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• HUMAN RIGHTS TRIBUNAL DISMISSES SPECIAL EDUCATION HUMAN RIGHTS APPLICATION, NO *PRIMA FACIE* CASE OF DISCRIMINATION FOUND •

Kathryn Bird, Partner and Amy Sherrard, Articling Student
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Kathryn Bird

Amy Sherrard

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In a recent decision, *U.M. v. York Region District School Board*, [2017] O.H.R.T.D. No. 1730, 2017 HRTO 1718 the Human Rights Tribunal of Ontario (Tribunal) dismissed an application brought against the Respondent school board which alleged that it had discriminated against two students (U.M and M.M.) in the delivery of educational services. This decision confirms that in special education situations, a school board is obliged to act in the interests of the students with respect to educational decisions; while it should communicate with parents, those educational decisions are not generally subject to parental control.

BACKGROUND

The Applicants, who were represented by their Litigation Guardian W.P.M., were students at an elementary school operated by the Respondent. Both students were diagnosed with autism spectrum disorder (ASD) and required special education programming in order to meaningfully access their education.

In the Application, the Applicants alleged that they were discriminated against on the basis of disability. There was no dispute that both Applicants had a disability under the *Ontario Human Rights Code* (*Code*), namely ASD. The

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Please address all editorial inquiries to:

LexisNexis Canada Inc.
Tel. (905) 479-2665
Fax (905) 479-2826
E-mail: rmce@lexisnexis.ca
Web site: www.lexisnexis.ca

issues to be determined by the Tribunal were as follows:

1. Whether the Respondent discriminated against U.M. by allegedly excluding him from school between January and June of 2014;
2. Whether the Respondent discriminated against U.M. and M.M. by placing the students in a self-contained autism class;
3. Whether the Respondent discriminated against M.M. by allegedly excluding her from a summer camp program;
4. Whether the Respondent ignored the educational needs of U.M. and M.M. by:
   (a) allegedly excluding U.M. from school during January to June of 2014;
   (b) allegedly limiting M.M.'s daily attendance from February to March of 2015;
   (c) allegedly placing U.M. and M.M. in a self-contained autism class in September of 2014 contrary to their IPRC statements and parental wishes; and
   (d) allegedly creating deficient IEPs for both students.

THE TRIBUNAL'S FINDINGS

The Tribunal dismissed the Application on the basis that the Applicants had not established a *prima facie* case of discrimination.

(A) Legal Principles

The Tribunal confirmed that the applicable test in determining discrimination under the *Code* is set out in the Supreme Court of Canada's decision in *Moore v. British Columbia (Education)*. In order to prove discrimination, applicants must show that:

1. they have a characteristic protected from discrimination;
2. they have experienced an adverse impact with respect to their education (*i.e.*, they have been denied a meaningful access to education); and
3. the protected characteristic was a factor in the adverse impact.

Once the applicant proves the above (*i.e.*, demonstrates a *prima facie* case of discrimination), the burden shifts to the respondent to justify its actions within the framework of exemptions available under the *Code*.

(B) Application To The Facts Of This Case

The Tribunal found that the Applicants had failed to establish a *prima facie* case of discrimination. In particular, the allegations advanced by the Applicants were not proven on a balance of probabilities. In arriving at this conclusion, the Tribunal made some important factual findings:

- The evidence did not support the allegation that U.M. was excluded from school between January and June of 2014. Rather, it was clear on the evidence that both parties had agreed to a gradual transition plan to return U.M. to school on a full-time basis following U.M.'s participation in IBI therapy with a third party service provider. Accordingly, there was no evidence that the Respondent had excluded U.M.
- The evidence did not support the allegation that the students were denied a meaningful access to education while in the self-contained autism class. The evidence of the Respondent was clear that the students were thriving and there was no evidence from the Applicants to the contrary. The Tribunal also noted that since the students were receiving a meaningful access to education during that placement, it was irrelevant that their IPRC may not have yet been formalized to reflect that placement:

> [97] While parents have clearly delineated rights under the *Education Act* and its regulations regarding their children's identification and placement decisions, variation of those decisions on a short term basis by providing additional and enhanced services prior to the next scheduled IPRC and before implementing an actual change of placement does not amount, in my opinion, to a breach of the *Code*. While it is clear that schools boards must function within the parameters set by the *Code*, the HRTO is not charged with ensuring full compliance with the IPRC process. [emphasis added]

- The evidence did not support the allegation that M.M. was excluded from a summer camp program. The Tribunal found that the Respondent offered the Applicant a place in its accessible summer camp program at a different location; a decision that was based on M.M.'s needs as a student with ASD. When W.P.M. requested that she be able to attend the camp program at her own school, the Respondent accommodated that request by providing the available supports. Since M.M. was able to attend the camp, the Tribunal concluded that there was no *prima facie*.
- The evidence did not support the allegation that M.M. was excluded from school in February/March of 2015. The evidence was clear that the parties were working through scheduling difficulties that were in part created due to W.P.M.'s requests. The Tribunal found that even if the evidence supported the allegation that the Respondent excluded M.M., it was *de minimis* under the *Code* as it amounted to a one day absence.
- Finally, the Tribunal found that there was no evidence that the Respondent ignored the students' educational needs as it related to the development of their IEPs. In particular, there was no evidence that the contents were inadequate or incorrect and in fact, the parent's signature on each IEP suggested that he was satisfied with the contents.

Based on its findings of fact, it was not necessary for the Tribunal to consider the application of the legal tests or principles because the Applicants had failed to establish their allegations on a factual basis. However, the Tribunal did make some comments in obiter regarding legal principles which may be helpful in future cases:

- A common argument advanced by W.P.M. was that the Respondent allegedly made decisions regarding the children's education and schedule that intentionally made his work schedule difficult. While this allegation was not established on the evidence, the Tribunal commented that

the circumstances surrounding a parent's work issues are irrelevant in so far as they relate to the Respondent's obligations to the students under the *Code* or the *Education Act*.

- Another common argument was that the Respondent failed to provide educational services in accordance with W.P.M.'s wishes. Again, the Tribunal noted that there was no evidence to support the allegation that the students were denied a meaningful access to education during the time period in issue. The only evidence advanced by W.P.M. was that the students were not receiving an education exactly in accordance with his wishes which the Tribunal concluded did not constitute a breach of the *Code*.

TAKEAWAYS FOR SCHOOLS AND SCHOOL BOARDS

This case confirms that in a special education human rights case, a School Board is obliged to act in the interests of the students with respect to educational decisions. The Tribunal stated that while parents have certain rights under the *Education Act*, "the determination of the content of appropriate educational programs and services that are delivered to children is primarily the responsibility of the school board under the direction of the Ministry of Education and the legislation and is not generally subject to parental control."

However, the decision affirms the importance of considering parental preferences and encourages communication with parents before implementing certain educational decisions. Accordingly, School Boards should be encouraged to continue working with families through disputes over educational decisions in a co-operative and thoughtful fashion aimed at delivering educational services that best meet the student's needs.

[***Kathryn Bird*** *is a labour, employment and human rights lawyer in Hicks Morley's Toronto office. She regularly advises employers, social service providers, school boards and municipalities regarding issues arising from the employment relationship in the workplace or the provision of services to the public. Kathryn also regularly advises school boards, colleges and universities about the provision of educational services to students with exceptional needs.*

Amy Sherrard *is an articling student at Hicks Morley LLP.*]