School Board Update

That’s a Wrap – Final School Board Update of 2018

Date: November 26, 2018

In this *School Board Update*, we review two recent decisions which will be of interest to school boards. The first is an arbitration decision which considers the Ontario teacher performance assessment (TPA) process in a case where the termination of a teacher’s employment was upheld. The second is a decision of the Human Rights Tribunal of Ontario which concluded that a school board was not in violation of the *Human Rights Code* when it did not provide Applied Behavioural Analysis / Intensive Behavioural Intervention to a young student.

We also discuss pending federal legislation proposing changes to family law in Canada which many impact the role school boards play in family law processes or their involvement in parenting orders.

We wish you all the best for this holiday season and a very happy New Year.

Termination of Teacher’s Employment for Cause Through TPA Process Upheld

An Arbitration Board chaired by Arbitrator Howe recently released *Ontario Secondary School Teachers’ Federation and Trillium Lakelands District School Board*, 2018 CarswellOnt 16289, a lengthy arbitration award upholding the school board’s termination of a teacher for cause. The grievance took 42 days to hear.

The teacher performance assessment (TPA) process is a means by which the Ontario government requires school boards to take active steps to ensure that teachers are competent and meet the standards imposed on them. The grievor in this matter alleged that he was dismissed by the school board without cause, in violation of the parties’ collective agreement. The Federation argued that an essential feature of the mandated TPA process was not followed because the grievor was not provided with an official “on review” letter, and therefore the final evaluation in the TPA process was void. It also contended that essential elements of fairness were absent from the process, the process was conducted in bad faith and certain key actors with the employer who had participated in the process exhibited anti-union animus.

The employer countered that the grievor was given written notice of his unsatisfactory rating as the Principal had provided him with a Summative Report, which specified the “Overall Rating of Teacher’s Performance” to be “Unsatisfactory.” The Principal also explained the reasons for that rating in an Explanation of Rating Form and advised the grievor at their meeting that he was officially “on review.” The school’s Superintendent followed up with the grievor to verbally confirm that he was “on review.” Accordingly, the employer argued that the absence of an official “on review” letter was inconsequential. The employer also entered extensive evidence documenting the grievor’s poor performance and the thorough manner in which the TPA process was conducted.

In its decision, the Arbitration Board followed the majority award in *OSSTF and Toronto District School Board* and affirmed that a teacher whose employment is terminated as a result of three consecutive overall performance ratings of “unsatisfactory” is subject to the protection of a just cause standard of review if the applicable collective agreement so provides. The applicable collective agreement had a “just cause” requirement. To satisfy that standard, the employer had to demonstrate that:

- the essential elements of the TPA process were followed;
- the essential elements of fairness built into the TPA process to enable the grievor to demonstrate his competence as a teacher were applied in this case;
- the respective evaluators carried out the TPA process without discrimination, arbitrariness or bad faith; and
- the three successive Overall Performance Ratings of “Unsatisfactory” were reasonable and based on supporting facts.

The majority of the Arbitration Board (union nominee dissenting) was satisfied that the grievor was told he was “on review” and understood the consequences of being “on review.” It held that the fact that there was not an official letter telling the grievor what he already knew was not a fatal flaw. The majority of the Arbitration Board further held that, based on the totality of the evidence, the employer’s decision to terminate the grievor’s employment for cause was not arbitrary, discriminatory, made in bad faith or unreasonable and there was no basis for interfering with the decision.

This is an important decision for schools boards. It demonstrates that while a school board may terminate a teacher for poor performance through the TPA process, it will need to be able to prove that the TPA process was followed and applied fairly in order to be successful at arbitration. According, careful documentation will be essential to success.

Human Rights Tribunal Finds School Board Not Obligation to Provide ABA/IBI

In *JS v. Dufferin-Peel Catholic District School Board*, the Human Rights Tribunal of Ontario (Tribunal) discussed the issue of meaningful access to education in the context of providing Applied Behavioral Analysis (ABA) / Intensive Behavioral Intervention (IBI). The Tribunal ultimately held that the school board did not breach the *Human Rights Code* (Code) when it did not provide ABA/IBI.

At the time of the application, the applicant, JS, was a kindergarten student who had been diagnosed with Autism Spectrum Disorder (ASD). JS was represented by his mother, BS. The applicant alleged that he required ABA/IBI therapy to be delivered in the classroom by persons trained and certified in those therapies. Without ABA/IBI, the applicant argued that he was denied access to meaningful education.

