in December 2018. In the application, Ms. Khan alleged that the Board had discriminated against Grayson on the basis of his disability, denying her son meaningful access to education by failing to provide reasonable accommodation of his autistic spectrum disorder and learning disability.

Tribunal Decision and Analysis

In its decision, the Tribunal found that the Board had not discriminated against the student. Rather, the Tribunal found that the Board had endeavoured to provide the student with meaningful access to education both leading up to and following his expulsion, thus satisfying its duty to accommodate his disabilities.

To come to this conclusion, the Tribunal applied the test established in *Moore v. British Columbia*, 2012 SCC 61, in which the Supreme Court of Canada set out the legal analysis for determining whether there has been discrimination in education cases. The test is comprised of a two-part analysis:

1. At the first stage of analysis, the applicant alleging the discrimination must establish that he or she was denied meaningful access to education on the basis of a protected ground, and thus that a *prima facie* case of discrimination exists.

2. If the applicant is able to do so, the court proceeds to the second stage of analysis at which the respondent must prove that the denial was justified under the Code.

Applying the first branch of the *Moore* test to the circumstances of Khan's case, the Tribunal found that Khan had established a *prima facie* case of discrimination. Although it was clear that the supports in place for Grayson provided him meaningful access to education from kindergarten to mid-September of his Grade two year, the Tribunal conceded that from that point on, even if a result of Grayson's extreme dysregulation, he was not able to attend class and therefore did not meaningfully access education. Notably, the Tribunal was careful to note that this preliminary conclusion was not caused by the Board's failure to provide ABA in the classroom. While the Tribunal acknowledged that the Ministry of Education's Policy/Program Memorandum No. 140 requires that "relevant methods of ABA" be incorporated into the programs of students with ASD "wherever appropriate," it explicitly rejected the assertion that the student required tier three ABA to access education.

In applying the second branch of the *Moore* test, the Tribunal found that the Board had fulfilled its duty to accommodate Grayson to the point of undue hardship. To reach this conclusion, the Tribunal acknowledged the many timely efforts made by the school in an attempt to provide continued access to education.

Among the factors considered by the Tribunal was the involvement of a Board Certified Behaviour Analyst (BCBA) for the creation of a Behaviour Plan, the lengthy meetings conducted by school and Board staff attempting to ensure continued access to education, and the development of the Loop of School Plan, which the Tribunal specifically found to be a "reasonable accommodation."

The Tribunal also considered that the school had offered three options, including paid home instruction, after Grayson's retroactive suspension on November 1, 2018, noting that the Board had continued to make reasonable efforts to accommodate throughout this lengthy period. Again denying Khan's claim that he required tier three ABA to be accommodated, the Tribunal agreed with one expert's assertion that safety issues can preclude the provision of tier three ABA in schools, since ignoring violent behaviour as part of the tier three strategy "would have created a risk of harm to others or to Grayson."

Perhaps one of the most significant factors that the Tribunal weighed in reaching their conclusion was the lack of co-operation, if not hostility, of Grayson's mother throughout the process. Emphasizing that an applicant "has an obligation to co-operate in the accommodation process," the Tribunal specified that this obligation "includes a 'duty to facilitate the implementation' of a proposal for accommodation that is reasonable."

With this duty in mind, the Tribunal then proceeded to examine Ms. Khan's own behaviour in dealing with the Board. The Tribunal found that Ms. Khan's pattern of behaviour was highly problematic. Ms. Khan was verbally abusive toward school staff. She was the only person who did not agree to the Loop of School Plan after her son's suspension, instead insisting that Grayson be either suspended or expelled. Ms. Khan rejected the request that she pick Grayson up if he became too dysregulated for the school to manage, and categorically refused any option made by the school that did not include tier three ABA therapy.

Noting that the circumstances of this case were exceptional and that Grayson's continued presence at the school created "an unacceptable safety risk," the Tribunal concluded that there was no reasonable basis for Ms. Khan's actions, holding that she herself had "rejected the accommodation which might have allowed [Grayson] to return safely."

