Education Law Newsletter

Summer 2019

The Changing Role of the Principal: Leading Schools in Turbulent Times

Recent education reforms such as increased class sizes and changes to the teacher hiring process have created new relationships and demands on principals and vice-principals.

The position of principals in Ontario has become increasingly complex.[1] Principals are having to balance competing sets of demands. School boundaries have become more and more transparent. The new curriculum, parent and community demands, government policy, changing technology, and staff morale issues have all contributed to a complex school environment.

Principals are taking on roles which are still in the process of being defined and refined throughout the province. Changes which have contributed to these new roles include:

- increase in class size in grades 4 to 8 and secondary schools;

1 E. Roher and M. Lipinski, *An Educator's Guide to the Role of the Principal*, Third Edition, (Toronto: Thomson Reuters, 2019).

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- proposed new processes and procedures regarding hiring teachers;
- responsibilities in undertaking teacher performance appraisals;
- role and authority as a member of the school council;
- administration of tests under the Education Quality and *Accountability Office Act, 1996*;
- new duties and responsibilities under the safe schools amendments to the *Education Act*; and
- an enhanced role as a member of the school board management team.

The position of principal and vice-principal requires an ability to manage and lead in turbulent times. It is a role with enhanced responsibilities as senior administrator, team leader and statesperson.

Recent education reforms have created new relationships and demands on principals and vice-principals.

Section 8 of the *School Boards Collective Bargaining Act, 2014* provides that principals and vice-principals are not eligible to be members of any bargaining unit of employees of a school board. They are clearly members of management and have duties and responsibilities to conduct performance appraisals and supervise teachers and other personnel in their school or under their authority.

In this regard, there has been a "cultural shift" in the education community.[2] It is essential that principals, vice-principals, teachers and school staff develop an understanding of each other's roles and responsibilities.[3]

On March 15, 2019, Education Minister Lisa Thompson announced plans to increase class size for high school and some elementary grades, as part of a sweeping change to the province's education system which included proposed changes to the teacher hiring regulation, banning cellphones in the classroom, a "back-to-basics" approach to math, revised sex-education curriculum and required e-learning courses.[4] The Ford government have indicated that they are committed to "modernizing" classrooms in Ontario.[5]

Increase in Class Size

The minister indicated that over the next four years, the average class size would increase by one student in grades 4 to 8, and from 22 to 28 students in high school. These remarks immediately set the stage for a confrontation with the relevant teachers' unions. Harvey Bishof, the president of the Ontario Secondary School Teachers' Federation (OSSTF), said that the change would provoke "massive resistance".[5]

Mr. Bishof indicated that the class size increases would mean a reduction of more than 20 per cent of teaching positions in high schools. He said that increasing class sizes would mean schools would have a difficult time offering as many specialized classes, such as technology studies, that require smaller classes of students. He predicted that classes in core subjects, such as math, could grow to as high as 40 students.

The Ontario English Catholic Teachers' Association (OECTA) said that the class increases from grades 4 through to high school would result in the loss of 5,000 teaching positions in its schools. Liz Stuart, the president of OECTA, stated that her union will "use all means" to fight the changes. Ms. Stuart said that "there is no doubt that increasing class sizes will make Ontario's intermediate and high school classrooms more crowded, more chaotic and less productive".[6]

Sam Hammond, the president of the Elementary Teachers' Federation of Ontario (ETFO), said that while he appreciates that the government listened to concerns about class sizes in the primary grades, he's "very disappointed" with what is planned. "We've already said that we are absolutely opposed to that, and we'll do whatever we need to defend class size averages that are reasonable, from kindergarten to grade 12."[7]

2 J. Judson and K. Tranquilli, "The Changing Role of the Principal: Life After Bill 160", in W.F. Foster and W.J. Smith, eds., *Focusing on the Future: Seeking Legal and Policy Solutions in Education* (Georgetown: Canadian Association for the Practical Study of Law in Education, 2000), p. 257.
3 *Ibid.*, at p. 258.
4 Nancy Naylor, *New Vision for Education* (Ontario Ministry of Education, 2019:B08 memo, March 15, 2019), at: <https://efis.fma.csc.gov.on.ca/faab/Memos/B2019/B08_EN.pdf.>
5 Caroline Alphonso, "Ford government to increase class sizes, modify sex-ed and math curricula", *The Globe and Mail*, March 15, 2019, online at: <https://www.theglobeandmail.com/canada/article-ontario-announces-that-high-school-class-sizes-will-increase-sex-ed/>
6 *Ibid*.
7 Kristin Rushowy, "Ford Government announces hikes to high school class size, but no changes to kindergarten", *The Toronto Star*, March 15, 2019, online at: <https://www.thestar.com/politics/provincial/2019/03/15/ford-government-announces-hikes-to-high-school-class-sizes-but-no-changes-to-kindergarten.html>

At the news conference announcing the new changes, the minister asserted that "Not one teacher, not one, will lose their job because of our class-size strategy".[8] The minister stated that the reductions will take place over four years. She indicated that the changes will come through retirements, resignations and other attrition. Asked about the resistance from the teachers' unions to class size increases, the minister said that Ontario has one of the lowest student-teacher ratios among provinces that have restrictions on class sizes, and the increase would align it with other jurisdictions.

Over the last number of months, the government has held a series of consultations both with education stakeholders and the broader public on a range of issues from class sizes in primary and staffing in full-day kindergarten to a cellphone ban in classrooms and rewriting the controversial sex-ed curriculum.

Minister Thompson confirmed that the government will not change class sizes in kindergarten, nor will it remove the cap of 23 students in grades 1 to 3.

