

School Board Update

Recent Developments of Note

Date: March 20, 2019

On March 15, 2019, the Ministry of Education outlined several new initiatives in a plan entitled “Education that Works for You” which will have a significant impact on the school board sector. In this *School Board Update*, we summarize the key initiatives.

We also discuss two recent decisions of interest. The first deals with a challenge to the Ontario government’s August 2018 directive that teachers of elementary students teach the 2010 sex education curriculum, rather than the 2015 curriculum which was introduced by the former government. The second deals with the factors to be taken into account in assessing whether a School Board acted appropriately in its decision to expel a young student with Autism Spectrum Disorder who had assaulted an education assistant.

Ontario’s New “Education that Works for You” Plan

On March 15, 2019, the Ministry of Education (MOE) released a plan entitled [“Education that Works for You”](#) along with a News Release [“‘Back-to-Basics’ Math Curriculum, Renewed Focus on Skilled Trades and Cellphone Ban in the Classroom Coming Soon to Ontario”](#) and a number of Backgrounders:

[Education that Works for You – Modernizing Classrooms](#)

[Education that Works for You – Modernizing Learning](#)

[Education that Works for You – Modernizing Health and Physical Education](#)

On the same date, the [MOE released](#) two B Memos: 1) “New Vision for Education” and 2) “Next Phase on Consultation on Hiring Practices and Class Sizes” (accompanied by two consultation guides) with a request for feedback by May 19, 2019.

Set out below is a summary of the government’s key initiatives:

Class Sizes:

For the school year 2019-2020, the government proposes to:

- maintain current class sizes for Kindergarten with funding for average class size remaining at the current level of 25.57 and a reduction to funded Registered Early Childhood Educators from 1.14 to 1.0
- no proposed changes to the caps or average class size for Grades 1 to 3
- maintain a board-wide average class size for Grades 4 to 8 of 24.5 or fewer students with funding increased from 23.84 to 24.5
- align secondary school class sizes with other Canadian jurisdictions, from 22 to 28 students with funding of school operations adjusted accordingly
- attrition protection for up to four years, to permit school boards to phase in the proposed class sizes; the B Memo states that boards “are advised to exercise restraint in hiring to replace retiring teachers or teachers leaving voluntarily.”

See the [Class Size Consultation Guide](#) for information about the consultation process on class size issues which will continue until May 19, 2019.

Technology:

- the use of cellphones during instructional time, except where that use is for educational purposes, health and medical purposes or special education needs, will be banned and the Provincial Code of Conduct will be amended accordingly, starting in September 2019
- enhanced access to reliable, secure and fast internet for all boards, school and students by 2021
- new digital curriculum platform, to be phased in starting 2019.

Curriculum:

- revised health and education curriculum, starting in 2019 with an opt-out policy for parents who wish to exempt their children from sexual health education
- new math curriculum strategy, to be phased-in over four years beginning in 2019, with online resources and a proposed legislative requirement that new teachers pass a “math content knowledge test” in order to teach math; funding will be provided for additional qualification courses in math for current teachers
- new Science, Technology, Engineering and Math strategy, beginning in 2019, with a revised mandatory Career Studies Grade 10 course which will focus on high-growth industries and revised Business Studies and Computer Studies courses
- increased focus on financial literacy
- revised First Nations, Métis, and Inuit Studies curriculum for Grades 9-12 with a continued approach to develop curriculum revisions to strengthen Indigenous content and learning
- increased focus on skilled trades, technology and apprenticeship training.

Hiring:

- greater support for teacher mobility
- greater “transparency, fairness, consistency, and accountability in teacher hiring across all school boards.”

See the [School Board Hiring Practices Consultation Guide](#) for information about the consultation process on hiring practices (Ontario Regulation 274/12) which will continue until May 19, 2019.

