Application Of School Board's Fresh Start Policy Upheld By Court

September 20, 2018

K.W. v. Toronto Catholic District School Board

In *K.W. v. Toronto Catholic District School Board*, K.W., a Grade 12 student in a school operated by the Toronto Catholic District School Board (the Board), brought an application for judicial review to challenge the decision of the Board to transfer him to a new school at the beginning of the 2017-2018 school year. The Ontario Superior Court of Justice dismissed K.W.'s application and concluded that the transfer was not disciplinary in nature. Rather, the Court held that it was a reasonable exercise of the Board's authority to transfer students.

Background

During the 2016-2017 school year, K.W. was in Grade 11. In April of his Grade 11 school year, K.W. was one of three students involved in an assault of M.V., a Grade 10 student at the same school (School 1). The principal of School 1 was advised by police that the perpetrators, including K.W., were not allowed to return to School 1. K.W. was placed on a 20-day administrative suspension so that the principal could complete an investigation. During the investigation, K.W. admitted that he had pushed and shoved M.V. and taken his glasses and thrown them.

After conducting the investigation, including interviewing M.V. and his mother, the principal of School 1 concluded that allowing K.W. to return would pose a risk to the physical and/or mental well-being of M.V. The principal contacted K.W. by letter advising that the investigation was completed and confirming that the suspension was being reduced to five days in light of K.W.'s insignificant prior disciplinary history. One of the other students involved in the assault was expelled from the Board and the other was expelled from School 1.

In addition, the principal transferred K.W. to another school (School 2), pursuant to the Board's Fresh Start Policy. School 2 was in the same school district and offered the same academic program for K.W.

In the Fresh Start Policy, a "Fresh Start" is defined as follows:

A Fresh Start is generally defined as a non-voluntary or unusual movement of a student to a new school within the school year or at the end of a semester. Fresh Starts can be considered as a response to TCDSB Victim's Rights Policy (S.S. 13), court conditions imposed by the Criminal Justice System for an incident for which the student was not expelled, or other special circumstances as approved by the superintendent of the student's school.

A Fresh Start is not considered disciplinary and it does not appear on the student's Ontario Student Record. The purpose of the policy is to ensure that students feel safe at school, and that those who are subject to a Fresh Start are provided with a successful transition. The policy sets out mechanisms to implement a Fresh Start.

Also relevant to the transfer of K.W. was the Board's Victim's Rights Policy. It applies where a serious incident causes harm, either physical, emotional or psychological, to a student. It requires the school principal to take several steps to ensure the safety and well-being of all students, including separating the victim from those who caused the harm and conducting an investigation. The Victim's Rights Policy includes the following:

7. Whenever a choice must be made as to which of the actual or intended victim, or the student(s) who may have caused the harm, must be transferred, generally (though not always), it will be the student(s) who may have caused harm who will be required to transfer to another school. This transfer is facilitated through the Fresh Start process.

K.W. appealed the transfer. At the appeal hearing, K.W. spoke of the impact of the transfer, particularly on his athletics career and the application of the Ontario Federation of Secondary School Athletic Associations Transfer Policy (the Transfer Policy). The Transfer Policy prohibits schools from including students on their school team rosters who have transferred from another school within the last 12 months. As a result of the Transfer Policy, K.W. was not permitted to be on sports teams at School 2. At the appeal, K.W. also argued that the decision to transfer him was made because he is black.

In his decision to deny the appeal, the superintendent concluded that he would not permit K.W. to return to School 1 as a result of concerns for M.V.'s well-being. In making this decision, he relied on the Board's Fresh Start Policy, the Victims' Rights Policy, and evidence from the principal. Finally, he concluded that there was no evidence that K.W. was given a Fresh Start because he is black.

The Court's Decision

In his application for judicial review, K.W. raised three legal issues:

1. Whether the Board lacked jurisdiction to impose a non-voluntary school transfer on a student for discipline purposes pursuant to its Fresh Start Policy;
2. Whether K.W. was denied procedural fairness in the appeal process before the superintendent; and
3. Whether the decision of the superintendent was unreasonable.

K.W. did not advance the argument of racial profiling before the Court, which had been relied on during the appeal before the superintendent.

First, in considering the Board's jurisdiction, the Court reviewed relevant sections of the *Education Act* (the Act) and Policy/Program Memorandum No. 145 (PPM 145). Specifically, the Court relied on subsection 265(1)(m) of the Act, which prescribes the duty of a principal to "refuse to admit to the school or classroom a person whose presence in the school or classroom would, in the principal's judgment, be detrimental to the physical or mental well-being of the pupils". Further, the Court confirmed that PPM 145 contemplates non-disciplinary school transfers to preserve school safety.

The Court concluded as follows:

We see nothing in the Fresh Start Policy that suggests it was designed to impose non-voluntary transfers for disciplinary reasons. There is nothing in it to suggest that its purpose is disciplinary. The Fresh Start Policy is one of the Board's suite of policies that deal with the management of student behaviour and student relations in the classroom and in schools. It is focused on student achievement and the protection of victims, and is consistent with the policies of the Ministry of Education.

Accordingly, the Court concluded that, when read in the context of the Act and PPM 145, the Board had the authority to adopt the Fresh Start Policy as it was intended to promote the safety and well-being of students.

Second, the Court concluded that the Board and the superintendent met its procedural obligations to K.W.–specifically, the superintendent provided K.W., his family, and a community leader the opportunity to present their views with the assistance of a lawyer. The superintendent's task was to gather information from K.W. and the principal and then come to a decision based on the information before him and taking into account relevant policies and legislation.

Third, the Court decided that the decision of the superintendent was within a range of possible, acceptable outcomes, given the facts and the law of the case. K.W.'s argument focused on the harshness of the transfer, given the impact on K.W.'s life and athletic aspirations. However, the superintendent had to weigh the impact on M.V., as well as K.W. He had concerns about both the physical and psychological well-being of M.V. if K.W. was present in the school.

The Court affirmed that "M.V. was entitled to a safe and comfortable environment in which to pursue his education". The Court concluded that the superintendent reasonably exercised his authority.

Comment

The decision in *K.W. v. Toronto Catholic District School Board* confirms the jurisdiction of school boards to implement Fresh Start policies with the goal of ensuring the safety and well-being of students. This is in accordance with school boards' and, in particular, school principals' obligations under the Act and PPM 145 to ensure both the physical and mental safety and well-being of students.

The decision also highlights the importance of providing students and their families with an appeal process for any decisions under Fresh Start policies, as well as underlining certain procedural requirements for school boards to consider, namely that the student should have an opportunity to be heard and provide his/her story. In such

circumstances, the transfer of a student under a Fresh Start Policy is a reasonable exercise of a school board's authority.

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