Under the ministry's plan, the average class size requirements in secondary schools would be adjusted from 22 to 28 students. The ministry takes the view that this change in class size aligns with secondary class sizes in other provinces across Canada. School boards would be required to maintain a board-wide average class size of 28 or less and the funded average class size would be increased to 28 to support this change.[9]

A memorandum issued by Nancy Naylor, the Deputy Minister of Education, to the Directors of Education on March 15, 2019, indicated that although these are "proposed changes" for the 2019-20 school year, the "government looks forward to the continued consultation with education partners to help shape the government's plans". Ms. Naylor stated that the consultation period will continue until May 31, 2019. She committed that to provide families, staff and school boards with certainty on the government's direction, it will move forward on next steps, including any required legislation, in time for the next school year.[10]

Notwithstanding the commitment to continue to consult with families, staff and school boards, the intent of the ministry's announcement was to provide school boards with information to build their budgets and staffing models for the 2019/2020 school year.

The concern arises that fewer teachers will mean reduced options for students and less adults in the schools to supervise.[11] The government has spent a lot of time talking about preparing students for the future, however, fewer teachers will result in larger classes, fewer courses and loss of expertise in our schools. This reduction of teachers in secondary schools will likely lead to a loss of programs that have smaller class sizes that serve specialized students.[12]

Changes to the Teaching Hiring Regulation

The ministry announced there would be changes to the teacher hiring regulation. Ontario Regulation 274/12 under the *Education Act*, established mandatory processes that all English-language school boards must follow when hiring long-term occasional and permanent teachers.[13] The expectation is that the Regulation will be revised in June or July of 2019.

The ministry has confirmed that its objective is to work with education partners to improve teacher mobility while increasing transparency, fairness, consistency and accountability in teacher hiring across all school boards. The goal of the ministry is to ensure that "principals are able to hire teachers based on merit who are a good fit for the role".[14]

Banning Cellphones in Classrooms

The government announced that it would ban cellphones in classrooms unless certain exceptions apply. Use of personal mobile devices during instructional time will be permitted under the following circumstances:

8 Caroline Alphonso, *op. cit.* at footnote 5.
9 *New Vision for Educatio*n, op. cit. at footnote 4, at p. 2.
10 Ibid. at p. 2.
11 Paul Hunter, "Ontario's Plan to raise class sizes will lead to loss of 800 public high school teaching jobs in Toronto, TDSB documents shows", *The Toronto Star*, March 17, 2019, online at: <https://www.thestar.com/yourtoronto/education/2019/03/17/ontarios-plan-to-raise-class-sizes-will-lead-to-loss-of-800-public-high-school-teaching-jobs-in-toronto-tdsb-document-shows.html>
12 *Ibid*.
13 *New Vision for Education*, *op. cit*. at footnote 4, at p. 3.
14 *Ibid.*, at p.4.

- for educational purposes, as directed by the teacher;
- for health and medical purposes; or
- to support special education needs.

The ministry stated that school boards and stakeholders will be consulted to ensure students and parents are clear on the new guidelines.[15]

New Math Strategy

The government announced a new four-year math strategy to ensure students have a strong understanding of math fundamentals and how to apply them. The plan is to phase in a new math curriculum that moves away from the current approach known as discovery math. The ministry stated that new strategy will:

- improve student performance in math;
- help students solve everyday math problems; and
- increase students' employability into the jobs of tomorrow.

The new curriculum will emphasize basic concepts and skills contributing to students' future success and be accompanied by parent and teacher resources. The first elements of the new curriculum will be available in September 2019.[16]

Revised Health and Physical Education Curriculum (HPE)

The minister indicated that the province would implement a new "age-appropriate" HPE curriculum.

Students will learn the proper names of body parts in grade 1, as they did under the previous 2015 curriculum introduced by the Liberal government. Students will also begin to learn about positive body images in grades 2 and 3, family and healthy relationships in grade 2 and consent and online safety in grades 2 and 3.

In the new curriculum, students will not learn about gender identity and gender expression until grade 8. In the 2015 curriculum, students were taught those topics in grade 6.

In grades 7 to 8, students will begin to learn about important topics such as sexting, contraception, tolerance and respect, intercourse and sexually transmitted infections.

The ministry has indicated that to ensure parents are respected, it would provide an "opt-out" policy so parents would be able to exempt their children from sexual-health education.[17] The government is still working through the process on how this opt-out would work. The ministry is also proposing to provide an opportunity for families to use educational materials online to teach the subject at home.

New E-learning Courses

In addition, the ministry stated that starting in the 2020/2021 school year, it will centralize the delivery of e-learning courses to allow students greater access to programming and educational opportunities. The e-learning classes will have an average class size of 35.

Secondary students will take a minimum of four e-learning credits out of the 30 credits needed to fulfill the requirements for achieving an Ontario Secondary School Diploma. In this regard, students will be required to take one credit per year online, with exemptions for some students on an individualized basis.

The Principal's Role is Becoming Increasingly Complex

All of these current and proposed revisions will result in further changes in the principals' duties and responsibilities. For example, the revisions to the class size regulation may make secondary school staffing and timetabling more difficult and will likely lead to larger classes, fewer courses and loss of expertise in schools. The new ban on cell phones in classrooms, with specific exceptions, will likely be difficult to enforce and administer for school administrators. The new sex-ed curriculum will likely result in additional challenges for elementary school principals where parents apply to exempt their children from sexual-health education. On the other hand, once finalized, the new processes and

15 *Ibid.*, at pp 5-6.
16 *Ibid.*, at p. 6.
17 *Ibid.*, at p. 8.

procedures for hiring teachers should give principals more flexibility in finding staff that are a good fit for their school. Overall, the current and proposed changes to the *Education Act*, its regulations and ministry policies will add significant complexity to the principals' role.