Reiterating that "parents do not have the right to dictate the accommodations which their children will be provided with access to education," the Tribunal ultimately found that Ms. Khan "had failed in her obligation to co-operate in the accommodation process." The Tribunal therefore concluded that in these exceptional circumstances, accommodation without undue hardship at the French immersion school could no longer be provided by the Board.

Takeaways for School Boards

The *Khan* decision represents an important precedent for school boards and their students, and is significant in three main ways. First, the decision affirms the accommodation measures made by one school, presenting good examples of proactive and effective actions that a school board may take in attempting to accommodate students under the Code. Second, the decision reiterates that parents do not have the right to dictate which accommodation their children will be provided with, reaffirming once again that school boards are not obligated to provide ABA therapy as part of the accommodation process.[1] Third, the *Khan* decision confirms the shared obligations between schools and parents in the accommodation of students with special needs, the key lesson being that while boards must accommodate students to the point of undue hardship, parents must also co-operate with them in the accommodation process. This lesson not only helps to discern the boundaries of reasonable accommodation but, most importantly, it encourages a combined effort between school boards and parents that puts the interests of students first.

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1 For more on this area of law, including the finding that accommodation of ASD does not require Boards to provide ABA/IBI therapy, see Madeeha Hashmi's article in the Summer 2019 edition of this Newsletter.

Court Concluded School Board and Teachers not Liable for Injuries Caused during Student Fight

Background

In *Deborah Tilli v. Hamilton-Wentworth Catholic District School Board et al.*, 2019 ONSC 1783, released on May 31, 2019, the Ontario Superior Court of Justice dismissed a claim that a school board was negligent and did not adequately supervise two students during a physical fight at school.

Ms. Tilli and Ms. DiTomaso were 15 years old and attending grade 10 at St. Jean de Brébeuf High School in the Hamilton-Wentworth Catholic District School Board ("School Board").

On September 19, 2008, Ms. Tilli and Ms. DiTomaso were involved in a physical altercation which caused injuries to Ms. Tilli. The altercation took place during a three-minute transition period between first and second periods in a busy hallway at school.

There were conflicting versions of what occurred and who initiated the fight. Ms. Tilli claimed the fight was initiated by Ms. DiTomaso, and vice versa. The altercation ended when Ms. DiTomaso banged Ms. Tilli's head on the floor more than once.

Ms. Tilli filed a personal injury claim against Ms. DiTomaso and a claim against the School Board and teachers stating that they were negligent for failing to provide adequate supervision and prevent the incident from occurring.

Court finds student partially liable for damage caused during fight

After considering the varying versions of the story told by the parties and witnesses, the court concluded that Ms. DiTomaso was liable for the injuries she inflicted on Ms. Tilli, however, who started the fight was not an important issue since this was a "consent fight" and they were both willing participants.

The court determined that the incident was likely triggered by Ms. DiTomaso calling Ms. Tilli offensive names at the time of the incident and on prior occasions. It began as a shouting match, and was likely followed by kicking and slapping, mutual hair pulling, pushing and shoving. Both girls lost their balance and fell to the floor, with Ms. DiTomaso ending up on top of Ms. Tilli.

The court decided that the fight stopped being consensual when Ms. DiTomaso grabbed Ms. Tilli's hair on each side of her head and banged the back of her head forcefully on the tile floor more than once.

Moreover, the court stated that provocation is a form of contributory negligence and mitigates damages. Ms. Tilli would have known that calling Ms. DiTomaso names in front of other students would eventually provoke a reaction, which it did. Therefore, the court found Ms. DiTomaso to be responsible for 60 per cent of the damages.

Court dismisses claim against School Board and teachers

The court assessed whether the School Board or the teachers were liable based on the standard of care set out by the Supreme Court of Canada in *Myers v. Peel County Board of Education, [1981] 2 S.C.R.*. The standard of care expected of educators is that of a prudent and careful parent.

The supervision schedule that the school had in place at the time was to supervise high traffic areas when students were in class, such as the front door area and the cafeteria. Since there were only three minutes between periods and the hallways were full of teachers going from one class to the next, there was no formal supervision schedule for the hallways during transition periods.

