

# Arbitrator rules after-school academic support program not the exclusive work of teachers

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A recent arbitration decision examined the right of a school board to deliver an after-school academic support program staffed, not by teachers, but instead by Educational Assistants (“EAs”). In *Re Hamilton-Wentworth Catholic District School Board and OECTA* (December 2011), the Ontario English Catholic Teachers Association (the “Association”) grieved the Board’s hiring of EAs for the program on the basis that the duties of the EAs constituted teaching duties and therefore fell within bargaining unit work. The arbitrator dismissed the grievance and ruled that the program was not part of the Board’s instructional program and that the EAs were not performing teaching duties.

## THE READING UPGRADE PROGRAM

The after-school program subject to the grievance is called the Reading Upgrade program. The program is available to students in grades 3 and 4 who are assessed by their classroom teachers as reading below their grade level, as set by provincial standards. The program is offered at the end of the school day and requires a signed agreement from parents whereby the parents commit to ensuring that the child reads 15-20 minutes at home daily. The program is delivered twice weekly, in one-hour sessions, over six weeks. Following completion of the program, the student’s literacy skills are reassessed by the classroom teacher in order to determine the student’s improvement as a result of participation in the program.

The program is a web-based computerized program consisting of 50 modules. Participating students sit at computers and wear headphones. Each module begins with a video, followed by a literacy lesson in which the student is presented with prompts or questions. If the student answers the questions correctly, he or she progresses to the next module. In addition to the after-school component, students participating in the program are provided with 20 minutes of computer time during the day, in the classroom working with a tutor. This additional computer time is generally provided during the Independent Reading time, or Independent Work time, that is part of the regular instructional day in the classroom. Students participating in the program are also given books to read at home for the requisite 15-20 minutes.

## EDUCATIONAL ASSISTANT DUTIES IN THE PROGRAM

Evidence at the hearing indicated that an EA’s role in the after-school program was principally that of monitoring the students to ensure that they stay focused on the modules. The computer program was largely self-operating and EAs would intervene if there was a problem with the technology. The EA would generally walk around the room to ensure that students were engaged

in the modules and were not disrupting other students. Generally, if a student was having difficulty progressing through the modules, the supervising EA would report this information to the student's special education resource teacher ("SERT") or the classroom teacher. Similarly, EAs would report to the student's SERT the progress each student was making in the program. Although there was a portion of the one-hour session allocated to one-on-one time between an EA and a student, this time was primarily for the student to choose a book to take home.

## **THE GRIEVANCE**

The Association grieved the hiring of EAs to staff the program, claiming that by doing so the Employer was in violation of the collective agreement and the *Education Act*. The Association argued that the "tutoring work" of the EAs in the program was instructional in nature and was therefore exclusively the work of teachers. In the Association's view, it was clear that an EA working in the program was responsible for managing, supervising, and ensuring order, in the class. EAs would interact with the students to the extent necessary to keep them on task. EAs would also give the students materials to take home, including books—the selection of which EAs would influence through assessment of the student's reading ability.

The Association also argued that the Reading Upgrade program was an extension of the instructional day, even though its delivery to students was at the end of the regular day. Since it is a teacher's duty to teach the instructional program of a school board, the Employer was obliged to have posted the program's positions for teachers.

## **BEFORE THE ARBITRATOR**

The arbitrator set out the key issue in the grievance as follows:

The issue to be determined in this award, is whether or not the Employer improperly failed to assign duties in the Reading Upgrade tutorial program to teachers in the OECTA bargaining unit. I find the merits of the grievance, on the evidence and submissions before me, require determination of whether or not the work performed by EAs in the Reading Upgrade program is work that is to be performed by certified teachers (there being no issue that members of the OECTA bargaining unit are certified teachers) and not to be performed by non-certified teachers. This determination requires close examination of what constitutes the work of a certified teacher.

The arbitrator went on to closely examine the provisions of the *Education Act* and the Regulations

that prescribe the instructional and supervisory work of a certified teacher.

