# FTR QUARTERLY

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In this issue:



Hicks Morley

HUMAN RESOURCES
LAW AND ADVOCACY

# TALES OUT OF SCHOOL

As school boards grapple with fundamental changes to education, the needs of multiple stakeholders and rising demands on all fronts, the issues they face have never been more dynamic.

When we think of legal issues relating to school boards, many of us think of labour disruptions – work to rule, picket lines and strikes that can shut down schools for weeks at a time. While those can be high-profile events that school boards face, they are really the tip of the iceberg in terms of the issues that boards must contend with.

"We act for about 30 public and Catholic district school boards across Ontario, so we see everything that's out there," says Michael Hines, Chair of the Hicks Morley School Board Group. "I can tell you that the range of issues that these boards face is staggering – and it just keeps growing with changes in the system."

Growing indeed. In addition to labour and employment concerns, school boards face issues that relate to human rights, safe schools, special education, freedom of information, student rights and – in an era of declining enrolment – school closings.

"To give you an idea of the scope, our firm has about 100 lawyers, and more than 30 of them are regularly engaged in school board work," says Hines. "That's a lot of knowledge and experience. So when you combine this with the fact that we work with so many boards province-wide, we have a fairly unique advantage in understanding and resolving the issues that boards are dealing with."

## THE MOVE TO HUMAN RIGHTS APPLICATIONS

One of the recent issues that school boards are addressing is the increased use of the Human Rights Tribunal of Ontario by a number of parties to challenge decisions made by the school boards.

"One of the emerging trends in special education is the tendency for parents to use the direct-access model provided by the Tribunal to challenge special education

decision-making," says Bushra Rehman, an associate in the Hicks Morley Toronto office.

This poses some unique challenges – especially where there already has been a determination of the issues by the Independent Placement Review Committee or the Special Education Tribunal. In effect, school boards are put in the position of addressing the same issue twice in two different forums.

"We've been successful in helping school boards resist the re-adjudication of some of these cases by having them dismissed as an abuse of process," says Rehman. "Boards are already stretched from a resources standpoint, so ensuring that they deal with the same fact situation and same issues only once is a key area where we can add value."

## DELICATE ISSUES ON THE LABOUR FRONT

As major employers, school boards also must deal with a number of labour issues. An emerging trend – which also is related to the direct-access model of the Human Rights Tribunal – is the frequency with which both the union and the board are named as respondents to an application.

"This can happen in a number of cases, such as claims of harassment or a claim of a failure to accommodate a disability," says Patty Murray, a partner in the Hicks Morley Toronto office. "If the union finds no basis for a harassment claim, or the union is satisfied that the board has bent over backwards in an accommodation case, there may be nothing left they can do for the applicant. So the applicant takes the case to the Human Rights Tribunal and names both the union and the board as respondents."

This can result in a delicate negotiating issue between the board and union. There can be a number of strategic decisions that must be made, such as whether to suggest that the application be "reframed" as something better handled under the grievance process.

> One of the emerging trends in special education is the tendency for parents to use the direct-access model to challenge special education decision-making.

"One procedural tool that's just emerged as of July 1, 2010 is a new summary motion rule that allows frivolous or vexatious applications to be dismissed up front, before a board spends thousands of dollars responding at a full hearing," says Murray. "I'm on the Tribunal's practice advisory committee and we've been advocating for the rule for some time. It should be a tremendous benefit to school boards in cases where they face meritless claims."

## ADAPTING TO FUNDAMENTAL CHANGE

One of the most difficult tasks faced by school boards is adapting to government-initiated changes – some of which can have a significant impact on how a board operates.

One recent change was the introduction of the Early Learning Program ("ELP") announced in October 2009. The ELP is the government's plan to implement full-day learning for four and five year olds (full-day junior kindergarten and senior kindergarten) and to offer parents an extended day program (before and after school programs) for those children.

In order to deliver this program, the government has amended the *Education*

*Act* to provide for the hiring of designated Early Childhood Educators ("ECEs") who will work side by side with teachers in delivering the program.

"This is a huge change for elementary schools, and the arrival of this new group of employees at school boards has led to a number of legal issues and questions that we're helping clients with," says John-Paul Alexandrowicz, a partner in the Hicks Morley Toronto office.

"These range from whether ECEs are already covered by a support staff collective agreement, to how collective agreement restrictions on class size affect the larger ELP classrooms, to whether Catholic school boards can require ECEs to be Catholic, as they do with teachers."