Other Initiatives:

- centralize the delivery of e-learning courses beginning in 2021, with an adjustment to the average class size to 35 and, subject to exceptions, permit secondary students to take a minimum of four e-learning courses out of the required 30 credits to complete their diploma
- modernize the assessment and evaluation approach across the province with a focus on equity
- introduce changes to education funding, which includes among other things certain changes to Grants for Student Needs Funding and increased funding for continued implementation of 2017-2019 central labour agreements to reflect salary adjustments
- reduce pressure on school board to put students in portables / split classes.

We will continue to monitor the implementation of these initiatives and provide updates as they become available.

Court Renders Decision on Challenge to Sex Education Curriculum

On February 28, 2019, the Divisional Court released its decision in [ETFO et al. v. Her Majesty the Queen](#), the highly anticipated challenge launched by the Elementary Teachers' Federation of Ontario (ETFO) and the Canadian Civil Liberties Association (CCLA) to the government's directive (Directive) that teachers of elementary students teach the sex education curriculum in place from 2010 to 2015 (2010 Curriculum) rather than the 2015 to 2018 curriculum (2015 Curriculum).

The central issue for the Court was whether the Directive and the events surrounding that decision infringed the rights of teachers, students, and parents under the *Canadian Charter of Rights and Freedoms (Charter)*.

The Directive was released on August 22, 2018 by the Ontario Minister of Education and was put in place for the 2018-2019 school year pending the creation of a new sex education curriculum. The 2010 Curriculum does not include teaching subjects that were included with the 2015 Curriculum, such as consent, the specific names for body parts, gender identity and sexual orientation, online behavior and cyber-bullying, and sexually transmitted infections. The 2010 Curriculum is currently taught to elementary school student. The 2015 Curriculum remains in place for secondary school students.

The Court ultimately dismissed the applications brought by ETFO and the CCLA, holding that Directive did not infringe the *Charter*. The Court clarified that teaching the 2010 Curriculum does not restrict teachers from using materials from the 2015 Curriculum to meet the needs of the students and that the 2010 Curriculum does not contain any provisions preventing teachers from addressing the topics introduced in the 2015 Curriculum.

Moreover, overarching legislation, such as the *Human Rights Code* and the *Education Act*, requires all teachers to be inclusive, tolerant and respect diversity. The 2010 Curriculum itself requires that it be taught in an inclusive manner to reflect the diversity of the student population. The Court recognized that teachers have the right to free expression under the *Charter*, “but this does not translate into a right to teach a particular curriculum.”

School Board’s Decision to Expel Student who Assaulted EA Upheld

Overview

In [L.K. v Upper Grand District Board \(EA 311.7\)](#), the Child and Family Services Review Board (CFSRB) considered the nature and application of mitigating factors to a Principal’s decision to recommend that an elementary pupil be expelled from his school. In doing so, it placed significant emphasis on all of the measures the School Board had undertaken to accommodate the pupil in confirming the expulsion.

Background

At the time of the expulsion, the pupil was 7 years old and in Grade 2. He had Autism Spectrum Disorder (ASD) and, specifically, he was classified as: Communication – Autism. He was placed in a regular class with resource assistance and accommodations related to his identification of ASD.

The School Board’s Identification, Placement and Review Committee (IPRC) identified the pupil’s strengths as communicating needs, thoughts and ideas; processing speed (when external stimuli is limited); and a desire to help others. The pupil’s identified needs were: self-regulation and sensory processing; safety of self; conflict resolution and aggression management; social skills; expressive and receptive language; phonological awareness and processing; fine motor skills and dexterity; and transitions.

The pupil was expelled from his school following a physical assault of an Education Assistant (EA) on school property. The assault was fairly serious, with the EA sustaining bodily harm which included bruises, contusions and a concussion. The EA was also diagnosed with post-traumatic stress disorder and went off on a two-month medical leave following the assault.

The pupil’s mother appealed the expulsion to the CFSRB, seeking an order quashing the expulsion and expunging the expulsion from the pupil’s Ontario Pupil Record (OSR). The School Board’s position was that it could no longer meet the pupil’s needs and the pupil’s continuing presence at his school created an unacceptable risk to the physical and mental well-being of others.