Principals have a critical role to play in leading change in the school as an organization. Researchers have made a distinction between leadership and management, and emphasize that both are essential. Leadership relates to mission, direction and inspiration. Management involves designing and carrying out plans, getting things done and working effectively with people.[18]

Important requirements for leadership involve: (i) articulating a vision; (ii) getting shared ownership; (iii) evolutionary planning; (iv) creating a collaborative school culture; and (v) fostering staff development. Management involves: (i) negotiating demands and resources; and (ii) coordinated and persistent problem-solving. It should be recognized that both sets of characteristics are essential and must be blended within the same person or team.[19]

Researchers have attempted to unravel the meaning of problem-solving by attempting to examine how "expert" principals go about solving actual problems. They found that successful principals took action to strengthen their schools' improvement culture. In addition, researchers concluded that effective principals fostered long-term staff development, engaged in direct and frequent communication about cultural norms and values, and shared power and responsibility with others.[20]

Professor Rosenholtz, an expert in education management and governance, points out that an effective principal is a collaborative teacher who makes continuous improvements in the school as an organization. She states:

> "Great principals do not pluck their acumen and resourcefulness straight out of the air. In our data, successful schools weren't led by philosopher kings with supreme character and unerring method, but by a steady accumulation of common wisdom and hope distilled from vibrant, shared experience both with teacher leaders in schools and colleagues district wide." [21]

The role of the principal is not solely one of implementing innovations in specific classrooms. There is a limit to how much time a principal can spend in individual classrooms. The larger goal is to transform the culture of the school. This points to the centrality of the role of the principal in working with teachers to shape the school as a workplace with shared goals, teacher learning opportunities and teacher commitment, focused on student learning.

The revisions to the *Education Act* over the past decade and the changes that are being implemented this year by the Ford government have created and will continue to create a sea of changes in the education environment across the province. More than ever, principals need to understand their legal rights and responsibilities. An awareness of the legal framework and an understanding of the past and current changes to the *Education Act*, its regulations and ministry policies are critical to ensure that our school leaders are successful and effective in their role.

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18 M. Fullan, *Successful School Improvement: The Implementation Perspective and Beyond* (Toronto: OISE Press, 1992), at p. 85.
19 *Ibid.*
20 *Ibid.*, at p. 86.
21 *Ibid.*

Tribunal Decides that Accommodation of ASD Does Not Require Boards to Provide ABA/IBI Therapy

This decision demonstrates that deciding whether a student has meaningful access to education under the Code requires a fact-specific analysis of the case and consideration of the specialized education goals set for the student.

In *J.S. v. Dufferin-Peel Catholic District School Board (J.S.)*, a decision of the Human Rights Tribunal of Ontario released on September 14, 2018, Adjudicator Michael Gottheil held that the Dufferin-Peel Catholic District School Board (the Board) did not breach the Ontario *Human Rights Code* (the Code) by not providing Applied Behaviour Analysis (ABA)/Intensive Behavioural Intervention (IBI) therapy in the classroom to a child diagnosed with Autism Spectrum Disorder (ASD).

Background

The mother of J.S., a student at one of the Board's schools who was diagnosed with ASD, filed an application in early 2016 claiming that J.S. required ABA/IBI therapy to be delivered in the classroom in order to have meaningful access to education.

When the application was filed, J.S. (the Applicant) was a kindergarten student who was first diagnosed with ASD in March 2015. At the time of his diagnosis, J.S. had already been receiving ABA/IBI therapy through a private provider. The clinical psychologist who initially diagnosed J.S. noted that he had several symptoms associated with ASD and recommended that his parents seek out IBI services from ErinOakKids (a regional agency that determines eligibility for services) and community-based ABA services. Following that diagnosis, at the time that he entered junior kindergarten, J.S. was assessed as "extremely bright" and "ahead of his peers in certain areas, such as reading, language and numeracy skills," with only a few goals that needed to be addressed.

When J.S.' parents contacted ErinOakKids to apply for ABA/IBI therapy, the assessment concluded that he was not eligible because he was at the high-functioning end of the ASD spectrum with mild symptoms, but recommended that J.S. continue with his private therapy, access special education programming at school, as well as other community-based ABA supports. J.S.' mother did not appeal ErinOakKids' decision, knowing that the appeal would likely take several years and that it was unlikely to succeed given J.S.' mild symptoms.

Just prior to the Tribunal hearing, when J.S. was 7 years old, a further evaluation indicated that J.S. had made significant gains in areas where he previously experienced deficits. The evidence also demonstrated that throughout his time at the Board, J.S. had excelled academically. His junior kindergarten, senior kindergarten, and grade one evaluations all showed that J.S. was succeeding in all areas, including the standard curriculum and the base goals in his Individualized Education Plan (IEP), as well as mastering skills related to overcoming his ASD deficits. Although J.S. had received private ABA/IBI therapy outside of school, the Applicant argued that it was necessary for ABA/IBI therapy to be provided in the classroom setting, citing evidence that it is preferable for therapy to be provided in the setting where the skills learned can be implemented.

At the hearing, the Board defended the allegations with the arguments that the Applicant did not require ABA/IBI therapy in order to have meaningful access to education and that ABA/IBI therapy is not an education service school boards are required to provide pursuant to the *Education Act* and the government regulations

under which they operate. The Board also highlighted that while it does not provide ABA/IBI therapy, it provides a range of education and special education programs for student with disabilities, including programs that use ABA methodologies. The Board's evidence was intended to prove that it accommodated J.S.' disability to the extent required by the Code.

Analysis and Decision

The Tribunal made its decision based on the test for determining whether discrimination has occurred in the context of provision of education services as set out in the Supreme Court of Canada's decision in *Moore v. British Columbia, 2012 SCC 61 (Moore)*. The test involves the following two-part analysis: (i) it must be determined whether the applicant has established a *prima facie* case of discrimination and, if so, (ii) the burden shifts to the respondent to establish a justification for breach of the Code.

