School Board Update

School Board Update – Bill 242, The *Full Day Early Learning Statute Law Amendment Act*: The Legal Framework for the Early Learning Program

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In our January 12, 2010 School Board Client Update, we discussed the Early Learning Program ("ELP"), which is the government's plan to implement full day early learning for four- and five-year-olds in Ontario. On February 17, 2010, the government introduced Bill 242, the *Full-Day Early Learning Statute Law Amendment Act, 2010,* which amends provisions of the *Education Act*, as well as other related statutes, in order to give effect to the ELP. This *FTR Now* discusses the implications of Bill 242.

BILL 242

Essentially, the Bill amends the *Education Act* to provide for:

- the operation of junior kindergarten and kindergarten on a full time basis;
- the operation of extended day programs outside the hours of junior kindergarten and kindergarten; and
- the appointment of early childhood educators to positions in junior kindergarten, kindergarten and extended day programs.

DESIGNATED EARLY CHILDHOOD EDUCATOR

The Bill creates a new position of designated early childhood educator ("DECE"). It is defined as an early childhood educator ("ECE", a member of the College of Early Childhood Educators) appointed to a position in junior kindergarten, kindergarten or an extended day program that is designated by the board as requiring an ECE. School boards are required to designate ECE positions for the purposes of the ELP and are then required to hire ECEs into these designated positions.

The DECE is a significant definition because it provides a distinction between new ECE positions dedicated to the ELP and other ECE classifications that may have been or are currently in place in a school board. This may be important in determining whether your DECEs fall within an existing bargaining unit.

There is a comprehensive set of amendments in the Bill that clearly establish parallels between the new DECEs and teachers. For example, the Bill expands some of the Ministry's current regulatory authority over teachers to include designated early childhood educators, such as accepting equivalency qualifications, providing scholarships, bursaries and awards and professional development funding.

In addition, many fundamental board powers with respect to teachers have also been extended to DECEs under the *Education Act*. These include the power to appoint and remove DECEs, to determine the terms upon which they shall be employed and the power to prescribe their duties and fix their salaries.

There are a number of teacher-like requirements for DECEs set out in the Bill. Incumbents of DECE positions are required to be members in good standing of the College of Early Childhood Educators. The Bill also allows for the granting of letters of permission to boards (to a maximum of one year) for incumbents who are not ECEs if the Minister is satisfied that no ECE is available. DECEs are subject to the same two year maximum probationary period that applies to teachers. Subject to regulations yet to be passed, boards may also be required to provide induction programs and performance appraisals for DECEs.

As with teachers, there are detailed reporting obligations in circumstances where a DECE has had his/her employment terminated or has had his/her duties restricted as a result of misconduct, negligence or performance issues.

One of the most significant aspects of the Bill is section 264.1, which sets out DECE duties. In effect, the Bill puts DECEs on equal footing with teachers in delivering the ELP by requiring teachers and DECEs to “coordinate” and “cooperate” with each other on the following matters:

1. planning for and providing education to pupils in junior kindergarten and kindergarten,
2. observing, monitoring and assessing the development of pupils in junior kindergarten, kindergarten and extended day programs,
3. maintaining a healthy physical, emotional and social learning environment,
4. communicating with families, and
5. performing all duties assigned to them by the principal with respect to junior kindergarten, kindergarten and extended day programs.

This last provision makes it clear that DECEs are to be given assignments directly by the principal, rather than by the junior kindergarten or kindergarten teacher.

Together, these provisions make it clear that the government intends the teacher/DECE classroom working relationship to be one of collaboration between professionals. In addition to the classroom duties listed above, DECEs will have the exclusive responsibility for the delivery of the extended day portion of the ELP.

Taken cumulatively, these special features of equality of responsibility and independence will make DECEs fundamentally different from educational assistants. This will strengthen arguments that boards and competing unions and teacher federations may wish to make in support of the position that DECEs do not fall within existing Educational Assistant bargaining units.

Subsection 264.1(3) is also important. It reinforces that teachers are still required to continue all of their other duties as prescribed by the *Education Act*. In other words, teachers are not to “download” their duties (such as the completion of report cards) onto DECEs. Interestingly, the many statutory duties that are currently placed expressly upon teachers will not apply to DECEs.