In addition to providing legal advice and opinions – and running seminars on the issue of ECE representation rights and related issues – Hicks Morley also is representing boards in a number of arbitrations across the province concerning the ELP.

"One of the pending arbitrations I'm involved in concerns the conflict between the government-mandated class size and the class size stipulated by the collective agreement," says Kees Kort, a Hicks Morley partner in the Kingston office. "And there are other issues emerging. For example, the teacher's federation has asked boards to provide the names and contact information for newly hired ECEs. But, as a general rule, there is no such obligation. It's just one example where boards are navigating uncharted waters – and where legal advice can be crucial."

## THE EVOLUTION CONTINUES

Change is a constant in the education world, and the school boards that enjoy the greatest success in managing it are the ones that are able to stay on top of evolving trends – and develop new best practices to suit their changing world. It's a proactive approach that can pay dividends in terms of conserving valuable resources and controlling future costs.

HR QUICK HITS

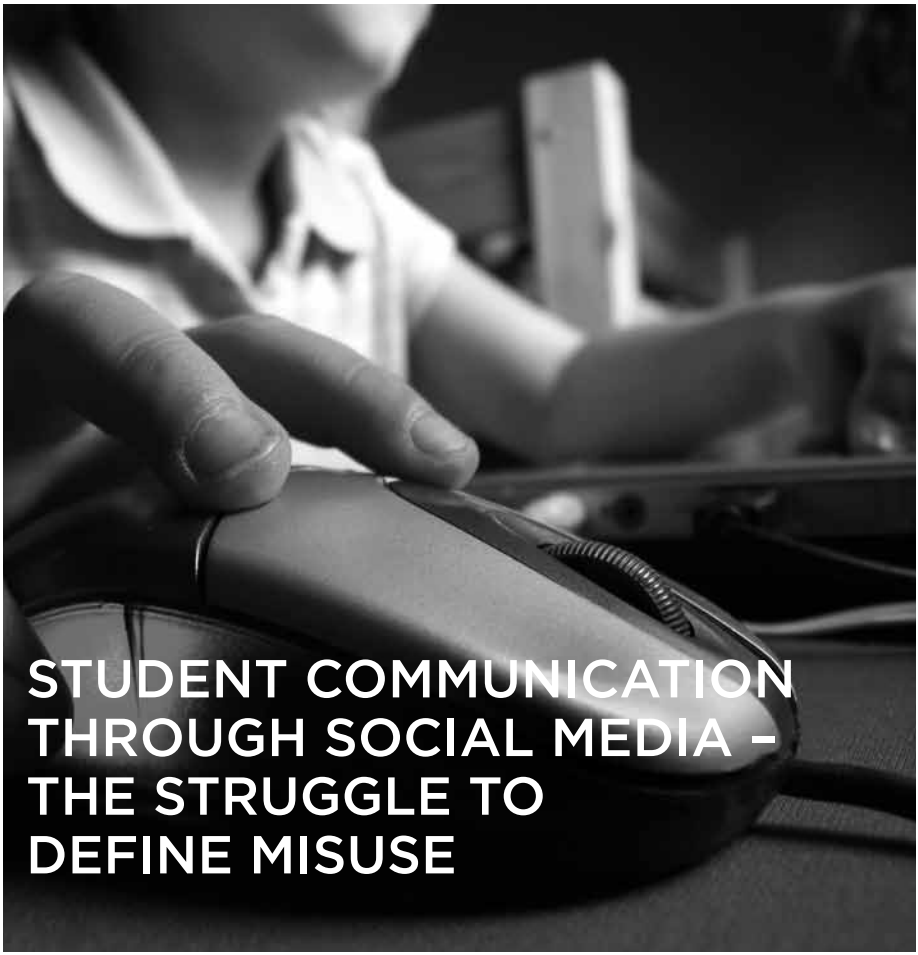
### HumanResourcesLegislativeUpdate.com

Hicks Morley recently launched Human Resources Legislative Update, a new blog that tracks the progress of select Ontario and federal legislation, regulations and regulatory initiatives, including related commentary periods and related government initiatives, that may affect employers or workplaces.

Topics covered include:

- Colleges and Universities
- Education Law
- General Employment
- Health and Safety
- Healthcare
- Human Rights
- Information and Privacy
- Minimum Standards
- Municipal
- Pension and Benefits

For more information about this new service or to sign up for the blog or subscribe by RSS feed, go to *www.hicksmorleylegislativeupdate.com*.