In this case, the Tribunal concluded that the applicant had failed to establish a *prima facie* case of discrimination. In coming to this conclusion, the Tribunal identified whether the program, supports and other facilities provided by the Board were insufficient or inadequate such that the Applicant was being denied meaningful access to education. The Tribunal provided the following guidance on how this questions should be answered:

> "… the Tribunal must make an overall assessment, based on all the evidence of whether an applicant has been given meaningful access to education. This will mean looking at successes and challenges in relative terms, in the context of the overall curriculum. For students with disabilities, this will also mean looking at the range of special education goals set collaboratively by the school and the parents.
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> In making such an assessment, the Tribunal should be mindful of the Court's comments in *Moore* that because a student does not succeed, does not mean that a school board has failed to provide meaningful access to education." [emphasis added]

Applying the above framework to J.S., the Tribunal found that he only had a few mild ASD-related deficits when entering junior kindergarten and was well-equipped to access the rest of the curriculum at or above the level of his peers. There was ample evidence before the Tribunal demonstrating that the Applicant had performed extremely well in many areas of the curriculum and had made significant strides in the areas of his ASD deficits. Furthermore, the Tribunal held that the Board provided a comprehensive, sophisticated and robust set of programs, including programs specifically designed to address the needs of students with ASD.

The Tribunal also rejected the Applicant's contention that J.S. had only been successful in school due to outside private therapy as a basis for finding the Board had failed to provide meaningful access to education. While it was clear, based on the evidence, that the private therapy had been beneficial and played a role in the gains J.S. made in the area of his ASD Deficits, the Tribunal commented that this evidence did not support the assertion that it was necessary for ABA/IBI therapy to be provided in the classroom setting. The Tribunal noted that simply because a school board does not provide a beneficial program does not mean that it has contravened the Code and also emphasized that school boards are not responsible for providing therapeutic services not required to access education at paragraphs 64 and 68 of the decision:

> "In more general terms I do not think that it is sufficient for an applicant to demonstrate that there is a program or treatment that would be beneficial for the Tribunal to find that a respondent school board has violated the *Code*. This would run counter to the principle outlined in *Moore* that school boards should be provided some deference in how they meet their obligation to provide meaningful access to education. It would also put the Tribunal in the position of constantly reviewing public and educational policy options, and implementing changes whenever an applicant was able to demonstrate they would benefit from a particular service or treatment.
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> […]

> Finally, I believe it is important to emphasize that school boards are responsible to provide meaningful access to education. They are not responsible for providing therapeutic services not required to access education, but perhaps needed or of benefit to children or youth." [emphasis added]

Before concluding his reasons, Adjudicator Gottheil noted that his decision is based on the facts of the particular case and that he was not making a finding about any other student applicant who may have their own particular needs and another school board respondent who provided more limited or a different range of supports.

While the Applicant subsequently filed a Request for Reconsideration of Adjudicator Gottheils' decision, this request was denied by the Tribunal in a decision released on January 11, 2019.

Comment

The decision in *J.S.* demonstrates that it is not always necessary for a school board to offer a particular support or service that benefits a student with special needs or a disability in order to satisfy the Code-related obligation to provide meaningful access to education. To decide whether a student has meaningful access to education requires a fact-specific analysis in each case. Having regard to the particular circumstances of the student, school boards must determine whether the supports they have arranged adequately allow a student to progress through the curriculum and also make advancements in special needs areas with reference to specialized education goals set for the student. School boards should use this framework when deciding whether they must provide a specific support to a student in order to ensure compliance with the Code.

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Ontario Court Upholds Return to 2010 Sex Education Curriculum

The decisions of the Divisional Court and the HRTO confirm that the Ontario government's directive to return to the 2010 Sex Education curriculum does not infringe upon the rights of students, parents, or teachers under the Charter or the Code.

In coming to its decision in *ETFO et al. v. Her Majesty the Queen (ETFO)*, the Court considered the *Education Act*, provided important commentary on the role of a curriculum generally and clarified that Ontario teachers are expected to include all of their students in sex education and can use the 2015 curriculum as a resource to do so.

The Return to the 2010 Curriculum

On August 22, 2018, Ontario's Minister of Education issued a directive requiring all public elementary school teachers (grades 1 through 8) to revert from the sex education curriculum that was introduced in 2015 by the Liberal government to a previous version of the curriculum from 2010 (the Directive). The return to the 2010 curriculum was implemented as an interim measure pending further consultations and the creation of a new sex education curriculum. The 2015 curriculum has remained in place for secondary school students (grades 9 through 12).

The Directive sparked concerns from teachers, parents and students, that the 2010 curriculum did not address certain topics that were introduced in the 2015 curriculum, including: consent, the specific names for body parts, gender identity and sexual orientation, online behaviour and cyberbullying, and sexually transmitted infections. This decision was challenged in the Ontario courts by a number of parties.

Litigation

On August 23, 2018, the Canadian Civil Liberties Association (CCLA) brought an application for judicial review of the Directive. The application was also brought by Becky McFarlane, a queer mother of a grade six student in an Ontario public school. The CCLA and Ms. McFarlane took the position that the Directive infringed on the rights of elementary students and their parents to security of the person and equality under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the Charter) and the Ontario *Human Rights Code* (the Code).

On September 4, 2018, the Elementary Teachers' Federation of Ontario (ETFO) filed their own application for judicial review of the Directive. The ETFO argued that the Directive requiring teachers to teach the 2010 curriculum put a "chill" on teachers and their ability to teach that infringed their section 2(b) Charter right to freedom of expression and students' rights to security of the person and equality under sections 7 and 15 of the Charter.

Both the CCLA and ETFO argued that the Directive is particularly harmful to vulnerable groups such as the LGBTQ2+ community, women and girls, Indigenous youth and those with or associated with persons with HIV/AIDS.

The Court's Decision

On February 28, 2019, a panel of three judges at the Ontario Superior Court of Justice (Divisional Court) unanimously held that the Directive did not infringe the Charter rights of students, parents, or teachers.

