

# Tribunal Ruled that School Board Did Not Discriminate Against Student with ASD

October 22, 2019

A recent decision by the Human Rights Tribunal of Ontario (HRTTO or Tribunal) confirms that while educators have a duty to accommodate special-needs students for the provision of meaningful access to education, guardians must also co-operate with schools in the accommodation process, an obligation particularly relevant where violent behaviour has been present in the classroom.

Educators have long been working towards a model of inclusive education, striving to create classrooms that integrate rather than segregate students with special needs. Faced with a rise in the number of children diagnosed with disabilities linked to behavioural problems, however, schools and their staff are finding it increasingly difficult to discern the limits of the accommodation process – a process often punctuated with violent incidents inside the classroom and strained relations outside it.

In *Kahn v. Upper Grand District School Board*, released on August 8, 2019, the HRTTO held that the Upper Grand District School Board (the UGDSB or Board) had fulfilled their duty under the Human Rights Code (Code) to accommodate a child diagnosed with autistic spectrum disorder and a learning disability. The decision reminds educators and guardians alike of the reciprocal obligations of both schools and parents throughout the accommodation process, helping to delineate the boundaries of the reasonable accommodation of students who behave violently in the classroom.

## Background

The *Khan* decision revolves around Grayson Khan, then a grade two student diagnosed with autistic spectrum disorder, who was suspended and ultimately expelled following a violent episode that resulted in one teacher's concussion and the injury of several of his classmates.

Observing the timeline leading up to the case, Grayson's educational history seems to have been marked with problematic behaviour from the outset. Running away from school, acting out in disruptive "melt-downs", and having difficulty maintaining attention throughout junior and senior kindergarten, Grayson was assessed by an occupational therapist in November 2016 and by two psychologists in August 2017, eventually being

diagnosed with autistic spectrum disorder and a learning disability just before the commencement of his grade one year.

Both prior to and following this diagnosis, Grayson's school was actively engaged in supporting the student's special needs. Implementing every recommendation suggested in the occupational therapist's and psychologists' assessment reports, the school modified the curriculum to create an Individual Education Plan (IEP) for Grayson, purchased an MP3 player for his personal use, made a computer and iPad available in the classroom, and collaborated with other private and community organizations who were also involved in the student's development. The school also ensured that educational assistants (EAs) worked one-on-one with Grayson on a daily basis. While Grayson continued to exhibit "serious behavioural issues" throughout his grade one year, these supportive measures helped the Board to effectively manage Grayson's behaviour, contributing to his successful completion of grade one.

Despite this early success, however, there were some challenges in Grayson's second-grade year. In summer 2018, Grayson's mother observed an increase in her son's aggressive behaviour, reporting to the school's principal that Grayson had begun to hit other children "randomly". Although Grayson's first week of school went well, his violent behaviour drastically increased thereafter. Incidents of hitting, swearing and threatening his teachers and fellow classmates became a regular occurrence. On one occasion, Grayson stood on a table and threw markers at an EA. On another, he cut off the head of the class mascot toy, yelling that he would kill it "like he [was] going to kill everyone else." Twice, he threw his metal water bottle at staff, soaking them with water as they stepped in to protect other students.

Grayson frequently threatened to hurt or kill his classmates and school staff, and engaged in physical behaviours, including: throwing a grapefruit-sized rock at his teacher, hitting an EA with a large stick, punching his teacher in the groin before punching another student, and attempting to push his EA and another student down a set of stairs. The school held meetings with Grayson's parents and community support providers. An Applied Behaviour Analysis (ABA) Facilitator Support Plan was developed and implemented, and additional EAs were assigned to Grayson such that he had two EAs working with him simultaneously each day. Despite these additional supports, Grayson's behaviour did not improve.

The breaking point occurred on October 22, 2018. That day, after stabbing and hitting an EA and several classmates with a stick as well as smashing a mug in class, Grayson hit another of his EAs in the chin, causing what was later found to be a concussion. Grayson's class was evacuated for safety reasons, and the EA took a medical leave.

