

Divisional Court upholds ruling that IBI treatment for autistic child is "therapy" not "education"

In a decision that is at odds with the result in *Wynberg v. Ontario*, a case that involved a successful challenge under the *Canadian Charter of Rights and Freedoms* to Ontario's funding of programs for autistic children (see "[Ontario Court rules government discriminates based on age and disability in denial of programs to students with autism](#)" on our What's New page), the Ontario Divisional Court has refused to overturn a Special Education Tribunal decision that Intensive Behavioural Intervention (IBI) is a medical treatment, not educational programming. The *Clough v. Simcoe County District School Board* case (May 26, 2005) involved a 12-year-old boy who was unable to communicate verbally because of severe autism.

The School Board's Identification, Placement and Review Committee (IPRC) placed the child in a program called the Primary Autism Pilot Project (APP). The child's mother objected to the placement and requested that he be provided with IBI programming, which would require 40 hours a week of treatment by a therapist, supervised by a psychologist and delivered privately, apart from other students. The IPRC's decision was upheld by the Special Education Appeal Board and then by the Special Education Tribunal, which held that what the parent wanted for the child was therapy, not educational programming. The parent then sought judicial review of the Tribunal's decision.

COURT: THERAPY FINDING NOT UNREASONABLE

In upholding the Tribunal's decision, the Court noted that the parent's own evidence indicated that IBI programming was "medically necessary" and held that it was not unreasonable for the Tribunal to have concluded that the parent was requesting medical treatment. The Court also rejected the argument that it was unreasonable for the Tribunal to have failed to find that IBI was superior to APP, as that was not the issue before the Tribunal. Rather, the issue was whether APP was appropriate to the child's needs. The evidence showed that it was appropriate and that it offered the child more support than was available to any other student in the School Board.

WYNBERG NO ASSISTANCE

While the Court agreed that the *Wynberg* case was "a useful source of information about the needs of autistic children and the availability of treatment for them, it held that the decision was of no assistance in resolving the issue in this dispute. The *Wynberg* case had been a full trial in which considerable evidence had been called. By contrast, the Court in *Clough* could consider only the record of proceedings before the Tribunal; and that record did not justify any interference in the Tribunal's decision.

The Court concluded by commending both parties' "remarkable efforts" to help the child.

Noting that the gap between the parties could not be bridged in this case, the Court added that, in the circumstances, "there is no dishonour where two such valiant efforts have been made".

In Our View

The finding that IBI is therapy, not educational programming, was characterized by the Court in *Wynberg* as a "myth" propagated by the government to justify its refusal to offer IBI in schools. It will be interesting to see whether the *Clough* decision has any impact on *Wynberg* as that case makes its way through the appeal process.

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/>