The court described the incident as follows, at paragraph 95:

> "It is not lost on this court that this was a sudden and spontaneous event that escalated and finished in approximately 30-45 seconds. Only by having a teacher posted in the exact area

> of this incident, at the very time it occurred, could the school perhaps have prevented the fight from occurring. Such a standard is not reasonable and certainly not one any reasonable and prudent parent would be expected to adhere to with its own teenage child."

Moreover, because the noise level was so high during the transition period, it would be very difficult for teachers to distinguish the noise of a fight from the usual noise of chatter and laughter until attention was drawn to it.

The court paid particular attention to the context, namely that the incident involved two fifteen-year-old students without a history of violence or discipline, noting the following at paragraph 92:

> "In this case the standard is that of a parent of 15-year-old teenagers, none of whom had any predisposition to violence or animosity with each other. Neither party had any type of discipline issues. As well these teenagers were well aware of the zero tolerance policy of the school for any type of fighting or violence and were obviously aware that serious repercussions would be enacted for any breach of that policy."

The court further noted that fifteen-year-old students are not constantly supervised by a careful parent. It stated at paragraph 94:

> "A 15-year-old teenager is not supervised constantly by a careful parent. They go out alone with friends, they travel to school alone, they are no doubt at home alone for periods of time, they take public transportation alone and many babysit younger children or have other part time work. In short, they are young adults who are aware of what is expected by way of behavior in a civilized society, without being supervised constantly."

The school had a supervision policy in place. There were surveillance cameras and numerous teachers circulating in the hallways for three minutes between classes. There was no evidence led by the plaintiff as to what else the school should have done to prevent this incident from occurring. No expert evidence showed that the school's supervision on the occasion in question fell below the standard of a reasonable and prudent parent of a teenager.

Since the actions of the School Board and its teachers did not fall below the accepted standard of care, the court dismissed the claim against them.

Comments

This recent application of the principles in *Myer*s reminds educators of the importance of having adequate supervision and policies for expected student behaviour. Further, it highlights that the standard of care of a reasonable and prudent parent be appropriate for the age and characteristics of the student and the setting. The adequate supervision of average teenage students does not necessarily require constant supervision.

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Tribunal Finds School Board did not Discriminate Against Parent of Student by Denying School Transfer Request

In *Bettencourt v Dufferin-Peel Catholic District School Board,* 2019 HRTO 607 (CanLII), released on April 3, 2019, the applicant ("Bettencourt"), who was a parent of a student, claimed that the Dufferin-Peel Catholic District School Board (the "School Board") discriminated against him on the basis of race, disability, family status and marital status, contrary to the Ontario *Human Rights Code* (the "Code").

Specifically, Bettencourt alleged that the School Board acted in a discriminatory manner by denying his request to transfer his son to a new school without either obtaining the consent of his former spouse (with whom he was engaged in a custodial dispute) or providing legal documentation supporting his right to make sole educational decisions with respect to his son.

He argued that the School Board improperly denied his transfer request, despite knowing that Bettencourt's disability affected his ability to drive his son to a school out of district. Bettencourt further claimed that his son's "primary residence" was with him and that the School Board ought to have relied on this fact alone in giving him the authority to make educational decisions on his son's behalf.

The School Board requested that the application be dismissed as having no reasonable prospect of success at a summary hearing. At the summary hearing, the School Board argued that it was acting in accordance with an existing Court Order at the time, as well as its statutory obligations under the *Education Act* and the *Children's Law Reform Act.* The School Board further stated that the requirements for the mother's consent and legal documentation is applied similarly to all parents, regardless of their race, disability, family or marital status, leaving no basis upon which Bettencourt could claim discrimination, contrary to the Code.

The Human Rights Tribunal of Ontario ("HRTO") agreed with the School Board and ultimately granted its request to dismiss Bettencourt's application on the basis that it had no reasonable prospect of success. The Vice Chair noted that Bettencourt could not provide any legal basis to support his view that his son's primary residence gave him the authority to make education decisions on his son's behalf. Furthermore, he failed to show that the School Board was wrong in citing that it required the mother's consent or the noted legal documentation in order to facilitate the school transfer.