By way of background, ABA refers to the systemic approach for modifying behavior in those with ASD. It can also be used with neurotypical individuals. It is not necessarily intensive and does not necessarily need to be administered one-to-one. In contrast, IBI is an intensive and more comprehensive version of ABA specifically designed for young children with ASD. The Behavioral Analyst Certification Board (BACB) is the regulatory college for behavioral therapists delivering ABA.

At the time of the application, the model for ASD services in the province was to provide early intervention and therapy programing funded and delivered through the Ministry of Child and Youth Services. This programming included two levels of support – ABA and IBI. Children eligible for these services could receive either direct service or funding that could be used to access therapy from private providers. The government established regional agencies that determined eligibility for service. The applicant was assessed before kindergarten and deemed eligible for services, which he used for private therapy.

School boards across Ontario generally do not provide ABA/IBI therapy in regular classrooms as part of their special education programs. The *Education Act* establishes the requirement for school boards to have comprehensive special education frameworks. This includes providing students with disabilities individual education plans (IEP) and customized programs to support their needs. Additionally, “section 23 classrooms” exist for children with complex and profound needs. Funding for these classes come from the Ministry of Child and Youth Services. While there may be students in “section 23 classrooms” that receive IBI/ABA therapy, it was well-established that the applicant was not eligible for such classes.

In this decision, the Tribunal did not make a finding on whether the programs and services established by the government and school boards were adequate. It also did not make a finding as to whether the steps the government and school boards have taken over the years, and continue to

take, are sufficient to meet the needs of children with ASD. The main issue the Tribunal sought to answer was whether the applicant had proven, on a balance of probabilities, that he was required to have ABA/IBI therapy delivered in the classroom by individuals specifically trained in that therapy (i.e. regulated by BACB) in order to have meaningful access to education. While the applicant produced a significant amount of evidence on the benefits of ABA/IBI therapy, he did not demonstrate that such therapy was required.

When the applicant entered junior kindergarten, he had a relatively small number of ASD deficits. His deficits were fairly mild and improved through his private therapy. Though the Tribunal recognized that the applicant had special needs, it also acknowledged the programs the school board had in place. The school board had a number of ASD-related programs across its schools, trained professional staff, and supported over 1000 students with ASD.

The Tribunal highlighted that the service a school board is to provide is meaningful access to education, not ABA/IBI therapy. Assessing meaningful access to education requires 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.

In this case, the applicant was bright, met his IEP base goals, and excelled at the curriculum at or above the level of his peers. There was no evidence that suggested that the applicant would have any difficulty in achieving future success. The Tribunal found that the school board provided a comprehensive, sophisticated, and robust set of programs, which included programs specifically designed to address the needs of students with ASD. As such, the Tribunal held that a school board's refusal to provide a particular, indicated treatment or support does not necessarily mean that it has failed to provide meaningful access to education.

This is an important decision for all school boards to be aware of and to consider when determining whether they are obliged to provide a specific kind of accommodation or program to a student.

Federal Government Proposes Changes to Family Law in Canada with Bill C-78

In May 2018, the federal government announced proposed changes to Canada's family law system. Promoted as being the "first substantive change to our family laws in over 20 years", Bill C-78 would amend Canada's family laws related to divorce, separation and parenting. Bill C-78 is expected to come into force in 2019.

A clear focus of the proposed legislation is promoting “the best interests of the child.” Bill C-78 introduces a “primary consideration” to the best interests of the child test. It would require courts to consider a child’s physical, emotional and psychological safety, security and well-being when determining parental access and decision-making. The primary consideration will be the lens through which all other best interests criteria will be evaluated.

The proposed amendments introduce a non-exhaustive list of criteria regarding the best interests of the child, which include the following:

- the nature and strength of the child’s relationships with parents, grandparents, and other important people in their life;
- the child’s linguistic, cultural and spiritual heritage and upbringing, including Indigenous heritage; and
- the child’s views and preferences.

What Bill C-78 Could Mean for School Boards

While not drastically altering the family law landscape, Bill C-78 would nevertheless alter how courts determine what type of parenting arrangement is most appropriate in the parties’ circumstances. The shift towards a greater emphasis on what would be in a child’s best interest could lead to educational actors, such as school boards, being called upon to play a greater role in family law court processes. Further, the introduction of “parenting orders” could set out the “decision-making responsibility” of each parent, including parenting time. Accordingly, school boards may need to review their policies to ensure that teachers and school administrators communicate with, and receive consent from, the parent or guardian who has the decision-making authority with respect to a child’s education.