Perhaps what is most interesting about the Bill is what it does not do. The Bill does not directly address any labour relations issues related to DECEs and in no way dictates the labour relations framework related to the arrival of DECEs in schools as a result of the ELP. Specifically, there is no new provision that would parallel Part X.1 (Teachers Collective Bargaining) of the *Education Act* which prescribes membership within specific federations and bargaining units. The Bill currently contains no bargaining unit description, no designated bargaining agent and no provisions regarding the ability of ECEs to strike. There is also nothing setting out any mandatory provisions of ECE collective agreements, including their duration.

Accordingly, boards will have to consider carefully and thoroughly their individual labour relations circumstances to determine what representation rights outcome (if any) they prefer and how to pursue that outcome effectively and legally.

REQUIREMENTS OF THE PROGRAM

The Bill provides that a school board’s obligation to operate full day junior kindergarten and kindergarten in a school is satisfied if classes operate during substantially the same period of time as Grades 1, 2 and 3 in that school.

The Bill clearly requires DECEs to be appointed in addition to junior kindergarten and kindergarten teachers. The Bill also contemplates the designation of persons to assist and complement the work of designated DECEs in junior kindergarten and kindergarten. This provides yet another statutory argument that DECEs are not the same as educational assistants. Ministry Guideline B-12 states that the class size standard for the ELP will be an average of 26 students on a board-wide basis, which

provides for an average child-adult ratio of 13:1. The Guideline goes on to stipulate that while this standard gives boards flexibility, boards are still expected to conform closely to the standard and to organize ELP classes so that almost all classes have 26 students. While this expectation is set out in the B-12 Memo, there is currently nothing in the Bill that addresses this specific staffing requirement.

EXTENDED DAY PROGRAMS

The Bill creates a new Part IX.1 governing extended day programs to be offered before and after the school day. Subject to regulations, policies and guidelines yet to be passed, every school board will ultimately be required to operate extended day programs in *every* elementary school, on *every* school day (other than PD days), before and after school, but only for those pupils of the school board who are enrolled in junior kindergarten and kindergarten. Boards are also allowed, but not required, to operate extended day programs for any other pupils. The Bill allows for two or more boards to enter into agreements to provide extended day programs jointly.

Boards are required to designate at least one ECE position to lead each extended day program class in each school of the board and to appoint a DECE to each position. Principals will be allowed to delegate their duties regarding the extended day program to vice principals or “another person approved by the board”. This could allow for the centralization of such supervisory functions.

The Bill will require school boards to charge fees to parents of pupils enrolled in the extended day programs to recover operating costs incurred by the board. The fees will be set by regulation. Boards will be allowed to enter into agreements with parents or others who are paying fees for the purposes of providing financial assistance.

Not surprisingly, Part II of the *Education Act* (which deals with mandatory attendance) does not apply to extended day programs. Interestingly, the Bill clearly indicates that the right to attend a school under Part II does not confer a right to be enrolled in an extended day program.

The Bill will allow the Ministry to issue policies or guidelines:

- requiring boards to establish criteria and conditions respecting which pupils may be enrolled;
- specifying criteria and conditions that a board must and may establish;
- authorizing extended day programs during the summer and breaks;
- prescribing the qualifications and experience required for ECEs and non ECEs and;
- providing for circumstances in which a board is not required to designate a position as requiring an ECE to lead the class.

The Bill also allows the Ministry to issue policies or guidelines governing the size of extended day program classes, including the methods used to determine the size, and requiring boards to prepare reports and plans containing specified information relating to the size of its ELP.

CONCLUSION

Overall, there are still many unanswered questions regarding the implementation of full day junior kindergarten and kindergarten and the extended day program. Particularly, the labour relations framework has been completely left to the various parties and applicable statutory mechanisms. It is clear, however, that DECEs are intended to be a new classification of employees who, for the purposes of the ELP, are arguably more similar to teachers than to any other employee group. Several union and teacher federations have already gone on record as claiming that DECEs will “automatically” fall under existing Educational Assistant bargaining units. However, this outcome is by no means certain. Depending upon their own objectives, school boards may well be facing significant litigation either before arbitrators or at the Labour Board on the issue of DECE placement for collective bargaining purposes.

Hicks Morley has established a team of lawyers who are continuing to actively consider and review these issues as they arise. If you would like to discuss how any of these issues may affect your board, please contact Dolores Barbini at 416.864.7303, Michael Hines at 416.864.7248 or your regular Hicks Morley lawyer.

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