# STUDENT COMMUNICATION THROUGH SOCIAL MEDIA – THE STRUGGLE TO DEFINE MISUSE

Two recent American decisions dealing with sanctions imposed by school boards for student "misuse" of social media have generated great interest amongst Canadian school administrators.

BY: DANIEL J. MICHALUK

On the same day in early February of this year, the United States Third Circuit Court of Appeals issued judgments in *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District*. Though both cases involved very similar student misconduct, the Court reached the opposite conclusion in each case. Though it has now re-heard the cases to resolve the apparent conflict (with judgment pending), these conflicting judgments illustrate the important dialogue that is taking place about whether to recognize the unique impact of harmful social media use by students.

## *LAYSHOCK* – PHYSICAL REMOTENESS PREVAILS OVER INTANGIBLE CONNECTIONS TO THE SCHOOL

In *Layshock*, the Court affirmed a student's successful First Amendment claim and rejected a school board's argument for an exception to the American "material and substantial disruption" test for prohibiting student speech.

The judgment says word of the profile "spread like wildfire" and led to the posting of two other similar sites.

Layshock argued that he was protected by the First Amendment in creating a MySpace "parody profile" of his principal. He created the website outside of school hours using a home computer, but used a picture of the principal that he copied from a board website. The profile included various assertions about the principal regarding drinking, use of drugs and use of prostitutes. It is debatable whether Layshock's communications were defamatory given their context, but they were vulgar and the principal testified to feeling demoralized and degraded. The judgment says word of the profile "spread like wildfire" and led to the posting of two other similar sites. The board issued a penalty that included a ten-day suspension.

The board argued that the speech itself (apart from its effect) deserved sanction because it was vulgar, harassing and directed at the school community. It faced two challenges:

- First, the link to the board's interests was very intangible; aside from the copying of the picture, Layshock's activity was clearly situated outside of the school and only linked to the school by virtue of Layshock's intent.
- Second, the board was arguing for an exception to the fundamental American rule on student speech from *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* The rule in *Tinker* establishes that a school board cannot forbid student expression that does not "materially and substantially disrupt the work and discipline of the school." One exception to this rule permits schools to sanction vulgar expression in the name of encouraging the "fundamental values of 'habits and manners of civility'." The question in this case was whether the exception could be applied to conduct so physically remote from the school.

The Court was clearly uncomfortable in departing from the rule in *Tinker* and found no authority that supported punishment for creating such a profile unless the profile resulted in foreseeable and substantial disruption of the school.

In terms of an exception to *Tinker* for vulgar and uncivil expression, the Court held that school boards have no business in sanctioning vulgar and uncivil expression outside of the school. Though it acknowledged that a school is not bounded by "bricks and mortar surrounding the school yard", it said that "it would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities."

By this statement, the Court suggests that student expression published through social media should be treated as private and not deemed to be associated with any particular school-related harms.

## *BLUE MOUNTAIN* – MAJORITY RECOGNIZES UNIQUE HARMS THAT FLOW FROM MISUSE OF SOCIAL MEDIA

In *Blue Mountain*, a 2-1 majority of the Court reached the opposite conclusion to the *Layshock* panel after affirming a finding that a school board had met the material and substantial disruption test from *Tinker*. Though the majority paid heed to *Tinker*, it made some very broad statements about the unique harms that flow from misuse of social media.

The facts in *Blue Mountain* were remarkably similar to those in *Layshock*. The board suspended J.S. and K.L., two eighth grade girls, for posting a MySpace profile that parodied their principal. The site did not name the principal, but included his picture (taken by the girls from the school's website) and asserted that he was a sex addict and pedophile. The principal, who testified that he felt upset, angry and hurt, investigated the matter himself and then suspended J.S. and K.L. for ten days.

The majority made it clear that it was deciding a different question than decided the same day in *Layshock*: "We decline today to decide whether a school official may discipline a student for her lewd, vulgar or offensive off-campus speech that has an effect on-campus because we conclude that the profile at issue, though created off-campus, falls within the realm of student speech subject to regulation under *Tinker*." It held that the *Tinker* rule does not prohibit school boards from prohibiting conduct that causes reasonably foreseeable harms and, in the circumstances, held that the board could act to prevent a foreseeable deterioration in school discipline.

