

Ontario Court rules government discriminates based on age and disability in denial of programs to students with autism

In *Wynberg v. Ontario*, a 217-page decision issued on March 30, 2005, the Ontario Superior Court of Justice has ruled that the government of Ontario violated the equality rights of children with autism by limiting eligibility for a program known as Intensive Behavioural Intervention (IBI) to children between the ages of 2 and 5. The Court issued an order declaring that the criterion for eligibility for the program discriminated on the basis of age under section 15 of the *Canadian Charter of Rights and Freedoms*, and that the Minister of Education breached his duty under subsection 8(3) of the *Education Act* in a manner that discriminated on the basis of disability by failing to ensure that IBI and other therapies were provided to children aged 6 and over. The Court also ordered significant damages to cover past and future treatment.

The Court found that IBI, also known as Applied Behavioural Analysis (ABA) is "the only scientifically supported effective intervention for children with autism" and that, in order to be effective, it should be provided from 30 to 40 hours a week and be continued until the child either is able to learn independently or no longer benefits from the treatment. The cost of such treatment can range from \$30,000 to \$60,000 a year.

REASONABLE IN 1998; UNREASONABLE IN 2002

The Court held that, when the Intensive Early Intervention Program (IEIP) was first brought to the government's attention in 1998, the government responded quickly and appropriately. At the time, there were no publicly funded services for autistic children of any age. The government decided to launch a pilot project focusing on children between the ages of 2 and 5 based on a number of factors, including a general expert consensus that intervention should be provided as early as possible and the assumption that the school system would be able to respond adequately to the children's needs once they reached the age of 6.

However, by June 2001, the Court found that long waiting lists had materialized. Government officials knew that few children were receiving the service, that there were serious consequences if they did not have the intervention, and that the inability to deliver the service was attributable in part to continuing capacity issues. At that time, the government re-committed to the cut-off at age 6 without asking for a policy analysis of the option of extending the IEIP beyond that age. While parents had raised the IEIP age cut-off as an issue, their concern had been rejected based on the expectation that the school system would receive the children and provide appropriate special education programs and services.

By October 2002, the Court found, more children were aging out of the eligibility range before being provided service than were being served. Also, it was becoming increasingly apparent that the education system was not responding appropriately to the special needs of children with autism, and that hundreds of children were reaching schools without having had IBI. The Minister of Education had not ensured that school boards had special

education plans to deal with the children who had aged out of the eligibility range without IEIP or with the children who had received IBI and were about to enter school.

While the cutoff at age 6 may have been reasonable in 1999, the Court stated, the developing research showed that it was no longer reasonable in October 2002. The Court found that no research supported the withdrawal of IBI at age 6. While there was less evidence as to the efficacy of the treatment after age 6, the Court found that what evidence there was showed that IBI continued to be effective, although perhaps in a less pronounced way. Accordingly, the Court was of the view that a systematic ineligibility criterion at age 6 was not responsive to the needs of children.

MINISTRY RESPONSIBLE FOR "POLICY BARRIER"

The Court also found that the Ministry of Education had effectively constructed a "policy barrier" against offering IBI in schools by creating the "myth" that IBI was a form of therapy or treatment that could not also be a teaching approach or educational method. The Court disagreed with the government's contention that the plaintiff families should have sought relief from the school boards involved in their children's education, and that their court action against the government should accordingly be dismissed. In holding against the government, the Court pointed to the duty of the Minister of Education under subsection 8(3) of the *Education Act*.

"The Minister of Education shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario, and shall provide for the parents or guardians to appeal the appropriateness of the special education placement, and for these purposes the Minister shall,

- (a) require school boards to implement procedures for early and ongoing identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented; and,
- (b) in respect of special education programs and services, define exceptionalities of pupils, and prescribe classes, groups or categories of exceptional pupils, and require boards to employ such definitions or use such prescriptions as established under this clause."

While, in the Court's view, the Minister is not accountable for a response to the individual needs of students who require special education programs, or for the planning and delivery of services, he or she does have significant accountability under the legislative scheme:

"Accountability [means] giving the school boards tools to provide appropriate special education. Local school boards are not experts in design and efficacy of special education programs and special education services. They need guidance. Accountability [means] identifying expectations that school boards must address in order for the boards to negotiate such requirements in negotiating collective agreements. Accountability [means] ensuring that the Minister and staff not give uninformed policy and direction and not communicate messages that are uninformed, and designed, or have the effect of being construed as, Ministry policy. Accountability means the Minister exercises discretion to establish informed policy."