The Vice Chair found, however, that neither of these two points, even if proved, would result in a successful outcome for Bettencourt's human rights application. While Bettencourt may have felt aggrieved by the School Board's alleged actions, he was unable to point to any evidence that could reasonably support his claim that the conduct was related to any of the protected grounds of discrimination identified under the Code, namely race, disability, family status or marital status.

The decision is a welcome reminder to school boards across Ontario that the HRTO does not have the power to deal with general allegations of unfairness, even if the allegations are proven true. Parents who file a human rights application on their own behalf or on behalf of their children are required to demonstrate that there is evidence of discrimination beyond mere speculation and accusations connected to one of the protected grounds under the Code. Otherwise, the HRTO may dismiss the application as having no reasonable prospect of success at a summary hearing.

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Adjudicator Upholds School Board's Decision to Deny Non-Custodial Parent's Request for Access to Information

In Order MO-3706, a decision of the office of the Information and Privacy Commissioner of Ontario (the "IPC"), released on December 17, 2018, the IPC adjudicator, Jennifer James, held that the Toronto District School Board (the "TDSB") was correct to deny a non-custodial parent access to information about the location of his daughters' current school as disclosure would have constituted an unjustified invasion of personal privacy under subsection 14(1) of the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA").

Background

The appellant in this case, a father, filed a request to the TDSB under MFIPPA to obtain information about the location of his daughters' current school. The TDSB located the information in the Ontario Student Records ("OSR") for each child, but issued a letter denying the appellant access to the requested information. The TDSB claimed that the disclosure of the information would constitute an unjustified invasion of personal privacy under section 14(1) of MFIPPA.

The father appealed the TDSB's decision to the IPC and the appeal was assigned to mediation. Mediation did not settle the appeal and the file was transferred to the adjudication stage of the appeals process, which resulted in Order MO-3706.

Analysis and Decision

The adjudicator's analysis was based on its interpretation and application of certain relevant provisions of MFIPPA, namely sections 14 and 54.

Under subsection 14(1) of MFIPPA, heads of institutions are directed to refuse to disclose personal information to any person other than the individual to whom the information relates, unless one of the exceptions listed in that section applies. These exceptions are:

a) prior written request or consent of the individual;

b) compelling circumstances affecting health or safety;

c) where the personal information is collected and maintained specifically for a public record;

d) under an act of Ontario or Canada;

e) for a research purpose that meets certain prescribed criteria, or

f) if the disclosure does not constitute an unjustified invasion of personal privacy.

With respect to what constitutes an unjustified invasion of personal privacy, subsection 14(2) provides a list of criteria to be considered in making such a determination. Additionally, subsection 14(3) of MFIPPA states that a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy in certain circumstances, including if the personal information "relates to employment or educational history," as specified in subsection 14(3)(d). The presumption under subsection 14(3) can only be overcome in certain situations listed in subsection 14(4) or if the public interest overrides the presumption pursuant to section 16.

Section 54 of MFIPPA operates as a further exception to the requirement that personal information not be disclosed to persons other than the individuals to whom the information relates. Under section 54, certain persons other than the individual may exercise the rights and powers conferred on an individual by MFIPPA in some circumstances. Most relevant to the facts of this case, subsection 54(c) states that, if the individual is less than 16 years of age, a person who has lawful custody of the individual can exercise the rights and powers conferred on that individual by MFIPPA, meaning that custodial parents can access personal information about their children who are under 16.