Unlike the panel in *Layshock*, the majority in *Blue Mountain* recognized that J.S. and K.L.'s off-campus expression was harmful by its very nature:

> The girls embarrassed, belittled, and possibly defamed McGonigle. They created the profile not as a personal, private, or anonymous expression of frustration or anger, but as a public means of humiliating McGonigle before those who knew him in the context of his role as Middle School principal.
>
> Undoubtedly, students have made fun of or made distasteful jokes about school officials, free from the consequences of school punishment, either out-of-earshot or outside the school context since the advent of our modern educational system. However, due to the technological advances of the Internet, J.S. and K.L. created a profile that could be, and in fact was, viewed by at least twenty-two members of the Middle School community within a matter of days.
>
> We thus cannot overlook the context of the lewd and vulgar language contained in the profile, especially in light of the inherent potential of the Internet to allow rapid dissemination of information. Accordingly, J.S.'s argument for a strict application of *Tinker*, limited to the physical boundaries of school campuses, is unavailing. Instead, we hold that off campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*.

These statements are very broad. Though the majority respects the *Tinker* framework, it establishes a strong basis for a presumed

disruption of school activity. In doing so, the majority accepts the very argument rejected by the panel in *Layshock*.

## CONCLUSION

Like school boards in the United States, Canadian school boards have a relatively broad licence to control student activity within the school. Given this licence, civil libertarians would like to sustain a relatively hard "in-school versus out-of-school" distinction because the distinction allows for free expression on a range of matters outside of the school and in private. The question, though, is whether it is proper to apply a hard distinction in assessing online student expression of the kind demonstrated in *Layshock* and *Blue Mountain*. These two cases illustrate a very live and significant debate about how to characterize online student expression – a debate that is ongoing in this country and highly relevant to Canadian boards.

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HR QUICK HITS

## The *Education Act*

The *Education Act* was amended in 2007 to reflect that the scope of a school board's interest in its students' activity is increasingly more difficult to define in tangible ways. The *Education Amendment Act (Progressive Discipline and School Safety), 2007* amended section 306 of the Act in a number of ways, one of which changed the scope of a principal's duty to manage harmful student activities to include "other circumstances where engaging in the activity will have an impact on the school climate." Prior to the amendment, a principal's duty rested on a student being "at school or [being] engaged in a school-related activity."

# "STRESS" LEAVE – THE LEGAL FRAMEWORK

In the grand scheme of things, the concept of "stress" as it relates to human beings is a relatively recent phenomenon.

BY: MICHAEL A. HINES

Until the 1950s, stress was an engineering term used to describe forces exerted on inanimate materials. By the 1970s, the term stress had not only been applied to the impact of environmental change on relatively simple organisms, but was becoming consistently used in describing a condition experienced by human beings. By the end of the 20th century, the quasi-medical concept of stress and the occupational concept of "stress leave" had become firmly entrenched.

When confronted by assertions of stress and the associated need for stress leave, many employers feel quite powerless. They recognize their duty to accommodate, but feel quite bewildered when confronted with such an amorphous malady. This is particularly so where the diagnosis of stress is attributable to factors within the workplace (such as the obligation to work productively or to participate in performance evaluations). If stress is a disability and disabilities must be accommodated, what is an employer to do?

## A RETURN TO FIRST PRINCIPLES

Many employers tend to treat stress as an idiosyncratic issue. However, the better approach is to return to first principles and to bring those principles to bear consistently on such situations.

**The employee has the onus of justifying absence and proving entitlement to sick benefits.**

Employers are not obliged to accept uncritically an employee's assertion of disability requiring absence from work. Arbitrators and courts presume good health. Where an employee claims absence due to sickness, the onus lies with the employee to produce satisfactory evidence of a legitimate, disabling condition. This principle is consistent with the expectations of human rights adjudicators, who typically require employees to inform their employers of any need for accommodation.

**An employee absent due to disability must take reasonable steps to recover, if possible.**

The duty of accommodation is often said to be a two-way street. This means employees with disabilities must communicate their medical needs and accept reasonable compromises rather than insisting on ideal solutions. But it also means that disabled employees must take reasonable steps to reduce the occupational impact of their disabilities, including participating in appropriate treatments.

**The duty of accommodation is not absolute.**

Although adjudicators are not uniform on this point, the majority of tribunals hold that the duty of accommodation does not oblige an employer to accept consistently substandard performance. Obviously, to the extent employers tolerate substandard performance from non-disabled individuals, they cannot be more exacting where a disability has been proven to exist. But, fundamentally, the concept of accommodation is intended to assist employees in performing their duties, not avoiding them. "Job duties" can include generic duties such as participation in a job performance review.

