

## School Board Update

### Recent Award on DECE Breaks: Implications for School Boards

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In an arbitration award released on January 17, 2014, Arbitrator George Surdykowski ruled that Designated Early Childhood Educators (“DECEs”) may not be scheduled to take breaks during the instructional day “unless appropriate and permissible replacement arrangements are made”. The Award makes it clear that such “arrangements” must involve the scheduling of a “replacement DECE” so that junior kindergarten (“JK”) and kindergarten (“K”) students are never receiving instruction in the absence of a DECE.

Because this Award was based upon an interpretation of the [Education Act](#) (“Act”) and associated subordinate Ministry of Education materials rather than any idiosyncratic provisions of a collective agreement, its rationale (if accepted by other arbitrators) would be applicable to every school board in Ontario. In this *School Board Update*, we review the Award and its implications.

The evidence in *OECTA v. Windsor-Essex Catholic DSB* was quite straightforward – OECTA was able to demonstrate that when the time allotted to DECEs under the CUPE collective agreement was aggregated, the Board’s JK and K teachers were obliged each day to provide a total of 44 minutes of instruction (or 13% of the instructional day) without the involvement of DECEs.

OECTA relied on the statutory and regulatory structure established under the *Act* concerning the Early Learning Program (“ELP”) and the respective roles of teachers and DECEs. Significantly, this structure allows the Minister to “issue and require boards to comply with policies and guidelines governing all aspects of the operation of junior kindergarten and kindergarten” under clause 8(1)(3.0.0.1) of the *Act*.

Reference was then made to four Ministry documents – the 2009 “Full-Day Early Learning – Kindergarten Program”, an October 27, 2009 memorandum from an Assistant Deputy Minister to Directors of Education regarding that same document, the “Full-Day Early Learning – Kindergarten Program Reference Guide” and an April 20, 2010 document now available on the Ministry website entitled “Who is working in the classroom?” (collectively, the “ELP Documents”). These documents provide lengthy descriptions of the ELP. In particular, they refer to the relationship between teachers and DECEs during the instructional program in the following terms:

- In each classroom, one teacher and one DECE would form an “educator team” that would “work side by side” to deliver the ELP.
- Teachers and DECEs would have “the benefit of a collaborative and complementary

partnership”.

- Teachers and DECEs would employ “a holistic and integrated approach”, with an emphasis on “jointly developing and delivering daily activities in the classroom”.
- DECEs would be expected to “work in the classroom with the teacher” and to “work alongside the teacher during the regular school day”.

Arbitrator Surdykowski concluded that he was legally required to consider and give some legal effect to these passages within the broader context of the *Act*'s other provisions on mandatory early childhood learning. Specifically, he held that the binding force of clause 8(1)(3.0.0.1) was triggered by “guidelines or policies issued by the Minister (*or her delegate*)” [emphasis added]. He gave weight in particular to the “Full-Day Early Learning – Kindergarten Program” and the October 27, 2009 memorandum, stating that he was satisfied that they set out “guidelines or policies” as contemplated by the section.

The Arbitrator also relied upon section 264.1 of the *Act*, particularly the passages that, according to the Award, require teachers and DECEs to jointly “provide education” to JK and K students as well as to “observe” them. This requirement was also, in the Arbitrator’s opinion, implicit in the requirement found in the ELP documents that the teacher/DECE team “work side by side”. Arbitrator Surdykowski also drew an equivalence between teachers and DECEs, stating:

As in the case of teachers, there is nothing in the legislation or the guidelines which specifically states that an ECE must be in the classroom (or teaching area) with the teacher for every minute of every instructional day. However, it cannot be otherwise.

In the result, the Arbitrator acknowledged that DECEs could take breaks during the school day – they simply could not take breaks during instructional time unless they were replaced by another DECE.

This Award will certainly generate considerable concern among many Ontario school boards. It will likely create a need either to radically reconfigure DECE schedules or to hire additional DECEs to provide coverage for “every minute of every instructional day”. Many boards will be forced to schedule DECE breaks during non-instructional periods (i.e., recess, nutrition breaks, lunch) and as a result will experience additional and potentially expensive challenges in providing adequate supervision to JK and K students.

The Award may be questioned on several levels. For example, the Arbitrator placed considerable reliance on Ministry documents that were not issued by “the Minister” (as contemplated by clause 8(1)(3.0.0.1) of the *Act*. These documents were not specifically identified as “policies” or “guidelines”, let alone policies or guidelines issued by the Minister under clause 8(1)(3.0.0.1). This is in contrast for example, with the Ministry’s practice followed in its June 8, 2010 Memo EL7, which expressly identifies certain documents as “Guidelines”. As of the time of writing, the Ministry had, in fact, been unable to advise us as to whether or not it considered any of the ELP Documents

“guidelines” or “policies”.

This cannot be dismissed as a mere technicality. Stakeholders in the school board system (as in any other area of activity) are entitled to know with certainty what documents constitute “laws” and what documents do not constitute “laws”. For this reason, adjudicators often apply a skeptical eye to “subordinate law”, demanding strict compliance with its authorizing statutory framework. This approach is simply an application of the constitutional concept of the rule of law.

The Award’s interpretation of the key provision of the *Act* is also troubling. The Arbitrator states:

Section 264.1 requires teachers and designated appointed ECEs to cooperate and coordinate, and plan and provide education to JK and K pupils. It also requires them to observe, monitor and assess their development. It is difficult to conceive how an ECE could provide education to JK or K pupils if s/he is absent during instructional time, and an ECE certainly cannot observe pupils if s/he is not present. [emphasis in the original]

However, the actual language of section 264.1 is arguably a great deal more flexible. The material portions of the sections paraphrased in the Award read as follows:

264.1 (1) It is the duty of the following persons *to co-ordinate* the matters listed in subsection (2) and *to co-operate* with each other with respect to those matters:

1. Teachers...
3. Designated early childhood educators...

(2) The matters referred to in subsection (1) are:

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 and kindergarten. ...

It will be seen that the section does not require the **joint, concurrent** provision of education to nor the **joint, concurrent** observation of JK and K students, as the Award appears to suggest. Rather, the *Act* merely requires that teachers and DECEs “co-ordinate” those matters and “co-operate” with respect to them. There is no reason, we suggest, why these responsibilities (insofar as they relate to DECEs) require their presence in the classroom (or other teaching area) for every instructional moment.

The Award’s attempt to draw an analogy between the asserted legal requirement under section 264 that a teacher be present at all instructional moments and the asserted legal requirement under section 264.1 that a DECE be similarly present is also questionable. The obligation of a teacher under section 264 is “**to teach** diligently and faithfully the classes or subjects assigned to the teacher by the principal” (emphasis added). Unlike the formulation in section 264.1, there is no

one else with whom the teacher can “co-operate” in the delivery of the instruction in question – the task falls exclusively to the teacher. It can certainly be argued that the difference between this structure and the “co-operative” model found in section 264.1 implicitly invites a situation where DECEs are not present for every instructional moment.

With the greatest of respect to the Arbitrator, it is open to another adjudicator to adopt a broader, less technical approach to such expressions as “co-ordinate”, “co-operate”, “providing”, “observing” and “working side by side” as a means of avoiding an outcome that he or she considers beyond the possible intention of the Legislature or the Minister. It may also be that this Award will lead the Minister to make revisions to the ELP Documents upon which OECTA relied.

If you have any questions regarding the *Windsor-Essex* case, please feel free to contact your [regular Hicks Morley lawyer](#).

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