The Court held that the 2010 curriculum was not discriminatory for a number of reasons, including:

- Teachers may go beyond the 2010 curriculum to meet the needs of a given class or student, as the curriculum contains no provision preventing teachers from addressing issues from the 2015 curriculum that are not in the 2010 curriculum. This includes topics such as consent, online behaviour, gender identity and sexual orientation, STIs and the proper named of body parts.
- The *Education Act* (the Act), the Code, and ministry Policy/Program Memoranda all require teachers and school environments to be inclusive, tolerant and respect diversity.
- The 2010 curriculum requires that, to the extent possible, the implementation of the 2010 curriculum be "inclusive and reflect the diversity of the student population… regardless of ancestry, culture, ethnicity, sex, physical or intellectual ability, race religion, gender identity, sexual orientation, socio-economic status or other similar factors.
- The minister confirmed that while gender identity is not listed as an example of "differences" in the 2010 curriculum, teachers may "teach the gender identity concept in the class."[1]

In coming to its decision, the Court considered provisions of the Act dealing with safety, inclusivity and school climate.[2] The Court commented that the purpose of the Act is to "provide students with the opportunity to realize their potential and develop into highly skilled, knowledgeable, caring citizens who contribute to society"[3] and that the minister's actions must aim to meet these objectives.

The Court further noted that section 8(1) of the Act provides that the minister of Education has the statutory responsibility to set educational priorities for all of Ontario's publicly-funded schools which includes "issu[ing] Curriculum guidelines and requir[ing] that courses of study be developed therefrom".[4] As such, the Court found that the Directive was a legitimate exercise of the minister's responsibilities. In discussing these responsibilities, the Court stated that, while a curriculum dictates *what* is to be taught in a broadly worded set of objectives and grading scheme, teachers are responsible for *how* the material is to be taught, guided by the objectives in the curriculum and the provisions in the Act and ministry guidelines.[5] The Court commented:

> "A curriculum is not an exhaustive script to be used by teachers to recite, nor does it contain a list of mandatory or prohibited words […]. [C]urriculum documents generally provide only 'conceptual frameworks for the design and delivery of lesson plans' by teachers."[6]

It was important to the Court that the minister's counsel had confirmed that although the curriculum provides certain expectations for students to meet, how students are taught to meet these expectations is a matter of teachers' professional judgment and discretion. Teachers can choose how to design classroom programs to achieve the expectations in each grade, and how to implement those programs for a diverse class of individual students, allowing educators to use their judgment and understanding of their classroom to structure their lessons. The Court confirmed that this includes teaching any of the topics or using the resources included in the 2015 curriculum.[7]

1 ETFO et al. v. Her Majesty the Queen, 2019 ONSC 130 at para 123.
2 *Education Act*, R.S.O. 1990, c. E.2, ss. 169.1, 300.0.1.
3 *Education Act*, R.S.O. 1990, c. E.2, s. 0.1(2).
4 *Education Act*, R.S.O. 1990, c. E.2, s. 8(1).
5 ETFO et al. v. Her Majesty the Queen, 2019 ONSC 130 at para 117.
6 ETFO et al. v. Her Majesty the Queen, 2019 ONSC 130 at para 88.
7 *ETFO et al. v. Her Majesty the Queen*, 2019 ONSC 130 at paras 122, 159.

Aftermath and Appeal

Following the release of the Divisional Court's decision, ETFO issued a press release saying that the Court's decision "gave teachers an important victory by establishing that teachers and schools are required, under the *Education Act* and the Ontario *Human Rights Code*, 'to be inclusive, tolerant and [to] respect diversity'".

The CCLA was not satisfied with the result, and is now seeking leave to appeal the decision to the Ontario Court of Appeal.[8] In its Notice of Motion for Leave to Appeal, the CCLA argued that the Court erred in its analysis under sections 15 and 7 of the Charter and in particular, that it erred by considering the "statutory context" provided by the Code and the Act to justify state action that infringes upon Charter rights.

The Court of Appeal has not yet made a decision on whether or not to grant leave to appeal.

Application at the Human Rights Tribunal

Also recently released was the Human Rights Tribunal of Ontario's (HRTO) decision in *AB v. Ontario (Education) (AB)*,[9] a decision that operates in tandem with the ONSC's holding in ETFO. In *AB*, the HRTO dismissed the application of a grade 6 transgender girl who attended public school. In doing so, the Tribunal provided further commentary on the obligation of Ontario teachers to teach the sex education curriculum in an inclusive manner.

A.B.'s application alleged that the Directive discriminated against her by removing the requirement that teachers teach the applicant and her peers about LGBTQ2+ people and identities as part of sexual health. The Tribunal found that the Court's decision in *ETFO* rendered A.B.'s application moot because, in confirming that teachers are required to include all students in their sex education curriculum and that they can use the 2015 curriculum to meet that requirement, the Court addressed the harms the student relied on to prove her discrimination claim. The Tribunal held that following the Court's decision, A.B.'s teachers must include her in the sex education curriculum because the Code and Charter require them to teach in an inclusive manner and that, if the teachers failed to do so, the applicant's complaint would lie with the school board, not the minister.[10]

Introduction of a New Curriculum

On Friday March 15, 2019, the Minister announced Ontario's new sex education program to be implemented for grades 1-8 starting September 2019.[11] The new curriculum pushes back education on gender expression to grade 8, but will teach the concept of consent at an earlier age, with grade 3 students deemed capable of handling this topic.

Personal safety, anti-bullying, and the proper names for genitalia will be taught beginning in grade 1 under the new curriculum. Beginning in grades 2 and 3, students will be instructed on the issue of body image, and online safety.