**Employers can insist on satisfactory performance of essential duties.**

This means that employers are not obliged to fundamentally alter jobs to accommodate disabilities. Rather, they are required to explore and implement methods of allowing a disabled employee to perform those duties. In particular, the duty of accommodation does not require an employer to tolerate consistently substandard attendance.

## STRESS IS NOT A MEDICALLY RECOGNIZED DISABILITY

How does reference back to first principles assist us in evaluating a claim for stress leave? To begin with, an employer should insist upon clear medical documentation of a recognized medical condition. Stress is a natural condition. In many cases, stress is adaptive – it causes an organism to avoid harmful stimuli or otherwise attend more carefully to environmental demands. In the employment context, if an employee experiences stress and consequently attends more carefully to his or her environmental demands in response to being told they must improve their performance or risk being fired, this is probably a good thing (assuming they wish to keep their job).

Most importantly, employers must recognize that stress is not a medically recognized sickness, nor is it a medically recognized disability. The *Human Rights Code* is not engaged simply by a diagnosis of stress. Similarly, sick leave provisions and sick leave benefit entitlements are not satisfied by a mere diagnosis of stress. From a medical perspective, stress is a symptom that can be associated with recognized sicknesses and disabilities (such as post-traumatic stress disorder, reactive depression or adjustment reaction). Employers may therefore legitimately demand proof of a recognized medical condition (rather than a mere, vague assertion of stress) before granting sick leave or engaging in accommodation.

## GET THE MEDICAL ADVICE YOU NEED

In seeking such medical confirmation, employers are best advised to engage expert medical advice (either through the employer's own medical staff or through a consultant). The information disclosed by the medical advisor to the employer's human resources staff should not include diagnostic details or specific treatment strategies. Rather, the employer

should only seek from its medical advisor information concerning capabilities and restrictions, not "conditions."

Let's take a concrete example. An employee is given a poor performance appraisal. He arrives the next day with a note from his doctor saying that he is suffering from stress attributable to the performance appraisal process and will be off work indefinitely on stress leave.

The employer should not accept a diagnosis of stress. If all that can be said of the employee medically is that he is experiencing stress as a result of his poor performance appraisal, the issue has been de-medicalized. No disability or illness is involved. The employee must deal with his normal, non-medical stress while at the same time improving his performance to an acceptable level. In other words, this is no longer a medical issue, it is a performance management issue.

Assuming the employee can, upon inquiry, substantiate a legitimate medical diagnosis, the employer can then take the position that participation in, and constructive reaction to, the performance appraisal process is a *bona fide* occupational requirement, an essential duty of all employees. The employee cannot avoid the performance appraisal process forever, nor can he expect the employer, under the mantle of accommodation, to tolerate his substandard performance indefinitely.

> To begin with, an employer should insist upon clear documentation of a recognized medical condition.

Finally, where the employee is in fact suffering from a properly diagnosed medical condition, the employer is entitled to satisfy itself (through its medical advisor) that he is receiving appropriate treatment and, in any event, is expected to improve to a point where participation in performance evaluations (and ultimately consistent satisfactory performance) can be anticipated. If the employee's healthcare providers cannot satisfy the employer's medical advisor of such treatment and such a prognosis, the employer may ultimately assert that the employment contract has been frustrated because of the disability upon which the employee has relied.

Obviously, individual situations will provide any number of intricate twists and turns to this template. However, where stress is relied upon by employees in a quasi-medical way, employers must realize that they should return to and rely upon first principles in dealing with the matter.

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# MAKING SCHOOL A PRIORITY

Brenda Bowlby joined Hicks Morley almost 30 years ago, with a career that has spanned multiple areas – including labour and employment, human rights and education law. As a litigator she has tackled issues of national importance and has appeared several times before the Supreme Court of Canada.

Brenda spoke with *FTR Quarterly* in July about her career – particularly in the area of special education – and the evolution of her education-related practice.

**Where did you start out?**

I was born in London, Ontario, and grew up close by. I stayed in the area as a young adult as well because I went to Western for two years of undergrad, then on to law school there.

**When did you start to think about law as a career?**

We did a couple of projects in Grade 12 that examined a couple of famous criminal cases, one of them being the Truscott case. I was fascinated by these cases, and I think that was when I first thought it would be great to be a lawyer. My parents took the position that I could do anything, and if that's what I wanted, then by all means pursue it. So I did.

