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VANCOUVER CALGARY EDMONTON SASKATOON REGINA LONDON KITCHENER-WATERLOO GUELPH TORONTO VAUGHAN MARKHAM MONTRÉAL



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Morning Recess

September 19, 2019

VANCOUVER CALGARY EDMONTON SASKATOON REGINA LONDON KITCHENER-WATERLOO GUELPH TORONTO VAUGHAN MARKHAM MONTRÉAL

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Kahn

v.

Upper Grand District School Board



Agenda

1. Background
 - Student's school history
 - Interactions between school and parent
 - Impact on school
2. Expulsion Appeal/CFSRB Decision
3. HRTO Decision
4. Implications of Decisions



“Educating Grayson: Are inclusive classrooms failing students?” Globe and Mail, Jan. 5, 2019





Background

- Grayson, represented by litigation guardian (mother)
- Attended French Immersion program since JK
- Diagnosis of ASD, learning disability
- IEP, Behaviour, safety plan
- Grade 2 – increasing incidents of dysregulation, former strategies ineffective
- Elopement - 2 EA's
- Regular classroom evacuations
- yelled, swore, threatened and attacked other students and staff – multiple injuries

- Parent complaints, work refusals, staff transfers



Expulsion

- October 22, 2018 - seriously injured Educational Assistant
- Discipline Committee: Expelled from FI school for physical assault on EA , for which she sought medical treatment:
 - resulted in bruises, contusions and a concussion, and PTSD.
 - Off work for 2 months, returned to part time role outside of classroom.



Proposed Next Steps Rejected

- Meeting with school staff, parent, private ABA provider
- Parent refused any re-entry that did not include FI and Tier 3 ABA
- Proposed “Loop of School” plan involved gradual re-entry into school, with home instruction, but parent refused plan – not willing to attempt unless childcare provided by school.
- Parent stated that she was not willing to pick up Grayson when school called unless Grayson is suspended, 911 has been called, or he is sick.
- Parent stated that if student not allowed at school, he would have to be suspended.
- Principal: Suspension pending investigation of assault on EA
- Discipline Committee: upheld Principal’s recommendation that Grayson expelled from French Immersion school only.



CFSRB

- Parties agreed the student committed the infraction
- Issue was disciplinary response, taking in to account mitigating and other factors
- considered mitigating and other factors in Reg. 472/07
- burden of proof rests with Appellant
- Mitigating: found that student could not control his behavior, or understand consequences
- But – outweighed by “The pupil’s continuing presence in the school does not create an unacceptable risk to the safety of any person” (S.2(3))
- Other factors: expulsion likely to have a positive effect on education, as parent had refused any other school or program but FI, and student needed fresh start.

Decision

- Appeal dismissed - expulsion from FI school upheld.



HRTO Application

- Applicant:
 - Alleged he had been denied meaningful access to education
 - Failure to accommodate disabilities (ASD and Learning Disability)
 - Dysregulation a result of failure to accommodate
- UGDSB:
 - Argued it had fulfilled obligations to accommodate to point of undue hardship, taking into account safety



Parent Conduct

- Multiple incidents of swearing and verbal abuse of staff, often in presence of students, including Grayson
- Accused school of “engaging in a form of psychological manipulation”
- “not one person in that school that ... would not like to see me dismantled 100%.”
- Accused school of lying about supports they were providing

Tribunal found:

- Inconsistencies in litigation guardian’s evidence
- Documents contradicted her oral testimony
- No rational basis for allegations of manipulation
- School staff found to be largely reliable and credible



ABA

- Applicant's family indicated they would not accept any transition plan that did not include the provision of "Tier 3 ABA at school"
- Ministry of Education PPM 140: "school boards must offer students with ASD special education programs and services, including, where appropriate, special education programs using ABA methods"
- Expert witnesses for the Applicant equated Tier 3 ABA to "Comprehensive ABA/IBI."
 - However, respondent expert testified that Tier 3 supports provided in classroom setting are not ABA therapy; comprehensive ABA/IBI takes place outside classroom setting
- Applicant attended Monarch house, a clinical setting
 - Lower dysregulation rates at Monarch House
 - Expert witness for respondent believed this was because of highly controlled environment and minimal demands