As one of the appellant's daughters was under the age of 16, the IPC adjudicator began her analysis by

first addressing the application of subsection 54(c) of MFIPPA as a preliminary issue. The decision notes that a Notice of Inquiry was sent to the appellant asking him whether he met the requirements of subsection 54(c); however he did not respond. The TDSB referred the IPC to a publicly reported family law matter between the appellant and his daughters' mother in which the court concluded that a final court order was already in place which awarded the mother sole custody of the children. Based on the appellant's lack of response and the information in the family law matter, the IPC adjudicator concluded that the appellant could not exercise a right of access on behalf of his daughters:

> "As stated above, the appellant was given an opportunity to provide submissions as to whether he is entitled to exercise access under section 54(c) but declined to do so. I have reviewed the submissions of the board, including the court decision referred to by the board, and am satisfied that there is insufficient evidence establishing that the appellant has lawful custody of his child who is less than 16 years of age. Accordingly, I find that the appellant cannot exercise a right of access on behalf of this individual under section 54(c) in the circumstances of this appeal."

Given the above finding, the adjudicator then turned to determining whether the mandatory exemption under subsection 14(1) applied to the personal information of a child who is less than 16 years, along with the other personal information at issue about the appellant's child who was over the age of 16. Before performing an analysis under section 14, the adjudicator first commented that there was no dispute that the records at issue contained "personal information" within the meaning of MFIPPA and that she was satisfied that the records did in fact contain the appellant's daughters' personal information, specifically their names, ages, information relating to their education, and information about the location of their schools, but that the records did not contain the appellant's own personal information.

As set out in subsection 14(1), where a person seeks access to personal information of another individual, institutions are prohibited from disclosing such information unless one of the listed exceptions applies. The parties had not claimed that any of the exceptions (a) – (e) (described above) applied and the adjudicator also concluded that they did not apply. She found that the only exception that could apply was (f), which allows disclosure if it would not be an unjustified invasion of personal privacy.

However, the adjudicator found that there was a presumption of unjustified invasion of personal privacy under subsection 14(3) because the information related to the employment or educational history of the daughters. In coming to this conclusion, she first referred to previous decisions from the IPC office, which had concluded that information relating to a student located in their OSR constitutes "educational history." Then, having found the presumption to be established, she found that it could not be rebutted because none of the circumstances in 14(4) existed and the "public interest override" in section 16 also did not apply:

> "Applying the reasoning of previous decisions, I find that the presumption at section 14(3)(d) applies to the information at issue. In addition, I find that this presumption cannot be rebutted by any factors favouring disclosure under section 14(2). As mentioned above, once established, when considering whether information is exempt under section 14(1), a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. In this case, I found that none of the circumstances listed in paragraphs (a) to (d) of section 14(4) apply to this appeal. In addition, the appellant did not raise the possible application of the public interest override in section 16, nor am I persuaded that it applies in the circumstances."

The adjudicator ultimately concluded that the disclosure of the withheld personal information to the appellant would result in an unjustified invasion of personal privacy under subsection 14(1) and upheld the TDSB's denial of access to the appellant.

Comment

This decision demonstrates that school boards must be vigilant in protecting the personal information of their students, even if such personal information is requested by a parent. The majority of requests to access personal information come from custodial parents of children

under 16 who are entitled to access such information under MFIPPA. However, as this case demonstrates, school boards should be prepared to provide the appropriate response to non-custodial parents or other individuals who seek access to information about children under 16 and cases where any person other than the student him/herself seeks to access information about a student that is 16 or older.

In cases where entitlement to access personal information is not clear due to custodial parenthood of a child under 16, school boards should undertake a careful analysis like the one conducted by the adjudicator in this case. First, school boards should determine whether any of the exceptions under subsection 14(1) apply. If this step necessitates considering whether the exception under subsection 14(1)(f) applies, namely that the disclosure does not constitute an unjustified invasion of personal privacy, school boards should include in their analysis a consideration of whether the nature of the requested information creates a presumption of unjustified invasion of personal privacy under subsection 14(3). Where such a presumption is established, school boards should determine whether any of the exceptions under subsection 14(4) or the public interest exception under section 16 rebut that presumption. As this decision did not provide substantive analysis on the application of these aforementioned exceptions, nor did it discuss the entirety of the MFIPPA scheme, school boards may require legal advice in carrying out this analysis.