Decision

At the outset of the decision, the CFSRB addressed a number of procedural issues that had been raised by the parties in advance of the hearing. Most notably, both parties requested that the matter before the CFSRB and a human rights application before the Human Rights Tribunal of Ontario (Tribunal) dealing with the same fact scenario, be consolidated. The CFSRB denied the request for consolidation, finding that the mandate and jurisdiction of the CFSRB and the HRTO are patently different: the CFSRB is mandated to uphold or quash appeals and expunge an OSR, whereas the Tribunal's mandate is to address discrimination. Accordingly, the CFSRB found that it lacked jurisdiction to adjudicate and provide remedies in relation to the discrimination allegations and therefore, consolidation of the two matters was not appropriate.

The CFSRB began its decision on the merits by finding that the incident constituted a physical assault as provided for in section 301(1)3 of the *Education Act (Act)*. Stating that to find otherwise because of the pupil's age or lack of mental culpability would impede the School Board from fulfilling its duties and responsibilities under the *Act*, to maintain order and discipline and ensure that the school was kept safe and secure for all pupils.

As required by the *Act* and its regulation entitled "Behaviour, Discipline and Safety of Pupils", the CFSRB then considered the application of the mitigating factors and whether or not they successfully mitigated against an expulsion. The Principal's Expulsion Report set out that for the purpose of the expulsion recommendation, the Principal was prepared to assume that the pupil's behaviour was not within his control and may have been a function of disability. The Principal also assumed that the pupil may have lacked the ability to understand the consequences of his behaviour in whole or in part. These findings were upheld by the CFSRB, but it noted that the Principal incorrectly used the latter factor to support an expulsion recommendation. To the contrary, it would have militated against such a recommendation.

As to whether or not the pupil's presence would create an unacceptable risk to the safety of any person, both the appellant and the School Board agreed that absent any changes, the pupil's continuing presence at school did create an unacceptable safety risk. However, the appellant asserted that if appropriately accommodated the pupil did not pose a safety risk to other pupils.

The CFSRB agreed with the School Board, finding that the pupil's aggressive behaviour did create an unacceptable level of risk to the safety of people at the school. In coming to this conclusion, the CFSRB placed significant emphasis on how much work the School Board had done in the past trying to accommodate the pupil's behavioural issues, including:

- revising the pupil's Individualized Education Program;
- assigning additional one-to-one support on an almost full-time basis;
- prioritizing the pupil's needs for EA support over other pupils;
- implementing an Applied Behaviour Analysis Facilitatory Support Plan;
- meeting with the pupil's private Board Certified Behavioural Analyst at school and the pupil's home;
- conducting multi-party meetings with professionals who work outside the School Board; and
- changing the school's reward system.

Despite all of the School Board's demonstrated efforts to accommodate the pupil, the CFSRB found that the pupil's inability to control his behaviour, coupled with the lack of utility of disciplining the pupil, jeopardized the safety of others at the school.

Further, the CFSRB found that the appellant and the School Board did not have an open and honest level of communication, which impeded both the accommodation efforts and the cooperation that was required to manage the pupil's behaviour.

Finally, the CFSRB determined that none of the discretionary mitigating factors supported the substitution of the expulsion for a lesser punishment.

As such, the CFSRB dismissed the appeal and confirmed the School Board's decision to expel the pupil.

Take-Away

It is apparent from this decision that the CFSRB relied heavily on all of the School Board's accommodation efforts in finding that nothing more could have been done to reduce the risk of the pupil jeopardizing the safety of others in the school.

School Boards are required under the *Education Act* and at law to provide accommodations to students to ensure they have meaningful access to education, and to coordinate with a pupil's guardian(s) in doing so. Such measures will then establish a foundation for whether or not the pupil can continue to meaningfully attend a school in the context of significant behavioural and other challenges