

## **Ontario Divisional Court grants exceptional pupil's judicial review application for special damages to cover the costs of private schooling**

**Date :** May 11, 2017

In *L.B. v. Toronto District School Board et al.* (March, 2017), the Ontario Divisional Court recently considered an exceptional pupil's judicial review application of a remedial decision of the Human Rights Tribunal of Ontario (and confirmed in a reconsideration decision). In its decision, the Tribunal found that the Toronto District School Board ("School Board") had discriminated against the Applicant, L.B., an exceptional pupil, and awarded general damages in the amount of \$35,000 as monetary compensation for injury to his dignity, feelings, and self-respect. However, the Tribunal denied the Applicant's request for special damages to cover the costs of private schooling following his mother's decision to transfer him from the public school system to a private boarding school. The Applicant requested that the Tribunal's decision denying the special damages be quashed and that the School Board be required to pay L.B. special damages to compensate him for the tuition and all other costs for his private school education from April 2013 when he was in Grade 9 to the end of his high school education.

The focus of the application before the Tribunal was the time period from September 2012 to April 2013, when L.B. was 14 years old and a student in Grade 9 at a large, collegiate institute operated by the School Board. Prior to this time, the Applicant had been diagnosed with multiple disabilities, including attention deficit hyperactivity disorder, learning disabilities, and mental health disabilities. The Tribunal found that the School Board did not accommodate the Applicant to the point of undue hardship during the 7 month period from September 2012 to April 2013. He was not seen by any professional staff; he did not have access to all of the supports included in his IEP and his mother was not informed of any potential alternatives to removing him from the collegiate to meet his needs. As a result, L.B.'s mother made the decision to remove him from the school and enrolled him in a private boarding school. Because of this discrimination, the Tribunal awarded general damages of \$35,000. However, the Tribunal denied the Applicant's request for special damages covering the costs of L.B.'s private school education from April 2013 to the end of his high school education. The Tribunal held that the option of private schooling was not the only option available to the Applicant to meet his needs.

The Divisional Court reiterated that the remedy of special damages, and specifically the cost of private school education, was recognized by the Supreme Court of Canada in *Moore v. British Columbia (Education)* (2012) where there was a complete refusal by the school board to provide the necessary accommodation services. In this case, however, the School Board did not abandon L.B., although there was a period of time in 2012-2013 when the services were not forthcoming. It was reasonable for the Tribunal to distinguish *Moore* on this basis. Moreover, the Court found that it was reasonable for the Tribunal to conclude that in dealing with a child's education, particularly

one with special needs, accommodation is multi-party process. On the one hand, a school board should do all that is within its legislative power to accommodate a student with disabilities to access public education. On the other hand, a parent should not deprive a school board of that opportunity by resorting to a private school education and expect to recover the full costs of doing so. It was also reasonable for the Tribunal to find that there was some obligation on the part of the Applicant's mother, after placing L.B. in a private school, to inquire during her child's education, whether the School Board was in a position to deliver the necessary services. Since L.B.'s mother did not engage with the School Board any further, and provide it with that opportunity after she removed him from the public school system in April 2013, it was not unreasonable to deny her the full costs of a multi-year private school education.

However, the Divisional Court noted that the Tribunal did find that there was a total failure on the part of the School Board to provide support throughout L.B.'s Grade 9 year, notwithstanding that his mother made every effort from the onset of the school year in September 2012 and throughout, to obtain the services that the School Board was capable of providing. In these circumstances, the Court found that one would reasonably expect a parent to act in the best interests of his or her child and L.B.'s mother did just that in enrolling him in a private school. The Court consequently ruled that it was unreasonable for the Tribunal, in such circumstances, to deprive the Applicant's mother of obtaining damages for the costs associated with the private schooling for the balance of the 2012-2013 school year. Therefore, the application for judicial review was granted to the extent that L.B. was entitled to special damages in respect to the Grade 9 year. The matter was remitted to the Tribunal for the purposes of assessing the quantum of the costs associated with the enrollment of the Applicant in private school for the balance of the 2012-2013 school year.

We will continue to monitor this case and will keep readers informed of future developments.

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