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Court Affirms College of Teachers' Ability to Caution Teacher Conduct when Acting as a Parent

On November 22, 2018, the Ontario Divisional Court dismissed Ahmed Bouragba's application for judicial review in *Bouragba v. Ontario College of Teachers*,[1] thereby affirming the Ontario College of Teachers' ability to issue a caution to a teacher based on the teacher's conduct while acting as a parent.

Background

As a teacher at a school board in Ontario, Mr. Bouragba was a member of the Ontario College of Teachers (the "College"). The complaint to the College was filed by the principal of his son's high school, Diane Lamoureux. She alleged that Mr. Bouragba acted in a manner that was offensive, degrading, and threatening in his communications with her after Mr. Bouragba's son received a suspension.

Following an investigation, the Investigation Committee of the College decided not to refer the complaint to the Discipline Committee, given the divergent nature of the information about what had occurred. However, the College issued a written caution to Mr. Bouragba pursuant to s. 26(5)(d) of the *Ontario College of Teachers Act* because of concerns about how Mr. Bouragba had expressed himself and the tone of his communications with Ms. Lamoureux.

Judicial Review

In response to the College's written caution, Mr. Bouragba sought a judicial review from Ontario's Divisional Court. Mr. Bouragba argued that he was denied procedural fairness, and that the Investigation Committee's decision was unreasonable, particularly because it imposed a caution upon him when he was acting in his role as a parent, defending his son's interests.

With respect to the merits of the College's decision, the court applied the reasonableness standard of review. The court cited the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*,[2] and noted that its task on judicial review was "…not to substitute [its] view as to the appropriate disposition of the complaint. Rather, it is to determine whether the Committee's decision falls within a range of possible, acceptable outcomes, based on the facts and the law."[3]

Within this legal framework, the court held that there was no merit to Mr. Bouragba's allegation that he was denied procedural fairness. On the contrary, the court noted that, "[t]he Committee followed the procedure set out in the [*Ontario College of Teachers Act*]. The Applicant was aware of the allegations against him, given ample opportunity to respond, and provided with written reasons for the decision."[4]

The court also dismissed Mr. Bouragba's allegation that the Investigation Committee should not have dealt with the complaint since he was acting as a parent, not a teacher. The court held:

> …the [*Ontario College of Teachers Act*] allows for complaints against teachers because of behaviour outside of the work setting. In this case, the Committee had conducted a screening hearing in accordance with s. 26(2) and determined that the allegations, if proven, would constitute professional misconduct, incompetence or incapacity.[5]

1 2018 ONSC 6935 (Ont. Div. Ct.).
2 [2008] 1 S.C.R. 190 (S.C.C.)
3 *Ibid* at para. 13.
4 *Ibid* at para. 5.
5 *Ibid* at para. 6.

The court added that:

> Pursuant to s. 26(5)(d), a Committee may take such action as it considers appropriate in the circumstances, including issuing a caution, reminder, advice or admonishment. A caution is not a disciplinary action, and is not made public. It is not based on any finding of wrongdoing. Rather, it is meant to express the Committee's concern about conduct and to provide guidance for the future.[6]

Mr. Bouragba also suggested that the caution imposed a reprisal, because he had filed a complaint against three other members of the College, and that a double standard had been applied in the outcomes of the two matters before the College. The court found no evidence to support a claim for reprisal and concluded that "[t]he caution was imposed by a panel of the Committee based on the panel members' review of the record before them."[7]

In closing, the court reiterated that deference is owed to the decisions by regulatory bodies, and concluded that the written caution to Mr. Bouragba fell within the range of reasonable outcomes. Accordingly, the court dismissed Mr. Bouragba's application for judicial review and awarded the College $3,500 in legal costs.

Lessons for Educators

This decision is a reminder to educators that the conduct of teachers outside the work setting is subject to investigation, caution and discipline by the College, even when the teacher is acting as a parent. While another panel of the Investigation Committee might have come to a different conclusion as to the utility of issuing a caution to Mr. Bouragba, the Divisional Court affirmed that deference is owed to a decision of the College where that decision falls within a range of reasonable outcomes.

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6 *Ibid* at para. 12.
7 *Ibid* at para. 10.

