Tribunal Decides That Accommodation of ASD Does Not Require Boards To Provide ABA/IBI Therapy

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In *J.S. v. Dufferin-Peel Catholic District School Board* (*J.S.*), a decision of the Human Rights Tribunal of Ontario released on September 14, 2018, Adjudicator Michael Gottheil held that the Dufferin-Peel Catholic District School Board (the Board) did not breach the Ontario *Human Rights Code*(the Code) by not providing Applied Behaviour Analysis (ABA)/Intensive Behavioural Intervention (IBI) therapy in the classroom to a child diagnosed with Autism Spectrum Disorder (ASD).

Background

The mother of J.S., a student at one of the Board's schools who was diagnosed with ASD, filed an application in early 2016 claiming that J.S. required ABA/IBI therapy to be delivered in the classroom in order to have meaningful access to education.

When the application was filed, J.S. (the Applicant) was a kindergarten student who was first diagnosed with ASD in March 2015. At the time of his diagnosis, J.S. had already been receiving ABA/IBI therapy through a private provider. The clinical psychologist who initially diagnosed J.S. noted that he had several symptoms associated with ASD and recommended that his parents seek out IBI services from ErinOakKids (a regional agency that determines eligibility for services) and community-based ABA services. Following that diagnosis, at the time that he entered junior kindergarten, J.S. was assessed as "extremely bright" and "ahead of his peers in certain areas, such as reading, language and numeracy skills," with only a few goals that needed to be addressed.

When J.S.' parents contacted ErinOakKids to apply for ABA/IBI therapy, the assessment concluded that he was not eligible because he was at the high-functioning end of the ASD spectrum with mild symptoms, but recommended that J.S. continue with his private therapy, access special education programming at school, as well as other community-based ABA supports. J.S.' mother did not appeal ErinOakKids' decision, knowing that the appeal would likely take several years and that it was unlikely to succeed given J.S.' mild symptoms.

Just prior to the Tribunal hearing, when J.S. was 7 years old, a further evaluation indicated that J.S. had made significant gains in areas where he previously experienced deficits. The evidence also demonstrated that throughout his time at the Board, J.S. had excelled academically. His junior kindergarten, senior kindergarten, and grade one evaluations all showed that J.S. was succeeding in all areas, including the standard curriculum and the base goals in his Individualized Education Plan (IEP), as well as mastering skills related to overcoming his ASD deficits. Although J.S. had received private ABA/IBI therapy outside of school, the Applicant argued that it was necessary for ABA/IBI therapy to be provided in the classroom setting, citing evidence that it is preferable for therapy to be provided in the setting where the skills learned can be implemented.

At the hearing, the Board defended the allegations with the arguments that the Applicant did not require ABA/IBI therapy in order to have meaningful access to education and that ABA/IBI therapy is not an education service school boards are required to provide pursuant to the *Education Act* and the government regulations under which they operate. The Board also highlighted that while it does not provide ABA/IBI therapy, it provides a range of education and special education programs for student with disabilities, including programs that use ABA methodologies. The Board's evidence was intended to prove that it accommodated J.S.' disability to the extent required by the Code.

Analysis and Decision

The Tribunal made its decision based on the test for determining whether discrimination has occurred in the context of provision of education services as set out in the Supreme Court of Canada's decision in *Moore v. British Columbia*, 2012 SCC 61 (*Moore*). The test involves the following two-part analysis: (i) it must be determined whether the applicant has established a *prima facie* case of discrimination and, if so, (ii) the burden shifts to the respondent to establish a justification for breach of the Code.

In this case, the Tribunal concluded that the applicant had failed to establish a *prima facie* case of discrimination. In coming to this conclusion, the Tribunal identified whether the program, supports and other facilities provided by the Board were insufficient or inadequate such that the Applicant was being denied meaningful access to education. The Tribunal provided the following guidance on how this questions should be answered:

"… the Tribunal must make an overall assessment, based on all the evidence of whether an applicant has been given meaningful access to education. This will mean looking at successes and challenges in relative terms, in the context of the overall curriculum. For students with disabilities, this will also mean looking at the range of special education goals set collaboratively by the school and the parents.

In making such an assessment, the Tribunal should be mindful of the Court's comments in *Moore* that because a student does not succeed, does not mean that a school board has failed to provide meaningful access to education." [emphasis added]

Applying the above framework to J.S., the Tribunal found that he only had a few mild ASD related deficits when entering junior kindergarten and was well-equipped to access the rest of the curriculum at or above the level of his peers. There was ample evidence

before the Tribunal demonstrating that the Applicant had performed extremely well in many areas of the curriculum and had made significant strides in the areas of his ASD deficits. Furthermore, the Tribunal held that the Board provided a comprehensive, sophisticated and robust set of programs, including programs specifically designed to address the needs of students with ASD.

The Tribunal also rejected the Applicant's contention that J.S. had only been successful in school due to outside private therapy as a basis for finding the Board had failed to provide meaningful access to education. While it was clear, based on the evidence, that the private therapy had been beneficial and played a role in the gains J.S. made in the area of his ASD Deficits, the Tribunal commented that this evidence did not support the assertion that it was necessary for ABA/IBI therapy to be provided in the classroom setting. The Tribunal noted that simply because a school board does not provide a beneficial program does not mean that it has contravened the Code and also emphasized that school boards are not responsible for providing therapeutic services not required to access education at paragraphs 64 and 68 of the decision:

"In more general terms I do not think that it is sufficient for an applicant to demonstrate that there is a program or treatment that would be beneficial for the Tribunal to find that a respondent school board has violated the *Code*. This would run counter to the principle outlined in *Moore* that school boards should be provided some deference in how they meet their obligation to provide meaningful access to education. It would also put the Tribunal in the position of constantly reviewing public and educational policy options, and implementing changes whenever an applicant was able to demonstrate they would benefit from a particular service or treatment.

Finally, I believe it is important to emphasize that school boards are responsible to provide meaningful access to education. They are not responsible for providing therapeutic services not required to access education, but perhaps needed or of benefit to children or youth." [emphasis added]

Before concluding his reasons, Adjudicator Gottheil noted that his decision is based on the facts of the particular case and that he was not making a finding about any other student applicant who may have their own particular needs and another school board respondent who provided more limited or a different range of supports.

While the Applicant subsequently filed a Request for Reconsideration of Adjudicator Gottheils' decision, this request was denied by the Tribunal in a decision released on January 11, 2019.

Comment

The decision in *J.S.*demonstrates that it is not always necessary for a school board to offer a particular support or service that benefits a student with special needs or a disability in order to satisfy the Code-related obligation to provide meaningful access to education. To decide whether a student has meaningful access to education requires a fact-specific analysis in each case. Having regard to the particular circumstances of the student, school boards must determine whether the supports they have arranged adequately allow a student to progress through the curriculum and also make advancements in special needs areas with reference to specialized education goals set for the student. School boards should use this framework when deciding whether they

must provide a specific support to a student in order to ensure compliance with the Code.

By

Madeeha Hashmi

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BLG Offices

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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