Comment

The decisions of the Divisional Court and the Tribunal confirm that the Ontario government's Directive to return to the 2010 curriculum for grades 1-8 does not infringe upon the rights of students, parents, or teachers under the Charter or the Code. The Court and the Tribunal decisions further clarify that:

- the *Education Act* and ministry PPMs can be used to inform the interpretation of curriculum;
- while a curriculum broadly dictates *what* is to be taught, teachers are responsible for *how* the material is to be taught, guided by the objectives in the curriculum, the *Education Act*, and ministry guidelines;
- a curriculum is not an "exhaustive script" to be used by teachers to recite, but a "conceptual frameworks for the design and delivery of lesson plans";

8 *CCLA v. Min. Education (Sex Ed)* Notice of Motion for Leave to Appeal, online at: https://www.scribd.com/document/402176677/CCLA-v-Min-Education-Sex-Ed-Notice-of-Motion-for-Leave-to-Appeal
9 *AB v. Ontario (Education)*, 2019 HRTO 685.
10 *AB v. Ontario (Education)*, 2019 HRTO 685 at para 50.
11 Sex education in Ontario, online at: https://www.ontario.ca/page/sex-education-ontario#section-0

- the Code and the Charter impose a duty on teachers to include all students in their classrooms, including LGBTQ2+ students, in the sex education curriculum;
- teachers are free to use the 2015 curriculum as a resource in adapting to meet the needs of a given class or student;
- the failure of a teacher to include all students in their classrooms in the sex education curriculum could lead to liability on the part of the school board.

It remains to be seen whether the CCLA will be successful in seeking leave to appeal the Divisional Court's decision to the Ontario Court of Appeal. If leave is granted, the Court of Appeal may provide further clarification on the role of a curriculum and the obligations of teachers in teaching inclusive, ministry-approved sex education.

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Proposed Changes to School Board Executive Compensation

The proposed amendments to BPSECA in Bill 100 are consistent with the Ontario government's stated priority of implementing constraint measures to find efficiencies.

For the past decade, executive compensation at school boards has been constrained and complicated by legislation and regulations. Passed on May 29, 2019, Bill 100, part of the Ontario government's budget, signals more changes to the *Broader Public Sector Executive Compensation Act*, 2014 (BPSECA). While the substantive changes will likely come in the form of regulations, the proposed changes to the BPSECA in Bill 100 provide a preview – including more government involvement, pay adjustments based primarily on performance, and limits on compensation increases.

Background

Compensation for directors of education, supervisory officers and other executives at school boards and other broader public sector organizations has been restricted in various ways under a series of laws and regulations since 2010. The restraint provisions in the *Public Sector Compensation Restraint to Protect Public Services Act, 2010* and then in the *Broader Public Sector Accountability Act, 2010* effectively prohibited increases to compensation for school board executives except in limited circumstances. This legislation has significantly affected the past earnings and future pensions for these essential senior administrators.

In 2016, these strict freezes were replaced with a somewhat more nuanced approach under BPSECA's Regulation 304/16. In compliance with Regulation 304/16, school boards worked with their trustee associations, consulting firm Mercer, the Council for Ontario Directors of Education, and legal counsel to collaboratively develop comprehensive executive compensation programs, salary grids and performance-pay envelopes. These programs were reviewed by the Ministry of Education, posted for public consultation, revised, and submitted for final ministry approval, to be effective retroactively commencing in the 2017-2018 school year.

As we previously reported, on August 13, 2018, however, the newly-elected government replaced Regulation 304/16 with a strict freeze under Regulation 406/18. The government committed to reviewing Regulation 406/18 by June 7, 2019. Bill 100 appears to position the government to amend or replace Regulation 406/18, on schedule.

Proposed Amendments under Bill 100

In its budget document, the Ontario government describes its "new approach" as follows:

> The review [of public sector leadership compensation] determined that existing practices in the public sector allowed for automatic adjustments to executive compensation regardless of the results achieved. This system does nothing to reward excellence or improve public services.
>
> The government is now moving forward with an approach that ends automatic pay increases for public sector leaders. Under the new framework, pay for performance may only be provided to those leaders who achieve the bold outcomes the Province needs. Compensation adjustments would be controlled, and only executives who deliver on priority driven outcomes would be eligible.

To this end, Bill 100 proposes the following amendments to the BPSECA:

- Regulations under BPSECA may authorize the Management Board of Cabinet to "establish rules governing a designated employer's use of performance assessment indicators in determining a designated executive's compensation". This means that the government may dictate the priorities and metrics for which achievement-based pay may be provided.
- Regulations may also authorize the Management Board of Cabinet to limit salary and performance-based pay increases, including by limiting the number of designated executives who may receive increases, and the time period for which a designated employer may provide increases. While the budget document referred to "ending automatic pay increases", this proposal suggests that salary increases will still be available, but in a more limited form.
- Newly-created designated employers may not hire permanent executives without government approval (or written exemption) of the executive's compensation plan.
- The government may exempt employers from requirements set out in the compensation framework found in the Regulation.
- The transition provisions in section 9 of BPSECA are clarified to confirm that existing executives may only be grandfathered until August 13, 2021, i.e. three years following the introduction of Regulation 406/18. The president of the Treasury Board, however, may bring that date forward to an earlier date, or exempt an employer until a specified date. The anti-avoidance provision found in section 9 has been removed.
- Finally, the proposed amendments formally repeal Part II.1 of the *Broader Public Sector Accountability Act, 2010* and the *Public Sector Compensation Restraint to Protect Public Services Act, 2010*. The compensation restraint measures in these statutes, however, had already expired or were inapplicable given the introduction of BPSECA.

Implications

Executive compensation restraint legislation has challenged many school boards for years, hampering their ability to recruit, retain and reward the leaders they need. The proposed amendments to BPSECA, along with announced consultations to review public sector collective bargaining and compensation, are consistent with the government's actions and stated priorities to date – primarily, implementing constraint measures to find efficiencies. Bill 100 sets the stage for another change to the BPSECA Regulation, in which the government will provide further detail on the powers it intends to exercise in respect of broader public sector executive compensation.

We will provide further updates once these amendments are proclaimed into force, and if any new regulations are issued thereafter, upon completion of the government's review.