While Grayson was sent home with his parents after the concussion incident on October 22, notably, he was not immediately suspended nor expelled. Instead, the next day the school organized a group meeting to develop a Student Centered Intervention Plan that would become known as the "Loop of School Plan." Under this plan, Grayson would initially work one-on-one with an EA in a quiet space, and would gradually be reintroduced into the classroom in short intervals that would increase in length as his behaviour improved. Another of the school's recommendations was that Grayson be taught in English, as it was thought that his behaviour could have been triggered in part by his inability to understand his French-language instruction within the French immersion program.

Grayson's mother rejected both the Loop of School Plan and the instruction in English. Ms. Khan requested that the school either admit Grayson to his normal classroom, or issue a written exclusion or notice of suspension. During discussions concerning the possibility that Grayson be admitted back to class, Ms. Khan refused to agree to pick Grayson up should he become severely dysregulated again. Unable to allow Grayson back to his normal class in light of the severity of his last episode and Ms. Kahn's refusal to assist the school should he act out again, on November 1, 2018 the school issued a notice of suspension retroactive to October 23, 2018.

Demonstrating a continued effort to find a resolution, the Board offered three options to ensure Grayson's access to education during the suspension. One of these options was a home instruction plan paid for by the Board, which the Khans accepted for a time. Communications broke down, however, when Ms. Khan refused to attend a Collaborative Case Conference organized by the Board in mid-November.

Following this refusal, on November 20, 2018 the Board's Student Discipline Committee recommended Grayson's expulsion from the French immersion school. Grayson had the option to attend his English-instruction home school during this time. Grayson's mother did not enrol Grayson at his home school, and she refused to consider any accommodation option that did not provide tier three ABA therapy.

The communication from Grayson's mother eventually came through her counsel, and she filed an application alleging discrimination at the HRTO in December 2018. In the application, Ms. Khan alleged that the Board had discriminated against Grayson on the basis of his disability, denying her son meaningful access to education by failing to provide reasonable accommodation of his autistic spectrum disorder and learning disability.

## Tribunal Decision and Analysis

In its decision, the Tribunal found that the Board had not discriminated against the student. Rather, the Tribunal found that the Board had endeavoured to provide the student with meaningful access to education both leading up to and following his expulsion, thus satisfying its duty to accommodate his disabilities.

To come to this conclusion, the Tribunal applied the test established in *Moore v. British Columbia*, 2012 SCC 61, in which the Supreme Court of Canada set out the legal analysis for determining whether there has been discrimination in education cases. The test is comprised of a two-part analysis:

1. At the first stage of analysis, the applicant alleging the discrimination must establish that he or she was denied meaningful access to education on the basis of a protected ground, and thus that a *prima facie* case of discrimination exists.
2. If the applicant is able to do so, the court proceeds to the second stage of analysis at which the respondent must prove that the denial was justified under the Code.

Applying the first branch of the *Moore* test to the circumstances of Khan's case, the Tribunal found that Khan had established a *prima facie* case of discrimination. Although it was clear that the supports in place for Grayson provided him meaningful access to

education from kindergarten to mid-September of his grade two year, the Tribunal conceded that from that point on, even if a result of Grayson's extreme dysregulation, he was not able to attend class and therefore did not meaningfully access education. Notably, the Tribunal was careful to note that this preliminary conclusion was not caused by the Board's failure to provide ABA in the classroom. While the Tribunal acknowledged that the Ministry of Education's Policy/Program Memorandum No. 140 requires that "relevant methods of ABA" be incorporated into the programs of students with autistic spectrum disorder "wherever appropriate," it explicitly rejected the assertion that the student required tier 3 ABA to access education.

In applying the second branch of the *Moore* test, the Tribunal found that the Board had fulfilled its duty to accommodate Grayson to the point of undue hardship. To reach this conclusion, the Tribunal acknowledged the many timely efforts made by the school in an attempt to provide continued access to education.