Expert Evidence

- Experts for the Respondent found to be more credible and reliable than Applicant's witnesses
- Indicated that it was impractical to provide Tier 3 ABA at schools vs clinical setting because it was not feasible / safe to ignore behaviours
- Indicated that "Loop of School" plan had provided best chance of success
- Found that Applicant's expert witnesses were unreliable, biased, lacked impartiality
- One of Applicant's experts admitted that Litigation Guardian's behavior could be expected to cause stress for Grayson
- FI also a trigger
- Psycho-educational assessment report developed by experts was based on limited / incorrect information



Legal Framework

- Applicant must show *prima facie* discrimination: ie. that they have a protected characteristic under the *Human Rights Code*, that they experienced an adverse impact with respect to the service, and that the protected characteristic was a factor.

Held:

- From JK to mid-September of grade 2 – Grayson had meaningful access to education.
- From mid-September of grade 2 – he did not have meaningful access, and his disability was a factor.
- Therefore – a *prima facie* case of discrimination existed



Legal analysis

The burden shifts to respondent to justify its conduct/practice.

Defence to *prima facie* discrimination:

Has the respondent school board established that the reason the applicant was denied meaningful access to education was:

- (i) because he was unable to fulfill a requirement due to his disability and the requirement that prevented his meaningful access to education was reasonable and *bona fide* (S.11); or
- (ii) he was incapable of performing the essential duties attending the exercise of his right to education because of his disability (S.17).

If so, has the respondent established that it was unable to accommodate the applicant, to the point of undue hardship, taking into account cost, outside funding, health and safety requirements



Legal Framework (cont.)

- Grayson was unable to fulfil the requirement that he remain in class and attend school in school in a manner that allowed for his access to education (S.17)

Undue Hardship:

- Before October, 2018 – effectively accommodated. Respondent took steps to deal with escalating dysregulation
- Up to and following October 22, 2018 – Board accommodated to the point of undue hardship.
- Grayson presented an unacceptable safety risk, and his mother rejected the options that would allow him to attend safely, eg. Modified day, picking up when dysregulated.
- Loop the School plan was reasonable. Ms. Kahn was the only one who didn't agree, citing child care concerns.
- Reasonable programming alternatives were offered after expulsion, including home instruction or a special education class in his home school.

Accommodation to Point of Undue Hardship

Ms. Kahn did not meet her obligation to cooperate in the accommodation process.

- Refused to attend meetings to discuss re-entry following expulsion.
- parents do not have the right to dictate the accommodations - must accept reasonable accommodations
- No evidence to support Ms. Kahn's insistence that Grayson required Tier 3/comprehensive ABA to access education.
- No evidence that board's failure to provide comprehensive ABA was the cause of Grayson's deregulation.
- had a "duty to facilitate the implementation" of a reasonable accommodation

Application Dismissed



Conclusion

- **Media** coverage “premature”.
- **CFSRB** expulsion upheld, after consideration of mitigating and other factors. Safety prevailed.
 - Can discipline rather than exclude in some circumstances;
 - Parent refusal of program options contributed to outcome.
- **HRTO** – accommodation to point of undue hardship due to safety. Balanced competing rights of staff and other students
- Decision relating to parental conduct consistent with R.B. v. Keewatin-Patricia District School Board 2013
 - conduct interfered with Board’s ability to provide accommodations
- Tier 3 ABA is appropriate for a clinical setting
- Contextual analysis of behaviours – behavior manifested in a therapeutic setting not proof that a similar approach will work at school, where demands are greater.
- Confirms - must continue to provide education while student is out of school

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