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The Debate Regarding the Duty to Accommodate on the Basis of Family Status Continues…

The key lesson for school board employers is to consider scheduling accommodations for employees who have family status obligations as a temporary measure (wherever possible) while also assisting them in their search for other childcare or eldercare arrangements.

Courts and human rights tribunals have long debated the extent of employer's legal obligations when it comes to accommodating employees in their family status responsibilities. Unfortunately, in Ontario, the test for family status accommodation continues to remain unsettled with the latest decision, *Simpson v. Pranajen Group Ltd. o/a Nimigon Retirement Home*, 2019 HRTO 10. Without clarity on the appropriate test-to-meet for family status accommodations, employers such as school boards are left to question the best approach for dealing with similar cases.

Background

In this Ontario human rights case, Simpson worked for Nimigon Retirement Home (Nimigon) as a personal support worker for approximately four years. She was a mother of two children. Her oldest child, who was five years old, was autistic and required the attendance of a caregiver to meet the school bus at the end of each school day. Simpson was the only caregiver in her family who was able to pick up her son from the bus. The employer was always aware of Simpson's son and his special needs circumstances.

In March 2017, the employer proposed to amend Simpson's work hours but she was unable to accept the changes, as the scheduling arrangements would conflict with her ongoing childcare obligations. Initially, the employer showed willingness to accommodate Simpson's schedule by offering her midnight shifts. However, Nimigon later retracted the offer in April 2017, when Simpson called in sick to work without giving enough notice. Upon receiving the notice of absence from Simpson, the employer issued a written warning, which alleged that Simpson neglected her employment responsibilities by failing to find a colleague to cover her shift. A few days after the incident, Nimigon issued an advisement, which stated that all personal support workers are required to provide 48 hours' notice of absence or accept the responsibility of sourcing a substitute colleague to cover any absenteeism.

On May 19, 2017, Simpson was informed that she would no longer be switching to the midnight shift because she had called in sick in April without giving enough notice. When Simpson informed the employer that she was unable to accept the change in schedule as a result of her previously-disclosed childcare obligations, Nimigon terminated her employment. However, at the time of termination, the employer claimed that the decision to end the employment was based on several cases of displayed misconduct, which included poor attendance, failing to follow instructions, creating a disturbance and poor work performance.

Tribunal Decision

The Human Rights Tribunal of Ontario found that Simpson's termination was discriminatory because it was based, at least in part, on her inability to work afternoon shifts due to childcare responsibilities. Further, the employer's decision to withdraw the offer to allow Simpson to work midnight shifts was found to be a failure of the duty to accommodate her family status obligations.

The vice chair noted that during the course of her employment with Nimigon, Simpson had a very good attendance record and was rarely absent from work due to illness. On previous occasions, Simpson would provide advance notice of just a few hours if she or her children were ill and it was the employer, and not

Simpson, who would source a substitute colleague to cover her shifts. It was therefore evident that Nimigon departed from its usual practices and procedures by issuing the written warning to Simpson and claiming that she was responsible for sourcing a substitute colleague.

Perhaps the most important element of the decision was that the Tribunal declined to take the opportunity to clarify whether the test derived from the Federal Court of Appeal decision of *Canada (Attorney General) v. Johnstone (Johnstone)* or the more recent test outlined in the tribunal's decision of *Misetich v. Value Village Stores Inc. (Misetich)* should be applied in cases of discrimination on the basis of family status.

To recap, the Federal Court of Appeal in *Johnstone* held that applicants must demonstrate that: 1) their childcare obligations engages the applicant's "legal responsibility" for that child, as opposed to personal choice; 2) the applicant has made reasonable efforts to meet those obligations through reasonable alternative solutions and that no such alternative solution is reasonably assessable (as a form of "self-accommodation"); and finally, 3) that the resulting impact of the workplace rule interferes with the individual's ability to fulfill their childcare obligations in more than just a trivial or insubstantial way.

However, the Tribunal rejected this approach in *Misetich* as being too onerous and inappropriately conflating the test to meet for discrimination and accommodation on the basis of family status by, for example, requiring applicants to demonstrate that they attempted to "self-accommodate". The Tribunal held that the test to be applied for human rights cases should always be the same, regardless of the prohibited ground that it involves. The applicant must therefore only be required to prove that they are in a parent and child relationship, that they have experienced adverse treatment, and that that treatment was due, at least in part, to discrimination based on their family status.

In this case, the Tribunal did not determine which test should be applied for determining family status cases but noted that, regardless of the appropriate standard, Nimigon's decision to terminate Simpson was discriminatory and that the employer ultimately failed in its obligation to accommodate her.

Ultimately, the Tribunal awarded Simpson $30,000 in compensation for injury to dignity, feelings and self-respect.

Takeaway for School Board Employers

While this case did very little to clarify the appropriate test for family status discrimination and accommodation under the Ontario *Human Rights Code*, the key lesson for school board employers is to consider scheduling accommodations for employees who have family status obligations as a temporary measure (wherever possible) while also assisting them in their search for other childcare or eldercare arrangements. In doing so, school boards will go a long way in demonstrating that both tests for accommodating an individual's family status responsibilities, as outlined in *Johnstone* and *Misetich*, are satisfied.

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WSIB Begins Providing Coverage for Medicinal Cannabis

School boards should review internal employment and insurance policies to determine whether, and to what extent, medical cannabis may be covered.

School boards in Ontario are already adapting to the introduction of legal cannabis in Ontario through the adaptation of school policies that permit the sale and use of cannabis by adults, while continuing to accommodate medical cannabis users.

The subject of cannabis continues to evolve, particularly with respect to insurance coverage. In that regard, on March 1, 2019, the Ontario Workplace Safety and Insurance Board (WSIB) introduced a new policy entitled "Cannabis for Medical Purposes" (the Policy). This will require employers, including school boards, to understand the Policy and how it applies to employees injured at work who qualify to receive medical cannabis.

