

Human Rights Tribunal of Ontario dismisses special needs student's discrimination claim

Date : June 9, 2011

The *Ontario Education Act* (the "Act") recognizes that students with special needs will not receive equal educational services unless appropriate accommodations are made. The Act requires school boards to accommodate such students by providing special education programs that aim at identifying, and placing, the students with special needs. The Human Rights Tribunal of Ontario recently considered whether the Ottawa Catholic School Board (the "School Board") discriminated against a student by failing to appropriately accommodate her special needs.

In *E.P. v. Ottawa Catholic School Board* (April 2011) the Tribunal dismissed the application on the basis that the School Board implemented appropriate accommodations. Emond Harnden's Paul Marshall successfully represented the School Board at the hearing before the Tribunal.

The applicant E.P., an elementary student entering Grade 4 at the relevant time, was diagnosed with mild conductive hearing loss, tinnitus, and a Central Auditory Processing Disorder (CAPD). These resulted in difficulties in selective attention, auditory closure and short-term auditory memory. In 2006 a psycho-education assessment from a psychologist retained by E.P.'s family indicated that E.P. had a learning disability, but also that she had scored in the gifted range in one area. The School Board's criteria for identifying a student as gifted required a score in the 96th percentile in verbal comprehension, and a score in the 93rd percentile in perceptual reasoning. E.P. met the score for perceptual reasoning, but not for verbal comprehension. The School Board recognized that the applicant's verbal comprehension score might have been affected by her learning disability. The School Board therefore excluded that score and identified her as gifted.

In June 2006 an Identification Placement and Review Committee ("IPRC") was held. The applicant was identified as having multiple exceptionalities. She was considered both learning-disabled and gifted. The IPRC recommended that the applicant be placed in a regular classroom with "Withdrawal Assistance". The Withdrawal Assistance meant that the applicant would be removed from the regular classroom to spend one day a week at the Program for Gifted Learners at a different school.

When the applicant entered Grade 4 in the fall of 2006, the vice-principal of the school and the applicant's mother consulted in the development of an Individual Education Plan (IEP) for the applicant. There were numerous accommodations that were, for the most part, unchanged for Grade 5.

In 2007 the applicant's mother filed a complaint with the Ontario Human Rights Commission alleging that the School Board failed to appropriately accommodate E.P. in Grades 4 and 5. The

issue before the Tribunal was whether the applicant received appropriate accommodation.

BEFORE THE HUMAN RIGHTS TRIBUNAL

The Tribunal relied on its own decision in *Schafer v. Toronto District School Board* (2010) to frame the scope of its inquiry (see: "[Human Rights Tribunal rules that it is not an avenue to appeal decisions by Special Education Tribunal](#)"). Readers of Focus might recall the Schafer decision in which the Tribunal unequivocally stated that its role is not to ensure compliance with the *Education Act*, but to determine whether there is discrimination under the *Human Rights Code*:

However, it is not the role of this Tribunal to oversee the implementation of the *Education Act*. Whether or not a school board strictly follows the procedures to arrange IPRCs or prepare IEPs is not for the Tribunal to determine. So long as there are steps taken to assess the child's needs and prepare accommodation, 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. The issue is not whether the accommodations implemented are what the student or parent wanted, whether they were ideal accommodations, or whether other accommodations would have been equally appropriate. The simple question is this: did the school board implement accommodations (generally, but not necessarily as recommended by the IPRC or IEP) that met the child's special needs?

Having set out the scope of its jurisdiction, the Tribunal then considered the applicant's arguments. The applicant asserted that the School Board failed in its obligation to accommodate her special needs in a number of ways. These included the failures to:

- provide a lower ratio of students to teacher in the classroom;
- provide an educational assistant;
- conduct frequent assessments of the applicant;
- provide a teacher qualified in special needs student training; and
- provide an adequate gifted program.

Much of the applicant's case was based on her mother's testimony. This testimony was often in direct conflict with the testimony of the teachers and principals of the School Board. In assessing the credibility of the various witnesses, the Tribunal stated:

The applicant, a child, understandably did not testify. The applicant's mother was not in the classroom to witness the implementation of the accommodations, and the evidence I heard about the alleged failure was necessarily second hand ... based on discussions with her daughter. It is necessarily less reliable than the direct evidence from the teachers.

I prefer the direct evidence of the teachers who testified. Their evidence was given in a straightforward manner. While they naturally had the tug of self-interest to defend the quality of their actions, they were not named as personal a respondent [sic], which lessens their self-interest. The applicant's mother on the other hand was motivated to demonstrate the inadequacy of the School Board's efforts. I prefer the evidence of the teachers and principals...

The Tribunal acknowledged that it did not hear from every teacher who taught the applicant in Grades 4 and 5. However the teachers who testified had all reviewed the applicant's Ontario Student Record and the IEP from the previous year. Although the teachers might not have had special training in the applicant's particular combination of needs, the Tribunal was satisfied that they understood, and were able to implement, the accommodations set out in the IEP.

The Tribunal also rejected the applicant's assertion that the School Board failed to accommodate her by not providing a smaller class size and an educational assistant. The Tribunal noted that these were recommendations from a private psychologist that were not included in the applicant's IEP. Furthermore, a special education consultant testified that she "didn't know of a psychological assessment that didn't recommend a smaller class size and an educational assistant."

The Tribunal found this to be indicative that the recommendation lacked "any recognition of the reality of School Board budgets." In the words of the Tribunal:

In my view, this recommendation, that a child with a gifted profile and a learning disability, who was consistently meeting the provincial guideline standards, required an education assistant, lacks any recognition of the real world situation of public education. I am satisfied that the applicant's learning needs did not require a smaller classroom or educational assistant. This is not to say that she, or any child, would not benefit from these recommendations. However, they were not required to permit her to understand the curriculum. I note that the IEP did not identify the necessity for an educational assistant.

The Tribunal concluded that the accommodations in the applicant's IEP were generally implemented by the teachers and the School Board. It dismissed the application.

In Our View

This decision is consistent with the Tribunal's ruling in *Schafer* that we referred to above. The evidence clearly demonstrated that the School Board took steps to assess the applicant's needs and to prepare appropriate accommodations. This met the procedural standard of the duty to accommodate. Similarly the IEP provided for the various accommodations was generally implemented, thereby satisfying the School Board's substantive duty to accommodate the applicant's special needs. The fact that the accommodations were not what the applicant's mother might have preferred was not relevant to the question of whether there was discrimination under the *Code*.

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