Ministry Introduces Requirement for School Boards to Develop Service Animal Policies

The new Ministry of Education Policy/Program Memorandum No. 163 ("PPM 163") requires all Ontario school boards to implement service animal policies by January 1, 2020. PPM 163 also outlines what the service animal policies must contain.

Background

Prior to this year, educators, students, and parents had very little access to guidance on the safe and inclusive introduction of service animals into the school environment. There was no provincial legislation on the matter specifically aimed at schools and, as recently as early September 2019, just over half of all Ontario school boards had implemented service animal policies.

The Ontario Government decided to remedy this deficiency on April 13, 2019, passing Bill 48, *Safe and Supportive Classrooms Act, 2018*. Among other things, this bill amends the *Education Act*, authorizing the Minister of Education to establish policies and guidelines respecting service animals in schools.

After circulating a draft policy/program memorandum in April, the final version of PPM 163 was published on September 9, 2019. Ontario school boards are now required to comply with PPM 163 through their own policies respecting student use of service animals in schools by January 1, 2020.

What is a Service Animal?

The term "service animal" refers to any animal that provides support to a person with a disability. Traditionally, service animals have been dogs, but other species may also provide services to individuals with disabilities. The types of functions performed by service animals are diverse and may include sensory, medical, therapeutic and emotional support services. In the context of PPM 163, service animals are animals that provide support relating to a student's disability to assist that student in meaningfully accessing education.

School boards must determine on a case-by-case basis whether a service animal may accompany a student, taking into account all the circumstances. School boards should allow a student to be accompanied by a service animal when doing so would be an appropriate accommodation to support the student's learning needs and would meet the school board's duty to accommodate students with disabilities under the Ontario *Human Rights Code*.

Content of PPM 163

At minimum, each service animal policy must contain:

1. A communication plan to inform parents about the requests process for allowing their child's service animal in the school; and
2. A clear requests process laying out how applications for students to be accompanied by service animals in schools can be made and the steps in the school board decision-making process.

In addition, the service animal policy should include:

1. A clearly articulated process for parents to follow when making requests for students to be accompanied by service animals in school;
2. A clear outline of the roles and responsibilities of students, parents, and school staff regarding service animals at school;
3. Information about how the school board will document its decision making process;
4. A written response to the family that made the request in a timely manner, if the school board denies a request for a service animal;
5. A process for developing a plan that addresses the ongoing documentation required for the animal, the type of support the service animal will provide, who the handler of the service animal will be, a care plan for the animal, how the animal will be identifiable, transportation for the animal and a timeline for implementation;

6. Strategies for sharing information with members of the broader school community who may be impacted by the decision, while considering the students' privacy;
7. A protocol for the board to hear and address concerns from other students, staff, and parents, including health and safety concerns such as allergies and fear or anxiety. Wherever possible, school boards should take steps to minimize conflict through cooperative problem-solving, and/or other supports which may include training for staff and students.

Service animal policies should be reviewed by school boards on a regular basis and school boards are expected to develop a process for data collection and to collect information regarding the use of service animals in schools.

Comment

Wherever possible, and depending on a student's cognitive, emotional, social and physical stage of development, policies should encourage students to actively support the development and implementation of their service animal plan and participate in meetings regarding their service animal plan.

Ontario school boards should implement service animal policies as soon as possible ahead of the January 1 deadline. Independent schools would also be wise to consider adopting service animal policies in order to stay abreast of their obligations under the *Accessibility for Ontarians with Disabilities Act* and the *Human Rights Code*.

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BLG's Education Law Group advises educational institutions throughout Canada with respect to all of their legal needs. Our breadth of expertise includes education law, governance, construction and procurement, real estate, litigation, labour relations and employment, mergers and acquisitions, IT and licence agreements, privacy and FOI, tax and risk management. Our clients include public and private schools at the K-12 and post-secondary level, colleges, universities and school boards. We are one of the largest education groups in the country and, as part of a national full-service firm, are uniquely positioned to provide our clients with expert, timely and innovative advice on a host of education sector related issues.

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