The New WSIB Policy on Cannabis

Though the WSIB did reimburse claimants for the cost of medical cannabis prior to implementing the Policy, eligibility was determined on a case-by-case basis. The new Policy establishes a comprehensive decision-making framework which will govern entitlement to, review of, and payment for medical cannabis.

The Policy establishes a number of criteria which must be satisfied in order to qualify for entitlement to medical cannabis. First, the worker must have one of five "designated conditions" of which there is evidence of the therapeutic efficacy of medical cannabis. These conditions are:

- neuropathic pain;
- spasticity resulting from a spinal cord injury;
- nausea and vomiting associated with cancer chemotherapy;
- loss of appetite associated with HIV or AIDS; or
- pain and other symptoms in palliative care.

The condition must also be clinically associated with a work-related injury/illness or the treatment of a work-related injury/illness in order to qualify for entitlement under the Policy. Though only these five conditions currently qualify under the Policy, the WSIB notes that more conditions may be approved as scientific research continues to progress.[1]

There are several other conditions which must be satisfied for the WSIB to consider a worker's eligibility for medical cannabis:

- the worker must have exhausted conventional medical treatments, except in the case of palliative care;
- the worker's treating health professional must authorize their use of medical cannabis;
- the worker must undergo an appropriate clinical assessment and, to support ongoing entitlement, must undergo subsequent reassessments;
- the therapeutic benefits of consuming medical cannabis must outweigh the risks. This will generally not be the case where the worker is under 25, is pregnant or breast feeding, has certain medical conditions, has a strong family history of psychosis or has a current or past substance use disorder; and
- the worker must have a valid medical document or a written order, which must conform to the Policy's dosing and route of administration criteria.

The Policy's limits on dosing and administration are as follows:

- the route of administration must not involve smoking. Where the approved route of administration is vapourizing, the WSIB will cover the reasonable cost of a vapourizer;
- the daily quantity of dried medical cannabis must not exceed three grams per day;
- the medical cannabis should be CBD-rich with minimal THC;

1 WSIB, "Explanatory Note for Operational Policy Manual (OPM) #17-01-10, Cannabis for Medical Purposes", online at: <https://www.wsib.ca/sites/default/files/2019-03/medical_cannabis_explanatory_note.pdf>.

- the THC percentage of the medical cannabis must not exceed nine per cent; and
- the milligrams (mg) of THC per day should be no more than 30 mg, but in no case shall exceed 75 mg.

There are also specific rules as to how a user may access or obtain prescribed marijuana under the Policy. Medical cannabis must be obtained from a licence-holder with whom the worker is registered as a client or from a hospital in order to be covered, as the Policy will not allow for coverage for cannabis obtained from any alternative source. The Policy does not provide for a maximum entitlement, but does require that approval be obtained by the worker prior to making any purchases. If entitlement is allowed, the WSIB will pay for the reasonable costs of medical cannabis.

Finally, the Policy provides for regular monitoring and review of entitlement to ensure medical cannabis treatment remains necessary, appropriate, and sufficient for the work-related condition. Except in cases of palliative care, the WSIB will review a worker's entitlement to medical cannabis no later than three months after initial entitlement is allowed, as well as after an adjustment to the person's dosage. Subsequent reviews will be conducted no later than six months after the last entitlement review. Ongoing entitlement may, in some cases, be allowed.

Comment

The new Policy provides insight into the circumstances in which medical cannabis will be approved by the WSIB, and points to a greater trend amongst insurance providers in Canada who now either offer, or are planning to offer, medical cannabis coverage in both the public and private sectors. Sun Life Financial, Manulife, Desjardins, Green Shield Canada, and Great-West Life are amongst the insurers who currently provide some extent of coverage for medical cannabis. School boards should review internal employment and insurance policies to determine whether, and to what extent, medical cannabis may be covered. Employers should be aware of cannabis as a medically-recognized treatment option and the ramifications of such treatment on legislative compliance, including in the context of workplace safety and accommodation for persons with disabilities. The Policy provides a new perspective on what is considered medically appropriate treatment using cannabis.

Under the *Smoke-Free Ontario Act*, smoking or vapourizing cannabis is prohibited in schools, on school grounds, and in all public areas within 20 metres of these grounds. It is also prohibited in an enclosed workplace. [2] In addition, health and safety protections under the *Occupational Health and Safety Act* remain applicable to impairment from substance use for teachers and other school staff where it forms a hazard in the workplace. The Ministry of Labour has published material to help employers understand their obligations under the *Occupational Health and Safety Act* when addressing the issue of workplace impairment due to substance use, including cannabis. [3]

As with alcohol and other drugs, employers can normally expect employees to be free from cannabis impairment while at work. However, employers have a duty under Ontario's *Human Rights Code* to accommodate the disability-related needs of employees who use cannabis for a medical purpose up to the point of undue hardship. As such, the Ministry of Education has stated that school staff should continue to be able to use medical cannabis at school and on school property in a non-smoking and non-vaping form (*e.g.*, cannabis oils, capsules). Employers should also be aware that addiction, including addiction to cannabis, is a disability that is protected under the *Code*.[4]

As more and more providers move towards coverage of medical cannabis, school boards, as employers, should ensure their workplace policies are complying with their obligations under both occupational health and safety and human rights legislation. Workplace issues related to cannabis generally need to be tackled on a case-by case basis, keeping the above concerns in mind.

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2 *Smoke-Free Ontario Act*, 2017, S.O. 2017, c. 26, Sched. 3, s. 12(2).
3 Ontario Ministry of Labour, "Impairment and Workplace Health and Safety", online at: <https://www.labour.gov.on.ca/english/hs/pubs/impairment.php>.
4 Ontario Human Rights Commission, Policy statement on cannabis and the Human Rights Code (July 2018), online at: <http://ohrc.on.ca/en/policy-statement-cannabis-and-human-rights-code#_edn5>.

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