Having found the Minister to be accountable for the provision of special education programs, the Court went on to hold that the government had breached its duty under

subsection 8(3) of the *Education Act* when it re-committed in 2002 to the cutoff at age 6:

"The Minister's duty is to ensure that appropriate special education programs and special education services are provided for the [plaintiff pupils] with the exceptionality of autism without payment of fees. The Ontario government is accountable and therefore liable in these proceedings. I find that the defendant has failed to fulfill its duty as of October 2002 by reason of: (a) the failure to respond to the needs of children with autism; (b) specifically, the failure to develop policy and give direction to the school boards to ensure that ABA/IBI services are provided to children with autism in schools; (c) the creation of systemic barriers to children with autism accessing learning; and (d) the failure to eliminate those known barriers."

AGE DISCRIMINATION

In holding that the plaintiffs had suffered discrimination based on age under the *Charter*, the Court found that the age cut off reflects and reinforces the stereotype that children with autism over age 6 are "virtually unredeemable". Contrary to this, the Court stated, the evidence showed that those children had the potential for "life-altering progress". Without access to the therapy, the Court held, the children would pay a steep price:

"I agree that without IBI/ABA, the plaintiff children are deprived of the skills they need for full membership in the human community. That child's isolation and lack of skills mean that s/he cannot participate in society and cannot exercise the rights and freedoms to which all Canadians are entitled. ... All of the plaintiff children are entitled to the opportunity to attain an equal place in society."

By maintaining the cutoff at age 6 in October 2002 in the face of clear evidence of the substantial obstacles that children with autism would face in the school system, the Court stated, the government drew a distinction against the children that amounted to a "wrongful insult to [their] human dignity".

DISCRIMINATION BASED ON DISABILITY

In its analysis of whether autistic children had suffered discrimination based on their disability, the Court determined that they had not been deprived of a benefit as compared to "typically developing" children, but rather as compared to exceptional pupils suffering from hearing, speech or vision impairments or those with a learning disability. Like autistic children, those students need interventions to enable them to access learning. However, unlike autistic children, they receive such interventions, allowing them to experience a "seamless transition" to the school system. Based on this comparison, the Court concluded that autistic children had been denied a benefit granted to other disabled children:

"I conclude that children with autism are: (a) ...denied the benefit of speech therapy and of occupational therapy; (b) denied the benefit of "appropriate educational services"; (c) in particular, denied the policy development and direction from the Minister of Education to the school boards as to the availability of IBI/ABA as a component of "appropriate educational services" or "special education services". ...[T]he ultimate consequence is that children with autism do not have the opportunity to access learning that children in the comparator groups share. Moreover, these children with a disability are excluded from *accessing* an appropriate education without payment of fees."

The Court then went on to conclude that this denial of benefits constituted discrimination

that resulted in a denial of the children's equal human worth and dignity.

REMEDY

In granting its declaration that the IEIP guidelines and the government's refusal to fund IBI were discriminatory, the Court declined to accede to the government's request that it suspend its order for two years. The government had requested the suspension to allow it to develop capacity to deliver the IBI. The Court held that there was no reason to grant the suspension: the government had known of the legal proceedings and had known that an immediate declaration was a possibility when it made its decision in October 2002. Moreover, it had known for some time that there were serious problems with its program for autistic children.

The Court expressed the view that, while a declaration would help all Ontario children with autism, the plaintiff children were entitled to a remedy that reflected the contribution that the legal proceedings would make to the enforcement of their constitutional rights. The Court stated that an award of damages would not be unfair to the government or impose a substantial hardship upon it, given that it had known when it made its decision in 2002 that damages might be awarded against it. The Court ordered that damages be paid to the plaintiffs from the latest of the following dates:

- (a) November 1, 2002;
- (b) when the child ceased to be eligible for the IEIP;
- (c) when the parent(s) of the child enrolled the child in public school and paid for IBI/ABA at home or at school because it was not available without payment;
- (d) when the child reached the age where s/he was eligible to be enrolled in public school but the parent(s) declined to enroll the child and paid for IBI/ABA at home or at private school because it was not available without payment.

In Our View

The result in this case is perhaps surprising in light of a decision of the Supreme Court of Canada last fall holding that British Columbia was not required to fund similar treatment under its health care system for children in that province. The difference in this case is that, in Ontario, some benefits were provided to children of a specific age while, in British Columbia, no benefits were provided. Moreover, while provinces have the discretion not to fund services that are not provided by doctors under their health systems, the *Education Act* specifically requires that Ontario provide free special education to those who need it.

The government has filed for appeal. We will keep readers informed of developments in the case.

For further information, please contact [Paul Marshall](#) at (613) 940-2754.

For more news about recent developments in Employment and Labour Law, and for information about how our firm can assist you, please visit <http://www.emondharnden.com/>