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## Human Rights Tribunal rules that it is not an avenue to appeal decisions by Special Education Tribunal

Recently, the Human Rights Tribunal of Ontario considered an application brought under the *Human Rights Code* (the “Code”) alleging that the Toronto District School Board (the “TDSB”) discriminated against a high school student by failing to provide a special education program that met the student’s disability-related needs. In *Schafer v. Toronto District School Board* (February, 2010) the Tribunal dismissed the student’s application noting that the Tribunal is not a proper avenue to appeal decisions by the Special Education Tribunal. The Tribunal further held that there was no evidence that the accommodations provided by the TDSB were significantly inappropriate or inadequate.

### THE STATUTORY SCHEME FOR SPECIAL EDUCATION

The Ontario *Education Act* (the “Act”) recognizes that students with special needs will not receive equal educational services without appropriate accommodations. The Act requires school boards to accommodate such students by providing special education programs which aim at the identification and placement of students with special needs.

The statutory scheme for special education is set out in the *Education Act* and provides that an “exceptional pupil” is a student whose “behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program...”

The Act requires that all exceptional pupils in Ontario have available to them appropriate special education programs and special education services. Regulations under the Act provide additional details for special education programs and for the identification and placement of exceptional pupils. The goal of special education programs is closely aligned with the goal of accommodation under the Code, as summarized by the Tribunal in *Campbell v. Toronto District School Board* (2008):

I find that the statutory scheme for special education has as its central purpose the accommodation of children with special needs, including those with disabilities, so that they are able to receive the benefits of education available to others (see *Eaton*, para. 68). With respect to the provision of education services to children with disabilities, therefore, it has the same goal as the Code. In the words of the Board, “special education is all about finding the appropriate accommodation for students with disabilities.” *Campbell v. Toronto District School Board* (2008) HRTO 62

The Act also provides mechanisms for parents (as well as guardians and adult students) to participate in decisions made under special education programs. They may request meetings with the Identification, Placement, and Review Committee (the “IPRC”) and can appeal IPRC decisions to an Appeal Board. The last stage in the appeal process is a hearing before the Special Education Tribunal (the “SET”), a special tribunal established under the Act to render final decisions.

## INDIVIDUAL EDUCATION PLAN AND ACCOMMODATION

In October of 2005, the TDSB, in consultation with the student's mother, developed and finalized the student's Individual Education Plan ("IEP") identifying the student's areas of strength, areas of need and the accommodations required. The student's teachers were provided a list of recommended accommodations to meet the student's needs. These accommodations included providing:

- reformatted tests;
- additional time on tests;
- extended deadlines on assignments;
- preferential seating at the front of the class;
- material in smaller "chunks"; and
- one-on-one instruction outside regular class hours.

Although the student's teachers implemented the recommended accommodations, the student nevertheless experienced various difficulties throughout the school year. The student was suspended twice, once for extortion and once for assault, and was arrested by the police for the second infraction. Following his arrest, the police placed a restriction on the student preventing him from attending his high school. The student was required to register at a different high school to finish the school year.

In November of 2008, the student, represented by his litigation guardian, filed an Application under the *Code* alleging that from September 2005 to April 2006 the TDSB breached the student's right to equal treatment under section 1 of the *Code*. Section 1 of the *Code* provides as follows:

Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

The student alleged that the TDSB had failed to comply with the requirements of the *Education Act* and failed to provide him with special education services that met his disability-related needs. The student also claimed that the imposition of the two suspensions was discriminatory because the TDSB did not take adequate account of the student's disabilities in determining culpability or the appropriate penalty.

## DISCRIMINATION UNDER THE CODE

The Tribunal began its analysis by discussing the scope of its inquiry, stating that it was not within its purview to ensure that the TDSB complied with the requirements of the *Education Act*.

"The Human Rights Tribunal is not an alternative or substitute body to monitor and regulate the special education scheme under the *Education Act*."

Whether or not the school board strictly followed the procedures provided for in the *Education Act* was not a question for the Tribunal to determine. Instead, the only issue before the Tribunal was whether the student experienced discrimination under the *Code*.

In the normal course, an Applicant in a human rights Application to the Human Rights Tribunal of Ontario has the burden of establishing a *prima facie* case of discrimination before the Respondent is required to respond. In *Schafer*, though, the Tribunal held that:

"in special education cases, it is self-evident that a child with special needs is unable to access the education systems without accommodations."

As such, the *prima facie* case was presumed and the Tribunal chose to hear the TDSB's evidence first. It then turned to the parents "to present their evidence why the accommodation was inadequate."

The duty to accommodate under human rights legislation has both procedural and substantive requirements. In *Schafer*, the Tribunal made an important finding. It held that:

“So long as there are steps taken to assess the child’s needs and prepare accommodations, then generally the procedural standard of the duty to accommodate will be met...Similarly, as long as the substantive accommodations as recommended in the IPRC and IEP are generally implemented, the substantive standard of the duty to accommodate will be met.”

With respect to the substantive accommodations, the Tribunal also made it clear that “the issue is not whether the accommodations implemented are what the student or parent wanted, whether they were the ideal accommodations, or whether other accommodations would have been equally appropriate.” The Tribunal limited itself to whether the TDSB implemented the general recommendations of the IPRC or IEP in order to meet the child’s needs. According to the Tribunal, the TDSB did just that. The evidence established that the student’s teachers were aware of his special needs and had incorporated appropriate accommodations early within the school year.

With respect to the two suspensions, the Tribunal stated in order for there to be discrimination under the *Code*, “the evidence must demonstrate that the school failed to appreciate or accommodate the impact of the student’s learning disabilities in assessing culpability or in choosing a penalty.” The Tribunal found that the evidence demonstrated that from the investigation stages to the discipline stages, the TDSB considered and accommodated the student’s special needs. Of particular relevance was the fact that in each case of suspension, the school had considered the student’s learning disabilities as a mitigating factor and imposed shorter suspensions as a result.

The student’s Application was dismissed. The Tribunal found that the accommodations provided by the TDSB were both appropriate and adequate and that the TDSB did not breach the student’s rights under the *Code*.

### **In Our View**

Notwithstanding the decisiveness of the Tribunal in making its ruling, the Applicant went on to submit a Request for Reconsideration of the decision. The Applicant argued that the Tribunal’s decision was tainted by jurisdictional confusion; that there was a misapplication of the legal test for discrimination; that the public interest was not considered; and that relevant evidence was omitted.

On the issue of jurisdictional confusion, the Applicant alleged that the Tribunal focused inappropriately on whether the TDSB complied with the *Education Act* rather than the *Code*. The Tribunal disagreed, quoting from its original decision when it stated, “it is not the role of this Tribunal to oversee the implementation of the *Education Act*.” The Applicant’s allegations that the test for discrimination was misapplied and that the Tribunal failed to consider the public interest were also dismissed. The Tribunal stated that in order to establish each allegation, the decision must be in conflict with established jurisprudence. It went on to point out that the Applicant could not point to any such conflicting jurisprudence. In support of its allegation that relevant evidence was omitted, the Applicant submitted Ministry of Education documents about education trends. The Tribunal reviewed the documents and found that they did not affect the decision or analysis and that they were not potentially determinative. In dismissing the request for reconsideration, the Tribunal reinforced its original decision sending two positive messages to School Boards: first, the Tribunal is not an alternative body to regulate the special education scheme under the *Education Act*; and second, that the implementation of the accommodations recommended in the IPRC and IEP will meet the substantive standard of the duty to accommodate.

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