Among the factors considered by the Tribunal was the involvement of a Board Certified Behaviour Analyst (BCBA) for the creation of a Behaviour Plan, the lengthy meetings conducted by school and Board staff attempting to ensure continued access to education, and the development of the Loop of School Plan, which the Tribunal specifically found to be a "reasonable accommodation."

The Tribunal also considered that the school had offered three options, including paid home instruction, after Grayson's retroactive suspension on November 1, 2018, noting that the Board had continued to make reasonable efforts to accommodate throughout this lengthy period. Again denying Khan's claim that he required tier 3 ABA to be accommodated, the Tribunal agreed with one expert's assertion that safety issues can preclude the provision of tier three ABA in schools, since ignoring violent behaviour as part of the tier three strategy "would have created a risk of harm to others or to Grayson."

Perhaps one of the most significant factors that the Tribunal weighed in reaching their conclusion was the lack of co-operation, if not hostility, of Grayson's mother throughout the process. Emphasizing that an applicant "has an obligation to co-operate in the accommodation process," the Tribunal specified that this obligation "includes a 'duty to facilitate the implementation' of a proposal for accommodation that is reasonable."

With this duty in mind, the Tribunal then proceeded to examine Ms. Khan's own behaviour in dealing with the Board. The Tribunal found that Ms. Khan's pattern of behaviour was highly problematic. Ms. Khan was verbally abusive toward school staff. She was the only person who did not agree to the Loop of School Plan after her son's suspension, instead insisting that Grayson be either suspended or expelled. Ms. Khan rejected the request that she pick Grayson up if he became too dysregulated for the school to manage, and categorically refused any option made by the school that did not include tier three ABA therapy.

Noting that the circumstances of this case were exceptional and that Grayson's continued presence at the school created "an unacceptable safety risk," the Tribunal concluded that there was no reasonable basis for Ms. Khan's actions, holding that she herself had "rejected the accommodation which might have allowed [Grayson] to return safely."

Reiterating that “parents do not have the right to dictate the accommodations which their children will be provided with access to education,” the Tribunal ultimately found that Ms. Khan “had failed in her obligation to co-operate in the accommodation process.” The Tribunal therefore concluded that in these exceptional circumstances, accommodation without undue hardship at the French immersion school could no longer be provided by the Board.

## Takeaways for School Boards

The *Khan* decision represents an important precedent for school boards and their students, and is significant in three main ways. First, the decision affirms the accommodation measures made by one school, presenting good examples of proactive and effective actions that a school board may take in attempting to accommodate students under the Code. Second, the decision reiterates that parents do not have the right to dictate which accommodation their children will be provided with, reaffirming once again that school boards are not obligated to provide ABA therapy as part of the accommodation process.<sup>1</sup> Third, the *Khan* decision confirms the shared obligations between schools and parents in the accommodation of students with special needs, the key lesson being that while boards must accommodate students to the point of undue hardship, parents must also co-operate with them in the accommodation process. This lesson not only helps to discern the boundaries of reasonable accommodation but, most importantly, it encourages a combined effort between school boards and parents that puts the interests of students first.

<sup>1</sup> For more on this area of law, including the finding that accommodation of ASD does not require Boards to provide ABA/IBI therapy, see [Madeeha Hashmi’s article in the Summer 2019 edition of this Newsletter](#).

By

[Neva Lyn Kew](#)

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#### Calgary

Centennial Place, East Tower  
520 3rd Avenue S.W.  
Calgary, AB, Canada  
T2P 0R3

T 403.232.9500  
F 403.266.1395

#### Ottawa

World Exchange Plaza  
100 Queen Street  
Ottawa, ON, Canada  
K1P 1J9

T 613.237.5160  
F 613.230.8842

#### Vancouver

1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC, Canada  
V7X 1T2

T 604.687.5744  
F 604.687.1415

#### Montréal

1000 De La Gauchetière Street West  
Suite 900  
Montréal, QC, Canada  
H3B 5H4

T 514.954.2555  
F 514.879.9015

#### Toronto

Bay Adelaide Centre, East Tower  
22 Adelaide Street West  
Toronto, ON, Canada  
M5H 4E3

T 416.367.6000  
F 416.367.6749

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