No Breaks Without Replacements For Designated Early Childhood Educators

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In *Re Windsor-Essex Catholic District School Board and OECTA,* 117 CLAS 246, Arbitrator George Surdykowski allowed an OECTA grievance relating to the Board's practice of scheduling breaks for Early Childhood Educators ("ECEs") during the instructional day. In his award, released on January 17, 2014, Arbitrator Surdykowski interpreted provisions of the *Education Act* and associated Ministry of Education materials that relate to Full-Day Early Learning. He concluded that ECEs may not be scheduled to take breaks during the instructional day "unless appropriate and permissible replacement arrangements are made".

Factual Background

At certain schools in the Windsor-Essex Catholic District School Board (the "Board"), ECEs had breaks scheduled such that they were absent from the classroom during instructional time. There was no replacement ECE provided. When all these breaks were aggregated, the Board's kindergarten and junior kindergarten teachers were obliged to provide a total of 44 minutes of instruction each day (or 13% of the instructional day) without the involvement of an ECE.

The *Education Act* imposes a duty on school boards to designate and appoint ECEs to its full-day junior kindergartens and kindergartens. It also stipulates that an ECE appointed to such a position is in addition to the teacher assigned to teach that class.

Further, the Act provides that the Minister of Education may require school boards to comply with policies and guidelines governing all aspects of the operation of junior kindergarten and kindergarten, including appointment of ECEs. In 2009 and 2010, the Ministry issued a number of documents relating to the Full-Day Early Learning - Kindergarten Program. These materials repeated numerous times that the learning team comprises a teacher and an ECE; that teachers and ECEs are to work together throughout the school day; that teachers and ECEs are to jointly deliver daily classroom activities; and that average child-adult ratios are to be 13:1.

Submissions of the Parties

Both OECTA and the Board framed this issue as one of statutory interpretation.

OECTA referred to the provisions of the *Education Act* and associated Ministry publications to argue that the Early Learning Program ("ELP") requires a full-day program delivered by a team of a teacher and an ECE, who work together in a collaborative and complementary manner. OECTA submitted that the Legislature's intention was clear, and that a Board cannot schedule or permit ECEs to be absent from the class during any part of the regularly scheduled instructional day. Just as a teacher cannot be permitted to be absent and leave the ECE to deliver the ELP alone, OECTA argued, the ECE cannot leave the teacher to manage the classroom alone. While ECEs are permitted to take breaks, a qualified replacement must cover their classroom absences.

The Board argued that the statutory provisions should be given their plain and ordinary meaning, and that the Ministry documents are extrinsic evidence that should not be used as an interpretive aid. The Board argued that the plain meaning of the legislation does not include "joined at the hip" classroom instruction by teachers and ECEs. Instead, the Board submitted, ECEs are not required to be in the classroom for the entire day, they are entitled to take breaks, and the teacher and ECE do not have to be actively engaged together for every minute of every instructional day.

The Arbitrator's Decision

Arbitrator Surdykowski framed his analysis and decision with reference to Driedger's modern rule of statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Under this approach, extrinsic evidence – that is, oral or documentary evidence that is not contained in the body or incorporated into the legislation in issue – may only be referred to if there is genuine ambiguity in the relevant legislation.

Arbitrator Surdykowski found that there was no such ambiguity, but that certain of the Ministry documents were not extrinsic evidence. Because the *Education Act* provides that the Minister may require school boards to comply with policies and guidelines governing appointment of ECEs, the Ministry's ELP document and associated memorandum were incorporated into the legislation and were properly referred to as interpretive aids. There were two other documents raised in argument that the arbitrator found were not covered by this provision, and were treated as extrinsic evidence.

Consulting all the relevant legislative provisions and Ministry publications, Arbitrator Surdykowski concluded that there must be an ECE present at all instructional times. It would be impossible for an ECE to provide education or to observe student development, as required by the *Education Act,* if he or she were not in the classroom. Further, the Ministry's ELP documents require teachers and ECEs to work side by side to deliver the program, which cannot be done if the teacher and the ECE are "not actually side by side and actually working (i.e. not on a break) together in the

classroom." Arbitrator Surdykowski equated the duties of teachers to those of ECEs, stating:

As in the case of teachers, there is nothing in the legislation or the guidelines which specifically states that an ECE must be in the classroom (or teaching area) with the teacher for every minute of every instructional day. However, it cannot be otherwise.

Arbitrator Surdykowski also stated that even if there were ambiguity in the legislative provisions, reference to the additional, extrinsic Ministry documents would lead him to the same conclusion. Those documents specify that the teacher and the ECE will jointly deliver the ELP, and will both be in the classroom for the full instructional period of the school day for that purpose.

While classrooms are required to have a teacher and an ECE, this does not mean that ECEs cannot take breaks during the day. Rather, ECE breaks cannot be scheduled or taken during instructional time unless appropriate and permissible replacement arrangements are made.

Implications

Because this decision was based on an interpretation of the *Education Act* and Ministry materials rather than a specific collective agreement, its rationale is applicable to every school board in Ontario. This may cause some concern, as many schools will likely need to adjust ECE schedules or hire additional ECEs to cover all classroom absences. Even if ECE breaks are scheduled during non-instructional times, such as recess and lunch, schools will need to find additional supervision for students during those times.

In future decisions on this issue, other arbitrators may choose to interpret the legislative provisions and Ministry documents in a different way. For instance, the Ministry's ELP documents were not specifically identified as "policies and guidelines" as referred to in the *Education Act,* so it may be possible to exclude them from consideration when interpreting the statutory provisions. It may also be possible to ascribe a somewhat less stringent meaning to the *Education Act* provisions that require teachers and ECEs to cooperate and coordinate classroom activities; the words in the legislation may support an interpretation that physical classroom presence is not required.

The Ministry may also choose to revise and clarify relevant legislation if it is unsatisfied with the interpretation and application of this award.

By

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