

Tribunal Finds That School Boards Are Not Required to Give Parents “Absolute Power” to Make Decisions About Education

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On December 29, 2017, the Human Rights Tribunal of Ontario ("HRTTO") released its decision in *U.M. v York Region District School Board*. In this case, the HRTTO addressed two applications against a school board in which a parent alleged discrimination and failure to accommodate his children's respective disabilities under Ontario's *Human Rights Code* (the "Code").

The Tribunal found that the school board had offered reasonable and appropriate accommodations to the students, even though their father clearly did not agree with many of the accommodation decisions. Further, the Tribunal made a number of statements confirming that parents do not have the "absolute power" or "control" to make all decisions about education, nor are school boards required to implement wishes or preferred choices about accommodation.

Background

The two human rights applications were filed by W.P.M., the father and Litigation Guardian for U.M., Grades Two and Three, and M.M, Senior Kindergarten, (the "Applicants"). The Applicants had both been diagnosed with Autism Spectrum Disorder ("ASD"). Based on the definition of "Disability" in section 10(1) of the Code, there was no dispute between the parties regarding ASD's classification as a disability. Therefore, the Applicants had a right under the Code to equal treatment with respect to educational services, along with accommodation of their disability to the point of undue hardship.

The father alleged that the York Region District School Board (the "Board") did not accommodate the Applicants to the point of undue hardship. Specifically, the Tribunal addressed the following allegations:

- U.M.'s exclusion from school between January and June 2014;
- The contravention of parental wishes, awareness and rights, regarding U.M.'s and M.M.'s educational placement in the "community class";
- The initial exclusion of M.M. from the summer camp program offered by the school; and

- The respondent ignoring U.M.'s and M.M.'s educational needs.

After sixteen days of hearings, the Tribunal issued its decision to dismiss the Applications.

Tribunal Applies "Meaningful Access to Education" Test

The Tribunal applied the test for discrimination in the provision of educational services set out in *Moore v. British Columbia (Education)*, 2012 SCC 61 ("*Moore*"). In *Moore*, the Court held that to demonstrate discrimination, applicants must show:

- that they have a characteristic protected from discrimination;
- that they have experienced an adverse impact with respect to their education, *i.e.*, that they have been denied a meaningful access to an education; and
- that the protected characteristic was a factor in the adverse impact.

The Court in *Moore* concluded that special education is not the service in and of itself, rather it is primarily the means by which certain students get meaningful access to the general education services that are available to all students.

The Tribunal was asked in this case to decide that the Board had failed to provide "meaningful access" because it did not implement all of W.P.M.'s wishes nor did the Board grant him absolute power over how his children should be educated. W.P.M.'s allegations ranged from not allowing him to stand outside the classroom, to his desire that the children not be withdrawn from the regular classroom. The Tribunal declined to make this conclusion, stating as follows:

...While the *Education Act* and the Regulations related to it acknowledge the importance and relevance of considering parental preferences and encourages communication with parents before implementing certain decisions, the legislation does not give parents the absolute power to make all decisions about the education of their children within the public education system, especially in the areas of curriculum and other related aspects of programming, such as teaching methodology.

Board's evidence demonstrated students were not denied "meaningful access"

The Tribunal's decision contains a detailed review of the allegations and clear statements about why there was no discrimination under the Code in each instance. To begin, the Tribunal decided that U.M. was not excluded from school at any time. W.P.M. had agreed to a gradual transition from his full-time autism therapy program to full-time attendance at school, and there was no factual basis to conclude that U.M. was denied meaningful access to education due to his exclusion.

Similarly, the Tribunal concluded that M.M. was not excluded from attending the Board's summer camp program and that she had the support of an Educational Assistant ("EA")

on a one-to-one basis. The Tribunal found that there were no grounds for concluding that M.M. had experienced discrimination.

The Tribunal stated that the allegation that the Board had limited M.M.'s attendance had to do with one specific day where there was no one-to-one EA support for M.M. during recess and her father had to take her home. The Tribunal decided that even if the allegations were true, a school board is required to offer reasonable and appropriate accommodation, but not "perfect accommodation" or what the father might deem as the "preferred accommodation". The Tribunal did not accept that the Board had discriminated against M.M. within the meaning of the Code. Furthermore, the Tribunal stated that recess is not an instructional period and that not being able to go outside for recess on one day is not a denial of meaningful access to education.

W.P.M. had alleged that the Board contravened his parental wishes, awareness, and rights by placing U.M. and M.M. in a "community class", which denied them meaningful access to education. The Tribunal reviewed the evidence, and determined that the school had been building a self-contained autism class. The teacher who would eventually teach in the autism class was working with U.M. and M.M., along with two EA's, outside their regular classroom. While the Tribunal agreed with W.P.M. that this situation amounted to withdrawal from a regular class, which was not in line with the Identification, Placement and Review Committee ("IPRC") placement of regular class with indirect support, the Tribunal did not agree that the Board had denied the students meaningful access to education.

School board personnel gave evidence that U.M. and M.M. were doing well with the level of support from the autism teacher, and from their perspective this was exactly the meaningful access that U.M. and M.M. needed. The Tribunal ruled that the Board was acting in the best interest of the children, and that the children had a meaningful access to education in accordance with their strengths and needs. U.M. and M.M. were thriving and benefiting from the community class. Varying the IPRC placement before implementing an actual change of placement did not amount to a breach of the Code. Furthermore, the Tribunal is not charged with ensuring full compliance with the IPRC process.

Commentary

Ultimately, the evidence heard by the Tribunal did not support the W.P.M.'s allegation that his children were denied access to a meaningful education. Rather, the Tribunal held that the Board cooperated with W.P.M. and accommodated his requests by varying the student's attendance; changing their placement from special education classes to regular classes; substituting the EAs working with the children; providing EA support during the summer camp program; and by allowing W.P.M. a significant level of involvement and even control, beyond what the relevant legislation normally calls for and which most parents expect and receive.

The Tribunal concluded that the Board provided reasonable and appropriate educational services to U.M. and M.M., even though their father had different ideas and wishes about the education he preferred for his children.

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