## **INSTRUCTIONAL AND SUPERVISORY DUTIES OF CERTIFIED TEACHERS**

In terms of the instructional program offered to students, the arbitrator found that a certified teacher's duties and responsibilities include the following:

- selecting curriculum materials to devise a lesson;
- deciding on the methods to be used to evaluate the efficacy of the curriculum materials for the lesson;
- deciding on the method to be used to evaluate or assess students' learning or progress that is intended to occur;
- planning the delivery of the lesson, including:
  - the time for the lesson
  - the activities to be performed by the students
  - the materials to be used by the students
- delivering the lesson to the students;
- evaluating or assessing the efficacy of the lesson, and the learning or progress of the students as a result of the lesson; and
- recording and reporting on the students' efforts and progress relative to the lesson.

In terms of the supervision of a lesson, the arbitrator found that a certified teacher's duties include:

- explaining the lesson content and students' activities to the students;
- directing students' activities, including on a one-to-one basis;
- responding to students' questions or issues concerning their activities and lesson materials;
- monitoring the students' efforts;
- managing the time for the lesson; and
- maintaining discipline in the classroom.

Having set out the instructional and supervisory duties of certified teachers, the arbitrator went on to compare these duties with those required of EAs in the Reading Upgrade program. The arbitrator found that the instructional duties in the Reading Upgrade program did not include:

- selection of curriculum materials;
- evaluation or assessment of curriculum materials;
- decision-making in regard to the method of evaluation or assessment of the students' performance for each module;
- planning of the delivery of the lesson, including the time spent by a student using the program; or
- decision-making related to the program materials.

Based on the lack of decision-making, and the lack of assessment of a student's progress, the arbitrator found that the limited instructional duties fell well-short of being the exclusive work of the bargaining unit.

In terms of the supervisory duties required in the Reading Upgrade program, the arbitrator made the following findings:

- there is no explaining of the lesson content and activities to be performed by the student;
- the time to complete a module is regulated by the program;
- there can be instances of responding to students' questions or issues with program content or technology;
- there is the requirement to maintain individual and classroom discipline; and
- interacting with students on a one-on-one basis is optional.

The arbitrator went on to find that the limited supervisory duties of an EA in the program fell within the general duties and responsibilities of an EA, and were not the exclusive duties performed by teachers. The arbitrator summarized his findings as follows:

[...] I find the tutorial work associated with the Reading Upgrade program is not the usual or typical instructional work performed by certified teachers in the bargaining unit. I find the supervisory work performed by EAs in the Reading Upgrade program is not outside the scope of their usual or regular duties.

## **DID THE READING UPGRADE PROGRAM EXTEND THE INSTRUCTIONAL PROGRAM?**

The arbitrator next considered the Association's argument that the Reading Upgrade program extended the Employer's instructional program. Since it is a teacher's duty to teach the instructional program of a school board, the Association argued that the Employer was obliged to have posted the program's positions for teachers.

The arbitrator found that the instructional program of a school board was "the program which a school board has in place for all of its students." The Reading Upgrade program, however, is scheduled to begin after the end of the school day. The arbitrator stated:

Therefore, by definition, that program is not part of the Employer's instructional program. [...] As previously indicated, in this respect, a teacher is responsible for implementing the

instructional program which a school board mandatorily provides to its students. That is, a teacher's duty is to teach the instructional program of a school board. Thus...the teacher's duty to teach ends with the termination of the instructional program on each school day.

The arbitrator found that the Reading Upgrade program did not extend the instructional program offered by the Employer, and dismissed the grievance.

### **In Our View**

An interesting aspect of the dispute is the fact that the Board originally invited the Grade 4 and Grade 3 teachers to attend the in-service session for the Reading Upgrade program. Although these teachers chose not to participate in the program, the Association claimed that this evidence supported the contention that the work involved in the Reading Upgrade program is of the sort performed by teachers. The arbitrator disagreed, and in fact relied on the teachers' choice to not participate in the program as evidence that the obligation to teach ended with the end of the school day. This in turn supported the arbitrator's finding that the program did not extend the instructional program offered by the School Board.

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