**Is that where your interest in advocacy and litigation start?**

It was really the extracurricular work that got me interested in litigation. During law school, I was involved in the student-run consumer complaints bureau and worked there all through my first summer.

Then I did the same thing with the student-run legal aid clinic the following year, which involved some criminal work.

During law school, I was involved in the student-run consumer complaints bureau and worked there all through my first summer.

I stayed in London to article at Lerners & Associates, which had a strong litigation emphasis. I was going to go do a Masters in Law after articling, but the firm offered me an opportunity to be Tom Granger's junior lawyer. He's a judge now, but at the time he was the top family law lawyer in London. I learned a lot about litigation from Tom, and with the *Family Law Reform Act* having just come into force, it was also an exciting time being at the forefront of all the changes.

**But family law wasn't your thing?**

It was a great experience, but I really grew weary of parents fighting over children. It was very draining. After two years, I returned to my first plan and went to the London School of Economics to do my Masters.

**Why the move to Hicks Morley?**

After living in London, England for a year, there was no turning back from big city life, so when I returned to Canada, I began looking for a job in Toronto. While I gave some thought to teaching, I really wanted to go back to advocacy, but not the traditional litigation route. Hicks Morley was hiring and the labour and employment law focus seemed ideal.

**How did your focus on special education evolve?**

The *Education Act* was amended shortly after I got here to include special education law – and the *Human Rights Code* was amended in 1982 to include disability as a protected ground. Bruce Stewart was counsel on the first appeal to the Special Education Tribunal and involved me in the case, and

as the work in special education and human rights grew, I got more involved.

Since then, I've developed a substantial practice in special education law – I think it is fair to say that I have been in front of the Special Education Tribunal in more cases than any other lawyer. The *Eaton v. Brant County Board of Education* case – in which I represented the Brant County Board – started as a parent appeal to the Special Education Tribunal and went up to the Supreme Court of Canada; it is still the seminal case in special education in Canada.

### How has your practice evolved over the years?

The real growth has been in the human rights area. And what we're seeing now in terms of special education issues is that parents are choosing to go to the Human Rights Tribunal of Ontario rather than to the Special Education Tribunal. Parents seem to feel that they will get a more favourable outcome at the Human Rights Tribunal, although I don't believe that this is proving to be the case. Both tribunals make determinations based on the evidence before them, and if a school board has bent over backwards to work with parents and provide appropriate special education programs and services to the child, the school board will usually be successful.

What is really interesting is that a lot of the kids who have been provided with special education programs and services in elementary and secondary schools are now heading off to college and university. Our college and university clients are now beginning to receive human rights complaints from students with disabilities and so my practice in handling human rights complaints from special needs college and university students is increasing substantially.

### What has your experience taught you about special education and school boards?

I think what I've learned to do – and what I love doing – is the proactive work that helps clients solve problems and avoid the cost and stress of litigation. That's where the greatest job satisfaction comes in, especially in a school board setting where the school and the parents have an ongoing relationship and must continue to work together. My clients have taught me, and I remind them from time

to time, that the important thing is always to keep the best interests of the child at the forefront. This sometimes can become difficult as there are some parents who can become aggressive or abusive in dealing with school board staff, but when this happens, I remind the client to "keep your eye on the ball" – the ball being the child.

My biggest piece of advice for school board clients is to be as patient as possible with parents – and to make copious notes. A harried administrator who gives short shrift to a parent may end up in front of an adjudicator, and if they've behaved in a way that looks unfair or arbitrary, it can really hurt the case. However, if the administrator has been patient and has done all they can in the particular case, then we can show this to the adjudicator and demonstrate that the parent was treated fairly. This will reflect on how the adjudicator views the board's actions involving the student.

My biggest piece of advice for school board clients is to be as patient as possible with parents – and to make copious notes.

### What keeps you busy outside of the office?

My husband and I have a daughter and we live in Burlington, but our daughter just graduated from university and is heading overseas to do her Masters at the London School of Economics where I did mine, so we are pretty much empty nesters. We're both involved as volunteers with local organizations in Burlington, and my husband is the current Chair of the Burlington Foundation, so we're pretty active in the community and really love it here. We've been fortunate to make a lot of friends along the way. I'm also the co-author of two books that both had their second editions recently released – *An Educator's Guide to Human Rights* and *An Educator's Guide to Special Education Law*. So it hasn't left a lot of time to unwind. But when I do, it's usually on the golf course – at a number of the local courses around here.

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HUMAN RESOURCES
LAW AND ADVOCACY

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